

**ANNUAL REPORT FOR 1998**

**and**

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SERIES No. 55**

**UNAFEI**

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## INTRODUCTORY NOTE

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It is with pride that the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 55.

This contains the Annual Report for 1998, the work produced in two UNAFEI international training programmes: the 110th International Training Course (conducted from 31 August to 20 November 1998) and the 111th International Seminar (conducted from 18 January to 19 February 1999). Specifically, papers contributed by visiting experts, selected country reports from among Course and Seminar participants, and reports of the Course and Seminar are published.

I regret that not all the papers submitted by the Course and Seminar participants could be published. Also, I must request the understanding of the selected authors for not having sufficient time to refer the manuscripts back to them before publication

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice and the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI international training programmes.

Finally, I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series, in particular, the editors of Resource Material Series No. 55, Mr. Hiroshi Iitsuka (Chief of Training Division) and Ms. Rebecca Findlay-Debeck (Linguistic Adviser), who so tirelessly dedicated themselves to this series.

March 2000



Mikinao Kitada  
Director of UNAFEI

## **PART ONE**

# **ANNUAL REPORT FOR 1998**

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- *Main Activities of UNAFEI*
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**UNAFEI**

# **MAIN ACTIVITIES OF UNAFEI (1 January 1998 - 31 December 1998)**

## **I. ROLE AND MANDATE**

The Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) was established in Tokyo, Japan in 1961 pursuant to an agreement between the United Nations and the Government of Japan. Its goal is to contribute to sound social development in Asia and the Pacific region by promoting regional cooperation in the field of crime prevention and criminal justice through training and research.

UNAFEI has paid the utmost attention to the priority themes identified by the Commission on Crime Prevention and Criminal Justice. Moreover, UNAFEI has been taking up urgent, contemporary problems in the administration of criminal justice in the region, especially problems generated by rapid socio-economic change (e.g., organized transnational crime, re-integration of prisoners into society, and economic and computer crime) as the main themes and topics for its training courses, seminars and research projects.

## **II. TRAINING**

Training is the principal area and priority of the Institute's work programmes. In the international training courses and seminars, participants from different areas of criminal justice discuss and study pressing problems of criminal justice administration from various perspectives. They deepen their understanding, with the help of lectures and advice by the UNAFEI faculty, visiting experts and ad hoc lecturers. This so-called "problem-solving through an integrated approach" is one of the chief characteristics of UNAFEI programmes.

Each year, UNAFEI conducts two international training courses (duration: three months) and one international seminar (duration: one month). Approximately 60 government officials from various overseas countries receive fellowships from the Japan International Cooperation Agency (JICA; a governmental agency for ODA programmes) each year to participate in UNAFEI training programmes.

Training courses and seminars are attended by both overseas and Japanese participants. Overseas participants come not only from the Asia-Pacific region but also from the Middle and Near East, Latin America and Africa. These participants are experienced practitioners and administrators holding relatively senior positions in criminal justice fields.

During its 37 years of existence, UNAFEI has conducted a total of 111 international training courses and seminars, in which approximately 2700 criminal justice personnel have participated, representing 94 different countries. In their respective countries, UNAFEI alumni have been playing leading roles and holding important posts in the fields of crime prevention and the treatment of offenders, and in related organizations.



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### **A. The 108th International Seminar**

#### **1. Introduction**

From 26 January to 27 February 1998, 28 participants from 22 countries attended the 108th International Seminar to examine the main theme of "Current Problems in the Combat of Organized Transnational Crime."

#### **2. Methodology**

Firstly, the Seminar participants respectively introduced their countries' experiences regarding organized transnational crime. Secondly, General Discussion Sessions in the conference hall examined the subtopics of the main theme. In sum, the causes and dynamics of organized crime were analyzed in order to seek concrete countermeasures. In order to conduct each session efficiently, the UNAFEI faculty provided the following four topics:

Topic 1: Current Situation of Illicit Drug Trafficking;

Topic 2: Current Situation of Organized Crime (Except Drug Trafficking);

Topic 3: Framework Against Organized Transnational Crime by Criminal Justice Systems in Different Countries; and

Topic 4: Current Situation of Detection and Investigation.

A chairperson, co-chairperson, rapporteur and co-rapporteur who were elected organized the discussions in relation to the above topics. Subsequently in the conference hall, all the participants and the UNAFEI faculty seriously studied the designated subtopics and exchanged views. Final reports were compiled based on said discussion, which were ultimately adopted as the reports of the Seminar. These reports will be printed in their entirety in UNAFEI Resource Material Series No. 54.

#### **3. Outcome Summary**

Of grave concern worldwide is the prevalence and complexity of organized transnational crime, which seems to be growing exponentially yearly. The manifestations and seriousness of organized transnational crime are overwhelming; for example, the smuggling of illegal migrants, money-laundering, large-scale corporate fraud, and illicit trafficking in drugs, firearms, stolen motor vehicles, and- most appalling- women and children. These crimes, as well as their perpetrators, are increasing exponentially. Moreover, organized transnational crime remains largely undetected due to the fact that, traditionally, it is committed behind a veil of secrecy.

The proliferation of such crime poses a great threat at various levels of society. First, the life and welfare of individual citizens are imperiled. Secondly, national security and the rule of law are threatened. Moreover, in the extreme case, it may destabilize the fundamental framework of a nation. In this regard, the importance of detecting and preventing such crime in every country and the international community cannot be emphasized enough.

The seriousness and heinousness of these crimes speak for themselves. Consequently, in light of the growing threat posed by organized transnational crime at both national and international levels, states and organizations have attempted to address this problem in the international arena, such as the United Nations Commission on Crime Prevention and Criminal Justice, and the P-8 Group (comprised of the G-7 Summit member countries

## MAIN ACTIVITIES

and Russia). Additionally, some crucial problems stemming from organized transnational crime are now being targeted as most urgent agenda issues in the coming United Nations Congress on the Prevention of Crime and the Treatment of Offenders, scheduled for the year 2000.

### **B. The 109th International Training Course**

#### **1. Introduction**

UNAFEI conducted the 109th International Training Course (from 13 April to 2 July 1998) with the main theme, "Effective Treatment Measures for Prisoners to Facilitate Their Re-integration into Society". This Course consisted of 29 participants from 17 countries.

The Institute's selection of this theme reflects its concern regarding the effective and smooth re-integration of prisoners into society. Facilitating this end requires the establishment, proper implementation, and strengthening of treatment programmes within and outside the prison walls.

#### **2. Methodology**

The participants identified obstacles to the re-integration of prisoners into society and searched for effective measures to facilitate integration. In this regard, the underlying tension between the need to offer rehabilitative services to offenders and the need to execute punishment and/or maintain order in the prison was acknowledged and explored, with a view to reducing recidivism.

The objectives were primarily realized through the Individual Presentations and the Group Workshop sessions. In the former, each participant presented the actual situation, problems and future prospects of their respective country with respect to the main theme of the Course. The Group Workshops further examined the subtopics of the main theme. To facilitate discussions, the participants were divided into the following three groups under the guidance of faculty advisers:

- Group 1: Rehabilitation Programmes in the Prison to Prevent Prisoners' Recidivism: The Actual Situation, Problems and Countermeasures;
- Group 2: Early Release of Prisoners to Facilitate their Re-integration into Society: The Actual Situation, Problems and Countermeasures; and
- Group 3: Rehabilitation and Correctional Programmes in the Community to Prevent Recidivism by Discharged Prisoners: The Actual Situation, Problems and Countermeasures.

Each group elected a chairperson(s) and rapporteur(s) to organize the discussions. The group members seriously studied the designated subtopics and exchanged their views based on information obtained through personal experience, the Individual Presentations, lectures and so forth. Nineteen sessions were allocated for Group discussion.

In the sixth week, Plenary Meetings were held to discuss the interim outline of the Group Workshop reports and to offer suggestions and comments. During the final Plenary Meetings in the ninth week, drafts of the Group Workshop reports were examined and critiqued by all the participants and the UNAFEI faculty. Based on these discussions, the Groups further refined their reports and presented them in the Report-Back Session,

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where they were endorsed as the reports of the Course. The full texts of the reports are published in UNAFEI Resource Material Series No. 54.

### 3. Outcome Summary

The imprisonment of offenders is executed as a punishment. However, at the same time, imprisonment (through the correctional treatment given in prison) is expected to rehabilitate offenders so as to facilitate their smooth re-integration into society after release. Even though countries are making every possible effort to realize this latter objective, various factors impair effectiveness. Consequently, worldwide there is a high-reported rate of re-offense by discharged prisoners, and of their resultant recommitment.

The guarantee of basic living conditions in prisons is a prerequisite to appropriately implementing the necessary treatment for the future re-integration of each prisoner into society. However in some countries, these conditions are not satisfied due to staff and budgetary constraints, as well as various complications resulting from prison populations exceeding legal capacity.

Under such circumstances, the need to offer rehabilitative services to offenders is overshadowed by the need to execute punishment and/or maintain order in the prison. Additionally, in other countries, despite the existence of prisoner rehabilitation treatment programs, an inadequate scope and improper methods of implementation make such programs relatively ineffective.

Consequently, considering that correctional treatment in prison is the first major step towards re-integrating offenders within society, the establishment and strengthening of such treatment is an urgent issue requiring attention. Moreover, to sustain or complement such efforts within the prison, importance should also be placed on early release systems and measures, which assist offenders upon release.

For example, the systems of many countries permit the release of selected prisoners before the expiration of their sentence by such means as parole, good time system, and remission. When such early release systems operate properly and efficiently, the re-integration of releasees into society can proceed smoothly. However, a flawed system is likely to result in discharged prisoners committing further offenses, which subsequently exposes the community to further harm. Thus, the effectiveness of early release systems as a criminal policy hinges on the careful screening of prisoners. In this regard, consideration should be given to factors which reflect that a discharged prisoner will be able to adjust easily to society, such as whether an offender has made genuine efforts to reform themselves within prison and has acquired vocational and living skills.

Further, it is essential to provide adequate supervision, as well as guidance and care, to releasees (whether discharged early or upon serving a full sentence) in order to ensure their re-integration into society. However, in many countries, such systems of supervision and aftercare within the community are either nonexistent or function poorly. Consequently, discharged prisoners who encounter difficulties or challenges in their daily lives may return to a life of crime.

As evidenced above, the smooth re-integration of discharged offenders into society relies upon the establishment, proper implementation, and strengthening of treatment programs within and outside the prison walls. Thus, correctional treatment in prisons, release systems, and treatment in the community must be designed to supplement and

## MAIN ACTIVITIES

complement each other in order to secure the re-integration of prisoners into the community, as well as to benefit the community which will receive them after release.

### **C. The 110th International Training Course**

#### **1. Introduction**

From 31 August to 20 November 1998, UNAFEI conducted the 110th International Training Course with the main theme, "Effective Countermeasures against Economic Crime and Computer Crime." This Course consisted of 28 participants from 17 countries.

#### **2. Methodology**

The 110th Course endeavored to explore the best means to more effectively combat economic and computer crime by discussing the strengthening of criminal justice systems. This was accomplished primarily through comparative analysis of the current situation and problems in the participating countries. Our in-depth discussions enabled us to put forth effective and practical countermeasures to such problems, so as to improve the fight against economic and computer crime.

This Training Course provided a forum for the exchange of information and views on how criminal justice agencies in the respective countries detect, investigate and prosecute economic and computer crime cases, as well as the problems and difficulties encountered in that regard. Discussions also highlighted the importance of establishing a more efficient system and effective countermeasures, and the need to increase international cooperation in this field in order to eradicate such crimes.

The objectives were primarily realized through the Individual Presentations and the Group Workshop sessions. In the former, each participant presented the actual situation, problems and future prospects of their country, with respect to the main theme of the Course. The Group Workshops further examined the subtopics of the main theme. To facilitate discussions, the participants were divided into the following three groups under the guidance of faculty advisers:

Group 1: Economic Crime Damaging Government and the National Economy;

Group 2: Economic Crime Against the Private Sector, and

Group 3: Economic Crime Against Consumers and Investors.

Each group elected a chairperson(s) and rapporteur(s) to organize the discussions. The group members seriously studied the designated subtopics and exchanged their views based on information obtained through personal experience, the Individual Presentations, lectures and so forth. Nineteen sessions were allocated for Group discussion.

In the sixth week, Plenary Meetings were held to discuss the interim outline of the Group Workshop reports, and to offer suggestions and comments. During the final Plenary Meetings in the ninth week, drafts of the Group Workshop reports were examined and critiqued by all the participants and the UNAFEI faculty. Based on these discussions, the Groups further refined their reports and presented them in the Report-Back Session, where they were endorsed as the reports of the Course. The reports will be published in full in UNAFEI Resource Material Series No. 55.

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### 3. Outcome Summary

In recent years, business activities, such as commercial and financial trading, have expanded dramatically both domestically and internationally, and new technologies reflected in transportation, telecommunications and computer networks have developed with equal rapidity. Despite the unquestionable benefits of such advancements, these trends also have been manipulated for illegal purposes, thereby significantly increasing the scale, transnationalization and sophistication of crime. The interrelated offences of economic crime and computer crime are particular forms of great concern in today's society.

The nature and scope of economic crime is incredibly diverse. The detection, investigation and prosecution of economic crimes are impaired significantly by various factors including the complexity of the transactions used to effectuate these offences, and the limited expertise of criminal justice officials in these fields. Moreover, reluctance by the victims to report such crimes for fear of negative business repercussions, such as the loss of consumer confidence, further frustrates and delays detection.

Computers are widely utilized in the activities of commerce and banking, as well as in the life of ordinary citizens. Regrettably, the advancement of computer technology has also facilitated various crimes, whether as instrument of crime (e.g., economic crime, forgery, copyright infringement of intellectual property and pornography) or the target of crime (e.g., unauthorized access and damage to, or modification of, computer data/programs).

Considering the extensive damage that can be caused in an instant worldwide by crime facilitated by computer technology, proper and immediate response by criminal justice agencies to computer crime is indispensable. However, since such crimes are relatively new to many countries, responsive legal frameworks, including what conduct should be criminalized, has not been specifically developed to date. Even if such legal framework is effectuated, difficulties will undoubtedly ensue in the investigation and prosecution of these crimes due to the limited knowledge of criminal justice officials about computer-related crime and technological problems stemming from the vulnerability of computer systems to sabotage, particularly as to the identification of offenders and the collection of evidence.

It is noted that threat posed by the proliferation of both economic and computer crimes to the sound development of a nation, as well as to the international community, has been severely underestimated. Thus, appropriate, stringent control and preventative measures for these crimes should be introduced as soon as possible. To this end, it is imperative for criminal justice agencies to understand thoroughly the current situation of these crimes; to establish a proper legal framework to address such crimes; to develop more advanced techniques commensurate with the nature of these crimes; and to enhance international criminal justice cooperation in this regard.

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### III. EXPERTS MEETING ON CRIMES RELATED TO THE COMPUTER NETWORK

From 5 to 9 October 1998, during the 110th International Training Course, the “Experts Meeting on Crimes Related to the Computer Network” was convened at UNAFEI in preparation for the Workshop on “Crime Related to the Computer Network” to be held at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. UNAFEI willingly assumed this responsibility to organize and host the experts meeting, as well as act as a coordinator for the said Workshop, in response to a request made during the Twelfth Co-ordination Meeting of the United Nations Crime Prevention and Criminal Justice Programme Network held in Courmayeur, Italy in 1997.

Participants in the Experts Meeting included sixteen experts from eleven countries representing all regions of the world and 2 United Nations officers, as well as the UNAFEI Director and faculty. The Experts and other participants discussed the scope of issues to be taken up at the Workshop, its objective, programmes, methodology, etc. It was agreed that the Workshop will focus primarily on issues relating to investigation, search and seizure of computer systems, tracing of communications to determine their source and destination, industry cooperation and mutual legal assistance, together with some preliminary attention devoted to issues of the nature of the problem, prevention, and to the substantive criminal law in proscribing conduct as criminal.

## IV. TECHNICAL COOPERATION

### A. Joint Seminars

Since 1981, UNAFEI has conducted 17 joint seminars under the auspices of JICA and in collaboration with host governments in Asia including China, the Republic of Korea, Malaysia, Nepal, Pakistan and the Philippines. With the participation of policy-makers and high-ranking administrators, including members of academia, the joint seminars attempt to provide a discussion forum in which participants can share their views and jointly seek solutions to various problems currently facing criminal justice administration in both the host country and Japan.

#### 1. Bangladesh-UNAFEI Joint Seminar

From 14 to 18 March 1998, UNAFEI held the Bangladesh-UNAFEI Joint Seminar in the Bangladesh capital city of Dhaka. The Government of the People’s Republic of Bangladesh, through the Ministry of Home Affairs and UNAFEI, organized the Joint Seminar. The Joint Seminar concluded with the adoption of draft recommendations for the betterment of the Bangladesh criminal justice system and society, based on discussions on effective crime control, fair and speedy trial, and rehabilitative and humane treatment of offenders.

#### 2. India-UNAFEI Joint Seminar

The India-UNAFEI Joint Seminar was held in Delhi under the theme of “Crime Prevention and Control Strategies in the Fight against Organized Crime” from 14 to 17 December 1998. The Government of the Republic of India, through the National Institute of Criminology and Forensic Science of the Ministry of Home Affairs, and UNAFEI

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organized the Joint Seminar. The Joint Seminar consisted of six sessions: an overview of organized crime; effective investigation and prosecution of organized crime; effective trial against organized crime; effective treatment of organized criminals; countermeasures against drug-related crime; and countermeasures against organized crime relating to firearms, explosives and economic offences. The Joint Seminar concluded with the adoption of draft recommendations for the betterment of the Indian criminal justice system, as formulated in each of the above sessions.

### **B. Regional Training Programmes**

#### **1. Thailand**

From 2 to 13 March 1998, UNAFEI dispatched an expert to Thailand to assist the Office of the Narcotic Control Board (ONCB) in organizing the Sixth Regional Training Course on "Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration." This training course was held with the cooperation of JICA and the Royal Thai Government. Participants from various Asian-Pacific countries attended this two-week seminar and discussed such issues as the implementation of the Vienna Convention in their respective countries and international cooperation based upon the Convention, as well as the improvement of investigative techniques.

#### **2. Kenya**

From 27 July to 3 October 1998, one UNAFEI professor was dispatched to Kenya to assist the Children's Department of the Ministry of Home Affairs and National Heritage in a project to develop nationwide standards for the treatment of juvenile offenders.

## **V. COMPARATIVE RESEARCH PROJECT**

Reflecting its emphasis on the systematic relevance of training activities and priority themes identified by the Commission, the research activities of the Institute are designed to meet practical needs, including those for training materials for criminal justice personnel. For example, UNAFEI is updating its research by requesting several experts from countries in the Asia-Pacific region to report on their respective probation systems. UNAFEI will subsequently compile and publish these reports for international distribution in a book titled "Adult Probation Profiles of Asia."

## **VI. INFORMATION AND DOCUMENTATION SERVICES**

The Institute continues to collect data and other resource materials on crime trends, crime prevention strategies, and the treatment of offenders from Asia, the Pacific, Africa, Europe and the Americas, and makes use of this information in its training courses and seminars. The Information and Library Service of the Institute has been providing, upon request, materials and information to United Nations agencies, governmental organizations, research institutes and researchers, both domestic and foreign.

## MAIN ACTIVITIES

### VII. PUBLICATIONS

Reports on training courses and seminars are published regularly by the Institute. Since 1971, the Institute has issued the Resource Material Series, which contains contributions by the faculty members, visiting experts and participants of UNAFEI. In 1998, the 51st, 52nd and 53rd editions of the Resource Material Series were published. Additionally, issues 95 to 97 of the UNAFEI Newsletter include a brief report on each course and seminar (from the 108th to the 110th respectively) and provide other timely information.

### VIII. THE INTERNATIONAL PENAL AND PENITENTIARY FOUNDATION EIGHTH COLLOQUIUM

UNAFEI collaborated with the International Penal and Penitentiary Foundation (IPPF) to organize and host the Eighth Colloquium "Some Essential Issues in Contemporary Correctional Policy" from 17 to 20 January 1998. IPPF is an international organization which promotes studies in the fields of crime prevention and the treatment of offenders, especially by scientific research, publications and teaching. This event was of particular significance as it was the first IPPF colloquium conducted in Asia. In attendance were about 50 high-ranking criminal justice officials from around the world.

### IX. OTHER ACTIVITIES

#### A. Public Lecture Programmes

On 10 February 1998, the Public Lecture Programme was conducted in the Grand Conference Hall of the Ministry of Justice. In attendance were many distinguished guests, UNAFEI alumni and the 108th International Seminar participants. This Programme was jointly sponsored by the Asia Crime Prevention Foundation (ACPF), the Japan Criminal Policy Society (JCPS) and UNAFEI.

Public Lecture Programmes purport to increase the public's awareness of criminal justice issues through comparative international study by inviting distinguished speakers from abroad. This year, the Programme sponsors invited Dr. Ernesto Ugo Savona (Professor, School of Law, Trento University, Italy) and Mr. Lau, Yuk-kuen (Director of Crime and Security, Hong Kong Police Force Headquarters, Hong Kong). Their lectures were entitled "The Organizational Framework of European Crime in the Globalization Process" and "Policing for the Millennium-The Hong Kong Police Perspective on Law Enforcement in the Twenty-first Century," respectively.

#### B. Assisting UNAFEI Alumni Activities

Numerous UNAFEI alumni associations in various countries have commenced or are about to commence research activities in their respective criminal justice fields. It is, therefore, one of the important tasks of UNAFEI to support these contributions to improve the overall crime situation.



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### **C. Overseas Missions**

Mr. Yuzuru Takahashi (Chief of Training and Professor) and Mr. Akihiko Abe (Administrative Staff) visited two Asian countries from 15 to 24 January 1998. Specifically, they traveled to the Republic of Korea and the People's Republic of China to study the unique criminal justice systems of these two nations. In the Republic of Korea, Mr. Takahashi and Mr. Abe toured the Supreme Court and the District Court, where they observed a criminal trial. In the People's Republic of China, they visited the Supreme People's Procuratorate, the Supreme People's Court, the Ministry of Justice, the Institute of Public Security of the Ministry of Public Security, the Beijing High People's Court and Beijing Prison. While in Beijing, a UNAFEI Alumni Association reception was held.

Mr. Masahiro Tauchi (Deputy Director) and Mr. Fusao Takayama (Chief of Secretariat) traveled to Nepal and India from 21 to 31 January 1998. While in Nepal, they toured Nakkhu Prison and met with the Home Secretary and the Special Secretary of the Ministry of Home Affairs. In India, Mr. Tauchi and Mr. Takayama first visited Calcutta, where they toured Police Headquarters. Subsequently, they attended the Asian Regional Workshop on Firearm Regulation for the Purposes of Crime Prevention and Safety. On the first day of the Workshop, Deputy Director Tauchi presented the UNAFEI position paper entitled "Overview and Discussion of the United Nations Regional Study on Firearms", which primarily highlighted the work product of the 102nd International Seminar "Crime Prevention through Effective Firearms Regulation".

Mr. Masahiro Tauchi (Deputy Director) traveled to Melbourne, Australia from 14 to 18 February 1998 at the invitation of the Australian Institute of Criminology (AIC). In preparation for the 110th International Training Course, Mr. Tauchi attended the Internet Crime Conference organized by AIC. Additionally, he met with the director and other officers of AIC to discuss preparations for the workshop on "Crimes related to the Computer Network", which will be held at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

Ms. Tomoko Akane (Professor) served as a visiting expert for the Sixth Regional Training Course on "Effective Countermeasures against Drug Offenses and Advancement of Criminal Justice Administration" in Bangkok, Thailand from 2 to 13 March 1998. She delivered a lecture entitled "Effective Countermeasures against Drug-Related Crime in Japan." Additionally, Ms. Akane visited various Thai criminal justice agencies during her stay.

Mr. Toichi Fujiwara (Director), Mr. Masahiro Tauchi (Deputy Director), Mr. Yuzuru Takahashi (Chief of Training and professor), Mr. Terutoshi Yamashita (Professor), Mr. Ryosuke Kurosawa (Professor), Mr. Shoji Imafuku (Professor), Ms. Makiko Miyamoto (Administrative Staff) and Mr. Shunichi Komatsu (Administrative Staff) represented the Institute at the Bangladesh-UNAFEI Joint Seminar in Dhaka, Bangladesh from 14 to 18 March 1998.

Mr. Terutoshi Yamashita (Professor) represented UNAFEI as an observer at the Asia Regional Ministerial Meeting on Transnational Crime held in Makati City, Manila, Philippines from 22 to 25 March 1998. The Meeting was organized by the United Nations Office at Vienna and hosted by the Government of the Republic of the Philippines.

## MAIN ACTIVITIES

Mr. Toichi Fujiwara (Director) and Ms. Tomoko Akane (Professor) attended the Seventh Session of the United Nations Commission on Crime Prevention and Criminal Justice held in Vienna, Austria from 21 to 30 April 1998. During the plenary meeting, the Director delivered a statement regarding the recent activities of UNAFEI.

Mr. Toichi Fujiwara (Director), Mr. Hiroshi Iitsuka (Chief of Training and Professor), Mr. Shinya Watanabe (Professor) and Ms. Tazuko Saitoh (Librarian) conducted research on the criminal justice system of the People's Republic of China from 6 to 15 July 1998. Additionally, they visited various Chinese criminal justice agencies during their stay.

Mr. Masahiro Tauchi (Deputy Director) and Mr. Shoji Imafuku (Professor) attended Pacific Islands Conference for International Cooperation on Criminal Justice and Administration organized by ACPF, held in Fiji from 14 to 17 July 1998. The theme of this conference was "International Cooperation in Criminal Justice and Administration in the New Millennium." They made presentations entitled "Crime and the Internet" and "Public Participation for Prisoners' Rehabilitation in Japan: Volunteer Probation Officers and Women's Association for Rehabilitation Aid" respectively.

Mr. Shoji Imafuku (Professor) served as an expert and provided technical assistance to the Juvenile Crime Prevention and Treatment of Offenders Project in Kenya from 27 July to 3 October 1998.

Mr. Toichi Fujiwara (Director) and Ms. Tomoko Akane (Professor) attended the 12th International Congress on Criminology "Crime and Justice in a Changing World: Asian and Global Perspective", held in Seoul, Korea from 24 to 29 August 1998.

Mr. Toichi Fujiwara (Director) represented UNAFEI at the Thirteenth Meeting of the United Nations Crime Prevention and Criminal Justice Programme Network in Courmayeur, Italy from 21 to 29 September 1998. Additionally, Mr. Fujiwara attended the Asian and Pacific Regional Preparatory Meeting on the Prevention of Crime and Treatment of Offenders held in Bangkok, Thailand from 2 to 4 November 1998.

Mr. Masahiro Tauchi (Deputy Director) attended the International Crime and Technology Conference in Singapore from 13 to 17 October 1998. Additionally, Mr. Tauchi served as a visiting expert for the International Symposium on the Prevention and Control of Financial Fraud, held in China from 18 to 24 October 1998.

Mr. Hiroshi Iitsuka (Chief of Training and Professor) participated in the Working Group Meeting on Drugs organized by the Asia Crime Prevention Foundation and held in China from 27 October to 1 November 1998.

Ms. Tomoko Akane (Professor) served as a visiting expert for the Regional Seminar for Police Officials of United Arab Emirates, hosted by the Naiif Arab Academy for Security Sciences in United Arab Emirates from 13 to 17 November 1998.

Ms. Kayo Konagi (Professor) conducted research on the treatment and rehabilitation system for adult offenders in Malaysia from 22 to 24 November 1998. A similar research study was undertaken by Ms. Konagai and two administrative staff from UNAFEI, Mr. Kenji Matsuda and Mr. Yoshinori Todaka, in Thailand from 24 to 27 November 1998.

Mr. Chikara Satoh (Professor) participated in the ACPF Working Group Meeting on the role of criminal law in the protection of the environment, held in India from 7 to 11 December 1998. In this meeting the participants finalized the commentaries of each

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article of the Guidelines on the subject adopted at the 6th ACPF World Conference, held in 1997.

Mr. Shinya Watanabe (Professor) participated in an International Conference with the theme of “Present and Future Perspective of Police Sciences”, held in Sharjah in the United Arab Emirates from 13 to 16 December 1998.

Mr. Toichi Fujiwara (Director), Mr. Masahiro Tauchi (Deputy Director), Mr. Hiroshi Iitsuka (Chief of Training and Professor), Mr. Ryosuk Kurosawa (Programming Officer and Professor), Ms. Tomoko Akane (Professor), Mr. Chikara Satoh (Professor), Mr. Wataru Okeya (Administrative Staff) and Mr. Tomohiro Tatsumi (Administrative Staff) represented UNAFEI at the India-UNAFEI Joint Seminar held in Delhi under the theme of “Crime Prevention and Control Strategies in the Fight against Organized Crime” from 14 to 17 December 1998.

### **D. Assisting ACPF Activities**

UNAFEI cooperates and corroborates with ACPF to further improve crime prevention and criminal justice administration in the region. Since UNAFEI and ACPF have many similar goals, and a large part of ACPF's membership consist of UNAFEI alumni, the relationship between the two is strong. Some examples of cooperation and corroboration can be seen as follows:

- a. UNAFEI faculty members attended ACPF working group meetings held in China in October 1998 and Delhi in December 1998 regarding drug-related crimes and environmental protection respectively.
- b. UNAFEI dispatched faculty members to Fiji to attend the Pacific Islands Conference for International Cooperation on Criminal Justice and Administration organized by ACPF in July 1998.

## **X. HUMAN RESOURCES**

### **A. Staff**

In 1970, the Government of Japan assumed full financial and administrative responsibility for running the Institute. The Director, Deputy Director and seven professors are selected from among public prosecutors, the judiciary, corrections and probation. UNAFEI also has approximately 20 administrative members, who are appointed from among officials of the Government of Japan, and a linguistic adviser. Moreover, the Ministry of Justice invites visiting experts from abroad to each training course or seminar. The Institute has also received valuable assistance from various experts, volunteers and related agencies in conducting its training programmes.

### **B. Faculty Changes**

Mr. Yuzuru Takahashi, formerly Chief of Training Division and Professor of UNAFEI, was appointed Judge and transferred to the 14th Division of the Civil Department of the Tokyo High Court and on 1 April 1998.

Mr. Hiroshi Iitsuka, formerly Appeals Judge of the Tokyo Regional Tax Tribunal, was appointed Chief of Training Division of UNAFEI on 1 April 1998.

## MAIN ACTIVITIES

Mr. Hiroyuki Yoshida, formerly Chief of Research and Professor of UNAFEI, was transferred to the Office of International Affairs of the Ministers' Secretariat of the Ministry of Justice and appointed as Assistant Director on 1 April 1998.

Mr. Shinya Watanabe, formerly Professor of the Training Institute for Correctional Personnel of the Ministry of Justice, joined UNAFEI as a Professor on 1 April 1998.

Mr. Terutoshi Yamashita, formerly Professor of UNAFEI, was transferred to the Trial Department of the Yokohama District Public Prosecutors on 1 April 1998.

Mr. Chikara Satoh, formerly a Public Prosecutor of the Investigations Department of the Tokyo District Public Prosecutors Office, joined UNAFEI as a Professor on 1 April 1998.

## XI. FINANCES

The Ministry of Justice primarily provides the Institute's budget. The total amount of the UNAFEI budget is approximately ¥325 million per year. Additionally, JICA provides assistance for the Institute's international training courses and seminars. Through its financial contributions, ACPF is another constant and reliable supporter of UNAFEI activities.

## **UNAFEI WORK PROGRAMME FOR 1999**

### **I. TRAINING**

#### **A. The 111th International Seminar**

The 111th International Seminar, "The Role of Police, Prosecution and the Judiciary in the Changing Society," will be held from 18 January to 19 February 1999. Such factors as industrialization, technological advancements and socio-economic change will be explored in terms of their effect upon crime, the criminal justice system and society as a whole. Particular attention will be given to the suitability of present-day criminal justice measures.

#### **B. The 112th International Training Course**

The 112th International Training Course, "Participation of the Public and Victims for More Fair and Effective Criminal Justice Administration", is scheduled to be held from 12 April to 4 July 1999. Participants are expected to explore measures to enhance participation of public and victims in all aspects of criminal justice administration from crime prevention, to community-based treatment of offenders, to develop a more fair and effective criminal justice administration.

#### **C. The 113th International Training Course**

The 113th International Training Course entitled "The Administration of Criminal Justice for the Prevention of Corrupt Activities by Public Officials," is scheduled to be held from 30 August to 19 November 1999. The prevalence of corruption in many countries and severe difficulties encountered by criminal justice officials in tackling and effectively deterring such crime prompted the selection of this theme. Thus, the 113th Course will examine the current situation regarding corruption in each of the participating countries, and analyze the causes and dynamics of corruption in order to seek concrete and practical countermeasures.

### **II. SPECIAL SEMINAR FOR SENIOR CRIMINAL JUSTICE OFFICIALS OF THE PEOPLE'S REPUBLIC OF CHINA**

The 4th Special Seminar for Senior Officials of Criminal Justice in People's Republic of China, "Rational Structure of Criminal Justice and Relationship between the Different Agencies of Criminal Justice," will be held from 1 to 19 March 1999. Ten senior criminal justice officials and UNAFEI faculty will comparatively discuss contemporary problems faced by China and Japan in the realization of criminal justice.

### **III. TECHNICAL COOPERATION**

#### **A. Thailand-UNAFEI Joint Seminar**

In December 1999, the Thailand-UNAFEI Joint Seminar is scheduled to be held in Bangkok. The Office of the Attorney General of the Kingdom of Thailand and UNAFEI will organize the Seminar.

## UNAFEI WORK PROGRAMME FOR 1999

### **B. Regional Training Programmes**

#### **1. Seventh Regional Training Course on Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration**

In January 1999, two UNAFEI Professors will travel to Thailand to assist the Royal Thai Government and the Office of the Narcotics Control Board (ONCB) in organizing the Seventh Regional Training Course on Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration. Approximately 20 participants from various Asia-Pacific countries will attend the two-week course and will discuss drug-related issues identifying the actual problems in the participating countries. Discussion topics in the Course will include the improvement of investigative techniques, effective measures against money laundering, the implementation of the Vienna Convention, international cooperation, and the treatment of drug offenders.

#### **2. Preparatory Survey for Costa Rica Regional Seminar**

In February 1999, the Preparatory Survey for the Regional Seminar on “Effective Measures for the Improvement of Prison Conditions and Correctional Programmes” will be held in San Jose, Costa Rica. The Government of Costa Rica through the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders will organize and host this seminar, should the results of the Preparatory Survey be positive, with the support of JICA and UNAFEI. This seminar will be held annually for five years and will target correctional officers in Latin America.

#### **3. Kenya**

From August to October 1999, two UNAFEI professors will be dispatched to Kenya to assist the Children’s Department of the Ministry of Home Affairs and National Heritage in a project to develop nationwide standards for the treatment of juvenile offenders.

## **IV. OTHER ACTIVITIES**

### **A. Preparation for the workshop at the tenth United Nations congress**

UNAFEI will continue to prepare for the Workshop on “Crimes Related to the Computer Network” at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 2000, in response to a request made during the Twelfth Co-ordination Meeting of the United Nations Crime Prevention and Criminal Justice Programme Network held in Courmayeur, Italy in 1997.

# APPENDIX

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## MAIN STAFF OF UNAFEI

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Director	Mr. Toichi Fujiwara
Deputy Director	Mr. Masahiro Tauchi

### **Faculty:**

Chief of Training Division	Mr. Hiroshi Iitsuka
Chief of Information and Library Service Division and Professor	Ms. Kayo Konagai
Chief of Research Division and Professor	Mr. Ryosuke Kurosawa
Professor	Ms. Tomoko Akane
Professor	Mr. Mr. Chikara Satoh
Professor	Mr. Shinya Watanabe
Professor	Mr. Shoji Imafuku
Linguistic Adviser	Ms. Priscilla Ferrazzi

### **Secretariat:**

Chief of Secretariat	Mr. Tadashi Ito
Deputy Chief of Secretariat	Mr. Kenji Matsuda
Chief of General and Financial Affairs Section	Mr. Rentarou Ueta
Chief of Training and Hostel Management Affairs Section	Mr. Wataru Okeya
Chief of International Research Affairs Section	Mr. Yoshinobu Gouda

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## APPENDIX

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### **1998 VISITING EXPERTS**

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#### **THE 108TH INTERNATIONAL SEMINAR**

Dr. Ernesto Ugo Savona	Professor, School of Law, Trento University, Italy
Mr. Frank J. Marine	Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice
Mr. Lau, Yuk-kuen	Director of Crime and Security, Hong Kong Police Force Headquarters, Hong Kong
Mr. Dimitris Vlassis	Crime Prevention and Criminal Justice Officer, Centre for International Crime Prevention, United Nations Office at Vienna, Austria
Mr. Madan Lal Sharma	Joint Director, Central Bureau of Investigation, India

#### **Seminar Counsellors**

Dr. Enamul Huq	Ex-Inspector General of Police, President ACPF Bangladesh
Mr. Severino H. Gaña, Jr.	Senior State Prosecutor, Department of Justice, Philippines

#### **THE 109TH INTERNATIONAL TRAINING COURSE**

Dr. Don A. Andrews	Professor, Department of Psychology, Carleton University, Canada
Mr. Matti Laine	Principal Lecturer, The Prison Personnel Training Centre, Finland
Ms. Celia Capadocia Yangco	Assistant Secretary, Department of Social Welfare and Development, Philippines
Mr. Lohman Yew	Deputy Director of Prisons, Prison Headquarters, Prisons Department, Ministry of Home Affairs, Singapore
Dr. Kenneth G. Adams	Associate Professor, School of Public and Environmental Affairs, Indianapolis, United States

#### **Course Counsellor**

Mr. Alfredo C. Benitez	Halfway House Manager, Bureau of Corrections, Department of Justice, Philippines
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**THE 110TH INTERNATIONAL TRAINING COURSE**

Mr. Donald Kenneth Piragoff	General Counsel of Criminal Law Policy Section, Department of Justice, Canada
Dr. Lee, Tae-Hoon	Chief Prosecutor Seongam Branch Office, Suwong District Public Prosecutor's Office, Republic of Korea
Mr. Soh Thiam Sim	Head, Computer Crime Branch, Commercial Crime Division, Criminal Investigation Department, Singapore Police Force, Singapore
Mr. John D. Arterberry	Deputy Chief, Fraud Section, Criminal Division United States Department of Justice, Washington

**Course Counsellors**

Dr. Slawomir Redo	Criminal Justice and Legal Affairs Officer, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention, Vienna International Centre, Austria
Dr. Peter Nils Grabosky	Director of Research, Australian Institute of Criminology, Australia
Mr. Shri L. C. Amarnathan	Director General of Police, Sikkim of Police Headquarters, India

## APPENDIX

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### **1998 AD HOC LECTURERS**

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#### **THE 108TH INTERNATIONAL SEMINAR**

Mr. Mitsuhiro Ohara	Assistant Director, Second Organized Crime Division, National Police Agency, Japan
Mr. Motohiro Yoshida	Counsellor, Public Security Division, Criminal Affairs Bureau, Ministry of Justice, Japan

#### **THE 109TH INTERNATIONAL TRAINING COURSE**

Mr. Takeyoshi Hongoh	Director General, Rehabilitation Bureau, Ministry of Justice, Japan
Mr. Masaharu Yanagimoto	Professor of Law, Asia University, Tokyo, Japan
Mr. Ichiro Sakai	Director General, Correction Bureau, Ministry of Justice, Japan
Dr. Ohashi Hideo	Director, Medical Care and Classification Division, Correction Bureau, Ministry of Justice Japan
Mr. Akio Harada	Director General, Criminal Affairs Bureau, Ministry of Justice, Japan
Dr. Ezzat A. Fattah	Professor Emeritus, School of Criminology, Simon Fraser University, Vancouver, Canada

#### **THE 110TH INTERNATIONAL TRAINING COURSE**

Mr. Masayo Hirao	Deputy Director, Special Investigation Division, Executive Bureau, Securities and Exchange Surveillance Commission, Tokyo, Japan
Mr. Shuzo Yamamoto	Deputy Director, Special Investigation Department of the Tokyo District Public Prosecutors Office, Japan
Mr. Takahiko Iiri	Superintendent, Assistant Director 2nd Investigation Division, Criminal Investigation Bureau, Japan
Mr. Kunio Mikuriya	Director of Enforcement, Customs and and Tariff Bureau, Ministry of Finance of Japan
Mr. Mamoru Izumisawa	Director, Management and Planning Division, Investigation Bureau, Fair Trade Commission, Japan
Mr. Hideo Arai, Director	Criminal Investigation Division, Examination and Criminal Investigation Department, National Tax Administration, Japan

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Mr. Akira Nakata	Public Prosecutor, Tokyo High Public Prosecutors Office, Japan
Mr. Chin Fook Leong	Deputy Director, Public Affairs Department, Singapore Police Force
Mr. Kunihiro Matsuo	Director General, Criminal Affairs Bureau, Ministry of Justice of Japan
Mr. Takashi Nonoue	Counselor, Criminal Affairs Bureau, Ministry of Justice of Japan
Mr. Mikio Itoh	Assistant Director of Life Environment Division, Life Security Bureau, National Police Agency, Japan
Mr. Kiyoshi Yasutomi	Professor of Law, Keio University, Japan

## APPENDIX

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### 1998 UNAFEI PARTICIPANTS

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#### THE 108TH INTERNATIONAL SEMINAR

##### *Overseas Participants*

Mr. Abdul Wahhab Sarkar	Deputy Secretary (Law), Bangladesh Secretariat, Bangladesh
Mr. Leonardo Ananias González Gómez	Legal Adviser, Ministerio del Interior, Dirección General Jurídica, Colombia
Mr. Armogam Gounder	Assistant Superintendent of Police, Central Police Station, Fiji Islands
Mr. Cheung, Yim-Fui	Chief Inspector I, Organised Crime and Triad Bureau, Police Headquarters, Hong Kong
Mr. Purushottam Sharma	Senior Superintendent of Police, Police Headquarters, India
Mr. Claude Ranjatoson	Deputy Chief of Air and Border Police, Ivato International Airport, Ministry of Police, Madagascar
Mr. Lai Yong Heng	Deputy C.I.D. Chief, Pahang, C.I.D. Headquarters, Malaysia
Mr. Eduardo Barclay Arce	Secretario Ejecutivo, Consejo Estatal de Coordinación del Sistema Nacional de Seguridad Pública, Mexico
Mr. Tserentsoodol Enkhtsogt	Senior Officer, Legal Reform Strategic Management and Integrated Planning Department, Ministry of Justice, Mongolia
Mr. Udaya Nepali Shrestha	Special Secretary, Ministry of Law and Justice, Nepal
Mr. José Eduardo Boza Guerrero	Criminal Judge, Supreme Court of Nicaragua, Nicaragua
Mr. Tahir Anwar Pasha	Deputy Inspector General of Police, Civil Secretariat Lahore, Pakistan
Mr. Maring Kataka	Acting Director of Prosecution, Police Headquarters, Papua New Guinea
Mr. Alberto Rama Olario	Deputy Regional Director for Administration, Philippines National Police

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Mr. Yang, Bu-Nam	Public Prosecutor, Kwangju District Public Prosecutor's Office, Republic of Korea
Mr. Abdallah Ali Mohammed Al-Shihry	Director, Sewaidi and Shobra Police Station, Saudi Arabia
Mr. Surasakdi Chungsanga	Interpol Superintendent, Foreign Affairs Division, Royal Thai Police, Thailand
Mr. Semisi Fonua Fifita	Assistant Chief Inspector, Officer-in-Charge, Investigation Training Unit, Tonga Police Force, Tonga
Mr. Muammer Yasar Özgül	Deputy General Director of Personnel, The General Directorate of Personnel, Turkey
Mr. Efrén Manuel Marin Taborda	Chief of Investigations, Cuerpo Técnico Policia Judicial, División Contra la Delincuencia Organizada, Venezuela
Mr. Pham Ba Khiem	Deputy Chief, General Department of the People's Police, Economic Police Department, Viet Nam

### ***Japanese Participants***

Mr. Yasutaka Harada	Judge, Tokyo District Court, Japan
Ms. Kuniko Hokin	Chief, Tokyo Probation Office, Japan
Mr. Toshio Kusunoki	Chief of Kokura Branch, Kyushu Regional Narcotics Control Office, Japan
Mr. Yutaka Nagashima	Senior Research Officer, Research and Training Institute of the Ministry of Justice, Japan
Mr. Hiroyuki Osawa	Assistant Director, Foreign Affairs Division, Security Bureau, National Police Agency, Japan
Mr. Ken Umemura	Deputy Superintendent, Tama Juvenile Training School, Japan
Ms. Sakiko Watanabe	Public Prosecutor, Tokyo District Public Prosecutors Office, Japan

## APPENDIX

### **THE 109TH INTERNATIONAL TRAINING COURSE**

#### ***Overseas Participants***

Mr. Md. Hemayet Uddin	Assistant Inspector General of Prisons, Prisons Directorate, Bangladesh
Ms. Elizabeth Malebogo Masire	Social Welfare Coordinator, Department of Prisons and Rehabilitation, Botswana
Mr. Sairusi Gauna Tuisalia	Assistant Superintendent of Prisons, Prison Headquarters, Fiji
Mr. William Kwadwo Asiedu	Assistant Director of Prisons, Ghana Prisons Service, Ghana
Mr. Chung, Wai Man	Chief Officer , Staff Training Institute, Correctional Services Department, Hong Kong
Mr. Mokhammad Frandono	Chief of Batam Prison, Indonesia
Ms. Josephine Muthoni Murege	Senior Probation Officer, District Probation Office Makadara-Nairobi Area, Kenya
Mr. Titera Tewaniti	Prison Inspector, Kiribati Prison Service, Police and Prisons Headquarters, Republic of Kiribati
Mr. Osman bin Ahmad	Superintendent of Prisons, Malaysian Prisons Department, Simpang Rengam Prison and Rehabilitation Centre, Malaysia
Mr. Gyan Darshan Udas	Under Secretary, Ministry of Home Affairs, Nepal
Mr. Mohammad Yamin Khan	Deputy Inspector General of Police, Office of the Inspector General of Police, Police Head Office, Pakistan
Mr. Michael Naplau Waipo	Deputy Commanding Officer, Bomana Metropolitan Jail, Papua New Guinea
Ms. Emilie Pantoja Aranas	Training Officer, Jail National Training Institute, Philippines
Mr. Yoon, Bo-Sik	Correctional Official, Correction Division, Ministry of Justice, Republic of Korea
Mr. Joseph Elvy Szetu	Assistant Controller of Prisons Training, Solomon Islands Prison Service, Solomon Islands
Ms. Yossawan Boriboonthana	Chief of Correctional Development Unit, Bureau of Penology, Department of Corrections, Thailand

## ANNUAL REPORT FOR 1998

### ***Japanese Participants***

Ms. Junko Fujioka	Principal Psychologist, Fuchu Prison, Japan
Mr. Tetsuya Kagawa	Assistant Judge, Tokyo District Court, Japan
Mr. Kenichi Kiyono	Public Prosecutor, Nara District Public Prosecutors Office, Japan
Mr. Hideharu Maeki	Narcotics Agent, Kinki Regional Narcotics Control Office, Japan
Ms. Fumi Murakami	Probation Officer, Kanto Regional Parole Board, Japan
Mr. Takao Nakamura	Probation Officer, Chubu Regional Parole Board, Japan
Mr. Satoshi Nakazawa	Family Court Probation Officer, Aomori Family Court, Japan
Mr. Yoshio Shibata	Immigration Control Officer, Higashi-Nihon Immigration Centre, Japan
Mr. Akihito Suzuki	Principal Supervisor, Kawagoe Juvenile Prison, Japan
Mr. Mamoru Suzuki	Researcher, Crime Prevention Section, National Research Institute of Police Science, Japan
Mr. Mamoru Takatsu	Public Prosecutor, Yokohama District Public Prosecutors Office, Japan
Mr. Nobuyuki Yamada	Senior Chief Programme Officer, Osaka Prison, Japan

### ***Observer***

Mr. Hisashi Ishizuna	Planner, Facilities Division, Minister's Secretariat, Ministry of Justice, Japan
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## APPENDIX

### **THE 110TH INTERNATIONAL TRAINING COURSE**

#### ***Overseas Participants***

Mr. Saadi Lahcene	Public Prosecutor, Tribunal of Algiers, Algeria
Mr. Md. Mahfuzur Rahman	Additional Deputy Commissioner, Office of the Deputy Commissioner, Bangladesh
Mr. Ramon Crespo Carrilho Machado	Federal Criminal Expert, Federal Police Department, Ministry of Justice, Brazil
Mr. Mao Borin	Assistant of Criminal Department Chief, Department of Criminal Police, Cambodia
Ms. Wang Yabin	Vice Director, Tieling Research Institute of the Public Security Bureau, The People's Republic of China
Mr. Marino Francisco Sagot Somarribas	Sub-Director General, Social Adaptation and Crime Prevention Direction, Ministry of Justice, Costa Rica
Mr. Burama Dibba	Assistant Superintendent of Police, Prosecutions Division, Police Headquarters of the Gambia
Mr. M. S. Bali	Deputy Inspector General of Police, Central Bureau of Investigation, Anti-Corruption Branch, India
Mr. Patrick Ochieng Obimo	Deputy Officer in Charge of Police Prosecution, Nairobi Area, Police Department, Office of the President, Kenya
Mr. Wasana Sisaykeo	Director of Transnational and Economic Crime, ASEAN Police Office, Lao People's Democratic Republic
Mr. Kedar Paudel	Under Secretary (Judicial Service), Ministry of Law and Justice, Nepal
Mr. Asif Nawaz	Deputy Inspector General of Police, Central Police Office, Pakistan
Mr. Wilfredo Vizon Lapitan	Assistant Chief Attorney, Office of the Chief Attorney, Supreme Court of the Philippines, Philippines
Mr. Choi, Joon-Weon	Public Prosecutor, Seoul District Public Prosecutor's Office, Republic of Korea
Mr. Jeshop Remember Shabangu	Commander of Crime Prevention, South Africa Police Service, South Africa
Mr. Torsak Buranaruangroj	Senior State Attorney, International Affairs Department, Office of the Attorney General, Thailand



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### *Japanese Participants*

Mr. Shinji Iwayama	Public Prosecutor, Tokyo District Public Prosecutors Office, Japan
Mr. Takahiro Maeda	Immigration Inspector, Tokyo Immigration Bureau, Japan
Mr. Masahiko Motoyoshi	Probation Officer, Saga Probation Office, Japan
Mr. Tetsuo Nagakura	Judge, Nagoya District Court, Japan
Mr. Akihide Nakamura	Probation Officer, Takamatsu Probation, Japan
Mr. Hiroshi Narikawa	Judge, Tokyo District Court, Japan
Mr. Tetsuo Ogura	Police Inspector, National Police Agency, Japan
Mr. Shuji Ohta	Chief Specialist, Sunpu Juvenile Training School, Japan
Mr. Yoshihiro Ono	Chief Program Supervisor, Mito Juvenile Prison, Japan
Mr. Teruo Taniguchi	Public Prosecutor, Osaka District Public Prosecutors Office, Japan
Mr. Atsushi Tohyama	Maritime Safety Officer, 11th Regional Maritime Safety Headquarters, Japan
Ms. Kiyoko Yokota	Public Prosecutor, Urawa District Public Prosecutors Office, Japan

APPENDIX

**DISTRIBUTION OF PARTICIPANTS BY PROFESSIONAL BACKGROUNDS AND COUNTRIES**

(1st International Training Course-111th International Seminar,  
U.N. Human Rights Courses and 1 Special Course)

Professional Background Country	Judicial and Other Administration	Judges	Public Prosecutors	Police Officials	Correctional Officials (Adult)	Correctional Officials (juvenile)	Probation/Parole Officers	Family Court Investigation Officers	Child Welfare Officers	Social Welfare Officers	Training & Research Officers	Others	Total
Afghanistan	7	8	5	3									23
Bangladesh	18	10		11	4		4			5		2	54
Bhutan				3									3
Brunei	4				2								6
Myanmar	3			2									5
China	11	1	5	8							7		32
Hong Kong	13			11	24	3	9		1	3	1		65
India	12	10		44	6	1	1			2	6	3	85
Indonesia	17	20	17	19	13		3			5		1	95
Iran	5	11	8	8	6						2	1	41
Iraq	5	3	3	5	5	5					2		28
Jordan				3									3
Cambodia	1	2	1	4	1								9
Oman				2									2
Korea	12	3	52	6	18	4					3		98
Laos	4	4	4	10									22
Malaysia	18	1	2	38	30	7	3		1	5	3		108
Maldives			1										1
Mongolia	1			1									2
Nepal	26	12	5	31								2	76
Pakistan	15	9	2	24	7	1	2				2	1	63
Philippines	17	7	21	31	8	3	9	3	1	5	2	5	112
Saudi Arabia	4			6	3						1	1	15
Singapore	10	18	5	12	10	3	10			3	1	1	73
Sri Lanka	21	18	11	19	17	1	10		1	2		1	101
Taiwan	12	4	2	2	1								21
Thailand	20	28	35	13	13	7	10	1		8	4	1	140
Turkey	2	1	1	2							1		7
Viet Nam	10	5	2	6						4	1		28
United Arab Emirates	1												1
<b>ASIA</b>	<b>269</b>	<b>175</b>	<b>182</b>	<b>324</b>	<b>168</b>	<b>35</b>	<b>61</b>	<b>4</b>	<b>4</b>	<b>42</b>	<b>36</b>	<b>19</b>	<b>1,319</b>

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Professional Background Country	Judicial and Other Administration	Judges	Public Prosecutors	Police Officials	Correctional Officials (Adult)	Correctional Officials (juvenile)	Probation/Parole Officers	Family Court Investigation Officers	Child Welfare Officers	Social Welfare Officers	Training & Research Officers	Others	Total
Algeria		3	2										5
Botswana	1			2									3
Cameroon	2												2
Cote d'Ivoire		1		1									2
Egypt	1										2	1	4
Ethiopia	3			1									4
Gambia				1									1
Ghana	1			3	1								5
Guinea			1	2									3
Kenya	5	4	1	10	6		6				2		34
Lesotho				1			2						3
Liberia											1		1
Madagascar				1									1
Mauritius		1											1
Morocco			1	4									5
Mozambique	1			1	1								3
Nigeria	1			2	5							1	9
South Africa				1							1		2
Seychelles				2			1						3
Sudan	2		1	13	1						2		19
Swaziland				2									2
Tanzania	4	3	4	2	1								14
Zambia		1		6									7
Uganda				2								1	3
Zimbabwe	1			2									3
<b>A F R I C A</b>	<b>22</b>	<b>13</b>	<b>10</b>	<b>59</b>	<b>15</b>	<b>0</b>	<b>9</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>8</b>	<b>3</b>	<b>139</b>
Australia			1				1			1			3
Vanuatu				1									1
Fiji	6	1	8	18	11					1			45
Kiribati	1												1
Marshall Islands	1			3									4
Micronesia							1						1
Nauru				1									1
New Zealand	1			1									2
Papua New Guinea	9		3	11	8		2			1		2	36
Solomon Islands	3			2									5
Tonga	2	1		6	2						1		12
Western Samoa	1			1			1					1	4
<b>T H E P A C I F I C</b>	<b>24</b>	<b>2</b>	<b>12</b>	<b>44</b>	<b>21</b>	<b>0</b>	<b>5</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>1</b>	<b>3</b>	<b>115</b>

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<b>Professional Background</b>	<b>Judicial and Other</b>	<b>Judges</b>	<b>Public Prosecutors</b>	<b>Police Officials</b>	<b>Correctional Officials (Adult)</b>	<b>Correctional Officials (Juve-)</b>	<b>Probation/ Parole</b>	<b>Family Court Investigation</b>	<b>Child Welfare Officers</b>	<b>Social Welfare Officers</b>	<b>Training &amp; Research Officers</b>	<b>Others</b>	<b>Total</b>
<b>Country</b>													
Argentina	2	2		1									5
Barbados				1									1
Belize				1									1
Bolivia		1										1	2
Brazil	2		3	11					1				17
Chile	1			3	2								6
Colombia	3	1	2	1					1			1	9
Costa Rica	3	3	3								1	2	12
Ecuador			1	4		1							6
El Salvador	1												1
Guatemala					1								1
Honduras				3									3
Jamaica	3				1								4
Mexico	1												1
Nicaragua		1											1
Panama			1	2								1	4
Paraguay				9		1							10
Peru	4	10	3	1							1	2	21
Saint Lucia	1				1								2
Trinidad and Tobago	1				1								2
Venezuela	1		1	6							1		9
U.S.A. (Hawaii)								1					1
<b>NORTH &amp; SOUTH AMERICA</b>	<b>23</b>	<b>18</b>	<b>14</b>	<b>43</b>	<b>6</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>2</b>	<b>0</b>	<b>3</b>	<b>7</b>	<b>119</b>
Bulgaria				1									1
Hungary	1												1
Macedonia	1												1
Poland				1									1
<b>EUROPE</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>4</b>
<b>JAPAN</b>	<b>100</b>	<b>127</b>	<b>209</b>	<b>86</b>	<b>75</b>	<b>68</b>	<b>158</b>	<b>53</b>	<b>38</b>	<b>2</b>	<b>45</b>	<b>45</b>	<b>1,006</b>
<b>TOTAL</b>	<b>440</b>	<b>335</b>	<b>427</b>	<b>558</b>	<b>285</b>	<b>105</b>	<b>233</b>	<b>58</b>	<b>44</b>	<b>47</b>	<b>93</b>	<b>77</b>	<b>2,702</b>

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## CRIME IN CYBERSPACE

*Peter Grabosky\**

### I. INTRODUCTION

It has almost become trite to suggest that we are entering an age as significant and profound in its impact as was the Industrial Revolution. The convergence of computing and communications has already affected most if not all of the major institutions of society. It has created unprecedented opportunities for education, health services, recreation, and commerce. Unfortunately, it has also created unprecedented opportunities for crime. Identifying these vulnerabilities, and mobilizing appropriate countermeasures, will be one of the great challenges of the next century. As we will observe, the challenge is so great that it defies the capacity of law enforcement alone to control. Consequently, new forms of policing, involving the harnessing of non-government resources, will become essential. Given the fact that cyberspace knows no boundaries, and that computer crime often transcends national frontiers, effective countermeasures will also require a degree of international co-operation which is without precedent.

### II. VARIETIES OF COMPUTER CRIME

The variety of criminal activity which can be committed with or against information systems is surprisingly diverse. Some of these are not really new in substance; only the medium is new. Others represent new forms of illegality altogether.

#### A. Theft of Information Services

Ever since the original "phreakers" of a quarter century ago attacked telephone systems out of curiosity, telecommunications services have been vulnerable to theft. From those whose motives were confined to simple mischief making, to those who have made theft of services a way of life and major criminal industry, those who steal services pose a significant challenge to carriers, service providers, and to the general public, who often bear the financial burden of fraud.

The market for stolen communications services is large. There are those who simply seek to avoid or to obtain a discount on the cost of a telephone call. There are others, such as illegal immigrants, who are unable to acquire legitimate information services without disclosing their identity and their status. There are others still who appropriate information services to conduct other illicit business with less risk of detection.

The means of stealing telecommunications services are diverse, and include the "cloning" of cellular phones, counterfeiting of telephone cards, and unauthorised access to an organization's telephone switchboard. In one case, hackers were reported to have obtained unauthorised access to the telephone facilities of Scotland Yard, and made US\$1 million in phone calls.

#### B. Communications in Furtherance of Criminal Conspiracies

Modern information systems clearly provide an effective means by which offenders can communicate in order to plan

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and execute their activities. There is evidence of information systems being used to facilitate organised drug trafficking, gambling, prostitution, money laundering, child pornography and trade in weapons (in those jurisdictions where such activities are illegal). Although the use of information facilities does not cause such illegal conduct to occur, it certainly enhances the speed and ease with which individuals may act together to plan and to execute criminal activity.

### **C. Information Piracy/ Counterfeiting/Forgery**

Each year, it has been estimated that losses of between US\$15 and US\$17 billion are sustained by industry by reason of copyright infringement. Arguably, the speed and accuracy with which copies of works may now be made has been dramatically enhanced by such modern technology as online information networks. Copyright infringement may occur quickly and without difficulty, and may be carried out by anyone capable of using the Internet. The Software Publishers Association has estimated that \$7.4 billion worth of software was lost to piracy in 1993, with \$2 billion of that being stolen from the Internet.

As broadband services continue to become available with text, graphics, sound and video information being freely accessible via cable modems, the potential for copyright infringement involving such works will be enhanced enormously. Already in the United States it is possible to download compact disks and feature films from the Internet.

### **D. Dissemination of Offensive Materials**

Content considered by some to be objectionable exists in abundance in cyberspace. This includes, among much else, sexually explicit materials, racist

propaganda, and instructions for the fabrication of incendiary and explosive devices. Information systems can also be used for harassing, threatening or intrusive communications, from the traditional obscene telephone call to its contemporary manifestation in “cyberstalking”, in which persistent messages are sent to an unwilling recipient. In one recent case, a student composed a sadistic fantasy and sent it out over the Internet. He used the name of a fellow student as the story’s victim, and was initially charged with communicating a threat, although this was later withdrawn.

The rich diversity in thresholds of tolerance around the world, combined with the global reach of information, make this a particularly difficult regulatory challenge. What is offensive to authorities in the People’s Republic of China, might be welcome in overseas Tibetan communities. Materials offensive to religious leaders in Iran may fail to raise an eyebrow elsewhere.

### **E. Electronic Money Laundering**

For some time now, electronic funds transfers have assisted in concealing and moving the proceeds of crime. Emerging technologies will greatly assist in concealing the origin of ill-gotten gains. Large financial institutions will no longer be the only ones with the ability to achieve electronic funds transfers transiting numerous jurisdictions at the speed of light. The development of informal banking institutions and parallel banking systems may permit central bank supervision to be bypassed, but can also facilitate the evasion of cash transaction reporting requirements in those nations which have them. Traditional underground banks, which have flourished in Asian countries for centuries, will enjoy even greater capacity through the use of information technology.

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With the emergence and proliferation of various technologies of electronic commerce, one can easily envisage how traditional countermeasures against money laundering may soon be of limited value. I may soon be able to sell you a quantity of heroin, in return for an untraceable transfer of stored value to my "smart-card", which I then download anonymously to my account in a financial institution situated in an overseas jurisdiction which protects the privacy of banking clients. I can discreetly draw upon these funds as and when I may require, downloading them back to my stored value card.

**F. Electronic Vandalism and Terrorism**

As never before, western industrial society is dependent upon complex data processing and information systems. Damage to, or interference with, any of these systems can lead to catastrophic consequences. A recent United States government study estimated that some 250,000 separate attempts to penetrate United States defence installations had occurred during the previous year. Not all of these are attributable to harmless curiosity. Defence planners around the world are investing substantially in information warfare as a means of disrupting the information technology infrastructure of defence systems. Whether motivated by curiosity, vindictiveness or greed, electronic intruders cause inconvenience at best, and have the potential for inflicting massive harm.

**G. Sales and Investment Fraud**

The use of the telephone for fraudulent sales pitches, deceptive charitable solicitations, or bogus investment overtures is a billion dollar a year industry in the United States. The intensification of commercial activity in the United States

and globally, combined with emerging communications technologies, would seem to heighten the risk of sales fraud. Already evidence is emerging of fraudulent sales and investment offers having been communicated over computer networks and Bulletin Boards. Further developments in electronic marketing will provide new opportunities for the unscrupulous and new risks for the unwitting.

**H. Illegal Interception of Information**

Developments in information provide new opportunities for electronic eavesdropping. From activities as time-honoured as surveillance of an unfaithful spouse, to the newest forms of political and industrial espionage, information interception has increasing applications. Here again, technological developments create new vulnerabilities. In New York, for example, two individuals recently used a sophisticated scanning device to pick up some 80,000 cellular telephone numbers from motorists who drove past their Brooklyn apartment. Had the two not been arrested, they could have used the information to create cloned mobile telephones which could have resulted in up to \$100 million in illegal calls being made. The electromagnetic signals emitted by a computer may themselves be intercepted. Cables may act as broadcast antennas. Existing law does not prevent the remote monitoring of computer radiation.

**I. Electronic Funds Transfer Fraud**

The proliferation of electronic funds transfer systems will enhance the risk that such transactions may be intercepted and diverted. Existing systems such as Automated Teller Machines, and Electronic Funds Transfer at Point of Sale technologies have already been the targets of fraudulent activity. The development of stored value cards or smart cards, super



smart cards and optical memory cards will no doubt invite some individuals to apply their talents to the challenge of electronic counterfeiting and overcoming security access systems. Just as the simple telephone card can be reprogrammed, smart cards are vulnerable to re-engineering. Credit card details can be captured and used by unauthorised persons. The transfer of funds from home between accounts and in payment of transactions will also create vulnerabilities in terms of theft and fraud and the widescale development of electronic money for use on the Internet will lead to further opportunities for crime. What has for the past quarter century been loosely described as "computer fraud" will have numerous new manifestations.

The above forms of illegality are not necessarily mutually exclusive, and need not occur in isolation. Just as an armed robber might steal an automobile to facilitate a quick getaway, so too can one steal information services and use them for purposes of vandalism, fraud, or in furtherance of a criminal conspiracy.

Communication of some forms of prohibited material (such as that relating to the manufacture of drugs or explosive devices) may itself entail criminal conspiracy. Even legitimate telemarketing may be regarded as intrusive and offensive to some recipients. Intrusions and interceptions for the purposes of industrial espionage may also be accompanied by theft of intellectual property.

In addition, a number of themes run through each of the forms of illegality described above. Foremost of these are the technologies for concealing the content of communications. Technologies of encryption can limit access by law enforcement agents to communications carried out in furtherance of a conspiracy,

or to the dissemination of objectionable materials between consenting parties.

Also important are technologies for concealing a communicator's identity. Electronic impersonation, colloquially termed "spoofing", can be used in furtherance of a variety of criminal activities, including fraud, criminal conspiracy, harassment, and vandalism. Technologies of anonymity further complicate the task of identifying a suspect.

### **III. THE TRANSNATIONAL IMPLICATIONS OF CRIME IN CYBERSPACE**

International crime of a more conventional nature has proved to be a very difficult challenge for law enforcement. Computer and telecommunications related crime poses even greater challenges. There may be a lack of agreement between authorities in different jurisdictions about whether or not the activity in question is criminal at all, who has committed it, whether in fact it has been committed, who has been victimised because of it, who should investigate it, and who should adjudicate and punish it. If an online financial newsletter originating in the Bahamas contains fraudulent speculation about the prospects of a company whose shares are traded on the Australian Stock Exchange, where has the offence occurred?

Other issues which may complicate investigation entail the logistics of search and seizure during real time, the sheer volume of material within which incriminating evidence may be contained, and the encryption of information, which may render it entirely inaccessible, or accessible only after a massive application of decryption technology.

#### **IV. COUNTERMEASURES**

It has long been recognized that the criminal justice system is a very imperfect means of social control, and that effective crime prevention requires the contribution of families, schools, and many other institutions of civil society. This is no less the case with crime in cyberspace than it is with crime in the streets.

It will be immediately apparent that the detection, investigation and prosecution of all of the above forms of criminality pose formidable challenges. Crime in the digital age can be committed by an individual in one jurisdiction against a victim or victims on the other side of the globe. The control of cyber-crime lies beyond the capacity of any one agency. What principles can we articulate to assist us in controlling computer crime?

##### **A. Emphasize Prevention**

It is a great deal more difficult to pursue an online offender to the ends of the earth than to prevent the offence in the first place. The trite homily that "prevention is better than cure" is nowhere more appropriate than in cyberspace. It applies no less to high technology crime than it does to residential burglary. Just as one would be most unwise to leave one's house unlocked when heading off to work in the morning, so too is it foolish to leave one's information systems accessible to unauthorised persons.

##### **B. Self Defence Should Be the First Line of Defence**

The first step in the prevention of online crime is to raise awareness on the part of prospective victims to the risks which they face. Individuals and institutions should be made aware of the potential consequences of an attack on their information assets, and of the basic precautionary measures which they should

take. Those businesses who stand to gain the most from electronic commerce have the greatest interest in developing secure payment systems. Technologies of computer security, to be discussed below, can provide significant protection against various forms of computer crime. There are other, "low technology" measures which should not be overlooked. Perhaps foremost among these is staff selection. Surveys of businesses reveal that one's own staff often pose a greater threat to one's information assets than do so called "outsiders". Disgruntled employees and former employees constitute a significant risk. Suffice to say that great care should be taken when engaging and disengaging staff.

##### **C. Non-governmental Resources Should Be Harnessed Whenever Possible**

Given the resource constraints which most governments face, it is desirable to enlist the assistance of private sector and community interests in the prevention and detection of computer-related crime. Market forces will generate powerful influences in furtherance of electronic crime control. Given the immense fortunes which stand to be made by those who develop secure processes for electronic commerce, they hardly need any prompting from government. In some sectors, there are ample commercial incentives which can operate in the furtherance of cyber-crime prevention. Information security promises to become one of the growth industries of the coming century. Some of the new developments in information security which have begun to emerge include technologies of authentication. The simple password for access to a computer system, vulnerable to theft or determination by other means, is being complemented or succeeded altogether by biometric authentication methods such as retinal imaging and voice or finger printing.

Detection of unauthorised access to or use of computer systems can be facilitated by such technologies as artificial intelligence and neural networking, which can identify anomalous patterns of use according to time of day, and keystroke patterns.

Issues of objectionable content can be addressed at the individual level by blocking and filtering software, by which parents or teachers can prevent children's access to certain types of sites. Selective consumption of internet content can be further assisted by classification schemes such as the Platform for Internet Content Selection.

The energies of private individuals can also be enlisted in furtherance of security and prosperity in cyberspace. A wide range of websites, under governmental or non-governmental auspices, invite private citizens to report suspected illegal conduct on the internet to authorities. Some such as the Cyber Angels, invite disclosures of all kinds, while others tend to specialize in particular areas, such as fraud or child pornography. What might be described as an "Electronic Neighbourhood Watch" enhances the capacity to detect some forms of electronic illegality.

There are other areas in which the state might arguably take a subordinate role to the individual. Consider violations of copyright or theft of intellectual property. In situations where civil remedies might be available to the victim, it is arguably more appropriate for the individual to secure their own rights than to rely upon the state to act on one's behalf. One could, of course, envisage circumstances where a wider state role may be justified—for example when the perpetrator in question is engaged in other criminal activity, or when the theft in question has wider economic ramifications. But conferring

rights upon the individual and providing the individual with the means of enforcing these rights may be appropriate in some circumstances.

In extreme cases, some would take the law into their own hands. The metaphor of cyberspace as a frontier is not entirely inapposite. There are vigilantes in cyberspace. In some instances, self-help by victims of telecommunications related crime may itself entail illegality. "Counter-hacking" by private citizens or by government agencies has been suggested as one way of responding to illegal intrusions. A group calling itself 'Ethical Hackers Against Pedophilia' have threatened to disable the computers of those whom they find dealing in digital child pornography.

A radical response to the problem of software piracy is to make use of so-called Logic Bombs which are installed into programs. When activated through an act of unauthorised copying, the malicious code would destroy the copied data and even damage other software or hardware belonging to the offender. The potential for such practices to result in liability for criminal damage, however, makes their use problematic.

#### **D. Enhancing the Capacity of Law Enforcement**

The continuing uptake of digital technology around the world means that law enforcement agencies will be required to keep abreast of rapidly developing technologies. This will entail training in new investigative techniques. As new technologies are exploited by criminals, it becomes even more important for law enforcement not to be left behind. This is a significant challenge, given the emerging trend for skilled investigators to be "poached" by the private sector. The collaboration of law enforcement with

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specialized expertise residing in the private sector will be a common feature in years to come.

One may also expect to see the use of fairly aggressive investigative methods in cyberspace. Even the domestic policing of telecommunications-related illegality may require measures which go beyond traditional law enforcement tactics. The technologies of encryption and anonymity noted above are invoked to justify aggressive investigative methods such as covert facilitation, more commonly referred to as "stings". In mid-1995 for example, the FBI charged an adult male who arranged over the Internet to meet what he thought was a 14 year old girl at a motel. The Internet contact was in fact an FBI agent. The accused was targeted because of his history of sex offences involving minors. Similar tactics have been directed at those who traffic in pornographic material, as well as perpetrators of telemarketing fraud. Law enforcement officers can easily pose on-line as prospective consumers of pornography. Laws will vary across jurisdictions with regard to the defence of entrapment, and the extent to which an offence was encouraged or suggested by police.

#### **E. The Imperative of International Cooperation**

The global nature of cyberspace necessitates the development of new strategies to combat criminal activity which can originate from the other side of the world. At present, if I, in Australia, were gullible enough to fall victim to a fraudulent investment scheme originating in Albania, I suspect that I could count on very little help from authorities in either jurisdiction. But transnational electronic crime seems destined only to increase.

The basic approach to overcoming the transnational issues of crime in cyberspace lies in developing cooperation between nations. This is more easily said than done, given the significant differences in legal systems, values and priorities around the world.

Enlisting the assistance of overseas authorities is not an automatic process, and often requires pre-existing agreements relating to formal mutual assistance in criminal matters.<sup>1</sup> Nevertheless, there are numerous examples of successful measures.

#### **1. Unilateral Action**

Some governments may take unilateral action against their citizens or residents who commit criminal offenses on foreign soil. Two of the most familiar examples in Australia are prosecutions for engaging in sexual activity with children, and for war crimes alleged to have been committed in World War Two. However in many cases, this may still require the co-operation of a foreign government in obtaining evidence and possibly in extraditing the offender.

#### **2. Bilateral Agreements**

The mobility of criminal offenders in a shrinking world has increased the need for arrangements to facilitate the apprehension and repatriation of those who seek to evade the law by fleeing to another jurisdiction. The most common mechanism for this is extradition, which is done pursuant to a treaty or other formal

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<sup>1</sup> Following recent amendments to the Mutual Assistance in Criminal Matters Act 1987, Australia may now grant assistance in criminal matters to any country. Bilateral mutual assistance treaties are currently in force with 18 nations. A further four treaties have been signed, but are not yet in force.

arrangement between two nations.<sup>2</sup> Australia was the originator of 33 and the recipient of 37 extradition requests pending at 30 June 1997.

Since 1985, Australia has adopted a “no evidence” approach as the preferred basis for international extraditions. The earlier approach required the production of a prima facie brief against the person sought, which effectively required foreign jurisdictions to produce evidence which accorded with Australia’s technical rules of admissibility. This was particularly difficult for civil law countries. The new approach is reflected in most of Australia’s modern extradition treaties and has generally facilitated cooperation between Australia and other jurisdictions.

Some jurisdictions seek to prosecute offences committed abroad by foreign nationals against their own citizens. The United States, for example, can seek extradition of alleged terrorists who have offended against citizens of the United States while abroad. Extradition is by no means an automatic matter, as the recent experience of Australian fugitive Christopher Skase illustrates. Moreover, other impediments exist. Some nations will not extradite their own citizens under any circumstances. Australia, as a matter of policy, will not extradite a fugitive who

would face execution in the jurisdiction seeking his or her return. Those jurisdictions which do practice capital punishment may waive the death penalty in order to obtain the extradition of a fugitive.

There are circumstances in which, as an alternative to extradition, a nation may prosecute a citizen for offences committed in, and against the laws of, a foreign jurisdiction. Australia, for example, may prosecute Australian citizens for offences committed on foreign soil, provided the relevant conduct would have been an offence under Australian law had it occurred within Australia. This process is only available within Australia in circumstances where extradition has been refused on the sole ground that the person was an Australian citizen at the time of the offence, and only if the Commonwealth Attorney-General is satisfied that the requesting State would have refused extradition of its nationals in corresponding circumstances. There are no recorded cases of such prosecutions within Australia.

In addition to extradition, a variety of arrangements may be put in place to facilitate cooperation between nations in the location and collection of evidence in furtherance of criminal investigation. Mutual assistance treaties, as they are called, provide a legal basis for authorities in country “A” to obtain evidence for criminal investigations at the request of authorities from country “B”. Instruments of this kind cover a range of assistance including:

- the identification and location of persons;
- the service of documents;
- the obtaining of evidence, articles and documents;
- the execution of search and seizure

<sup>2</sup> By the end of 1997, Australia had signed bilateral extradition treaties with 32 countries. Twenty nine of these were in force. A further 64 jurisdictions were covered by the London Extradition Scheme, which provides for the rendition of fugitive offenders among members of the Commonwealth of Nations. A special extradition relationship exists with New Zealand. Australian extradition laws have been applied to seven additional countries without a treaty. Australia has succeeded to extradition treaties entered by the United Kingdom with 21 countries in the late 19th and early 20th centuries.

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- requests; and
- assistance in relation to proceeds of crime.

Australia was the originator of 162 mutual assistance requests, and the recipient of 130 requests by other nations, which were pending at 30 June 1997.

The Mutual Assistance in Criminal Matters Act 1987 was amended in March 1997 to provide for “passive” application of the Act to all foreign countries, rather than requiring the Act to be specifically applied to particular countries by regulation. This enables assistance to be requested and provided much more expeditiously than was previously the case.

In addition, the posting of law enforcement personnel overseas can facilitate the development of informal networks which can help expedite response to the various requests which may arise from time to time. Formal agreements are essential, but there is often no substitute for interpersonal contact. The Australian Federal Police has 29 liaison officers stationed in 13 nations around the world. In addition to serving Australia’s needs, the AFP and Australian consular staff are able to help overseas governmental authorities check on the probity of prospective investors from Australia. AFP liaison officers may also assist their hosts in the training of law enforcement personnel and in the exchange of intelligence.

Steps taken following the G-8 Birmingham meeting in May 1998 for nations to designate liaison offices, which will be on call on a 24 hour basis, illustrates the need for prompt concerted responses to the problem of transnational digital crime.

## V. CONCLUSION

It has become trite to suggest that the world is a shrinking place. On the one hand, this shrinking is highly beneficial. People around the world now enjoy economic, cultural and recreational opportunities which were previously not accessible. On the other hand, the rapid mobility of people, money, information, ideas and commodities generally, has provided new opportunities for crime, and new challenges for law enforcement agencies. Linkages between events and institutions at home and abroad are inevitable, and will proliferate. This will require unprecedented cooperation between nations, and will undoubtedly generate tensions arising from differences in national values. Even within nations, tensions between such values as privacy and the imperatives of enforcement will be high on the public agenda. New organizational forms will emerge to combat new manifestations of criminality. The 21st century will be nothing if not interesting.

# THE PREVENTION AND CONTROL OF ECONOMIC CRIME

*Peter Grabosky\**

## I. INTRODUCTION

Economic crime, by which I refer generally to fraud in its various manifestations, is among the most costly of all criminal activities. Although it would be interesting to determine its cost with some precision, the total impact is unquantifiable. There are a number of reasons why attempts to estimate the cost of economic crime are bound to be futile. First, the most skilfully perpetrated offences are not even detected by victims. Even when an offence is detected, and the victim knows that he or she has sustained a loss, they may be reluctant to report it. In the case of an individual, he or she may simply be too embarrassed, and the expectation of recovering lost assets may be remote or nonexistent. In the case of an organization, they may be concerned about possible damage to their commercial reputation, and decide as a matter of business judgment not to disclose their vulnerability.

Statistics aside, our reasons for being concerned about economic crime should be obvious to many. The essence of fraud is a breach of trust. Trust is the very foundation of commerce, and the very basis of civil society. Economic crime thus jeopardises basic interpersonal relations, economic development, and in some cases, even the stability of governments. One wonders, for example, what the economy of the former Zaire might have become had its corrupt leadership not plundered the nation's wealth. The collapse of the Albanian regime following massive losses

sustained by thousands of citizens in an investment fraud constitutes another example. One could compile a long list of cases, but the purpose of this paper is to discuss the risks of economic crime, and the countermeasures which might be put in place to minimize them. It will place special emphasis on computer-related crime, because the convergence of computers and communications will become the dominant factor in commerce as we enter the new millenium.

Crime is a changing phenomenon. Some activities, such as criminal exploitation of on-line commerce, which were inconceivable less than a decade ago, now pose significant risks to the economy and society of many nations. Fraud is one general type of crime which, whilst as old as commerce itself, may be expected to take new forms as the 21st century progresses. In some cases, these forms have already begun to emerge. In the following pages, I will outline a number of social, demographic and economic developments which may be expected to influence the shape of economic crime in years to come. One quickly notes that these trends, and the variety of economic crime which may be expected to accompany them, are beyond the capacity of law enforcement agencies alone to control.

### A. The Environment of Economic Crime

It has become trite to suggest that the world is shrinking. The world is now characterized by unprecedented mobility of information, finance, goods and services, people, cultural artefacts, flora and fauna, even viruses-both those of the microbial

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variety as well as those which infect one's hard drive.

The globalization of finance, where electronically mediated exchanges occur in nanoseconds, is far removed from the days where deals were sealed with a handshake, and "a man's word was his bond". In recent times, the Barings and Sumitomo experiences have had significant global repercussions, with adverse effects on financial markets and commodity prices. In brief, the proliferation of anonymous financial transactions is accompanied by a commensurate proliferation of opportunities for betrayal of trust.

## II. VARIETIES OF ECONOMIC CRIME

Let me just outline some of the major forms of economic crime which confront us as we approach the 21st century. The following categories are not mutually exclusive, but are intended to illustrate the range and variation of economic crime.

### A. Insurance fraud

Insurance is a most important institution, enabling us to spread risk and thereby engage in activities of tremendous commercial or individual benefit. With insurance, however, comes the opportunity for fraud. The fabrication of false insurance claims is as old as the institution of insurance itself. Whether at the hands of opportunistic individuals, or criminal organizations, the cost of insurance fraud is substantial, and often borne by honest and law abiding policyholders.

### B. Fraud against Governments

Governments are at great risk of fraud. They dispense benefits, and many citizens are not beyond obtaining these benefits fraudulently. They buy goods and services, and many purveyors of these goods and services are not beyond providing inferior

products or otherwise inflating their invoices. Governments raise taxes, and many taxpayers evade payment. Government employees may divert public assets for private use. When governments are defrauded, all honest citizens pay the price. To the extent that funds defrauded would otherwise be spent on worthwhile government programs, the public suffers twice.

### C. Fraud against Employers

Organisations, whether in the public or private sector, may be at risk from their employees. Embezzlement or theft of money, goods or services by employees can mean the difference between economic survival or collapse. When an employer's business fails because of employee theft, law abiding employees are among those who pay the price.

### D. Fraud against Consumers

Purveyors of goods and services can cheat their customers in many ways. They may provide defective or inferior products or fail to deliver goods and services entirely. They may advertise their products in a deceptive manner. At the extreme, this can lead to death or injury, in the case of dangerous products purported to be safe. At the very least, the consumer or will pay more for a product than he or she should

### E. Telemarketing Fraud

The media of commerce are also changing. The days of face-to-face exchange are yielding to increased sales by means of mail-order and telemarketing.

Telemarketing may involve the use of the telephone, or increasingly, the internet, which may well become the dominant medium of commerce in the coming century. While these new media offer greater opportunity and choice for consumers, they also pose greater risk; the



greater the uptake of new technologies for commercial application, the greater the risk that they will be exploited for criminal purposes.

#### **F. Fraud against Shareholders and Investors**

The directors of large companies may divert company assets for personal use. When this occurs on a scale sufficient to effect the company's financial performance, shareholders and investors suffer. At the extreme, companies may collapse leaving investors and creditors at a loss. Endemic fraud can taint an entire economy, leading to capital flight and discouraging foreign investment.

#### **G. Superannuation Fraud**

The world's industrialised nations are at present experiencing economic change at a dramatic pace. One of the most dramatic examples of such change is the growth of the superannuation industry, which establish and manage private pension funds. Over 100,000 superannuation funds currently exist in Australia alone. Around the world, vast sums have accumulated, and the superannuation savings pool contains trillions of dollars.

This is not to suggest that persons charged with the stewardship of such funds have unusual criminal propensities, but again, the sheer volume of money constitutes what may be an irresistible temptation to the unscrupulous. Abuses of superannuation funds in the United States and the United Kingdom illustrate the attractiveness of such enormous amounts of money to those who would commit fraud. Short of the risk of outright fraud, the risk of imprudent management cannot be ignored.

#### **H. Bribery and Corruption**

Public officials may demand or accept financial or other considerations as the

price of doing business. This can erode the legitimacy of an entire government.

Companies in the private sector may require side payments from suppliers. In the long run the cost is borne by consumers. Widespread, entrenched corruption can detract from a nation's economic competitiveness, and may discourage foreign investment.

#### **I. Money Laundering**

The term 'Money Laundering' is used to describe the process by which the proceeds of crime ('dirty money') are put through a series of transactions which disguise their illicit origins, and make them appear to have come from a legitimate source ('clean money'). This makes criminal activity more difficult to detect, can lead to the criminal infiltration of legitimate business, and can distort the economies of small nations.

#### **J. Telecommunications Fraud**

As telecommunications services become more widely accessible, the theft of such services becomes more common. From the 'cloning' of cellular telephones, to the unauthorised access and use of telephone switchboards, to the fabrication of stored value telephone cards, millions of dollars of telecommunications services are misappropriated.

#### **K. Credit Card Fraud**

There are four basic vulnerabilities of plastic card payment systems:

1. Vulnerability of cards to alteration and counterfeiting;
2. Vulnerabilities arising from the issue of cards;
3. Vulnerabilities arising from card holder identification systems (PINs); and
4. Vulnerabilities arising from the misuse of cards.

As plastic cards eclipse the use of

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currency, opportunities for their misuse will increase. The cost will be borne by merchants, and by card issuers.

#### **L. Industrial Espionage**

The world of international business is in some respects a jungle. Competitors at home and abroad, and nations which might be hosts to a company's investment, may have a strong interest in a company's trade secrets and other economic intelligence. The lengths to which some will go in order to acquire such information are substantial, and at times, illegal. Industrial espionage by governments and private sector institutions is a fact of contemporary commercial life. One's company's, indeed one's nation's, competitive advantage may be at stake.

#### **M. Theft of Intellectual Property**

Copyright infringement can occur quickly and easily, greatly facilitated by the advent of digital technology. Text, video, sound, designer labels and computer software can be copied and reproduced as never before. Unrestrained, such modern forms of piracy can discourage invention and innovation, and deprive artists and creators of the royalties to which they are entitled.

#### **N. Forgery**

Currency, negotiable instruments, and a variety of other valuable documents may be forged or counterfeited. The advent of digital technology, including scanning and copying, enables almost perfect reproduction. Not only may the recipient be left holding a worthless piece of paper, but forged documents can be used in the furtherance of a variety of other economic crimes.

#### **O. Business Opportunity Fraud**

In the industrialised world, the downsizing of organizations in both the public and the private sector has begun to

generate growing numbers of individuals, in mid-career, with significant disposable income. With increasing sums of money to invest, the temptations of fiduciary fraud are bound to increase.

In addition to entrusting their funds to financial managers, those with money to invest may wish to start a small business. Unfortunately, they are also within reach of other fraudsters who would exploit them. Business opportunity fraud or other 'get rich quick' scams may be an unfortunate by-product of a nation's move to a more competitive economy.

One of the easiest avenues into small business is through purchase of a franchise. It has been estimated that in the United States, by the year 2000, over half of all retail sales will occur through franchised establishments. Short of the most blatant form of franchise-related fraud, i.e. simply taking the new franchisee's up-front money and disappearing with it, there remains the potential for a variety of lesser misrepresentations, such as overstatement of earnings potential and understatement of risks or other hidden costs of a franchise agreement.

#### **P. Electronic Funds Transfer Fraud**

The move to a cashless society has significant implications for both law enforcement and society. Although reducing the use of cash in the community may help to solve traditional forms of bank robbery and theft, new cashless payment systems will create new problems. The proliferation of electronic funds transfer systems will enhance the risk that such transactions may be intercepted and diverted. Existing systems such as Automated Teller Machines and Electronic Funds Transfer at Point of Sale technologies have already been the targets of fraudulent activity. Most of the large scale electronic funds transfer frauds which

have been committed have involved the interception or alteration of electronic data messages transmitted from bank computers, sometimes with the complicity of bank employees. The development of electronic commerce will be impeded to the extent that the security of electronic transactions is threatened.

#### **Q. Commonalities**

One common thread running through most if not all of the types of economic crime listed above is that they are greatly facilitated by recent developments in information technology. This does not mean that we should 'pull the plug' on our computers. Indeed, if we were to reject all technologies because of their potential for abuse, we would have rejected the wheel. Rather, we must learn to exploit the benefits of new technologies, and manage the risks which accompany them. But we should not underestimate the challenges which the digital age poses to those of us involved in the prevention and control of economic crime.

Where computers are used in the commission of fraud, difficulties of investigation are exacerbated, as offenders are able to disguise their identities and activities through the use of complex electronic technologies. Those who seek to mask their identity through the use of computer networks are often able to do so, by means of 'looping', or 'weaving' through multiple sites in a variety of nations. Electronic impersonation, colloquially termed 'spoofing', can be used in furtherance of a variety of criminal activities, including fraud. Anonymous e-mailers and encryption devices can shield one from the scrutiny of all but the most determined and technologically sophisticated regulatory and enforcement agencies. As a result, some crimes may not result in detection or loss until some time after the event, thus making the process

of investigation ever more challenging.

Other issues which may complicate the investigation of computer-based frauds entail the logistics of search and seizure during real time, the sheer volume of material within which incriminating evidence may be contained, and the encryption of information, which may render it entirely inaccessible, or accessible only after a massive application of decryption technology.

#### **R. Economic Crime in a Shrinking World**

It bears noting that not only can many fraudulent initiatives originate on the other side of the globe, few remedies are available to the unfortunate individual who might fall victim to transnational economic crime. Even if one is able to mobilize the law, the chances of locating the offender, obtaining extradition, mounting a prosecution, or recovering compensation may be impossible.

Particular problems arise when financial crimes are committed against a local company or government agency by a person situated in a foreign country.

Enlisting law enforcement assistance in the foreign country may be difficult, as their resources will be finite, and their priorities may well lie elsewhere.

Even when a perpetrator has been identified, two problems arise in relation to the prosecution of offences which have an international aspect: first, the determination of where the offence occurred in order to decide which law to apply and, secondly, obtaining evidence and ensuring that the offender can be located and tried before a court. Both these questions raise complex legal problems of jurisdiction and extradition.

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Additional problems are reflected in the difficulty of exercising national sovereignty over capital and information flows. Jurisdictional issues may arise from transborder online transmission. If an online financial newsletter originating in Albania contains fraudulent speculation about the prospects of a company whose shares are traded on the Tokyo Stock Exchange, where has the offence occurred?

Even if the host law enforcement agencies are willing and able to assist, collection of evidence in the foreign country may be problematic. Distance will be more of an impediment to the thief-taker than to the thief. The cost of sending law enforcement officers abroad to assist in an investigation, or the cost of bringing witnesses from abroad to testify in proceedings, may be prohibitive. Even then, there are often legal impediments which must be overcome. The laws of evidence of one's own country are not likely to be instantly hospitable to all evidence obtained from abroad. In nations where a degree of thought has been given to these issues, mutual assistance arrangements may be reached with selected nations for the collection of evidence on their soil, and special legislation may be enacted to provide for the admissibility in one's own courts of evidence taken abroad.

It must be emphasized that none of these impediments to the investigation and prosecution of transnational economic crime are unique to high technology offending. They exist for more conventional forms of criminality as well. Their significance is heightened, however, given the increased opportunities for transnational offending which new technology provides.

Extraterritorial law enforcement costs are also often prohibitive. Moreover, the cooperation across international

boundaries in furtherance of such enforcement usually requires a congruence of values and priorities across nations which, despite prevailing trends towards globalization, exists only infrequently. This may be less of a problem with fraud than with matters relating to political or artistic expression.

### III. COUNTERMEASURES

The extreme diversity of economic crime in its many manifestations means that no one institution of prevention or control will suffice. There can be no 'magic bullet' or panacea. The police alone will be unable to cope with economic crime. Rather, each separate type of economic crime will be best addressed by a combination of countermeasures. Some of these will be governmental, some will lie in the hands of the prospective victim, and some will be at the disposal of third parties.

1. The first line of defence against economic crime is awareness of one's vulnerability. The popular term for this is 'risk assessment'. This applies to the individual consumer or investor, who should become familiar with the basic pitfalls of the marketplace; to companies, who should be aware of the procedures and processes which are likely targets; and to governments, whose various functions (such as payment of benefits, and purchasing of goods and services) may be targeted for criminal exploitation.
2. The next step is to take necessary precautions. The key to fraud prevention on the part of organisations, whether of the public or the private sector, is the development and refinement of a fraud control system. Having identified one's points of vulnerability, one should put individual systems and processes in place which

protect these vulnerabilities from “attack.” These principles apply to the control of “electronic” economic crime; those offences committed with or against telecommunications and information systems, as well as the more conventional. The foundation for such a system is a management philosophy which is sensitive to fraud risk. The basic elements of such a system are careful recruitment of staff, a culture of integrity and loss prevention within the organisation, and formal procedures for the protection of assets.

The design of systems can be an important means of fraud prevention. The introduction of a requirement that the recipients of public funds have an account with a financial institution in which the funds can be deposited automatically, has dramatically reduced the risk of lost or stolen cheques, or fraudulent claims. Fraud control systems may include technologies as diverse as the requirement that company cheques be signed by two people, to sophisticated systems of biometric authentication (based on physical characteristics such as fingerprints or retinal images) required for access to a computer system. Let us briefly review some of the basic principles for the prevention and control of economic crime.

#### **A. Audit**

The scrutiny of a company’s accounts by an independent auditor is an important safeguard against economic crime. It is by no means ‘fail-safe,’ as accountants all too often fail to detect irregularities. The very necessity of having to prepare accounts in a form suitable for independent scrutiny and then subjecting them to a degree of examination is an important first step.

#### **B. Transparency**

It was once said that ‘sunlight is the best

disinfectant’. Procedures for the public disclosure of basic aspects of a government’s or a company’s operations can help safeguard against a variety of crimes. Freedom of information legislation can facilitate citizen access to government information. This is not to suggest that trade secrets, or military secrets for that matter, be made available to anyone who wants them. Rather, that fundamental information is available to keep markets, and citizens, informed.

The requirement that organizations in both the public and private sectors publish regular accounts which disclose details of income and expenditure, including the salaries of executives, and liabilities relating to environmental pollution, has become an international standard of best practice. Markets are beginning to expect nothing less.

#### **C. Procedures for Independent Review of Administrative Decisions**

The possibility of bias or other irregularities in the administrative decisions of governments can be addressed through the system of administrative law.

Procedures for the independent review of administrative decisions by a specially constituted court, the institution of an Ombudsman with investigative powers who can hear complaints by individual citizens, and freedom of information legislation which provides public access to government documents are three ‘prongs’ of an administrative law system which can contribute to the integrity of governments.

#### **D. Specialized Bodies for the Investigation and Prosecution of Serious Economic Crime**

In many nations around the world, the investigation of complex and sophisticated economic crime lies beyond the capacity of

conventional law enforcement agencies. Some have thus created new agencies with special powers and expertise to address specific issues. The Independent Commission Against Corruption (Hong Kong); the Serious Fraud Office (UK) and their variations elsewhere, are all examples of such agencies. This is not to suggest that specialised bodies are an essential solution to all problems in all jurisdictions. Where more general law enforcement bodies are adequate, there may be no need to create new ones. Indeed, a proliferation of agencies may lead to overlap and duplication, to bureaucratic rivalries, and to important cases 'falling between the cracks'. The effective exchange of intelligence and operational information can be made difficult. Such a lack of cooperation may often be to the advantage of offenders who may be able to delay or avoid detection and prosecution through a lack of coordination on the part of law enforcement agencies. But the increasing specialisation of economic life suggests that designated organizations may be appropriate in some circumstances.

#### **E. Cash Transactions Reporting**

The challenge of money laundering and tax evasion is made that much easier, when the offender is able to shift funds from place to place undetected. To this end, a growing movement among nations around the world has seen the development of cash transactions reporting systems. Banks and other financial institutions are now required to report to a central authority all transactions over a specified amount, or any transaction of any amount which appears in some manner to be suspect. In those jurisdictions where cash transaction reporting systems are in place, it becomes that much easier to 'follow the money trail'.

#### **F. A Free Press**

We have already noted the famous adage that sunlight is the best disinfectant. To

the extent that an open and free press exists within a nation, questionable practices will be subject to questioning. This is important across a range of offences, from bribery and corruption, to consumer fraud, to fraud against shareholders and directors. This is not to suggest that some media are always virtuous and responsible in their coverage. They most certainly are not, but it could be said that the best antidote for irresponsible speech is more speech.

#### **G. An Adequate Regulatory System**

Freedom of expression does not extend to the freedom to publish false or misleading advertising, or spurious commercial claims. A regulatory system which can identify such misconduct, and respond to it effectively, will help insure the integrity of markets. This need not be the exclusive province of government.

Private remedies such as civil litigation, and self regulatory regimes by individual companies and industry associations, are no less important than government agencies. A regulatory system which combines private and public remedies is likely to be more effective than one based solely on government or on self regulation.

#### **H. Mechanisms for Building Public Awareness**

By no means should knowledge about fraud and fraud risks remain the monopoly of law enforcement agencies. The first line of defence against fraud can and should be self help; appropriate knowledge should be shared with private citizens, businesses and public sector agencies alike. All prospective victims of fraud, this includes just about everyone, should be aware of the types of fraudulent activity to which they are most vulnerable: the 'red flags' or indicia of fraud; the most appropriate means of prevention; and the best avenues of response when they detect an offence.

New developments in communications permit not only the dissemination of basic fraud control information, but also the reporting of suspicious activity to appropriate authorities. The Internet abounds with materials on fraud control; some industry-specific, others focusing on certain vulnerable groups such as senior citizens. Other sources of information are medium-specific; sites are dedicated to warning of fraud on the Internet. Moreover, many law enforcement and regulatory agencies have established hotlines which are available to fraud victims or civic-minded third parties to report illegal or questionable conduct.

#### **I. Freedom for Individuals to Form Non-governmental Organizations**

Some of the most effective activities to combat economic crime comes from citizen activity. Before the rise of the modern State, citizens performed a number of functions (including policing, prosecution, and imprisonment) which later became governmental functions. Even in modern times, one sees in some nations activities undertaken by citizens' groups which complement the work of government agencies. The examples of victim assistance and prison aftercare associations come immediately to mind. The control of corruption is greatly facilitated by organisations such as Transparency International. Consumer groups and Better Business Bureaus remain vigilant against unfair trading. Citizens crime commissions are vigilant against activities as diverse as abuse of power by law enforcement agencies, bribery, and electoral fraud.

#### **J. Responsible Banking**

In addition to their role in the prevention of money laundering, banks and other financial institutions have an important role to play in the prevention and control of economic crime. Prudent lending

practices will deny opportunities to the unscrupulous. The challenge facing governments today is to allow sufficient flexibility in the financial services industry to permit the economy to flourish, but also to provide sufficient safeguards to protect against irresponsible or predatory conduct.

#### **K. Commercial Third Parties**

A variety of other third parties can complement the work of governments in the prevention and control of economic crime. A burgeoning industry in information security can assist clients in both public and private sectors to ensure the integrity of their systems. All of the large multinational accounting firms offer fraud control services to clients anywhere in the world. Many have established departments or subsidiaries specialising in fraud prevention. Their products range from a total review of risk management practices to more narrowly focused issues such as security of information technology systems.

Private fraud control services are by no means limited to prevention. Private organisations which find themselves the victims of fraud may retain their own inhouse investigators, or may engage specialised fraud investigators residing in the private sector. These private investigators may conduct an entire investigation, handing the matter over to the police for prosecution. This is common in the Australian insurance industry in response to insurance fraud.

Market forces themselves may exert positive effects from time to time on the behaviour of some public and private organizations. There are opportunities for the second-order operation of market forces through the guidance provided by financial and insurance institutions, and by institutional investors.

#### **L. An Open Political System**

An open political system permits individual citizens, interest groups, or an organised opposition the freedom to question policies and programs. A viable political opposition can be alert to financial irregularities in both public and private sectors, and can make them more difficult to conceal.

#### **M. International Co-operation**

Because many fraud offences do not involve face-to-face interactions in their commission, it is possible for offenders and victims to be located in more than one jurisdiction. More sophisticated conspiracies may involve individuals in three or more jurisdictions within Australia or overseas. Few remedies are available to the unfortunate individual who might fall victim to such activities. The transnational dimension of many economic crimes requires unprecedented international cooperation. This cooperation must occur on many levels, from the most formal, involving treaties and mutual assistance arrangements, to informal liaison between and exchange of law enforcement personnel. In the case of transnational electronic crime, it will require very timely cooperation indeed, involving the capability of contacting overseas authorities at a moment's notice.

#### **N. Sanctioning of Offenders.**

While some would argue that severe penalties do not always deter crime, or that increasing penalties are unlikely to achieve a commensurate decrease in crime, one should not ignore the potential usefulness of punishment for economic crime. Perhaps to an extent greater than in other areas of crime, economic crime is often based on rational decision making. Embezzlement does not occur in a moment of passion; corrupt payments are not made in an alcoholic rage. Penalties commensurate with the seriousness of the

crime can send a message to would-be offenders, as well as educating the public that economic crime is serious and will not be tolerated.

#### **O. Economic Crime Prevention Requires a Combination of Countermeasures**

None of the above solutions is guaranteed to prevent economic crime. But each helps reduce the risk. The more that are in place, the more difficult it is to perpetrate fraud and other forms of economic crime. Here it may be useful to use the analogy of a web. Any one strand of a web may be insufficient to support a load. But many strands, interwoven, may be very strong indeed. Alternatively, consider a cable. The same principle applies.

The prevention and control of economic crime, however, should avoid imposing unrealistic burdens on commerce or on agencies of the State. Absolute integrity may be unattainable, and its pursuit may have counterproductive consequences. One might speak of 'burning the house to roast the pig'. At the end of the day, it is the overall health of the economy and the integrity of its markets which matters most. Initiatives for the prevention and control of economic crime should be undertaken according to a risk-benefit calculus. This would see the most stringent controls operating where there is significant vulnerability to catastrophic loss, with fewer controls in place when risk is correspondingly less. The challenge for the future lies in designing systems which will reduce opportunities for fraud, while at the same time allowing commerce to flourish.



# COMBATING CREDIT CARD CRIME: ENACTING EFFECTIVE CRIMINAL LAWS

*Donald K. Piragoff\**

## I. INTRODUCTION

Modern technology has advanced to the point where, around the world, a large percentage of financial transactions involve the use of credit cards and devices for obtaining goods and services. Complicating the issue is the proliferation of other types of information-carrying cards, such as debit cards, and pre-payment cards designed for specific purposes, and electronic cash cards. The economy of any country that relies on the use of such cards must have an effective legal structure for deterring abuse.

Credit cards and other such cards function by transferring data or information; the cards themselves are of little value. It is the data or information stored on the card that is of use to trigger or make a commercial or financial transaction. The card is merely a physical mechanism by which this information can be stored and easily transported and used by the person wishing to make the commercial or financial transaction. However, the possibility of abuse is great. The relevant information can be intercepted and manipulated at various stages, from manufacture of the card, to delivery of the card to the card-holder, to possession and loss of the card by the card-holder, to the use of the card at a retailer. Abuse can occur in various ways, from unauthorized use of a card, to falsifying a card, and to unauthorized use of the information even without possession or use of the card. Moreover, the card and information may be subject to abuse by just

about anyone, from the card-holder to the merchant, from persons in temporary possession to sophisticated criminal organizations to a person who catches a glimpse of someone else's card and remembers the key information embossed on it.

Ultimately, modern technology brings more than just convenience, it also creates tremendous opportunity for clever criminals unlawfully to use or appropriate credit cards or the stored information. Industry losses from credit card crime reach millions of dollars every year, and the figure keeps increasing. In Canada alone, it was estimated that there were 89,000 occurrences of credit card fraud in 1997.<sup>1</sup> Equally important, the number of fraudulent uses of credit cards has increased dramatically over the past several years. As techniques for counterfeiting cards and misappropriating information become more sophisticated and less expensive, the problem of payment card fraud will continue to escalate.

Credit card companies and other financial institutions have implemented numerous technical and operational mechanisms for preventing and detecting credit card crime. Individuals who are legally in possession of cards may also take precautionary behavioural steps to reduce the likelihood of someone else obtaining the card or information for unlawful purposes. The problem can be attacked from many sides, and with the efforts and ingenuity of everyone involved with the cards.

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<sup>1</sup> Courtesy of Canadian Bankers Association.

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In addition to the various technical and behavioural countermeasures against credit card crime, there is a role for the criminal justice system in deterring credit card crime, and in providing an effective system for prosecuting offences when they do occur. This paper will address the latter issue: the role of substantive criminal law in addressing credit card crime. Reference will be made to various legal structures in North America, particularly within Canada, to illustrate and determine some optimum legal proscriptions and procedures for countering credit card crime.

## II. ESSENTIAL ELEMENTS OF A CRIMINAL LAW

Any criminal law that is intended to effectively prevent crime involving credit cards must have certain basic elements. The criminal law functions by describing as offences those acts that are to be prohibited, establishing a procedure for prosecuting individuals accused of those acts, and providing for penalties where the commission of those acts has been proved. Different jurisdictions may choose to penalize particular crimes in any number of different ways. However, in the case of a global and universal problems such as credit card crime, there may be certain common features to an effective set of criminal offences and procedures that are necessary for a coordinated international approach.

### A. Defining “Credit Card”

One fundamental feature of an effective criminal law against credit card crime is a definition of what is included within the term “credit card”. Absent a clear definition, a criminal law would be potentially too broad in which case it might catch behaviour that should not be criminalized, or too vague and ambiguous and therefore difficult to apply or interpret. It is also important to note that modern

technology has advanced and evolved rapidly, and continues to do so at a fantastic rate. The criminal law must keep up with that pace of change in order to be effective. Therefore, it is important that definitions not be too technologically or commercially specific.

For example, the state of New York describes “credit card” in the following way<sup>2</sup>:

“Credit card” means and includes any credit card, credit plate, charge plate, courtesy card, or other identification card or device issued by a person to another person which may be used to obtain a cash advance or a loan or credit or to purchase or lease property or services on the credit of the issuer or of the holder;

New York penal law also applies to “debit cards”<sup>3</sup>:

“Debit Card” means a card, plate or other similar device issued by a person to another person which may be used, without a personal identification number, code or similar identification number, code or similar identification, to purchase or lease property or services. The term does not include a credit card or a check, draft or similar instrument.

While the New York definitions are adequate in describing cards used to obtain credit or to debit directly an account for the purpose of purchasing property or services, it is not clear that bank cards used solely to access one’s bank account to withdraw, deposit or transfer money are included in these definitions. Interestingly, certain offences in New York also apply to a “public benefit card”, defined as any “medical assistance card, food stamp assistance card, or any other identification, authorization card or electronic access device issued by the state or a social

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<sup>2</sup> CLS Penal Law § 155.

<sup>3</sup> CLS Penal Law § 155 as am. L1987, ch556, § 7.

services district... which entitles a person to obtain public assistance benefits under a local, state or federal program...”.<sup>4</sup>

In Canada, the *Criminal Code*<sup>5</sup> defines the term “credit card” in s. 321<sup>6</sup> as:

“any card, plate, coupon book or other device issued or otherwise distributed for the purpose of being used:

- (a) on presentation to obtain, on credit, money, goods, services or any other thing of value; or
- (b) in an automated teller machine, a remote service unit or a similar automated banking device to obtain any of the services offered through the machine, unit or device”.

A definition such as this one takes into account the multiple functions served by payment and access cards. Paragraph 321(a) is commercially specific to a credit transaction. Paragraph 321(b), however, contains a broader definition, recognizing that modern technology has reached a stage where the ways in which a card is used are greater than just the presentation of the card to a merchant for the purchase of goods and services on credit. The definition catches not only debit cards (i.e. cards permitting direct debit of a bank account), but also what are commonly referred to as bank or access cards, a card inserted into automated machines for the purpose of obtaining any services offered by the machine associated with a financial institution. However, it should also be noted that paragraph 321(b) is still somewhat limited in that it applies only to cards used in automated machines somehow connected to the *banking* industry. So for example, long distance telephone calling cards or telephone pre-payment cards would not appear to be included.<sup>7</sup>

<sup>4</sup> CLS Penal Law§ 155 as am L1995, ch81, § 169.

<sup>5</sup> R.S.C. 1985, c. C-46.

<sup>6</sup> R.S.C. 1985 c. 27 (1st Supp.), s.42.

The United States Federal Code contains an even broader definition. The Code focuses on “access devices”, defined as “any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument)”.<sup>8</sup> This definition is very useful. It is sufficiently broad and open-ended to cover any technological advances in account access. It is also broad in terms of the types of transactions to which it applies. For instance, it applies not only to devices used for purchase of goods and services, but also to transfer of fund transactions, as well as transactions for “any other thing of value”. Unlike the Canadian definition, it is not limited to automated machines associated with financial institutions. As well, it includes “account number” as an access device, so that the offences apply to the use of the pertinent information alone, even in the absence of a card or other physical device.

## B. Proscribing Offences

In addition to the difficult task of defining the term “credit card”, it is essential that the criminal law carefully and adequately define all of the conduct that is to be prohibited. Because of the complexity and number of ways that credit cards are used, there is perhaps an even greater number of ways that credit cards can be used fraudulently or unlawfully. Each of these should be explicitly covered in a criminal law to ensure that all loopholes are closed to potential crime. It

<sup>7</sup> It should be noted, however, that fake telephone cards or other devices to improperly obtain telecommunication services are addressed by sections 326 and 327 of the *Criminal Code*.

<sup>8</sup> 18 U.S.C. § 1029(e)(1).

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should be noted that if numerous offences are set out, there may be overlap between the elements from one offence to another. Moreover, factual circumstances may reveal that more than one offence has been committed. Some of the types of criminal conduct associated with credit card (or access card) crime include: theft of the card; forgery or falsification, possession, use or trafficking of stolen, forged or falsified cards; possession, use or traffic in credit card data; possession of instruments for forging or falsifying credit cards.

Different jurisdictions may employ different techniques to proscribe conduct. Some may simply apply offences of general application, such as theft and forgery, to offences involving credit cards. Others may have specific offences concerning credit cards. Finally, some jurisdictions may use a combination of approaches. In Canada, a combined approach is used. The manner of prosecution and range of penalty for the general offence of theft is largely dependent on the value of the property that has been stolen.<sup>9</sup>

This approach is not appropriate with respect to theft of credit cards, since the cards themselves, the stolen property, have little or no value, but the economic loss associated with their misuse can be great. As the existing structure was not easily

adapted to credit cards and other payment cards, a new and separate provision was enacted to deal specifically with credit cards.<sup>10</sup> Within the specific provision on credit cards, reference is made to other existing offences, thereby importing the definition of these offences as part of the types of prohibited conduct in relation to credit cards. As well, the new provision contains new and specialized offences which relate exclusively to credit cards. Section 342 of the *Criminal Code* reads:

342. (1) Every person who
- (a) steals a credit card,
  - (b) forges or falsifies a credit card,
  - (c) possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered
    - (i) by the commission in Canada of an offence, or
    - (ii) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence, or
  - (d) uses a credit card knowing that it has been revoked or cancelled, is guilty of
  - (e) an indictable offence and is liable to imprisonment for a term not exceeding ten years, or
  - (f) an offence punishable on summary conviction

1. Theft of Property

As the nature of property rights can be quite complex and because there are a multitude of types of property and uses of property, there may be many ways in which property can effectively be misappropriated by another without consent. It is, therefore, important that “credit cards” be considered as property, both in terms of the physical

<sup>9</sup> Pursuant to s. 334 of the *Criminal Code*, where the value of the property stolen exceeds \$5000, the offence is indictable and carries a maximum penalty of 10 years imprisonment. Where the value of the property stolen is equal to or less than \$5000, the offence is either indictable, with a maximum of 2 years, or summary, with a maximum of 6 months. An additional consequence is that theft under \$5000 is within the absolute jurisdiction of a provincial court judge according to s. 553 of the *Criminal Code*, while theft over \$5000 can be tried before a judge, a judge and jury, or a provincial court judge, at the option of the accused.

<sup>10</sup> R.S.C. 1985 c.C-46 as am. S.C. 1997, c.18, s.16(1). The manner of prosecution and the penalty are not dependent on the value of the card. This is one range or penalty, and the manner of prosecution is subject to prosecutorial discretion.

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card and as evidencing rights to property that the card may represent.

In Canada, “property” is defined in section 2 of the *Criminal Code* as:

- (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
- (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange, and
- (c) any postal card, postage stamp or other stamp issued or prepared for issue under the authority of Parliament or the legislature of a province for the payment to the Crown or a corporate body of any fee, rate or duty, whether or not it is in the possession of the Crown or of any person...

In Canada, s.322 of *Criminal Code* defines the offence of theft:

322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
  - (b) to pledge it or deposit it as security;
  - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
  - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
- (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material

In this statute, the act of theft is committed by either a “taking” or a “conversion” of the property to the accused’s own use. Even in the absence of a taking, a person commits theft if they lawfully come into possession of the card and dishonestly intends to keep it, even temporarily, and use it for their own purposes. This is what is meant by “conversion”. The notion of conversion is important to address the situation of a card being borrowed and used without or beyond the consent of the cardholder. The taking or conversion must be done fraudulently and without colour of right. The term “fraudulently” has been interpreted to mean “dishonestly” and proof of fraud is not necessary. The term “without colour of right” means without an honest belief in the legal right to act as the person does. The accused must also have had the intent to deprive the owner or lawful holder of the card either permanently or temporarily. This catches, for example, the taking of a card from someone’s possession. or the conversion of the card, with the intent to make an unauthorized purchase and then return the card.

An important consideration with respect to the offence of theft is that it protects property rights vis-à-vis a lawful *possessor* and not merely the owner of the property. With respect to credit cards, this element is very important. Many agreements governing the relationship between the card issuer (e.g. credit card company) and the client provide that the card always

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remains the property of the issuer. The company remains owner and the card-holder is merely a lawful possessor. Therefore, the phrase "the owner of it, or a person who has a special property or interest in it" is of significance as it allows the card-holder (the person who has a possessory property interest) to be the complainant or "victim" in a case of theft.

In New York a person commits the offence of larceny when "with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof".<sup>11</sup> To "deprive" another of property means to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, while "appropriate" means to exercise control over property, or to aid a third person to exercise control over it. The notion of "appropriate" roughly parallels the Canadian concept of "conversion". However, the New York statute limits theft to taking or appropriating property from the "owner".

## 2. Theft of a Credit Card

Credit cards, being property, are capable of being stolen. Theft of credit cards can be subsumed under the general offence of theft, or it can be specifically prohibited in an offence that targets credit card crime. As noted above, in Canada, theft of a credit card (and other criminal acts in relation to credit cards) is a distinct offence, but theft is defined within that provision by reference to the general offence of theft.<sup>12</sup>

## 3. Forgery or Falsification of a Credit Card

Credit cards, like other documents that

contain and are intended to convey information, are vulnerable to being falsely fabricated and made to look legitimate. For example, blank cards can be imprinted with account information obtained from merchants or from discarded sales slips and an encoded magnetic strips can be added. The result is a card that looks authentic and liable to be accepted by merchants. Closely related to the act of falsely manufacturing a credit card is the act of altering or modifying an existing legally manufactured card. Numbers or letters can be smoothed out and re-embossed to reflect a different account.

When a forged or falsified card is used to obtain goods and services, the purchase is made on credit and the user of the card obviously incurs no cost. The cost will be borne by one of the other parties, either the card-issuer, the card-holder or the merchant. Crime involving counterfeit cards accounts for approximately 50% of all losses related to credit card misuse in Canada.<sup>13</sup> As well, as counterfeiting techniques become cheaper and more effective at circumventing security features, the problem will continue to cost millions of dollars in losses. An effective criminal law must, therefore, prohibit various acts related to manufacturing false credit cards and altering legally manufactured cards.

In Canada, s.342(1)(b) of the *Criminal Code* prohibits the forgery or falsification of a credit card. Forgery and falsification are defined in s.366 of the *Code* as:

366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent
- (a) that it should in any way be used or acted on as genuine, to the prejudice

<sup>11</sup> CLP Penal Law §155.05.

<sup>12</sup> See subsection 342(1)(c).

<sup>13</sup> Statistics for year 1997 in Canada, courtesy of Canadian Bankers Association.

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- of any one whether within Canada or not; or
- (b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.
- (2) Making a false document includes
- (a) altering a genuine document in any material part;
  - (b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or
  - (c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.
- (3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.
- (4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Section 321 of the *Criminal Code* expressly includes “credit card” within the definition of “document”. The definitions of “forgery” and “false document” in s.366 recognize that there are multiple ways in which a card or other document can be altered. They also recognize that harm stems from the *intent* to use the false card or document to someone else’s detriment. For this reason, it is important that the law also address incomplete forgeries, if there was intent to use the document upon its completion. As is the case with respect to theft of a credit card, the offences of falsification and forgery can be dealt with

in a specific provision dealing with credit card crime, or in a general forgery and falsification provision. In Canada, the offence can be prosecuted under either the specific or the general offence provision.

In the United States, a person commits a federal offence who “knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices”.<sup>14</sup> “Produce” is defined as including design, alter, authenticate, duplicate or assemble.<sup>15</sup> “Counterfeit access device” is defined as any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device”.<sup>16</sup> In New York, it is a crime to forge a credit card. A person commits forgery when, “with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be [a credit card], or which is calculated to become or to represent [a credit card] if completed”.<sup>17</sup>

#### 4. Possession of Instruments for Forging or Falsifying Credit Cards

If falsifying or forging a credit card is criminalized because of the potential harm of counterfeit cards, it follows that various other activities that assist or facilitate the forgery or falsification of credit cards should also be prohibited. Schemes for forging and falsifying credit cards can be quite complex and sophisticated, and involve numerous levels of individuals. Each link in the chain should be criminalized to deter more effectively such criminal operations.

In Canada, the *Criminal Code*<sup>18</sup>

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<sup>14</sup> 18 U.S.C. § 1029(a)(1).

<sup>15</sup> 18 U.S.C. § 1029(e)(4).

<sup>16</sup> 18 U.S.C. § 1029(e)(2).

<sup>17</sup> CLS Penal Code § 170.10.

<sup>18</sup> R.S.C. 1985 c. C-46 as am. 1997, c.18, s.17.

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specifically prohibits activities related to the possession of instruments for forging and falsifying credit cards:

- 342.01 (1) Every person who, without lawful justification or excuse,
- (a) makes or repairs,
  - (b) buys or sells,
  - (c) exports from or imports into Canada, or
  - (d) possesses

any instrument, device, apparatus, material or thing that the person knows has been used or knows is adapted or intended for use in forging or falsifying credit cards is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction.

The offence is drafted broadly to apply where there is knowledge of either past use or intended future use of the instruments for forgery. As well, it covers any instrument, whatever its original purpose, that is intended to be used for forging or falsifying credit cards. It is sufficiently broad to include any “material thing” and therefore would encompass materials such as blank cards. This provision is also sufficiently broad to prohibit many types of conduct related to forgery equipment or material, from possessing to selling or buying to repairing and manufacturing. Notably, it also prohibits the importation and exportation of such instruments or materials. This is important, especially in the Canadian context, since at present most instruments for forging cards are manufactured outside Canada, and brought into the country.

Under US federal law, anyone who “knowingly, and with intent to defraud, produces, traffics in, has control of, or possesses device-making equipment” is guilty of an offence.<sup>19</sup> “Device making equipment” includes any equipment,

mechanism or impression designed or primarily used for making an access device or a counterfeit access device.<sup>20</sup> The offence is less precise than the Canadian model, in that it does not expressly include the acts of repairing, buying or selling, or importing and exporting forgery equipment. It is also somewhat more narrow than the Canadian model in that it applies to instruments that are “designed or primarily used” for making cards. It is, therefore, not clear whether an instrument designed or generally used for another purpose, but which is adapted to use in forgery of credit cards, or whether blank cards, are covered by the definition.

In California, it is an offence to design, make, possess, or traffic in card making equipment or incomplete access cards with the intent that the equipment or cards be used to make counterfeit access cards.<sup>21</sup> This offence is interesting because it expressly includes blank or incomplete access cards. Other jurisdictions may still prohibit possession of blank cards under another offence, but California expressly treats blank cards in the same manner as other instruments of forgery, as Canada does by implication.

5. Possession, Traffic or Use of Stolen, Forged or Falsified Credit Card

Just as it is a crime to steal, forge or falsify a credit, debit or access card, a criminal law should also adequately deter against the possession of a card knowing that it has been dealt with illegally in some way. Mere possession of the unlawfully handled cards creates the potential for serious economic harm.

Trafficking is another problem that must be addressed. Trafficking involves the movement or distribution of property. Some criminal organizations have

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<sup>19</sup> 18 U.S.C. § 1029(a)(4).

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<sup>20</sup> 18 U.S.C. § 1029(e)(6).

<sup>21</sup> Penal Code § 484i.



sophisticated systems in place for transferring possession of unlawfully handled cards from person to person; many people who are involved do not actually use the cards to make a purchase or to obtain credit, and they may not remain in possession of the cards for any significant period of time. In other cases, individuals who come into possession of a lost or stolen card, for example, may sell it quickly for profit, or trade it for other property. This intermediary phase creates an equally damaging potential for economic harm and must be adequately prohibited.

More importantly, while forging, falsifying, stealing and possessing unlawfully handled credit cards creates the potential for economic harm and loss, that potential is fully realized when the cards are actually used. Credit Cards and other payment cards are primarily devices used for convenient access to goods and services. It is the purchase of those goods and services without payment that has major consequences for a society. Typically, the financial institution that issued the card will bear the cost of unlawful purchases, but in some cases, the merchant or the card-holder may be responsible for a certain portion of the loss. Even if the card-issuers generally absorb the cost of unlawful transactions, it is considered a cost of doing business, and so is ultimately passed on to the consumer in the form of higher service charges or fees. It is essential, therefore, that the criminal law adequately prevent the ultimate use of stolen or forged cards.

In Canada, section 342(1)(c) of the *Criminal Code* provides a global offence that catches each of the above types of conduct. It states that it is an offence to possess, use or traffic in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered by the commission of an offence, either in Canada

or elsewhere. This offence is quite broad in three ways: first, the types of predicate offences that result in the obtainment, making or alteration of the card are not specified, so that it applies broadly to any offence which could have any of those results, for example fraud; second, the predicate offence can occur anywhere, even outside Canada; and third, the definition of “traffic” is broad and means “to sell, export from or import into Canada, distribute or deal with in any other way”.<sup>22</sup>

Under US federal law, the offences are set out separately. A person who does the following acts is guilty of an offence:

- §1029 (a)(1) knowingly and with intent to defraud produces, uses or traffics in one or more counterfeit access devices;
- (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period;
- (3) knowingly and with intent to defraud possesses 15 or more devices which are counterfeit or unauthorized access devices;
- ...
- (5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to another person or persons, to receive payment or any other thing of value during any 1-year period the aggregate value of which is equally to or greater than \$1,000;...

Each term is in turn defined, providing greater clarity. An “unauthorized access device” is a device that is “lost, stolen, expired, revoked, cancelled, or obtained with intent to defraud”. A “counterfeit access device” is one that is “counterfeit, fictitious, altered, or forged, or an

<sup>22</sup> Section 342(4), R.S.C. 1985, c.27 (1st Supp.), s.44 as am. 1997, c.18, s.16.

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identifiable component of an access device or a counterfeit access device”.

Interestingly, it is only possession of fifteen or more counterfeit or unauthorized access devices that constitutes an offence, while with respect to counterfeit devices, use or trafficking in a single card is an offence, and with respect to unauthorized devices, it is only use or trafficking that results in the acquisition of property equaling or exceeding \$1,000 that is prohibited. No monetary or quantum distinctions are made in the Canadian offence. Although worded differently, both the Canadian and US federal offence require knowledge by the accused of the illegal character of the card that is possessed, used or trafficked. This supplies the requisite mental element, along with any dishonest intent or intent to defraud.

In New York, a person commits theft of services when he “obtains or attempts to obtain a service, or induces or attempts to induce the supplier or a rendered service to agree to payment thereof on a credit basis, by the use of a credit card or debit card which he knows to be stolen”.<sup>23</sup> Interestingly, this offence seems quite restrictive, in that it prohibits use of a card that is known to be stolen, but not the use of a card that is known to be counterfeit. Other offences relating to credit cards, such as possession of stolen cards and possession of forged cards, are subsumed under the more general laws applicable to those offences.

#### 6. Use of Revoked or Cancelled Card

In addition to the use of a card that may have been obtained or altered illegally, a legitimately issued card can be used beyond its expiration or cancellation date, or after it has been cancelled on account of theft or loss. This results in equally direct financial

loss to the card issuer.

Revoked and cancelled cards are included within the definition of “unauthorized access device” in the US Federal Code, and consequently dealt together with stolen cards and cards otherwise obtained with intent to defraud, as noted above. Therefore, in addition to the offence of *using* revoked and cancelled cards, it is also an offence to knowingly and with intent to defraud *possess* fifteen or more revoked or cancelled cards. As possession of revoked or cancelled cards is not in itself wrongful, an intent to defraud is also required in addition to knowledge of the card’s character.

In other jurisdictions, revoked and cancelled cards are dealt with separately from forged or stolen cards. For instance, in Canada it is a separate offence to use “a credit card knowing that it has been revoked or cancelled”.<sup>24</sup> Similarly, in New York, a person commits an offence when, “in the course of obtaining or attempting to obtain property or a service, he uses or displays a credit card, debit card or public benefit card which he knows to be revoked or cancelled”.<sup>25</sup> As these two jurisdictions have treated the use and possession of forged and stolen cards separately from use of revoked or cancelled cards, there is no need to require an intent to defraud, in addition to knowledge, in respect of the offence of usage.

#### 7. Unlawful Use of Credit Card Data

One of the unique features of credit cards is that, unlike other forms of property, the value lies in the account information that is accessible by the data programmed into or embossed on the card. The card itself has little economic or other value. For this reason, the information alone, even in the

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<sup>23</sup> CLS Penal Law § 165.15.

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<sup>24</sup> Section 342(1)(d).

<sup>25</sup> CLP Penal Law § 165.17.

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absence of the card, can be used unlawfully. For example, a person who knows the name, number and expiration date embossed on a card can use that information to obtain goods and services, without any need for presenting the card; for example, over the telephone or computer, or by mail order. This information can be obtained in any number of ways, from observing an actual card and remembering the data, to obtaining carbon copies discarded by the card-holder, to intercepting a card in the mail, to a merchant taking a second electronic recording of the card's magnetic stripe.

Fraudulent use of credit card data or information is on the rise. In Canada, a recent phenomenon known as "skimming" has been observed by law enforcement. This practice involves a merchant double swiping a card, effectively capturing and recording the relevant data on the second swipe. The data is later transferred onto a Internet false or counterfeit card. The Internet is an entire new area of concern in the fight against credit card crime. For Instance, websites have been identified that contain lists of stolen card numbers and account numbers; the information is available to anyone to obtain and use for their own purposes. As well, law enforcement have discovered that security systems of internet commerce have been breached, and credit card information sent over the internet to merchants has been intercepted, recorded, and used to make counterfeit cards. With so much commerce taking place over the telephone and through computer networks, actual use of cards is diminishing in frequency. In the absence of a law that clearly prohibits unlawful use of the critical data, credit card crime will continue to be a major concern.

In Canada, this problem is addressed specifically by section 342(3) of the *Criminal Code*<sup>26</sup> which reads:

Every person who, fraudulently and without colour of right, possesses, uses, traffics in or permits another person to use credit card data, whether or not authentic, that would enable a person to use a credit card or to obtain the services that are provided by the issuer of a credit card to credit card holders is guilty of [an offence].

United States federal law takes a more generic approach: the definitions of "access device" includes account numbers or other means of account access, so that every offence related to access devices applies equally to access device data or information.

In California, it is a specific offence<sup>27</sup> for a person to:

publish... the number or code or an existing, cancelled, revoked, expired or nonexistence access card, personal identification number, computer password, access code, debit card number, bank account number, or the numbering or coding which is employed in the issuance of access cards, with the intent that it be used or with knowledge or reason to believe that it will be used to avoid the payment of any lawful charge, or with intent to defraud or aid another in defrauding...

This section defines "publishes" to mean "the communication of information to any one or more persons, either orally, in person or by telephone, radio or television, or on a computer network or computer bulletin board, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book".<sup>28</sup> As well, California also makes it a specific offence to acquire access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with

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<sup>26</sup> R.S.C. 1985, c. C-46 as am. 1997, c.18, s.16(2).

<sup>27</sup> Penal Code § 484j.

<sup>28</sup> *Ibid.*

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the intent to use it fraudulently.<sup>29</sup>

### 8. Merchant Fraud

Credit card crime can be especially difficult to detect and prosecute where a merchant participates in the unlawful activity. California has enacted laws that directly address the merchant.<sup>30</sup>

Every retailer or other person who, with intent to defraud:

(a) Furnishes money, goods, services or anything else of value upon presentation of an access card obtained or retained in violation of Section 484e or an access card which he or she knows is a counterfeit access card or is forged, expired, or revoked, and who receives any payment therefor, is guilty of theft. If the payment received by the retailer or other person for all money, goods, services, and other things of value furnished in violation of this section exceeds four hundred dollars (\$400) in any consecutive six-month period, then the same shall constitute grand theft.

(b) Presents for payment a sales slip or other evidence of an access card transaction, and receives payment therefor, without furnishing in the transaction money, goods, services, or anything else of value that is equal in value to the amount of the sales slip or other evidence of an access card transaction, is guilty of theft. If the difference between the value of all money, goods, services, and anything else of value actually furnished and the payment or payments received by the retailer or other person therefor upon presentation of a sales slip or other evidence of an access card transaction exceeds four hundred dollars (\$400) in any consecutive six-month period, then the same shall constitute grand theft.

California deems the obtaining of payment from the card-issuer, in the circumstances described, as theft. Other jurisdictions, however, address such conduct under the general offences of

“fraud”; i.e. payment by the card-issuer was voluntary and consensual, but was obtained as a result of deceit or false pretences by the merchant.

### C. Jurisdictional Issues

Technological advances have created a system of electronic commerce that does not require the merchant and the card-holder to be in the same location. Purchases are regularly made over the telephone or computer using only the information contained on a credit card; the merchant and card-user being in different countries. Moreover, people who own credit cards can travel great distances, across borders, and use the card far from their residence or the location of the card-issuer.

Each of these types of cases can result in jurisdictional problems when a crime is committed. Is the crime committed in the place where the card or its information is stolen? In the place where the person is when he or she makes an unlawful purchase? In the place where the merchant is located? In the place where the card-issuer is located? Which location has jurisdiction to prosecute? The law should account for the various possibilities and provide mechanisms for prosecuting offenders even where much of the criminal act occurs outside of a country's jurisdiction. Of course, there are limitations to the extra-territorial application of a country's criminal laws, but certain mechanisms can reduce the criminal's ability to evade prosecution.

In Canada, section 342(1)(c) makes it an offence to possess, use or traffic in a credit card or a forged or falsified card, knowing that it was obtained, made or altered either by the commission in Canada of an offence, or “by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence.” Thus while the accused's act of

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<sup>29</sup> Penal Code § 484e(e).

<sup>30</sup> Penal Code § 484h.

possessing, using or trafficking must occur within Canada, the circumstances that render the character of the card as being unlawful can have arisen anywhere and by another person.

However, even with respect to conduct such as use or trafficking, portions of the conduct may often traverse a border. For example, trafficking or using a card may involve a transborder transaction, such as sale or distribution of the card across a border, or the purchase of goods across a border with use of the card. In the case of transborder conduct, where is the offence committed?

It is important that states have flexible jurisdictional laws in cases of transborder offences, particularly given the increase in international commerce by individual consumers. In Canada, an offence may be subject to the jurisdiction of Canadian courts if a significant portion of the activities constituting the offence took place in Canada. It is sufficient that there is a real and substantial link between the offence and Canada. For this purpose, the court must take into account all of the relevant facts that occurred in Canada justifying a prosecution, and consider whether there is anything in those facts that offends international comity such that the court should refrain from exercising its jurisdiction.<sup>31</sup>

With respect to the jurisdiction of the courts as between internal territorial jurisdictions within Canada, a prosecution in respect of credit card offences can occur not only in the place where the offence was committed but also in the place where the accused is found or arrested. This is significant in a country as geographically large as Canada. The cost of transferring

<sup>31</sup> *Libman v. The Queen* (1985), 21 C.C.C. (3d) 206 (S.C.C.).

<sup>32</sup> R.S.C. 1985, c.27 (1st Supp.), s.44.

an accused back to the place where the offence was committed can dissuade the commencement of a prosecution. Section 342(2) of the *Criminal Code*<sup>32</sup> states that:

An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be commenced in that place without the consent of the Attorney General of that province.

#### D. Evidentiary Matters

Due to the jurisdictional complications in credit card crimes, a trial may take place far away from some of the victims or witnesses who are required to testify about the ownership or possession of the card, or something else in relation to its character. For example, the card may be used in one jurisdiction, or part of a country, while the card-issuer and lawful card-holder are located elsewhere. The law should provide for evidentiary rules that facilitate the occurrence of trials in locations far from some of the witnesses.

As noted earlier, in Canada, it is possible to conduct a trial involving a credit card offence not only in the place where the offence is alleged to have been committed, but also in the place where the accused is found, is arrested or is in custody. Any one of these places can be far away from the place of residence or business of the card-issuer or the card-holder. In Canada, an evidentiary provision facilitates the proof of essential issues that can be provided by such witnesses. Section 657.1 of the *Criminal Code*<sup>33</sup> reads.

<sup>33</sup> R.S.C. 1985 c.23 (4th Supp.), s.3; S.C. 1994, c.44 s.63; S.C. 1997, c18, s.79.

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- (1) In any proceedings, an affidavit or a solemn declaration of a person who claims to be the lawful owner of, or the person lawfully entitled to possession of, property that was the subject-matter of the offence, or any other person who has specialized knowledge of the property or of that type of property, containing the statements referred to in subsection (2), shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration without proof of the signature of the person appearing to have signed the affidavit or solemn declaration.
- (2) For the purposes of subsection (1), a person shall state in an affidavit or a solemn declaration
- (a) that the person is the lawful owner of, or is lawfully entitled to possession of, the property, or otherwise has specialized knowledge of the property or of property of the same type as that property;
  - (b) the value of the property;
  - (c) in the case of a person who is the lawful owner of or is lawfully entitled to possession of the property, that the person has been deprived of the property by fraudulent means or otherwise without the lawful consent of the person;
  - (c.1) in the case of proceedings in respect of an offence under section 342, that the credit card had been revoked or cancelled, is a false document within the meaning of section 321 or that no credit card that meets the exact description of that credit card was ever issued; and
  - (d) any facts within the personal knowledge of the person relied on to justify the statements referred to in paragraphs (a) to (c.1).
- (3) Unless the court orders otherwise, no affidavit or solemn declaration shall be received in evidence pursuant to subsection (1) unless the prosecutor has, before the trial or other proceeding, given to the accused a copy of the affidavit or solemn declaration and reasonable notice of intention to produce it in evidence.

- (4) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration.

These provisions greatly facilitate the prosecution of trans-Canadian and transnational offences related to property, including credit cards.

### **E. Procedural Matters**

Other peripheral matters are also of great importance in the criminal justice system's fight against credit card crime. Without being exhaustive, certain matters which are useful include:

- the power to seize and, upon conviction, forfeit instruments for counterfeiting or forging credit cards.
- provision for wiretap authorizations to detect and gather evidence of credit card and other organized criminal activity.
- provision for seizing and, upon conviction forfeiting the proceeds of criminal activity, including credit card crime.

In Canada, it is clear that the first two of the above noted procedural measures can be applied in the investigation and enforcement of credit card crime.<sup>34</sup> With respect to seizure of proceeds of crime, while the provisions do not apply specifically to credit card offences, the proceeds obtained by such criminal activity can be seized within the context of the more general offences of theft, forgery, uttering forged document, and fraud.<sup>35</sup>

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<sup>34</sup> Sections 183 and 342.01(1) respectively.

<sup>35</sup> Section 462.3.

### III. CONCLUSION

Modern technology doubtlessly improves our lives in countless ways. In the realm of commerce, it allows us to search the world for a product or service that serves our needs and desires, with just the click of a few buttons. More importantly, we can acquire that desired thing of value, no matter how far away it is, with amazing ease and convenience. It is as simple as reading off a few numbers over a telephone line or punching them into a computer keyboard. Moreover, we do not even have to pay immediately. The immediate cost is borne by one of numerous credit card companies, who in turn request payment from us at a later date.

As noted at the outset of this paper, however, this technology brings more than just convenience. It also brings opportunity; opportunity for clever criminals to wreak economic havoc on a global scale. With each new technological development designed and intended to make our lives more comfortable and convenient, there comes a corresponding potential for criminal activity. It is a difficult but not an insurmountable task to discern what laws are needed to combat existing modes of credit card crime; that is what this paper has attempted to do. The first challenge will be for criminal laws to keep pace with current and future developments. The second challenge will be to ensure that similar laws exist in all countries in order that differences between the laws of states cannot be exploited to the benefit of clever criminals.

# ECONOMIC CRIME IN INDIA

*Shri L.C. Amarnathan*

## I. INTRODUCTION

Crimes in whatever form or category they may fall in, impact mankind in multifarious ways. They damage democratic development, skew social development, inhibit industrial development and endanger economic development. Overall crime is the antithesis of development and is strongly pitted against it. Development is an innate urge nurtured by nations. Economic development, a pre-requisite for development of any other kind, and development is also intrinsically linked to mutual and international cooperation.

The United Nations Declaration and the Programme of Action on the Establishment of a *New International Economic Order (1974)* aims at the creation of better conditions so that all peoples may attain a decent life. It then proceeds to define new guiding principles for the future course of crime prevention and criminal justice in the context of development needs and the goals of an International Development Strategy for the third U.N. Development Decade. This would appear as a collective global response towards development, the key element being economic development.

Countries, without exception, have been spurred into economic activities in the recent decades, with the objective of ensuring improved quality of living for their citizens. The 'haves' sharing with the 'have nots' through monetary and material aids became a norm, serving mutual interests equally. As if to add conviction to

the trite saying that 'good and evil go together' is the emergence of new forms of crime, more sophisticated at exploiting loopholes and opportunities. These are characterised as economic crimes, growingly becoming the order of the day, robbing the masses of the assurances of the State.

The global march from the industrial age to the economic age is confronted principally by the growth of crime, that impedes progress towards an egalitarian society. The disruptive effects of crime, particularly economic crime, that makes mankind collective victims, can not be checkmated unless countries stand united. The effective countermeasures against economic crime need, therefore, to be on a firm foundation of international cooperation.

### A. Globalization and Liberalization

From time immemorial, the driving force behind every nation is to boost trade and build the economy. The dominant economic trends of the current decade are globalization and liberalization. Globalization is being growingly recognized as the present day compulsion for growth. Liberalization has put countries world over on a fast track to grab the opportunities that lie ahead to establish economic competitiveness.

There is a revolutionary tide sweeping the world as a consequence of the above. Profound changes are taking place in the way businesses, small or large are being done. Remarkable technological developments, significantly the information revolution and enticing

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economic opportunities, have opened a new world of commerce. Traditional paper based procedures are fast being replaced by new standards such as Electronic Data Interchange (EDI), Electronic Fund Transfer (EFT), Electronic Commerce (EC) etc.

A Pandora's box of opportunities to indulge in crime of a sophisticated kind have also grown. With an openness of economy coupled with the vacuum in law and procedures, 'economic crime' was not far behind. Even the traditionally known forms of economic crimes such as cheating, fraud, larceny, embezzlement, criminal misappropriation and criminal breach of trust have taken serious proportions involving enormous sums of money and affecting scores of victims. Globally, nations seem to be driven to the realisation that it is not possible to be at once politically internationalist and economically isolationist.

### **B. Globalization of Crime**

In recent times we are witness to a growth of crimes not merely in quantity but more so in quality. The threats posed by present day dimensions of crimes, particularly their sophistication in personal and public security are matters of serious concern. Crimes are presently modeled on business ventures, operated in syndicate styles and with 'profit' as the motive, practically emulating the current economic development in this respect. Organised crimes, as they are called, have even transcended borders to constitute transnational organised crime.

In the above developments, crimes are ignoring or overcoming borders. However, borders have established themselves as the bane of law enforcement. The criminals thus operate as if they are in a borderless world, while the law enforcers are confined to operate in a bordered world. If efforts

towards economic development and growth compel countries to stop recognizing borders and start cooperating, it is a major question as to why there is reservation or resistance to the same in the effort to curtail crime.

Cosmopolitanism has led to the emergence of criminal networks. This would call for the development of a law enforcers network capable of countering the commissions of criminal networks. Many relevant question will arise; should not economic liberalization and development be matched by the liberalization and development of criminal justice system? Should not the emergence of criminal networks be countered by the establishment of a law enforcers network? Does it not call for law enforcement cooperation that emulates economic cooperation?

### **C. Crime Prevention**

The United Nations commemorated their golden jubilee in October 1995. What figured prominently on the agenda was the urgent need for international cooperation against crime. The serious global concerns of the late 20th Century are economic crimes and organised crimes, the transnational kind in particular.

In the present day global trends, if criminal development outpaces economic development it would be a disquieting development because of its deleterious and destabilising effects. The rule of law and public security are as essential for democratic development as they are for economic development. Governments are governed by priorities. The compulsions of economic growth may have given precedence for economic development over democratic development. In this context, issues of contention and conflict may also arise. Are globalization and liberalization aiding and contributing to growth and

sophistication in new crimes? Should the priority be shifted towards crime control with strict regulations and stringent laws? However, a base approach can not be advocated, nor will it ever be acceptable. For analogy, if there are bank hold ups, can we stop banking? In the conflict between the administrators of economic development and criminal justice, the overarching question concerns identification of a balance between the twin exigencies of economic development and democratic development. Both are essential for the establishment of a new economic order and improved quality of living.

A response to resolve the conflicts could be crime prevention as a policy, with strategies and plan of actions. Also, possibly to conceive the appointment of Crime Prevention Managers whose singular task would be to prevent crime.

## II. ECONOMIC CRIME

Barter, a trade by direct exchange of goods, as was prevalent even at the beginning of the millenium, would perhaps appear as the safest economic practice. With a monetary system consisting of money currency, money value, exchange value, market determined goods/products value etc., controlling the present economic practices in relation to trade in diverse forms, the idea of going back to barter system would be a utopian one.

### A. Crime Classification

Over the decades, a few broad classifications of crimes have come into general usage. One set distinguishes them as 'crimes against life', 'crimes against body', 'crimes against property', 'white collar crimes' and 'others'. Prevalently in use is the set that classifies them as 'violent crimes', 'property crimes', 'economic crimes' and others. These terms are self-

explanatory.

The U.N.Crime Survey adopts a direct classification of crimes by type, under eleven (11) heads. The Interpol crime survey adopts a direct classification of crimes by the type under ten (10) heads, but using slightly different terminology. Though not differing much in general classification, some degree of difference in the usage of terminologies continues to exist in the approaches of countries. It would be suffice to mention that similarity helps foster appreciation and further generate conviction to cooperate and coordinate efforts to curb crimes.

### B. Definition

"Economic crimes are a manifestation of criminal acts done either solely or in an organised manner with or without associates or groups with an intent to earn wealth through illegal means, and carry out illicit activities violating the laws of the land, other regulatory statutory provisions governing the economic activities of the Government and its administration" (Crime in India, NCRB, Govt. of India).

Once popularly known as 'white collar crime' by virtue of the fact that it can be indulged in by a person of responsibility (holding an office) in the course of occupation, these forms of crime were known to cover cheating, fraud, larceny criminal misappropriation, embezzlement, criminal breach of trust and to some extent forgery, corruption and counterfeiting. Considering the profound economic changes and directions, these forms of crime have taken a hydra-headed transformation as economic crimes, encompassing many more new generation crimes from misappropriation to money laundering; from simple fraud to floating fictitious firms; from breach of trust to bank manipulations. Thus in form and content, crime would appear to be dynamic and ever-changing.

When it comes to defining 'economic crime' there appears to be agreement that it can not be defined precisely, comprehensively and wholly acceptably. There are as many definitions as there are countries, with each one correct in themselves and based on the perceptions as well as experiences in dealing with these forms of crimes already manifested and manifesting. The sheer diversity of such crime makes us appreciate that it can be defined infinitely. This would only go to project the scope and extent to which economic crimes have become all pervasive universally.

As far as criminality is concerned these economic offences, while bearing similarity to traditional offences, constitute a separate class by virtue of their scale and dimension; *modus operandi*; and in making individuals/state/society as collective victims of financial loss.

Summarising, "an evil (criminal) intent is evident in economic crime - an intent to gain wrongfully by the perpetrators and cause loss wrongfully to the perpetrated". With general acceptance on this fundamental, the call of tomorrow may be a comprehensive "economic offences code", distinct from penal codes, to effectively counter economic crimes.

### **C. Impact on National Economy**

Economic crimes cause significant damage to the general economy of the country, adversely affecting the growth and development of the nation. Internationally it erodes confidence in the financial credibility and stability of the nation, thus weakening its global competitiveness and further, becoming unattractive to investments from within as well as outside. Where there is a high incidence level of economic crime, the government and bureaucracy are also viewed as being corrupt and weak.

Some of the major impacts on the national economy that may be caused by the economic crimes, are:

- Increase in inflationary pressure
- Uneven distribution of resources and creation of elitism
- Marginalisation of tax base
- Generation of abundant black money
- Creation of parallel economy
- Undermining of developmental works/efforts
- Becomes a breeding ground for corruption
- Illicit businesses thrive affecting licit business
- Resources of financial and commercial institutions are diverted and distorted
- Weakens morale and commitment of citizens
- Poor/weakest continue to be at risk
- Countries economic equilibrium is at stake

A significant corollary to the above is the diversion and investment of the illicit money (black money) acquired by committing such crimes into furthering crimes and the hegemony of the criminal syndicates rule. The threats to public security and eventually national security, would appear imminent as an ultimate consequence.

### **D. Problem of Definition**

Controlling and effectively dealing with crimes, even the ordinary kind, pose some challenges. Some of the major ones are:

- (i) A legal definition and precise conception of economic crime is yet to come into acceptance.
- (ii) In a large number of cases, these forms of crime are viewed not as 'criminal' but as 'civil' in nature, falling somewhere between 'crime' and 'tort'.
- (iii) Often *mens rea*, criminal intent or

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- malafides* may prove to be difficult to establish, and they can be effectively hidden by claiming carelessness, procedural infirmities, lack of supervision, pretention of not knowing the consequence, transfer or distribution of culpability and diluted liability.
- (iv) While individual liability for a crime is the accepted principle, collective liability and/or vicarious liability is yet to be strongly encoded in statutes and law. These constitute the grey areas of law.
  - (v) There is application of the rigid judicial doctrine of evidence beyond all reasonable doubt. Adverse presumption of conduct of the accused and shifting of the onus of proof is yet to become acceptable as a relaxation of the doctrine.
  - (vi) There is a tendency to treat these forms of crime as 'fine only' offences, whereas the calculated manner in which these crimes are schemed, organised and committed strongly call for prison terms in addition to fines and forfeitures.
  - (vii) Generally public awareness is lacking for want of legal education, with the result they get preyed on are to their gullibility. They also continue to get trapped despite lessons learnt, in their craze to get rich quick.
  - (viii) No less important are a score of organisational issues such as information sharing, availability of trained manpower, collective drive, coordination of efforts, trust between law enforcement agencies etc.
  - (ix) There are innumerable regulations in government, with areas of incompatibility. This coupled with compartmentalisation of various regulatory and enforcement measures lends to easy exploitation

- and commission of economic crimes.
- (x) By the very nature of such crimes, economic crimes surface long after the actual period of commission and evidence (oral/documentary/circumstantial) is hard to come by. Further, what is reported constitutes the tip of the iceberg, leaving scores of others unexposed and not dealt with.

**E. Cost of Crime**

A precise and universally acceptable method of computing the costs of crime is yet to emerge. Society pays substantial costs, both directly and indirectly, as a result of crimes and in confronting them. The operation of the criminal justice system and crime prevention efforts direct cost is itself quite substantial. The U.N Survey (1990) revealed that highly developed countries expend on an average 2% to 3% of their budgets on crime control and the administration of justice. The same in developing counties showed a high percentage ranging from 9% to 14% of the national budgets. The 3rd U.N. Crime Survey revealed that developed countries enlist the services of 225 police officers for every 1,00,000 population for crime control, and about 20 per 1,00,000 to staff prisons. The developing countries maintain more than 500 police officers and more than 50 prison staff per 100,000 population.

Victims face colossal losses in both direct and indirect terms. While precise costs are available for property of various kinds, there are no yardsticks to compute the indirect costs. Even in respect to the former, constituting the direct kind, it is often alleged that property lost is undervalued and correspondingly the properties recovered are overvalued.

Since 1990 the U.N. has carried out a novel 'Victimisation Survey' to indicate the growth of crime and the indirect costs as a

result of these; largely in terms of the level of general insecurity of the citizenry. Based on empirical data and on an interview-based approach, a cross-section of the urban population of 50 countries principally, the first round of study showed that more than half the urban population worldwide have been victimized by a crime at least once during the period 1990-1994. It profiled regions of high crime rates as Africa, Latin America on the one hand and Canada, Australia and the USA on the other, as well as regions of relatively low crime rates in Asia, Europe, west Asia and Arab Countries.

Citizens not usually perceived as victims do also pay for crime. The cost of the same being indirect can not be easily estimated and quantified. For example, witnesses spend hours and days in investigation and trials. Consumers pay higher prices, without knowing that they do, in crimes related to business or economic crime. Car owners and real estate owners pay higher insurance premium than what they would have otherwise paid. Take into account the manhours lost through leave on mourning and obsequies. Tax evasion by the unscrupulous brings on higher taxation of honest tax payers. Ultimately everyone, every citizen of every country, is short on the goal of improved quality of living.

Crime discourages investments and inhibits economic growth. Low income slums and ghettos of countries in transition, when plagued by crimes, bear the brunt when capital is diverted to more productive environments. The ability of crime to distort economic activities is more manifest in the emergence of organised crimes of a transnational nature. The criminal syndicates are a force to reckon in the world economy and determine even the destiny of developing nations. The 'Economist' in an article (1995) points out that "where the main purpose of

investment (illegal) is to launder drug money, the effect is often to crowd out legal business".

## F. Classification

Though 'economic crime', being non-violent in nature with often organised or collective perpetrators, could be precisely set as a major classification distinctively from 'violent crime' and 'property crime', its minor classification based on nature and form could generate a healthy debate. The popular understanding of 'economic crime' at the functional level is that these offences concern money and matters of finance. The traditional classification of 'white collared crime' covers cheating, fraud or larceny; misappropriation or embezzlement; breach of trust and counterfeiting principally involving money.

To attempt a sub-classification of economic crime purely on a criteria that it concerns money and matters of finance will be contestable, as it would exclude some important types already characterised as economic crime. Correspondingly, there may arise logical questions as to traditional offences where gain, in terms of money and value figures, may be included under economic crimes. These are all matters to consider before a sub-classification is attempted. Largely the following forms of crimes have been characterised as constituting economic crimes or offences:

- (i) Tax evasion
- (ii) Excise/Custom duty evasion
- (iii) Smuggling in contraband goods
- (iv) Bank frauds/Scams
- (v) Corporate frauds
- (vi) Stock market manipulations/Scams
- (vii) Insurance frauds
- (viii) Foreign Exchange violations (Hawala)
- (ix) Money laundering
- (x) Drug trafficking
- (xi) Real estate dealings (Benami)

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- (xii) Industrial espionage
- (xiii) Intellectual Property Rights violations
- (xiv) Credit Card crimes
- (xv) Corruption (Political/Govt/Corporate)
- (xvi) Counterfeiting (Currency/Bonds/Shares)
- (xvii) Floating fictitious firms
- (xviii) Floating Non-Banking Financial Corporations (NBFC)
- (xix) Collection of protection money (Extortion)
- (xx) Frauds relating to government subsidy
- (xxi) Abuse of Foreign Aid programmes

Considerations may arise whether 'organised crime', including 'transnational crime', should figure as the 'genus' and the above forms as 'species', particularly when the main motive of these crimes is 'profit'. It still leaves from consideration a few more types of crime such as 'theft of cultural objects', 'Real Estate frauds/land hijacking', 'Trade in human body parts', 'Racketeering in employment', 'Racketeering in passports', 'Illegal migration', 'Computer-related crimes' including software piracy.

It would be a constructive exercise to attempt 'major' and 'minor' classifications of economic crime by harmonizing views. One such attempt is a classification by the nature of crime and by form of punishment. In a broad way, the former can be subclassified as:

- (i) Crimes involving government finances (eg. tax evasion, duty evasion, subsidy frauds etc.)
- (ii) Crimes involving individuals' finances (eg. cheating, misappropriation, breach of trust etc.)
- (iii) Crimes related to corporate management (eg. commissions as bribes, illegal gratification, floating

fake firms, copyright violations etc.)  
(iv) Crimes affecting national economy (eg. foreign exchange manipulations, stock market manipulations, counterfeiting currency etc.)

The latter can be sub-classified as:  
(a) Crimes punishable by penal codes  
(b) Crimes punishable by special laws

### III. INDIAN SCENARIO

#### A. Institutional Support

A sound institutional arrangement exists in India to collect, collate and analyse reported crime statistics, to support effective decision making and regularly review policy formulation. The National Crime Records Bureau is such an institutional arrangement set up under the Ministry of Home Affairs (interior) on the strength of the National Police Commission (1979). A strong organisational structure exist at the: district level (province), the District Crime Records Bureau; the State level (regional), the State Crime Records Bureau; again networked at the national level, the National Crime Records Bureau, to collect information on crimes and criminals.

The common objective, "to act as a clearing house of information on crimes and criminals", has greatly enabled effective, efficient and economic law enforcement. The statistical information for analysis is a by-product and is published as "Crime in India" for public dissemination covering more than 55 million crimes, thus making the criminal justice system accountable. The report covers all the criminal cases reported under a score of laws and by all enforcement agencies set up to deal with ordinary, as well as sophisticated, crimes.

A major technological upgrade is responsible for attaining this capability, establishing a fully computerised "Crime

Criminal Information System”. A captive sat.com based network styled “Polnet”, an exclusive law enforcement computer network that offers voice, data and image transfer facilities, is the next step of upgrade to be taken up.

In addition to the key steps of institutional networks and technology upgrade, a major unifying step is the uniformity of procedures, forms and reporting systems. This has become the focal issue for achieving “standardisation in policing” as a vision for the future.

### **B. Economic Crime Statistics**

The ‘Crime in India’ publishes annually the reported crimes and also profiles the percentage of detection, number of accused persons charged, the result of trial etc. It features the list of criminal laws that demand effective enforcement by law enforcement agencies. The bulk of reported crimes constitute those falling under the relevant sections of the Indian Penal Code namely cheating, fraud or larceny; misappropriation or embezzlement; criminal breach of trust, counterfeiting, and narcotic drugs cases.

### **C. Law Enforcement Agencies**

Besides strengthening laws where there are perceived loopholes, regular upgrade of laws, by enacting ‘special laws’ to deal with emerging crimes, have received close attention. Institutionalised arrangements ensure that a close degree of monitoring is exercised. A few of the recent legal initiatives are:

- (i) Foreign Exchange Management Bill
- (ii) Money Laundering (Prevention) Bill
- (iii) Security Exchange Board of India Act
- (iv) Depositories Ordinance
- (v) Computer Crimes (Prevention) Bill (draft)
- (vi) Information Technology Bill (draft)

A major step was recently initiated by setting up a Commission for Administration of Law to take up legal reforms holistically. In the first report submitted only recently, the Commission has observed the following:

- (i) List of Central (federal) Acts-more than 2500
- (ii) List of Central Acts to be scrapped-1300
- (iii) List of laws to be changed-60
- (iv) List of laws to receive regular review-115

As anachronistic laws abound, they advocate recourse to ‘sunset’ provisions in all laws, which compel review at predetermined periods for decision as whether to continue, amend or scrap such laws.

### **D. Estimates and Guestimates: Cost of Economic Crime**

The fall out or consequences of economic crime, are colossal. At the high end are arguments that the illegitimate economy generated by various forms of crime virtually matches the size of the legitimate economy of the country. Economic crime, being a high reward and low risk activity, is also construed as an area of expansion, much like the national economy. The existence of ‘black money’, principally in cash form, is known to exist in practically every country. Drug crimes have added a new dimension by bringing into existence ‘dirty money’. While black money is obtained by avoiding taxes/duties, including circumvention of regulations, dirty money is obtained completely by illegal means.

A recent survey estimated that nearly Ro 46,000 crores (\$460 million) proved to be bad loans given by banks, with little or no scope for recovery. If this represents the accounted for input of loss to the national

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economy, it is possible to guesstimate the true, staggering size of the illegitimate economy. The National Institute of Public Finance and Policy estimated in 1985 a black economy of Ro 405 billion. Tax evasion is stated to be anywhere close to 70%.

There should be well formulated effort in the days to come to estimate, as accurately as possible, the damage in terms of money as a result of the commission of economic crimes. This, in other words, would be a step to estimate the cost of crime itself. The obvious benefit would be a compulsion for proper policy formation, regulations for plugging loopholes coupled with effective enforcement measures. Needless to add, the strategy of the criminal justice system should not only be to establish that 'crime does not pay' but also to assert that 'crime will entail recovery of illegitimate money'.

#### IV. THE COUNTERMEASURES

##### A. Introduction

It is difficult to make anything foolproof. Further, law enforcement becomes complicated when on the one side, crimes are growing in sophistication and on the other, individual rights recognition is growing in stringency. In the present day reality, the criminal justice system can at best make things difficult, and aim in the process to achieve crime prevention. If our experiences are any lesson, a successful example of crime prevention exists in counterfeit proofing currency and travel documents. By its very nature economic crimes call for counterfeit proofing measures.

Though some battles have been won, the war waged against economic crimes will continue to be a relentless one; with every modus operandi adopted by criminals countered by successful strategies by law

enforcement agencies. It would not be a convincing argument to maintain or expect that the traditional law enforcers, namely the police or the anti-corruption agencies, alone are to come to grips with the development of economic crime. The growing complexity and diversity of economic operations would necessitate a multiplicity of enforcement agencies, but with a high degree of coordination. This is expected to be achieved only by sensitizing all the enforcement agencies adequately.

##### B. The Progress

What was viewed essentially as a national malady, with duty and tax evasion constituting black money, assumed global dimensions with the coming into circulation of 'dirty money' as a consequence of drug money or laundered money. The U.N Drug Convention (Vienna 1988) focused attention on this problem. The constructive development is the constitution of the Financial Action Task Force (FATF) to conceive policy measures that inhibit and detect money laundering attempts. A recent attempt is the preparation for a UN declaration on Organized Transnational Crime (Warsaw 1998). It would be a matter of interest to study the forty (40) recommendations given by the FATF which zeroes in on the banking operations that contribute in a major way in the perpetration of money laundering. The principal recommendations are:

- (i) Limit bank secrecy laws
- (ii) Adopt 'know the customer policy'
- (iii) Compel banks to report suspect transactions
- (iv) Regulate non-banking business
- (v) Introduce measures for asset forfeiture
- (vi) Treat money laundering as an offence and as extraditable

Progressively, attempts have been made in few countries to consider largely legal



reforms involving measures to amend and upgrade existing laws, and introduce special laws to deal with emerging forms of sophisticated crimes. Principal among them are laws to deal with money laundering; enabling asset forfeiture; regulating bank transactions, operation of non-banking financial corporations; and regulating operations of stock markets. Institutional support for enforcement, fine and imprisonment as penalty, and measures for expeditions trial, are other concrete steps that have been initiated.

In India, a number of special laws have been enacted to deal with various forms of economic crimes. The existing legal provisions in the following legislation for asset forfeiture are being increasingly and effectively used with a growing degree of success:

- (i) Criminal Law Amendment Ordinance (1944)
- (ii) Customs Act (1964)
- (iii) Code of Criminal Procedure (1973)
- (iv) Foreign Exchange Regulation Act (1973)
- (v) Smugglers and Foreign Exchange Manipulates (forfeiture of property) Act (1976)
- (vi) Narcotic Drugs and Psychotropic Substances Act (1985)

The mere conception of new laws can not be deemed as a panacea for legal ails. Proliferation of laws many prove over a period of time counter-productive for very many reasons. One school of thought holds that we should stop making new ineffective laws and seek means to render effective the existing laws. Effective enforcement becomes relevant in this context. However, a blend of both, or a balance by enacting laws on a needs based manner (coupled with effective enforcement) is advocated.

The emerging concept of sunset laws is borne out of years of long experience. Under this principle, laws are enacted for a specified period (say 10 years) to meet the challenges of a new form of crime. At the due time, a review of the law becomes a compulsory measure either to extend or to allow its continuance, or it becomes anachronistic at the time of review. Considering the proliferation of laws, new enactments should necessarily contain sunset provisions to keep the list at an optimal level.

### C. Recommendations

#### 1. Conceptual

In battling economic crimes there has been an overwhelming introduction of regulations and enactments of new laws. Regulations and laws are good, provided they are regularly monitored and effectively enforced.

#### (i) *Counterfeit Proofing*

It has been elaborated that 'crime prevention' holds a lot of promises, if proper strategies are devised. If counterfeit proofing measures have proved effective to prevent counterfeiting of currencies and travel documents, similar approaches/measures in economic operations may result in prevention of economic crimes. Illustratively:

- (i) Shares can be counterfeit-proofed to prevent use of forged shares for transactions.
- (ii) The Depository System can be adopted where shares are held in trust by the depository and their trading be done notionally, without physical exchange/transaction in shares.
- (iii) Floating of fictitious firms in the name of non-existing persons can be frustrated by obtaining photographs of the constituent members, by verifying their addresses, by

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subjecting the cases to physical inspections.

- (iv) Operation of Non-Banking Financial Institutions can be subject to tighter regulations, regular monitoring, their members made accountable, and by simply generating public awareness campaigns.
- (v) Unauthorised taking of deposits can also be made a cognizable offence.
- (vi) Operation of bank account can be subject to regulations such as keeping photographs of account holders, restricting the limit of monetary transactions on a single day etc.

Many more innovative steps can be conceived and regularly monitored after implementation.

(ii) *Crime Prevention Officers*

The time-tested approach to deal with crime has at best proved to be a post mortem step. Typically, a law enforcement officer comes into role after the commission of a crime, to set the law into motion or investigate. Economic crimes are distinctively different from ordinary crime. The crime that gets committed remains shrouded in secrecy and surfaces incidentally when a situation has gone out of control.

This situation is unlikely to improve unless there are meaningful measures, such as by appointing Crime Prevention Officers whose sole task would be as watchdogs to monitor developments day to day and report suspicious transactions. If there exists a concept of a vigilance officer in government departments, it has to permeate widely and role redefinition is also needed.

2. Legal

(i) *Redefining Economic Crime*

It is difficult to deal with sophisticated crime by relying on the traditional sections

of the law. A glaring disparity in economic crime is the existence of collective involvement in crime as in corporations and other institutions, as against the conventional concept of an individual's involvement in the crime. Legally, this aspect needs to be addressed.

Most importantly, existence of *mens rea* or criminal intent is difficult to prove in this form of crime; having to pass the judicial doctrine when it comes to trial. A recognized concept in defining the culpability of an individual can be:

1. Misconduct, as in departmental discipline.
2. Criminal misconduct, as in corrupt practices
3. Criminal conduct, as in a crime.

A path breaking measure could be to conceive acts involving economic crimes as either 'financial misconduct' or as 'criminal misconduct', to give the same a new dimension and meaning. The next progression, linked to the same, would be innovative punishments for such offences that involve recovery of the illgotten money.

(ii) *Economic Offences Code*

Economic offences are even now dealt by the relevant provisions of the Penal Code. This has resulted in an anachronistic status wherein sophisticated crimes are treated as conventional crimes, namely cheating, fraud or larceny; misappropriation or embezzlement; and breach of trust. This carries many pitfalls.

The newer forms of economic crimes can be countered effectively by evolving a new and comprehensive 'Economic Offences Code'. The Code should also contain institutional arrangements and procedures for its enforcement. The Code may modify investigation procedures, methods/standards of proof, as well as system of

trial. There can be scope for regulated, negotiated settlements. Sentencing can be made innovative and imaginative, including confiscation of property, deprivation of privileges etc. The Code may have to be constructed to convey a message to all that economic liberalization should not mean freedom to exploit.

(iii) *Independent CJS*

The political system has to bear pressures from various corners and the elected bodies' judgements in relation to the national economy is often influenced by various considerations. A reasonably independent criminal justice system, with checks and balance measures, would be more capable of dealing with the crimes effectively in the overall interests of the nation. This is a measure that is much wanted when political parties sustenance is dependent on contributions of the undisclosed kind.

3. Organizational

A sound infrastructure is essential as a countermeasure to deal with economic crime, more so because of their organized manner of operation. Some of the issues concerning organization have been indicated as passing remarks in the preceding paragraphs.

The coming into operation of a number of independent law enforcing agencies is necessitated by the sheer complexity of governmental functions and the inability of one organization to emerge as an omnipotent enforcement agency. While accent will be on strictly monitoring the regulations with an aim of crime prevention, the independent departmental enforcement agencies can play a fruitful role as crime prevention managers; while the criminal acts that gets noticed can be dealt with by law enforcement authorities, namely the police.

Some of the factors that would be resulted oriented are:

- (i) Organized/standardized collection of information and close monitoring of the same
- (ii) Setting up of common database with a view to exchange information
- (iii) Establishment of proper infrastructure to discharge crime prevention responsibilities
- (iv) Informal measures, such as personnel exchange and coordination, at the operational level
- (v) Agreement for a transparent information sharing mechanism
- (vi) Networking of all agencies through innovative technological solutions
- (vii) Hosting the set up with officers of proven integrity
- (viii) Incentives to effective enforcement of crime prevention, detection and recovery measures

(i) *Technical Cooperation and Assistance*

A measure to enable and vitalize collective efforts can not be achieved without technical cooperation within the country or among countries. There is need for specialized organizations to combat these sophisticated crimes. This would call for training of personnel, regular exchange programmes and a means to constructively share experience as a confidence building measure.

(ii) *Mutual Cooperation*

Economic crimes, particularly the money laundering kind, transcend national borders. The effect of such crimes are also felt not only in one's own country, but also in other countries. Traditionally, the place of occurrence of a crime is highly relevant from the viewpoint of jurisdiction. The enforcement of law is by its nature territorial, for no State allows other States, as a general rule, to exercise powers of government within it. National borders are

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regarded, thus, as inviolable. Mutual cooperation has become the only available means to overcome these borders. The available practical solutions are:

- (i) Bi-lateral/multi-lateral treaties
- (ii) Mutual legal assistance treaties
- (iii) Extradition
- (iv) Neutral trial venues

## V. CONCLUSION

In the words of Oscar Wilde, a “thief is an artist, and a policeman is, at best, a critic”. If this carries conviction, law enforcers are required to remain convincingly ahead in the race between the law breakers and law enforcers. If countries are to cooperate for economic development, there seems to be no valid reason not to cooperate in curbing crime. The foregoing would substantiate that international cooperation is built and rests on the pivotal props of:

- (i) Legal reforms/harmonization of legislation
- (ii) Institutional growth/professional skills
- (iii) Technical cooperation/assistance
- (iv) Mutual cooperation/assistance

Ultimately, trust could be the triumph card.

# ECONOMIC CRIMES IN KOREA

*Lee Tae-Hoon\**

## I. INTRODUCTION

Korea marked its 50th anniversary in 1998 as a free democratic republic. Korea was in ruins after three years of bombing in the Korean War that came to an end with the signing of the armistice agreement in July 1953. Korea, however, has made enormous stride in economic development since that time, particularly from the 1970's until 1997, when Korea turned to the International Monetary Fund (IMF) for a record \$58 billion rescue package. Prior to this, the Korean economy reported an average annual growth rate of 8%, shifting from light industries to heavy industries in the 1970's and into high tech industries in the 1990's. Korea's Gross Domestic Product (GDP) grew 312-fold from \$1.4 billion in 1953 to \$437 billion in 1997, making Korea the 11th largest economy in the world. The per capita income, less than \$70 in 1953, soared to the \$10,000 level in 1996, although it slightly fell to \$9,511 in 1997 and may decline further in 1998 if affected by the IMF program. Exports, a trifling \$22 million in 1947 reached a staggering \$136 billion in 1997. The success story of Korean economy culminated in Korea's joining, in December 1996, the Organization for Economic Cooperation and Development (OECD), the so-called 'rich countries club', as the second Asian nation after Japan.

However the miraculous economic development was accompanied by large-scale economic crimes. Statistics show a growing number of large scale economic

crimes since the 1970's, which should not be punished as mere personal property crimes. Given the complexity and huge amounts involved, such economic crimes create various socio-economic problems, and contributed to jeopardising the domestic financial systems, ultimately prompting Korea to enter the IMF retrenchment program (as the cases illustrate in this paper). It is ironical that large scale economic crimes, that were the natural outgrowth of economic development, in turn were partially responsible for the current financial crisis.

## II. ECONOMIC CRIMES IN KOREA

### A. Definition of Economic Crime

It is not so easy to define economic crime as generally recognized. In defining the term, there has been discrepancy between legal practitioners' group and legal theorists' group, i.e., law professors and scholars.

In Korea, it is safe to say that the prosecution represents the legal practitioners' group. The prosecution took the initiative in defining economic crime as an act that is punished among acts which are violative of economy-related law's compulsions or prohibitions. In 1962, the Supreme Prosecutor's Office, i.e., the Office of the Prosecutor General, issued a directive (No. 287) categorizing economic crime for the first time in Korean modern history. Here, 26 items which were in violation of criminal law or economy-related laws were named as economic crimes.

In 1977, the Ministry of Justice, setting new standards of crime classification,

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expanded economic crimes to 39 items. In this directive (No. 69) the Ministry of Justice reflected the economic changes of Korea since the 1960's and newly included illegal financing and violation of intellectual property rights as economic crime. In 1988, the Ministry of Justice, through its directive (No. 145), again expanded the category of economic crime to 52 law violations. Under this directive, violations of the Securities Exchange Act, Unfair Competition Prevention Act, Monopoly Regulation and Fair Trade Act and the Act Regarding Real Name Transactions etc., were newly added to economic crimes. According to this directive, in the prosecutorial definition of economic crime (among the 52 economic crimes), only one crime regarding money is in violation of the Criminal Code; the rest are in violation of economy-related laws.

Since 1984 general property crimes such as fraud, embezzlement and breach of trust of the Criminal Code were also added to economic crimes, if the damages exceeded certain amounts, i.e. W500 million (\$625,000). This was possible because on December 1983, a law called "Act on the Aggravated Punishment, etc. of Specific Economic Crimes" was promulgated; the violation of which was also added to economic crime in 1984.

However, this definition of economic crime, from a practitioner's viewpoint, has some problems in establishing economic crime theoretically. Definition is mainly done by the names of crimes, based on the convenience of the investigation authority. This definition narrows the range of economic crime too much by including fraud, embezzlement and breach of trust in a very restrictive way. In reality, however, such property crimes occupy a large portion of economic crime.

From a theoretical viewpoint, economic crime is defined as "an act which violates or endangers social or super-personal economic order or economic systems by breaking trusts which are required in economic life and economic transactions." This definition appears to be supported by many law professors and scholars. Of course, there is also some criticism over this definition. It is argued, for example, that the notion of either "breaking trusts which are required in economic life" or "violation of social or super-personal interests" is so abstract that it is not easy to establish it between offenders and victims. The uncertainty or ambiguity of this definition makes it difficult to adopt it in investigation practice. This ambiguity also makes the range of economic crime too broad.

#### **B. Patterns of Economic Crime**

Economic crimes which are committed in Korea could be classified as below:

(i) *Crimes Related to Government Finance*

These crimes are with respect to currency, securities, postage stamps, and include violations of the Tariff Act, Punishment of Tax Evaders Act, Act on Government Monopoly of Tobacco Sales, Salt Control Act, Act on Government Monopoly of Red Ginseng Sales, etc.

(ii) *Crimes Related to National Economy*

These crimes include violations of the Marine Industry Act, Decree on the Preservation of the Marine Resources, Foreign Exchange Management Act, Grain Management Act, Act on Prevention of Draining Domestic Properties, Petroleum Business Act, Foreign Capital Inducement Act, Foreign Capital Control Act, Fertilizer Management Act, Illegal Check

Control Act, Act on Prevention of Selling Specific Foreign Goods, Interest Limitation Act, Price Stabilization and Fair Trade Act, Market Act, Bank Act, Special Banks Act, Measure Act, Act on Stabilizing Demand and Supply of Coal, Mutual Savings Company Act, Energy Use Rationalization Act, Act on Real Name Financial Transactions, etc.

(iii) *Crimes Related to Corporate Management*

These crimes include violations of the Foreign Trade Act, Act on the National Association of Small and Medium Sized Enterprises, Insurance Act, Construction Business Act, Quality Control of Manufactured Goods Act, Trademark Act, Design Patent Act, Utility Model Act, Electricity Business Act, Heavy Vehicles Act, High Pressure Gas Safety Control Act, Securities and Exchange Act, Electric Appliances Safety Control Act, Unfair Competition Prevention Act, Anti-monopoly and Fair Trade Act, Act on External Audit of Corporation, etc.

(iv) *Crimes Related to Consumers and General Public*

These crimes are represented by Fraud, Embezzlement, Breach of Trust, and include violations of National Association of Marine Industries Act, National Association of Agriculture Act, National Association of Mutual Credits Act, Live Stock Feed Control Act, Act on Aggravated Punishment etc. of Special Economic Crimes, etc.

**C. Recent Trend of Economic Crime Cases**

Please refer to Appendix 1 and 2. Appendix 1 shows the number of economic crime cases by type and year for the period

from 1991 to 1996. The number of total cases of economic crimes including fraud, embezzlement and breach of trust increased 2.7 fold from 118,771 in 1991 to 325,416 in 1996, in line with the general growth of the national economy. It is noteworthy that the number of economic crimes grew even faster than the national economy, which increased 1.8 fold from \$271 billion in 1991 to \$485 billion in 1996, in terms of Gross Domestic Products.

Appendix 1 also shows that continued increase in the portion of major economic crime cases among all crime cases. Fraud represents the largest single economic crime accounting for 62% of total economic crime cases in 1996. Appendix 2 shows the number of cases of fraud, embezzlement and breach of trust involving damages of W1 million (\$700) or more for each year from 1991 to 1996. With respect to fraud, embezzlement and breach of trust, the number of cases involving damages of W1 million (\$700) or more grew almost five-fold in 1996 over 1991, with continued increase in these cases from 54% in 1991 to 74% in 1996 for fraud, and from 44% in 1991 to 65% in 1996 for embezzlement. These trends reflect the increasingly complicated economic activities in a rapidly growing economic environment have led to growing dependence on lawsuits for settlement of conflicts.

**III. MAJOR CASES OF ECONOMIC CRIMES**

**A. The Case of Yoolsan Group**

This is one of the early cases of economic crime that shocked the public due to the scale of the amount involved, at a time when such economic crimes were a rare occurrence. The Yoolsan Group started business as a single company by the name of Yoolsan Corporation, with a paid-in capital of W1 million (\$1,250) in 1975. However, in three years the Group grew

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into a conglomerate with 14 affiliated companies and a combined capital of W10 billion (\$12.5 million), drawing the attention and admiration of the Korean public.

In March 1979, the Seoul District Prosecutor's Office obtained some information that the Yoolsan Group had been heavily dependent on curb market loans since October 1978 and the scale of total debt had reached W150 billion (\$187.5 million). The prosecution also heard that the Yoolsan Group's extremely shaky financial structure was the result of the group chairman's illegal business activities.

Around the end of March 1979, two Special Investigation Divisions of Seoul District Prosecutor's Office initiated an investigation into the Yoolsan Group. They finally proved that Chairman Shin Sunho of the Yoolsan Group owned about 89% of Group companies' shares worth W8.9 billion (\$11.1 million), purchasing them with the money he had illegally taken out from the Group's affiliated companies. Prosecutors also proved that he also had bought W260 million (\$325,000) worth of real estate under his personal title with the company money he embezzled.

He had also embezzled \$72,000 out of employees' overseas travel expenses and the W160 million (\$200,000) the company had withheld for interest payments. He also defaulted on payment of W22.7 billion (\$27.4 million) worth of cheques. The prosecution arrested Chairman Shin Sunho and indicted him on charges of occupational embezzlement in the Criminal Code and violations of the Foreign Exchange Control Act.

At the same time, the prosecution also arrested and indicted the president of Seoul Bank, Hong Yoonsup, on charges of occupational breach of trust in the

Criminal Code. He had lent W23.6 billion (\$29.5 million) to the Yoolsan Group knowing that it would be impossible to retrieve the loan because of the Yoolsan Group's aggravated financial conditions.

In the trials that followed, defendant Shin Sunho was sentenced to 7 years imprisonment, and the Seoul Bank President, Hong, was sentenced to 3 years imprisonment. This case showed how reckless expansion of business could harm the national economy as well as ruining the owner and the business itself.

**B. The Case of Bills Fraud by Lee and Jang**

On June 2, 1982, the Special Investigation Division of the Supreme Prosecutor's Office indicted defendants Lee Chulhee and his wife, Jang Youngja, and other 29 defendants on fraud charges.

Lee Chulhee once served as deputy director of the Agency for National Security Planning. Jang Youngja used to introduce herself as a relative of the then Korean President Chun Doowhan. This intrepid husband and wife conspired to make a fortune by defrauding owners of large corporations. Lee and Jang approached corporations which were in dire need of working capital, offering to provide them with funds at a very low interest rate. In return for the loans they asked corporations to issue, as security, promissory notes with combined face value twice as much as the money they would lend, deceitfully stating that such a process was required to hide the source of their funds. As soon as Lee and Jang received the promissory notes from corporations, they discounted them in the curb market and took the difference between the loan they made to the companies and the funds they obtained from notes discounting. In this way, Lee and Jang defrauded 6 corporations and swindled W168 billion



(\$210.5 million) in total.

Lee and Jang case has been the biggest fraud case since the foundation of the Republic of Korea. This case dealt a heavy blow on the morality of the newly inaugurated 5th Republic in 1981. Lee Chulhee and Jang Youngja were sentenced to 15 years of imprisonment respectively by the Seoul High Court. Their appeals to the Supreme Court were rejected.

Later Jang Youngja was later released on parole and in 1994, she was again arrested and indicted on charges of defrauding several company owners of W7.7 billion (\$9.6 million). Jang Youngja was sentenced to 4 years imprisonment in February 1994. She was released again on August 15, 1998. This time she was released on suspension of execution of penalty.

### **C. The Case of Myungsung**

On September 2, 1983, the Special Investigation Division of the Supreme Prosecutor's Office indicted Kim Chulho, chairman of the Myungsung Group, who had been arrested on charges of embezzlement and tax evasion, and 37 other defendants.

With the inauguration of the 5th Republic in 1981, the Myungsung (meaning 'Venus' in Korean) Group was rising high in a very short period of time. Within a couple of years, it grew into a conglomerate specializing in the leisure industry including construction of condominiums all over Korea. Chairman Kim Chulho pretended to have a strong connection with a close relative of the then President Chun. He bribed bank officials and conspired with them to embezzle W106.6 billion (\$133.3 million) that depositors had placed with banks. He also evaded various taxes totalling W4.7 billion (\$5.9 million) and bribed high ranking government officials

to rezone the "Green Belt" area into a commercial area for construction of condominiums. Kim Chulho dreamed of making a quick fortune, with almost no money of his own, by selling ownership of a condominium when the real estate business was booming in the early 1980's.

Kim Chulho was sentenced to 15 years imprisonment by the Seoul High Court in April 1984. After 10 years in prison, he was released on parole in March 1993.

### **D. The Case of Youngdong Scandal**

On October 24, 1983, the Special Investigation Division of the Supreme Prosecutor's Office indicted Lee Bokrae, chairwoman of the Youngdong Development Promotion Corporation, and Lee Hunseung, president of Cho Hung Bank, and 28 other defendants on charges of forgery of negotiable instruments, negotiation of forged negotiable instruments, occupational breach of trust, etc.

Youngdong Development Promotion Corporation, which was run by chairwoman Lee Bokrae, had financial difficulties. So she decided to borrow money in an irregular manner, conspiring with her son, who was the president of the same corporation, to bribe bank officials and employees. They bribed the president of the Cho Hung Bank, the branch manager of the Bank's Central Branch and several other bank employees. Then, they attached Cho Hung Bank's forged guarantee to their blank corporate promissory notes and discounted them in the curb market and short-term money market. In this way, they financed W101.9 billion (\$127.4 million).

They also settled their corporate bills illegally when the bills were presented to the Cho Hung Bank for payment. When there was not enough balance in

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Youngdong Corporation's accounts, the bribed officials and employees of the Cho Hung Bank shored up balances by fabricating their bank book, as if they had credited managers' cheques issued by other banks. In this way, the president, branch manager and employees of the Cho Hung Bank illegally settled Youngdong Corporation's bill totalling W47.1 billion (\$58.9 million).

This was somewhat of a bank corruption case in that among the 30 indicted, 19 were bank personnel including a bank president and a branch manager. This case shocked the nation particularly in that the bank officials and employees were major accomplices in a significant fraudulent economic crime. Citizen's faith in banks in general was shaken. In the trials that followed, chairwoman Lee Bokrae was sentenced to 15 years imprisonment, the President of Cho Hung Bank, Lee Hungseung to 4 years imprisonment, and the bank branch manager, Go Gunho, to 12 years imprisonment.

The seriousness of these three big economic scandals of the early years of the 1980's prompted the 5th Republic to enact new laws that could deter and punish economic crimes more effectively. Thus, in December 1983, the Act on the Aggravated Punishment, etc., of Specific Economic Crimes was promulgated.

**E. The Case of Hanbo Group  
Chairman Chung, Taesoo**

In December 1996, Hanbo Steel Co. Ltd., the flagship of the 14th largest business conglomerate in Korea, defaulted on payment while constructing steel mills at Tangjin, with excessive borrowings from banks and other financial institutions totalling W5.7 trillion (\$7.1 billion).

The demise of the debt-ridden Hanbo Steel worsened the troubles of Korean

banks and other financial institutions and, together with the collapse of Kia Motors with a total debt of W9.3 trillion (\$11.6 billion) in July 1997, played a critical role in triggering the country's financial crisis, forcing Korea to turn to the IMF for a \$58 billion loan in December 1997. Given the negative impact of the Hanbo bankruptcy and the alleged irregularities Chairman Chung conducted in day-to-day management, the Central Investigation Division of the Supreme Prosecutor's Office commenced an investigation into this case and revealed the wrongdoings of Hanbo Group Chairman Chung as summarized below:

- (a) He swindled W107.7 billion (\$134.6 million) by discounting W111.6 billion (\$139.5 million) worth of accommodation bills with various creditors during the period from December 3, 1996 to January 18, 1997.
- (b) He misappropriated a total of W108.9 billion (\$136.1 million) from affiliates of Hanbo Group on 24 occasions from January 1994 to December 1996 to purchase real estates under his name.
- (c) He forced Hanbo Credit Union Co. Ltd., one of Hanbo Group's affiliates, to make loans totalling W43.2 billion (\$54 million) to Hanbo Steel Co. Ltd..
- (d) He failed to honor checks totalling W53.9 billion (\$67.4 million) from July 1995 to January 3, 1997.
- (e) He offered a total of W400 million (\$0.5 million) each to Shin Kwangsik, former president of Korea First Bank and Woo Chanmook, former president of Cho Hung Bank, in July 1996 in return for a huge amount of loans they offered to the company during their terms.
- (f) He offered a total of W700 million (\$0.9 million) to Lee Chulsoo, who was serving as president of Korea First Bank from August 1994 to April

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1996 in return for loans provided by the bank.

- (g) He handed over a total of W450 million (\$0.6 million) to two politicians in the ruling and opposition parties from October 1995 to October 1996 asking them not to take the Hanbo Steel issue to the National Assembly.
- (h) He offered W200 million (\$0.3 million) to Kim Woosuk, who was serving as the Minister of Construction asking construction of road connecting Hanbo's Tangjin mills to the highway passing the mills nearby.

Chung Taesoo was indicted on February 19, 1997 on the above noted criminal charges, sentenced to a 15-year imprisonment on December 16, 1997 and is currently serving his prison term.

Hanbo Chairman Chung, a former tax official, harbored the naive dream of making the world's fifth largest steel company. With only W90 billion (\$112.5 million) in capital, he pushed for the construction of the steel plant allegedly with support from those in power and politics. Initially, it was projected that the steel plant project would cost W2.7 trillion (\$3.375 billion). Hanbo, however, poured in W5.7 trillion (\$7.125 billion) to complete 90% of the project by early 1997 apparently due to unrealistic projections.

Hanbo Chairman Chung's tragic end to the debt-financed expansion strategy taught the lesson that overly aggressive business expansion, beyond financial means, would result in a bankruptcy during a period of business recession. Businesses also realized the need for restructuring aimed at improving financial structure. For this, many business groups have implemented business strategies which are focused on streamlining by

disposing of marginal or unprofitable business lines and non-business purpose real estate. Korean banks realized the importance of credit decisions based on assessment of the creditworthiness of a borrower or the feasibility of a project. Several banks have already implemented stricter credit approval procedures or introduced new risk management techniques to improve asset quality. Mergers among banks were accelerated in one financial reform effort. The scandal is also likely to help sever corrupt and irregular links between politics and business enterprises in the long run, as it resulted in the arrest of several congressmen, two bank presidents and even the second son of former President Y.S. Kim.

The government, for its part, introduced a tighter credit control system for fear that excessive loans to a single conglomerate can threaten the lending bank's survival itself. Effective August 1, 1997, business groups with external debts of over W250 billion (\$280 million) are prohibited from borrowing loans in excess of 45% of a bank's shareholder's equity. The scandal also prompted the government to introduce five corporate reform guidelines for effective implementation of the reform program which include:

- (a) Improvement of corporate transparency:
  - Introduction of combined group financial statements beginning fiscal year 1999.
  - Improvement of accounting practices and full disclosure of financial information.
  - Appointment of outside boards of directors by listed companies at least one in 1998 and 25% of board members by the end of 1999.
  - Strengthening of minor shareholders' rights.
- (b) Eliminate cross-payment guarantees

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- with full clearance by the end of 1999.
- (c) Dramatic improvement of financial structure with lower financial leverage (debt to capital ratio) to below 2:1 by the end of 2000.
  - (d) Streamline focus on core businesses and cooperate with small/medium-sized companies.
  - (e) Strengthen legal liability of major shareholders:
    - Major shareholders must take legal responsibility for corporate failure.
    - Major shareholders should make every effort to improve group company financials even through the contribution of personal assets.
    - Remove the position of group chairman and office of group chairman.
    - Laws have been revised to expedite the bankruptcy proceedings and force companies which have no possibility of reviving to exit from the business quickly.

**F. The Case of Forgery and Fraudulent Use of Listed Companies' Promissory Notes**

In 1997, the second Special Investigation Division of the Seoul District Prosecutor's Office conducted an investigation after obtaining information that a substantial amount of promissory notes, issued by certain companies listed on the Korea Stock Exchange, were offered to some financial institutions and curb market dealers in downtown Seoul for discounting in September 1997. The prosecution found out that six individuals forged and discounted seven promissory notes of six listed companies with a combined face value of W3,070 million (\$3.8 million), in their attempt to forge and discount W23,380 million (\$29.2 million) worth of promissory notes.

The investigation revealed that the suspects swindled W326 millions (\$0.4

million) by discounting only two of the seven forged promissory notes, and then conspired to forge and sell national and public bonds (realizing that promissory notes were no longer sellable since November 1997 when Korea was placed under the IMF program). It was also revealed that the suspects attempted to forge 17 promissory notes of nine large companies with a combined face value of W23,380 million (\$29.2 million). Subsequent to the findings three individuals were indicted with physical detention and one was placed on the wanted list. This case also revealed that new IMF-type economic crimes appear to be looming near.

**G. The Case of Smuggling Advanced Technology for Semiconductor Chips**

In late January 1998, the Suwon District Prosecutor's Office obtained information that KSTC (Korea Semiconductor Technology Company), established by former researchers of Samsung Electronics Co. Ltd., had been smuggling advanced technology for semiconductor chips into a foreign country. Judging that this would be a very critical crime which could weaken the international competitiveness of Korean semiconductor chips, which is one of Korea's strategic export items, the Suwon District Prosecution immediately initiated an investigation into this case.

After months of full-scale investigation, the prosecution proved that the former researchers of Samsung Electronics Co. Ltd. and LG Semiconductor Co. Ltd. had established what they claimed to be semiconductor venture firms, KSTC and DESTEC (Dream of Engineer's Technology) for illicit purposes that they then lured present and former researchers of Samsung and LG to steal memory chip manufacturing technology from their companies. Finally they sold the smuggled

technology with respect to 64M DRAM and 256M DRAM to NTC (Nan Ya Technology Company) of Taiwan, which allegedly promised officials of the two venture firms kickbacks and research jobs in its laboratory at huge salaries. The prosecution also found that the smuggled technology included about 800 items stolen from Samsung and about 40 items stolen from LG which were critical to the whole manufacturing process including design, fabrication and inspection of 64M DRAM. The value of stolen technologies was estimated at W70 billion (\$50 million) in terms of research and development expenses, while the two semiconductor manufacturers claimed that the value of the possible loss from the illegal outflow of the chip manufacturing technology would amount to W1,250 billion (\$900 million).

On February 28, 1998, the Suwon District Prosecutor's Office prosecuted 20 defendants (including Kim Hyungik, a principal offender and managing director of KSTC) on charges of violating the Act on the Aggravated Punishment of Specific Economic Crimes with respect to breach of trust, occupational breach of trust, theft and for breach of the Unfair Competition Prevention Act.

In the trial that followed, the Suwon District Court sentenced from four to two and a half years' actual imprisonment the five principal defendants including Kim Hyungik, and from three to two years' suspended sentence to the rest of the fifteen defendants. This case represented the biggest industrial espionage case attracting the attention of the government and the public. This case also prompted the Prosecutor's Office to recommend legislation of the so-called Industrial Espionage Act in order to prevent recurrence of similar intellectual property theft cases in Korea.

#### **H. The Case of Dongsuh Securities Co. Ltd.**

In February 1998, the Special Investigation Division of the Seoul District Prosecutor's Office initiated an investigation into the case of Dongsuh Securities Co. Ltd., which became insolvent due to illegal financial support of its affiliated construction company which was suffering financial crisis.

Dongsuh Securities Co. Ltd., an affiliate of Kukdong Group, provided W144.2 billion (\$180.2 million) worth of financial support to Kukje Construction Co. Ltd., another affiliate of Kukdong Group, during the period of June to December 1997. This was without collateral, even though they were cognizant of the fact that the financially troubled company would not be able to honor its obligation to Dongsuh when they became due. Certain officials and employees of Kukje Construction Co. Ltd. illegally set aside W10.5 billion (\$13.1 million) in a slush fund and embezzled W4.5 billion (\$5.6 million) for personal use, which gave rise to the financial difficulties of the construction company.

As this was the first case where a Korean financial institution defaulted on payment, it led to the withdrawal of more than W300 billion (\$375 million) by the depositors of the securities firm, creating a ripple effect on the national economy and society. By providing financial support totalling W144.2 billion (\$180.1 million) to its affiliate, Dongsuh Securities Co. Ltd. violated the Securities Exchange Act Article 54 and the Standing Rule on Financial Soundness of Securities Companies Article 25. Both prohibit securities companies from extending loans and credit to their affiliates and individuals identified as having a "special relationship" with the lender. The company also failed in its due diligence by extending credit to the near-bankrupt construction company

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without collateral.

The prosecution conducted an investigation into this case in February 1998 based on the outcome of the Securities Supervisory Board's special examination of Dongsuh Securities Co. Ltd.. In May 1998, Kim Yongsan (age 76), Chairman of Kukdong Group, and Kim Kwangjong (61), Representative Director of Dongsuh Securities Co. Ltd., were indicted without detention on charges of violating the Act on the Aggravated Punishment of Specific Economic Crimes with respect to breach of trust and the Securities Exchange Law. Kim Sejung (42), Representative Director of Kukje Construction Co., and Yoo Chongwhan (55), Managing Director of Kukje Construction Co. Ltd., were indicted with physical detention on charges of violating the Act on the Aggravated Punishment of Specific Economic Crimes with respect to embezzlement.

**I. The Case of False Financial Statements Produced by Shinwa Group**

In Early 1998, the Seoul District Prosecutor's Office initiated a probe of the allegation that a couple of Shinwa Group affiliates produced false financial statements to make their status appear better than it actually was. The two core companies of the seven Shinwa Group affiliates produced false financial statements since 1995 in an attempt to gain easy access to bank borrowings, and to prevent a fall in share prices of the two listed companies. The debt ratio of the group affiliates including the two companies rose considerably since 1994 due to loose management. Taehung Leather Co. Ltd. for example, by means of window dressing, increased sales for the first half of 1997 from W27.9 billion (\$34.9 million) to W30.7 billion (\$38.4 million); converting the bottomline result from the net loss of W400 million (\$0.5 million) to net profit of

W8.8 billion (\$11 million) and decreased the amount of total liabilities as of 6/30/97 from W75.7 billion (\$94.6 million) to W64.2 billion (\$80.3 million).

In addition, Shinwa Co. Ltd., another core group company, cheated stock investors by announcing that it concluded a big sales contract. In fact, the new high-tech "car location tracking system" did not sell well and had uncertain business prospects. Based on the credit the company obtained as a result of false financial and business information, the company borrowed W157.2 billion (\$196.5 million) from financial institutions by discounting fake commercial bills.

On February 15, 1998, Lee Eunjo, Shinwa Group Chairman, was indicted with physical detention, and Huh Pilju, Finance Director of Shinwa Co. and Chung, Sukhun, Finance Director of Taehung Leather Co., Ltd. were indicted without physical detention. Charges filed on these three suspects included violation of the Act on the Aggravated Punishment of Specific Economic Crimes with respect to fraud and breach of trust, the Commercial Code, the Act on External Audit of Limited Liabilities Companies, and the Securities Exchange Act.

Occurrence of similar cases would be less likely in the future as one of the five major guidelines of the Corporate Reform Program has improved managerial transparency through disclosure of detailed financial information based on international accounting standards.

**J. The Case of Irregularities Relating to Real Estate Trust Business (Kyungsung Scandal)**

In June 1998, the Special Investment Division of the Seoul District Prosecutor's Office conducted an investigation into the case of Kyungsung Scandal with respect to

irregular real estate trust business. This case involves irregular financial support by certain officials and employees of Korea Real Estate Trust Co. Ltd., in collusion with landowners, subcontractors and politicians. Such irregularities placed the real estate trust company in financial difficulties.

During the period from January 1996 to February 1998 the Korea Real Estate Trust Co. Ltd., in relation to the development project of land owned by Kyung Sung Co. Ltd., committed irregularities by extending credits to Kyung Sung Co. Ltd. and Kyung Sung Construction Co. Ltd.. These irregularities include issuance of payment guarantees totalling W36.4 billion (\$45.5 million), payment of W15.6 billion (\$19.5 million) in advance without obtaining collateral and extension of loans totalling W20.4 billion (\$25.5 million) based on insufficient securities collateral worth only W6.8 billion (\$8.5 million).

Lee Jaekil (55), Kyung Sung Group Chairman, and Lee Jaekook (54), former president of Korea Real Estate Trust Co. Ltd., were indicated with physical detention on charge of violating the Act on the Aggravated Punishment of Specific Economic Crimes with respect to breach of trust. With investigation still going on as of July 16, 1998, as many as 25 suspects were indicted; 17 suspects with physical detention and 8 suspects without detention. Included in the 17 arrestees was Chung Daechul, Vice President of the ruling party, National Congress for New Politics, who was placed under arrest on September 2, 1998 on the charge of taking W30 million (\$37,500) in bribes from certain officials and employees of Kyung Sung Co. Ltd..

#### IV. MAJOR CONTROL STRUCTURES FOR ECONOMIC CRIMES

##### A. Legislation

###### (i) *Criminal Code (Act)*

Traditional personal property crimes in the Criminal Code such as fraud, embezzlement and breach of trust of more than a certain extent, could constitute economic crimes. Fraud, embezzlement, occupational embezzlement, breach of trust, occupational breach of trust, forgery of currency and securities are punished by the Criminal Code promulgated on September 18, 1953. The penalty for fraud is imprisonment for not more than ten years, or fine not exceeding W20 million (\$14,200 at current exchange rate of \$1:W1,400). The penalties for embezzlement and breach of trust are imprisonment for not more than five years or by fine not exceeding W15 million (\$10,700), respectively. The penalties of occupational embezzlement and occupational breach of trust is imprisonment for not more than ten years or by fine not exceeding W30 million (\$21,400).

###### (ii) *Act on the Aggravated Punishment of Specific Economic Crimes*

Stunned by the enormous damage to the national economy caused by the three big economic crimes in the early 1980's, the 5th Republic, in order to deter recurrence of economic crimes, promulgated on December 31, 1983, the Act on the Aggravated Punishment of Specific Crimes (hereafter referred to as the Act). The major provisions of this Act against economic crimes are as follows.

First, the Act expands the range of economic crime according to the amount of profits which have been acquired by fraud, embezzlement and breach of trust (traditionally personal property crimes). In

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cases when the illegal profits acquired through those crime exceed W500 million (\$625,000 at then prevailing exchange rate of \$1:W800), offenders are not punished by the Criminal Code but by this Act.

One of the most important means of deterrence of this Act is the aggravated punishment. In cases of fraud, embezzlement and breach of trust when the amount of profit obtained by those crime exceeds W500 million (now \$357,000) or more, offenders shall be punished by imprisonment for life or not less than five years. There is no fine penalty. It is clear that so long as a case of fraud, embezzlement and breach of trust falls within this Act, it is an economic crime.

Second, this Act also expands the offenders of economic crime. Traditionally, according to the Criminal Code, the subject of bribery used to be public officials or mediators. However, the Act expands the subject of bribery to officials or employees of a financial institution. Any person who promises or gives a bribe to them is also punishable by this Act.

Third, any money or other benefits that officials or employees of a financial institution have illegally gained in violation of this Act shall be confiscated. In addition, anyone who is convicted of property crimes under this Act, and officials or employees of a financial institution who are convicted of bribery under this Act, may not be employed by a related company for a certain period of time.

Since its promulgation, this Act has played a major role in deterring, detecting and punishing economic crimes. Together with Real Name Financial System Order of 1993, this Act is one of the most important pieces of legislation to suppress economic crime.

(iii) *Real Name Financial Transaction System*

In connection with the suppression of economic crime in Korea, another major step was taken in 1993. On August 12, former President, Kim Youngsam, issued a Presidential Financial and Economic Emergency Order on Real Name Financial Transactions and the Protection of Confidentiality. This Emergency Order shocked the nation by its serious effect on the national economy, as well as household economies.

By this Emergency Order, a Real Name Financial Transaction Order System has been effectuated. The causes of implementating this Real Name System are traced back to the case of Lee and Jang bank bills fraud in 1982. In the wake of this case, the Chun Doowhan administration enacted and promulgated the Act Regarding Real Name Financial Transactions in December 1982. However, implementation of the core of this Act, i.e. compulsory real name financial transactions, had been delayed until the Emergency Order of 1993.

The essentials of effective Real Name Financial Transactions are as follows:

- (a) Financial Institutions shall carry on Financial Transactions with their customers under the real names of customers. Here, "Real Name" shall mean names designated by Presidential Decree such as names appearing in resident registration books and tax registration certificates.
- (b) Regarding Financial Assets held in accounts created before the effective date of the Order, Financial Institutions shall, at the time of the first transaction after the effective date, verify whether such Financial Assets are held under the real names of account holders.
- (c) For Existing Financial Assets which



have not been verified pursuant to the above, or which have been identified to be under non-real names as a result of such verification, financial institutions shall not allow any payment, refunding, repayment, repurchase, etc.

- (d) Obligation to convert existing non-real name assets to real name assets within two month from the effective date of the Order.
- (e) Penalty for breach of real name conversion Obligation:
  - (1) Penalty rate ranging from 10% to 60% of the asset value depending on the period from the effective date of the Order (e.g., 10% up to 1 year, 20% from 1 to 2 years, 40% from 3 to 4 years, 50% from 4 to 5 years, and 60% over 5 years).
  - (2) 90% of income tax to be imposed on the interest income and dividend income to be earned on non-real name assets.
- (f) Default Fine: Officials or employees of a financial institution who violate the provisions of real name financial transactions shall be subject to a default fine of not more than W5 million (\$3,570).

Minor revisions have been made on the Real Name Financial Transaction System Act on several occasions since December 1997 to avoid inconveniences in the day-to-day financial transactions, to remove public concern on possible audit by tax authorities on their financial transactions, and to induce non-real name funds into certain industries.

The contribution of the Real Name Financial Transaction System Act to the detection of economic crimes has been enormous. If it had not been for the real name system, the prosecution of the former Presidents Roh Taewoo, Chun Doowhan and the likes in November 1995 would not

have been possible.

## **B. Investigative Structure**

### *(i) Prosecutor*

The prosecutor is the supreme investigative authority under the Constitution and the Criminal Procedure Act in Korea. As long as investigations of crimes are concerned, both judicial police and special judicial police are under the control and supervision of a prosecutor. The prosecution of a case is the sole responsibility of a prosecutor.

The prosecution is comprised of three offices with different hierarchies: District Prosecutor's Offices, High Prosecutor's Offices and the Supreme Prosecutor's Office. Most District Prosecutor's Offices which have jurisdiction over provinces or special cities have, respectively, several Criminal Investigation Divisions and one Special Investigation Division.

Criminal Investigation Divisions are mainly responsible for general criminal cases. One division among them is exclusively assigned to take charge of economic crimes. Prosecutors belonging to the economic division are appointed exclusively responsible for one specific area of economic crime under the supervision of a division-chief prosecutor. They carry out investigations in the specific area assigned to them.

The Special Investigation Division is designated to independently investigate major crimes which are deemed inappropriate for judicial police to control. Generally speaking, it is difficult for judicial police to handle some kinds of economic crime requiring specialized knowledge and techniques, such as analysis of account documents and tracing of bank transactions in investigation. Thus, economic crime is one of the items which the prosecutors of the Special

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Investigation Division willingly handle in Korea.

National confidence in the prosecution system is very high in Korea. This confidence tends to impose a remarkable burden on the prosecution in some important cases. Whenever large scale economic crimes or scandals are brought to public attention, the public tend to ask the prosecution to investigate and disclose the entire picture of the case or scandal within a short period of time. When a case or scandal is related to a high-ranking official or is viewed to be extremely important, the Central Investigation Division of the Supreme Prosecutor's Office tends to investigate the case or scandal directly.

For certain economic offenses, investigation team personnel must have specialized knowledge in order to effectively review and analyze relevant evidence. Therefore, Korea's prosecution frequently carries out investigations into a given case with the cooperation of the related expert organizations. For instance, in the event of tax crimes, bank loan-related crimes, securities-related crimes etc., the experts of the Tax Office, the Office of Bank Supervision, or the Securities Supervisory Board are temporarily assigned to the prosecution investigation team in order to help the prosecutors' investigation.

Occasionally, the prosecution does not investigate a given case until the related authorities inspect that case in advance. In many cases, this method has proved to be very effective. In most economic crimes, the decisive clue is not easily available because the critical evidence is already concealed or destroyed. This is why such investigations will fail to reveal the entire picture unless they are conducted in a very sophisticated manner.

(ii) *Judicial Police*

Among the police force, judicial police are assigned to investigation of crimes. The judicial police that are under the control and supervision of a prosecutor are comprised of police administrative officials, superintendents, captains, lieutenants, and patrolmen.

The Korean National Police also play an important role in enforcing the economy-related laws. In Korea, the police initiate the investigation of most criminal cases including economic crimes. However, since prosecutors have the authority to supervise and instruct the police investigation under the Criminal Procedure Act, the police should report important cases to prosecutors and conduct investigation under instruction of the prosecutor.

(iii) *Special Judicial Police*

The Chief Prosecutor of the District Prosecutor's Office may appoint special judicial police officials among public officials when investigations involve such areas as forestry, marine affairs, monopolies, taxes, customs, military investigation organization and other special matters. The customs office did not have the authority to investigate economic crimes until 1990. In August 1990, the legislature vested that office with the authority to investigate customs-related crimes within the area of each customs office.

**V. PROBLEMS IN SUPRESSING  
ECONOMIC CRIMES**

**A. Difficulty in Initiating  
Investigation**

Unlike other criminals, offenders of economic crimes generally have strong influence on those in power and politics. The influence they buy brings them more money and in turn, greater funds for further influence, which brings more

money to them. This vicious circle makes it very difficult for investigators to detect and carry out investigations into economic crimes.

For example, in the case of the Hanbo Group Chairman, Chung Taesoo, Chung bribed the then-ruling party's Congressmen, Hong Ingil (W1 billion, or \$1.25 million), Hwang Byungtae (W200 million, or \$250,000), Chung Jaechal (W200 million), and then- opposition party Congressman, Kwon Rogap (W200 million), and then-Minister of Construction Kim Woosuk (W200 million). Other cases introduced in this paper show similar patterns.

## **B. Unfair Punishment System under Criminal Code**

### *(i) Method of Aggravating Penalties*

While working as a prosecutor for more than twenty years, I have noticed critical problems with the way aggravated penalties are imposed on concurrent crimes, and felt the strong need to rectify the system. Under the Criminal Code, when concurrent crimes are adjudicated at the same time, aggravated punishment shall be imposed as follows:

- (a) In the event that the punishment specified for the most severe crime is the death penalty or imprisonment for life or imprisonment without prison labor for life, the punishment available for the most severe crime shall be imposed.
- (b) In the event that punishments specified for each crime are the same kind, other than the death penalty or imprisonment for life or imprisonment with prison labor for life, the maximum term or maximum amount for the most severe crime shall be increased for one half there of, but shall not exceed the total maximum term or maximum amount

of punishments specified for each crime. Besides, the Criminal Code also stipulates that the term of imprisonment shall be from one month to fifteen years: provided, that it may be extended twenty-five years in case of aggravation of punishment.

These legal provisions, I believe, indirectly serve to favor violations of crimes, including economic crimes, rather than deterring or suppressing them.

Let me take some examples. There is no death penalty for economic crimes. Therefore, life imprisonment is the maximum penalty for economic crimes. Suppose an offender committed three independent economic crimes which call for legal penalty of life imprisonment, the maximum penalty for the offender will be just one, not three, life imprisonment terms. Economic crime offenders tend to hire the best lawyers their illegally earned money can buy. Again, suppose that a judge in charge wants to mitigate the punishment for some reason, using their's discretionary mitigation authority under the Criminal Code, a life imprisonment term could be mitigated to imprisonment for not less than seven years.

Suppose again that an offender committed more than two independent frauds and the maximum penalty for each fraud is ten years imprisonment. The aggravated maximum punishment in this case will be 15 years imprisonment, whether he or she committed two independent frauds or one hundred independent fraud crimes. Again the maximum limit of the penalty system allows an offender to benefit from committing more crimes if he or she is determined to make a fortune out of economic crime.

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(ii) *Problem with "Definite Imprisonment Term" System*

Another problem related to the Criminal Code is the unreasonableness in imposing penalty terms under the "definite imprisonment term" system. Allow me to take another example. W100 million (\$71,400 at current exchange rate of \$1:W1,400) is a lot of money for most ordinary Koreans. They may have to save for ten or twenty years to make that much money. However, an offender who defrauded W100 million (\$71,400) or less, generally, is sentenced to only one year or less imprisonment with prison labor. This lenient sentence, in many cases, motivate average offenders to serve a one year term in prison rather than reimbursing W100 million to the victim, to be released on a suspension of execution of penalty, etc. Based on the above "one year term per W100 million" rule, 15 years of imprisonment would be sentenced to those who defrauded W1,500 million (\$1.71 million).

While I believe that even one year imprisonment is not enough for W100 million, in the Hanbo Group case Chung Taesoo was sentenced to a 15-year imprisonment for various charges including fraud of W107.7 billion (\$134.6 million at then prevailing exchange rate of \$1:W800). If "one year term per W100 million" rule is to be applied, Chung Taesoo's maximum imprisonment term should be 1,070 years. Also, the scope of the fraud money involved in the case was big enough to warrant a life imprisonment term under the Act on the Aggravated Punishment of Specific Economic Crimes. Nevertheless, Chung Taesoo was sentenced to only a 15 year term under the Act, raising the value of Chung Taesoo's one year service in prison to as high as W7,180 million (\$9.0 million). Here again, the more money an offender swindles, the more advantages, not disadvantages he or she

gets. The issue of such unfair punishment under the Criminal Code has never been raised in Korea before.

**C. Too Generous Sentences**

Keeping in mind what is presented above, court sentences should be severe enough to deter offenders from committing crimes or repeating crimes. This is particularly true for economic crimes, considering the astronomical amount of damages inflicted upon individuals, societies, and the national economy. However, there has been a tendency in Korea that sentences have been too generous to deter crimes. Especially in most economic crime cases, defendants have the best lawyers helping them to reduce sentences. Furthermore, defendants get more and more favorable sentences as they appeal to the High Courts and the Supreme Court.

**D. Problems with Execution of Punishment**

As I have presented, it is not easy for the prosecution to investigate and to prosecute economic offenders, to have them sentenced to actual imprisonment. It is true that effectiveness of criminal punishment comes from strict execution of punishment as sentenced. From time to time, however, some of the convicted offenders of economic crimes or related crimes have been released either on parole or suspension of execution of punishment or amnesty.

This has been seen rather frequently in cases where politicians or high ranking government officials were involved. For example, in the Hanbo Group case, Congressman Chung Jaechul, who had been sentenced to 3 years imprisonment with 4 years suspension of execution of sentence, was rehabilitated on August 15, 1998. Congressman Kwon Rogap, who had been sentenced to 5 years imprisonment,

was released on special amnesty on the same day. Also Congressman Hong Ingil was released on suspension of execution of 6 years imprisonment on January 15, 1998, although he was arrested again on August 25, 1998 on a charge of accepting bribes of W4,500 million (\$5.625 million at then prevailing exchange rate of \$1:W800) from a conglomerate called Chunggu. Frequent use of the early release of prisoners discourages not only the prosecution but also most law-abiding public and weakens enforcement of the laws.

### **E. Fugitive Offenders**

Unlike other offenders, those of economic crimes have tended to flee easily to foreign countries with huge amounts of money illegally taken. Prior to the partial revision of the Criminal Procedure Code on December 29, 1995, fugitive offenders could enjoy two things. First, they were able to escape justice. Second, the limitations period for prosecution proceeds towards expiration during their stay in foreign countries. However, under the amended Criminal Procedure Code, a fugitive can no longer enjoy the second advantage, because the limitations period shall be suspended during the period of his or her stay out of the country. For Korean offenders of economic crimes, Japan and the United States have been the most popular hiding places.

### **F. Other Problems**

There are some other problems that have been generally recognized by other prosecutors, researchers, law professors and scholars in Korea as obstacles to effective suppression of economic crimes. These problems include: lack of specialized knowledge in economic crimes on the part of general investigators and judicial police; difficulties in collecting evidence and maintaining prosecution in trial ; and loopholes in the local law that easily allow offenders of economic crime to start

business again by using somebody else's name.

## **VI. EFFECTIVE COUNTERMEASURES AGAINST ECONOMIC CRIME**

### **A. Continued Efforts to Remain Independent of Political Influences.**

The foremost thing to overcome difficulties in initiating investigation into economic crimes is to protect the prosecutor's office from political influence. It is true that, notwithstanding the high credibility of the prosecutor's office in Korea, the prosecution has occasionally been criticized for being influenced by politics. Ironically, these criticisms come mainly from the politicians according to their political interests at stake.

The Korean prosecution has achieved remarkable progress in terms of independence. The prosecution investigated and indicted two former Korean Presidents with arrests in November 1995. The prosecution also arrested and prosecuted then ruling President Kim Youngsam's son, Hyunchul, with charges of tax evasion and accepting money in connection with a mediation in 1997.

The second most important thing is to provide specialized training to investigators and to consolidate related investigative forces. Investigators should be given an opportunity to learn general knowledge in accounting, economics, foreign trade, business administration, economic law, and so on. They must be equipped with the ability to collect and analyze all of the proof and information needed to investigate economic crimes. Presently in Korea, the Institute of Research and Training for Legal Affairs under the Ministry of Justice has been

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providing both prosecutors and general investigators with training programs in the economic crime area.

To effectively suppress these economic crimes, it is necessary to consolidate various organizations and task forces. By doing so, investigators are able to actively cope with changes in criminal trends and also build up their specialized techniques of investigation. Principal District Prosecutor's Offices in Korea have special task forces exclusively responsible for tax crimes, tariff crimes, and infringements of intellectual property. Those task forces are composed of prosecutors, judicial police, and expert personnel of the related organizations.

In addition, integration of judicial police, apart from administrative police, with the Prosecutor's Office should be considered to maximize the deterrence of crimes in general.

### **B. Revision of Punishment System in the Criminal Code**

In order to effectively suppress and deter criminal offenses, as well as economic crimes, we need to revise the current systems with regard to aggravation of punishment and definite term of imprisonment. Therefore, I strongly recommend revision of the Korean Criminal Code as follows:

- (i) The aggravation of punishment on concurrent crimes should be revised so as to add all the penalties arithmetically, whenever independent crimes are committed. For an example, if an offender committed one fraud, the maximum penalty would be less than 10 years imprisonment as the Criminal Code prescribes. If an offender committed two fraud crimes, the maximum aggravated penalty would be 20 years

imprisonment. If ten fraud crimes were committed, the maximum aggravated penalty would be 100 years imprisonment, and so on. Under the system, I believe that only few offenders would dare to commit as many crimes as current opportunities allow.

- (ii) In addition, the present system of definite imprisonment term should be revised for effective deterrence of economic crimes of an astronomical scale and, ultimately, for guarantee of the people's constitutional right of equality before the law. Specifically, imprisonment terms in the case of economic crimes should increase in proportion to the amount of damages that an offender had inflicted on a victim. Suppose \$100,000 damage is approximate to one-year imprisonment. If a swindler defrauded \$100,000, the maximum term of imprisonment would be one year. If a swindler defrauded \$1 million, the maximum term of imprisonment would be 10 years. If any person were to swindle \$134 million, like defendant Chung in the Hanbo case, he or she would have to serve 1,340 years of imprisonment.

### **C. Establishing of Sentencing Guidelines**

The Constitution of Korea provides that judges shall rule independently according to their conscience and in conformity with the Constitution and Acts. However, this provision does not necessarily mean approval of different sentences on similar cases by the same judge, or quite different sentences on similar cases by different judges. In order to avoid such unfairness and inconsistencies, something like the U.S. Sentencing Guidelines needs to be established.

**D. Restraint on Frequent Use of Parole, Amnesty, etc.**

If execution of punishment were shaken, it would shake the law and order which are the foundation of a country. Therefore, release of convicts based on parole, suspension of execution of punishment or amnesty should be exercised in a fair and impartial manner or, if possible, should be avoided.

**E. Better International Cooperation Regarding Extradition**

I am confident that no lawyers in the world are against extradition. All lawyers would agree that no country should give a sanctuary or safe haven to criminals. To make a prosperous world without crime, it is urgent for all countries in the world to share the consensus that crimes, like poverty and disease, are common enemies of mankind.

In connection with extradition, one good way is to conclude extradition treaties with as many countries as possible. Concluding regional extradition treaties seems to be a better solution. However, entering into treaties is a time consuming process. Korea has tried to conclude extradition treaties with the United States and Japan for several years. Korea, was only successful in concluding an extradition treaty with the United States this year, with its enforcement is still reserved, pending ratification of the treaty by the two countries.

Considering the time consuming process of extradition, not to mention urgent need for it, it would be beneficial for every country to incorporate the principle of reciprocity with respect to extradition in its domestic law. This would enable better cooperation in providing extradition between countries that have no extradition treaty.

**VII. CONCLUSION**

I believe the proposition “where there is a society, there is law” very well symbolizes relations between people and law. If I were allowed, it could be paraphrased as “where there is a society (or people), there is crime.” There always exist law and crime in the society we live in.

As I have presented so far, Korea has seen a lot of large scale economic crimes that have not only inflicted enormous damage on the national economy, but also discouraged and even frustrated ordinary citizens. However, the prosecutor’s office in Korea, with assistance from judicial police and other economy-related special judicial police, has been successful in coping with those economic crimes.

So long as man has a desire to make a fortune daring to break laws, it will be hard to make a prosperous society without crime. However, if we were better prepared to suppress economic crimes, we could deter economic crimes to a considerable degree and make better countries to live in. In this sense, the role of law enforcement officers is crucial to building such good systems. Their important role can not be emphasized too greatly.

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**APPENDIX I**

**MAJOR ECONOMIC CRIME CASES  
VIOLATIONS OF MAJOR ECONOMY-RELATED LAWS**

Violation of	Year	1991	1992	1993	1994	1995	1996
Construction Business Act		-	-	-	996	1,372	933
Measure Act		784	1,004	343	39	3	-
High-Pressure Gas Safety Control Act		51	-	-	58	78	170
Quality Control of Manufactured Goods Act		274	281	302	118	4	-
Customs Duties Act		336	243	998	374	556	439
Enforcement Decree of the State Properties Act		-	-	-	55	86	73
Act on Distribution and Price Stabilization of Agricultural and Fishery Products		-	-	-	77	16	31
Agricultures Cooperatives Act		-	-	-	118	10	16
Act on Government Monopoly of Tobacco Sales		190	163	216	358	882	843
Price Stabilization and Fare Trade Act		21	-	-	-	-	-
Unfair Competition Prevention Act		203	249	336	624	668	373
Illegal Cheque Control Act		36,328	48,760	55,834	85,957	104,940	84,166
Trademark Act		-	472	1,023	-	-	-
Mutual Savings Company Act		-	-	-	33	28	29
Petroleum Business Act		-	-	-	75	71	102
Fisheries Act		1,910	1,802	2,191	2,667	2,708	2,203
Decree on the Preservation of Marine Resources		-	-	-	1,158	1,577	1,499
Utility Model Act		-	-	-	144	157	148
Grain Management Act		63	-	-	-	-	-
Energy Use Rationalization Act		166	133	291	220	130	208
Foreign Exchange Control Act		606	935	682	1,547	664	421
Crimes with regard to Securities, Posts, Stamps		576	905	1,168	1,634	1,817	1,841
Design Act		-	-	-	222	233	204
Electric Appliances Safety Control Act		171	460	379	358	284	153
Punishment of Tax Evaders Act		9	71	292	961	380	603
Heavy Vehicles Act		-	4,891	6,908	935	15	8
Securities and Exchange Act		-	-	-	31	45	41
Crimes with regard to Currency		56	82	114	37	10	18
Act on Aggravated Punishment, etc. of Specific Economic Crimes		9,849	11,272	15,852	653	697	725
Patent Act		-	-	-	50	41	60
Fraud		51,100	72,640	97,854	132,537	170,613	200,879
Embezzlement		13,346	16,789	19,120	21,976	23,836	24,194
Breach of Trust		2,732	3,200	4,009	4,829	4,693	5,036
Total		118,771	164,352	207,912	258,841	316,614	325,416
% of Total Crime Cases		9.6	13.2	15.3	18.8	22.6	21.8

\* Source: "Analysis of Crimes" published by Korea's Supreme Prosecutor's Office



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**APPENDIX II**

**NUMBER OF CASES OF FRAUD, EMBEZZLEMENT, BREACH OF TRUST INVOLVING DAMAGES OF W1 MILLION (\$700) OR MORE**

Name \ Year	1991	1992	1993	1994	1995	1996
Fraud	27,517 (53.8)	40,369 (55.6)	57,566 (58.8)	96,792 (72.8)	130,023 (76.3)	149,741 (74.4)
Embezzlement	5,844 (43.8)	7,860 (46.8)	9,454 (49.4)	13,759 (62.3)	15,496 (65.0)	15,755 (64.8)
Breach of Trust	1,277 (46.7)	1,519 (47.5)	2,024 (50.5)	3,158 (64.4)	3,268 (67.4)	3,179 (63.7)
Total	34,638	49,748	69,044	113,709	148,698	168,764
% of Total Crimes	2.8	4.0	5.	8.3	10.6	11.3

\* Numbers in parentheses represent the percentage of cases involving damages of W1 million (\$700) or more, to total cases for each type.

\*\*Source: "White Paper on Crime" published by the Institute of Research and Training for Legal Affairs, Ministry of Justice.

# EFFECTIVE COUNTERMEASURES AGAINST ECONOMIC CRIME AND COMPUTER CRIME

*Soh Thiam Sim\**

## I. INTRODUCTION

In the last two decades, the Asia-Pacific region has made significant economic progress. Economic growth has led to an increase in the region's wealth and purchasing power. Money, people and goods can move with greater ease from one state to another. However, such developments have opened up opportunities for cross-border economic criminals to thrive. Due to its increased wealth, the Asia Pacific region has inevitably become a target of economic crime. Singapore is also not spared and commercial crime has resulted in a total loss of about S\$78 million in 1997.

Apart from increased wealth, the advent of information technology in the Asia Pacific has made communications and business transactions more sophisticated. As the region enters the information age, the use of computers in both commercial and non-commercial environment has increased significantly. While information technology enables business enterprises to compete globally and provides for a higher quality of life, it also enables criminals to commit a whole range of computer and computer-related crime. Indeed, the FBI predicted that in the near future almost every major crime would involve the use of some form of information technology. The emergence of new and complex techno-crime and the cross-border nature of syndicated economic crime have posed problems to the law enforcement agencies.

The challenge to the law enforcement agencies lies in devising effective measures to counter such crime.

Economic crime can range from fraud, embezzlement, forgery, insurance fraud, and computer-related offences to insider trading, and organised crime schemes involving money laundering. In Singapore, the agencies investigating economic crime are the police and the Commercial Affairs Department (CAD) which comes under the Ministry of Finance. Most of the commercial crime cases are investigated by the police in the Police Land Divisions while the complex cases are investigated by the Commercial Crime Division (CCD) of the Criminal Investigation Department. The cases handled by the CAD are more specialised, eg offences under the Companies Act, the Banking Act, the Securities Industry Act and fraud and embezzlement involving company officials who abuse their position of trust. On the other hand, computer crime cases are investigated by the Computer Crime Branch which is one of the four branches under the CCD.

The following four specific types of commercial crime and computer crime continue to be areas of concern as Singapore strives to be a financial/transport center and IT hub in the region:

- (i) counterfeit credit card fraud;
- (ii) maritime fraud;
- (iii) documents of identity fraud; and
- (iv) advance fee and telegraphic transfer fraud.

This paper was prepared to share with

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you some of our experience in handling these types of crime and the countermeasures adopted. The material for this paper is based largely on the experience of CCD.

## II. CREDIT CARD FRAUD

### A. Background

Unlike cash, credit cards operate in an international payment system, crossing jurisdictional confines. A credit card transaction can be made anywhere in the world. Currently, there are more than 700 million credit cards in circulation globally. Nearly 22,000 financial institutions are issuers of credit cards. About 13 million merchants world-wide accept cards as payment. The total annual cardholders' spending exceed US\$1 Trillion. Credit cards have thus become a lucrative business and an integral part of the banking world. Its use has gained overwhelming popularity in the Asia Pacific region in recent years, including in Singapore.

The increase in card usage has led to a rise in card fraud. In 1996, the industry lost US\$2.1 billion globally to card fraud, double that of 1995. Credit card fraud is committed by both petty offenders operating on their own and by well organised syndicates. From arrests handled by the Singapore Police, it appears that syndicates have built themselves a network between Malaysia, Thailand, Singapore, Indonesia, Hong Kong, Japan, Europe, South Africa and the U.K.

### B. Types of Credit Card Fraud

Credit card fraud is perpetrated in the following ways:

- (i) *Lost & Stolen Cards:* When a card is misplaced, lost or stolen from the cardholder, the culprits use these cards to make purchases in the

shortest possible time, before the cardholder is alerted. The only hurdle for the culprits is imitating the cardholder's signature and they are able to overcome it by producing a signature close to the cardholder's;

- (ii) *Intercepted Cards:* Cards may be intercepted through the mail or by the internal staff before the cardholder receives it. As the newly issued card is unsigned, the culprit would append a signature before using it;
- (iii) *Fraudulent Applications:* The culprits would apply for cards using a fictitious identity or the identity of another person. Upon receipt of the card, they would go on a shopping spree with no intention of making payment;
- (iv) *Colluded Merchant Fraud:* Merchant fraud is multi-faceted. It can involve a dishonest merchant making multiple charges on an unsuspecting customer's card and submitting the fraudulent charge slips to the bank for payment. The merchant may also collude with other perpetrators to accept counterfeit cards for payment. A merchant may also steal a cardholder's card information and sell it to syndicates to make counterfeit cards;
- (v) *Mail Order/Telephone Order (MOTO):* Dishonest cashiers or counter staff at shops may compromise a cardholder's account. Using computer software such as 'CreditMaster', valid card account numbers are generated from the shoppers' data. The culprits then order goods and services via

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telephone or mail, quoting the card account numbers and expiry dates. In such cases, the delivery addresses given by the culprits are usually vacant premises, or premises rented for the specific purpose of collecting the delivered goods;

- (vi) *Altered Cards*: The culprits would alter the details on a genuine card which was stolen, lost or expired. Alteration is done through a 'heat process' whereby the account details on the face of the card are flattened and new account details are re-embossed and re-encoded. The genuine account holder would be unaware of this until they receive the statement of accounts showing the unauthorised transactions;
- (vii) *White Plastic*: White Plastic is a blank plastic card, with an integrated magnetic stripe, that is used to imitate the functions of a credit card. It is not necessarily white in colour and does not bear any resemblance to a normal credit card. The culprits would emboss details of legitimate accounts on the plastic, or encode account details onto the magnetic strip, or both. As white plastic does not have the physical appearance of credit cards, they are often used with the connivance of dishonest merchants; and
- (viii) *Counterfeit Cards*: Statistics show that organised syndicates using counterfeit cards perpetrate most credit card fraud. Advanced technology enables syndicates to produce counterfeit cards of close-to-genuine quality. The final stage of counterfeit card production is the

encoding of genuine account details onto the cards. Such details are usually supplied by dishonest merchants who steal the information from cardholders.

**C. Skimming Fraud- Latest Modus Operandi in Counterfeit Cards**

By 1995, credit card fraud syndicates were able to penetrate the security systems of credit card companies and produce counterfeit cards complete with information and security codes using a "Skimmer Machine". In January 1995, credit card issuing banks in Singapore received complaints that their customers' cards had been used extensively in Europe. None of the cardholders, however, had lost their cards. Investigations conducted by CCD revealed that all the cards had been used at a local Karaoke lounge between May and October 1994. The information on the cards was stolen at the lounge and supplied to the syndicate to produce counterfeit cards. About 500 fraudulent transactions were made in Europe on these counterfeit cards, amounting to S\$160,000.

The counterfeit cards were believed to have been produced with genuine cards' information which was captured by a portable card reader called a "skimmer". The skimmer can electronically record access codes encoded in the magnetic strip of the cards. Skimming fraud has hit the card industry world-wide, causing millions of dollars in losses. In recent years, the Asia Pacific region alone suffered losses from skimming exceeding US\$10 million. More than 40 % of these losses were incurred in Japan. The detection of skimming activities is difficult as the Point of Compromise (POC) is very mobile.

In March 1998, CCD arrested a Malaysian for skimming fraud. The culprit, a waiter in a KTV lounge, had used the KTV lounge as a point of compromise

(POC) for skimming. He had obtained a skimming machine from another Malaysian and was promised M\$50 for the details of each gold credit card he swiped. The culprit stole customers' card data by swiping the cards through his skimmer and furnished the information to the accomplice in Malaysia. Subsequently, counterfeit cards were made from the data captured in the skimmer and fraudulent charges amounting to S\$16,260 incurred in Malaysia. The culprit was charged in Singapore in July 1998 for fraud offences. The Prosecution pressed for a deterrent sentence and he was sentenced to 5 years imprisonment.

#### **D. Countermeasures**

Given the nature of the crime, countermeasures against credit card fraud should be organised on a regional or international basis. The Singapore Police Force has thus undertaken the following:

- (a) Intensify the sharing of information through regular meetings and exchanges with the card industry and international law enforcement agencies to cripple cross-border syndicates;
- (b) Increase regional co-operation in ASEAN through:
  - (i) Intelligence sharing. By setting up a database on such fraud reported in the ASEAN region, early detection and apprehension of criminals can be facilitated; and
  - (ii) Appointing a liaison officer in each member country. This would help co-ordinate cross-border enquiries, investigations and exchange of information.

International co-operation should lead to development of effective strategies aimed at breaking up and defeating the spread of criminal organisations, including dismantling their alliances and support

networks. To this end, legislative mechanisms could further international co-operation; legislation on asset seizure is one such means.

In the area of prevention, the card industry and law enforcement agencies feel that both merchants and cardholders play important roles in curtailing such fraud. Merchants must be accountable for the fraud that takes place at their outlets and cardholders should assist by providing information on suspicious transactions. However, these are short and medium term solutions. A long term solution would be to make cards more difficult to be duplicated.

In particular, for skimming fraud, there is presently no one standard preventive solution. Various Task Forces have been set up to devise strategies to combat skimming fraud. The card industry and law enforcement agencies agree that timely identification at the point of compromise (POC) sites and sharing of such information can contribute to the successful crackdown on such syndicates and thus a reduction of fraud losses. The Singapore Police also believes in training to strengthen officers' capabilities and upgrade their investigative skills through training on handling transnational economic crime. We would also press for deterrent sentences against criminals so as to prevent like-minded persons from committing crimes of a similar nature.

### **III. MARITIME FRAUD**

#### **A. Types of Maritime Fraud**

Maritime fraud can range from the crude to the very sophisticated, from ship scuttling to stealing cargoes using 'phantom ships'. In most cases, it involves the issue of false or altered documents which misrepresent the existence of certain goods, their quality, value, ownership or

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location. The extent and complexity of such crimes may be beyond the capacity and jurisdiction of any single law enforcement agency to deal with. A law enforcement agency investigating such activities within its own country may not detect any particular criminal offence. However, when examined in totality, such activities may constitute a criminal conspiracy to commit fraud. However, the complications of jurisdictional boundaries make it difficult to apprehend and prosecute the offenders with success. Three common types of maritime fraud are:

- (i) *Charter Party Fraud*: In charter-party fraud, the perpetrator would first charter a vessel from an unsuspecting ship owner. After paying the ship owner the initial instalment of the freight, the culprit would offer all the available cargo space to unwary shippers. When the second or subsequent payment is due to the ship owner, the culprit would abscond with all the freight charges that he has collected, rendering the ship owner incapable of delivering the cargo to its final destination. If the shippers or consignees refuse to pay any freight surcharge to complete the shipment, the ship owner is left with no alternative but to discharge the cargo at any port and sell it so as to recover the freight charges due;
- (ii) *Ship Scuttling*: In ship scuttling, the perpetrator would charter or own an old vessel, and offer cargo space to unwary shippers at extremely low freight rates. Once the vessel is loaded with cargo, worth much more than the value of the vessel, it would set sail for an unscheduled port where the cargo is discharged and sold for the highest proceeds. The vessel would thereafter leave port for the high seas and be deliberately sunk.

Having done this, the perpetrator would claim insurance not only for the lost vessel, but also for the full value of its cargo, purportedly lost together with the vessel; and

- (iii) *Phantom Ships*: In recent years, phantom ship fraud has seen a significant increase in number. It is a developing phenomenon that requires close scrutiny. A 'phantom ship' is a vessel with a phantom identity. The registration of such a vessel is based on false information and documents provided by the perpetrators to the registering authority, and may include the vessel's name, owner's particulars and technical specifications. Such fraud is facilitated by ship registry officials who are not stringent and are prepared to grant provisional registration based on the unverified information and documents provided. Owners of phantom ships are usually shell companies using the premises of secretarial service providers, sometimes set up a few days prior to the illegal operation. The crew hired for the job are often of mixed nationalities and sometimes given false identities, thus making it extremely difficult to trace them when the phantom ship and its cargo 'disappear' in the high seas.

Between April 1997 and March 1998, CCD investigated three cases involving phantom ships. In two of the cases, Singapore companies had chartered the vessels for the carriage of cargo which subsequently disappeared en-route to the port of discharge. In the third case, the provisional voyage documents had been collected in Singapore. However, the Maritime and Port Authority records showed that none of the vessels had called at Singapore. Investigation conducted by

CCD however does not reveal any evidence to substantiate a criminal charge against any of the parties.

### **B. Countermeasures**

As the investigation and prosecution of maritime fraud is fraught with problems of jurisdiction, the best approach is to work towards preventing it. Based on CCD's experience, some possible preventive measures include:

- (i) Tightening procedures for the registration of marine vessels to prevent registration through the use of false or forged documents;
- (ii) Installation of technologically advanced gadgets on board marine vessels, such as black boxes, to enhance the identifying and tracing of movements of vessels; and
- (iii) Working in partnership with the shipping, freight and insurance industries, as well as with other law enforcement agencies.

## **IV. DOCUMENTS OF IDENTITY FRAUD**

### **A. Background**

The enhanced movement of people across borders has given rise to the use of fraudulent documents of identity. Fraudulent identification documents are used by illegal aliens to enter a country. Criminals also use fraudulent identification documents to prevent detection from law enforcement authorities. The use of fraudulent documents would make it laborious for law enforcers to establish a criminal's identity.

Whilst advanced technology has facilitated the production of high-quality identification documents, with improved anti-counterfeiting features, fraudsters

have been able to match this by producing convincing fakes. Indeed, technology will continue to facilitate such fraud and pose challenges to law enforcement.

### **B. Types of Fraudulent Documents of Identity**

In Singapore, four main types of fraudulent documents of identity have surfaced in recent years. They are:

- (i) *Photo Substituted Passports*: where the genuine passport is either purchased or stolen from the owner. The syndicates would tamper with the passport's laminate and security features to change the photograph on it. Biological data may also be altered in the photo-substituted passport;
- (ii) *Altered Passports*: which are often used by syndicate runners to smuggle children. A common ploy is to imprint a child's photograph with forged immigration endorsement onto a runner's passport. Fictitious biographical data may also be imprinted on the passport. An altered passport enables the runner to pass off as a guardian or parent of the smuggled child. Syndicates have attempted to smuggle Sri Lankan children using altered passports;
- (iii) *Counterfeit Passports*: which are the least common of fraudulent passports. The distinguishing features in a counterfeit passport are the inferior quality and lack of security features. Counterfeit Singapore international passports were detected in the mid 1990s. However, this is a dwindling trend due to improved anti-counterfeiting security features in genuine passports; and

- (iv) *Counterfeit Identity Cards*: Counterfeit Singapore identity cards were recently detected. The distinguishing features in a counterfeit identity card are the lack of security features and inferior quality. Most of the counterfeit identity cards had been used by illegal immigrants and illegal overstayers who tried to make their stay in Singapore appear legal.

### C. Proliferation of Syndicates

Syndicates have grown significantly in recent years because of two main reasons. The first is the constant demand for such fraudulent documents. Fraudulent passports are in high demand as they are needed for illegal migration purposes. This demand is created when people want to migrate and look for jobs in other countries, but could not meet immigration requirements. The Singapore passport, particularly, is highly sought after for illegal entry purposes. The Singapore passport is popular because Singapore's multi-racial community enables illegals from various nationalities to pass off as Singaporeans in other countries. Its high demand has resulted in the emergence of fraudulent passport cross-border syndicates made up of Singaporeans, Chinese or Indians.

The second reason for the proliferation of such syndicates is profitability. Trafficking in fraudulent documents of identity has become a profitable venture. Alien smuggling rackets, for instance, may charge between S\$6,000 and S\$12,000 for a 'package' which could include a fraudulent passport, accommodation and air ticket. During an operation in June 1996, police arrested 20 Chinese nationals who attempted to leave Singapore with fraudulent Singapore international passports. If we assume the subjects were charged S\$6,000 each, this particular

venture would have generated S\$120,000 for the syndicate.

### D. Countermeasures

Document fraud, in particular involving criminal syndicates, may be tackled from 4 broad angles:

- (i) *Prevention*: A preventive strategy may be adopted to counter such fraud. For instance, the document of identity may be made tamper-proof and forgery-proof. In the case of Singapore passports, much of the abuse occurs in other countries. Presently, the Singapore international passport is being re-designed. Features deterring photo-substitution, counterfeit and forgery have been factored into the passport's new design and make. The re-design process is still in progress. Other countries could similarly review their passport design to prevent document fraud.
- (ii) *Detection*: Another vital strategy is detection. This may be facilitated by a good intelligence network which can ferret out the criminals. Currently, information on criminals involved in such activities is scarce. End-users of these fraudulent documents are often reluctant to cooperate with law enforcers. Intelligence is often the key to detection. For instance, the intelligence and investigation initiatives of the Singapore Police have resulted in the prosecution of several alien smuggling syndicates. Between 1995 and 1997, 465 persons of various nationalities were identified and prosecuted in Singapore for passport-related offences. These persons included both syndicate leaders and runners, as well as users of the fraudulent



passports;

(iii) *Deterrence*: In Singapore, the authorities take a stern view of fraudulent passport offences. Courts are urged to impose deterrent sentences on those convicted of such activities. Those convicted of selling their passports are also denied future passport facilities. These measures help deter fraudulent passport syndicates and quell the supply of Singapore passports to illegal aliens; and

(iv) *International Co-operation*: Close cooperation on a regional and international basis, is another key strategy which could be adopted. Law enforcement agencies could work closely and pinpoint transit points and sources of illegal aliens. Singapore participates in ASEAN-organised discussions on trends in alien smuggling and coordinated efforts in combating the problem. Regional states could also work closely through existing Interpol channels to combat these problems.

Accelerated enforcement pressure will cause criminals to change tactics. Also, with access to the latest technology, it is unlikely that fraudulent identity document syndicates can be easily eradicated. In fact, documents of identity fraud will become more sophisticated. Law enforcement agencies may also have to employ new measures and seek new alliances, eg working closely with the airline industry, in order to identify emerging trends and nip these developments in the bud.

## **V. ADVANCED FEE & TELEGRAPHIC TRANSFER FRAUD**

### **A. Advanced Fee Fraud - Nigerian Scams**

In recent years, African nationals, operating alone or as part of larger syndicates, have employed several methods to perpetrate large scale and elaborate scams in this region. One such target is Singapore, perhaps because of its reputation as a business and financial centre. Such scams often involve extracting an advance fee from victims to transfer non-existent overseas funds.

In the early 1990s, such fraud was perpetrated largely by syndicates in Nigeria. There are several variations in the modus operandi of Nigerian scams. The following are the two more common scams:

- (i) *Bank Deposit Scams*: A syndicate member claiming to be a high-ranking government official, would send letters to various recipients, mostly businessmen. The victims are invited to receive transfers of large sums of money into their bank accounts in return for a commission. The syndicate would claim that the money is excess government funds left from over-invoiced government projects. The victims are advised to send them their bank account particulars, company letterheads and pre-signed company invoices, and also lured to Africa to purportedly arrange for the funds. Once the offer is accepted, the syndicates make the recipients pay various forms of advance fees, ostensibly for administrative purposes such as local taxes, legal fees, money-transfer fees and bribery. In Singapore, local companies and individuals in Singapore have been forwarding

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Nigerian letters to CCD. In 1995, a total of 551 letters was received but this decreased to 414 in 1996 and 187 in 1997; and

- (ii) *Money Duplicating Scams*: Another modus operandi commonly applied is the 'money duplicating scams'. Syndicates lure victims into believing that US dollar notes may be duplicated after treatment by 'special chemicals'. Victims are shown demonstrations during which currency notes are duplicated. The culprits then cheat their victims into making advance payments ostensibly to purchase the 'special chemicals'.

The increasing number of such scams has prompted Interpol's Secretary General to label them as "advance-fee frauds". He has also issued a general alert to all member countries. African advance fee fraud, like other economic crime, is subject to changes in technology. With hi-tech channels replacing conventional modes of commercial transactions, criminals now have a wider, global reach. The Internet for example is increasingly being used as a communication means. Its relative low cost has facilitated the entry of new players and providers. Its usefulness, however, is frequently abused by criminal enterprises. It is therefore not surprising that African advance fee fraud is increasingly perpetuated via the Internet. Again, law enforcement agencies would have to find updated means to combat these new problems.

### **B. Telegraphic Transfer Fraud**

Recent cases investigated by Singapore's CCD indicate that syndicates emanating from Africa were engaged in telegraphic transfer fraud. In these cases, banks in Britain and the USA received letters purportedly from their account holders, authorising the wire transfer of money to

the culprits at Singapore banks. Between March and April 1998, CCD handled 3 such cases. The sums involved ranged from US\$10,000 to US\$40,000. However, the African culprits were not able to withdraw the money successfully when they called at the Singapore banks. This was because the local authorities were alerted in time by the UK and US enforcement agencies. The close working relationship between the banks and CCD resulted in the arrest of the African culprits. They were charged in court for offences of attempted cheating and possession of forged documents and sentenced to imprisonment terms ranging from 12 to 24 months.

Like many types of cross-border crime, telegraphic transfer fraud confronts the problem of comprehensive solvability. In telegraphic transfer fraud, a fraudulent release of money in one country would result in the illegal receipt of money in another country. Even though the offender is successfully prosecuted in one country, the law enforcement agency would have solved only a part of the crime. Jurisdictional limits often hamper such crime from being solved as a whole.

### **C. Countermeasures**

Advance fee fraud and telegraphic transfer fraud may be tackled using the following broad strategies:

- (i) *Prevention*: Public awareness of such scams is a key preventive strategy. The Singapore Police works with the local media to increase Singaporeans' awareness of such scams. As such scams may come on and off, the public should be alerted on a periodic basis. This has proven to be a successful strategy as the number of victims cheated have declined over the years;
- (ii) *Detection*: As with most cross-border crime, detection through a good

intelligence network is another useful strategy. Currently, victims often hesitate to report the crimes for fear of embarrassment. There is thus little information for law enforcers to work on. In Singapore, Police-initiated intelligence efforts have resulted in the detection of several African nationals involved in advanced fee fraud. Between 1995 and 1998, 7 different syndicates were uncovered and prosecuted for criminal offences;

- (iii) *Deterrence*: In Singapore, courts are often urged to impose deterrent sentences on those convicted of fraudulent advance fee activities. The tough penalties could serve to deter such fraudsters from making Singapore a target of such scams; and
- (iv) *Enforcement*: In view of the cross-border nature of advance fee and telegraphic transfer fraud, law enforcement agencies should work closely with one another to fight such crime. This would facilitate detection, investigation and successful prosecution of criminals involved in these transnational illegal activities. Close cooperation between the local law enforcement agencies and the private sector, such as banks, could also lead to early detection and apprehension of the culprits. In the 3 cases of telegraphic transfer fraud mentioned earlier, the close coordination between the UK, US law enforcement agencies, the local banks and the Singapore Police resulted in the arrest of the culprits.

## VI. COMPUTER CRIME

### A. Introduction

Commercial and non-commercial organisations increasingly realize the

strategic potential of Information Technology (IT) and they use IT to gain competitive advantage in the rapid changing global environment. IT enables business enterprises to compete globally and ensures that we will enjoy a higher quality of life. Unfortunately, the progress of IT also enables criminals to commit a whole new range of high-technology crimes eg computer hacking, unauthorized access, and sabotage of computer materials. Organized crime syndicates also employed IT to facilitate commission of traditional offences such as forgery, cyber gaming and prostitution.

### B. Computer Crime in Singapore

A global definition of computer crime has not been achieved. In Singapore, what constitutes computer crime is defined under the Computer Misuse Act, enacted in August 1993. There are four main offences under this Act, namely, unauthorised access to computer material (eg. hacking), unauthorised access to commit further offences involving property or fraud, unauthorised modification of computer material (eg. introduction of viruses) and unauthorised use/interception of computer service (eg. unauthorised use of other's Internet account). The Act was amended in middle of 1998 to include another two offences, namely, unauthorised obstruction of use of computer and unauthorised disclosure of access code for any wrongful gain or for unlawful purposes.

There are other computer-related crimes where a computer is used as an instrument in committing crimes. These cases are dealt with under other existing legislation, for example, the Penal Code. The number of computer crime cases in Singapore is relatively low compared to other crimes. However, the numbers are increasing over the years. In 1993 and 1994, only 1 case was reported. In 1995, only 3 cases were reported. The number of cases reported

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more than doubled in 1996 to 7 and the increase was more than 5 times in 1997 to 38 cases. Until the middle of 1998, 39 cases have been reported and the figures are still increasing (table 1). Although the majority of these cases are unauthorised access to obtain computer service, committed by teenagers, there are a few cases of economic computer crime which resulted in significant losses.

Most of the economic computer crime were perpetrated by employees of the victimised companies. Some examples include a case where an ex-employee of a bank siphoned away S\$1.2 million from the bank. In this case, the ex-employee was allowed entry into the working area of the bank manager and left alone to move freely. He managed to find an unattended terminal, keyed in his account number and bank over-riding codes, and credited a sum of S\$1.2 million into his account. He knew the bank's over-riding code through 'shoulder surfing'. (i.e. peeping over the officer's shoulder to observe the keying in of the over-riding code). Later in the same day, he withdrew the entire sum of S\$1.2 million and fled from Singapore. He was eventually arrested in Malaysia and extradited. He was charged in court and

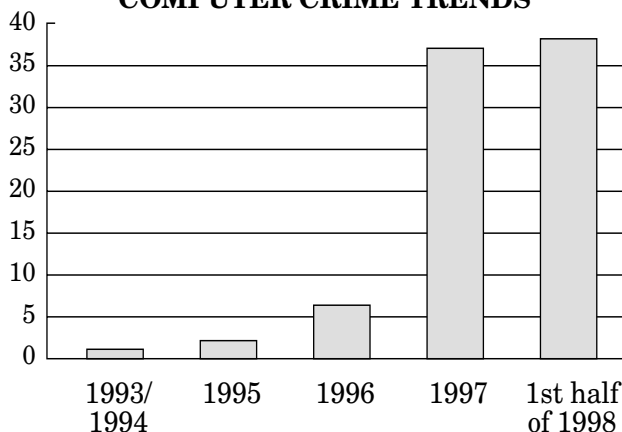
sentenced to five years' imprisonment. In another case, an employee gained access to the payroll system and credited more than S\$30,000 to his own salary. This was not detected until three years later.

In another case involving smart card technology reported in early 1997, two managers of a major cinema chain modified the cinema's ticketing system to siphon off cash amounting to about S\$500,000. The managers were convicted and sentenced to 36 months and 24 months' imprisonment. A Computer Service Engineer who assisted the manager to illegally modify the computer system, was also convicted and sentenced to one month's imprisonment.

Sabotage of companies' computer systems usually occurs when the offender is unhappy with the company management. In one such case, a disgruntled System Administrator inserted a Trojan horse program that replaced the original system files with damaged files while the back up of the system was done. He also used a logic bomb program to time the back up process so that he would not be in the country at that point of time. As a result, the company's system crashed and the entire manufacturing process came to

**TABLE I**

**COMPUTER CRIME TRENDS**



a stand still. The offender was convicted under the Computer Misuse Act and fined S\$20,000.

The profile of criminals committing cases of unauthorised access commonly known as 'hacking' is quite different from criminals who commit economic computer crime. Generally, hackers are teenage students. They usually commit unauthorised access to a computer system for kicks, without further criminal intent. Our Computer Crime Branch has solved cases where students 'hacked' into local and overseas servers for free access to the Internet. They obtained the knowledge of 'hacking' through the Internet or from friends. The technical knowledge of a computer criminal varies from novice to professionals (e.g. with tertiary education in computer related subjects). In our experience, computer criminals are often bright, serious and relish a technical challenge, but they are not geniuses.

### **C. Countermeasures**

Cyberspace will present new opportunities for criminals and change the modus operandi of crime. This has implications on the strategies and capabilities required for detecting, enforcing and preventing of crime. The integrity of the social and economic environment in which law enforcement agencies operate is therefore likely to be affected by these characteristics in the new millennium. Countermeasures implemented to fight computer crime include the following:

- (i) Expertise in criminal investigation;
- (ii) Preventive measures;
- (iii) Detection measures;
- (iv) Legislation; and
- (v) Partnerships and International co-operation.

#### **1. Expertise in Criminal Investigation**

The Singapore Police Force has responded to this challenge as early as 1981 when an officer was sent to the FBI Academy, USA, for training in computer crime investigation. Since then, officers have been sent to the USA, UK, Canada and Hong Kong for training and attachment. To further enhance our capabilities, the Computer Crime Branch of CID was set up in January 1997 to handle the investigations of computer crimes and to conduct computer forensic examination. Most of the officers of the Computer Crime Branch have received formal education in computer studies. They were also trained locally by professional trainers from the USA and UK to handle computer forensic examination.

Criminals who commit high-technology crime usually leave behind electronic fingerprints. We start by asking, "What needs to be done?" in order to leverage on the opportunities provided by IT. Our experience shows that electronic fingerprints has helped the investigation agency to solve crimes. We must take on the challenge of technology and develop capabilities to retrieve and examine these electronic fingerprints.

#### **2. Preventive Measures**

The importance of IT security is always neglected by the users. Generally, there is a lack of security standards for those systems operating in cyberspace. A sound security system will deter, if not reduce, the incidence of computer crime. Public education is a means to bring security awareness to the community. Towards this end, our National Computer Board and the Computer Crime Branch have held regular seminars and talks to highlight the importance of computer security to the industry.

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3. Detection

Most of the computer crime cases are either not detected or are discovered sometime later. In one of the cases highlighted earlier, the offence was only discovered three years later. In our public education seminars/talks, we constantly remind the business community to adopt security practices to detect the occurrence of crimes. Such measures include physical security, proper procedures and audit capabilities. Early detection of a crime will prevent the victim from suffering drastic losses.

4. Legislation

Legislation has to be constantly reviewed to ensure that it can keep up with technological progress and adequately deal with computer crime. The Computer Misuse Act was enacted in August 1993 to make provision for securing computer material against unauthorised access or modification. With the increasing use of computers, not only has the number of computer crimes increased, but new crimes have also come about. The Act was thus amended in July 1998 to enhance the penalties against computer criminals and provide stiffer penalties for repeat offenders. It also introduces new offences of unauthorised obstruction of use of a computer and unauthorised disclosure of access code for any wrongful gain or for any unlawful purpose. The concept of 'protected computers', which are systems used in connection with national security, banking and finance, emergency services and essential public services, was also introduced and offences committed against these systems would attract enhanced penalties. The tough laws will serve as a deterrent to potential computer criminals. In addition, the amended Act also provides additional police powers for investigation into computer crime.

5. Partnerships and International Co-operation

Law enforcement agencies need to tap industry and academic expertise in the field of forensic computing. Information technology is wide ranging and no one person can profess to know everything about information technology. Partnering with various organisations having expertise in the related fields will complement our capabilities. We will need to liaise and employ the services of industry experts to retrieve and analyse evidence on proprietary devices or software.

There is also increasing need for countries to cooperate in the fight against computer and computer-related crimes. With the rapid expansion of large-scale transnational computer networks and the easy accessibility of many systems through communication lines, such crimes are easily committed on an international scale. A criminal can physically operate in one country, access systems in another country, and cause the consequences to be felt in a third country. Committed and concerted mutual co-operation and assistance can assist to combat transnational computer crimes more effectively. The commitment among nations to assist each other in investigation and prosecution can also resolve potentially complex issues of territorial jurisdiction, extradition and trans-border searches and seizures of electronic evidence.

**VII. CONCLUSION**

Organised economic crime and transnational computer crime can result in significant losses of revenue and resources. It could render the financial and legal systems vulnerable and diminish the Asia Pacific region's credibility as an investment and business hub. This would in turn adversely affect the region's economic wealth.

Effective responses are needed to counter organised economic crime and computer crime, both at the national and international levels. At the national level, a review of existing legislation may be necessary to address the difficulties in prosecuting cross-border criminals. Close cooperation between the police and private sector (e.g. banks, credit card service providers, IT service providers) would facilitate better exchange of information. This could lead to the early detection and apprehension of culprits.

On an international level, regional States should work closely with one another to fight economic and computer crime. This would facilitate investigation and prosecution of cross-border criminals. States would eventually recognise that policing is now carried out over a global community. In the region, there are currently conferences organised by regional groupings such as ASEANAPOL on cross-border crime and enforcement concerns. Such regular meetings are helpful in fostering mutual understanding and cooperation. They may also enable regional States to map out long-term working relationships with one another.

In the next millennium, policing will be carried out over a borderless community, rather than within the confines of national boundaries. Therefore, Asia Pacific States should aim towards cultivating strong links in the areas of intelligence and operations. In this way, we can overcome the limits posed by such crimes' cross-border nature and speed at which the criminals work. We could then look forward to solving such crimes in a more effective and comprehensive manner.

# CRIME AS THE GROWING INTERNATIONAL SECURITY THREAT: THE UNITED NATIONS AND EFFECTIVE COUNTERMEASURES AGAINST TRANSNATIONAL ECONOMIC AND COMPUTER CRIME

*Slawomir Redo\**

## I. INTRODUCTION

This paper, which seeks to integrate criminological, legal and public policy perspectives on transnational crime, emphasizes that crime has markedly extended its reach beyond any borders. It also has an exemplary negative influence on the official domestic economies. With the rapid advance of the Internet, perpetrating transnational economic and computer crimes became easier. This paper reviews various forms of transnational illicit trafficking, including illicit profits derived from it, and addresses the problems of search, seizure and confiscation of those. It emphasizes that transnational crime poses an increasing threat to the economies and security of States, as seen from the United Nations standpoint. In conclusion, this paper calls for further strengthening and consolidating of criminal policy and legal action. This would enhance the effectiveness of global countermeasures against transnational crime.

## II. DIMENSIONS OF TRANSNATIONAL CRIME

Transnational crime, which is increasingly becoming organized, assumes many dimensions. From the public policy (governance) perspective it is seen as an

expression of “uncivil society”<sup>1</sup>. From the criminological (crime prevention and criminal justice) perspective, it is a threat to the security and well being of peoples<sup>2</sup>. In practical terms, one may note that most representative dimension of transnational crime includes at least two State jurisdictions, not necessarily adjacent to one another<sup>3</sup>. This will be demonstrated by the first of the three cases below.

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<sup>1</sup> Kofi Annan, Secretary-General of the United Nations. In November 1997, the CICP/ODCCP/UNOV was designated to deal with criminal manifestations of “uncivil society” (see: doc. A/51/950, *Renewing the United Nations: a programme for reform*. Report of the Secretary-General, para. 209). United Nations resolutions and other documents may be obtained electronically through the Internet at <<http://www.un.org>>.

<sup>2</sup> United Nations Declaration on Crime and Public Security, General Assembly resolution 51/60 of 12 December 1996 (art.1).

<sup>3</sup> Criminological definition suggested by G.O.W. Mueller, speaks of “criminal activities extending into, and violating the laws of several countries” (*Global Report on Crime and Justice*, (chapter 9), Oxford University Press, New York 1999(forthcoming)). Treaty definition of transnational organized crime has been a subject of discussions in the process of elaboration of a draft United Nations convention against transnational organized crime, due to be finalized by the end of the year 2000. Ongoing drafting work is officially reported to the General Assembly through the Economic and Social Council, in the form of reports on the sessions (sixth-eighth) of the Commission on Crime Prevention and Criminal Justice (docs E/1997/30-E/1999/30).

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On 17 December 1995, huge quantities of firearms and ammunition were air-dropped by parachute into Purulia (West Bengal, India) from an AN-26 Russian-made aircraft. An estimated two to three hundred AK-47 assault rifles, 17 000 rounds of ammunition, 8 rocket launchers, 80 anti-tank grenades, seven 9 mm pistols and various combat accessories were among the dropped weapons. Reportedly, in addition to this cargo, two other consignments were dropped in Pakistan, and another in the sea of Thailand. The plane, purchased in Latvia, carried arms loaded in Bulgaria. It was manned by a 4 person crew of Latvian, Dutch, Danish and British. Before it was stopped by the Indian authorities in Bombay, the plane transited Pakistan, Thailand, and attempted to land in Bangladesh. The shipment it carried was financed by a Hong-Kong based Chinese with connections to a Romanian arms trafficker, as well as British, Chinese and Indian shipping companies. The plane was impounded, and the crew of the aircraft have been arrested and detained by the Indian authorities. However, the two main operatives in the scheme remain at large. One of them is also wanted for gold and drug smuggling, and for counterfeiting US \$100 bills. On behalf of the Indian police, INTERPOL issued its pre-arrest “red notices”<sup>4</sup>.

The following example of a “local” transnational crime shows how it may be

“grounded” in one particular area. In 1996, in a border triangle between Argentina, Brazil and Paraguay, in a Paraguayan city Ciudad del Este, the law enforcement agencies of the Paraguayan and Brazilian Governments jointly carried out an investigation with a view to eliminating a cross-border firearms trafficking between those two countries. The scheme involved a legal purchase (with an export license) of such weapons in the U.S., and their legal import (no import license was necessary) to Paraguay. Shipments arriving to Ciudad del Este were sold to Brazilian customers, and illegally brought (import license is required) into one of the Brazilian bordering cities. There they fell into the hands of organized crime traffickers. Alternatively, shipments ordered in Ciudad del Este ended up directly from the U.S. in Sao Paulo (Brazil), where they were sent to the “favelas” (slums). There, again, they fell into the hands of organized criminals<sup>5</sup>. Reportedly, in the same Paraguayan city, organized crime groups were involved in cross-border trafficking to Argentina and Brazil of various other contraband (e.g., drugs, alcohol, cigarettes, pirated compact disks, software). The city’s trade industry were, partly, involved in the illicit manufacturing of such commodities, and, plainly, in their massive sale. It was estimated that the official gross national product of Paraguay (US \$ 10 billion) matched the profits from provision of such contraband, that ends up in Argentina and Brazil and undermines their official economies. To visualize the amount of illicit trafficking originating in Ciudad del Este, in 1997, according to an Argentine intelligence report, more than 1500 freight containers passed through the borders

<sup>4</sup> Donald Manross, Developing new links and international policing (in:) Pericles Gasparini Alves, Daiana Belinda Cipollone (eds), *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies. An Action-Oriented Agenda*, United Nations Publication, Sales No. G.V.E.98.0.8, New York and Geneva 1998, p. 105; Raymond Bonner, A world of arms: weapons in the sky. The murky life of an international gun dealer, *New York Times*, 14 July 1998.

<sup>5</sup> Silvia Cucovaz, Interrelationship between illicit trafficking in small arms, drug trafficking and terrorist groups in South America (in:) Pericles Gasparini Alves, Daiana Belinda Cipollone (eds), *Ibid.* p. 38.

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without scrutiny. According to other estimates, most of the 40 000 people crossing each day the bridge between Paraguay and Brazil were not controlled. In a spot check by the Brazilian police, within two hours, they arrested 200 illegal immigrants.

Finally, a Taiwanese businessman, taking advantage of good investment opportunities, who built up his toy factory in Ciudad del Este, reportedly became a victim of extortion demands. These were carried out by two Chinese gangsters, and one Paraguayan woman (such groups are also composed of Arabic nationalities). In sum, the amount of criminal violence (e.g., extortions and gang wars), vice (gambling), perpetrated by various foreign and Paraguayan nationals in the city, and transnational smuggling originating from it, is so great, that one of its residents sarcastically and with resignation concluded to a visitor: This is the United Nations of crime<sup>6</sup>.

The Transnational nature of crime is brought home to almost any visitor of the Internet. One may imagine a group of computer users involved in penetrating, for financial gain, a computer system of a trade company. The penetration takes place indirectly through computer networks in other jurisdictions, in the same State or abroad. Investigating law enforcement agencies, tracing the origin, finds out that its last stage was carried out by a computer in country B. The law enforcement authority turns to that country for assistance under an existing mutual legal assistance treaty. Country B offers such assistance, but informs that it was only a

transit country through the computer network of which the penetrators send their communications to the victimized trade company. That communication arrived earlier from country C with which country B has neither a mutual legal assistance treaty nor friendly relations. Ultimately, after further such tracing, it turns out that both the penetrators and the victim reside in the same jurisdiction in country A.

Obviously, perpetrators want to conceal their identity by routing their actions through countries from which it would be difficult, if not impossible, to detect their original location<sup>7</sup>. In fact, similar penetration has already taken place in the United States, as reported by the press<sup>8</sup>. What appeared to be a transnational crime planned abroad, turned out to be local, in the sense that both offenders and victim were of the same country and place of residence. In the virtual world nowadays, the "United Nations of crime" has arrived at the doorsteps of Internet users under the guise of foreign involvement.

### III. DIMENSIONS OF THE INTERNET

One hundred and ninety four countries with about 70 000 networks are now connected by one Internet meta-protocol. In January 1997 there were 16.1 million computer hosts worldwide serving 57 million users, not including 14 million who have access only to electronic mail. All those included governments, transnational and domestic financial and commercial institutions, millions of private individuals and, last but not least, academics, with whom the dynamic growth of the Internet

<sup>6</sup> Sebastian Rotella, *Jungle hub for gangsters, terrorists*, *The Yomiuri Shimbun* (Tokyo, Japan), in the article of 7 September 1998 jointly published with *The Los Angeles Times*, p. 12. Other alleged facts and estimates are also drawn from that article.

<sup>7</sup> This example was drawn by Mr. Gregory P. Shaffer, Computer Crime Unit, U.S. Department of Justice (private conversation, 6 October 1998).

<sup>8</sup> *Ibid.*

started<sup>9</sup>. Although the majority of computer servers are located in the developed world, this proportion becomes more favourable to developing countries, where the growth of the Internet is particularly strong<sup>10</sup>. Needless to say, this dynamic growth, currently estimated at a rate of 20 % a month, basically takes place in the developed world (North America and Western Europe)<sup>11</sup>. However, the U.S. holds 80 % of all global computing power. As of this writing, there existed about 320 million world wide web sites, mostly in the developed world<sup>12</sup>.

Estimates suggest that by the year 2001 there may be 1 billion personal computer users, with one third connected to the Internet (that is about ten fold more than in 1996). This about 175 million of them

will have an access to, and the possibility to enter into, various financial transactions facilitated by this medium<sup>13</sup>. By the year 2001 the value of financial operations carried out through the Internet may exceed US \$ 210 billion.

This may be very little in comparison with the total volume of economic transactions carried out in the world now, by means other than the Internet. But one would need to put such estimate into perspective to realize, for instance, that what is now 100 % of all available data and information in the world, will represent only 5 % of that available in 50 years<sup>14</sup>. Consequently, the growth of electronic commerce on the Internet will alter the proportions between the Internet and non-Internet-based commerce steadily and more dramatically, as the time goes by.

Last, but not least, in sharp contrast with the facts, figures and estimates suggesting expanding dimensions of the Internet, one must note that in the world population of about 6 billion people, more than 60% of the world's population have never made a phone call<sup>15</sup>. The great divide between developed and developing countries may be even greater in the years to come.

<sup>9</sup> In 1969 Internet begun its origins as a very small internal network connecting about 100 computers of scientists and engineers forming a team of the Advanced Research Projects Agency (*ARPANET*) of the U.S. Department of Defense (DOD). Its international outreach started in 1971. "Cyberspace", as a term, was first used in a science-fiction novel "Neuromancer" by William Gibson (1964). Currently, "cyberspace" tends to be equated with "the Internet," though cyberspace is generically broader than the Internet, and better communicates a meaning of this new multidimensional, non-physical global community.

<sup>10</sup> Matrix Information Directory Services, Inc. (MIDS), Austin, Texas, USA <<http://www.mids.org/>>.

<sup>11</sup> Neil Chambliss, Lee W. McKnight, and Richard J. Solomon, *Re-Engineering the Elephant: Organizational Alternatives for Accelerating Internet Access in Africa* (in:) White Paper for United Nations Development Programme in Cooperation with the World Bank, US National Aeronautics and Space Administration, US Agency for International Development, US Department of State, 16 May 1995, <<http://www.undp.org/sdnp/aif/mitrep.html>>.

<sup>12</sup> <<http://www.neci.nj.nec.com/homepages/lawrence/websize.html>>

<sup>13</sup> Estimates published by a private transnational company, International Data Corporation <<http://www.idcresearch.com/HNR/ii7sf.htm>>.

<sup>14</sup> S.L. Amranathan, *Crimes related to the Computer Network*. From *New Economic Order to New Information Order*, position paper submitted for the Experts Meeting on "Crimes related to the Computer Network," UNAFEI, 5-9 October 1998, para. 3 (available from UNAFEI).

<sup>15</sup> Pekka Tarjanne, Secretary-General of the International Telecommunication Union, *TeleEuropa's Communications Newsletter*, 30 October 1995.

#### IV. TRANSNATIONAL ECONOMIC AND COMPUTER CRIME

Abuse of the Internet for illicit or criminal purposes makes economic and computer crime more intermingled than before. Before the computer era, illicit profits derived from various forms of economic crime could be concealed by fraudulent (paper) book-keeping. With the outset of computer (“paperless”) book-keeping records held on stand alone machines could be more readily manipulated. However, the outcome of such manipulation could be exclusively identified and pursued within a local parameter. Local computer networking and global computer networking through the Internet overwhelmed such limits. It enabled honest and dishonest users to carry out paperless financial transactions anyplace in the world. For the latter ones, it also allowed them to hide and legalize illicitly earned profits any place where domestic legislation and regulatory schemes were more favorable (“tax havens”). The burden, anxiety or fear of carrying through State checkpoints cash of, e.g., US \$ 1 million, in false-bottomed suitcases or smugglers’ vests is no longer felt. By one computer key stroke, the same amount of cybercash within a moment ends up in a bank account in one of the many tax havens in the world. There is no physical trespass of a border, only virtual<sup>16</sup>.

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<sup>16</sup> Obviously, crimes related to the computer network go beyond money laundering, and involve violations the essential motive of which is not economic. For instance, stealing passwords (hacking), sending harrasing e-mail or intrusion to destroy computer records, including “cyberterrorism”, have other motives. This article focuses mainly on economic computer crimes.

<sup>17</sup> E.g., Trafficking in children for medical exploitation <<http://www.uia.org/uiademo/pro/d4271.htm>>.

#### A. Illicit Trafficking: Facts, Figures and Estimates

Facts and figures about various forms of transnational trafficking, even if occasionally questionable, are plentiful<sup>17</sup>. Every day, on a case-by-case basis, the international press reports on spectacular seizures, arrests and convictions. Police and other criminal records which evidence how the criminal justice apparatus handle those cases hardly confirm the composite picture of developments in illicit trafficking, especially if it transcends national boundries. However, there are no transnational crime statistics on these phenomena; there is hardly any country in the world whose statistics would account for them, and there is no treaty definition of transnational crime or transnational organized crime. Moreover, amongst geopolitical, legal and economic factors, the volume of illicit traffic in certain commodities would also be influenced by black market relations between the demand for and supply of that commodity, and the more active or passive activities of law enforcement apparatus involved in seizing it.

Depending upon the assumptions and methodologies of experts, governmental authorities, international and non-governmental organizations, informed estimates on the full scope of the traffic in the commodities in question, and resulting illicit profits, will vary<sup>18</sup>. To these many limitations is added still another: none of those estimates consider what proportion of illicit profits remains within the jurisdiction of the country of origin of the assessed activities, and what is abroad, thus making them really transnational.

Questionable as the estimates may be, the most overarching estimate, supposedly covering all forms of illicit trafficking, was hazarded by a group of economists in 1997, and reported by the Financial Times<sup>19</sup>.

According to that source, the total annual amount of laundered money would be about US \$ 1000 billion, resulting from illicit traffic in various commodities. In the most frequently repeated, but also speculative estimate, the first part of this sum (US \$ 300-500 billion) involves annual sales of drugs; out of which there are enormous, unaccounted for and, of course, untaxed profits.<sup>20</sup> The lowest estimate of US \$ 85 billion acquired in the late 1980s from illicit sales of cocaine, heroin and cannabis in the

US and Europe equalled the individual Gross Domestic Products (GDP) of 150 of the 207 economies of the world. The highest estimate of USD \$500 billion would approach 13 % of the combined GDP of the European Union (EU) countries, 8 % of the GDP of the U.S., or about 4 % of countries of the Organization for Economic Cooperation and Development (OECD)<sup>21</sup>.

Apparantly, the turnover in and illicit profits obtained from selling other commodities follow suit. Stolen art is said to be second to drug trafficking, in turnover and in laundering the profits<sup>22</sup>. Not corroborated by any evidence, this is undermined by an equally unsubstantiated and competing claim that it is the illicit traffic of flora and fauna which occupies second place<sup>23</sup>.

<sup>18</sup> "Police seize at most 40 percent of the drugs coming into the U.S. and probably a smaller percentage of those entering western Europe. The supply of nuclear materials is obviously much smaller, but law-enforcement agents are also less experienced at stopping shipments of uranium than they are in seizing marijuana or hashish. To believe that authorities are stopping more than 80 percent of the trade would be foolish" (Phil Williams and Paul N. Woessner, *The Real Threat of Nuclear Smuggling*, <<http://www.sciam.com/0196issue/0196williams.html>>. Nevertheless, all appear to agree that the number of incidents is growing and represents a disturbing trend, especially in qualitative terms. For example, the New York Times in February 1995 cited a "Western European intelligence report" to the effect that the number of cases of actual or attempted nuclear smuggling from former communist countries reported to Western governments had more than doubled in 1994, to 124 from 56 the previous year and 53 in 1992. Furthermore, of the 1994 cases, a total of 77 had involved uranium or plutonium rather than "more harmless materials". For its part, the German federal criminal police (the BKA) recently reported that it had investigated no fewer than 267 cases of "illicit traffic in nuclear or radioactive materials" during 1994, compared to 241 in 1993, 158 in 1992, and just 41 in 1991. See A. Robitaille; R. Purver, *Commentary No. 57, Canadian Security Intelligence Service Publication, Smuggling Special Nuclear Materials*, <<http://www.csis-scrs.gc.ca/eng/comment/com57e.html>>.

<sup>19</sup> Vincent Boland, *Earnings from Organised Crime Reach 1000*, *Financial Times*, 14 February 1997.

<sup>20</sup> Freda Adler, G.O.W. Mueller, William S. Laufer, *Criminology*, (sec. ed.) Mc-Graw Hill, Inc. 1994, p. 327. This estimate was originally calculated by the Financial Action Task Force working within OECD. United Nations estimates, based on cash flows from international banking and capital account statistics, suggested that up to US \$ 300 billion globally turned over annually may have been available globally for lundering in the 1980s, amounting now to US \$ 500 billion in the 1990s. This is to represent 8 - 10 times of the original value of drugs before their entering the US market, i.e., \$ 50 billion. See further: United Nations Drug Control Programme, *Economic and Social Consequences of Drug Abuse and Illicit Trafficking*, UNDCP Technical Series Number 6, Vienna 1997, p. 27.

<sup>21</sup> *Human Decelopment Report 1997*, Oxford University Press, New York 1997, pp. 222-223.

<sup>22</sup> Norman Palmer, *Statutory, forensic and ethical initiatives in the recovery of stolen art and antiques* (in:) Norman Palmer (ed.) *The Recovery of Stolen Art. A Collection of Essays*, Kluwer Law International, London 1998, p. 4.

<sup>23</sup> Deutsche Presse Agentur, 17 November 1994 (*Global, op.cit* note 3., (chapter 9)).

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Available estimates show the possible financial scale of illicit traffic. International traffic in human beings, which is claimed to involve millions of people, reportedly produced about US \$ 9.5 billion in illicit profits in 1994,<sup>24</sup> stolen, smuggled and looted art between US \$ 4.5 to 6 billion a year<sup>25</sup>, and in trafficked flora and fauna, between US \$ 2-3 billion a year<sup>26</sup>. Quite notable are believed to be the illicit profits caused by maritime fraud, illicit trafficking in human organs, and in motor vehicles<sup>27</sup>. Last but not least, in 1997, while illicit traffic in computer software reportedly caused losses of US \$ 11.4 billion in roughly half of the world (80 surveyed countries) against US \$ 17.2 billion in revenues, there were also unaccountable illicit profits untaxed by States<sup>28</sup>. The heaviest losses in taxes, and the highest profits for illegal traders, were absorbed because of developing countries which seemed to be a scene of, comparatively, more cases of software pirated from the originals manufactured in developed countries, than within developed countries themselves<sup>29</sup>.

Separately, one should mention a very sizeable traffic in small arms and light weapons, but the proportion between traffic driven by political and economic motives cannot be ascertained. While aggregate estimates are extremely tenuous,<sup>30</sup> information on black market prices of single items shows a great disparity in prices, hence illicit profits<sup>31</sup>. Profits from that traffic are additionally increased from barter transactions involving illicit selling

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<sup>24</sup> D. Torres, *Esclaves: 200 Milliond' Esclaves Aujourd'hui*, Phebus, Paris 1996; Financial estimate of the International Center for Migration Policy and Development (Global, *op. Cit* note 4 (chapter 9)). In comparison with that suggested in the above book, the United Nations estimate is of 4 million people trafficked worldwide annually. Also "[t]here is an estimated seven billion dollars annual profit in this market" (Gillian Caldwell, Co-Director of the Global Survival Network, interviewed by Associated Press, 22 June 1998).

<sup>25</sup> Global, *op. cit* note 3 (chapter 9).

<sup>26</sup> Estimate of the World Wildlife Found (Global, *op. Cit* note 3 (chapter 9)).

<sup>27</sup> See further, Global, *op. Cit* note 3. (chapter 9).

<sup>28</sup> Software Publishers Association, *Software piracy and global competitiveness. Report on global software piracy, 1998* <<http://www.spa.org>>.

<sup>29</sup> Global, *op. cit* note 3 (chapter 9).

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<sup>30</sup> The legal turnover of the armaments industry "has been estimated at around \$ 5 billion a year-plus at least as much again on the black market" (The Economist, Hey, anybody want a gun ?, 16 May 1998, p. 47).

<sup>31</sup> An AK-47 automatic machine gun in Albania can be bought for a few U.S. dollars. In Uganda, an AK-47 can be purchased for the cost of a chicken and, in northern Kenya, it can be bought for the price of a goat (Note by the Secretary-General, Impact of armed conflict on children, UN doc. A/ 51/306 of 26 August 1996, para. 27). Research in South Asia reveals that locally produced AK-47s are everywhere, but those manufactured in national arsenals still fetch a higher price (The New Field of Micro-disarmament: Addressing the Proliferation and Buildup of Small Arms and Light Weapons, Brief 7, based on a study prepared for the German Foreign Office by Edward J. Laurence, assisted by Sarah Meek, Bonn International Centre for Conversion (BICC), September 1996, p. 13). In Japan, a handgun is as expensive as a compact car (Statement in : Firearms Enforcement Strategy of Japanese Police, Firearms Control Division National Police Agency, Japan). The profit margins for retail shipments of firearms are high. For example, and reportedly, in the Purulia drop case, the contracting company operated at a 65 % profit margin (Bonner, *op.cit.* note 4.).

<sup>32</sup> R.T. Naylor, *The structure and operation of the modern arms black market* (in:) Jefferey Boutwell, Michael T. Klare and Laura W. Reed (eds), *Lethal Commerce: The Global Trade in Small Arms and Light Weapons*, Committee on International Security Studies, American Academy of Arts and Sciences, Cambridge, MA 1995.

of arms for diamonds, precious gems, jade, ivory, teakwood, recreational drugs, and also looted antiques<sup>32</sup>.

In other forms of illicit trafficking, financial profits may still be very considerable, e.g. in the case of traffic in nuclear material<sup>33</sup>. However, experts, even if they emphasize the seriousness of nuclear smuggling, add also that such traffic "has been overblown by the media because it was a good scare"<sup>34</sup>. Secondly, they are not sure whether the motive of smuggling (political or criminal) has been identified clearly enough. Only according to some is it now, with the onset of Mafia-type organizations, becoming increasingly criminal, whereas earlier it had mainly been political<sup>35</sup>. Nonetheless, transactions in all the above mentioned commodities would contribute to part of a total of an estimated US \$ 1000 billion in money to be laundered. In what percentage, it is impossible to say.

### **B. Illicit Trafficking: Search, Seizure and Confiscation of Illicit Profits**

Traffic in most of the above involves receiving countries but also countries where obtained illicit profits may be finally returned as laundered, through the network of others and legislation vulnerable to such processes. In 1998, the United Nations listed 48 countries and territories with such legislation attractive

to stock fraudsters, drug traffickers, corporate embezzlers and commodity smugglers. The problem seems to be not only identified with a particular location, but also with evolving comparative advantages that any banking system in the world may offer their clients<sup>36</sup>.

Technically, identifying possible money laundering schemes is a tedious task. In the U.S. the volume of annual money wire transfers reaches approximately \$500 trillion per year. Assuming that all laundered funds pass through the United States, sent by wire transfers (either single or several), a median of 0.05 percent was suggested to represent the portion of money which is laundered<sup>37</sup>. Estimates concerning other countries in the world are, generally, not available (except for Australia)<sup>38</sup>. For the time being, finding out the global extent of money laundering is impossible.

The legal and technical context enabling search, seizure and confiscation of incriminated funds gets even more complicated in cases of identifying computer records of operations supporting illicit traffic. As official traders rely more on computer networks, so do the criminals, organized or not, who carry out their operations<sup>39</sup>. Commission of crime by using

<sup>33</sup> In an unsuccessful police entrapment attempt, US \$ 250 million had been offered for four and a half kilograms of plutonium (Barry Kellman, David S. Gaultieri, *Barricading the nuclear window - a legal regime to curtail nuclear smuggling*, University of Illinois Law Review, Vol. 1996, Number 3, p. 672). See also: Pricles Gasparini Alves, Daiana Belinda Cipollone (eds), *op.cit.* note 6, pp. 125-152.

<sup>34</sup> Statement ascribed to the IAEA official, as quoted in: Barry Kellman, David S. Gaultieri, *Ibid.*, p. 676.

<sup>35</sup> *Ibid.*, p. 673.

<sup>36</sup> Financial Havens, Banking Secrecy and Money Laundering, United Nations Office for Drug Control and Crime Prevention, Global Programme Against Money Laundering, Preliminary Report, 20 May 1998, p. 51.

<sup>37</sup> For further details see: OTA, *Information Technologies for the Control of Money Laundering*, September 1995 (OTA-ITC-630).

<sup>38</sup> John Walker, *Estimates of the Extent of Money Laundering in and through Australia*, AUSTRAC, Sydney 1995.

<sup>39</sup> Raphael Winnick, *Searches and seizures of computers and computer data*, Harvard Journal of Law & Technology, Vol. 8, No. 1 (1998), p. 76.

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traditional techniques only (e.g., making the paper based operation of money laundering as seemingly legal as possible) is already a very difficult investigative and judicial task. But with the increasing use of computer networks for criminal purpose, the difference in the methods of operation (paper based or paperless) makes a tremendous impact on the way in which two suspects, using, respectively, traditional or modern techniques, will be handled by the criminal justice system. This will be illustrated by the example below.

Mr. J. D., who is a citizen of country A, had been suspected of illicit drug trafficking to country D, through country B and C. While he was staying there, police of country D surveilled his activities. Police surveilled visits made to Mr. J.D's house, and controlled incoming letters. After obtaining a search and arrest warrant, provided in two days at the request of the police by a judge, and delivery of last mail of which police knew contained incriminating material, they decided to start with the search. Police simultaneously searched the premises rented by Mr. J. D., and where he lived. They entered the rented premise by force, and found large quantities of drugs hidden in a cargo with officially imported coffee. In Mr. J. D.'s house, which stood open, police found papers documenting his illegal transactions with accomplices and banks in which he deposited profits from those transactions. They also found suspected papers, located in a container in a locked safe, which they opened with the assistance of a locksmith. Further, they found in his house merchandise (TV set and a radio), allegedly stolen from a nearby shop. Outside his house, police found a car with a counterfeit vehicle identification number. Police seized the drugs, papers, TV set and radio, sealed off the rented premises and his house, and towed away a suspect

vehicle. Since, at the time of the police action, Mr. J. D. was visiting a neighbour in the vicinity of his house, and noticed an imminent danger of being arrested, he managed to elude police and flee to country A. An extradition request prepared by country D, was not granted by country A because that country's constitution prohibits extradition of its own nationals abroad. Instead, country A initiated preparatory proceedings with a view to determining if Mr. J. D. may be charged with a serious criminal offence in country A.

Depending on the legal tradition of a country (common, civil law) from which one may want to assess the situation of countries A and D, there will be rather clear answers to the questions asked. If actions taken by their respective criminal justice authorities regarding various objects searched and/or seized, and Mr. J. D. himself, were legal or not. With more difficulty, the same actions may be legally assessed in terms of their compliance with the United Nations criminal justice and human rights standards and norms. Hardly in any country in the world, and not in the United Nation law at the time of this writing, could one find comprehensive and uncontested answers to the following series of questions, if they were posed in relation to an alleged crime related to the computer network:

- (i) May police monitor the traffic of data on the Internet ?
- (ii) Is the data regarded as a tangible or intangible object ?
- (iii) Can criminal justice authorities of countries B and C be asked for legal assistance, in finding out if the Internet service provider(s) (ISP) in their countries have any computer records evidencing a suspect's transactions, both with alleged accomplices and/or financial



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- institutions ?
- (iv) Is the ISP under the obligation to keep its own records for a specified period of time for possible inspection by the police in cases of alleged computer criminal activities of receivers of their service ?
  - (v) What if a suspect used an alias on the Internet to hide their true identity and original location from which s/he was communicating by the Internet ?
  - (vi) Is it necessary to catch a suspect in the act (striking the keys on the computer's console) or is it sufficient that incriminating data would be found on the computer in their absence?
  - (vii) Does the ISP have an obligation to cooperate with the police in country A, by notifying the arrival of specific suspected messages ?
  - (viii) What happens if some of those messages were not anticipated ?
  - (ix) May any messages be read by their content, or only from whom they originate ?
  - (x) Should the search warrant and subsequent possible seizure be particularized or extended to any data found on the suspect's computer, including those which a suspect may have deposited abroad, for example with the affiliated financial institutions abroad on their computer servers there ?
  - (xi) What if some of the data stored on the hard disk of a suspect's computer are personally very sensitive and private (e.g., correspondence with family, health records) ?
  - (xii) May a computer system of an ISP provider be searched, all its equipment with data seized, thus bringing its operation to a complete halt ?
  - (xiii) How soon can the police receive a search warrant from a judicial authority, given that computer data may be faster, more readily and inadvertently destroyed than objects like drugs or papers ?
  - (xiv) Is it possible for the police to force (hack) entry to a suspect's computer and use an encryption key to decipher the contents of the communication (data on transactions, and transaction data) ?
  - (xv) May the police search for and seize computer data from an unrelated alleged criminal activity by a suspect ?
  - (xvi) Does the bilateral extradition treaty cover the question of making and granting requests for crimes related to the computer network ?
  - (xvii) Is the suspect entitled to any remedy against the seizure of their lawful belongings, either in the country of seizure or in the country to which the suspect fled ?
- The above set of questions is far from being exhaustive. However, they do not seem to be farfetched, even though FATF admits that no case of Internet-based money laundering has been noted<sup>40</sup>. Finding legal answers to those questions in the near future may be ever more urgent for determining effective countermeasures against crimes related to the computer network.
- Fragmentary replies can now be found in the United Nations trade and criminal law. They have the form of various recommendations. Regarding drug related

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<sup>40</sup> "The fact that no laundering operation has been identified to date may mean that the appropriate services lack the necessary means and capability of detection" (FATF Annual Report 1997-1998, para. 7 <<http://www.oecd.org/>>).

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crimes, there are the recommendations and treaty provisions of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Convention). In the "Model Law on Electronic Commerce," the United Nations Commission on International Trade Law (UNCITRAL) defined "data message" as "information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange..., electronic mail, telegram, telex or telecopy" (art. 2 (a))<sup>41</sup>.

The provisions of the 1988 Convention oblige each party to adopt such measures as may be necessary to enable the identification, freezing or seizure of any item which constituted either instrumentalities of incriminated acts or their proceeds for the purpose of eventual confiscation (art. 2). "Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence covered by the Convention. "Property" means "assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets" [art. 1 (p), (q), respectively, italics added]. The draft United Nations convention against transnational organized crime (UNTOC) extends such provision to all other offences to be covered by it. However, in art. 2b it lumps in the definition of "proceeds of crime," "property" which in tangible or intangible form is "of any description," as in the 1988 Convention.

Both instruments also empower State Party's courts or other competent authorities to order that incriminated

bank, financial or commercial records be made available or be seized (art. 5 (3); arts 4. 3 (c) and 7 (2), respectively). The UNTOC would impose the obligation to retain such records by a financial institution (which could also be a fund transmitter, casino or securities dealer) for at least 5 years (art. 4bis (c)). Currently, however, regulations of the 1988 Convention have no treaty parallel for commodities other than drugs, and themselves are no longer regarded as sufficient. For the time being, model and "soft law" seeks to fill out this gap.

In 1995 the United Nations International Drug Control Programme elaborated a "Model law on money laundering: confiscation and international cooperation in relation to drugs" (Model Anti-Money Laundering Law)<sup>42</sup>. This law not only deals with the seizure and placing under seal any plants, substances, instrumentalities or other things connected with a drug offence, but also allows for the

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<sup>42</sup> This model law responds to the legal needs of civil law countries. Common law countries may be interested to use a set of six UNDCP model laws (bills) on drug abuse, money laundering and proceeds of crime, mutual legal assistance, extradition, foreign evidence, and witness protection. All texts are available from the United Nations International Drug Control Programme (<undcp\_hq@undcp.un.or.at>). Before the 1988 Drug Convention, the General Assembly of Interpol adopted a model legislation which provides for the temporary freezing of property prior to the filing of criminal charges. Additionally, the legislation authorizes the issue of restraining orders, injunctions and other actions upon property which is deemed to be derived from criminal activity (Bruce Zagaris, The emergence of an international anti-money laundering regime: implications for counselling businesses (in:) Richard D. Atkins (ed.), The Alleged Transnational Criminal. The Second Biennial International Criminal Law Seminar, Martinus Nijhoff and International Bar Association, The Hague 1995, pp. 136-137).

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<sup>41</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, United Nations, New York 1997.

taking of provisional measures, including the freezing of capital and blocking of financial transactions, relating to moveable or immovable property suspected of being used or intended for use in the commission of a drug offence (arts 26 and 27). Moreover, the law clearly extends its scope to surveillance of operations which, without apparently being connected with drug money laundering, either involve sums equivalent to US \$ 200 000 or are surrounded by circumstances of unusual complexity (art. 9).

FATF fills that gap with its recommendations approved later by the Lyons Summit of 1996. Next year, the same recommendations were submitted to the United Nations General Assembly which annexed them to its resolution 51/85. Recommendations welcome the resolve of FATF to extend criminalization of money laundering to other serious offences, but also states that countries “should consider adopting legislative measures for...seizure of illicit proceeds from drug trafficking and other serious offences..., as required”. Concerning provisional arrangements, they should include the freezing or seizing of assets, always with due respect for the interests of bona fide third parties (recommendation 29 and 30).

Regarding the confiscation of illicit profits, the most elaborate and far reaching United Nations scheme can be found in the 1988 Convention, and the draft UNTOC. In both, there is an obligation for confiscation of proceeds, property, equipment and other instrumentalities used or intended for use in violation of specific substantive provisions of both conventions (art. 5 (a), (b), and 7, respectively). As the assets from transnational organized crime may be dispersed over several countries, that obligation extends to all such countries, and not only to a country which has

exercised jurisdiction over the offender (UN TOC, arts 4 and 7 (3)).

Model Anti-Money Laundering Law elaborates in detail on the confiscation of proceeds and properties. Starting from the premise that such confiscation is not only a sanction. It is also “a kind of restitution, to the community, of property unlawfully obtained to its detriment”<sup>43</sup>. Among many provisions, the Law refers to confiscation of proceeds and property directly or indirectly from the offence, including income and other benefits obtained therefrom; places on the offender the burden of proving the lawful origin of property belonging to them; leaves it to the public prosecutor’s office to prove the illicit origin of property obtained by third parties from convicted offenders. In cases where proceeds of illicit origin have been intermingled with property acquired from legitimate sources, confiscation of such property shall be ordered only up to the value, as assessed by the court, of the intermingled proceeds (art. 30).

FATF recommendations state that countries should consider adopting legislative measures for the confiscation and assets forfeiture, always with due respect for the interest of bona fide third parties. Countries should also consider the introduction of arrangements for the equitable sharing of such forfeited assets (recommendation 30).

## **V. CRIME AS THE GROWING INTERNATIONAL SECURITY THREAT**

### **A. New Security Threat**

Inspired by the statement on governance (attributed to the German philosopher Emmanuel Kant, 1724-1804), that the “establishment of a civil society which

<sup>43</sup> Model Anti-Money Laundering Law, *op. cit.* note 42, p. 20.

generally administers the law” has been described as “mankind’s most difficult problem,” the commentators felt that:

“[i]n a community of states afflicted with clashing conceptions of the appropriate ends of law and civil society, whose largest arena is a military arena of multiplying devices that promise both infernal destruction and access to the havens, the establishment of a society generally administering law adequately expressing the deepest aspirations of the world’s peoples for freedom, security, and abundance - the establishment, in other words, of a world public order of human dignity - is truly a problem of the most heroic proportions”<sup>44</sup>.

## **B. Redefining Global Security Conceptually**

Two ages after Kant’s statement, and shortly before the outset of the 21st century, transnational crime as an expression of an “uncivil society”, and security, as one of the elements of civil society, have both been increasingly seen as the two sides of one coin.

New dimensions of security are emerging. They start replacing the traditional notion of global security understood as balancing out military security by a more, albeit only gradually surfacing, universal notion of security. A prominent expert concedes that the initial stage of this development ensues from the two inabilities: to establish a global security scheme by only one super power, and by all. There is no country in the world, including the United States, which would have significant security interests. In today’s very interdependent and heterogenic world, what determines order

<sup>44</sup> Myres S. McDougal, Florentino P. Feliciano, *Transnational Coercion and World Public Order*, New Haven Press, New Haven, Martinus Nijhoff Publishers, Dordrecht/Boston/London 1994, p. 261.

exists in a particular civilization and beyond it<sup>45</sup>.

How to define and deal with what is “beyond” is a matter of further consideration. It has been argued, for example, that much more attention must be given by the United Nations Security Council to:

“the most pressing economic, social, and environmental problems. The connection between the absence of democracy, gross human rights abuses, and the propensity for aggression and other forms of international irresponsibility was clearly established even before Iraq’s attack on Kuwait. The spread of democracy, and respect of human rights, are indispensable elements of a more stable, less violent human society, and are, as such, a legitimate - indeed an indispensable international concern”<sup>46</sup>.

The Human Development Report observes that:

“[w]hen the security of people is endangered anywhere in the world, all nations are likely to get involved. Famine, disease, pollution, drug trafficking, terrorism, ethnic disputes and social disintegration are no longer isolated events, confined within national borders. Their consequences travel the globe”<sup>47</sup>.

<sup>45</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (1996), *Zderzenie cywilizacji i nowy kształt ładu światowego* (Polish translation of 1997, Muza SA, Warszawa 1997, p. 227).

<sup>46</sup> Brian Urquhart, *The UN and international security after the Cold War* (in: Adam Ck and Benedict Kingsbury (eds), *United Nations, Divided World. The UN’s role in International Relations*, Clarendon Press, Oxford 1993, p. 97.

<sup>47</sup> *Human Development Report 1994*, UNDP, Oxford University Press, New York 1994, p. 22.

The chairman of the U.S. Senate task force on economic sanctions observes that his country's sanctions should balance the U.S. economic interests with the desire to promote "improvements in basic civil liberties, human rights and nonproliferation, or defeating terrorism, narcotics trafficking and crime"<sup>48</sup>. The U.S. Ambassador to the U.N. extends this observation, saying that:

"[n]arcotics trafficking, international crime, migrant smuggling, terrorism and environmental degradation...these are our enemies. The illegal drug trade and related activities such as money laundering and terrorism undermine fragile democratic institutions, distort economies and hinder long-term growth"<sup>49</sup>.

Those developments and phenomena are "beyond" the sphere of influence of any one country. They are out of reach, in tax, extradition or money laundering havens from where they threaten the security of nations by pouring onto them illicit drugs, aliens and arms, writes another high-level U.S. official<sup>50</sup>. Others emphasize that while earlier, manufacturing and providing small arms and light weapons was once accepted as a necessary evil or even welcomed as a guarantor of security, nowadays cause concern that their excessive amounts can have devastating consequences for global

security<sup>51</sup>.

### C. Redefining Global Security Legally

Save terrorist bombing, the above mentioned manifestations of transnational crime have not yet been legally embraced by the resolutions of the United Nations Security Council within the concept of global security. However, the General Assembly, in the aforementioned "United Nations Declaration on Public Security," undertook steps to redefine global security. Several illicit trafficking activities (illicit trafficking in drugs, firearms, human beings, laundering of proceeds from serious crimes) have already been declared by the General Assembly as endangering "the security and well being of citizens and all persons" (art. 1). Looking into other official records (statements) of or for the Security Council from the above group State-sponsored or connived acts involving illicit drug trafficking, illicit arms trafficking, but also corruption (art. 10) may fall under the redefined concept of global security<sup>52</sup>.

As noted, and as of this writing, there was only one case of Council's involvement in one possible type of transnational crime

<sup>48</sup> Senator Mitch McConnell, quoted in: Thomas W. Lippman, Clinton seeks authority to waive any sanctions, *International Herald Tribune*, September 10, 1998, p. 3.

<sup>49</sup> Bill Richardson, U.S. Ambassador to the UN, *Narcotics Enforcement and Prevention Digest* Vol. 2 No 6 (1996), p. 3.

<sup>50</sup> Jonathan M. Winer, *International crime in the new geopolitics: a core threat to democracy* (in:) William F. McDonald, *Crime and Law Enforcement in the Global Village*, ACJS/Anderson Monograph Series, Anderson Publishing Co. 1997, pp. 61-62.

<sup>51</sup> Michael Renner, *Curbing the Proliferation of Small Arms* (in:) Lester R. Brown et.al., *State of the World 1998. A Worldwatch Institute Report on Progress Toward a Sustainable Society*, W.W. Norton & Company, New York-London 1998, p. 148.

<sup>52</sup> For an interesting review of the question of the transnationalization of corruption, see: Michael Jonson, "Cross-border corruption". *Points of vulnerability and challenges for reform*, and Susan Rose-Ackerman, *Corruption and the global economy*, both published in: *United Nations Development Programme, OECD Development Centre, Corruption. Integrity. Improvement. Initiatives in Developing Countries*, Sales number E.98.III.B.18, United Nations Development Programme, New York 1998, pp.13-24, and 25-44, respectively.

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- terrorist bombing<sup>53</sup>. By adding "terrorism" to the list of acts which either are "a threat to international peace and security" (apartheid,<sup>54</sup> internal conflict) or "a breach" thereof (aggression<sup>55</sup>), the Security Council broadened the interpretation of the above quoted notions, and opened the way for possible considering other international crimes or violations as threatening or breaking peace and security. Currently, the catalogue from which the Security Council may draw these crimes extends to 26 types<sup>56</sup>.

On the occasion of passing other resolutions, various declarations and other statements were made either by the Council itself, its President or the Secretary-General, which included references to illicit drug and arms trafficking, violence, banditry, etc. Those references or developments provided a part of the entire factual and legislative context in which the Council imposed sanctions on target States.

For example, in 1997, after adoption of the resolution concerning Afghanistan, the President of the Council noted that human

suffering and material destruction there threatens to lead to the disintegration of the country and "represents a growing threat to regional and international peace and security". He stressed the Council's concern about mass killings of prisoners of war and civilians in Afghanistan, and the looting of United Nations premises and food supplies. He reiterated that, in the opinion of the Council, the continuation of the conflict in Afghanistan provided a fertile ground for terrorism and illegal drug production and trafficking which destabilize the region and beyond<sup>57</sup>. The Secretary-General observed that concerned parties must be held responsible for exacerbating the conflict, which already was spreading beyond the borders of Afghanistan, posing a serious threat in the shape of terrorism, banditry, narcotics trafficking, refugee flows, and increasing

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<sup>53</sup> Against Libya to surrender two Libyan nationals suspected of terrorism and to renounce all forms of terrorist action (S/RES/748 (1992) of 31 March 1992, and S/RES/883 (1993) of 11 November 1993).

<sup>54</sup> Against South Rhodesia to bring to an end the rebellion in Southern Rhodesia (S/RES/232 (1966) of 16 December 1966; S/RES/253 (1968) of 29 May 1968), and South Africa to end violence against the African people and neighbouring States (S/RES/418 (1977) of 4 November 1977). However, the treaty notion of apartheid first was used in 1965 in the Convention on all Forms of Racial Discrimination, and does not appear in the two first resolutions.

<sup>55</sup> Against Iraq to restore the sovereignty and territorial integrity of Kuwait (S/RES/661 (1990) of 6 August 1990, S/RES/670 (1990) of 25 September 1990, S/RES/687 (1991) of 3 April 1991.

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<sup>56</sup> While there is no definitive list of such crimes, expert classification includes the following international crimes : genocide, aggression, slavery, torture, apartheid, war crimes, crimes against humanity, crimes against the United Nations and associated personnel, unlawful possession, use or emplacement of weapons, theft of nuclear materials, mercenarism, unlawful medical experimentation, piracy, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, aircraft hijacking, threat and use of force against internationally protected persons, taking of civilian hostages, unlawful use of the mail, falsification and counterfeiting, destruction and/or theft of national and archeological treasures, unlawful acts against certain internationally protected elements of the environment, unlawful interference with international submarine cables, international traffic in obscene publications, bribery of foreign public officials, drug offences, and terrorist bombing (see further: M. Cherif Bassiouni, *International Criminal Law Conventions and their Penal Provisions*, Transnational Publishers, Inc., Irvington-on-Hudson, New York 1997).

<sup>57</sup> Presidential Statement S/PRST/1997/55.

ethnic and sectarian tension<sup>58</sup>.

References to various forms of crime either in the Council's resolutions or justifications thereof, are certainly not coincidental. There seems to be an emerging agreement that the concept of global security should gradually embrace select forms of international and transnational crime.

**VI. UNITED NATIONS AGAINST CRIME IN THE 21ST CENTURY: NEW DIMENSIONS OF INTERNATIONAL COOPERATION**

**A. Global Economy and Crime**

The above examples of crime, as dealt with by the Security Council, point strongly to ramifications it has to the security of nations. Traditional transnational (and international) crime, like trafficking in narcotic drugs has been for a long time a worldwide concern. And so terrorism, which, because of its original political or politicized nature, has only recently started entering the classification of "international crime", has entered the Council's agenda<sup>59</sup>. As helpful as defining certain activity as international crime or transnational crime is, there are overriding issues which may drive discussions on redefining global security ahead of other considerations.

Two crime issues, partly interlinked, may contribute to further focus on globalization of the notion of security. First, the spread of economic crime across the world. The global economic recession looming in 1998 prompted some experts to argue that international criminal cartels

could easily arrange the concerted withdrawal of US \$ 10-20 billion in "black" money from a single market economy. "With the threat of such a financially devastating blow, they would be able to extort entire countries"<sup>60</sup>. Second, is the growing computerization of economic transactions. To underscore their actual and potential scope, one may reemphasize that what is now 100 % of all available data and information in the world, will represent only 5 % of that available in 50 years, and add that the functional equivalent of the progress in information technologies made over past 500 years (from the first printed book until today's computer) now will probably be repeated ten times faster in the next 50 years<sup>61</sup>. Helpful as computer networking is, it is also a powerful and increasingly dominant medium to create, more easily than before, a fictitious (virtual) basis for brass-plate banks, anonymous trade corporations and other commercial firms<sup>62</sup>.

**B. Progress in Legal Assistance**

(i) *Mutual Legal Assistance*

In the face of computerized information quickly becoming a new "global commons", the international criminal justice community is not prepared to prevent and control crime on and abuse of computer networks, let alone transnational crime committed with traditional methods. Presently, only about one third of most industrialized European countries have criminalized

<sup>58</sup> Press Release SC/6453.

<sup>59</sup> In its resolution 51/210 of 16 January 1997 on "Measures to Eliminate International Terrorism," the General Assembly noted the risk of terrorists using nuclear, biological and chemical agents, and involving electronic or wire communications systems and networks to carry out criminal acts.

<sup>60</sup> Expert statement (in personal capacity) by Vito Tanzi, International Monetary Fund at the press conference on 10 June 1998 (United Nations, DPI/1452, Development Update # 24, July-August 1998).

<sup>61</sup> S.L. Armanathan, *op.cit.* note 14.

<sup>62</sup> Pino Arlacchi, Under Secretary-General, United Nations Office at Vienna, at the press conference (DPI/1452, *op.cit.* note 60).

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unauthorized access to data or information, which, by and large, makes such penetrations still legitimate<sup>63</sup>. Consequently, mutual legal assistance is, in principle, possible only when, in both the requesting and requested country the act in question is criminalized.

(ii) *Bilateral Extradition*

Other facets of legal assistance, such as bilateral extradition treaties, have not caught up with the necessities resulting from globalization and informatization. In the 19th and the 20th century, available data shows that 112 bilateral extradition treaties were registered and published in the League of Nations Treaty Series. The first 550 volumes of the United Nations Treaty Series (1945-1964), contain texts of 50 extradition treaties. In making a very rough estimate of valid treaties at the beginning of 1970s, one commentator hazarded a figure below 500 for still functioning old (the 19th-20th century) extradition treaties, and about 1000 for others, unregistered and registered with the United Nations Secretariat<sup>64</sup>.

Against this total estimate of 1500 bilateral extradition treaties, the same expert assumed that if every Member State of the United Nations were to be linked with every other (and at the time of that writing there were 120 Member States) through

bilateral extradition treaties, theoretically, there could have been no less than 14 000 of such treaties. However, since extradition problems were also dealt with through multilateral conventions, regional arrangements secured by reciprocal legislation, and by reciprocal practice of extradition, that magnitude would have been less. Such qualified estimates look pale against the developments in the 1990s. According to the United Nations database, 131 current Member States on which data was collected had, roughly, 900 various legal assistance instruments. This amount consisted of no less than 525 bilateral extradition treaties, including 65 supplementary extradition agreements, 174 mutual legal assistance treaties, and 142 instruments against the struggle in international narcotic drugs, plus a number on the transfer of foreign prisoners<sup>65</sup>. Again, if all Member States (185 at writing) were to be linked by bilateral extradition

<sup>63</sup> Doc. CDPC (97) 5; PC-CY (97) 5, Council of Europe, European Committee on Crime Problems, Implementation of Recommendations No. R (89) 9 on computer-related crime, Report prepared by Professor Henrik W.K. Kaspersen, Amsterdam, February 1997.

<sup>64</sup> Shaffer, *op.cit.* note 7, p. 37.

<sup>65</sup> Judicial assistance treaties may also contain extradition provisions. For a fuller review of the variety of extradition arrangements, see: United Nations Crime and Justice Information Network (UNCJIN), <<http://www.ifs.univie.ac.at/~uncjin/extradit/extindx.html>>. Out of the total known number of 525 existing bilateral extradition treaties, including supplementary agreements, at least 148 (28 %) were signed by the U.S. alone (or 38 % of all such instruments in the developed world). In construction of this database the following sources were consulted: the United Nations Treaty Series, the Treaties in Force: A List of Treaties and Other International Agreements of the United States on January 1, 1994 (TIAS, 1994), The Cumulative List of and Index of Treaties and International Agreements: Registered or Filed and Recorded with the Secretariat of the United Nations - December 1969 December 1974, (1977).



treaties, there would have been no less than 34000 of them. This seems to be, if not indeed is, pure nonsense.

### C. New Approaches

#### (i) *Multilateral Legal Assistance and Extradition Provisions*

Another approach is needed, which is now being advanced in drafting the aforementioned United Nations convention against transnational organized crime. This draft convention is to cover quite a broad spectrum of legal assistance and extradition matters involving more effective investigation, prosecution and adjudication of acts recognized by it as crimes, including illicit trafficking in and manufacturing of firearms. The draft may provide legal answers to some of the questions ensuing from the case study of Mr. J.D., but also goes beyond. However, by and large, legal assistance and extradition matters have been approached in a generic manner, enabling coverage of the widest possible list of transnational organized crime cases, as determined by the convention itself.

The original draft started with a provision for considering entering into bilateral and multilateral agreements, including direct cooperation between State police agencies and common operations in the territory of each Contracting State (art. 11)<sup>66</sup>. However Member States' observations and commentaries which the draft convention evoked, suggest that in

dealing with the provision on inter State cooperation, there should be joint teams and other arrangements established for "electronic surveillance, undercover operations and controlled deliveries with a view to gathering evidence," including "when appropriate, necessary items or quantities of substances for analytical or investigative purposes" (art. 19 (c), (d))<sup>67</sup>. The Netherlands added to this a proposal that convention "States Parties...shall consider...analyzing trends in organized crime...as well as the circumstances in which organized crime can operate, the professional groups involved and the communication technologies" (art. 20 (2))<sup>68</sup>. Supportive of this approach were Latin American criminal justice

<sup>66</sup> Doc. E/1997/30, Draft United Nations Framework Convention Against Organized Crime, Commission on Crime Prevention and Criminal Justice. Report on the Sixth Session (28 April-9 May 1997), Annex III, p. 14.

<sup>67</sup> In favour were also Argentina, Australia, Belarus, Bosnia and Herzegovina, Brazil, Canada, Chile, Colombia, Czech Republic, Finland, Greece, Guatemala, India, Italy, Japan, Mexico, Morocco, The Philippines, Qatar, Republic of Korea, Saudi Arabia, Slovakia and Turkey. This was reiterated later by the U.S. in doc. E/CN. 15/1998/5, Commission on Crime Prevention and Criminal Justice, Report of the Meeting of the Intersessional Open-ended Intergovernmental Group of Experts on the Elaboration of a Preliminary Draft of a Possible Comprehensive International Convention against Organized Transnational Crime (2-6 February 1998, Warsaw, Poland), sec. III. 19 (d) and (e). Such an approach will influence investigative techniques of cooperating countries to the point of possible later harmonizing evidentiary requirements for admission of evidence by respective courts. For a review of judicial cases in which U.S courts assessed legality of joint team operations with a number of countries, see: Richard Downing, The domestic and international legal implications of the abduction of criminals from foreign soil, *Stanford Journal of International Law* Vol. 26, No. 573 (1990), p. 107.

<sup>68</sup> Doc. E/CN. 15/1998/5, *Ibid*, sec. III, 20.2.

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ministers, and senior experts of the group of eight leading industrialized countries (P-8, now G-8)<sup>69</sup>. States, in turn, suggested restrictions on such forms of inter-state cooperation dictated by sovereignty and be self-determination (Mexico), and human rights requirements<sup>70</sup>. The latter should also generally apply to international criminal law enforcement, including exchange of criminal records, suggested in the draft, and be understood as information not only on previous conviction(s), but criminal investigation and prosecution as well (Australia). Interestingly, in cases where double criminality requirements cannot be observed (e.g., lack of criminalization of hacking in the requested State, and thus no obligation to provide non-criminal information and/or evidence), some States were proposing that mutual legal assistance should nevertheless be rendered, in the interest of more effective and efficient international law enforcement (Russia)<sup>71</sup>. The proposed texts speaks of an obligation to render such assistance without the requirement of dual criminality, unless the assistance required unvolves the application of coercive measures (art. 14.6). However, a

counterproposal under the revised United Nations Model Treaty on Mutual Assistance in Criminal Matters, states that “[c]ountries may also consider restricting the requirement of double criminality to certain types of assistance such as search and seizure” (art.4)<sup>72</sup>.

(ii) *Preservation of the Integrity of Evidence*

Preservation of the integrity of evidence is essential for compliance with the principle of accuracy of data, as inaccurate or incomplete records shared, may lead to suppression of evidence by the court of a requesting State, if not to violating fair and humane trial.<sup>73</sup>

In case of evidence gathered through electronic surveillance and shared internationally, preservation of its integrity is an extremely difficult process, starting with the need to assure that, a file documenting fraudulent electronic

<sup>69</sup> Doc. E/CN. 15/1996/2/Add.1, Regional Ministerial Workshop on Follow-up to the Naples Declaration and Global Plan of Action against Organized Transnational Crime (Buenos Aires, Argentina, 27-30 November 1997), Report of the Secretary-General, recommendation No 14; doc. E/CN. 1997/30, Senior Experts Group Recommendations, recommendation No 26.

<sup>70</sup> Proposed by the Intergovernmental Expert Group Meeting on Extradition (doc. E/CN. 15/1997/6, recommendation No 29).

<sup>71</sup> Doc. E/CN. 15/1998/5, sec. III, 14.14.

<sup>72</sup> Doc. E/CN. 15/1998/5, Add. 1, Report of the Intergovernmental Expert Group Meeting on Developing and Promoting the Efficiency of Mechanisms in International Mutual Assistance Practice (Arlington, Virginia, USA, 23-26 February 1998), Annex I. The proposals from that report, as reviewed and recommended by the Commission on Crime Prevention and Criminal Justice, have been forwarded by the Economic and Social Council for action of the General Assembly.

<sup>73</sup> Those guidelines, adopted over the period 1980-1995, could be found in the the Privacy International Archive: <[http://privacy.org/pi/gopher/ftp\\_cpsr.org/cpsr/privacy/privacy\\_international/](http://privacy.org/pi/gopher/ftp_cpsr.org/cpsr/privacy/privacy_international/)>. See also: Christine van den Wyngaert (ed.), Guy Stessens (ass. ed.), International Criminal Law. A Collection of International and European Instruments, Kluwer Law International, The Hague/London/Boston 1996, p. 599.

banking transactions for example, does not contain erroneous or materially false information accidentally generated by the criminal justice agencies handling the data files. Of course, States are required to act in “good faith,” but negligent handling of electronic files may tremendously complicate admitting such questionable evidence into trial. As there are only very nascent internationally standardized encryption and decryption procedures for dealing with electronic evidence, this risk cannot be underestimated<sup>74</sup>.

(iii) *Preservation of the Privacy of Evidence*

The problem of preservation of privacy of a suspects’ records continues to be felt by the law enforcement community as hampering the effectiveness of their criminal investigations. It also alerts courts and entire human rights community from the, at times, opposing rule of law perspective. The U.S proposal, made in the context of discussion over the draft United Nations framework convention, called for establishing and maintaining “channels of communication between the competent authorities, agencies and services to facilitate secure and rapid exchange of information concerning all aspects of the offences set forth in this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities.”

Specificity in collecting and maintaining criminal records can be interpreted more broadly in two ways. First, so as to cover other potential criminal activities to which ongoing investigation may be not central. Secondly, also as a disclosure abroad, as far as the obtaining information on such activities by other countries is concerned. It seems, that if the principle of equal protection of data (in its transborder flows) is observed by the requesting and requested State, re-interpretation of the principle of specificity to cover foreign criminal investigations would be consonant with the international recommendations in this regard. However, the constituency receiving information will be wider.

This is important the in the case of collecting and sharing electronic records, which would clearly come within the purview of such a proposed regulation. Experts emphasize that there will be a growing conflict between the requirements of privacy, and requirements to collect data in lawful and fair ways. Solutions found to deal concurrently with those requirements, recommended by the UN Guidelines and other international instruments will influence the ways and means of combating the increasing danger of organized crime and terrorist acts<sup>75</sup>.

<sup>74</sup> Recommendation of OECD concerning guidelines for cryptography policy, 27 March 1997 <<http://www.oecd.org.dsti/sti/it/index.html>>.

<sup>75</sup> Doc. E/CN. 4/1997/67, Commission on Human Rights, Question of the follow-up to the guidelines for the regulation of computerized personal data: report of the Secretary-General prepared pursuant to Commission decision 1995/114, para. 18.

#### **D. Ingenuity of Lawmakers and Criminals**

Criminals used to be always ahead of the lawmakers, as much as thieves ahead of policemen. Sometimes lawmakers and policemen catch up with the criminal underworld by making the laws more flexible, with due regard to the rights of offenders. For example, the Presidential decree in Brazil enabled money raising to fight illicit drug trafficking, mostly destined for Europe and the United States, by auctioning seized assets before the confirmed conviction of alleged traffickers. The seized 100 hundred planes, 200 trucks and several hundred cars, which would have otherwise depreciated in value awaiting valid conviction, can now be auctioned. In case of a suspect found innocent, the value of any assets seized and sold will be reimbursed<sup>76</sup>.

Another innovation is proposed by the draft UNTOC which encourages State Parties to give consideration to the sharing the value of confiscated proceeds and property among themselves, as well as contributing them to intergovernmental bodies specializing in the fight against organized crime (art. 7 (5)). Finally, and as already suggested in the "Model Anti-Money Laundering Law," the draft provides that a State Party may consider putting on to the alleged offender the onus of proof concerning the lawful origin of alleged proceeds of crime or other property liable to confiscation (art. 7 (7)). This innovation would have to undergo scrutiny in the light of domestic constitutional and other legal principles, and by human rights experts in general.

However, more often, it is the criminal underworld that is more ingenious than the criminal justice community. For instance,

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<sup>76</sup> Narcotics Enforcement and Prevention Digest, Vol. 4 No. 17 (1998), p. 9.

in cases of telemarketing and Internet schemes which involve selling foreign currencies, investments in high-risk penny stocks, gourmet coffee shops, and even ostrich farms<sup>77</sup>. Presently, international policing of the Internet is far behind such ingenuity (as admitted by FATF).

Another example involved an Ukrainian criminal group based in California, U.S.A., which cracked mathematical codes of assigning new vehicle identification numbers (so called "VINs") of car manufacturers. The group was able to create their own "VINs" that could make the stolen car appear as if had just rolled off an assembly line. The cars, the total value of which was estimated at US \$ 10 million, ended up in Central America, Russia and Ukraine<sup>78</sup>. German car manufacturers finalized projects for tracing cars' routes through satellites<sup>79</sup>. One may imagine that organized criminals would illegally access satellite telecommunications systems, in order to obtain control over cars' locations and their possession. In an attempt to cut financial losses because of pirated computer programmes, software manufacturers have considered replacing compact disks with a shareware service offered to end users via the Internet. One may concede that theft of intellectual property will become more difficult, but will it be eliminated ?

Many of the new forms of crime employ or will employ computer or satellite technology, which in its various forms is increasingly intermingled and contributes

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<sup>77</sup> Authorities cracking down on gambling investment fraud, *Organized Crime Digest*, Vol. 19 No. 6 (1998), p. 7.

<sup>78</sup> Warren Richey, *World's cops rev up strategies to nab cross-border car thieves*, *Christian Science Monitor*, 4 December 1996.

<sup>79</sup> *The Reuter European Business Report*, 2 December 1996.

to the generic term of “information technology”. There is little doubt that the international community will also resort to new forms of crime control<sup>80</sup>. However, it is not technology itself which will dramatically improve international cooperation. In fact, if present trends in technological applications continue, the “great divide” between developed and developing countries will also stay on. Transnational abuse of the Internet may affect countries with weaker telecommunication infrastructures. Poorer protection gives way to penetrating computer networks in developing countries, which are unprepared to face the new challenge.

For attaining significant progress in fighting transnational crime there must be a strong commitment among States, officials and others involved in combating it. If there is a new common international enemy, and crime in its new dimensions gradually assumes this position, there will also be such commitment. With it, the international criminal justice community will be able to quickly finalize a draft United Nations convention against transnational organized crime. Later, it can move on to develop new accessory, flexible and ingenious instruments which may help in the 21st century to better counteract crime related to computer networks.

## VII. CONCLUSION

The potential of transnational crime to grow is very considerable and so are the illicit profits. This paper showed cases of transnational crime, increasingly legally and technically complex and in various dimensions. They are off and on the ground, in cyberspace and outerspace. All call for finding commensurate, consolidated and effective countermeasures, in the wake of the growing international security threat such crime poses. More concerted and comprehensive efforts on the search, seizure and confiscation of illicit profits is still required.

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<sup>80</sup> First inroads in using space technology for control of transnational crime have already been made. See, for example, Panaiotios Xefteris and Maurizio Fagnoli, Using small satellite constellations to track and monitor the illicit trafficking in weapons and sensitive technologies, (in:) Péricles Gasparini Alves, Daiana Belinda Cipollone (eds), *op. cit.*, pp. 178-194; and B. Jasani, Relevance of outer space capabilities to international security (in:) N. Jasentuliyana and K. Karnik, *Space Futures and Human Security*, United Nations Office for Outer Space Affairs, Vienna 1997, pp. 21-27.

# **ECONOMIC CRIME AND THE GLOBAL ECONOMY: UNDERSTANDING THE THREAT AND IDENTIFYING EFFECTIVE ENFORCEMENT STRATEGIES AND COUNTERMEASURES**

*John D. Arterberry\**

## **I. THE GLOBALIZATION OF ECONOMIC CRIME**

“Laws stop at borders, but crime does not.”  
Speaker at 1997 World Economic Forum,  
Davos, Switzerland

During the 1990s, we have witnessed the emergence of the Global Economy from a largely theoretical concept, to a vital and growing force in the affairs of nations. Evidence of that growth can be found in the airline industry. According to a recent news report, passenger volume in international commercial flights soared from 26 billion passenger miles in 1960 to 3.5 trillion miles in 1990.

While the Global Economy has developed, we have experienced a corresponding globalization of crime. Whether engaged in traditional organized crime activities like narcotics trafficking or sophisticated economic crimes like the BCCI scandal, criminals and their crimes now show no respect for political boundaries or geographic barriers and exploit the jurisdictional complexities both to expand and to conceal their crimes.

Increasingly, experts and leading law enforcement officials are sounding warnings about the threats posed by the globalization of crime. Economic crime stands at the forefront of this new wave of lawlessness that threatens the stability

and prosperity of global commerce. Those of us in law enforcement face an urgent challenge: effectively countering this global crime wave by overcoming barriers presented by institutional rigidity and national political considerations.

### **A. Defining the Threat**

Often termed “white collar” or “financial” crime, economic crime inflicts its harms in many ways. Most directly, there are the financial losses suffered by fraud victims. Other harms are less apparent. At a meeting of police officials from 23 countries in September, attendees were told that the investment by criminals of their illicit funds in the world economy is generating annual profits of some \$500 billion, about 2% of the global financial activity. These funds may not only corrupt otherwise legitimate enterprises through which they flow, but also provide seed money for new and more damaging frauds.

#### **1. A Menu of Economic Crimes**

Economic or white collar crime presents itself in many forms. The crimes range from investment frauds that target the life savings of senior citizens to sophisticated bank frauds that use computers to divert bank funds to hidden accounts. No matter the degree of sophistication, there will always be common elements in the crime: lying, cheating or stealing will be at the heart of the scheme.

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(i) *Financial Institution Fraud*

During the 1980s and 1990s, financial institution fraud has been a prominent and persistent problem. In the United States, we experienced a crisis in our savings and loan industry that resulted, in part, from pervasive fraud and other abuses requiring a massive government response. To date, the federal government has suffered losses in excess of \$200 billion resulting from the savings and loans (S&L) debacle.

Although the S&L crisis is behind us, financial institution fraud continues to be an economic crime priority for the federal government. Mortgage fraud inflicts losses estimated at \$60 billion each year. Cheque fraud involving counterfeit cheques is conducted by organized rings that range across the United States and cause losses to banks of about \$6 billion yearly.

On a more global dimension, the BCCI scandal demonstrated the vulnerabilities in regulation of multinational financial instruction. It also demonstrated the benefits obtained through international cooperation. Even though its citizens were not victimized, the United States successfully prosecuted BCCI for defrauding its banking regulators. Through that prosecution the United States has forfeited more than \$1 billion of BCCI-controlled assets, an action that has enabled the world community to compensate many of the individual depositor victims.

(ii) *Insurance Fraud*

Insurance fraud schemes may victimize either the insurer or the insured. Many schemes seek to tap the immense reservoir of assets held

by legitimate insurance companies. Arson for profit, staged accidents creating sham-injury and property damage claims, and inflated automobile body repair bills are examples of schemes aimed at the insurance companies.

Alternatively, insurance businesses may simply be a clever facade for massive fraud schemes. Unscrupulous promoters will establish insurance operations using "rented" or fraudulently inflated assets to satisfy government-established capitalization and reserve requirements. These operations often use off-shore shell entities to facilitate and conceal their frauds. The perpetrators collect policy payments from unsuspecting individuals and businesses before abruptly ceasing operations and departing with the scheme proceeds.

(iii) *Government Program Fraud*

Government programs and operations also are vulnerable to fraud. Dishonest claimants in government social welfare programs undermine citizen support for this effort and cause losses to the taxpayers of billions of dollars each year.

Health care presents a dramatic example of this problem. In the United States, health care has government programs and private sector components that are equally susceptible to fraud. In addition to individual, corporate and private insurance expenditures for health care, the federal government provides various health care programs that entail federal outlays of hundreds of billions of dollars annually.

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Some estimates place spending on health care in the United States at more than \$1 trillion each year, and as much as 10 percent of that amount, or about \$100 billion, resulting from fraud and related abuses. With such enormous sums of money spent each year, it is not surprising that frauds have proliferated. Health care fraud in the United States thus has emerged as one of the most serious domestic crimes in this decade.

The Department of Justice has instituted an aggressive enforcement campaign against health care fraud. Convictions in health care fraud cases have increased over 300 percent since Fiscal Year 1992 and hundreds of millions of dollars have been returned to the federal treasury through these prosecutions and related civil cases.

(iv) *Commercial Bribery and Foreign Corrupt Practices*

In the private sector, one of the most corrosive and costly abuses is commercial bribery. Businesses are victimized by dishonest employees who, in exchange for bribes, cause their companies to purchase defective goods, enter into inflated or bogus contracts or otherwise cheat their employers.

Closely related to commercial bribery is bribery of foreign officials by corporations seeking to obtain or retain business in foreign countries. In the United States, the Foreign Corrupt Practices Act expressly prohibits such conduct. Efforts are underway to obtain international agreement on similar prohibitions.

(v) *Credit Card Fraud*

Nothing symbolizes the global economy in personal terms better

than the credit card. Accepted universally, the credit card has revolutionized commerce and transformed business and personal travel. The credit card industry tallies billions of dollars in worldwide commerce annually. On the negative side, the industry suffers billions of dollars in fraud losses each year. Visa alone acknowledged in 1997 annual worldwide fraud losses at well over \$700 million.

Closely akin to credit card frauds are schemes in which victims' identification is appropriated by criminals and used to obtain funds and property through credit cards and bank accounts. Approximately 25 percent of credit card losses in the United States can be traced to this relatively new crime known as "identity theft". Identity thieves obtain, through various fraudulent means, the personal identifying data of their victims, including names, addresses, telephone numbers and federal Social Security numbers, which they then employ to gain unauthorized access to bank and credit card accounts. A consumer magazine reports that more than 1000 cases of identity theft occur each day in the United States. Just this year, federal law was amended to address this abuse.

(vi) *Securities / Investment Fraud*

Investment and securities fraud blossomed during the boom years of the world's equities markets in the late 1990s. The mutual fund industry in the United States, with assets of about \$5 trillion, is now larger than the nation's banking industry.

The euphoria created by enormous gains in the market prices of



securities has led investors to discard caution and place their hard-earned funds, often representing their retirement savings, to promoters who promise unrealistic profits to their victims. The securities industry estimates about \$6 billion annually in investor losses to securities fraud in the United States.

## 2. Costs of Economic Crime

Beyond the direct losses inflicted by fraud, which total in the tens of billions of dollars each year, there are less apparent costs. For example, businesses incur substantial expenses stemming from efforts to prevent and detect fraud. These precautions include comprehensive audits, large security staff, and sophisticated monitoring and other high-tech preventive measures. An official of a private security firm stated, in remarks at an international conference, that there has been an explosion in the private security industry, which currently employs 1.6 million individuals and consumes \$65 billion in resources. The speaker estimated that by the turn of the century the industry will grow to \$100 billion and employ 2 million persons. Ultimately, these costs are passed on to the consumer or are absorbed by businesses as profit reducing expenses.

Fraud also exacts less tangible losses. It distorts the flow of commerce and disrupts the development of global trade. Its staggering costs stifle developing economies and can undermine the stability of banks and other commercial enterprises. Economic crime, simply stated, is one of the greatest threats to the realization of a vibrant and healthy global economy.

## **II. COMBATING ECONOMIC CRIME: STRATEGIES AND COUNTERMEASURES FOR AN EFFECTIVE GLOBAL RESPONSE**

### **A. Criminal Enforcement Measures**

Success in fighting white collar crime requires a focused and coordinated response that blends the domestic effort with the broader international response. On the domestic front, available resources must be applied to the most pressing economic crime problems. These priorities can be set through a consultative process that includes the investigative and prosecutive authorities, as well as all relevant government departments and agencies.

International cooperation and mutual legal assistance treaties and agreements are essential tools in fighting global economic crime. As countries focus their attention on transnational crime, the need to modernize the methods by which we obtain legal assistance from other sovereigns becomes more apparent.

#### 1. Domestic Strategies

##### (i) *Investigative Techniques*

During the past two decades, the Department of Justice has formulated varied approaches in investigating and prosecuting economic crime. We have moved away from the traditional practice of strictly separating investigators and prosecutors. Instead of keeping the prosecutor away from the investigative process, we regularly team agents and prosecutors to investigate cases jointly. This encourages closer collaboration and consultation in developing an investigative plan and leads to more expeditious completion of that phase in the development of a criminal case. At the same time, this collaboration

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ensures that promising avenues of investigation are not overlooked, that successful strategies for prosecution are fully exploited and that legal pitfalls are avoided.

Undercover operations (UCOs), originally developed as a means of infiltrating traditional organized crime groups like the Mafia, are now an important part of our arsenal of anti-fraud weapons. UCOs are especially valuable in exposing corrupt firms and individuals imbedded in regulated sectors of the economy. UCOs provide additional deterrence by keeping the criminal element off balance. White collar criminals can never be certain that the apparent collaborator may not actually be an undercover agent ready to expose their criminal activity.

(ii) *Prosecutive Strategies*

Prosecuting economic crimes presents many challenges. The schemes are often complex and potentially confusing. Thus, presenting the evidence necessary to prove criminal conduct may require numerous witnesses and voluminous documentary exhibits.

Experience gained by federal prosecutors over the past decade suggests that there are certain strategies that significantly enhance prospects for success. For example, charging decisions can sharpen the theory of prosecution and reduce some of the evidentiary burdens inherent in these cases. Rather than focusing charges on the entire episode of criminal conduct, our experience has shown that selecting the most egregious acts or those transactions for which the evidence is strongest

not only reduces the burden of preparation and presentation for the prosecutor but also facilitates a better understanding of the case and the evidence by the adjudicatory body.

Prosecutors and investigators may be grouped together in specialized units, or task forces, to concentrate on a particular economic crime problem. Task forces proved especially effective in addressing the frauds uncovered during the savings and loans (S&L) crisis in the United States earlier in this decade.

Denying criminals the fruits of their crimes through the forfeiture of their assets is one of the most dramatic and effective economic crime prosecutive tools to gain prominence during the 1990s. Forfeiture eliminates the profit in crime and also serves to remove valuable instrumentalities of crime, whether aircraft, office buildings or the criminals themselves.

At the end of 1997, approximately \$450 million had been deposited into the Department of Justice Asset Forfeiture Fund. The funds are shared with state and local law enforcement agencies to supplement their crime-fighting assets. In addition, the fund assists in compensating crime victims.

2. International Strategies

Established and predictable mechanisms for obtaining evidence from foreign jurisdictions is essential to fighting economic crime on the international front. Mutual legal assistance treaties (MLATs) are one of the most common means of achieving this goal. Rather than relying on the cumbersome process of letters rogatory, which invokes time-consuming

diplomatic processes for conveying assistance requests, nations are turning increasingly to the MLAT to ensure that borders are not barriers to pursuing economic criminals.

Treaties for extraditing individuals charged with economic crimes are being renegotiated in order to incorporate, as covered crimes, more modern versions of fraud and related offenses that may not have existed in domestic law when the treaties were first executed.

(i) *Regulation*

A key component in combating economic crime is effective regulation. Regulation helps by suppressing practices that invite or conceal fraud. Regulation can also deter migration of undesirable individuals into positions of trust or substantial financial responsibility.

In the United States, all federally insured financial institutions are required by law to file reports with law enforcement agencies whenever they have reason to believe that crimes may have occurred at the institutions. The federal bank regulatory agencies recently revised the reporting procedures to incorporate the benefits of information technology. Under the revised system, known as the Suspicious Activity Report (SAR) system, the reports are filed at one central point where they are entered into a computer database. Law enforcement agencies access the SAR database and retrieve all SARs for their respective jurisdictions. In addition, the computerized database enables law enforcement and regulatory agencies to analyze the SARs and identify emerging crime trends.

(ii) *Regulation of Currency Transactions*

Because money laundering facilitates criminal activity, Congress enacted statutory provisions that create a paper trail for currency that resembles the document trail created by other financial transactions involving bank cheques and money wire transfers. Essentially, the legislation creates reporting requirements when currency enters or leaves the country and whenever cash transactions take place at banks and certain other businesses.

On the international level, several organizations are engaged in sponsoring money laundering enforcement programs. The Financial Action Task Force (FATF), an organization comprising of twenty-six nations, issued revised recommendations in 1996 that broadened the scope of the original recommendations to include monies derived from all serious crimes and to mandate the reporting of suspicious transactions by financial institutions. FATF also conducts mutual evaluations and assessments of member states' anti-money laundering measures by representatives from fellow members.

The United Nations Global Program Against Money Laundering (GPML), based in Vienna, Austria, uses technical cooperation and research projects aimed at providing member states with the means to combat money laundering. GPML is working with other international organizations to develop an Internet website on money laundering matters, including a database of law and regulations.

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A relative of the credit card, the stored value or smart card, may someday replace currency entirely. But the stored value card adds another dimension to money laundering. Simply loading the stored value card with a value of \$5 million in credit renders it the functional equivalent to several suitcases of hard currency.

(iii) *Coordination and Working Groups*

The presence of government regulation is an important step in helping to protect an industry or sector of a country's economy. To maximize the benefits of regulation, however, another ingredient must be added, coordination with the law enforcement community. We have found that interagency bodies, which we call working groups, are an effective means of developing and maintaining that coordination. For example, during our recent savings and loan (S&L) crisis, we relied heavily on our national Interagency Bank Fraud Enforcement Working Group to ensure that our law enforcement and regulatory communities were working in tandem to fight fraud against our financial institutions. In addition to the Bank Fraud Working Group, the Department of Justice currently maintains at least five other working groups for insurance, health care and telemarketing fraud, as well as for money laundering and securities and commodities fraud.

### III. TRENDS AND STRATEGIES

#### A. The Challenges of the Next Decade

Many of today's fraud schemes are simply repackaged versions of classic frauds. We can expect, however, that

tomorrow's frauds will continue to embrace advances in technology and to exploit gaps created by the absence of international agreements and coordination.

(i) *Cybercrime*

Cybercrime, a term that has come to embrace computer-related crime and other high-tech offenses, seems certain to be the crime of the next decade. Computers may be used as a storage or communications device in the execution of a fraud scheme. As an example, a fraudulent telemarketing firm could store names and relevant data concerning prospective victims to be telephoned in a systematic execution of the scheme.

Computers may be used more directly in the scheme as an instrumentality of crime, a tool facilitating the fraud. For example, personal computers have been used successfully to gain unauthorized entry into bank computer systems and then to transfer bank funds to accounts controlled by the cyber-criminals.

The computer also serves as a weapon for the theft of data, telephone or computer services, or for damage to computers and communications systems. Recent media reports described precautions being taken by some governments against the threat of a computer terrorist attack on vital parts of a country's infrastructure.

#### B. Effective Countermeasures

##### 1. Prevention

The United States Attorney General has placed high priority on crime prevention. In the white collar crime arena, this is an especially cost-effective approach to fighting crime. It has great potential not only to prevent billions of dollars in fraud

losses but also to conserve precious law enforcement resources.

Crime prevention enlists the private sector and citizens in the campaign to fight economic crime. The preventive measures need not be expensive or rely heavily on high-tech solutions. Our experience with prevention programs suggests great promise. For example, the banking industry, plagued by mounting losses from counterfeit cheque schemes, recently adopted a straightforward preventive measure. When a non-customer seeks to cash a cheque, the bank requires that the non-customer place his/her fingerprint on the cheque using an inkless fingerprint pad. In states in which this practice has been adopted, cheque fraud has been reduced by 60% or more.

Credit card companies are experiencing success in fighting fraud through the use of neural network technology that uses computers to track individual cardholder spending habits. Visa reported this year that fraud, as a percentage of volume, reached an all-time low in 1997 as a result of the neural network and related fraud detection measures. "Smart" cards, the next generation of credit cards, employ embedded computer chips to store a wealth of information about the cardholder, including biometric information that includes the cardholder's physical characteristics.

Government benefit fraud has been reduced through the use of electronic benefit cards that create a computer trail to detect illegal usage of the welfare benefits.

## 2. International Cooperation

The Global Community has come to realize the critical need for coordination and cooperation in meeting the threat of global economic crime. Some groups, like

UNAFEI, operate under the auspices of the United Nations. Others are based on regional or economic relationships. Although their precise missions may differ, all of these organizations share one common goal, ensuring that borders do not remain barriers to effective law enforcement cooperation.

## 3. Training

Training is an essential ingredient in mounting a successful law enforcement response to economic crime. White collar criminals are clever and resourceful and often operate in sophisticated segments of industry and finance. Moreover, many white collar crimes occur in regulated business environments. Investigators and prosecutors require specialized training in order to navigate these difficult areas.

Commerce is exploding on the Internet. Stocks can be bought and sold, merchandise and airline tickets purchased, and banking transactions conducted from the home personal computer. Our law enforcement agencies must expect financial crime to gravitate to the Internet as it becomes the global marketplace. Thus, investigators and prosecutors will face difficult issues, both technical and legal, as we confront cybercrime. Only through formal, structured training programs will we be able to develop the necessary expertise to meet the challenge.

## **IV. THE FUTURE : PROMISING OR PROBLEMATIC?**

As we prepare to enter the new millennium, the law enforcement community faces the dual challenges of ever-evolving economic crime and technological innovation that constantly accelerates the pace of change in the Global Economy. Technology serves as a powerful tool in the hands of criminals, but it also can be a devastating weapon against these same criminal forces. Through training

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and professional development of investigators and prosecutors, the law enforcement community can continue to suppress the global white-collar crime threat. International cooperation and coordination are central to enforcement responses and to ensuring that a tidal wave of global crime does not engulf the many benefits of the Global Economy.

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## PARTICIPANTS' PAPERS

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### EFFECTIVE COUNTERMEASURES AGAINST ECONOMIC CRIME AND COMPUTER CRIME

*Ramon Crespo Carrilho Machado\**

#### I. ACTUAL SITUATION OF ECONOMIC CRIME

Brazil is no exception to the late-century economic crime sweeping the world. On the contrary, it bears a long list of financial scandals, strenuously prosecuted or still unresolved serious cases and a widespread sense of impunity. The existing set of laws and regulations are under a continuous, although slow, improvement process in an attempt to fill legal gaps, stay abreast of criminal innovations and fulfill international agreements.

At the same time, criminal business activities constantly change their means of action, quickly adapting to the legal and economic context. Surely, money laundering constitutes one of the most serious problems to study and control. Money to be legalized come from countless illicit sources; drugs and arms traffic, corruption, import/export schemes, financial system fraud, contraband and organized crime, the most significant of them.

Economic crime seems to present a typology of special importance and frequent occurrence in Brazil. It concerns large corporations fraud, particularly banks and financial institutions. In the beginning of most cases, banks emerge as financially troubled institutions and later, after investigation, turn out to include a substantial criminal component. That was the case of *Banco Economico*. Its financial problems became public in December 1994

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and upon continuous demand for official monetary assistance, Central Bank intervention amounting to USD \$3 billion began only in August 1995. Later in the same month, the National Monetary Council approved PROER, which is a treasury fund that guarantees account deposits and finances to troubled banks for restructuring. *Banco Economico's* "good part" was sold to other banks while "the rest" remained under Central Bank administration, demanding USD \$2.9 billion from PROER; due November 1996 and never paid.

As to the fraud, the police inquiry process came across several illicit actions entrusted to Banco Economico's owners who cooperated with the financial insolvency. Among these actions were money transfers to foreign accounts, the transfer of assets to associated companies and to controlled off-shore companies, simulated real state operations, bad loans, etc., which significantly reduced its asset guarantees. A remarkable fact was that the Central Bank noticed these frauds only after the police inquiry.

A private bank called *Banco Nacional* has an even more astonishing story. The Central Bank intervention of it took place in November 1995, although there is evidence that inspectors knew about misdeeds since September 1987. The inquiry process conducted by the Federal Police resulted in 700,000 pages, distributed in 900 volumes. Forensic computer experts went through 6,000 magnetic tapes containing 30,000 software programs used by *Banco Nacional*. They

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selected evidence from over 50,000 backup magnetic tapes and developed over 100 data filtering programs in 'Easytrieve', 'Cobol' and 'Clipper' computer languages. One IBM 9672 mainframe and several personal computers were used to manipulate this material.

Accounting and computer forensic examinations managed to prove that *Banco Nacional* utilized up to 1,046 of its accounts to grant phony credit amounting to USD\$ 16.9 billion over a period of seven years. There was no real money involved in these operations, but on manipulating accounting computer programs, those credits incorporated positive results into the audited balance sheets and made it look financially sound. *Banco Nacional* demanded USD \$4.98 billion from PROER, due November 1996 and still unpaid. Again, its "good part" was sold to another bank.

Brazil's land border with Paraguay has also provided an opportunity for large scale money laundering after the Central Bank imposed limitations on foreign resident bank accounts and financial operations in 1996. Some exempt status was granted to a few banks and exchange bureaus, to remain working under the old rules in consideration of border intense commercial transactions. This exception attracted an enormous amount of money laundering operations to the border. Some of *Banco Nacional's* accounts analyzed during the inquiry process raised clues to the border operations, and investigation began. The present status of investigation points to operations amounting to USD \$10 billion, under scrutiny through 152 police inquiry processes, with 50 more being started nationwide to identify these money sources. The Central Bank revoked the special status for that area and enhanced inspections.

Another instance of illicit money transfer being explored is related to "Annex IV", a Central Bank Ordinance that permits foreign investment in Brazilian capital and stock markets through Foreign Investment Funds. Together with legitimate investment money, money previously sent abroad as a result of corruption, tax evasion, parallel accounting schemes, etc., has an excellent method of legally returning to the country and leaving again in the same way. Finance specialists estimate that 50% of Brazilian foreign reserve is funded in Annex IV investments.

The most recently noticed economic crime typology, being followed closely by the Central Bank and the Federal Police, is related to NGOs (Non Governmental Organizations) and "Foreign Entities Assistance Funds". They are moving large amounts of money into Brazil, justified as relief assistance by NGOs and as social investment by Foreign Entities.

One of the few statistical data studies available on economic crime was developed by a Federal Public Prosecutor as a doctoral thesis. It became a book titled "Criminal Control on Crimes Against the National Financial System" (Ela Viecko Volkmer de Castilho) published this year. It researched all Central Bank communications to the Public Prosecutors Office related to facts defined as 'economic crime' by a 1986 law, which is the main legal provision defining crimes against the national financial system. This law places financial institutions under Central Bank inspection, thus greatly centralizing in it all information. During the Central Bank's exercise of this attribute, identified irregularities are addressed via an administrative process. When illicit facts come up, the Central Bank must refer the case to Prosecutors Office, which can dismiss it or request the Federal Police institute a police inquiry process. Upon



completion, police inquiries end up in the Federal Justice courts for trial. The research period covered July 1986 (when the 1986 law was enacted) to July 1995 and considers a selection of 606 Central Bank communications, as shown in Table 1.

**TABLE 1**  
**NUMBER OF CENTRAL BANK COMMUNICATIONS**

Year	No.	fr %
1987	0	0.00
1988	8	1.32
1989	14	2.31
1990	25	4.13
1991	87	14.35
1992	117	19.31
1993	131	21.62
1994	125	20.63
1995	99	16.33
Total	606	100.00

Table 2 shows the information gathered about the average time, in years, calculated from the time the alleged criminal facts occurred and the date they were communicated to the Prosecutors Office.

**TABLE 2**  
**ELAPSED TIME BETWEEN FACT AND COMMUNICATION**

Time	No. of years	fr %
0 to less than 1	63	17.36
1 to less than 2	93	25.62
2 to less than 3	102	28.10
3 to less than 4	72	19.83
more than 4	33	9.09
Total	363	100.00

Average time = 2.2 years

Table 3 shows the elapsed time, in months, calculated from the date of the Central Bank communication to the Prosecutors Office, and the date that the

police inquiry process was instituted.

**TABLE 3**  
**ELAPSED TIME BETWEEN COMMUNICATION AND PROCESS INSTITUTION**

Time	No. of years	fr %
0 to less than 1	63	29.72
1 to less than 2	46	21.70
2 to less than 3	43	20.28
3 to less than 4	25	11.79
more than 4	35	16.51
Total	212	100.00

Average time = 2.1 months

Table 4 shows the elapsed time, in years, calculated from the date of the police inquiry process being instituted and its conclusion by the Federal Police.

**TABLE 4**  
**ELAPSED TIME BETWEEN PROCESS INSTITUTION AND CONCLUSION**

Time	No. of years	fr %
0 to less than 1	2	3.33
1 to less than 2	14	23.33
2 to less than 3	26	43.34
3 to less than 4	14	23.33
more than 4	4	6.67
Total	60	100.00

Average time = 2.5 years

Table 5 shows elapsed time, in years, calculated from the date of the police inquiry process being instituted and indictment by the Prosecutors Office, which is the beginning of the judicial process.

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**TABLE 5**

**ELAPSED TIME BETWEEN  
PROCESS INSTITUTION AND  
INDICTMENT**

Time	No. of years	fr %
0 to less than 1	38	26.21
1 to less than 2	48	33.10
2 to less than 3	37	25.52
3 to less than 4	22	15.17
Total	145	100.00

Average time = 1.8 years

Table 6 shows the elapsed time, in years, calculated from the date of indictment by the Prosecutors Office and the sentencing by a Federal Justice Court.

**TABLE 6**

**ELAPSED TIME BETWEEN  
INDICTMENT AND SENTENCING**

Time	No. of years	fr %
0 to less than 1	5	25.00
1 to less than 2	4	20.00
2 to less than 3	9	45.00
3 to less than 4	2	10.00
Total	20	100.00

Average time = 2,5 years

Table 7 shows the number of adjudicated cases. The distinction between a dismissed sentence and a merit sentence is as follows. The first one is issued after the conclusion of the police inquiry or Prosecutors Office appraisal, when there is no basis for referral to a Federal Justice Court. The latter, after the conclusion of instruction in Federal Court, is provoked by referral.

**TABLE 7**

**NUMBER OF ADJUDICATED CASES**

Item	No.	fr %
Dismissed sentence	62	80.52
Merit sentence	15	19.48
Total	77	100.00

Table 8 shows the nature of merit sentences.

**TABLE 8**

**NATURE OF MERIT SENTENCES**

Item	No.	fr %
Acquittal sentence	10	12.98
Conviction sentence	3	3.90
Mixed sentence	2	2.60
Total	15	100.00

Additionally, table 9 shows the Federal Police Department statistics about the total number of police inquiry processes initiated based on the two main laws regulating economic crime. They amount to 7,742 inquiry processes since 1986 (when the first law was approved) up to the present day. Only 2,893 of these cases are registered as being concluded.

**TABLE 9**  
**NATURE OF MERIT SENTENCES**

Year	Law 7.492/86		Law 8.137/90	
	Started	Concluded	Started	Concluded
1986				
1987	6	1		
1988	11	1		
1989	46	7		
1990	78	36	2	2
1991	154	35	60	17
1992	201	100	59	35
1993	481	235	280	114
1994	401	255	434	209
1995	369	190	518	288
1996	821	470	550	252
1997	629	228	851	257
1998	1,107	81	684	80
Subtotal	4,304	1,639	3,438	1,254

The research study and table data eloquently demonstrate the application of the economic crime law. The small number of registered criminal offences bear no proportional significance when compared to the total criminality registered in official statistics; estimated as one million Penal Code offences per year in the country. It shows the necessity to investigate the current interpretation of the legal provisions and to study the Central Bank, Public Prosecutors Office, Federal Police and Federal Justice system's operation and procedures.

**II. PROBLEMS IN INVESTIGATION AND PROSECUTION OF ECONOMIC CRIME AND THEIR COUNTERMEASURES**

The economic crime research mentioned before showed the Central Bank's predominant role in identifying illicit procedures and reporting them to justice authorities. Legal power to inspect the financial system's operating procedures

places the Central Bank under a judicial duty to communicate crimes to the Public Prosecutors Office. This communication is not a requirement to start the police inquiry process or criminal justice process, but it has conditioned other instances of action in practice.

The 1986 economic crime law predicts the assistance of the Central Bank in prosecuting cases in the criminal process. However, it is not rendering greater and better scrutiny of economic crime. As became evident in the bank crash cases cited in the previous section, Central Bank monitoring has not prevented trouble in financial institutions. Its inspecting structure is oriented to law-abiding auditing actions, instead of real financial situations and assets quality evaluations.

Among other institutions with inspecting duties and illicit communication obligations are the CVM (Securities Exchange Commission), the Internal Revenue Service (IRS) and some government banks. Compared to the number of Central Bank communications, CVM has communicated a total of 85 cases to the Public Prosecutors Office, based on the 1989 law defining responsibilities for damages caused to investors on the Exchange Market.

The Central Bank's functions and autonomy are expected to undergo significant changes as further regulations are being debated in Congress. Its autonomy, in relation to Executive power, is intended to avert political influence in all areas. The same autonomy is desired for CVM as well, including a greater role in assisting prosecution.

### **III. CRIME PREVENTION MEASURES TO CONTROL ECONOMIC CRIME**

The first step to preventive action on economic crime is a sound, effective set of laws. It is a prevalent belief that the resolution and significant change of serious problems can only take place in a country as a consequence of political motivation. Observation of recent trends in Brazil leads to the conclusion that important changes are taking place.

Recent developments include the March 1998 Congress approval of Law 9.613/98, incriminating money laundering activities. This long-awaited law filled an important gap in Brazilian criminal legislation, while at the same time complying with several international agreements, (among them the 1991 Vienna Convention). It also created COAF (Council to Control Financial Activities) responsible for monitoring the activities of money laundering suspects in financial and commercial operations. COAF is empowered to apply administrative penalties and request needed information.

Along the same line, the constitution of SGT-4 (Money Laundering Subcommittee of the Mercosul Financial System Commission) is intended to develop strategies for the Mercosul countries. They are presently evaluating the Brazilian proposal for a minimum regulatory code.

Another important initiative was the creation of the National Anti-drug Bureau, upon the recognition that Brazil has become a corridor for drug export, and the biggest manufacturer of chemical products in Latin America. The estimated consumption of illegal drugs in the country is USD \$7.5 billion. Brazil has also become more attractive for money laundering and capital recycling, due to economic stability.

A new anti-drug policy is to be developed based on prevention and rehabilitation, including better laws and regulations, particularly on the concept of preserving national sovereignty and individual rights. This new policy will also pursue investigating the financial flow of drugs and Brazil's incorporation into FATF (Financial Activities Task Force). The Brazilian Federal Police Department also has improved its structure, aiming to become a more effective and specialized force against economic crime. A specific commissioners division was created to this end, namely DICOIE (Organized Crime and Special Inquiries Division), under the direct guidance of the General Director. Finally, it's crucial to optimize international cooperation, especially with Interpol.

### **IV. ACTUAL SITUATION OF COMPUTER CRIME**

The term "computer crime" is being widely utilized and is well established and defined. However, due to the fast pace of technological innovation, a comprehensive approach must be adopted to efficiently combat this type of crime. Based on the the Brazilian Federal Police Department's experience relating to computer crime, a specialized Computer Crime Investigative Division was created as part of the National Forensic Institute. In developing a cognizance for, and extending this category of crime, it was first necessary to devise three kinds of offences, as follows:

#### **A. Computer Aided Activities**

These are activities usually developed without 'computer demand', but the use of computers come from the assistance they provide. It presents the possibility of evidence retrieval when police action comes across these types of devices. Some examples are:

- computer organizers used by drug traffickers to store telephone numbers

and addresses, and computers storing information about their business;

- parallel accounting control in computers.

**B. Technology as an Instrument**

In this category, the presence of computers in the process is required to perpetrate the offence. Without the computer, the fact of the crime would not occur. This category is not intended to indicate the appearance of new criminal facts, although this might be the case. It is mainly for activities using computers as a new tool to gain efficiency, lower costs and improve crime member security. An illustrative example is counterfeit money, which migrated from labor intensive and costly printing processes to the average cost of a graphics workstation. Likewise, this is also the case for economic crime.

**C. Virtual Crime**

Labeled this way are those crimes targeting computers and the reality (data) stored in them. The intention is to alter the digital representation of goods and values in order to obtain unmerited advantages. For this purpose, all it takes is privileged access to computers, commanding transactions through keyboards, which is far more convenient than handling pistols and machine guns to demand and withdraw money from a bank.

Offenders in these cases seem to be motivated by the small probability of physical injury, together with the support that a device which processes millions of operations per second can offer, to use these operations to benefit them directly.

Its known that in Brazil, several credit card companies have been victims of credit card fraud; but they will not disclose these frauds through fear of negative publicity and breach of client confidence. One of

these institutions suffered a USD \$800,000 loss through illicit Internet credit card purchases between July 1997 and March 1998, which were not reported to police.

Counterfeit money produced through graphics workstation resources, and printed on laser and inkjet printers, has increased dramatically since the introduction of the 'Real' (Brazilian currency denomination) in 1994, with newly designed bills. The number of forged currency bills made through this method and seized by the Central Bank increased as shown in table 10.

**TABLE 10**  
**NUMBER OF SEIZED COUNTERFEIT MONEY BILLS**

Year	Bills
1994	1.046
1995	9.168
1996	75.283
1997	137.489
1998	101.182
Total	324.168

The enormous incidence of this type of offence compelled the Federal Police Forensic Section to develop a computer database intended to classify each counterfeit bill according to its:

- value
- printing process: ink jet, laser, off-set, copying machine
- individualizing details: type of paper, serial number, defects
- origin: city where bill was apprehended
- date
- inquiry process number
- names involved

This database registers money forgery occurrences in Sao Paulo since February 1996, storing information from 1,387 police

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inquiry processes and totaling 4,177 currency bills classified to date.

A report containing matching characteristics keyed by value, printing process, details and name is then issued and attached to the forensic analysis report which is sent to the origin for further police investigation. Another benefit of this report is the possibility of quickly identifying and effectively charging the criminals also responsible for counterfeit money with similar characteristics found in distant locations.

**V. PROBLEMS IN COLLECTING  
EVIDENCE OF COMPUTER CRIME  
AND THEIR COUNTERMEASURES**

Within evidence collection, a more pressing and crucial problem is posed by tracking and identifying offenders, particularly when considering cases originating in large networks such as the Internet. The actual stage of WWW computer interconnection allows anyone, from the most remote location, to access information in unsecured systems virtually unnoticed. Moreover, his/her system might be used to store, diffuse and/or promote such crimes as pornography, bomb manufacturing, introducing computer viruses, etc.

Although most reported cases relate to pornography involving children and teenagers, damage caused by hackers is frequent, but seldom effectively prosecuted, due to criminal classification uncertainty. Questions to address in examinations of this nature are:

- i) First, the existence of legal provisions for the crime;
- ii) Correct identification of the criminal acts authorship. Most of the time, computer activities registers (logs) are obtained, but the possibility of

forged computer access using third parties accounts must be considered, as it is a common procedure in hackers attacks;

- iii) What can be considered as evidence? For example, one Internet page containing illicit material is initially noticed (browser). Usually, there's a responsible person for each page on the web, and he/she is identified by inquiring through the server operator (it must be remembered that servers will not take responsibility for users published material). To better support prosecution, these pages are apprehended in the server's system. Couldn't the hackers be those who inserted the pages, considering the previous item's (2) rationale?
- iv) One computer being "invaded" by a hacker theoretically situated in a different state poses the problem of distance, in actions of search and apprehension.

In a recent and very much publicized case in Brazil, a TV presenter of a cultural program which shows its e-mail address on screen for viewers interaction, received 105 harassing messages from a "rapist@macho.com". Police were successful in identifying the author, a married systems analyst, who disguised his signature using software called Unabomber. In addition, he had 430 more messages in his HD sent to a newspaper columnist. He was charged with harassment and convicted to a one-year alternative sentence.

To track him, as has happened in other cases, police relied on the network service provider's cooperation. Obviously, this cooperation can not always be expected, as some service providers are resistant to disclose client registers; posing the problem of devising other effective means of investigation and mandatory disclosure

regulations.

A relevant case of child pornography was investigated by Interpol in Brazil, based on information received from counterparts in other countries and child protection groups. Working with remote monitoring, electronic surveillance and search warrants, Interpol managed to identify and arrest the service operator, and one of its users, in another state as responsible for furnishing several images.

The creativity component found in the practice of these particular offences is a continuous challenge for forensic specialists' knowledge improvement. Some useful technical concepts for evidence collection are presented below, although it is important to mention that it is difficult to list a detailed set of proceedings and techniques suited for all forensic examinations.

#### **A. Evidence Retrieval**

The title expression has been used for some time by special computer crime units in international organizations; meaning a whole set of proceedings to be performed in the forensic examination of computer materials. An elemental sequence in this set of proceedings is as follows:

- i) **Ambience Analysis:** gathering all information concerning work environments, hardware and software adopted, user activities, data flow, connections configuration (e.g. isolated workstation, network station, modem connections, etc.), amongst others, is fundamental in reducing the possibility of error in the next steps;
- ii) **Search:** after taking cautionary measures to preserve all the material (unchanged), useful data is searched in the equipment support;
- iii) **Translation:** considering that any and

every computer content is, in fact, a digital representation of the comprehensive information of human beings, translation processes are used to both insert into and retrieve information from computers, thus making it possible to obtain original unaltered information. It may look simple but, considering the possibility of a faulty translation, methods and proceedings must be defined to guarantee sufficient clarity and accuracy;

- iv) **Presentation:** issuing a final report.

#### **B. Search of Information**

Special methods and tools are employed to recover data, information, or remnants of them, located in permanent memory computer media, such as hard and floppy disks, magnetic tapes, CD-rom, optical disks, etc. The usual proceedings are:

- i) Searches adopting a user point of view, oriented to understanding the work ambience of the equipment's user, comprehending directory tree verification, main software programs and installed systems;
- ii) Meticulous search of scattered data, such as text and images fragments, deleted files and printing spools.

The above mentioned cautionary measures in handling examining material anticipate the following actions, taken in order to preserve evidence integrity:

- i) **Technical measures:** boot control, media mirroring etc;
- ii) **Physical Care:** packaging, transportation, magnetic fields etc.

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**VI. LEGAL FRAMEWORK AND  
CRIME PREVENTION MEASURES  
TO CONTROL COMPUTER CRIME**

The existing legal framework on computer crime in Brazil still lacks a specific and comprehensive law defining principles, legal use of information, and related offences and punishments. There is a draft bill in Congress, which has not been submitted to debate yet, whose proposals contain:

- Principles to regulate computer network services;
- Rules for the use of computer and network information;
- Definition of computer offences and respective punishments, ranging from six months to six years imprisonment and fine.

Some existing laws provide partial support to the prosecution of determined offences. The relevant portions of these laws are summarized below:

- i) Law 5.988 - 1973: when information turns to be original material and is related to literary, artistic or scientific work, its author has rights defined in this law;
- ii) Law 7.170 - 1983: considering a given set of data as secret and of Brazilian state interest, its diffusion (communication, delivery, consent to communication or delivery) to foreign governments or groups, or organizations or groups of illegal existence, constitutes a crime against national security, political and social order;
- iii) Law 7.492 - 1986: the plain unauthorized access to extraneous data kept by financial institutions is already typical conduct. Article 18 defines as a crime the breach of financial institutions operational secrecy or rendered services;

- iv) Law 7.646 - 1987: software is defined as original intellectual property.

In some cases, certain laws are being used with a broader interpretation of their provisions; to penalize computer-related crime conduct lacking a specific legal basis. According to one approach, "If computer equipment is considered someone's else property, actions of erasing or altering its digital representations directly affects the condition of its regular functionality. In this way, the equipment can be properly considered as an aggregate of its physical parts (hardware), in association with essential instructions to achieve its intended functionality (software), thus any such damage could be characterised as a crime."



# EFFECTIVE COUNTERMEASURES AGAINST ECONOMIC CRIME AND COMPUTER CRIME

*Mahavir Singh Bali\**

## I. INTRODUCTION

Economic crime has been a phenomenon of commercial life since the days of the Romans, but in the latter half of the 20th century, it has become a growth industry. With the development of sophisticated means of communication, jet travel, facsimile machines, the wire transfer of money and now open borders, there are now no barriers to those who would prey on our financial institutions, destroy the economic stability of our commercial enterprises or corrupt our governments. Moreover, it is a crime of low risk and high gain, with usually very little investment from the perpetrator. Access to a fax machine and telephone are sufficient tools with which to perpetrate massive frauds.

The detection, investigation and successful prosecution of the economic criminal is difficult enough for those responsible for it in developed countries. The cases being complex and multi-jurisdictional, require not only dedication and commitment of the investigating agencies and their governments, but also the expertise, manpower and funding necessary for the task. Developing countries face an insurmountable task in this regard. The officials of many of these governments, as a result of a combination of factors, including all pervasive corrupt practices and low wages, are themselves highly vulnerable and have little incentive to change the situation. Many Governments are loath to delve into allegations of massive frauds and

corruption committed by their predecessors, for fear that their successors may be inclined to do the same.

At the heart of all free market economies lies a fundamental paradox. It is the need to provide the greatest degree of commercial freedom for the market to enable the entrepreneurial business to flourish, while at the same time ensuring that those whose criminal activities would subvert and undermine the commercial effectiveness of those markets are denied access to the benefits which that very freedom allows. It is one of the great ironies of western capitalism that in so many cases, the most apparently innovative and entrepreneurial financial schemes, which are most attractive to investors are all too often the brainchild of the white collar criminal. For countries whose free market economies are still evolving, it is extremely difficult to strike the delicate balance between the imposition of too great a degree of bureaucratic regulation, which has a tendency to inhibit entrepreneurial activity, and deliberately refraining from introducing tough regulatory legislation, thereby allowing emerging markets to become infiltrated by criminally corrupting influences (who offer the tempting short-term profits, with accompanying long term damage and subversion). Nevertheless, it must be recognised at the threshold that criminal infiltration of the commercial infrastructure of society is one of the quickest ways of ensuring the ultimate corruption of the social and political fabric, with all the inherent implications which such a scenario possesses for the very basis of a free democracy.

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Economic crime, by the very disparate nature of its component activities, is incapable of simple definition. White-collar crime is expressed most frequently in the form of:

- misrepresentation in financial statements of corporations
- manipulation in the stock exchange
- commercial bribery
- bribery of public officials directly or indirectly in order to secure favourable contracts and legislation
- misrepresentation in advertising and salesmanship
- embezzlement and misapplication of funds
- short weights and measures and misgrading of commodities.
- tax-frauds
- misapplication of funds in receivership and bankruptcies.

Measuring the underground economy of any nation, much less of developing countries, is an imprecise science, involving only guesstimates and probabilities based on imperical hypotheses. According to Edger L. Feige, Professor of Economics, University of Wisconsin-Madison;

“the world economy appears to subsume a hidden economy which employs US currency as its medium of exchange and is roughly 90 per cent as large as the US. economy”.

The Congressional Quarterly Researcher, puts the size of the global underground economy at a staggering US\$ 5.8 Trillion (1993). Generation of unaccountable funds from an underground economy is not peculiar to the United States. Among other industrialised nations the problem is equally severe. However, the problem is more acute in developing economies, particularly, in Africa and South Asia. The International Labour Organisation estimates that the informal economy employs 59 percent of the urban

labour force throughout Sub-Saharan Africa, and accounts for as much as half the GDP of some countries in the region.

In India, various estimates have been made to ascertain the extent of black money generated from time to time. Amongst them, the most authentic is that of the National Institute of Public Finance and Policy, New Delhi (NIPFP). NIPFP estimated the black money income in India at Rs. 405,000/- Million (USD \$ 32,440 Million) in 1985, amounting to 18 to 21 per cent of the GNP. This study also estimated that the tax evaded can be anywhere up to 70 percent. The main headings under which the estimates were made are as below :

- i) Grant of licences and permits in return for bribes or political contributions.
- ii) ‘Speed money’ to accelerate administrative procedures.
- iii) The sale of jobs, postings or transfers in various public services.
- iv) Regular bribes to petty functionaries from different government departments (for instance factory inspectors, health inspectors, police, tax inspectors, etc.). These collections are often shared with higher officials of the department concerned.
- v) Bribes to alter land use, zoning or to regularise unauthorised structures.
- vi) Bribes to obtain and maintain scarce public goods and services, such as electricity, telecommunications, irrigation water, and rail wagon allotments.
- vii) Bribes to obtain public contracts.
- viii) Bribes to political authorities at various levels, ostensibly to finance elections and post election manipulations.

Apparently the above report did not take into account many other factors responsible

for generating unaccountable funds in India. According to Prof. Suraj B. Gupta of the Delhi School of Economics, the black income in India stood at Rs.1,492,970 Million (US \$ 113,241- Million) in 1987-88.

It is to be noted that most of the estimates of black income made by economists do not take into account unaccountable funds generated in arms sales, organised crimes, drug trafficking, terrorism and money laundering. The underground economy by definition is informal, invisible, subterranean and off-the-books. These factors make it extremely difficult to guesstimate, let alone estimate, the quantum of funds involved in these transactions.

India has a plethora of laws to curb economic crime in its various manifestations and dimensions. Appendix 'A' indicates such crimes and the corresponding statutes to deal with them.

## II. CORRUPTION (GOVERNMENT & CORPORATE)

Ingowalter identified four distinct categories of payments which possess corrupt characteristics:

- i) *Bribes* : Significant payments to officials with decision making powers to convince them to do their jobs improperly.
- ii) *Grease* : Facilitating payments to minor officials to encourage them to do their jobs properly.
- iii) *Extortion* : Payment to persons in authority to avoid damage from hostile actions on the part of unions, criminals, utilities, etc.
- iv) *Political contributions* : payments to political parties linked to favours or threats of retribution in case of non-payment.

The effect of such payments means that ordinary commercial life soon becomes undermined, because the bribes paid are inevitably passed on by the payer of the bribe to the customer, who has to pay more for inferior goods. At the same time, the corrosive effect of institutionalised corruption permeates every level of society. This leads to the growth of a cynical disregard for subjects such as commercial morality, public sector ethics or the rule of law.

Economic crime is invariably associated with corruption, which of course represents an even more direct attempt on the integrity of the State and its institutions. Corruption, illegal gratification and considerations which are not due, involve huge amounts of money and valuables. These transactions not only breed black money but are also potential grounds for parties with vested interests for the commission and expansion of the activities directed towards economic offences. Even few millions of illegal dispensation by way of bribery is sufficient for economic manipulation to the tune of billions, by these offenders.

Corruption in public and corporate life has assumed serious dimensions in India. From the early eighties, political corruption has been on the increase and many leading political figures in India and many political parties have been accused of accepting illegal monetary contributions from the business world in the matters of arms contracts, power and fertiliser contracts, etc. Liaison agents, both of leading Indian and foreign firms, have been operating this system in conjunction with corrupt politicians and bureaucrats. In some of the cases which have come to light, complicated money laundering operations and "hawala" (underground banking operations) have been found to have taken place in order to stash illegal funds abroad. The higher

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judiciary in India, particularly, the Supreme Court of India and various State High Courts had to intervene and order investigations against leading political figures on the basis of public interest litigations, when the normal criminal justice system and the anti-corruption machinery was found weak or insufficient to proceed against them.

The issue of corruption in public life has engaged the attention of the people, the judiciary and the Government of India. India has had the legislative tools (Anti Corruption laws) for the last five decades to combat corruption in the public service. The updated Prevention of Corruption Act, 1988 is quite comprehensive in its scope and covers the bribe giver, the bribe taker, their aides, abettors and conspirators including the 'touts' or middlemen. Under Criminal Law Amendment Ordinance 1944, assets acquired through corrupt means, both in the name of self or "Benami", can be forfeited. However, the legal provisions alone are not sufficient to tackle the problem on account of the enormity of the problem. Only a small number of investigators are available to tackle the task and a long time is taken in investigation and trial. The information collected from the Central Bureau of Investigation, India and various State

Vigilance Bureaux in regard to punitive actions against the public servants and others is indicated in Tables I to IV.

Table I indicates cases registered by the CBI and by the various State Anti-Corruption Bureaus.

**TABLE I**

Year	No. of cases registered		Persons Arrested	
	CBI	States/Uts	CBI	States/UTs
1991	1180	1708	-	1325
1992	1231	1772	-	1011
1993	1282	1895	-	1167
1994	1106	2104	463	2296
1995	825	2064	297	2604

Table II indicates departmental action taken against various categories of public servants by the CBI, for their involvement in corruption cases. Table III indicates departmental action taken against various categories of public servants by the State/UT Vigilance Bureau. Table IV gives statistics with regard to the public servants prosecuted by the CBI for their involvement in corruption cases along with assets seized from them.

**TABLE II**

Year	Persons reported for regular Dept. action	Persons reported suitable for action by Dept.	Departmental punishment				Categories of public servants involved in regular Dept. action		
			Dismissal	Removal	Major	Minor	Gazetted	NGO	Pvt
1991	1132	364	35	10	NA	NA	608	493	31
1992	1338	582	54	24	NA	NA	NA	NA	NA
1993	1179	NA	NA	NA	NA	NA	NA	NA	NA
1994	1922	149	22	22	137	256	249	187	1
1995	735	44	11	11	133	194	392	322	21

**TABLE III**

Year	Persons reported for regular Dept. action	Persons reported suitable for action by Dept.	Departmental punishment				Categories of public servants involved in regular Dept. action		
			Dismissal	Removal	Major	Minor	Gazetted	NGOs	Pvt
1991	734	317	19	17	207	207	868	1623	159
1992	831	45	6	2	45	45	1027	1253	151
1993	939	35	18	10	52	52	411	1431	294
1994	318	103	7	3	27	27	464	1176	229
1995	295	87	27	14	53	53	1114	1278	499

**TABLE IV**

Year	No. of cases regd.	No. of public servants involved						Total seizure during searches (Rupees)
		Charge sheeted Arrested		Convicted				
		GO	NGO	GO	NGO	GO	NGO	
1992	1025	234	252	38	33	31	130	6,70,54,928/-
1993	1016	277	248	45	57	57	10	8,31,94,603/-
1994	1117	295	470	46	65	70	139	4,55,14,180/-
1995	1134	384	425	51	53	87	153	3,07,34,994/-
1996	1189	478	412	57	76	78	131	9,07,95,209/-
1997	988	385	331	66	110	57	114	5,60,59,639/-
1998	430	119	195	31	53	14	38	92,79,954/-

### III. ABUSE OF FOREIGN AID PROGRAMMES

Since World War II, the more developed countries of the northern hemisphere have provided financial and economic aid to underdeveloped nations in the "Third World". A proportion of the aid supplied has been donated by religious and social welfare charities who draw their funding, to a large extent, from voluntary contributions given by private donors.

By far, the greatest proportion of aid funds are provided by government agencies. The terms under which such aid packages are given are often associated

with parallel, reciprocal agreements such as the supply of arms or other military hardware, the provision of political advice or consultancy, or guaranteeing (by the recipient government) the suppression of the political ambitions of groups whose aims are perceived to be antithetical to those of the donor State.

Examples are payments made in the Iran-Contra Affair. In an investigation in 1991, evidence surfaced of U.S. Contractors improperly using foreign military financial funds to pay unauthorised commissions for contracts in Egypt and Israel. Huge fortunes in foreign

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banks, deposited by dictators of underdeveloped countries, are nothing but the systematic plunder of nations by those leaders. In India, allegations have frequently been made of misuse with corrupt motives of foreign aid programmes by both officials and politicians.

**IV. SMUGGLING AND CUSTOMS/  
EXCISE FRAUDS**

Smuggling, which involves clandestine operations leading to un-recorded trade, is another major economic offence. The volume of smuggling depends on the nature of fiscal policies pursued by the Government. The nature of smuggled goods and the quantum thereof is also determined by the prevailing fiscal policies.

India, with a vast coastline of about 7500 kilometres and open borders with Nepal and Bhutan, is prone to large scale smuggling of contraband and other consumer items. Though it is not possible to quantify the value of contraband goods smuggled into this country, it is possible to estimate the extent of smuggling from the value of contraband seized, even though it may constitute a very small proportion of the actual size. Table V shows the value of goods seized.

**TABLE V**

Year	Value of Goods Seized (in crores)
1988	443.14
1989	554.95
1990	760.08
1991	740
1992	535.71
1993	388.96
1994	535.22
1995	631.25

The high point of smuggling was in 1990 when contraband worth Rs.760 Crores was seized. The introduction of various liberalisation measures, such as with regard to gold and silver imports in 1992-93, had an impact on customs seizures. The total value of seizures came down by 30% (Rs.536 Crores in) 1992 and further down to Rs.389 Crores in 1993. The value of seizures of other important commodities from 1991 to 1996 is shown in table VI.

The value of seizures of gold and silver accounted for about 44% of total seizures annually prior to the liberalised import policies. It came down to 21% after the announcement of new policies and has continued to fall. On the other hand, the seizures of commodities like electronic goods, narcotics, synthetic fibres, wrist watches, Indian currency, foreign currency,

**TABLE VI**

Items	(in Crores)			
	1990-91	1991-92	1994-95	1995-96
Gold	198.8	188.5	55.4	50.8
Silver	146.6	147.7	3.6	0.54
Narcotics	25.1	21.8	54.3	77.94
Electronic Items	55.5	23.1	51.2	38
Foreign Currency	7.7	10.8	27.4	40.2
Indian Currency	6.5	5.6	6.6	5.6
Synthetic Fabrics	4.8	2	2.4	12.9
Watches	3.2	6.2	3.3	3.9

etc, rose during 1994-95. The value of seizures of electronic items rose from Rs.35 Crores in 1993 to Rs.51 Crores in 1995. The value of Indian currency and foreign currency seized rose from Rs.5 Crores and Rs.20 Crores in 1993 to Rs.10 Crores and Rs.43 Crores respectively in 1995. In 1987, gold occupied the top position amongst the smuggled items followed by narcotics, electronics, watches and silver. In 1995, however, narcotics occupied number one position followed by gold, electronics, foreign currency and synthetic fibres.

Table VII shows the number of persons arrested, prosecuted and convicted under the Customs Act. In addition, 758 persons were detained under COFEPOSA in 1991; 423 in 1992; 372 in 1993; 363 in 1994 and 350 in 1995.

**TABLE VII**

Year	Arrested	Prosecuted	Convicted
1991	2358	1669	574
1992	1745	1051	381
1993	1234	679	350
1994	1210	301	352

Sovereign countries of the free port areas, with few exceptions, impose import tariffs on goods being brought within their jurisdiction for the following reasons :

- (i) Indirect taxation.
- (ii) To prohibit the importation of articles which may pose a specific threat to the host nation.
- (iii) As a measure of protection to home based industries.

Fraudsters find ways and means to circumvent these regulations/duties. In Europe, it takes the form of an attempt to obtain unlawful payment of agricultural subsidies based upon the production of forged documents etc. In India, the various schemes employed by the fraudsters are:

(i) Over-invoicing of exports to take advantage of the DEEC scheme wherein imports of duty-free raw materials are made subject to the export obligation being fulfilled. The larger the value of the export goods, the greater the value of the duty-free imports permitted. Difficulty experienced in countering this is that the Customs Department has to prove the contract between the Indian and the foreign parties is fake. An unholy relationship between the exporter and the importer has to be established. This requires foreign investigation which is both expensive and time-consuming, and cannot be undertaken in every case. Double taxation treaties do not help as they do not exist in every country. Problems have been encountered by India, particularly with regard to the investigation of such deals between Indian exporters and importers in Dubai.

- (ii) Another method adopted by the fraudsters in India is to over-invoice the exports, in which case the money comes back to India through 'Hawala' or by the smuggling of narcotics, gold, etc. Similarly, another method to defraud Customs is by under-invoicing the imports. In this case, money is transferred out of the country by 'Hawala'.
- (iii) Fraudulent importers also misuse the provisions of value-based, advance-licensing schemes for importing raw materials into the country, and later for selling the same at huge profits in the black market.

Table VIII gives the latest figures in respect of the value of seizures under the Customs Act.

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**TABLE VIII**

(Value Rs. in Crores - a Crore is ten million).

NAME OF ITEM	1994-95	1995-96	1997	1998 (to August)
Value of seizures (smuggling)	587.46	648.59	539.96	256.18
Duty value of evasion cases	66.83	364.87	143.98	73.01
Total	654.29	1,013.46	683.94	329.19
Seizures of major Commodities	1994-95	1995-96	1997	1998 (to August)
Gold	60.8	56.76	54.59	30.25
Foreign currency	33.26	51.53	53.05	26.77
Synthetic yarn and fabrics	13.78	22.62	21.67	7.41
Electronic items	57.24	51.07	24.45	5.78
Narcotics	89.7	73.31	41.32	12.9
Narcotics (International value)	NA	1,250.79	765.33	209.59
Chemicals	2.68	1.92	3.99	14.77
Agricultural produce	NA	4.26	5.58	2.6
Ball bearings	NA	5.43	12.63	5.05
Machinery & parts	NA	23.74	32.42	16.96
Others including vehicles/vessels/aircraft	330	357.95	290.26	133.69
Major commodities in respect of duty evasion cases	1994-95	1995-96	1997	1998 (to August)
Electronics	NA	21.23		0.01
Synthetic yarn and fabrics	NA	13.42	8.73	11.95
Machinery & parts thereof	NA	2.15	1.75	2.29
Chemicals	NA	6.94	2.05	1.87
Others	NA	321.13	131.45	56.89

### V. DRUG ABUSE AND DRUG TRAFFICKING

This is perhaps the most serious (organised) crime with economic overtones affecting the country, being truly trans-national in character. India is geographically situated between the countries of the Golden Triangle and Golden Crescent, and is a transit point for narcotic drugs produced in these regions, to the West. India also produces a considerable amount of licit opium, part of

which also finds place in the illicit market in different forms. Illicit drug trade in India centres around five major substances, namely; heroin, hashish, opium, cannabis and methaqualone. Seizures of cocaine, amphetamine and LSD have not been known, and if occur, are insignificant and rare.

The Indo-Pakistan border has traditionally been most vulnerable to drug trafficking. In 1996, out of the total quantity of heroin seized in the country,



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64% was sourced from the “Golden Crescent”. The Indo-Mynamar border is also quite sensitive but the percentage of seizures from there is much smaller. The Indo-SriLanka border has also started contributing considerably to the drug trade.

The seizure of narcotic drugs from 1991 to 1995 and the persons involved in the trade is indicated in Table IX. In 1996, 13,554 persons were arrested under the Narcotic Drugs and Psychotropic Substances Act (NDRS). Out of them, 130 persons were of foreign origin. Eighty persons were detained under the NDPS Act in 1991; Eighty each in 1992 and 1993; 123 in 1994 and 89 in 1995.

India has a draconian anti drug law - the Narcotic Drugs and Psychotropic Substances Act 1985, which provides a minimum punishment of 10 years for offences under this Act. The conviction rate in drug offences is rather low. It was 48.8% in 1995. The acquittals mainly result due to non-observance of statutory and procedural safeguards, i.e. the enforcement officer failing to volunteer themselves for personal search before conducting the personal or house search of the accused, or failure in offering to have the accused searched by a Gazetted Officer or a Magistrate. It is being contemplated to amend the Act to plug procedural loopholes

and to calibrate punishments by grouping the offences.

Investigative skills need to be honed and trials expedited. Inter-agency exchange of information amongst the countries by the quickest possible means, coupled with expeditious extradition proceedings, would prove helpful in curbing the drug menace. India has signed bilateral agreements with the USA, UK, Myanmar, Afghanistan, UAE, Mauritius, Zambia and the Russian Federation for drug control.

**VI. CORPORATE FRAUD (THEFT & FALSE ACCOUNTING)**

This consists of the formation of limited companies which will then obtain large quantities of goods on credit, in what would appear to be a normal commercial deal. The supplies are then secretly re-routed to other corporate entities or sold at ‘knockdown’ prices. The proceeds from the sale are then passed back to the controllers of the fraud, whose names and antecedents in most cases do not appear anywhere in the company documentation. The main difficulty lies in being able to differentiate between a deliberate operation of such a company and the activity of a wholly legitimate concern; which falls upon hard times owing to economic recession or a fall in commercial demand for its products. Once the proceeds from the crime have

**TABLE IX**

Drug Type	1991	1992	1993	1994	1995
Opium	2145	1918	3011	2256	1183
Marijuana	52633	64341	98867	187896	57584
Hashish	4413	6621	8238	6992	3073
Heroin	622	1153	1088	1011	1251
Mandrax	4415	7475	15004	45319	16838
Persons Arrested(No.)	5300	12850	13723	15452	14673
Persons Prosecuted (No.)	5546	7172	9964	9154	12918
Persons Convicted (No.)	855	761	1488	1245	2456

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been secured, the directors of the company allow it to be liquidated and start another company in another town using the same method. During the year 1992-93, the British Serious Fraud Office was investigating fraud cases of this nature where total losses exceeded 5,300 million pounds.

In India it is very easy to register a company, private or limited, or a partnership concern. Inter-company transactions are established with a view to defrauding income tax authorities. In banks also corruption invariably plays a part, as in most of such deals, certain officials of the departments/banks concerned are compromised.

With the liberalisation of the Indian economy, positive developments in the stock exchange, primary share/securities markets, foreign investments, opportunities for joint ventures abroad etc., there has been a sudden spurt in demand for credit/finance from the corporate world. Unfortunately, this has also resulted in a growing incidence of corporate frauds which can be clubbed in the following categories :

- (i) *Frauds in Public Issue of Shares:* Many private limited companies have floated the public issues of shares. On receipt of application money, the shares have not been allotted. At times, against the public issue of shares, bridging loans have been obtained from the banks. The funds so obtained have been diverted to the front companies for various other purposes. One securities scam on a huge scale took place in the country and will be discussed under bank fraud.
- (ii) *Non-banking Financial Companies, Plantation Companies and Chit*

*Funds:* In the recent past, there has been a mushroom growth of NBFCs, Teak/Agro Plantations, Chit Funds, etc. These promised very high and attractive returns on investments made with them. Funds thus collected have been diverted for other purposes and most of these companies have become defunct.

- (iii) *Imports into Bonds:* Gold, as an unfinished product, is imported into bonded warehouses by specified agencies without payment of Customs duty. From the bonded warehouses, gold is then issued to export-oriented units for manufacturing finished products for exports. However, it has been observed that in a large number of cases, gold was found to have been diverted to the local markets for huge illegal profits.

## VII. BANK AND SECURITIES SCAMS

All the free market economies are based, to a large extent, on trust. Indeed, without a degree of trust, it is doubtful whether any of the instruments of the free market economy would work successfully. At the heart of that trust lies the reputation of the banking sector. All international trade is conducted on a documentary basis ; bills of exchange, certificates of deposit, bills of lading, letters of credit, cheques, bank drafts, telegraphic transfers and collateralised lending, to name but a few of the financial documentary services provided by banks.

Apart from the obvious kinds of fraudulent activities to which the banking sector is exposed and well-attuned to ie cheque and credit card fraud, forged credit documentation etc, banks are increasingly concerned about the egregious use of their

computer systems by dishonest employees or criminal outsiders to obtain cash.

In the last two decades, India has seen a transformation in banking from class-banking to mass-banking. There has been a phenomenal growth in banking - both in terms of size and activities/businesses. This large scale expansion has not been without attendant risks. It has brought in its wake, dilution in the quality of various services, weakened supervision and control mechanisms in many banks. In 1976, commercial banks reported to the Reserve Bank of India 930 cases of fraud involving an amount of about Rs.9 Crores. During 1990, these figures had gone up to 1785 cases of fraud involving amounts more than Rs.110 Crores. The public sector banks had reported a total number of 24,918 cases of fraud involving an amount of Rs.512 Crores for the period from 1976 to 1990.

Analysis of the fraud cases reported by banks to the Reserve Bank, however, broadly indicates that frauds perpetrated on banks could be classified into the following categories :

- (i) Misappropriation of cash tendered by the bank's constituents, and misappropriation of cash in remittances.
- (ii) Withdrawals from deposit accounts through forged instruments.
- (iii) Fraudulent encashment of negotiable instruments by opening an account in a fictitious name.
- (iv) Misappropriation through manipulation of books of accounts.
- (v) Perpetration of frauds through clearing transactions.
- (vi) Misutilisation of lending/discretionary powers, non-observance of prescribed norms/procedures in credit dispensation etc.
- (vii) Opening/issue of letters of credit, bank guarantees, co-acceptance of

bills without proper authority and consideration.

- (viii) Frauds in foreign exchange transactions, mainly through non-adherence to Exchange Control Manual Provisions.

Category-wise, classification of frauds reported by the 19 Public Sector Banks to the R.B.I. during the period from 1/1/90 to 30/6/91 is given in Table X. The perpetration of frauds are mainly attributable to :

- (i) Laxity in observance of the systems and procedures by the operational staff and also by supervisory staff.
- (ii) Over-confidence in the bank's constituents, who often indulge in breach of trust; and
- (iii) Frauds committed by unscrupulous constituents taking advantage of the laxity on the part of the officials in the observance of established time-tested safeguards.

An expert committee has undertaken the task of devising ways and means for tightening regulatory procedures, as well as for devising effective countermeasures for the prevention of bank fraud. The committee has recommended that steps be taken by the bank authorities in the following areas :

- (i) Matter of handling cash, valuables and other negotiable instruments to stop diversion of scarce credit resources for unrelated purposes, and for regulating the growing tendency to use banking channels for money laundering etc.
- (ii) Prevention of fraud in investment portfolios.
- (iii) Prevention of fraud in advances portfolios.
- (iv) Prevention of frauds in the area of foreign exchange operations.

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**TABLE X**

(Amount in Crores of Rupees)

Category	No. of frauds (1990)	Amount (1990)	No. of frauds (1991 to June 30)	Amount (1991 to June 30)
Fraudulent encashment, manipulation of books of account and conversion of property	729	28.28	345	8.64
Cheating and forgery	215	5.7	134	4
Misappropriation or criminal breach of trust	162	4.81	89	6.04
Negligence and cash shortage	53	0.2	25	0.06
Unauthorised credit facility extended for illegal gratification	18	3.12	7	0.43
Irregularities in foreign exchange transactions	11	0.9	10	0.19
Others	54	5.05	53	4.94

- (v) Prevention of frauds in a computerised environment.
- (vi) Ensure the effectiveness of existing systems of inspection, audit and control returns.
- (vii) Tone up the vigilance set up in the public sector banks.
- (viii) Co-ordination amongst various agencies like the Central Bureau of Investigation, Police and the Bank Vigilance machinery to ensure prompt detection and effective prosecution of fraud cases.

#### **A. Fraud in the Securities Market**

This subject is as old as the markets themselves. The decision to buy or sell a particular security is based, in many cases, upon nothing more than a representation of its future value made by a promoter of the share itself. Therefore, the potential for a fraudulent share offering is very high, and it is with the aim of preventing a fraud in the sale of securities that all mature free-market economies design their securities legislation. However, such fraud prevention activities cannot be brought to bear on the determination of the specific

worth of an individual stock offer, as this would impose an artificial standard on the working of a free commercial market. In other words, it is axiomatic in free market economies that investors must be free to make imprudent commercial decisions which act to their financial detriment. The need to ensure a continued uniform policy of anti-fraud surveillance of the international securities market has become more acute in the last decade, following a greater degree of internationalisation of the capital markets.

The main areas of fraudulent activity, which possess the greatest degree of commercial risks, in the trade of securities are :

- (i) *Market Manipulation*: individuals or groups operating in such a way as to bring undue influence to bear, thereby affecting the value of a share.
- (ii) *Insider Dealing*: is a criminal activity whereby an investor, knowing that a bid is about to be made for a particular stock or having

information gained from connections with the management of a firm which could directly affect the price of a particular share, makes a considerable short-term profit by buying as much of the stock as they can acquire prior to the announcement of the bid, and then sells the same once the share value has risen.

- (iii) *Trading of Worthless Securities:* An example is to famous Wall Street crash of 1929 before which approximately 20 million Americans took advantage of the post-war prosperity and tried to make a fortune on the stock market. Between 1918-1929, out of the USD \$50 billion worth of new securities offered to the public, half proved to be worthless. Variations of this fraud can be the well-known "PONZI" scheme to "Pyramid" schemes or chain-letters or the lotteries by "Caritas" of Romania.

The investment in the securities market has provided organised crime with a fertile ground for fraudulent activity. Around 1990, India and a few developing countries have started to restructure their economies. Economic and fiscal policies have taken a turn towards liberalisation, deregulation, non-control and non-licensing, and the economy has opened up resulting in macro-adjustments.

As a part of the liberalisation process, foreign exchange regulations were relaxed, multinational companies and overseas corporate bodies were permitted to invest in Indian companies (up to 51 percent barring a few selected sectors) and foreign banks were allowed to operate. Under the same process, there is a talk of the services and insurance sectors being opened up. Public sector banks were allowed to set up

Mutual Funds and Portfolio Management Schemes. Public sector companies were permitted to raise funds from the public through bonds. Government encouraged companies both in the private and public sectors to reduce surplus staff through 'golden handshakes' or other similar schemes. This resulted in considerable sums of money entering the market.

The weakness of the securities exchange mechanism was exposed when a massive security scam, running into several billions of rupees, surfaced in April 1992 involving the Standard Chartered Bank, the National Housing Bank, many other nationalised banks, Mutual Funds and other financial institutions. The committee (CBI) set up by the RBI estimated the loss at Rs.40,000 million (US\$ 1,279.63 million). In the estimation of the CBI, the loss has been Rs.83,830 million (US\$ 2,665 million). This case was a deliberate and premeditated misuse of public funds through various types of security transactions, with the sole object of illegally siphoning funds from the banking system and public sector undertakings.

After the above experience, the Indian Government set up a Securities and Exchange Board of India (SEBI) with the sole objective of regulating the shares and securities business. Needless to say, certain individuals and institutions involved in the above mentioned securities scam are facing prosecution in a special court.

## VIII. INSURANCE FRAUD

As large funds are available with insurance companies, they are liable to be subjected to a high degree of fraudulent activity. Competitiveness of the insurance market is such that rather than attract a reputation for being unsympathetic to client claims, the companies will pay out

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claims which they know may be made by professional fraudsters, but will be pursued vigorously by the claimants. However, the smaller but honest claims, more difficult to pursue, will suffer because the companies feel that the claimants will eventually get tired of the remorseless bureaucracy and abandon the claim.

The insurance salesmen indulge in widespread mis-selling of financial policies in order to enhance their own commission income and to ensure a regular cash-flow of new capital. In India, at the moment, both the life insurance and general insurance are in the public sector and are, therefore, subject to strict government regulations and audit requirements. However, small and medium scale frauds, do sometimes take place. These frauds are mostly related to the filing of false or exaggerated claims on the insurance companies. Most of the times, these frauds are perpetrated in collusion with the employees of the insurance companies like the surveyors and field agents, who, for corrupt motives, tailor their reports to the advantage of the claimants.

#### **IX. FRAUD IN INTERNATIONAL TRADE**

Fraud in the international trade takes the following forms :

- (i) Shipping of adulterated products.
- (ii) Theft of goods in transit, as in the Nigerian Oil Fraud.
- (iii) Hijacking and piracy at sea.
- (iv) Deviation of ageing, low-value ships.
- (v) Phantomship fraud in which corrupt employees, with the registries of such countries as Panama and Honduras, indulge in false registration. The high-value cargo simply disappears with the ship, which later appears again under a new name and guise.
- (vi) Product counterfeiting, whereby

cheaper and less stringently produced products are manufactured to lower tolerance levels and are introduced in to the market. Counterfeit aircrafts parts or bogus pharmaceuticals with lower chemical standards, are sold. It is estimated that 6 percent of the total world trade involves trading in counterfeit products.

#### **X. TAX EVASION & MISUSE OF TAX HAVENS**

With the passage of time, the imposition of taxes has become as much a political means of social and economic control, as it is a measure of raising revenue. The dichotomy expressed, in the moral conundrum of the difference between lawful tax avoidance (generally perceived to be the legitimate work of *bona fide* tax advisors) and criminal tax evasion (the illegitimate activities of those who hide lawfully taxable proceeds from the fiscal authorities) has been reflected in the competing effectiveness of tax-shelters as opposed to tax havens.

Tax-shelters are a legal form of tax avoidance, expressed most usually, in the creation of a tax saving incentive for high-worth individuals, encouraging them to invest theoretically in socially responsible activities, or in schemes which attract a lower rate of tax. Since these provisions are subject to the changes in law and court rulings, they less popular than tax havens.

Tax-Havens are sovereign off-shore countries with an advanced degree of willingness to permit foreign, non-resident, high-rate taxpayers to deposit funds secretly behind anonymous corporate fronts, or by forming highly complex trust arrangements.

Since the foreign depositors are likely to face considerable difficulties in their home jurisdictions, an obsessive level of secrecy and the guarantee of complete discretion in the handling of clients affairs are the hallmarks of the most successful tax havens. Such havens have been one of the main influences on the proliferation of channels for moving criminally generated money, whether it be in the form of the proceeds of drugs, crime or for terrorist purposes. A typical example of the transfer of money to off-shore tax havens is the transfer of money from the USA to the Bahamas, from where it ultimately lands in Swiss Banks.

### **XI. MONEY LAUNDERING & "HAWALA"(UNDERGROUND BANKING)**

Money laundering means the conversion of illegal and ill-gotten money into seemingly legal money so that it can be integrated into the legitimate economy. Proceeds of drug-related crimes are an important source of money laundering worldwide. Besides this, tax evasion and the violation of exchange regulations play an important role in merging this ill-gotten money with tax-evaded income, so as to obscure its origin. The aim is generally achieved via the intricate steps of placement, layering and integration, so that the money so integrated in the legitimate economy can be freely used by the offenders without fear of detection.

Besides the traditional methods of money laundering, with the advent of the Internet, cyber-laundering by means of anonymous digital cash has also come to the fore. E-cash may facilitate money laundering on the Internet. Money laundering thus poses a serious threat world over, not only to the criminal justice systems of countries, but also to their sovereignty.

The United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act 1988 (known as Vienna Convention), to which India is a party, calls for criminalisation of laundering of the proceeds of drug crimes and other connected activities, and for the confiscation of proceeds derived from such offences. There are no reliable statistics as to how much money is laundered in India, but the problem is certainly serious and a lot of drug money is being laundered and integrated into the economy. The tainted money is being accumulated by organised racketeers, smugglers, economic offenders and antisocial elements, and is adversely affecting the internal security of the country. In order to curb the menace of money laundering, the Government of India is in the process of enacting the Money Laundering Prevention Act 1998. In the proposed Act, money laundering has been defined as:

- (i) Engaging directly or indirectly in a transaction which involves property i.e. proceeds of crime; or
- (ii) Receiving, possessing, concealing, disguising, transferring, converting, disposing of within the territory of India, removing from or bringing into the territory of India, the property i.e. proceeds of crime.

“Crime”, as defined in the Act, covers several Penal Code offences, i.e. waging war against the Government of India, murder, attempted murder, voluntarily causing hurt, kidnapping for ransom, extortion, robbery, dacoity, criminal breach of trust, cheating, forgery, counterfeiting currency, etc. Also for certain provisions of the Prevention of Corruption Act 1988; NDPS Act 1985; Foreign Exchange Regulation Act 1973; and the Customs Act 1962. Thus, crime has been defined very comprehensively in the Act. The money generated through crime is liable to be

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confiscated by the State.

Illegal currency transfer via non-banking channels is called "Hawala". It is an underground banking system. Secret flows of money can take place in free currency areas, as well as in areas where currency conversion restrictions are practised, due to the shortage of foreign exchange. An example of the operation is as follows - somebody in the USA deposits \$1000 with an underground banker for a payment to be made to an Indian in India. The US underground banker contacts their counterpart in India immediately via phone, and sends some coded message for payment to the Indian recipient. The hawala operator in India would contact the recipient and fix a meeting place. The recipient, in the meanwhile would have got instructions on the telephone about the codeword s/he has to exchange with the hawala operator. Thus, the hawala operator in India would, after the exchange of codeword, hand over money to the Indian recipient. Of course, the hawala operator in the USA would charge some fee for the services rendered. There is no physical transfer of money in hawala transactions, as in the regular banking channels. This channel is generally used by drug traffickers, smugglers and kidnappers.

Basically, the system operates on an ethnic network and is based on mutual trust. The network may include more than three or four countries. The principal operators engage agents and sub-agents in various countries for collection and disbursement of money. Hawala is widespread in India. Families who have members earning abroad are clients of the system. The dangerous aspect of the hawala system is the nexus between the hawala and illicit arms smuggling, drug trafficking and terrorist crimes.

Investigations in hawala-related crimes are conducted under the Foreign Exchange Regulation Act. Even though the word 'hawala' has not been defined in FERA, the essence of the Act is that any person who retains foreign exchange abroad or sends foreign exchange abroad, without the Reserve Bank's permission, is violating the provisions of the Act. In the liberalised economic atmosphere, the Government of India has felt it necessary to ease restrictions in the flow of foreign exchange, both into and out of the country. Thus, a new draft Act called Foreign Exchange Management Act (FEMA) has recently been introduced in the Parliament to replace the FERA. After the passage of the Act, foreign exchange offences will acquire the character of civil offences, as against criminal offences as is at present. It is hoped that with ease in transactions relating to foreign exchange after the passage of FEMA, the propensity to make use of hawala channels will decrease.

Table XI shows figures relating to crime involving illegal transactions in foreign exchange in India. Table XII shows the data relating to cases registered, offenders prosecuted, etc. with regard to foreign exchange offences in India.

## **XII. COUNTERMEASURES**

Increase in international law enforcement activity is having a very positive result and the doomsday-based scenario is changing. Organised crime can never be eradicated, but it can be capped and controlled. However, there is much to be done in the form of assisting less developed countries with expertise, guidance and encouragement. Since work against the Mafia is resource-intensive and expensive, it requires talented and skilled personnel to be able to travel and operate with the same freedom as the criminals.



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**TABLE XI**

Year	No. of		Currency Seized		Currency confiscated		Fines	
	Searches /Raids	Seizures /Recoveries	Indian	Foreign	Indian	Foreign	Imposed	Realised
1991	2319	1482	11.8	3.6	1.1	1.5	-	2.8
1992	1215	738	3.9	2.5	2.4	2.2	-	2.3
1993	1234	843	6.7	4.5	3.1	3	-	3.2
1994	1540	1046	9.8	8.1	1.8	2.2	27.8	3.4
1995	1175	832	10.2	6.5	1.2	2.3	10.6	2.2

(Cases under FERA in Indian Rs. inCrores)

**TABLE XII**

NAME OF ITEM	1994	1995	1996	1997
<b>Searches &amp; Seizure</b>				
Searches conducted	1540	1175	1164	1238
F.E. seized*	314.26	541.34	724.42	555.48
I.C. seized*	974.78	1,021.02	1,083.16	1,269.49
Total of F.E & I.C	1,289.04	1,562.36	1,807.58	1824.97
<b>Investigations</b>				
Initiated	6,601	5,633	5,486	5,511
Disposed	6,300	4,652	4,347	5,219
SCNs issued	2,771	2,456	2,291	2,721
Amount involved in SCNs issued*	76,265.32	144,728.58	39,095.21	209804.07
<b>Penalties</b>				
Imposed*	2,775.32	1,067.29	7,804.19	8380.59
<b>Prosecutions</b>				
Launched	264	202	101	92
Disposal	265	125	64	49
<b>Arrests</b>				
Persons arrested	365	228	213	159
<b>Cofeposa</b>				
Orders issued	107	62	38	49
Detained	74	67	43	39

(\* in lakhs of Rs.)

**A. Steps at the International Level**

Some of the steps which have been taken by the international community and individual nations as counter measures against economic crime are still in their initial stages. As more nations participate in taking steps against this type of crime,

there is every hope that the world economic order will become more stabilised.

International Co-operation

Efforts have been made in the last five years for increasing co-operation between the national police forces and the customs

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and excise services. It has been matched by the efforts of government departments, legislators and judiciaries particularly, the Member States of the European Union, G-7 Group of States, the OECD and the British Commonwealth, in providing the machinery for assisting each other in the pursuit of suspected and convicted criminals, and for their repatriation, prosecution, also for the recovery of the proceeds of crime. Given the disparities between domestic legislation, judicial systems, penal codes and the application of domestic law to foreign citizens, the task of harmonising practices internationally is immensely complex and results have been mixed. However, the pace of international co-operation has quickened significantly during the last five years.

Some of the useful international conventions in this direction have been: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; European Community Directive on Prevention of the Use of the Financial System for Money Laundering; European Convention on Extradition. In this direction, some of the other steps recommended for the collective action of the nations are:

- (i) Development and regular upgrading of networks of national contact points on police/customs co-operation and judicial co-operation.
- (ii) Exchange of information regarding the scale and trends of organised crime.
- (iii) Regular exchange of information on the provisions and effectiveness of national laws relating to organised crime.
- (iv) Continuing study of the scope to simplify the legal arrangements for judicial co-operation between States, to overcome difficulties associated

with differences in national laws such as offence definition and prosecution time limits.

- (v) In relation to money laundering, further study of the desirability and practicability of applying the obligation to report suspicious transactions (currently applicable to financial institutions) to other relevant professions and organisations, and the sharing of information derived from disclosures.
- (vi) Exchange of experience and information about witness protection methods and consideration of effective measures to protect other persons involved in the administration of justice.

#### Confiscation

International conventions, as well as corresponding domestic legislation relating to confiscation of the illegal proceeds of serious crime, have their origin in measures designed to stop the criminals from being able to retain and use the proceeds of their criminal activities. A key element in the national and international strategy is to deny criminals the huge profits derived from organised crime, in the form of laundered money. The aim of measures authorising the confiscation of laundered money are :

- (i) *Deterrent*: making organised crime less profitable.
- (ii) *Preventive*: stopping reinvestment of the proceeds in further criminal activities.
- (iii) *Investigative*: enable investigators to follow the money trail, thereby making it easier to identify and dismantle criminal organisations.

As in all aspects of international organised crime, co-operation is vital if confiscation measures are to be successful. Major criminals are skilled in concealing

and putting their ill-gotten wealth beyond the reach of the law through the use of modern banking, and communications technology and practice.

In this regard, some of the major international and national efforts have been in the form of: European Convention on Extradition (fiscal offences) Order 1993; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the Prevention of Terrorism (Temporary Provisions) Act 1989 passed by UK; Vienna Convention 1988; and the proceedings of the Basel Committee on Banking Regulations and Supervisory Practices (1990).

National crime control organisations like FINCEN of the USA, NCIS Financial Intelligence Unit of UK, TRACFIN of France and AUSTRAC of Australia are some of the new specialised agencies making use of financial intelligence and data-communications in the field of economic crime. In India, the DRI (Directorate of Revenue Intelligence) and the EIB (Economic Intelligence Bureau) have been collecting intelligence, as well as investigating serious cases of economic crime and spearheading efforts to plug the loopholes in existing laws, they have also proposed enactment of new laws like FEMA (Foreign Exchange Management Act) and the anti-money laundering legislation.

#### Other Measures

Some of the other measures required for the effective fight against the economic crime are :

- (i) *Steps to provide teeth for regulators and international standards of practice:* Steps should be taken to ensure that criminals are not able to take advantage of imperfect investigative co-operation, a lack of harmonisation between domestic

legislation, bank secrecy and absence of regulations, etc. Confiscation procedures should be swift and effective with the result that the accumulated proceeds from organised crimes, and assets acquired subsequently from them, are hard to replace.

- (ii) *Steps for making domestic and international anti-money laundering systems effective.*
- (iii) *Steps for protecting the integrity of the financial system:* This involves measures to protect the transparency and integrity of economic and financial systems. Criminal penalties are often applied to reinforce the integrity or transparency of the financial system, while regulatory policies are used to detect or deter criminal activities.
- (iv) *Steps for motivating banks and financial institutions to co-operate with law enforcement agencies.*
- (v) *Steps for improved auditing practice:* Such auditing techniques can be applied as a part of the organisational control framework, where they form part of activities described as internal audit, inspection or monitoring.
- (vi) *Steps for strengthening corporate governance:* Weaknesses like dominant chief executives with unfettered powers, insufficient checks and balances over executive directors, no clear role for the board of directors and for non-executive directors, inadequate control over levels of executive remuneration and insufficient disclosure of what is actually happening to the business, are some of the areas which must be addressed.

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(vii) *Mobilisation of public opinion*: Public awareness of the dangers involved in various facets of economic crime has yet to be taken up by the media and politicians to a level where the public starts taking an active interest, and is willing to accept reasonable regulatory efforts required to tackle this crime.

### **B. Steps for India**

In India, the concept of economic crime is still in its initial stages of being understood and appreciated. Understandably, there are several difficulties in combating economic crime, not the least of which is lack of awareness in government circles, media, investigating agencies and the general public about the extent and corrosive effect of economic crime on Indian society and its institutions. Violent crime makes headlines, consumes media attention and raises public furore.

However, since the early 1990s, after the liberalisation of the economy and discovery of serious financial scandals/scams in its wake, which adversely affected a large number of private investors, the subject has started receiving serious attention from the Government and Parliament.

Existing laws have been found to be totally inadequate in dealing with economic crime, as they target individuals and not the criminal groups or criminal enterprises. It is therefore imperative to enact special laws covering each aspect of economic crime, i.e, the criminal group itself and its members or associates, as has been done in many countries. At the same time, there is a need to deprive the criminal groups and their co-conspirators of the ill-gotten gains of their criminal enterprises by the enactment of effective confiscation laws.

#### Strengthening of Criminal Laws

(i) *Substantive law*: India does not have

special laws to control/suppress organised crime, including economic crime. However, there has been a move in this direction. The Government has brought before the Parliament draft bills for economic offences in the field of foreign exchange and money laundering (FEMA and Money Laundering Prevention Bills) which are soon expected to become law. Earlier, SEBI (Securities Exchange Board of India) legislation was passed in order to regulate the securities market after a famous securities scam. Thus, the Indian Government and Parliament is alive to the emerging situation in the field of economic crime and suggestions for modification of various laws already in place are also being given careful consideration.

(ii) *Procedural Law*: It is in the field of procedural law that considerable improvement is required in India. Police are a 'State Subject' in India, with the result that many cases having inter-state ramifications get stalled in legal/jurisdictional wrangles.

Under section 167 of the Code of Criminal Procedure, the police are required to file charge-sheets within 90 days from the date of arrest, failing which the accused is liable to be freed on bail. This often results in charge-sheets being filed on the basis of 'half-baked' investigations.

Bail provisions in India are quite liberal and "bail and not the jail" is the rule pursuant to a Supreme Court order. Legislatures should intervene to make the bail provisions more stringent. The provision for anticipatory bail (section 438 CrPC)

in grave crimes (i.e. punishable with 7 years or more) should be deleted. Further, no ex-parte bail orders should be passed by the judiciary in grave crimes without hearing the public prosecutor.

- (iii) *Evidentiary Law*: The Indian police are legally handicapped in collecting foolproof evidence against criminals due to certain archaic provisions of evidentiary law. According to section 25 of the Evidence Act, a confession made before a police officer is not admissible in the court, resulting in valuable evidence gathered during questioning of the accused persons being lost. Such confessions are admissible in most countries of the world. Of course, the courts should look for material corroboration of such confessions.

There is no law in India which legally binds an accused to give specimens of handwriting, photos, etc to the police, even under the orders of the court. The result is that valuable evidence is beyond the ambit of the investigating agency. A provision should be incorporated in the Criminal Procedure Code legally binding the accused to give handwriting samples etc, if required by the investigating agency.

#### Miscellaneous

- (i) *Monitoring of Telephones and Computer Networks etc*: These facilities are freely used by gangs in organising criminal activities. Section 5 of the Indian Telegraph Act 1885 empowers the Central Government or the State Government to monitor telephones and intercept calls for a period of 60 days. However, the evidence thus gathered is not admissible in the

trial. In the USA, telephones can be monitored by a law enforcement agency under the order of the Federal Court, and the evidence so gathered can be used in the trial. The Indian Telegraph Act and the proposed Computer Law should have provisions to provide for admissibility of evidence gathered by interception of telephonic conversation. Similarly, evidence of computer print-outs of telephone calls or fax messages sent or received on a particular telephone terminal should be made admissible as evidence.

- (ii) *Under-cover Agents / Decoys*: Law enforcement agencies use under-cover agents in most countries to gather information about the criminal gangs, study their *modus operandi* and evaluate their future plans and strategies. This information is used both for preventive and investigative purposes. In the USA, evidence gathered by undercover agents is admissible as evidence - whether it is in the form of their oral testimony or in recorded audio or video form. Indian law does not permit the same. It is suggested that the law should be amended to provide for admissibility of such evidence.

- (iii) *Witness Protection Programme*: In cases of economic crime where influential businessmen and politicians are involved, the witnesses are reluctant to depose in open court for fear of reprisal at the hands of criminal syndicates. The cases of threat or criminal intimidation of potential witnesses are too many to be recounted. As the courts use the evidence on record for determining the guilt of the accused, it is essential to protect the witnesses

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from the wrath of the criminal gangs. Hence, legal and physical protection should be provided to crucial witnesses in sensitive cases, so that they can depose fearlessly in court. After the enactment of the Witness Security Reform Act 1984, the USA authorities secured convictions of several notorious Mafia leaders. The US Witness Protection Programme essentially involves changing the identity of the witness, relocation, physical protection (if needed) and financial support until such time as they become self-supporting, subject to the condition that they depose truthfully in court. It is extremely necessary to provide protection to witnesses in India which, to begin with, could cover cases of International/National/State importance involving criminal syndicates.

(iv) *Confiscation of Proceeds of Crime:*

The main object of economic crime is the acquisition of money/assets. It is through money-power that gangs corrupt criminal justice agencies and political leadership. A stage comes when gangs put a question mark on the existence of the State. It has already started happening in small pockets of India. It is therefore, essential to deprive the criminal gangs of their ill-gotten wealth through stringent legislative measures. The laws relating to confiscation of the proceeds of crime are found in parts of several statutes. Some of the important Acts relating to this are as follows :

- (i) Sections 102 and 452 of CrPC;
- (ii) Sections 111 to 121 of the Customs Act 1962;
- (iii) Section 68 of the Narcotic Drugs and Psychotropic Substances Act

- 1985;
- (iv) The Criminal Law (Amendment) Ordinance 1944;
- (v) Foreign Exchange Regulation Act 1973; and
- (vi) Smugglers & Foreign Exchange Manipulations (Forfeiture of Property) Act 1976.

Notwithstanding the existence of the aforesaid legal provisions, it is a well known fact that organised criminal gangs have acquired huge assets. The annual turnover of the Dawood Ibrahim Gang is estimated to be about Rs.2000 Crores a year. Several Bombay smugglers have invested hundreds of crores in real estate and other front businesses. This clearly shows the inadequacy of the current laws. Hence, consolidation and strengthening of laws regarding seizure/confiscation of proceeds of crime is essential. It must, however, be added that the provisions in the Narcotics and Psychotropic Substances Act 1985 are quite stringent, but this Act is applicable only to drug related money and not to the money amassed through other crimes.

(v) *Immunity from Criminal Prosecution:*

As per section 306 of the CrPC, on the request of a police officer or a public prosecutor, the court may tender pardon to an accused at the investigation or trial stage, subject to the condition of them making full and true disclosure of facts and circumstances concerning an offence. This provision is applicable in offences punishable with imprisonment of seven years or more. The witnesses are not overly keen to turn approvers (State Witnesses), as they have to remain in jail till the conclusion of trial. As the trials take

years, there is little incentive for them to accept immunity from the State. As the evidence in conspiracy cases is rather weak, approver testimony helps in securing convictions. It is suggested that the law should be amended to the effect that the approver will be released on bail soon after the conclusion of their testimony in court. This may encourage some accused to turn approvers.

(vi) *Presumptions against the Accused:*

An accused is presumed to be innocent until proved guilty. The entire burden is cast on the prosecution to prove the guilt of the accused beyond reasonable doubt. Silence of the accused in a given crime situation, or his/her presence at the scene of a crime at or about the time of the crime's commission, is not presumed to be a circumstance against which they must explain. This casts an unfair and unreasonable burden on the prosecution.

The Prevention of Corruption Act 1988 (Section 20) provides for a situation where "if it is proved that an accused person has accepted or obtained or has agreed to accept or obtain for himself or for any other person any gratification..... it shall be presumed unless the contrary is proved that he accepted or obtained..... gratification or valuable thing as a motive or reward.....". Such provisions should also be included in other preventive and regulatory economic legislations.

(vii) *Need for Special Courts:* Punishment should visit the crime within a reasonable time if it is to have any deterrence value. The Anglo-Saxon

legal system prevalent in India, although seemingly fair and equitable jurisprudence, in practice [due to interminable delays], has tended to be ineffective, unfair, pro-rich and pro-influential. About 770,000 criminal cases are pending trial for over 8 years. This does not include cases pending in the High Courts on appeal/revision, all over the country. The average time of trial taken in grave offences in India is much higher when compared to countries like Japan, where the average time taken is only about 3 months. Few anti-corruption cases in CBI have been pending trial for the last 20 years. More often than not, the accused public servant retires from service and sometimes even dies before the trial is completed. This has resulted in a situation where the investigating agencies get demoralised. It is, therefore, essential that more special courts are set up to try important cases of economic crime.

(viii) *Setting up of National Level Co-ordinating Body:*

India has a federal structure in which the States have exclusive jurisdiction to investigate and prosecute criminal cases. The CBI comes into the picture very sparingly in cases of national importance. The police forces in the States gather intelligence. The police forces/concerned departments in the States are supposed to gather intelligence about criminal activities within their jurisdiction. Generally this is not shared by these agencies with other States or the Central Agencies. This insular attitude is equally true of the Central Investigative/enforcement agencies. It would, be advisable to setup a national level co-ordinating body outside of the gamut of present

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enforcement agencies. The main function of this body should be coordination between the police forces of the different States and the Central Investigation Agencies in the field of economic crime.

(ix) *Setting up of Economic Offences Wings in Various State Police Forces:* Some State Police Forces in India have separate Economic Offences Wings. All State police forces have separate Vigilance/Anti-Corruption Directorates. However, political will is needed to make these strong and effective; lacking at the moment.

(x) *Common Data Base for Enforcement Agencies:* At the moment no mechanism or institutional arrangement exists for the collection of data regarding economic crime either at the Central or State Level. This hampers investigative efforts and perspective planning. It is suggested that on the pattern of FINCEN of the USA, a common database should be built up and stored in computers in India, which should also be accessible to all enforcement agencies through a network of computers. The National Crime Records Bureau can take up this job.

### **XIII. COMPUTER CRIME**

Information technology today constitutes an integral part of daily life. In India, as in the rest of the world, computers have become an integral part of the fast developing society. Already computers are being used in banking, manufacturing, health-care, defence, insurance, scientific research, strategic policy making, law enforcement etc, apart from their routine use as office-automation and decision-support tools. Increasingly computers

which transact huge amounts of business are linked to each other via networks. More than a hundred million electronic messages are transferred daily on the world's network. Banking networks transfer trillions of dollars daily on computer networks.

The computer revolution has a darker side. Most of the computer applications are likely targets for traditional crimes including theft, fraud, vandalism, extortion and espionage. They are also susceptible to new threats specific to computers and networks, such as computer viruses.

Though computerisation in India started 25 years ago, the use of computers, particularly in the service sector, is still very low as compared to world standards. The density of personal computers in the country is only 1.8 per thousand persons, as against the world average of 25 per thousand persons. Only 40 per cent of the computers are connected on LAN. There are quite a few large databases like railway reservation systems, airline reservation systems, the district information system of National Informatic Centre (NIC) etc, which are more of closed user groups in nature, with no outside and inter-connectivity.

Due to low-level computer use, the subject of computer related crime did not gain much importance in India. Nevertheless, as per the statistics gathered by the National Crime Records Bureau, 45 cases of computer crime have been reported so far. Most of the cases pertain to unauthorised copy of programmes/software, and there are 15 cases mostly relating to alteration of data in the banking accounts maintained on computers. However, this may be just the tip of the iceberg. Difficulty of detection, evidence gathering and lack of knowledge on the part of investigative agencies in computer data processing are the main reasons for



the low number of solved computer crime cases.

The situation in regard to the use of computers in India is changing fast, and it is expected that the usage of computers in the country will reach 10 per thousand persons by the turn of the century. The Internet users in the country are also expected to increase from the present level of 80 thousand to about two hundred thousand. The concept of Internet and intranet is growing. Data processing and its component will be used as a tool in many areas such as tax administration, stock market and capital investment.

Computer crime can be defined as crime against an organisation or individual in which the perpetrator of the crime uses a computer for whole or part of the crime. Computer crime can be broadly divided into computer fraud and computer abuse. Computer fraud is any defalcation or embezzlement accomplished by tampering with computer programmes, data files, operations, equipment or media, resulting in losses sustained by the organisation or individual whose computer system was manipulated. Computer abuse is the improper use of computer resource provided by an organisation to the individual who misuses it.

### **XIX. CLASSIFICATION OF COMPUTER CRIMES**

Classification of computer related crime as defined by OECD and expanded by the Council of Europe as :

(i) *Computer-related Fraud*: The input, alteration, erasure or suppression of computer data or computer programs, or other interference with the course of data processing that influences the result of data processing, thereby causing economic

or possessory loss of property of another person, with the intent of procuring an unlawful economic gain for themselves or for another person (alternative draft : with the intent to unlawfully deprive that person of their property).

(ii) *Computer Forgery*: The input, alteration, erasure or suppression of computer data or computer programs, or other interference with the course of data processing in a manner or under such conditions which would, according to national law, constitute an offence of forgery if it had been committed with respect to a traditional object of such an offence.

(iii) *Damage to Computer Data or Computer Programs*: The erasure, damaging, deterioration or suppression of computer data or computer programs without right.

(iv) *Computer Sabotage*: The input, alteration, erasure or suppression of computer data or computer programs, or interference with computer systems, with the intent to hinder the functioning of a computer or a telecommunications system.

(v) *Unauthorised Access*: The access without right to a computer system or network by infringing security measures.

(vi) *Unauthorised Interception*: The interception, made without right and by technical means, of communications to, from and within a computer system or network.

(vii) *Unauthorised Reproduction of a Protected Computer Program*: The reproduction, distribution or

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communication to the public without right, of a computer program which is protected by law.

(viii) *Unauthorised Reproduction of a Topography*: The reproduction without right of a topography, protected by law, of a semiconductor product, or the commercial exploitation or the importation for that purpose without right, of a topography or of a semiconductor product manufactured by using the topography.

Optional List

(i) *Alteration of Computer Data or Computer Programs*: The alteration of computer data or computer programs without right.

(ii) *Computer Espionage*: The acquisition by improper means or the disclosure, transfer or use of a trade or commercial secret without right or any other legal justification, with intent either to cause economic loss to the person entitled to the secret or to obtain an unlawful economic advantage for oneself or a third person.

(iii) *Unauthorised Use of a Computer*: The use of a computer system or network without right, that is either :

(i) made with the intent to cause loss to the person entitled to use the system, or harm to the system or its functioning; or

(ii) causes loss to the person entitled to use the system or harm to the system or its functioning.

(iv) *Unauthorised use of a Protected Computer Program*: The use without right of a computer program which is protected by law and which has

been reproduced without right, with the intent either to procure an unlawful economic gain for oneself or for another person, or to cause harm to the holder of the right.

**XV. COMMON TARGETS OF  
COMPUTER CRIME**

The most common targets of computer crime are :

- Military and intelligence computers may be targeted by enemies.
- Business houses may be targeted by their competitors.
- Banks and other financial institutions may be targeted by professional white collar criminals.
- Any organisation of government or service industry may be the target of terrorists.
- Any commercial, industrial or trading company may be the target of employees or ex-employees of competitors.
- Universities, scientific organisations, research institutions may be the target of students, industrial or business houses and other antisocial elements.

Finally, any computer user may be the target of crackers/hackers who do it sometimes for intellectual challenge, for revenge, for gain or even for fun.

**XVI. PROBABLE PENETRATION  
POINTS**

In computer crimes, hardware, software, data or communications are vulnerable. Below, some common data security loopholes are specified:

- Erroneous or falsified input data.
- Misuse by an unauthorised end user.
- Uncontrolled system access.
- Ineffective security practices.

- Procedural errors within the computer EDP Cell.
- Programme errors.
- Flaws in the operating system.
- Failure of communication system.
- Lack of job definition for employees.

### **XVII. PREVENTION OF COMPUTER CRIMES**

Preventive measures should be taken by computer users to make it difficult for possible criminals to penetrate the system. There should also be a set of detection tools to identify instances where preventative tools cannot safeguard the system. First of all, threats which are expensive and critical should be prevented, they are :

- (i) Large loss threats having potential to cause great financial distress to the organisation.
- (ii) Threats which could stop or disrupt the effectiveness of the organisation for extended periods.
- (iii) High visibility threats which could cause serious damage to the image of the organisation.
- (iv) Habit forming threats which may lead the criminal from smaller to high level crimes, if not prevented at the initial stages.

### **XVIII. COUNTER-MEASURES FOR PREVENTION OF COMPUTER CRIME**

Counter-measures should be aimed at attacking the various steps which are generally involved in the commission of computer crimes i.e. planning, execution, concealment and conversion stages of computer crime. Some of the steps are :

- (i) Identify the potential perpetrator and penetration point(s).
- (ii) Determine the magnitude of the risks for each type of threat.
- (iii) Identify the most probable threats.

- (iv) Select the method of prevention i.e. internal controls, audit, security force and surveillance.

#### Internal Controls

These include access control, accountability, audit trails, error message follow-up, anticipation controls, data validation, output controls etc.

#### Audit

Auditing includes promoting a strong audit image, performing surprise audits, adopting audit procedures for electronic data process, designing systems with built-in-audit-jacks, risk analysis, studies and periodical reviews.

#### Security Force

This would secure the physical safety of the personnel and equipment, and the safety of the data. Some of the safety measures would include posting of dogs, security of the visible area, installation of cameras, sensors, TV monitors, warning signs and use of security software having password protection, access control, virus check, copyright protection etc.

#### Surveillance

Some methods for the most effective use of first-line supervisors to foster anti-computer crime environments include detecting and reprimanding employees for minor policy violations, detecting breaches of control functions or security procedures, creating an environment for which computer crime is difficult to perform, and counselling the staff on matters like integrity, loyalty and conscientiousness.

### **XIX. THE LAW RELATING TO COMPUTER CRIMES**

Interpol has identified the following as offences or crimes which can be classified as computer-related crimes :

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- (i) Unauthorised access or interception and theft of data (hacking, theft of data, interception of data, time theft and others).
- (ii) Alteration of computer data (logic bombs, Trojan horse, virus, worms and others).
- (iii) Computer-related fraud (automatic teller machines and cash dispensers, credit cards, computer forgery, gaming machines, input/output/programme manipulations, means of payment, point of sale, telephone phreaking and others).
- (iv) Unauthorised reproduction (computer games, other software, semi-conductor topography etc).
- (v) Computer sabotage (hardware, software, etc).
- (vi) Counterfeiting using computers.
- (vii) Computer pornography.
- (viii) Other computer-related crime (bulletin board systems, theft of trade secrets, indictable material, etc).

## XX. THE LEGAL PROVISIONS

Laws, criminal justice systems and international co-operation have not kept pace with technological changes. Only a few countries in Western Europe and the Organisation for Economic Co-operation and Development (OECD) have drafted laws to address the problem. However, none of the countries have resolved all legal, enforcement and preventive issues arising out of technological change. Computer crime is a new form of transnational crime and its effective treatment requires concerted international co-operation.

Some of the important international efforts in the direction of computer crime legislation and its prevention have been :

- (i) 12th Conference of Directors of Criminological Research Institutes

within Council of Europe (1976) and the formation of select Committee of Council of Europe on Economic Crime.

- (ii) Study by Organisation for European Co-operation and Development in 1983 and the publishing of analysis of legal policy in 1986 for international application and harmonisation of criminal laws in the field of computer crimes.
- (iii) Study by the Council of Europe wherein procedural issues such as international search and seizure of databanks and international co-operation in the investigation and prosecution of computer crimes were examined.
- (iv) International Chamber of Commerce published documents in July, 1988 describing international business view on computer-related crime and criminal law.
- (v) OECD developed a set of guidelines for security of information systems in 1992.
- (vi) The issue of prevention of computer related crime was discussed in a report entitled "Proposals for Concerted International Action Against Forms of Crime Identified in the Milan Plan of Action" prepared by the United Nations in 1987. In its 13th Plenary meeting, the UN Congress adopted the resolution calling upon the member States to intensify their efforts to combat computer crimes by adopting a series of measures.
- (vii) In 1994, the United Nations also prepared a manual on the prevention and control of computer-related crime which presented an international review of the criminal policy.
- (viii) Many of the countries, largely industrialised and some which are moving towards industrialisation, have in the past ten years reviewed

their respective domestic criminal laws from the point of view of adaptation, further development and supplementation so as to prevent computer-related crime. A number of countries have already introduced more or less extensive amendments by adding new statutes in their substantive criminal law. These are USA, Austria, Denmark, France, Germany, Greece, Finland, Italy, Turkey, Sweden, Switzerland, Australia, Canada and Japan. Countries like Spain, Portugal, UK, Malaysia and Singapore have made isolated efforts by enacting new laws to prevent computer-related crimes.

There is yet no specific law in India to deal with computer crimes. The various cases reported are dealt with under the existing laws/offences like Copyright Act, theft, trespass, fraud, forgery, etc. However, the Government of India is aware of the issue and it is expected that soon a specific law for prevention and prosecution of computer crimes will be passed, based on the guidelines and classification suggested by OECD.

It is proposed that an information security agency will be set up at the national level to play the role of 'cyber-cop' to take care of computer-related crime. The cyber-cop provisions will take care of acts such as hacking through Internet, and devise ways of maintaining data privacy. According to the action plan on the subject drawn by the Government of India, a national policy on information security, privacy and data protection for the handling of computerised data shall be framed by the Government of India within six months. It is also proposed that a national computerised records security department shall be created within three months for enforcing security requirements.

## **XXI. CONCLUSION**

With the explosion in the field of information technology, certain common features are bound to be found internationally in the field of economic and computer crime. As of necessity, nations should unite in countermeasures against these crimes. After the Cold War, there has been a fair amount of integration world wide in the spheres of banking, trade and commerce.

Despite our best efforts, domestic crime is likely to spill over into the international arena. Hence the need for international cooperation in suppressing it in the form of expeditious extradition of fugitive criminals, deportation of undesirable aliens, mutual legal assistance in investigations and prosecutions, and the speedy execution of Red Corner Notices issued by Interpol. Further, the International Community must put their heads together to harmonise extradition, deportation, dual criminality and confiscation laws to make the global society and its financial systems sound and stable.

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**ANNEXURE A**

**Various Economic Offences**

Economic Crimes	Legislation	Enforcement Authorities
Tax Evasion	Income Tax Act	CBDT
Illicit Trafficking in Contraband Goods (Smuggling)	Customs Act, 1962 COFEPOSA, 1974	Collectors of Customs
Evasion of Excise Duty	Central Excise and Salt Act, 1944	Collectors of Central Excise
Cultural Objects Theft	Antiquity and Art Treasures Act, 1972	Police/CBI
Money Laundering	Foreign Exchange Regulation Act, 1973	Directorate of Enforcement
Foreign Contribution Manipulations	Foreign Exchange Regulation Act, 1976	Police/CBI
Land Hijacking /Real Estate Fraud	IPC	Police/CBI
Trade in Human Body Parts	Transplantation of Human Organs Act, 1994	Police/CBI
Illicit Drug Trafficking & PIT NDPS Act, 1988	Narcotic Drugs and Psychotropic Substances Act 1985	NCB/Police/CBI
Fraudulent Bankruptcy	Banking Regulation Act, 1949	CBI
Corruption and Bribery of Public Servants	Prevention of Corruption Act, 1988	State Vigilance Bureaux/ CBI
Bank Frauds	IPC	Police/CBI
Insurance Frauds	IPC	Police/CBI
Racketeering in Employment	IPC	Police/CBI
Illegal Foreign Trade	Import & Export (Control) Act, 1947	Directorate General of Foreign Trade/CBI
Racketeering in False Travel Documents	Passport Act, 1920/IPC	Police/CBI
Credit Cards Fraud	IPC	Police/CBI
Terrorist Activities	Terrorist and Disruptive Activities (Prevention) Act, 1987	Police/CBI
Illicit Trafficking in Arms	Arms Act, 1959	Police/CBI
Illicit Trafficking in Explosives	Explosives Act, 1884 & Explosive Substance Act, 1908	Police/CBI
Theft of Intellectual Property	Copyright Act, 1957 (Amendments 1984 & 1994)	Police/CBI
Computer Crime/Software Piracy	Copy Right Act, 1957	Police/CBI
Stock Manipulations	IPC	Police/CBI
Company Frauds (Contraband)	Companies Act, 1956 MRTP Act, 1968	Civil in Nature

# ECONOMIC AND COMPUTER CRIME IN KOREA

*Choi Joon-Weon\**

## I. INTRODUCTION

The large scale economic crimes (i. e. Lee and Chang's bank bill fraud case, Myongsung case, Youngdong case) and real estate speculation crimes which took place in the early 1980's made the Korean people aware of the seriousness of economic crime. Since the late 1980's, computer crime has rapidly increased as the users of computers and the Internet have increased.

However economic crimes, including computer-based crimes, are very hard for investigating authorities to gather evidence on, since such crimes are being committed in an organized and intellectualized way, and the evidence can be easily destroyed. Most investigating authorities are not specialized enough to cope effectively with economic crime. Therefore, it is necessary to develop diversified countermeasures, in accordance with each situation facing economic crimes.

## II. REPRESENTATIVE TYPES OF ECONOMIC CRIME AND LEGISLATION IN KOREA

### A. Tax and Tariff Evasion

The accusation of the taxation office is a prerequisite to indict for the evasion of tax amounting to less than 50 million won (1 USD \$1=1300 won). Because the taxation office punishes most evaders with forfeiture instead of accusation, few evaders have been indicted by prosecution.

### B. Monopoly and Unfair Trade

Korea established the Act on Monopoly Regulation and Fair Trade in 1980. In line

with the introduction of the Act, the Fair Trade Commission was established. This Commission is committed to removing anti-competitive regulations which act as a stumbling block to free business activities, and to alleviate economic concentration. The main crimes against this law are

- (i) anti-competitive aspects
- (ii) abusive acts
- (iii) undue collaborate acts
- (iv) unfair trade acts

### C. Infringement of Intellectual Property

Korean people are not yet familiar with the notion that intellectual property (IP) should be protected as a kind of real property. To spearhead Korea's efforts to eradicate violations of IP, the Joint Investigation Team which specifically handles IP infringement cases was organized at every District Public Prosecutors Office in January 1993. Since then, vigorous crackdowns have been carried out on IP infringements such as illegal copying of computer software and video game cartridges, unauthorized sound recordings and videos, and counterfeited footwear. The result of the nationwide crackdown was remarkable. Public awareness of IP has also been enhanced by the continuous reports of mass media, which is, in some sense, the most crucial countermeasure for effective protection of IP.

### D. Insolvent Stock Openings

The Securities Transaction Law of Korea provides that any company, which wants to go public in order to join the stock market, should satisfy the requisite financial conditions achieved by the just examination of a certified public

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accountant (CPA).

If an insolvent enterprise disguises its own financial condition through conspiracy with a CPA, and places its stocks on the market, it may cause damage to the many innocent consumers who subscribed to those stocks. That scheme has no purpose but to defraud consumers. In Korea, this kind of fraud is restrained by the Securities Transaction Law. In 1992, the managing staff of 15 bankrupt corporations were indicted and sentenced because of this type of scheme. The financial damage of defrauded stockholders was presumed to exceed several billion won.

The manipulation of stock price is also restrained by the Securities Transaction Law. This is an act conducted by conspired trades, which induces the purchase or sale by others in the stock market, misleading consumers to believe that the trade is in a prosperous condition, and to make a wrong decision.

#### **E. Illegal Cheques**

The Illegal Cheques Control Act was established in 1961 to actively cope with illegal cheques in Korea. Under this Act, issuing an illegal cheque intentionally or accidentally, is one of the primary crimes subject to punishment. On the other hand, the offender of this crime is not punished when the holder does not want to charge the offender. Other types of cheque crimes include forged cheques, false reports, violation of reporting obligations by banks etc.

#### **F. Dishonored Promissory Note**

In the commercial transactions of Korea, promissory notes are very widely used as means of payment for goods and services. By issuing or falsifying (faulty) bank bills, that will be obviously dishonored, many offenders are frequently defrauding enterprises of goods or service exchanged

for those bills, which causes serious damage to the enterprises receiving the faulty bank bills as payment. Every year, thousands of enterprises in Korea have gone bankrupt by fraud through faulty bank bills.

#### **G. Credit Card Crime**

In Korea, credit cards are widely used as a means of payment. The fraud patterns of credit card crime occurring in Korea are as follows:

- (i) using a stolen or lost credit card against the card holder's will;
- (ii) using a forged credit card;
- (iii) using credit cards excessively to settle payments;
- (iv) defrauding a credit card company by demanding money with a forged credit card voucher.

#### **H. Pyramid (Multi-level) Sale Schemes**

Since the late 1980s in Korea as well as Japan, pyramid selling has negatively impacted society because of its monetary and mental damage to large-scale consumers. Previously, we had tackled the pyramid sale scheme by the provision of fraud in the Criminal Code. However we underwent some difficulty in sentencing pyramid sale scheme participants as 'fraud' criminals, and in categorising the consumer participants as victims of fraud.

Thus in June 1992, the Door-to-Door Sales Law was enacted and came into force to regulate multi-level marketing, namely, pyramid sale schemes. The Law of 1992 was effective enough to curb the proliferation of pyramid sale schemes. Apparently since the Law came into effect, pyramid sale schemes have subsidized in Korea.



### **I. Fraud, Embezzlement, Breach of Trust**

In Korea, there are too many cases of fraud, embezzlement or breach of trust being reported to investigation agencies. Almost all of these cases are reported by the victim's, however, few of these cases are indicted; rate of about 12% in fraud cases and about 23% in both embezzlement and breach of trust cases.

For reference, in 1995 the number of the complaints was 471,702 in Korea, while it was 10,596 in Japan. The number of complaints per 100,000 capita in Korea in 124 times as many as that of Japan. The reason why there are such a great number of complaint cases in Korea is explained by:

- (i) The trend that a party concerned chooses to settle the dispute by criminal investigation, even in civil cases such as payment default, on account of time consuming civil procedures.
- (ii) The practice of investigating agencies to receive complaints indiscriminately without examining whether they are worth investigating as criminal cases.

Because of such an excessive number of complaint cases, the problems of violating the rights of the complained, and wasting investigation resources, are getting worse. Therefore, versatile programs to solve this problem are under consideration.

### **J. Organizational Structure**

- (1) Prosecutor's Office
- (2) Police
- (3) Customs, Office of National Tax Administration
- (4) Fair Trade Commission
- (5) Security (Insurance, Bank) Supervisory Board

### **K. Money Laundering and Asset Forfeiture**

The Republic of Korea declared the Special Act Against Illicit Drug Trafficking in December 1995. Only money laundering related to drug offenses is criminalized. Korea does not have a special act for money laundering control, as exists in the U.S.A. We do not criminalize money laundering itself. Consequently, we can't punish money laundering if it is not related to a drug offense. Only the assets related to the drug offense and special crimes committed by officers can be forfeited.

In January 1993, concerned authorities in the Korean Government jointly started legislating a new statute for asset forfeiture related to drug offenses. In the middle of 1993, a large-scale local tax evasion case was revealed. The officers who were in charge of local tax collection received bribes and falsified the collection data to disguise and prevent the evaded tax from being collected. In that case, the concerned officers revealed that they accumulated in excess of USD \$2 million. However the Government was unable to access the money. As a result of that case, in December 1994 the Korean government made a special statute for asset forfeiture related to special crimes committed by officers.

## **III. MAIN CASES OF ECONOMIC CRIME IN KOREA**

### **A. Lee & Chang's Case**

Lee and Chang's bank bill fraud case took place in May 1982. Lee and Chang defrauded 6 business enterprises, suffering from financial difficulties, of promissory notes equivalent to 164 billion won and put them into circulation. This kind of fraud was possible because Lee and Chang took advantage of their position as the relatives of the President of Korea.

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The prosecution indicted 30 people, including Lee and Chang, bank personnel and the public officer involved in the case. This was the largest fraud case during the stage of high economic growth in Korea, and shocked the whole nation. The prosecution suffered from many problems such as leakage of investigation secrets, overlapping or unnecessary investigations, which provided a good lesson for the investigation of large scale fraud cases thereafter.

**B. Fraud Sales in Department Stores**

In January 1989, a consumers association made a complaint against several department stores on the suspicion that they deceived consumers by attaching a false previous price tag to merchandise to make the consumers believe that the stores were selling the goods at a special price. That is, the department stores attached tags written with "400,000→300,000", as if they had been selling merchandise at a special price. The items were scheduled to sell at the price of 300,000 won from the beginning.

Though the sales managers of the 6 department stores were indicted for the fraudulent sale, they were given a sentence of not guilty by both the District and Appellate Court for the reason that they did not cause actual financial loss to consumers. After long-term examination, the Supreme Court reversed the sentence of the Appellate Court, and the sales managers were finally given a guilty sentence.

**C. A Large Scale Smuggling Case**

In April 1995, the Seoul District Prosecutor's Office indicted 18 people (14 arrested) involved in a ring of gold smuggling disguised as a legal enterprise. They smuggled gold by hiding it in hollow silver bars for camouflage. This was the

largest seizure of gold (188kg) confiscated in a single smuggling case.

**D. Fraudulent Representation of Corporate Financial Statements**

In April 1992, Seoul District Prosecutor's Office indicted 24 people, including the CPAs and the directors of the enterprises, who prepared and audited the financial statements that were fraudulently presented and caused investors to believe the misrepresented financial statement. These enterprises were bankrupt before the investigation began. The investors who believed in the false financial statements suffered huge losses that could not be compensated.

**E. Tax Embezzlement Case**

In September 1994, the officers who were in charge of local tax collection received bribes for falsely processing collectible tax not received from the tax-payers. Furthermore, they embezzled the tax received from taxpayers by forging receipts. This embezzlement was possible because the computer system for the collection of local tax, such as acquisition tax and registration tax, was not set up then. The Incheon District Prosecutors Office indicted 135 people (92 arrested) including taxation officers and the legal affairs office personnel.

**F. Manipulation of Stock Price**

In May 1998, the Seoul District Prosecutor's Office indicted 11 persons (7 arrested) including Mr Woo, fund managers and investment company personnel who helped Mr Woo with the manipulation of the price of a spinning business company. The market price of the company's stock doubled in 5 months after the manipulation. The fraud was conducted by the following methods:

- (1) Inducing price rise by purchase orders at the highest price possible.
- (2) Placing purchase and sales orders

intentionally at the same time, to show designated stock as very popular.

- (3) Disclosure of a false information and new technological developments which might cause price rises in related stock.
- (4) The institutional investors maintained the purchase trend for a considerable period of time.

### **G. Credit Card Fraud Case**

In May 1996, the Seoul District Prosecutor's Office indicted 130 entertainment businessmen and members of a bogus credit card company (37 arrested) who evaded sales tax by reporting the sales amount as being less than it was. This fraud was conducted by the following methods:

- (1) Opening a bogus credit card membership store by forging business registration certification.
- (2) Setting up a credit card identification machine and giving ID numbers of the bogus credit card membership store to an entertainment store (ie. bars, nightclubs etc).
- (3) The entertainment store then sells sales receipts at 90% of the real sales purchase price to the bogus credit card company, which causes the tax evasion.
- (4) The entertainment store gives bribes to bank managers and credit card company personnel so that they don't cancel the credit card contracts.

### **H. HanBo Case**

This was a representative case which took place in January 1997, showing the connection between politics and the economy in Korea. Mr Jung, President of Hanbo Steel Corporation, bribed some politicians who forced the bank to lend money to his company that seemed to have a very slim chance of profitability and growth.

Unable to repay the loan amount of 3.2 trillion won (about USD \$ 2.8 billion), the Hanbo company went bankrupt, causing serious damage to the Korean economy. The Korean citizens became angry at politicians and businessmen. The prosecution arrested and indicted 10 people, including Mr Jung and influential politicians of both the ruling and opposition parties, former ministers, and the president of the bank, most of whom were found guilty and sentenced.

## **IV. PROBLEMS IN CONTROLLING ECONOMIC CRIME**

### **A. Lack of Specialization**

To investigate economic crimes effectively, general investigators should have some specialized knowledge concerning the details of foreign trading procedures, bank finance procedures, tax calculation systems, and analyzing techniques of account records or financial documents, etc. Otherwise, they may often be led astray by the explanation of a suspect.

The lack of the above makes general investigators or policemen depend upon their experience alone. In Korea, both public prosecutors and general investigators go through formal training courses that teach specialized areas to help them investigate economic crimes.

### **B. Difficulties in Proof-Collection**

In most economic crimes, just as it is easy for offenders to eliminate or deform proof, it is very difficult for investigators to detect and prove interference with evidence. Furthermore, judges in Korea who are responsible for criminal trials require strict specification of the content and range of evidence in an indicted case.

### **C. Name Lending (Concealment of Real Name)**

In Korea, many offenders who caused their creditors to be confronted with financial damage due to their bankruptcy or economic offenses, frequently restart their business under the names of their wives or relatives quickly after being punished for their wrongdoings. Furthermore, they even promote cheque transactions with the bank under their wife's or relative's name. Of course, any enterprise or individual that fails to settle a bank cheque is questioned by the bank, and thereafter restricted from issuing bank cheques for a certain period of time by law. However, if that enterprise or individual tries to restart a business by stealth, under the name of another person, it is difficult to detect the real person. This factor plays an important role in the recurrence of economic crime.

### **D. Difficulty in Initiating Investigation**

The high social influence of some offenders makes it difficult to initiate investigation. Some offenders distribute their illegal proceeds to politicians who have influence or power to appoint or dismiss criminal justice officials and protect the offenders from being punished. Therefore, the criminal justice officials often initiate investigating offenders only after having decisive evidence.

## **V. COMPUTER CRIME IN KOREA**

### **A. Introduction**

#### **1. Drastic Increase of Users of Computers and the Internet**

From the late 1980's, inexpensive personal computers were distributed and became widely popular in Korea. Further, communication technology development enabled personal computers to be connected to each other through networks.

As a result, the average person, as well as experts, has the opportunity to take advantage of computers and to have easy access to information through computers.

#### **2. Definition of Computer Crime**

Computer crime is defined as 'a crime in which a computer is used as a tool of crime or is an object of crime, or a crime related to data or knowledge processed through a computer'. In this context, computers include hardware, software and data. (Some scholars use the terminology of 'Information Crimes' to refer collectively to the crimes with respect to information or information processing machinery; devices including computer crime and computer-related crime).

### **B. Computer Crime Under Korean Law**

#### **1. Regulation Necessity**

First, computers create new and various tools for crime. Traditional crimes can be committed in new ways, for example there could be: computer-using fraud; disclosure of personal information of individual; infringement on corporate information; diffusion of obscene materials through communication networks; or defamation by means of commercial networks or electronic mail.

Second, computer-based crime can cause disorder in the basic structure of each sector of society, including, but not limited to, economic damage. The more dependent on computers the society is, the more serious the potential for damage. If a financial network, a resident registration network or land integrated information network, which are already in operation, are victimized by crime, its result will not be limited to economic damage.

Third, computer-based crime is very hard to uncover and prove. Because

computers store volumous data into small spaces such as disks, magnetic tapes and stored data, they have many non-accessible, confidential and invisible characters. Especially in the case of computer programs, there is a peculiar program language and expression or technology unique to each programmer. Thus, even computer experts may have difficulty in fully examining the works of other programmers and in finding errors. Therefore, it is necessary to recognize the importance of the prevention and suppression of computer crimes and to develop competent countermeasures.

## 2. Korean Law

### (i) *Criminal Law*

The amendment of the Criminal Law as of December 31, 1996 added special media records, like electronic records, as an object of crime, into the crimes of: rendering null and void symbols of official secrecy (§140); untrue entry in officially authenticated original deeds (§228); utterance of falsified public document (§229); utterance of falsified private documents (§234); violation of secrecy (§316); obstructing another from exercising his/her rights (§234); robbery by hostage (§336). The amendment also created new provisions of: preparation of false public documents (§227); interference with business (§314 II); fraud by use of computer (§347-2); and added special media records into the object of forfeiture.

### (ii) *Special Laws Related to Computer Crime*

- Act for Expanding Distribution and Fostering Usage of Computers
- Act for the Protection of Personal Information in Public Agencies
- Military Secret Protection Act
- Basic Electric Communication Act
- Telecommunication Business Act
- Communication Secrecy Protection

Act

- Radio Wave Act
- Election for Public Office and Election Malpractice Prevention Act
- Computer Program Protection Act
- Copyright Act, Patent Act, Trademark Act, Design Act, Utility Model Act,
- Unfair Competition Prevention Act

## C. **Status of Computer Crime**

### 1. Type of Computer Crime

Computer Crime is composed of each or combined types of computer hacking (which is a typical type of computer crime), eavesdropping or wiretapping of computer communications and telephones, disturbance of telephone systems and phone phreaking, cryptanalysis or code-breaking, computer virus etc.

### 2. Manipulation of Electronic Records etc.

The misconduct of manipulating computer programs or electronic records is being committed by way of manipulating commercial or financial files such as point-of-sale, electronic funds transfer systems or Trojan Horses, Superzapping Trap Doors, Logic Bombs, and Simulations and Modeling, which are expanding worldwide. Such misconduct has been repeated for a long time and is difficult to uncover.

An international counterfeit ring of credit cards was prosecuted at the end of 1995 in Korea. A woman working in the local post office was under arrest for embezzling about 4.6 billion won by means of falsely recording deposit accounts during the 6 years from 1988 to 1994. In July 1997, it was revealed that personnel in the Choheung Bank conspired with a private lender to unduly loan 65 billion won to him. Bank personnel operated a terminal to make a false deposit to the lender's bank account. In exchange, he received bribes totalling 85 million won.

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In February 1998, a 23 years old person working in an island post office in Cheonnam province operated the post office terminal to make a deposit of about 8 billion won into 58 non-named or name-borrowed accounts, and withdrew 2.7 billion won in Seoul over two days and disappeared.

### 3. Information Espionage

Information espionage, which includes industrial espionage, means an act of gathering, or transmitting illegally, confidential information regarding the business of other people, companies or the nation.

In Korea, a certain company transmitted the production methods of high-tech industrial equipment to Eastern European countries in July 1988, attracting public attention. In December 1992 an Australian, who was working (as a technology consultant) in a Korean manufacturing company of speaker products, copied the production technology onto floppy diskettes and sold it to the United States.

In addition, 19 people in organizations as industrial spies were arrested by a prosecutor after they stole, and transmitted to a Taiwanese semi-conductor production company, manufacturing process information of circuit charts for 64 Mega D-Ram of domestic semi-conductor production companies such as Samsung and LG.

### 4. Information Piracy

While information itself is intangible, a media (device) embodying it can be reproduced. Information piracy is an act to make free use of valuable information by reproducing information that has national, social and economic value, without authorization. Its primary target is computer programs, i.e. software. Illegal

reproduction using Writable CD ROM, as well as on-line distribution through computer communication, is prevalent in Korea.

Especially, the Internet is becoming popular. The number of users having application programs which enable multimedia production has been rapidly increasing, and the combination of credit card systems and electric commerce has made possible transactions among individuals in cyber-space. Thus, the Internet, is an exemplary electronic market that could be used as a huge duplicator.

### 5. Infringement of Privacy

As society is going toward an information era, every organization including national and private business companies are creating databases of personal information of people related to its business, such as residents, customers and patients, using information processing machines (devices). Revealing such data to other people could cause a serious violation of that persons rights.

In 1992, a list of employees who engaged in labor disputes was circulated among employers in Pusan, Korea. Those on the list were rejected to be hired. In 1993, 25 police officers who obtained resident references or criminal records without authorization and distributed them to the delivery service company which gave them bribes, were arrested by the Seoul District Prosecutor's Office. In 1994, department store personnel sold a database about large customers to whomever wanted such information. As a result, those customers became the target of a criminal murder organization called *Jizon-pa*, causing a big sensation nationwide.

Despite such troubles, the fact that materials which are printed out from information processing machines (devices)

detailing bank or business transactions are still being used as wrapping paper in street shops near subway stations, shows a serious problem in security for those who are engaged in computer-related work in Korea.

Under the Credit Information Usage and Protection Act, it is prohibited to illegally gather and investigate particular information such as privacy. To engage in a non-licensed credit information business, and to disclose such information other than for the contemplated purpose, is illegal. Further, the Public Institution's Private Information Protection Act prohibits private information files, gathered and kept by public institutions, from being disclosed without authorization, or being taken advantage of for undue purpose. However, from the fact that private study institutes are sending letters or e-mail to each house promoting out-of-school studies, we may conclude that a lot of personal information about subscribers of computer communication networks are leaking out through illegal channels. Therefore, the protection of privacy seems to be a serious problem in Korea.

#### 6. Cyber-Terror

Cyber-terror is an act to make threats to do harm to an other's life, body or property, through an information processing machine (device), or an information communication network, or to intend to obtain money or something of value by means of such threats. There were two such cases in August 1997 in Korea which were uncovered by the prosecutor's office. One case stopped the function of Internet e-mail via "Hitel", a local internet service company, by way of sending 100,000 e-mails to the same person at the same time. Another made the Internet connection (access) network of "Naunuri", a local Internet service company, out of order by way of sending 20 people a huge

file of 450 Mb at the same time.

#### 7. Distribution and Exhibition of Obscene Materials

Obscene sites on the Internet, without any restriction to access, is a problem. In Korea, the people who opened an obscene site on the Internet and sold the visual images, which were combined with pictures of an actress' face, were arrested by prosecutors in April 1998.

Under the Korean Communication Secrecy Protection Act, with regard to the investigation of obscene materials, wiretapping with a warrant is allowed for the investigation of certain crimes. However, on-line wiretapping during communication, which is needed to find out the extent of violence or whether it is obscene or not, is not allowed. Such restriction is creating trouble in investigation practices.

### **D. Actual Situation of Computer Crime Control in Korea**

The investigation results of computer crime (have been provided in tables III and IV of Annexure A.)

#### 1. Main Investigation Cases

- Hacking case in Seoul National University computer system ('96.3)
- Hacking case in Pohang Technology College computer system ('96.5)
- Home Banking Fraud case by means of account transfer through hacking ('96.9)
- Fraud case by manipulating computer networks in the Office of Railroads ('97.3)
- Leaking case of Drafting List in the Office of Military Manpower ('97.4)
- Hitel Computer Business interference case by way of an electronic mail bomb ('97.8)
- Large Amount Withdrawal case by manipulating a terminal in a post

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office ('98.2)

2. Establishing Investigation Systems

The Information Crime Investigation Center was set up in the Seoul District Prosecutor's Office in April 1995 and the Information Crime Countermeasure Headquarters was newly established in the Central Investigation Department of the Supreme Prosecutor's Office in June 1996. Some prosecutors were designated to be in charge of Information Crime in each of the 20 local branches of the District Prosecutor's Office on December 20, 1996 and an investigation squad (team) was created in each District Prosecutor's Office in Seoul, Taegu, Pusan and Kwangju on April 25, 1997. Thus a nationwide investigation system of Information Crime was set up.

3. Training of Investigation Experts

To date, there are 48 investigators trained through experts training programs and systems management education programs. Further, it is planned to train 35 investigators each year totaling about 150 investigators by the year 2000.

4. Introduction/Operation of New High Technology Equipment

A full-time investigation team for Information Crime was provided with high technology computer equipment for networking, and Internet exclusive lines for setting-up hacker chasing systems. Further, it created its own internet homepage and is providing Internet connection services through a terminal server.

5. Research/Development of Investigation Techniques

Developing an analysis system of evidence in computer crime was commenced in order to gather and analyze Information Crime-related materials. Such a system is also required for general

crime-related evidence that is being inputted into electronic records or computer files.

6. Building up Investigation Support Systems

In light of the trend towards a rapid increase of setting up and using various databases, it is planned to promptly build up a database system for investigation of Information Crime and general crime, and to have a Full-time Information Crime Investigation Team to support any self-initiated ("sua sponte") investigation using databases.

**E. Measures to Cope with Computer Crime**

1. Diversification of Countermeasures

As the crime organizations impacting national, social and economic values are becoming more organized and sophisticated in their ability to use information, the Information Society faces future trouble. However, if we adopt a policy that only channels provided by the country are allowed for international information communications, and all such communications are subject to censorship in advance (as there is a possibility for international communications to damage the nation's interest), such passive countermeasures will also be an obstacle to the arrival of an Information Society

Accordingly, such passive countermeasures should be the last resort to protect out nation and society. It is necessary to prepare various and general countermeasures from legal, technological and/or social aspects, in order to cope with the challenge from adverse influences in the Information Society.

2. Necessity of Unified Enactments

The Korean law to counter computer crimes is primarily the Criminal Code. It



is our nation's basic law and does not facilitate thorough practical research into real cases of computer crimes. Therefore, some main cases of computer crime could be insufficiently covered by regulations or under no regulations at all. Further, each relevant Ministry enacted its own special law for each type of information crime, which resulted in an unreasonable assessment of cases for punishment/prosecution.

Typical examples are: the lack of provisions punishing illegal spying or illegal monitoring; lack of regulations on attempt and conspiracy to commit an act causing direct threat to public welfare; an unbalance in punishment between the Criminal Code and special laws; jurisdictional disputes between investigation authorities and judgement authorities, and the warrant requirements as a basic principle of the Criminal Procedure Code.

Therefore, it is urgent to enact a general law, a proposed Computer Crime Regulating Act which includes countermeasures against all adverse impacts of computer crime, resolution of jurisdictional disputes and solves the warrant requirement problem under the Criminal Procedure Code when computer crimes are spread out. In addition, the Act would have to deal with new issues in the Information Society, such as electronic commerce, electronic funds transfer, admissibility and authenticity of electronic evidences, and international cooperation.

### 3. Practical Measures

Since misconduct in communication networks, such as hacking or phone phreaking, is likely to be directly connected to criminal acts, it is urgently required to develop a Realtime Intrusion Detection System, or any immediate chasing system for such misconduct, as well as a firewall

system of blocking such misconduct. Further, we need to develop various and multifunctional security technology and systems e.g:

- (i) Abuse/misuse controlling technology for System Security Tools in computer communication networks;
- (ii) duplication protection technology;
- (iii) connection blocking technology;
- (iv) multi-user recognition systems; and
- (v) standardization of cryptosystems.

### 4. Inter-Linked Research by Related Institutions

In Korea, a person or an institute interested in computer crimes independently research each field in the absence of an inter-linked system for general research into computer crimes. However, an Information Society can be secured and settled through general research by investigating authorities, research institutes and business enterprises, and joint research from the natural and social sciences.

### 5. International Joint Research

The contemplated goals can be attained only if computer crime research and the training and education of investigators are accompanied by international cooperation. Investigating authorities in each country will have to gather, examine and compare information about the extent of regulation and its impact, as well as technical information on information crime in other countries. Further, they should have a joint discussion on the crimes committed in each country and make efforts to cope together with new crime techniques. Without such efforts, developing countries in the computer industry might provide a hotbed for computer crime when crime techniques in developed countries are introduced.

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**VI. CONCLUSION**

Economic crimes are social evils which distort the reasonable distribution of wealth, and harm sound economic development. With the development of transportation and the gradual breaking of tariff barriers, all the countries around the world are now advancing to one market in which all countries are subject to the same economic principles. Thus some kinds of economic crime in one country may cause other countries to be faced with economic damage.

From this standpoint, it is necessary to make all efforts to develop investigation techniques and prevention measures which are suitable for individual countries. When a certain economic crime may cause a bad effect on other countries, or has some relationship with other countries, it is necessary for all related countries to carry out cooperative countermeasures. The control of economic crime must be pursued for the mutual interest of all concerned countries.

**APPENDIX A**

**TABLE I**  
**ECONOMIC CRIME OFFENDERS (NUMBER)**

Types	Year	1995	1996	1997
Tax Evasion Punishment Act	Reported	1,006	1,619	2,756
	Indicted (Arrested)	301 (61)	552 (105)	803 (79)
Infringement of Intellectual Property	Reported	13,683	15,166	13,460
	Indicted (Arrested)	13,683 (843)	15,166 (1,106)	13,460 (777)
Illegal Cheques	Reported	109,719	96,347	79,829
	Indicted (Arrested)	23,224 (7,099)	25,427 (7,504)	16,681 (4,144)
Credit Card Act	Reported	2,962	3,434	3,565
	Indicted (Arrested)	1,606 (569)	1,729 (576)	1,614 (398)
Fraud	Reported	294,967	364,970	37,526
	Indicted (Arrested)	31,355 (8,897)	44,514 (11,289)	40,946 (10,035)
Embezzlement & Beach of Trust	Reported	47,997	51,324	47,023
	Indicted (Arrested)	10,852 (1,994)	11,815 (1,990)	10,938 (1,652)

RESOURCE MATERIAL SERIES No. 55

**TABLE II**  
**PC & INTERNET USERS (NUMBER)**

	1994	1995	1996	1997	1998
PC units (thousands)	4,459	5,349	6,231	7,214	9,000 (Estimated)
Internet Users (thousands)	140	370	730	1,090	2,190

**TABLE III**  
**INVESTIGATION RECORDS BY YEAR**

Year	No. of Case	No. of Investigated Allegations	(Arrested)
1995(Apr. - Dec.)	21	45	(12)
1996	72	146	(24)
1997(Jan.-Aug.)	47	72	(39)
Total	140	263	(75)

**TABLE IV**  
**INVESTIGATION RECORDS BY TYPE**

Type	Cases	No. of Investigated allegations	(Arrested)
Forgery/alteration of private electronic records etc.	2	4	(2)
Business interference, such as destruction of computer/electronic records	6	17	(12)
Home banking fraud	3	3	(3)
Mis-issue of ID/ID usage fraud	6	51	(5)
Terminal mis-usage fraud	10	20	(12)
Commercial communication network fraud	5	5	—
Credit card fraud	4	5	(2)
Computer network protection infringement (Hacking)	10	15	(6)
Computer network processing information damage	3	5	—
Mis-usage of private information by public institute	3	10	(6)
Production/distribution of obscene CDs etc.	9	9	(6)
Others	79	118	(21)
Total	140	263	(75)

# EFFECTIVE COUNTERMEASURES AGAINST ECONOMIC CRIME IN NEPAL

*Kedar Paudel\**

## I. INTRODUCTION

About a decade ago, economic crime was rather 'foreign' to the Nepalese people. However, during the past few years, the economic activities of different sectors of the economy have increased tremendously, completely changing the social life of the people. This development has invited the opportunity for corruption and fraud relating to finance, banking transactions, foreign currency speculation, real estate transactions, illegal trade practices, procurement of goods and the construction of development projects. As a result, trends have emerged which have contributed to new social problems, including economic crime. Due to the lack of understanding and limited expertise of criminal justice officials in this new sphere of crime, the problems are further aggravated. It is a challenge to the government and other criminal justice agencies to fight against such economic evil in society. Most enforcement agencies in the country are mainly concerned with conventional types of crime like murder, robbery, theft, rape, etc. Some countermeasures have also been adopted to combat and control economic crime, but these are seen as insufficient.

With the growth of commercial and banking activities, and emerging new technologies in various fields of telecommunications, international air ticketing, financial institutions, revenue administration etc, computers are widely utilized and a new problem of computer crime has emerged. This crime is

completely new to Nepal and a responsive legal framework, including what conduct should be criminalised, has not been developed. This paper will put forward some of the Nepalese experiences vis-a-vis the countermeasures adopted against economic crimes.

## II. SITUATION OF ECONOMIC CRIME IN NEPAL

Several types of economic crime are committed in Nepal. With few exceptions, most of these crimes seem simple and direct, without any complication. However, with the globalization of various economic and commercial activities and illegal cross-border operations, these crimes are being complicated day by day. Economic crime is becoming a major public issue in the country, and the credibility of the government in general, and the investigating institutions in particular, is being questioned.

### A. Nature of Economic Crimes

The nature of economic crimes which are committed in Nepal, can be categorized as follows:

- (i) Corruption and Bribery
- (ii) Tax evasion
- (iii) Non payment of customs/excise duties
- (iv) Crimes related to banking transactions (e.g. letters of credit, overdrafts, hypothecation, loan pledges, remittance, intrabranh/interbank suspense accounts etc.)
- (v) Forging of commercial documents
- (vi) Illicit drug trafficking
- (vii) Counterfeiting of legal documents

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- (viii) Foreign employment fraud
- (ix) Money laundering
- (x) Dubious real estate transactions
- (xi) Privatization of public owned corporations
- (xii) Export of timber
- (xiii) Tenant in *Guthi*-land land registration
- (xiv) Lottery
- (xv) Undue price fixing
- (xvi) Smuggling
- (xvii) Foreign currency irregularities
- (xviii) Revenue pilferage
- (xix) Other unexposed economic crimes

Some of the economic crimes experienced in Nepal are briefly summarized as follows.

## B. Corruption and Bribery

Corruption and bribery are the major forms of economic crime in Nepal. Various economic crimes have been included within the meaning of corruption under the Prevention of Corruption Act, 1960. Corruption, in the global context, has adversely affected many societies. To combat corruption is quite a tough task and, therefore, corruption is spreading in all dimensions more and more rapidly. A developing country like Nepal has to bear the loss of a colossal percentage of its development expenditure through corruption, without any fruitful return. Reasonable investment towards development activities are in existence, but the level of output in terms of benefit is worsening. The people in Nepal have clearly recognized that there is corruption in both the government and private sectors, involving the whole spectrum of society (though empirical evidence has never been gathered or analyzed). There are problems in corruption investigation and prosecution. The lack of skilled manpower, limited resources and inadequate laws are a few of the major obstacles in this field. The types of corruption that exist in Nepal are of various forms. In the fiscal year

1996/97, 2019 complaints of corruption and improper conduct were registered and investigated by the Commission for the Investigation of Abuse of Authority (CIAA); out of which 11 cases of corruption were filed and 1 minister, 3 secretaries and various public officials, private individuals and businesses were prosecuted. A portion of the Seventh Annual Report (abridged) 1996/97 of CIAA states the cases filed in the courts as presented below:

- (a) The Secretary of the Ministry of Land reforms and Management was involved in making decisions on the transactions of tenantship of Royal *Guthi* land. This *Guthi* has an area of 106 *Ropanis* in Kathmandu Municipality, Baneshwor, and Mahadevsthan. As provided by the Law, transactions of tenantship of such *Guthi* land is authorised to the *Guthi Sansthan* only. Along with the recommendation to take necessary action for the protection and preservation of such *Guthi* lands to *Guthi Sansthan*, charge sheets were filed against public officials and other individuals, including the secretary and his relatives.
- (b) *Guthi Sansthan* administrator was found to be involved in registering the tenantship of the *Guthi* owned land of 4-14-1 *Ropani*, under *Shivalaya Guthi*, located at Bishnu Village Development Committee, ward No. 3(ka), cadastral No.133. The Steering Committee of the *Guthi Sansthan* is the only authority allowed to make decisions on the issue of registering tenantship of such *Guthi* lands. So, a total of RS. 3,912,500.00 and a fine of the same amount was claimed, as per the provision of sections 7(1), 8 and 29 of the Prevention of Corruption Act, 1960.

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- (c) One person was arrested 'red-handed' while carrying illegal gold weighing around 14 kilograms. He could not produce any certificate for his source of income, to verify that the gold was produced by him. In that circumstance, the gold was subject to seizure by the Customs Office. However the Chief Customs Officer unlawfully decided to allow the person to import the gold. Hence, a total claim of RS. 6,414,600.60 was made and the Customs Officer and the illegal gold carrier were charged as per the provisions of the Prevention of Corruption Act, 1960.
- (d) The Commission filed suit against the Minister of Agriculture, along with the Secretary and members of the Board of Directors and other officials of the Agricultural Input Corporation (AIC), and with the suppliers and local agents in connection with corruption in the procurement of chemical fertilisers. The main charges for the following allegations were:

The Minister of Agriculture decided to open a letter of credit to procure 50,000 MT of urea fertiliser at the rate of US\$235 per MT, subject to the concurrence of the Board of Directors of AIC. This was not consistent with the regulations of the Corporation. Moreover, the original offer of US\$ 225 per MT was amended to US\$ 235 per MT for urea fertiliser. In addition to that, the performance bond was taken only for 12,500 MT instead of agreed quantity of 50,000 MT.

The claimed amount thus was calculated as the difference between the original offer rate and the amended offer rate, and the

unauthorised concession provided in accepting the performance bond. So, a charge sheet was filed against the Minister of Agriculture, the Secretary of Agriculture, General Manager of AIC, Joint Secretary of the Ministry of Finance, General Manager of the Agriculture Development Bank, Advisor to the Governor of Nepal Rashtra Bank, Peasant Representative of the Board, Procurement Officer of AIC, President of Semi-conductor Materials and local representative, claiming US\$ 940,625 (equivalent to NRs. 53,897,812.50).

- (e) Cases of corruption were filed in the court regarding the following letters of credit issued by the Rashtriya Banijya Bank, Bishalbazar, Kathmandu; which were found to be against the provisions of the Prevention of Corruption Act, 1960.

The concerned personnel, along with the Chairman of the Steering Committee and the General Manager of the Bank, were charged for their failure to monitor and take necessary actions against such irregularities, and for creating favorable conditions and opportunities for the escape of the accused. Similarly, the concerned authority was recommended to take departmental action against other various public officials for their negligence in signature verification, limit checking, denoting the margins and for the production of false documents to support the illegal issuance of the letters of credit. The Nepal Rashtra Bank was suggested to make necessary provisions for regular monitoring and follow up. The Department of Revenue Investigation was also suggested to take necessary actions regarding the

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misappropriation of foreign currency.

- (f) Bid proposals from landowners or registered companies was invited by the Nepal Oil Corporation for purchase of land to construct a depot. The proposal accepted was that of a person who was the attorney of some of the other persons. It was found upon investigation, that the real landowner received only RS. 3,000,000.00P, while the mediator (the attorney) illegally earned 4,639,862.50P. The purchased plot, upon site inspection, was also found not to complying the specifications and the plot was not suitable for the

corporation's objectives. So, the conveyor and members of the tender evaluation committee were charged as per sections 3 and 7(2) of the Prevention of Corruption Act, 1960. Similarly, the landowner, along with their attorney, were charged under the provisions of the section 16(a) of the same Act.

In all cases, the concerned authorities were recommended to take departmental actions against other various public officials for their negligence in failing to undertake an in-depth study of the issues and prevailing legal provisions before forwarding files to the decision-makers.

**TABLE I**

L/C No.	Amount claimed in USDollars
30/1730	165,0
30/2355	140,1
30/2356	151,2
30/2715	184,2
30/2829	189,7
30/2830	207,0
30/2831	210,7
30/2832	193,8
30/2833	215,6

Status: Guarantee limit exceeded, documents irresponsible.

### C. Tax Evasion

Tax revenue is the major source of financing government expenditure in the country. Tax revenue and non-tax revenue is comprised of 80.4 percent and 19.6 percent shares respectively. However, the violation of customs and other various tax laws, as well as the smuggling of the goods, has largely affected the tax revenue of the country. The business community and other high-income groups mostly partake in tax evasion. Businessmen often do not

**TABLE II**

Tax Heading	RS in Millions 1995/96	RS in Millions 1996/97	RS in Millions 1997/98 (first 9 months )
Customs	7327.4	8309.1	5921.6
Consumption & Products	9684.7	10775.2	7507.9
Land Revenue & Registration	1066.6	1015.4	681.5
Property Profit & Income	3589.3	4324.6	3090.6
Total	21668	24424.3	17201.6

Some cases of tax evasion were investigated but data was not published and is not available.

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declare goods at relevant entry points nor maintain or show real accounts for tax assessment. Statistics show that the volume of business transactions, as well as the tax base of the country is increasing; but revenue is decreasing. This situation worsened last year. Table II shows the status of the tax revenue in last three years.

**D. Letter of Credit Scandal**

The opening of Letters of Credit (L/C) in various commercial banks, and getting payment on the basis of forged documents (without importing goods), is a common misuse of foreign currency and a major source of economic crime in the country. A report submitted in 1996 by the Letter of Credit Investigation Commission, appointed by His Majesty's Government under the Inquiry Commission Act 1970, shows that when investigating misuse, Letters of Credit to the value of US\$50,000 were opened within the period between July 1994 to October 1995. The recorded foreign currency misuse for this period was US\$ 36,156,797. The banks involved in such scandals, and the corresponding amounts, are given table III.

**TABLE III**

Bank	US \$ Amount
Nepal S.B.I. Bank	78,04,100.00
Nepal Bangladesh Bank	77,38,038.38
Nepal Indoswez Bank	15,81,097.00
Himalayan Bank	3,13,652.45
Nepal Arab Bank	10,44,515.00
Restrain Banijya Bank	174,54,997.86
Nepal Bank Limited	2,20,396.49
Total	361,56,797.18

On the basis of this report, among the 92 parties involved in this scandal, the Revenue Investigation Department so far has filed 51 cases in court. The CIAA is also conducting investigations of the public

officials for separate charges of corruption.

**E. Money Laundering**

Money Laundering is a newly emerging economic crime in Nepal. The threat of money laundering has spread and national economic reforms such as liberalization, market economy, creation of favorable environments for foreign investors, and casino businesses, have provided ground for (and have intensified the possibility of) the commission of such crimes. However, such economic crime has yet to be identified, investigated and addressed in Nepal. There is still a lack of legislation making money laundering a criminal offence. The adoption of necessary measures for the identification, tracking, freezing, seizing and confiscation of instrumentalities and the proceeds of crime are yet to be realized.

**F. Smuggling**

Smuggling is another form of economic crime in the country. Violations of the Customs Act, the Foreign Exchange Act, and other related laws foster such crimes. Forged Letter of Credit documentation, as well as forged customs receipts and registration papers, are the common ways of smuggling goods and motor vehicles into Nepal. The illicit trafficking of narcotics, illegal import of gold and illegal export of timber, precious bones of scare animals like the tiger, rhinoceros, elephant etc, are other major smuggling items in the country,.

**G. Illicit Drug Trafficking**

Extensive international air links and the adoption of a liberal visa policy to promote tourism in the country has made it easy for criminals to misuse this facility to engage in drug trafficking. The nature of illicit drug trafficking in Nepal at present is as follows;

- Some of the seizures show that people from Mizoram and Burma smuggle drugs into Nepal via land following



the route of the Golden Triangle (West Bengal of India to Kathmandu Nepal)

- Heroin has been found to be smuggled into Nepal from Bangkok and Pakistan by air.
- A number of cases of hashish smuggled from Nepal have been intercepted and seized from carriers at Kathmandu Airport, destined for Hong Kong, Thailand, Singapore, India and other countries.
- Drug trafficking is also used for local consumption. Drugs are smuggled from neighboring countries into Nepal and are sold by peddlers.
- Lists of the seized quantity of narcotics and the persons involved in the transaction, sale and distribution of drugs, as well as the number of arrested persons, are given in annexure A.

### III. COUNTERMEASURES TO COMBAT ECONOMIC CRIME

His Majesty's Government of Nepal has adopted various countermeasures to effectively combat the growing challenges posed by various economic crimes. To fight against such crime, a system based on laws and regulations has been set forth in the country. Various institutional efforts, as well as a series of legislation, have been designed and enforced. However, the countermeasures that are being undertaken may not prove adequate and more is required to be done. The following are some of the countermeasures adopted in the country:

#### A. Constitutional and Statutory Provisions

- The Constitution of the Kingdom of Nepal; Part 12 (1990)
- The Commission for the Investigation of Abuse of Authority Act, 1991
- The Prevention of Corruption Act,

1960

- The Custom Act, 2019 (1962)
- The Foreign Exchange (Regulation) Act, 2019 (1962)
- The Income Tax Act, 1975
- The Excise Duties Act, 1959
- The Value Added Tax Act, 2052 (1996)
- The Revenue Leakage (Investigation and Control) Act, 1996
- The Narcotic Drug (Control) Act, 1976
- The Nepal Rastra Bank Act, 1953
- The State Cases Act, 2049 (1993)
- The Extradition Act, 2045 (1989)

#### B. Institutional Efforts

##### Anti-Corruption Institutions

##### 1. *Commission for the Investigation of Abuse of Authority (CIAA)*

The CIAA is a constitutional body established under Article 97 of the Constitution of the Kingdom of Nepal, 1990. The Commission investigates cases of abuse of authority in terms of corruption, or improper conduct (mal-administration) by any person holding any public office. In other words, the CIAA functions as an Ombudsman institution, as well as an anti-corruption institution. It has been given the power to admonish such persons, or forward recommendations to the concerned authorities for departmental or any other necessary actions, if it finds upon its inquiry or investigation that such persons have misused their authority by improper conduct. In cases of corruption, the CIAA may bring, or cause to be brought, an action against such persons, or any other person involved therein, in a court with jurisdiction in accordance with law. The Prime Minister, Ministers, Speaker of the House of Representatives, members of Parliament, and all bureaucrats are included within the jurisdiction of the commission. The CIAA is the sole body

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that looks after cases of corruption in the country. However, it can delegate some of its power to other statutory or governmental organizations. The number of complaints received by the Commission and its disposal are presented in Annexure B.

2. *Special Police Department (SDP)*  
The SDP was established under the Prevention of Corruption Act, 1960. It is the statutory body which exercises the power delegated by the CIAA for the investigation of cases of corruption in the three districts of Kathmandu valley.
3. *District Administration Office (DAO)*  
The DAO is the main administrative agency of the government in the districts. The CIAA has delegated some of its power to the Chief District Officer of the DAO to investigate cases of corruption within the district.

Other Economic Crime Control Institutions

1. *Revenue Investigation Department (RID)*  
The RID is responsible for investigating and prosecuting cases of revenue pilferage by any person in the sector of customs, excise duties, tax administration for non-payment of customs/excise duties, forging Letters of Credit, stealing motor vehicles and their illicit trafficking etc. The statistics of such crimes investigated and prosecuted by the RID have not been published in a compiled form.
2. *The District Administration Office (DAO)*  
The DAO exercises the power to hear some cases of economic crime, like black marketing, undue price fixing etc, as a quasi judiciary body under various statutes.

3. *The Narcotic Drug Control Administration Division*

The Narcotic Drug Control Administration Division was established under the Ministry of Home Affairs. To control the cultivation, production, manufacture, sale, purchase, storage, traffic, consumption, export and import of narcotic drugs, the Narcotic Drugs (Control) Act 1976, was enacted in the country. This Act is in line with the Single Convention on Narcotic Drugs 1961, and the UN Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988, to which Nepal is a party. In addition to this, adoption of the SAARC Convention on Narcotic Drugs and Psychotropic Substances 1990, and the regular exchange of information with SAARC member countries (India, Pakistan, Bangladesh, Sri Lanka, Bhutan, Maldives) through the SAARC Drugs Offences Monitoring Desk, represent other efforts to combat such crime.

Nepal has an extradition treaty with India, concluded on October 2, 1953. The Extradition Act 2045 (1989) of Nepal has also laid down the procedures to be adopted for requests of extradition, or for requesting punishment in cases where an offender has committed a crime in one country and absconded to another. These instruments may become useful to combat economic crime of a transnational nature.

**IX. PROBLEMS IN THE INVESTIGATION AND PROSECUTION OF ECONOMIC CRIMES, AND REFORMS**

The legal system of the country does not differentiate between economic crime and other crimes committed against the State. It is difficult, if not impossible, to specifically define economic crime. To

gather evidence in various white collar crimes, and to determine responsibility in a particular offense, is difficult. Moreover, to prove the intention to commit a crime, without detailed evidence, is rather impossible in such crimes. Most of the economic crimes have an international dimension. Their transnational character is very complex due to the methods of commissioning. Nepal, having opened its borders with India and China, and being sandwiched between these two giants, is subject to crimes that have illegal cross-boarder operations. Further, lack of political commitment to combat economic crimes, accountability in political parties, transparency in administration, proper education and an over-all lack of trained and motivated investigators, is a major problem for the combat of economic crime in Nepal. Therefore the following countermeasures to combat economic crimes are highly desirable in Nepal:

1. Establishment of a Special Court to deal with various economic crimes.
2. Burden of Proof should, in some instances, be shifted to accused.
3. Better staffing, training and incentives for investigation institutions.
4. Proper infrastructure and physical facilities in the investigative agencies.
5. Public awareness campaigns against economic crime activities.
6. Political commitment.
7. Code of Conduct for all public officials, including elected members.
8. Better co-ordination between government departments and investigation agencies.
9. Free, independent and impartial media.
10. International co-operation and mutual assistance.

## V. CONCLUSION

With the expansion of development activities and the advent of new technology, the nature of the crime is changing and new types of crimes are emerging. The advancement of computer technology has invited various computer crimes, but such crimes are new to the investigation agencies and there are no countermeasures developed to combat them. However, various economic and computer crimes are costly to society, and the entire country is being penalized through inaction. The struggle against such crimes is the struggle against poverty, backwardness, and moral declination. It is therefore, essential that the criminal justice system should give priority to the detection and combatting of such crimes. International co-operation and technical support in this field would be highly beneficial to a developing country like Nepal.

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**ANNEXURE A**

**SEIZED QUANTITY OF NARCOTIC DRUGS IN THE FISCAL YEAR 1996/97**

Drug Type	Marijuana	Hashish	Heroin	Morphine
Kilograms	2208	1251	10	—
Grams	867	742	794	739
Milligrams	50	252	185	—

**ARRESTED PERSONS IN NARCOTIC DRUGS CASES**

Fiscal Year	Foreigner		Resident/National	
	Male	Female	Male	Female
1994/95	641	40	104	8
1995/96	633	46	104	7
1996/97	534	18	58	—

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## REPORTS OF THE COURSE

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### GROUP 1

#### ECONOMIC CRIME DAMAGING GOVERNMENT AND THE NATIONAL ECONOMY

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<i>Co-Chairperson</i>	Mr. Jeshop Remember Shabangu	(South Africa)
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#### I. INTRODUCTION

Economic crime has become the crime of choice; it is a crime of low risk and high gain. After economic crime became international, it has been necessary for criminals to legitimize the fruits of crime, and accordingly, the mushrooming of off-shore banking and bank secrecy legislation has taken place. Tax evasion, smuggling and money laundering have become the tools of economic criminals, with corruption playing the part of lubricant for the smooth running of the crime machine. The South Pacific and the Caribbean, far flung from the international financial centers of the world, have developed off-shore banking into an art form, where invariably, the financial institutions are knowingly or unknowingly used, directly or indirectly, for the purpose of concealing the source and existence of the proceeds of crime. In many instances, the laws have been designed to make inaccessible the information required by investigating agencies and defrauded victims. According to one estimate, the size of the global underground economy in the

region was a staggering US \$ 5.8 Trillion in 1993.

In areas such as evasion of taxes and breaches of exchange control regulations, views appear to be changing in the international community. It was, and is, a basic tenet of international law that one nation is not obliged to enforce the fiscal policy of another nation. Accordingly, fiscal offences were not normally extraditable, and international co-operation was rarely extended to the investigation of such crimes. More recently, policy makers in many jurisdictions are questioning the rationale behind this principle. However, within the conflicting priorities, a common conscience has also begun to emerge amongst the nations of the world, forcing them to make joint efforts to fight the menace of economic crime.

Keeping in view the above, the group studied economic crime, particularly in the participating countries, with a view to assessing its volume; impact on the government and the economy of the

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country concerned; the difficulties encountered in its investigation; prosecution and trial; and possible countermeasures which can be implemented complimentary to individual political, social, economic and legal systems and the state of their development.

## II. CORRUPTION

Economic crime is invariably associated with corruption, which of course represents an even more direct attack on the integrity of the State and its institutions. Corruption, illegal gratification, and considerations which are not due, involve huge amounts of money and valuables. Their transactions not only breed black money, but also potential grounds for vested interests for the commission and expansion of activities directed towards economic offences.

Corruption in public and corporate life has assumed serious dimensions. Corruption in the global context has adversely affected the societies of both developed as well as developing countries. Corruption on a practical level has various aspects. The legal definition of corruption differs from country to country. According to one view, corruption at the lowest levels of administration, where money or some other consideration is paid on a small scale to speed up the process of decision-making (Grease), does not affect the economy of a country and therefore should not be treated as an economic crime. At the same time, an opposite view exists that small corruption leads to bigger, and the credibility of the government apparatus is damaged by all kinds of corruption, as ultimately conditions favourable for economic crime are created. Therefore, no attempt has been made to give a legalistic interpretation of corruption in this report. However, the group considered the following major areas in the field of

corruption:

- Corruption by means of bribery (as differentiated from 'Grease')
- Abuse of authority
- Political corruption
- Embezzlement of public money

### A. Actual Situation

#### Bangladesh

Corruption is perceived as a disease impairing the vital elements of society. This, in turn, has ramifications in limiting the socio-economic development of the country. According to the statistics of the Bangladesh Bureau of Anti-Corruption, from 1995 to August 1997, a total of 1378 petitions were lodged by the Bureau in different courts. Due to the lengthy investigation procedure, a large number of corruption cases are pending investigation.

#### Cambodia

Like other developing countries, Cambodia is also suffering from the problem of corruption. Most vulnerable areas in the Cambodian administration are high-ranking public servants (both political and bureaucratic), departments of Customs, Economic police, Immigration, and the judiciary. Laws and regulations are not effectively implemented in the country because of corruption, which results in other economic crimes such as smuggling, tax evasion, drug trafficking etc. The fight against corruption has not received the seriousness it deserves in Cambodia, and corruption has become a culture amongst public officials.

#### China

Corruption accounts for almost 50% of economic crime. During the formation of the socialist market economy, imperfections in the economic order provided loopholes for some types of economic crime. Besides, the policy of opening up to the world has exposed the Chinese people to external influences and

inducements. Advances in science and technology, as well as administration methodology, has brought benefits to the Chinese people. At the same time, some negative elements have contributed to new crimes, especially corruption. The criminal law of China describes public servants as those who work in government agencies, State owned companies, enterprises, institutions or peoples' associations. Also those public servants that are assigned to work in non-State owned companies, enterprises, institutions, or peoples' associations are covered by the anti-corruption law. The law further stipulates that public servants who illegally take advantage of their office, steal or fraudulently appropriate public property, are guilty of a crime. Further a public servant who misappropriates large sums of public funds for profitable business, or misappropriates large public funds without return over three months, is guilty of the crime of embezzlement. Anti-corruption agencies in China have been filing large numbers of anti-corruption cases and the courts have also disposed of most of these cases.

#### India

From the early eighties, political corruption has been on the increase. Many leading political figures in India and many political parties have been accused of accepting illegal monetary contributions from the business world in the matter of arms contracts, power and fertilizer contracts etc. Liaison agents, both of leading Indian and foreign firms have been operating this system in conjunction with corrupt politicians and bureaucrats.

There has been a steady trend in the incidence of cases registered under the Prevention of Corruption Act by the Central Bureau of Investigation (CBI) during the years 1992 to 1996. During 1996, the CBI has taken 304 persons under

custody for various offences under the Act. Enforcement by the States/Union territories on this account shows a significant increase in the number of persons arrested in the cases registered under the Act during 1995 to 1996.

During 1996, the CBI made a record seizure to the tune of Rs. 143 million. The State/ Union territory Vigilance Officials seized property to the tune of Rs. 262 million in various cases of corruption. In the cases investigated by the CBI in 1996, departmental action was taken against 544 officials, whereas in the States, departmental action was taken only against 168 persons. The punishment awarded to various public servants in the cases handled by the CBI included 42 dismissals, 20 removals, 148 major and 228 minor punishments in 1996. In State Vigilance cases, 168 persons were referred for departmental action in 1996. There were 9 dismissals, 2 removals from service, 27 minor and 97 major punishments awarded to the public servants during this year. An analysis of the profile of the public servants proceeded against by various agencies in India on the charges of corruption shows that:

- (a) The number of politicians and senior bureaucrats proceeded against is very minor.
- (b) Almost 2/3rd of the public servants charged for corruption are at the lower levels of administration.
- (c) Action taken by the State / Union territory anti-corruption agencies is very small as compared to the CBI.

#### Japan

Analysis shows that 40 percent of corruption cases in Japan pertain to *malafide* deals between private construction companies and local public bodies involving big enterprise on one side, and politicians or bureaucrats on the other.

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Recently, a serious case of corruption in which heads of several self-governing bodies and major construction companies were involved, was detected in 1993. Such corrupt deals have been the source of illegal profit to private firms, and illegal collusion between the contractors has made prices unfair by interfering with healthy competition. The companies have been able to keep large amounts of unaccounted funds, which have been used in corrupt deals.

There is no special legislation to deal with the corruption cases in Japan, but various penal regulations have been enshrined in the Criminal Code and other laws. In Japan, basically the police investigate corruption cases. There is a special investigation division that investigates economic crimes including corruption at the police headquarters of each prefecture. Police and public prosecutors regard cooperation between them as the key for successful investigation. Public prosecutors also investigate special corruption cases in which high-ranking politicians and bureaucrats are involved. Special Investigation Departments have been organized in the District Public Prosecutors Office of Tokyo, Osaka and Nagoya. These Special Investigation Departments investigate the corruption cases of the category mentioned above. These Special Investigation Departments have been getting good results by conducting investigations independently, without any political influence.

### Korea

Korea, in the recent past, has been jolted by serious cases of corruption. In 1995, the Central Investigation Department investigated bribery charges involving the former President Mr. Roh Toe Woo, in which he was awarded a heavy punishment. In 1993, Regulations for

Enforcement of Emergency Presidential Order on Real Name Financial Transactions and Protection of Confidentiality was enacted. As a result, bank accounts cannot be opened in somebody else's or false names. This has proved to be a deterrent to the corrupt and has helped investigators in tracking criminals and their assets in cases where a banking channel is used by the corrupt in their deals.

### Laos

Together with socio-economic development, Laos has been facing problems of various types of economic crime. Corruption is not a serious problem in the country, but it is still significant enough to be taken serious note of. Involvement of government officials in various corrupt activities is damaging socio-economic development and resulting in the loss of the confidence and faith of the people. Corruption in Laos has been endemic in middle and high-ranking officials of the government working in the fields of finance, tax, customs, immigration police, banks etc. Lack of moral values, poor living conditions and low salary are some of the causes of corruption amongst public servants in Laos. The present laws and regulations are not effective enough to combat corruption in the country.

### Nepal

There is a general realisation in Nepal that there is corruption in both the government and private sectors that involves the whole spectrum of society. A developing country like Nepal loses a colossal percentage of its development expenditure by way of corruption. Reasonable investment towards development activities is allocated, but the output in terms of benefits is worsening. In 1996/97 the Commission for the Investigation of Abuse of Authority (CIAA) started investigation of 1320 cases of



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corruption, and completed investigation in 629 cases. Out of the completed cases, 11 cases were filed in the court in which 1 Minister, 3 Secretaries and various other public officials were prosecuted. The CIAA also forwarded the recommendation for departmental and other actions against more than 32 public officials. Likewise in 1997/98, besides 6 cases filed in court, the Commission recommended departmental and other action against more than 30 public officials. The departmental action taken in the cases investigated by the Special Police Department in the fiscal years 1993/ 94, 1994/ 95 and 1995/ 96 has been against 82, 73, and 30 officials respectively.

A system based on law has been set forth to combat corruption in the country. The constitution of the Kingdom of Nepal 1990, the Commission for the Investigation of Abuse of Authority Act 1991, the Prevention of Corruption Act 1960, contain legal provisions in this field. The Constitution has made provision for complete independence and neutrality for the investigation and trial of corruption cases. As the rule of law is the basic feature of the Constitution and political system, the independence of the judiciary, as well as the Constitutional Commission for the Investigation of Cases of Corruption, has been ensured.

The Constitution has made the provision for the establishment of the Commission for the Investigation of Abuse of Authority (CIAA). The Commission investigates cases of abuse of authority in terms of corruption or improper conduct (mal-administration) by any person holding a public office. The CIAA functions as an Ombudsman institution as well as an Anti-corruption institution. It has been given the power to admonish such public servants or forward recommendations to the concerned authorities for departmental or

any other necessary action, if it finds on inquiry or investigation that they have misused their authority by improper conduct. In cases of corruption, CIAA may bring, or cause to be brought, an action against such public servants or any other person involved therein in a court having jurisdiction in accordance with law. The Prime Minister, Ministers, Speaker of the House of Representatives, members of Parliament, and all public officials are included within its jurisdiction. CIAA is the sole body, which looks after cases of corruption and all other anti-corruption institutions of the government function under the delegated power of the Commission.

### Pakistan

Corruption is a serious problem and permeates all stratas of society in Pakistan. The last three governments were dismissed on charges of corruption. Recently the government has enacted new legislation called the 'Ehtsab' Act (Accountability Act) to weed out corruption in the higher echelons of bureaucracy/politics. This enactment has produced positive results so far.

### Philippines

Corruption amongst public servants has been a problem in the Philippines. A tough Anti-corruption law was enacted in 1991 as a result of corruption under former President Marcos, who allegedly plundered billions of dollars from the government coffers. The Anti-Graft and Corrupt Practices Act and Anti-Malversation (Embezzlement) Revised Penal Code have also been enacted to deal with various aspects of corruption in the country. In the latter law, a presumption of malversation (embezzlement) has been created which shifts the burden of proof to the accused, on their failure to account for public funds/property in their charge.

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South Africa

Achieving good governance, and overcoming the practices of profligacy and corruption inherited from the apartheid government and its economy, are two of the most important challenges facing South Africa. Corruption is also rife in South Africa's private and public institutions. The apartheid era was structurally conducive to corruption as its culture of secrecy resulted in a lack of a transparent and accountable system.

In South Africa, corruption in the criminal justice system is pervasive. Particularly disturbing is the theft and/or sale of police dockets, the destruction or contamination of exhibits, the withdrawal of criminal cases etc, with prosecutors, court interpreters and police officials often involved. A member of the provincial legislature (deputy speaker) has been removed and is facing criminal charges of corruption.

The current legislation to combat corruption is inadequate and there is no provision for the presumption of guilt. There are various institutions involved in the investigation of corruption. These structures are inadequate and work in isolation. The Anti-Corruption Unit investigates cases of corruption within the South African Police Service, the Office for Serious Economic Offences (OSEO) investigates allegations of serious economic offences that include corruption on a large scale. The Commercial Crime Unit, the D'Olivera Task Unit, the Presidential Task Unit, the Public Protector, the Independent Complaints Directorate, the Health Commission, the National Intelligence Agency and other intra-departmental units are involved in the investigation of specific types of corruption in the country. There is growing public support for coordinated action to be taken against corruption in South Africa.

**B. Contributory Factors for Corruption**

Some of the factors which contribute in creating an environment for corruption identified during the discussion are as follows:

- (i) *Political Commitment*: There seems reluctance on the part of some of the political parties and governments to seriously combat corruption. As a result, the attitude of the governments becomes lackadaisical in combatting corruption.
- (ii) *Lack Of Transparency in the Administration and Management*: Lack of transparency in framing policies and in taking administrative decisions of the government in the matter of the allocation of contracts, procurement of goods and supplies, appointment and transfer of officers etc, creates conditions where corruption thrives. The climate of secrecy in government work provides opportunity for the corrupt to often go undetected.
- (iii) *Internal Auditing and Control Systems*: Lack of efficient internal auditing and control systems in the governmental set-up makes a favorable environment for corruption. More often than not, the audit has become a formality and lacks effectiveness.
- (iv) *Lack of Ethical Standards and Non-Adherence to Code of Conduct*: In some countries, a low level of ethical standards in the society in general, and a low regard of conduct rules amongst public servants in particular, breeds a culture of corruption and cynical acceptance of the same amongst the public.
- (v) *Lack of Professionalism*: Professional experts such as Chartered Accountants,

Income-Tax Attorneys etc go against their professional ethics and help the corrupt in legitimizing their ill-gotten gains. This has in turn made the task of the investigating agencies so much more difficult.

- (vi) *Inadequate Pay Structure*: In some countries, the abnormally low pay structures for public officials has also led to a perverted justification of corrupt practices on the part of some public servants.
- (vii) *Poverty and Shortage of Essential Supplies and Lack of Awareness*: In some countries, the vicious circle of poverty, and shortage or lack of proper education amongst the populace creates an environment for corruption and lowers the capacity of the public to resist the same.

**C. Problems in investigation, Prosecution and Trial**

This basically involves action by one organ of the government, i.e. the criminal justice system, against its counterparts in other organs of the government, often far more powerful than the former. The situation becomes even more exasperating when the criminal justice system is infected with corruption. The fight against corruption is a fight against well-entrenched vested-interests.

During the group discussion on the subject, it was clear that whereas some of the problems and possible solutions are identical for different countries, others are not uniformly applicable due to differences in their political, social, economic systems and the state of their development.

- (i) *Independence and Neutrality of Investigating and Prosecuting Agencies*: In some of the countries it seems that investigating agencies have been

hesitant to proceed against highly placed public servants. This has been noticed particularly when high political and bureaucratic persons are suspect. In some cases, even the judiciary has been pressurised by the vested interests. This has highlighted the need to insulate the investigating/prosecuting agencies in such countries from the political/ bureaucratic executive, so that they can carry out their task without fear or favour.

- (ii) *Difficulty in Obtaining the Information/Clues for Starting Investigation*: Due to the 'white-collar' nature of the crime, information is often either not forthcoming or is imprecise. Complicated financial transactions have enabled the corrupt to disguise their illegal incomes as legal assets. In cases of highly placed public servants, informants are often reluctant to come forward with information out of fear of retribution.

- (iii) *Lack of Resources Including Training*: Lack of human and other physical resources also limits the reach and efficiency of the investigating agencies. Sometimes vested interests in the government deliberately do not allow the enforcement agencies to become strong and capable of effective investigation. In some countries where the number of corruption cases is very large, it has been felt that investigators are overburdened, resulting in delays, as well as poor quality of investigation. It has also been felt that investigation and trial of corruption cases requires special skills and knowledge in accounting, tax and company laws etc on the part of investigators and prosecutors, which they often lack.

- (iv) *Provision of Prior-Sanction*: In some countries, prior-sanction of the

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government is required before starting investigation of a case against a senior public servant. This leads to motivated delays and sometimes even leakage of information to the advantage of the corrupt.

- (v) *Shortage of Courts*: In some countries, the number of special courts to try corruption cases are not sufficient, and in others, such cases are tried in the ordinary courts which are already overburdened and also lack the expertise to try such cases. Due to these reasons, a long time, sometimes extending to a number of years, is taken in anti-corruption trials. Due to this, the witnesses, and sometimes even the complainants, become hostile in the court, leading to many unsuccessful prosecutions.
- (vi) *Delays In-Built in the Legal System*: A corrupt accused, due to their resources, is able to make use of various provisions of the legal system, like appeals and revisions, to delay the prosecution, thereby affecting its ultimate result.
- (vii) *Burden of Proof*: The prosecution has to prove the case beyond all reasonable doubt. In most cases where a corrupt public servant has been legitimizing assets by a series of financial operations over a period of time, the degree of proof required in law for successful prosecution becomes difficult to collect.
- (viii) *High Non-Guilty Judgements*: Due to the variety of factors discussed above, the rate of not guilty judgements is usually high, resulting in the low morale of investigators and the spread of cynicism in society about the effectiveness of anti-corruption efforts. This in turn demotivates people to lodge information against corruption.

**D. Countermeasures in the Field of Criminal Justice**

Corruption can definitely be controlled, if not eradicated altogether. With the best of efforts, the criminal justice system can only minimize it. Keeping in view this fact, the group came to the conclusion that to combat corruption, preventive measures, as well as curative measures, are necessary. Based on the problems analyzed above, the following are some of the countermeasures, which can be used to combat corruption in so far as they are acceptable in the individual systems of the participating countries.

- (i) *Independent and Neutral Investigating Agencies*: In order to ensure a free hand to the enforcement agencies in this field, personnel should be given security against abrupt transfers and other forms of retributive action on the part of politicians and senior public servants. Prescribing fixed tenures and a strict and impartial procedure for the induction/appointment, as well as transfer/removal, of personnel working in these agencies can go a long way in ensuring the independence and neutrality of these agencies.
- (ii) *Protection of the Complainants and Witnesses*: In order to encourage complainants to come forward with information, and to allow the witness to depose freely, Witness Protection Programs should be introduced. Invariably, the offenders in serious cases of corruption are highly placed politicians and/or bureaucrats, and very often there is a collusion between these two kinds of public servants. Under any system of government, such persons wield a lot of power. Informers and witnesses are extremely reluctant to depose against such powerful persons for fear of retribution. It is therefore, either difficult to start

investigation or it is virtually impossible to conduct a successful investigation and trial. Countries have to consider this problem in their own perspective and determine exactly what kind of protection is to be offered to the informers, complainants and witnesses.

- (iii) *Adequate Number of Well-Trained Investigators*: Besides increasing the number of investigators in the anti-corruption agencies, special training programmes should be organised for them in the fields of accounting, tax and company law, including practical training under experienced investigators.
- (iv) *Removal of Prior Sanction System*: The provision of prior sanction before initiating an inquiry or investigation, prevailing in some countries, should be removed. Instead, if felt necessary, a statutory commission could be established to examine grounds for starting an inquiry or an investigation.
- (v) *Increase in the Number of Courts*: The number of courts dealing with corruption cases should be increased so that trials are not inordinately delayed. This will increase the effectiveness of the fight against corruption.
- (vi) *Restriction on Appeal/Revision*: Procedural laws may be amended to restrict actions intending to cause delays in the ongoing trials, and the courts should, on their part, take a strict attitude against attempts to delay the trials.
- (vii) *Burden of Proof*: The Burden of proof or a presumption of guilt should lie on the accused in certain circumstances of highly suspicious evidence against public officials. In a case where a link

by way of ownership of an asset has been proved against the accused by the prosecution, the court should make it incumbent on them to prove that they are not the owner of the same, to the satisfaction of the court. Provisions for shifting the burden of proof, in certain circumstances, onto the accused already exist in some countries in anti-corruption and other laws. If necessary, substantive and procedural laws can be reviewed and amended accordingly. Hearsay evidence is often the major part of evidence gathered by investigators in anti-corruption cases. However, the evidentiary laws of most countries regard hearsay evidence as inadmissible. It is recommended that wherever proper foundation has been laid, hearsay evidence should be made admissible by amending the evidentiary laws.

- (viii) *Immunity from Prosecution*: Some countries have provisions in their laws wherein immunity from prosecution is granted to a co-accused by the courts upon their confession. This can be an effective means to strengthen evidence against the main accused where a number of conspirators are involved. This step is recommended to strengthen anti-corruption laws where ever possible. Besides this, steps to provide protection to state witnesses (approvers) under the witness protection programme should also be considered.
- (ix) *Freezing and Confiscation of Assets*: The provision for freezing and confiscation of illegal assets should be made simple, quick and effective.
- (x) *International Cooperation*: At times, the accused have found sanctuary in other countries out of reach of the investigators. The international

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community should recognize the offences of corruption as an extraditable offence and take steps to expeditiously extradite such accused to face legal action.

**E. Other Countermeasures**

To make the fight against corruption effective, the following countermeasures in the realm of government and legislature are recommended by the group:

- (i) *Transparency in Administration and Effective Management Systems to Eliminate Situations which could Lead to Corruption:* Transparency in the policy and administrative decisions of the government in the matter of acceptance and allocation of contracts, procurement of goods, appointments and transfer of officers should be ensured. The internal management should be made efficient and prompt. A Single Window System of government decisions should be introduced, obviating the need for making contact with different public servants by the applicant. Legislation on the Right to Information may also prove to be a step in making the system of government decision-making more open.
- (ii) *Professional Misconduct:* In case of professional misconduct by chartered accountants and income tax attorneys, a special provision debarring them from their profession should be introduced in the relevant Acts.
- (iii) *Suspension from Holding Public Post:* A politician accused of corruption should be debarred from holding a public office until the conclusion of the legal proceedings. Similarly, a government servant accused of the crime of corruption should be compulsorily suspended from service

until the conclusion of legal proceedings. Such a system already exists in some of the participating countries.

- (iv) *Public Education and Mobilization:* Public-cooperation and support play an important role in any anti-crime measure, and more so for the successful campaign against corruption. Therefore, emphasis should be given for public education and mobilization by governmental, as well as non-governmental, organizations and by campaigns through mass media.

**III. TAX EVASION**

Chiselled into the granite portico of the Internal Revenue Service building in Washington, DC, are the words 'Taxes are what we pay to live in a free society'. However, such egalitarian sentiments are more often than not scoffed at by the rich and wealthy, who regard taxes as a measure of fiscal unfairness and as a reduction of incentive to create wealth. This situation contributes another facet to the capitalist paradox, as those with the greatest need to protect their wealth from the grasp of acquisitive chancellors are also those with sufficient means to pay for the expensive advice available to enable them to avoid paying more tax than is absolutely necessary, and to minimize taxes to which they are already subject. This ensures that in practice they pay proportionally less tax than the poorer members of society.

**A. Actual Situation**

China

In recent years, China has made reforms in its taxation system. Cases of tax evasion have been increasing. In 1994, the procuratorates received 12074 cases relating to tax evasion, and filed 6841 cases prosecuting 7562 defendants; 7180 cases were finalised. In 1995, the courts handled

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491 cases relating to tax evasion, 495 cases ended in conviction and 1354 defendants were punished.

### India

In India, tax evasion is the most common illegitimate activity, which is practiced by suppressing facts and the manipulation of records by professionals and other tax payers. Information from the Central Board of Direct Taxes reveals that there has been a steady and continuous effort to unearth income tax evasion through searches. The assets seized during 1996 were to the tune of Rs. 4056.3 million. According to one estimate, as much as 70% of taxes are evaded in India (the years 1992-96). A look into the prosecutions that were launched for tax evasion reveals that the conviction rate has been low. During 1996, out of 234 cases, which were prosecuted under the direct taxes enactment, 70 were compounded, 149 cases were acquitted and only 15 cases resulted in conviction.

### Japan

Recently in Japan, on average 40 to 60 billion yen is lost every year due to tax evasion. Most of the evasion is in the field of income tax, corporation tax and inheritance tax. In Japan, the police do not investigate tax evasion cases, because this requires expert technical knowledge of the many tax laws and techniques of the investigation. Investigation of these cases is conducted by the tax investigation officers of the Tax Administration Bureau and the Public Prosecutors Office. During investigation, the public prosecutor and the tax investigation officers usually discuss the many points of investigation, and the investigation is carried out under close cooperation between them. The Tax Investigation Bureau recently investigated about 230 tax evasion cases, and referred about 75% of the cases to the public prosecutor, most of which were prosecuted.

In the trial, almost 100% cases were found guilty, out of which 80% or more were given suspended sentences.

### Nepal

Tax revenue is the major source of financing the Government expenditure in the country. Tax revenue and non-tax revenue comprise 80.4% and 19.6% respectively of the government revenue. However, the business community and other high-income groups mostly evade taxes. The usual ways of tax evasion is by submitting false documents whereby a false income is declared, resulting in lower tax assessment. It is often alleged that the actual tax collection is only in a fraction of the taxes which are due. Statistics show that the volume of business transactions, as well as the tax base of the country, is increasing but in comparison, revenue is decreasing. The Revenue Investigation Department, an administrative body, has been established for the investigation of tax evasion cases in the country. Very few cases of tax evasion are investigated and prosecuted. Where cases are prosecuted in the court, it takes a long time for them to be disposed of. In the fiscal year 1994/95, out of the 14 cases prosecuted, only 1 case was disposed of. In 1995/96, no new cases, other than those carried forwarded from the previous year, were prosecuted and no cases were disposed of.

### South Africa

Withholding tax was deemed a legitimate means to fight the Government during the apartheid regime. Businesspersons, professionals and other taxpayers suppressed facts and manipulated records. This culture has taken root. The current Government is taking corrective steps to stop the above practice. Tax laws have been enacted to deal with tax evasion.

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**B. Contributory Factors for Tax Evasion**

The group identified some of the following contributory factors for tax evasion during its discussion:

- (i) *Tax-Shelters*: In order to encourage private investment in socially responsible activities, the fiscal laws provide for tax shelters where lower taxes are charged for making such investments. This provides incentive for manipulation of records to take advantage of tax shelters.
- (ii) *Fiscal Policies*: At times, fiscal policies are deliberately distorted and loopholes are left by corrupt politicians and senior bureaucrats in the tax laws for corrupt motives, with the objective of favoring big business houses.
- (iii) *High Rate of Taxation*: In some countries, the rate of taxation is very high with the maximum being as high as 70%. It is felt in some quarters that a high rate of taxation is itself a motivation for evasion. In a graded tax structure, persons with low incomes, agriculture sector etc are either not taxed or taxed very lightly, with the result that there is a feeling of unfair treatment amongst persons in higher income levels, motivating them in turn to evade taxes.
- (iv) *Implementation of Company Laws*: Weak implementation of companies laws also results in companies forging records and avoiding full disclosure of business information, leading to tax avoidance.
- (v) *Lack of Deterrence*: Penalties for tax-defaulters are lenient and most of the times, the cases are compounded (dealt with administratively) through the payment of fine. Thus the penalties

lack a deterrent effect.

- (vi) *Unprofessional and Unethical Conduct of Tax Professionals*: Large scale unprofessional and unethical practices by chartered accountants and income tax attorneys, whereby for personal gain they actively collude with rich clients and private firms to create and forge records for tax-avoidance, is rife.

**C. Problems of Investigation, Prosecution and Trial**

- (i) *Corruption in Tax Administration*: There is a large scale corruption in tax administration, where a mutually beneficial but unholy relationship exists between the assessed and the tax official, with resultant loss to the treasury.
- (ii) *Independent Tax Administration*: In some countries, the tax administration lacks independence of action, as they are subject to extraneous pressures from high political and bureaucratic quarters.
- (iii) *Lack of Professional Skills*: Lack of professional competence amongst the tax-administration officials, prosecutors and judges about modern complex financial operations works to the advantage of the tax-defaulter.
- (iv) *Reporting of Transactions*: Absence of reporting requirement by the banks and financial institutions for transactions of more than a certain value, and bank secrecy laws, help the tax-evader to hide information about various commercial deals and incomes generated therefrom.



**D. Countermeasures in the Field of Criminal Justice**

The group recommends the following countermeasures related to the problems as identified above.

- (i) *Deterrent Penalties*: Exemplary deterrent punishment should be prescribed for dishonest tax officials and politicians colluding in tax evasion.
- (ii) *Neutrality of Tax-Administration*: The independence and neutrality of tax administration agencies should be ensured through constitutional/legislative steps. In some countries, tax administrations have been given statutory status.
- (iii) *Improving Professional Skills*: In order to correctly analyze highly complex financial deals involved in the tax cases, tax administration officials, prosecutors and judges dealing with tax cases should be trained in up-to-date tax administration methodology and accounting. Tax administration officials have been posted as advisors to the courts in Japan.
- (iv) *Reporting of Financial Transaction*: Reporting of financial transactions of more than a certain value should be made mandatory for banks and financial institutions. This has been made a legal requirement in many countries including the U.S.A.
- (v) *Computerization of Tax Records*: The tax administration should computerize its record keeping to make the forging of records difficult and detectable.
- (vi) *Double Taxation Treaties*: International cooperation should be freely sought and given in getting details of bank deposits and financial transactions accomplished abroad. More 'double

taxation' treaties should be concluded with countries to elicit their cooperation in this field.

- (vii) *Public Education*: In some of the countries, tax-payment has been considered as a donation to the government rather than a legal duty of the citizen. Public awareness programs play an important role in the efforts to decrease tax evasion. The emphasis should also be given for public education through various means, including mass media, in order to motivate them to become honest taxpayers.

**E. Other Countermeasures**

The group also identified the following countermeasures which can be taken on the part of the government to supplement the efforts of the tax-administrators to reduce the tax evasion.

- (i) *Simple Tax Laws*: Tax laws should be made simple and fair. The laws should be free from escape routes in the form of 'tax shelters' and 'exemption schemes', which provide an opportunity for manipulations and forging of records by the assessors.
- (ii) *Fiscal/Tax Policies*: Fiscal and tax policies should be designed and implemented to make tax evasion a 'high risk/low profit' business.
- (iii) *Overall Rate of Taxation*: Some participants were of the opinion that the overall rate of tax should not be very high and should be realistic. Instead, efforts should be made to increase the tax base by including more persons, professions and businesses in the categories eligible to pay tax.
- (iv) *Financial Intelligence/Data Bank Organization*: An organization on the

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lines of FINCEN (United States Department of the Treasury Financial Crimes Enforcement Network) may be formed in every country to act as the central repository for financial intelligence and analysis, for providing assistance in the investigation of financial crimes including tax fraud.

#### IV. SMUGGLING

In their initial stages of development, the developing countries had extremely limited foreign exchange reserves and therefore, had to conserve it for the import of essential items, defense and other crucial requirements. Regulatory measures including restrictions on the import of goods, both for the sake of protecting indigenous industry and for conserving scarce foreign exchange, had to be resorted to. Further, in the absence of a strong industrial or agricultural sector, revenue required to undertake massive development had to be generated by imposing high tariffs. Evasion of duty and circumvention of import trade control restrictions therefore put a premium on smuggled items and made smuggling profitable.

Smuggling of contraband like drugs, firearms and pornographic material etc can lead to serious social and political problems. Smuggling of items protected by copyright and intellectual property rights can seriously upset relations between the countries. Smuggling is a transnational crime and requires cooperation between nations for combating it.

##### A. Actual Situation

###### Cambodia

Cambodia has been fighting a terrorist war at its northwestern borders for over two decades. Consequently, large-scale firearms and other offensive weapons have

been smuggled into the country. Apart from this, large scale smuggling of gold, timber, consumer items and drugs has resulted in the country, from its borders with Thailand and Vietnam.

###### China

In 1995, 1119 cases of smuggling were filed with 1097 cleared by public security organs; 154 cases were convicted by the courts and 239 defendants were punished. In 1996, the public security organs finalised 1000 cases of smuggling involving cars, tobacco, drugs, pornography, CDs and DVC disks. Smuggling offences by companies are increasing and sometimes government officials are also involved. Most of the smuggling in China is carried out by organized gangs.

###### India

In India, apart from outright smuggling, evasion of customs duty by mis-declaration of value and description of goods also takes place. These activities bring together unscrupulous elements both in India and abroad. Well organized gangs, which have the capacity to arrange funds abroad for establishing sophisticated communication networks, arrange the landing of goods both by air and sea. Smuggling, involving consequent evasion of customs duty, generation of black money, money laundering and evasion of taxes etc, grew as a formidable parallel economy in the 1960's and 1970's.

Information in respect to the number of seizures made and the nature of commodities seized for the years 1992-1996 presents the gravity of the offence and the traffic that takes place in contraband goods in the country. Over the years, the trend for this type of crime has been steady, however, the type of contraband has changed. Consequent to the ushering in of new economic policies in 1992-93, there was a reduction in rates of custom duties

and liberalization in the economic policies of the country. There has been a gradual fall in the quantum of goods sought to be smuggled into the country. Compared to 1995, there has been a decrease of 11.4% in cases of seizures made by the Customs in 1996. The value of articles was around half of the previous years and stood at RS. 5533.7 million.

Gold, which has traditionally been the most important item of smuggling, has yielded place to narcotics and electronic items. Outright smuggling of gold has come down due to the economic measures initiated by the government, which includes import of gold up to 10 kg allowed to each passenger returning from abroad after 6 months, and the import of gold under special license. There has been a disturbing trend of smuggling foreign currency in and out of the country by various means, including payments for under-invoiced imports, inward remittances for over-invoiced goods or bogus exports for financing the import/smuggling of gold and other sensitive items. Other items seized by customs include silver, diamonds, watches, synthetic fibers etc.

#### Japan

The Japanese law enforcement agencies are especially striving against anti-social smuggling (illicit drugs and guns) on account of their obvious negative effects on society. 'Boryokudan' (mafia gangs) have been found to organize most of this kind of smuggling. In addition, duties are evaded on articles like silk, pork and clothes by importers via fraudulent declarations. In recent times, cases involving smuggling by tourists of illicit drugs, guns, jewellery have come to notice. Smuggling is carried out amongst other methods through storage in ships, cargo containers and postal services.

#### Laos

In Laos, the commodities involved in smuggling include motorcycles, medicine, fruit, cosmetics, construction equipment etc. Since it is one of the 'Golden Triangle' countries, Laos is also a transit route for drug smuggling. As Laos is a land locked country, having international borders with five countries, smugglers find it relatively easy to carry out their nefarious trade.

#### Nepal

Smuggling has a serious effect on the economy of the country. Though statistical data is not available for smuggling activities, it is accepted that the national revenue, mostly dependant on the customs and tax revenue, has suffered due to an increase in smuggling activities. Illicit trafficking of narcotics, illegal import and export of gold, foreign currencies, and illegal export of timber are some of the major items involved in smuggling in the country. Violation of the Customs Act, the Foreign Exchange Act and other related laws is a consequence of smuggling activities. Forged Letters of Credit, as well as forged customs receipts and registration papers, are commonly used in the smuggling of goods and motor vehicles. Nepal is basically a transit point for smuggling. Due to its open borders with India and China, most of the smuggling activities are cross-border operations.

#### Pakistan

Despite efforts to root out the evil of smuggling, considerable luxury items and electrical appliances are smuggled into the country due to porous borders with Afghanistan. Afghanistan has transit rights through Pakistan and quite a few consignments find their way into the tribal areas of Pakistan, from where they are distributed to different parts of the country.

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South Africa

The most damaging aspect of smuggling operations is the killing of rhinos for their horns, and elephants for their ivory, by poachers. These items are smuggled out of the country for sale. Stolen motor vehicles, gold and diamonds are also smuggled out of the country. Drugs, firearms, counterfeit goods are smuggled into the country.

**B. Contributory Factors for Smuggling**

The group felt that following factors contribute to an increase in smuggling:

- (i) *Long Land and Sea Frontiers*: In most of the countries, due to long coastlines, as well as long land frontiers, the task of detecting smuggling and enforcing anti-smuggling measures has become quite daunting, involving huge financial and human resources.
- (ii) *Duty Free Export Schemes*: Violation of certain fiscal measures designed to encourage exports in developing countries, like the duty free exemption schemes, is difficult to detect and investigate due to lack of co-operation amongst the countries in the matter of information sharing about the crime and criminals.

**C. Problems in Investigation, Prosecution and Trial**

- (i) *Lack of Information*: As smuggling is a transnational crime, enforcement agencies are handicapped due to the lack of information about the activities of the organised gangs in other countries affecting them. Smugglers have been using containers, complicated structures of the ships and even human bodies to hide contraband, making the job of detecting the same extremely difficult.

- (ii) *Conflicting Jurisdictions*: Conflicting/overlapping jurisdictions amongst Customs, tax authorities, police, narcotics control departments etc, delay the detection, investigation and trial of smuggling cases to the advantage of the offenders.

- (iii) *Lack of Co-operation Between the Enforcement Agencies*: Lack of co-operation between enforcement agencies in the matters of sharing/follow-up of information, and in actual anti-smuggling operations, works to the advantage of the smugglers.

- (iv) *Lack of Manpower*: Lack of sufficient manpower in the enforcement agencies, particularly at small local ports or wayside border custom offices, makes them the focus of operations by smugglers.

- (v) *Corruption in Customs Department*: In most of the developing countries, corruption amongst Customs officials and border police further compounds the problem of detection and investigation.

- (vi) *Involvement of Organized Gangs*: Involvement of organized crime groups in smuggling, like the 'Boryokudan' in Japan and similar gangs in other countries, makes the job of enforcement difficult. These gangs have large resources and are transnational organisations, with none of the problems/handicaps of information, jurisdiction etc, faced by the official enforcement agencies. The carriers rarely belong to the gangs, as they operate in the background. Thus in the event of the carrier being apprehended, the smuggling syndicate remains intact.

- (vii) *Extradition*: Difficulty in the

extradition of smugglers, due to the hurdles in extradition processes often experienced between countries, also helps the smugglers. As long as the investigating agencies are unable to proceed against the gang behind the operations, action against the carriers is like treating the symptoms rather than the disease.

**D. Countermeasures in the Field of Criminal Justice**

- (i) *International Co-operation in the Field of Investigation and Information Sharing*: Close monitoring of the activities of the organised gangs, and information sharing between the countries affected, has proved very effective in curbing smuggling. This has resulted in the offenders coming under pressure from both ends. Joint training programmes between the enforcement agencies of various countries, based on the one conducted under the UNDCP in the field of drugs smuggling, can be organised. Japanese enforcement agencies have been exchanging information and seeking cooperation under the aegis of the Asia Pacific Maritime Safety Agencies Forum and World Customs Organisation, which has proved to be of immense help in their anti-smuggling operations.
- (ii) *Co-ordination and Joint Operations Between Enforcement Agencies*: Coordination, including information sharing meetings, between senior officers of the enforcement agencies; joint training programs; inspections and exchange of personnel at middle and lower levels, will improve inter-agency co-operation and speedily resolve jurisdictional problems to make joint operations more efficient. In Japan, officials of police, Customs and the Maritime Safety Agency closely co-operate and this has led to many successful operations.
- (iii) *Strengthening Manpower at Smaller Ports/Inlets*: To supplement the manpower shortage of the enforcement agencies, video-monitoring, more patrol cars, patrol vessels and air-crafts may be used as force-multipliers. Manpower of smaller ports and land inlets should be strengthened.
- (iv) *Anti-corruption Measures in Customs Departments*: Senior supervisory officers and anti-corruption agencies shall keep a close watch on the conduct and lifestyle of their subordinates, from the point of view of enforcing integrity. Exemplary punishment shall follow cases of *malafide* conduct.
- (v) *New Technology to Improve Detection and Monitoring*: Provision of the latest gadgetry to enforcement authorities will increase their detection and monitoring ability. Video monitoring, fiber-scopes, x-ray machines and computer programs are being used in Japan, which makes the task of monitoring and checking more efficient for the purpose of detecting smuggling items ingeniously hidden, without slowing down the process of Customs clearance. Detection dogs have been effective in anti-drug operations.
- (vi) *Fast Extradition*: High level contacts and improved co-operation between countries in matters of the extradition of suspects will act as an effective deterrent to smugglers.
- (vii) *Double Taxation Treaties*: These bilateral treaties are negotiated between countries having considerable trade between them, in order to secure co-operation between their

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investigating agencies. More double taxation treaties should be negotiated between affected countries, which will help in exchanging information and evidence about individual deals.

(viii) *Controlled Delivery Operations*: In certain countries, including Japan, controlled delivery operations by the Customs/narcotics department have proved very successful, particularly in smuggling through postal channels. This enables the enforcement agencies to apprehend the main gang behind the operations.

## V. MONEY LAUNDERING

Money laundering means conversion of illegal and ill-gotten money into seemingly legal money, so that it can be integrated into the legitimate economy. Proceeds of drug related crimes are an important source of money laundering world over. Besides, tax evasion and violation of exchange regulations play an important role in merging this ill-gotten money with tax-evaded income, so as to obscure its origin. The aim is generally achieved via the intricate steps of placement, layering and integration, so that offenders, without any fear of detection, can freely use the money so integrated in the legitimate economy. Initial deposits are usually made in states without regulations and then transferred to offshore centers.

In some parts of Asia, 'illegal underground banking' is used by launderers because it leaves no paper trail. Money never enters the formal banking system but is instead transmitted through alternative banking systems such as the 'hawala' in India and Pakistan. These parallel banking systems are based on family or gang alliances and reinforced with an unspoken covenants of retributive violence. Now, Africa is also being

increasingly used as a route by money launderers.

### A. Impact of Money Laundering

As for as the impact of money laundering, it is well known that it facilitates tax evasion, smuggling, drug-trafficking and terrorism. An I.M.F. working paper concludes that money laundering impacts financial behaviour and macro-economic performance in a variety of ways, including policy mistakes due to measurement errors in national account statistics; volatility in exchange and interest rates due to unanticipated cross-border transfer of funds; the threat of monetary instability due to unsound asset structures; tax collection and public expenditure allocation due to misreporting of income; misallocation of resources due to distortions in assets and commodity prices; and contamination of legal transactions due to perceived possibility of being associated with crime.

### B. Actual Situation

#### China

China has of late experienced the crime of money laundering. In view of this situation, China has criminalised the general offence of money laundering by amending its Criminal Law.

#### India

The Enforcement Directorate in India, in the course of its action against money launderers, made recoveries/seizures in money laundering cases during 1996 to the value of Rs 124 million (Indian Currencies) and Rs 78 million (Indian equivalent of foreign currencies seized) respectively. The value of confiscated Indian currencies by adjudication registered a sharp rise, to the tune of 40 million as against 12 million during 1995.

The offence of money laundering is likely to be criminalised soon and 'the Prevention

of Money Laundering Bill 1998' has been introduced in the Indian Parliament. It contains provisions for the mandatory reporting of financial transactions above a certain value, and for the compulsory maintenance of records of such transactions by the banks and financial institutions.

#### Japan

In Japan, the Special Drug Law specifically provides for regulation of money laundering of 'illicit proceeds or the like'. Any person, *'who disguises facts with respect to the acquisition or disposition of illicit proceeds or the like, or conceals illicit proceeds or the like, shall be imprisoned for not more than five years or fined not more than three million yen or both'*. The same shall apply to any person who disguises facts with respect to the source of illicit proceeds. However, the scope of anti-money laundering legislation in Japan at the moment is limited only to proceeds connected with trafficking in drugs. Some of the cases have indicated the involvement of organized gangs like the 'Yakuza' (mafia).

So far, 8 cases of money laundering have been investigated in Japan. Four of these case were disposed of by suspension of prosecution, whereas three cases have resulted in convictions. The Japanese Ministry of Justice is actively considering a report to extend the scope of money laundering laws to other crimes, besides drug offences.

#### Nepal

Money laundering is a newly emerging economic crime in the country. The opportunities for money laundering have increased in the era of economic reforms. Liberalization of market economy, creation of favorable environments for foreign investors and the casino business have provided ground for huge financial transactions. However, the crime of money

laundering in the country has yet to be identified and investigated. There is still a lack of legislation making money laundering a criminal offence. The Narcotic Drug Control Act 1976 has provision for the forfeiture of drug related property and assets. Other financial regulatory laws such as the Nepal Rasrta Bank Act 1953 (The Central Bank Act) and the Foreign Exchange (Regulation) Act 1962 do not cover all aspects of the sophisticated and complicated crime of money laundering.

#### Pakistan

Principal money laundering methods detected so far are Hawala/Hundi, Bearer Investment Schemes, over and under invoicing of imports and exports, smuggling of currency, investment and speculation in real estate. Hawala is the preferred method of money laundering in Pakistan. The Government of Pakistan has not enacted any laws against money laundering. However, the Control of Narcotics Substances Act 1997 provides punishment for laundering drugs proceeds. Reporting of suspicious transactions by the banks and financial institutions has been made obligatory in this law.

#### South Africa

The proposed Money Laundering Control Bill, which is supposed to compliment the enforcement of the Proceeds of Crime Act by combating the money laundering in the country, is yet to be promulgated. The proposed Bill provides for the establishment of a Financial Intelligence Centre (FIC).

### **C. Contributory Factors for Money Laundering**

- (i) *Lack of International Co-Operation:* Today nearly 40 countries in all parts of the world are considered tax havens. The situation in the Cayman Islands

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provides a glimpse into the offshore industry. With the seventh largest deposit base in the world, the Cayman Islands has 550 banks in the territory, only 17 of which have a physical presence and are subject to money laundering laws. Total assets held by Cayman banks in 1994 were above \$USD 430 billion. Other countries considered as being 'major offence centers' are the Bahamas, Bahrain, Hong Kong, the Netherlands Antilles, Panama and Singapore. Some of these countries have been hesitant in enforcing controls on tax havens due to the benefits accruing to their individual economies.

- (ii) *Free Trade Zones*: Trade liberalization and free trade zones provide additional money laundering venues. It is believed that these zones are shifting from using the banking system to using international trade to launder money. Free trade zones in various parts of the world bring economic prosperity to their individual economies, but they have often been manipulated by money launderers due to an absence of controls, by indulging in deals with manipulated invoices.
- (iii) *Big Businesses*: Billions of dollars in drug proceeds are laundered through major businesses such as stock brokerages and insurance firms. Other money laundering schemes involve cash businesses such as bars, casinos and restaurants, as well as non-bank financial institutions such as cheque-cashing stores and money exchange houses. Such businesses have large cash turnovers and, unless closely monitored, are likely to and have often been used by money launderers in their operations of conversion of illegal into legal money.
- D. Problems in Investigation, Prosecution and Trial**
- (i) *Absence of Anti-Money Laundering Legislation*: Most of the countries, particularly in the developing world, are yet to introduce comprehensive anti-money laundering legislation. In some countries, this crime so far has been dealt with under Foreign Exchange Regulation Acts; under which most of the cases get compounded and very few prosecutions are launched. Absence of specific laws in this field has provided a climate of non-deterrence to criminals.
- (ii) *Bank Secrecy Regulations*: These regulations, which were designed to give privacy to genuine customers, are being used by criminal money launderers for illegal deals. For the sake of attracting deposits, some bankers misuse these laws by opening fictitious accounts for the money launderers.
- (iii) *Electronic Transfer of Funds*: Wire transfer systems allow criminal organizations the facility of a swift and nearly risk free conduit for moving money between countries. With the establishment of electronic cash, it has become virtually impossible to trace the transfer of funds from one place to another over the Internet or via e-mail. Dig-Cash uses public key and digitally blind signature techniques, whereby 'blinding' carried out by the user's own device makes it impossible for anyone to link payments to the payer. Electronic cash has of late been increasingly used by money launderers due to the anonymity it provides to the source of the funds.
- (iv) *Lack of Information*: Professionals such as attorneys, tax consultants etc, are



usually involved in money laundering operations. Since the crime is committed by white-collar criminals, information which is traditionally received by the enforcement agencies from the criminal world is lacking in these cases. Absence of mandatory reporting of financial transactions by the banks also deprives the enforcement agencies of clues about money laundering rackets.

**E. Countermeasures in the Field of Criminal Justice**

- (i) *Enacting Tough Anti-Money Laundering Legislation:* This should now be the objective of every country. This measure should include the requirement of mandatory reporting of transactions over a certain amount, and the keeping of documentary records of transactions for certain number of years.
- (ii) *Co-operation between Nations:* As money laundering is a transnational crime, the nations of the world must co-operate to relax bank secrecy laws which should, while ensuring legitimate customer privacy, readily provide required information to authorized investigators. Besides facilitating extradition of offenders/suspects, nations should also impose commensurate regulatory controls on banks functioning as tax havens, exports and imports in free trade zones, and on the monitoring of transactions in cash rich businesses like casinos, non-banking financial institutions and money exchange stores etc, in order to make their misuse by money launderers counter-productive.
- (iii) *Use of Technology for Pre-shipment Inspections:* In order to effectively deal with over-invoicing as a mode for the

transfer of funds, Florida International University experts have developed software to filter trade data which can be used in developing countries as a potential compliment or substitute for pre-shipment inspection to monitor abnormal pricing. Governments should provide their enforcement officials with such technology and training to operate the same, in order to make the use of manipulation of import and export invoicing difficult by money launderers.

- (iv) *Creation of Financial Database Agencies:* Along the lines of FINCEN of the U.S.A (and other such agencies in the U.K and France), agencies may be created in every country which have a large database on financial operations within the country, collected from various sources like banks, financial institutions, customs, Internal Revenue Services, narcotic control organizations etc, to aid and help financial investigations. The AUN anti-money laundering program, started in 1997 by the Vienna-based UN office for Drug Control and Crime Prevention, the ‘Global Program against Money Laundering’ provides governments with legal advice and offers training for law enforcement and judicial officers. It also assists in establishing national financial intelligence units.

**F. Other Countermeasures**

The group has recommended the following countermeasures as preventive measures to combat the crime of money laundering:

- (i) *Legislation in the Area of Digital Money:* Laws are in the process of being enacted in various countries in the world, criminalising various computer offences. These laws should also attempt to include the area of digital

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money and virtual banking. Organizations like FINCEN in every country should be granted constitutional authority to secretly monitor all cyber-banking transactions.

- (ii) *Relaxation of Tough Foreign Exchange Regulations:* This measure is necessary to allow free flow of foreign exchange, particularly in countries where 'underground banking' operations like 'Hawala' abound. This measure will, to a large extent, put underground banking out of business. As underground banking channels are also being used by money launderers in certain countries, this measure will reduce avenues of money laundering in such countries.

## VI. CONCLUSION

The study of economic crime, both from theoretical as well as practical aspects, has a common objective. It is the objective of making the world safe and secure for free trade and commerce, and for ensuring the stability of national economies. The task requires educating the public about the danger facing the economies from the actions of economic criminals, and thereby ensuring international co-operation in controlling economic crime.

RESOURCE MATERIAL SERIES No. 55

**CORRUPTION**

**CHINA**

**Economic Criminal Cases Investigated by the People's Procuratorates in China (1995)**

Type	Disposition Cases	Filing		Finalization	
		Cases	Defendants	Cases	Defendant
Total	126453	63953	72601	58773	67286
Corruption	51340	21642	25897	20281	24564
Bribery	30080	16831	17763	15550	16499
Embezzlement	20618	12616	13550	11650	12683
Tax evasion	13621	8049	8912	17302	8128
Others	10794	4815	6479	3990	5412

Note: 1. Finalization includes the previous year  
 2. Source data is from Law Yearbook of China

**Corruption Cases Disposed and Finalized by the Court in China**

Types	1994		1995	
	Disposition	Finalization	Disposition	Finalization
Corruption, bribery & embezzlement	31223	30793	33068	39934
Economic offences	43065	43013	46614	46386
Percentage	72.5%	71.5%	70.9%	86%
Numbers of defendants punished	20019		26689	

Note: 1. Finalization includes the previous year  
 2. Source data is from Law Yearbook of China

Types	1993		1994		1995	
	Disposition	Finalization	Disposition	Finalization	Disposition	Finalization
Economic offences	27463	27323	43605	43013	46614	46386
Total of criminal offences	403267	403177	482927	480914	495741	496082
Percentage	6.81%	6.77%	9.03%	8.94%	9.4%	9.35%

Note: 1. Finalization includes the previous year  
 2. Source data is from Law Yearbook of China

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**INDIA**

**Details of Cases Registered and Persons Arrested under the Prevention of Corruption Act (1992 - 1996)**

Years	No. of vigilance cases registered by		Persons Arrested	
	CBI	States / Uts	CBI	States / UTs
1992	1231	1772	-	1011
1993	1282	1895	-	1167
1994	1106	2104	463	2296
1995	825	2064	297	2604
1996	845	2361	304	2922

**JAPAN**

Year	No. of Cases	No. of Offenders		
		No. of Bribe-taker	No. of Bribers	Total
1993	67	80	139	219
1994	82	102	176	278
1995	77	98	138	236
1996	60	82	141	223
1997	89	120	172	292

Note : Statistics compiled by the National Police Agency

Offenders were investigated first by the police then sent to the public prosecutor

Year	No. of Offenders		
	No. of Bribe-takers	No. of Bribers	Total
1993	23	39	62
1994	26	16	42
1995	32	27	59
1996	11	8	19
1997	11	14	25

Note : Statistics compiled by the Ministry of Justice

Offenders were investigated by the public prosecutor independently

RESOURCE MATERIAL SERIES No. 55

NEPAL

**Cases Investigated by CIAA**

Fiscal year	Total No. of Complaints			Investigation started	Investigation completed	Cases filed in court
	C/F from last year	Registered this year	Total			
1996/97	334	1422	1756	1320	629	11
1997/98	691	1004	1695	1432	800	6

Note: Extracted from the Annual Reports of CIAA

**Departmental Actions taken by SPD**

Fiscal year	Government servants		Personnel of Public Corporations		Total
	Gazetted	Non-gazetted	Officers	Non-officers	
1993/94	10	44	13	15	82
1994/95	12	37	7	17	73
1995/96	8	4	1	17	30

Note: Extracted from the Annual Report of the Attorney General of Nepal 1995/96

**TAX EVASION**

INDIA

**Seizures by Income Tax Department (1992 - 1996)**

Year	No. of searches conducted	Assets seized (Rs. in crores)	Unaccounted income disclosed during searches (Rs. in crores)
1992	4777	384.02	501.05
1993	5026	396.46	448.83
1994	4830	381.43	577.08
1995	4612	458.14	NA
1996	4299	405.63	NA

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**JAPAN**

**Situation Regarding Criminal Investigation in Past 5 Years**

Year	No. of commence-ments (case)	No. of dismissals (case)	No. of complaints referred to public prosecutor	Accusation rate (%)	Total amount of tax evasion (yen mil.)	Total amount of accused tax evasion (yen mil.)
1993	212	215	161	75	60,107	52,721 (327)
1994	215	216	155	72	44,050	37,817 (244)
1995	217	223	163	73	41,533	33,144 (203)
1996	221	232	177	76	44,723	33,640 (190)
1997	232	225	166	74	36,310	32,629 (197)

Note: The amount of tax evasion includes the amount of additional taxes

The figure in the parenthesis is the amount of accused tax evasion per case

ANNEXTURE 6(B)

Year	No. of tax evader				Prosecution Rate
	Referred to public prosecutor by Tax Administration Bureau	Prosecuted by Public Prosecutor	Not Prosecuted by Public Prosecutor	Under investigation by Public Prosecutor	
1990	452	264	20	168	93%
1991	484	330	23	132	94%
1992	783	354	35	394	91%
1993	879	382	304	193	56%
1994	559	298	107	154	74%
1995	497	337	58	103	86%
1996	574	402	49	123	89%
1997	567	379	63	125	86%

**NEPAL**

**Number of Cases Prosecuted in Court**

Fiscal year	C/F	Current year	Total	Disposed of	Outstanding
1993/94	-	16	16	5	11
1994/95	11	3	14	1	13
1995/96	13	-	13	-	13

Source: Annual Report of Attorney General of Nepal 1995/96

RESOURCE MATERIAL SERIES No. 55

**SMUGGLING**

**INDIA**

**Seizure made by Customs under Customs Act (1992 -1996)**

Year	Total no. of Seizures	Value of Seizures (Rs. in crores)
1992	59,270	502.1
1993	52,963	389.0
1994	49,997	535.2
1995	55,947	1,062.0
1996	49,580	553.4

**JAPAN**

Year	Antisocial smuggling	Evade duty	Without permission	Total
1993	205	390	453	1,048
1994	259	372	438	1,069
1995	259	260	324	843
1996	257	324	301	837
1997	242	843	352	834

**MONEY LAUNDERING**

**INDIA**

**Money Laundering 1992 -1996 (Cases under FERA)**

Year	No. of		Currency Seized (Indian Rs. in crores)		Currency Confiscated (Indian Rs. in crores)		Fines (Indian Rs. in crores)	
	Searches/ Raids	Seizures/ Recoveries	Indian	Foreign	Indian	Foreign	Imposed	Realized
1992	1,215	738	3.9	2.5	2.4	2.2	-	2.3
1993	1,234	843	6.7	4.5	3.1	3.0	-	3.2
1994	1,540	1,046	9.8	8.1	1.8	2.2	27.8	3.4
1995	1,175	832	10.2	6.5	1.2	2.3	10.6	2.2
1996	1,164	868	12.4	7.8	4.0	2.0	78.0	1.6

## GROUP 2

### ECONOMIC CRIME AGAINST THE PRIVATE SECTOR

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#### I. INTRODUCTION

At the outset the group would wish to place on record its gratitude and thanks to the advisors and visiting experts for their valuable advice and guidance in the workshop sessions. This group workshop was assigned to deliberate on the issue of economic crime against private enterprise. It was agreed that we will consider crimes where private enterprise is the victim. However, it was felt that many a times, crime against private enterprise will have its effects on investors.

It was observed that economic crime is rampant in both developing and developed countries, and is eating at the very roots of society. It is vitiating the business atmosphere and the public in general is losing faith in the regulatory apparatus of the State/criminal justice system. The gravity of the problem is highlighted by the finding of an international survey conducted by Earnest & Young regarding the effect of fraud on business (May 1998). As per its findings, more than half the respondents (those enterprises who

responded to the questionnaire) had been defrauded in the last 12 months; 30% had suffered fraud more than five times in the last five years; 84% of the worst frauds were committed by employees (nearly half of whom had been with the organization for over 5 years) and most of the worst frauds were committed by management.

The group decided to tackle the subject by discussing the actual situation of economic crime in various countries. Facts and figures were gathered to appreciate the preponderance of crime in these countries. Case studies were undertaken to identify problems/difficulties faced by criminal justice officers at various stages of investigation, prosecution, and trial of offenders. Solutions were explored and recommendations formulated.

#### II. ACTUAL SITUATION OF ECONOMIC CRIME AGAINST THE PRIVATE SECTOR

Most of the countries represented in the course do not have any definition of economic crime in their penal codes.



Offenders are punished under various laws pertaining to fraud, cheating, breach of trust, misappropriation and embezzlement, etc. It was agreed that crime is a complex phenomenon and offers no easy solutions. There are multiple socio-economic factors affecting the state of crime in a particular society. It has to be understood in relation to a particular time and social milieu. However, effort was made to explore commonalities and find ways to manage criminality.

It was noticed that crime in general, and specifically economic crime is being committed on a larger scale and becoming more sophisticated in member countries. The group will discuss crime against private enterprise under the categories listed below:

- a) (i) Breach of trust by executives/staff of the enterprise
- (ii) Embezzlement by executives/staff of the enterprise/others
- (iii) Fraud/fraudulent management by executives/staff of the enterprise/others
- b) Infringement of intellectual property rights
- c) Counterfeit credit cards/prepaid cards
- d) Computer-related crime

The above categorization is not mutually exclusive. However, ingredients of all these criminal acts/behavior may be present in a particular crime. Since breach of trust, embezzlement, and fraud/fraudulent management by executives/staff of the enterprise may include similar kinds of elements constituting the respective crimes, the group decided to categorize them for the sake of convenience in discussion.

**III. BREACH OF TRUST,  
EMBEZZLEMENT, AND FRAUD/  
FRAUDULENT MANAGEMENT BY  
EXECUTIVES/STAFF OF THE  
ENTERPRISE**

**Algeria**

These crimes are dealt with under the Penal Code of Algeria and are on the increase due to the process of change from a government controlled economy to a free market economy. The regulatory apparatus to deal with such crimes is still not firmly in place. There is a need to develop institutions and regulations to handle this transformation. The total number of cases convicted during the last three years are given below.

CRIME (ALGERIA)	1995	1996	1997
Breach of trust	20	122	53
Embezzlement	10	30	72
Fraud	42	336	160
Total	72	448	285

Source: Ministry of Justice, Algeria.

The total number of cases prosecuted in 1998 from January to July was 1115, much higher than previous years. Fraud was committed against private enterprise both by insiders and outsiders.

**Brazil**

Brazil experienced a succession of bankruptcies since 1970. The Central Bank decreed intervention in financial institutions which revealed cases of fraudulent management/embezzlement, and in a few cases, breach of trust committed by owners/executives of these institutions. The Government of Brazil enacted new legislation to ensure stricter control over and inspection of financial institutions, which resulted in a decrease in such incidents/cases. Criminal interest has now shifted to the government sector and consumers, against whom a significant number of fraud cases are being

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perpetrated, such as off-the-book sales, tax evasion, misappropriation of public funds, etc. Law 7492, enacted in 1986, is the main provision presently used in fraud/embezzlement cases. Although statistics related to the private sector are not available, overall 4304 cases have been registered since 1986, and out of them, 1639 have been concluded at investigation level.

### Costa Rica

The Costa Rican Penal Code provides punishment for economic offences. Fraud in private enterprise is mostly committed by insiders. The following chart reflects the state of this crime in Costa Rica. The cleared cases are as follows.

There was a slight increase in cleared cases but the situation in Costa Rica regarding economic crime in private enterprise is not very serious. The public in general is more concerned about corruption in government departments.

### Japan

The so-called 'bubble economy' swelled in 1986 to 1990, with a dramatic rise in stock and land prices. With the objective of countering this phenomena, the government of Japan switched to a belt-tightening policy. The bubble then burst; stock and land prices tumbled and around 1991 the economy experienced a severe slump causing bankruptcy in various enterprises. This contributed to revealing misconduct done by private companies during the bubble economy, with a resultant increase in fraud, breach of trust and embezzlement cases by executives of financial institutions. The table below illustrates crimes committed by executives of financial institutions in 1997.

### Kenya

Economic crimes against the private sector are on the increase. Victims do not report these offences to police for fear of negative business repercussions, so statistics are not reflective of the real

CRIME (JAPAN)	1992	1993	1994	1995	1996
Fraudulent Management	149	142	141	162	194
Embezzlement	121	89	122	160	169
Fraud	2063	1878	2097	2397	2481
Bankruptcy	24	4	1	2	16
Total	2357	2113	2361	2721	2860

Note: Fraud includes all frauds, not specifically private enterprise (source: Supreme Court of Justice of Japan).

Breach of Trust	Number of cases	6 (-3)
	Number of persons arrested	28 (-2)
	Amount of damage	2.6 billion yen (-78.2 billion yen)
Embezzlement	Number of cases	23 (+5)
	Number of persons arrested	25 (+6)
	Amount of damage	3.2 billion yen (-0.2 billion yen)
Fraud	Number of cases	56 (+35)
	Number of persons arrested	113 (+83)
	Amount of damage	5.8 billion yen (-3 billion yen)

Note: Figures in parentheses show the increase or decrease from the previous year (source: National Police Agency of Japan).

situation. Global economic turmoil has affected the Kenyan economy and quite a few companies have gone bankrupt. Receivers appointed over the companies have reported many cases of fraud/fraudulent management. These cases are tried under the Penal Code of Kenya.

**Pakistan**

The Pakistan Penal Code prescribes punishment for offences like breach of trust, cheating, misappropriation etc. The economic crime which impacted the national economy, was a co-operative scandal in which executives of financial corporations indulged in large scale frauds/embezzlement, resulting in the bankruptcy of these corporations. Banks are also the common victims of fraudsters, who obtain loans under various schemes on fake securities. The table below indicates cases regarding economic crime investigated and cleared by the Federal Investigation Agency. Through statistics of one agency are not a true reflection of the state of crime in the country, they do indicate a trend which is on the rise.

**Other Countries**

Crime data was not available regarding other developing countries represented in the course. However many private enterprise/banks have been defrauded by executives/others in India. In the famous securities scandal in India (1992), management of a bank of Karad misused

the funds of the bank in the securities market, causing huge losses to the bank. No significant case of breach of trust/fraud has been reported in Nepal. Such crimes however, registered an increase in the Republic of Korea, with rapid growth of the economy (1991-1996). There are numerous cases in which more than ten million U.S. dollars were embezzled or swindled by Korean executives. These executives were later arrested and indicted by public prosecutors.

The Economic Crime Investigation Bureau of the Police Department of Thailand has reported 57, 66, 64, 46, 71 and 92 cases involving financial institutions and commercial banks in 1992, 1993, 1994, 1995, 1996 and 1997 respectively. In 1997, damage caused by these offences was more than USD\$ 233 million.

**Case Studies**

1. Fraud/Fraudulent Management in Banco Nacional (BN) of Brasil

*Facts*

BN ranked 8th among Brazilian banks and had 13,000 employees and 335 branches throughout the country. In 1986, the Brazilian economy experienced a rapid growth, whilst BN provided a great number of loans to small enterprises. When high inflation struck, hundreds of such companies went out of business, leaving non-performing loans.

**PAKISTAN**

YEAR	CASES INVESTIGATED	CLEARED	REFERRED FOR DEPARTMENTAL ACTION	CLOSED
1993	222	79	9	26
1994	224	69	6	10
1995	189	60	25	8
1996	240	61	3	7
1997	303	146	4	45

Note: Figures include economic crime in government organizations as well.

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Executives of the Bank managed to alter the due dates of these loans in BN's computerized accounting system and applied high interest rates to keep them looking as good credits. Instead of writing off bad loans, they were shown as performing/active loans providing interest income, generating positive results at the end of the fiscal year. Fictitious income from interest earnings amounted to nearly US\$ 17 billion from 1988 to 1995. When adjusted, fiscal year positive results turned into a loss of US\$ 10 billion. A total of US\$ 145 million was paid as dividends from 1990 to 1995. Undesirable effects were generated at same time, such as taxation on profits and compulsory withdrawals from the Central Bank.

Independent auditing of balance sheets and financial demonstrations were conducted by a private multinational auditing company during this period. They granted BN approval based on misleading assessments from insufficient evidence, contrary to legislation and accounting procedure requirements. This crisis brought problems to stockholders/investors and to the country's financial system, provoking Central Bank intervention in November 1995. The Brazilian government created a bail-out program for the banking system through which BN demanded US\$ 4.98 billion. Investigation identified inside employees, at the vice-presidency level and executives heading two other areas, as responsible for conceiving and implementing changes in the accounting system. They were indicted for fraudulent management, for providing false information to the market and for preparing false balances.

*Difficulties / Problems raised by Participant*

Stretched over the period 1988 to 1995, requiring the services of police experts in the fields of accounting and computer technology.

*Countermeasures / Solutions shown by Participant*

Investigation agencies should be staffed with skilled investigators and allowed to request specialist cooperation from other institutions.

*Discussion in the Group*

The participant from Pakistan pointed out that, in his view, this does not qualify as a case of fraud/fraudulent management as the investigators have neither indicted the president of the bank nor proved the bad intention of the executives. Management of the bank might have misrepresented the situation to avoid negative business repercussions. He was of the view that the banking industry is facing problems in many countries due to world-wide recession. In Indonesia, Thailand, Pakistan and Republic of Korea, over 30 % of loans granted by banks have gone bad.

The participant from Brazil asserted that falsification of records amounts to fraud and Brazilian law provides punishment for that. The participant from Kenya opined that management might have been driven to misrepresent their financial position due to fear of losing the confidence of the public. Fraud/fraudulent management involving misappropriation may well follow in the wake of misrepresentation, as inhibitions which discourage fraud have already been overcome. In the actual case, had the management of the bank identified overall bad loans from good ones at the outset, and shown them in a high risk category, they could have avoided aggravating consequences such as paying taxes, dividends to share holders and compulsory withdrawals by the Central Bank.

The participant from Japan introduced a similar case regarding Yamaichi Securities Corporation, in which executives

of Yamaichi concealed debt of 260 billion yen on the balance sheet in November 1991. Since the investigators required specific expertise and knowledge to understand the transaction of securities and bonds, the services of inspectors of the Security and Exchange Surveillance Commission were co-opted to assist the investigators, and the executives of Yamaichi were indicted in this case.

The participants pointed out the importance of establishing special investigation agencies, and close co-operation between criminal justice officers and executives of the regulatory bodies, such as SESC, which may provide necessary expertise to investigate such cases.

## 2. Breach of Trust in Inditex of Algeria *Facts*

A case regarding breach of trust/ embezzlement was detected by Algerian Authorities in 1997, in which a manager and two executives of the Inditex (a textile company) manipulated the company's funds for their own interests. They entered into a partnership contract with a fictitious off-shore company called Radco (situated in Spain), purported to be a producer of raw material which would provide Inditex:

- (a) Raw material at whole sale price.
- (b) Technical know-how.
- (c) Sale of goods of Inditex to other countries.

In return, Inditex would pay 30% of its annual profit to Radco.

During investigation, it was established that the Spanish company was not the producer of the raw materials. Inditex was purchasing raw materials at 5 to 8 % higher than the market price, and the profit so gained was shared among the group of perpetrators. Similarly, 30% of the profit being paid to the Spanish company was transferred to various banks in

Switzerland, France and Algeria through "bank-drafts". So accessing those accounts was not possible for investigators.

### *Difficulties / Problems raised by Participant*

- (a) It was difficult to gather evidence because the proceeds of the illegal profits were stashed away in foreign banks.
- (b) Secrecy laws of the banks made it impossible for investigators to get material evidence of accounts in foreign banks.
- (c) Investigating officers lacked knowledge of commercial law operations.

### *Countermeasures / Solutions shown by Participant*

- (a) Regional and international co-operation be strengthened.
- (b) The rules regarding bank secrecy be reviewed.
- (c) Services of specialized agencies may be co-opted i.e. audit departments.

### *Discussions in the Group*

The Algerian participant explained that it is legal in his country to hold anonymous bank accounts, and the rights of depositors are protected by law. However this creates problems for investigators in tracing the flow of a suspect's transactions in the bank. In this case, the problem was further compounded as the profits/money was kept in foreign banks and the accomplice was a foreign national (Spanish). So gathering evidence required international co-operation and an extradition treaty with Spain. He pointed out that the confession of the accused, recorded by prosecutors, was the main evidence in this case, and it would not be possible to convict the offenders if they convince the court that confession was recorded under duress.

It was pointed out by a participant that, ordinarily, it is very difficult and time

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consuming to get a person extradited or to get information from foreign banks. He suggested greater mutual assistance in the international field and informal contact between criminal justice officers of various countries for resolving this problem. The Japanese participant told that it is not possible to hold anonymous accounts in Japan and investigators can thoroughly examine bank records.

Some of the participants expressed the view that anonymous bank account systems and the secrecy laws of banks should be reviewed/changed. However it was perceived that Algeria is keeping this system to attract deposits/capital so that the financial resources of the country will not be drained by competing European banks.

The participant from Brazil explained that many financial institutions in his country established off-shore companies in the Caribbean Islands to indulge in illegal trade/money laundering. The Central Bank of Brazil is making efforts to enter into bilateral agreements with the Central Bank of Caribbean Islands for allowing inspectors of the Central Bank to carry out audits of such affiliated companies.

3. Embezzlement in a Large Financial Institution of Costa Rica

*Facts*

From July 1983 to May 1984, in Costa Rica, four executives of a large financial institution embezzled money from the institution. These executives, who were authorized to issue cheques, gave cheques to fictitious companies, which in turn, through various accomplices, endorsed the cheques many times, and finally deposited them in the bank accounts of companies owned by these executives. The total amount of cheques resulted in damage to the financial institutions of \$1.5 million dollars.

*Difficulties / Problems raised by Participant*

- (a) Judges are overburdened and avoid taking up cases of a complicated nature. They tend to postpone hearings in economic crime cases.
- (b) A lot of evidence is to be collected. Investigators require special knowledge of commercial laws/operations.
- (c) Cheques were endorsed many times, therefore it was difficult to determine offenders.
- (d) Although the investigators proved the flow of cheque transactions, illicit profits could not be recovered.

*Countermeasures / Solutions shown by Participant*

- (a) In Costa Rica, a new law was enacted to prohibit endorsing cheques more than once.
- (b) Special investigators offices, one in the judicial police and another in prosecution, have been established. The offices specialize in economic crimes.

*Discussions in the Group*

The participant from Costa Rica informed that the law regarding endorsements of promissory notes/cheques has been revised in his country, to discourage malpractice, and now only one endorsement is allowed.

The participant from Japan was of the view that use of promissory notes provides ease of transaction in business and is very common in Japan. Restricting their endorsement can adversely affect the business atmosphere. Further, the efficacy of restricting endorsements is doubtful as promissory notes without endorsement (blank) often circulate in the business world.

4. Breach of Trust in a Bank of Pakistan  
*Facts*

Mr. HL, president of a bank in Pakistan, transferred USD\$ 5 million to the account of A.O.Y. via American Express in New York. The amount was debited to the bank branch in Karachi. This case was registered in 1997 for committing criminal breach of trust. Both the president of the bank and directors of A.O.Y. were abroad. The Federal Investigation Agency procured warrants of arrest from the Special Banking Court in Karachi and moved Interpol for their arrest. Mr. H.L. went to the High Court in Punjab, challenging the jurisdiction of the F.I.A. to investigate this case. The Chief Justice of the High Court directed that the accused shall not be arrested, pending the writ petition. No date has been fixed for the regular hearing of the petition.

*Difficulties / Problems raised by Participant*

- (a) Affluent offenders involved investigators in legal cases to frustrate the purpose of criminal justice.
- (b) Defendants, being abroad, were out of reach of the local authorities.

*Countermeasures / Solutions shown by Participant*

- (a) Greater co-operation between various organs of the criminal justice system.
- (b) International co-operation for extraditing offenders.

*Discussions in the Group*

The participant from Pakistan expressed the view that economic crime offenders are generally affluent people. They have money to spend on entertaining bureaucrats and financing campaigns of politicians, who in turn provide necessary assistance when required. Further they can engage competent lawyers to create impediments by raising legal issues in the course of investigation, and such delay in

investigation buys them time to wriggle out of a situation.

Criminal justice officers enjoy high social status in developing countries and wield considerable discretion/influence, but their salary structure is not commensurate with that status, making them prone to corruption. Political systems in most of these countries are still struggling to shed a colonial past. Political executives try to use the criminal justice system to perpetuate its rule, so it is necessary to provide a better salary structure for criminal justice officers and operational autonomy to insulate them from political influence.

**General Discussion of the Group**

A participant raised the issue of the expertise required of investigators in dealing with complicated business transactions and the plethora of commercial laws. Participants from Brazil and Japan pointed out that they have a system of auditing private enterprise by external auditors and various regulatory bodies, i.e. Security & Exchange Surveillance Commission, Tax Agency, Ministry of Finance and Central Bank etc, all have authority to inspect banks/companies. Such inspections sometimes provide the beginning of a case. Better co-ordination between regulatory bodies and criminal justice officers can ensure co-operation, and the experts of these bodies can provide necessary assistance in the investigation.

Some participants expressed the view that better training of officers in investigation techniques will improve their skills and arranging common training programs will foster goodwill amongst officers of various countries and result in better informal international co-operation. The group deliberated to find effective measures to deal with crime. It was agreed

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that the nature of private business is such that over-regulation may kill the atmosphere of free enterprise and pose problems to genuine entrepreneurs in effectively exploiting business opportunities. The following countermeasures were proposed by some of the participants:

- (a) Organizations should develop and refine their fraud control systems, and encourage a culture of integrity.
- (b) Raising the awareness of the public regarding pitfalls of the market culture.
- (c) Procedures for public disclosure of the basic aspects of a company's operations can help safeguard against such crime.
- (d) Criminal justice officers be made conversant with commercial laws/operations.
- (e) The agencies dealing with economic crime may be provided with the services of experts in the field of accounting.
- (f) Regional and international mutual assistance in the field of criminal justice matters.
- (g) Role of regulatory bodies may be strengthened.
- (h) To prevent the emergence of shell companies, rules may be framed to require them to be registered with the Chamber of Commerce and Trade of the host country.
- (i) Operational autonomy to various enforcement bodies to insulate them from political pressure/external influence.
- (j) Better service conditions for criminal justice officers.

#### **IV. INFRINGEMENT OF INTELLECTUAL PROPERTY**

##### **Algeria**

The old Penal Code prescribed very lenient punishment for infringement of these rights, which is being reviewed to enhance punishment of imprisonment from 2 months to 1 year, and fine from 5000 to 20,000 DA. Special provisions dealing with infringements of trademark and copyright law are included in the Competition Law. The figures regarding these crimes were not available, however violations of these laws are common. Both the public and law enforcement does not attach much importance to these violations. Further, the victims are reluctant to lodge complaints due to the apathy of the regulatory bodies.

##### **Brazil**

The usual practice in the past was related to software copying and official support for the production of patented computer technology and pharmaceutical products. With the recent enactment of specific laws protecting intellectual property rights, the previous freedom to copy any foreign patented item ended, and enforcement was put in place, thus significantly reducing its occurrence. Presently, the most common infringement relates to counterfeiting brand name consumer products.

##### **Costa Rica**

The Penal Code of Costa Rica provides for punishment of offences regarding infringements of intellectual property rights. Special legislation provides for the setting up of regulatory bodies to deal with issues regarding the Trademark Law, Illegal Competition Prevention Law, Copyright Law, Utility Model Law and Patent and Design Law. However infringement of these rights are common, as the criminal justice system attaches low



priority to these violations, and the victims normally don't come forward to lodge complaints.

**Japan**

The products inscribed with fake brand names are banned, but can still find their way into the market. However a few cases have been registered and successfully prosecuted in the criminal courts. As most of the cases are handled by the civil courts, violations of intellectual property rights are not frequently reported to the police. The available statistics from Japan indicate that violations of trademarks and copyright are more common than other laws concerning infringement of intellectual property rights. The table below shows the cleared cases in Japan during the last five years.

**Kenya**

Copyright and trademark laws are violated with impunity, as victims do not report these offences to law enforcement agencies. The officers of law enforcement agencies lack special knowledge of the laws and expertise to deal with such violations. Video and music cassettes are the most affected items, and markets abound with garments, shoes, bags, and medicines using fake brand names. Few reports received originate from our local artists. These cases are considered to be petty and are never submitted to the statistical bureau for record.

**Pakistan**

Pakistan has special legislation regarding copyright, trademarks, patents and design. The Penal Code of Pakistan also prescribes punishments for offences regarding infringement of intellectual property rights. However cases regarding infringement of these rights are rarely lodged with the police. Society in general does not attach much importance to such infringements, which take place without much resistance from either public or law enforcement bodies. However people do differentiate between goods on the basis of quality, and protection of these rights is mainly determined by market forces or the zeal of the aggrieved party.

**Other Countries**

The situation in Nepal is almost similar to Pakistan. In India, the Copyright Act deals with such crimes. Offences under this Act are mainly committed in urban areas. In 1996, the highest incidences of violation of this Act were reported from the city of Bombay (100) and Delhi (55). The Philippines has, under certain conditions, criminalized the infringement of intellectual property rights under the new Intellectual Property Code. In Korea, a joint investigation team was formed in 1991 in every District Prosecutor's Office to specifically investigate this type of crime. Figures of indicted cases during the last three years in Korea are 13683,15166 and 13460 respectively.

JAPAN	1993	1994	1995	1996	1997
Trademark Law	465	251	342	517	442
Illegal Competition Prevention Law	40	34	43	99	56
Copyright Law	384	138	172	348	433
Patent Law	1	1	2	0	0
Design Law	5	4	2	0	0
Utility Model Law	0	0	0	0	0
Total	895	802	901	964	933

(Source: National Police Agency of Japan)

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**Case Study**

1. Infringement of Intellectual Property  
Case in Japan

*Facts*

Company A was a legal producer of video-game machine software, bearing the copyright 'Arukanoid'. B was a director of C company, which dealt in the production, sale or lease of video-game machine software bearing a different copyright. During the period between 1986 and 1987, B was found to have sold 18 pieces of Arukanoid video game machines without consent or permission from company A. Company C was found guilty and fined 500,000 yen. B was also found guilty and sentenced to 8 months imprisonment with 2 year's suspension of execution of the sentence.

*Difficulties / Problems raised by Participant*

- (a) It was difficult to gather evidence to prove that B knowingly purchased the software violating the copyright of Arukanoid video.
- (b) The investigators had difficulty in distinguishing the software which B was selling from the genuine Arukanoid product, due to the similarity of appearance.

*Countermeasures / Solutions shown by Participant*

- (a) The analysis of the accounts book seized from Company C containing sales records showed variation in prices between the genuine and the copied software.
- (b) The victim cooperated with investigators to recognize the difference between the genuine and the copied software.

*Discussion in the Group*

The situation in member countries clearly indicates that low priority is attached to the infringement of intellectual property rights by both society and the

criminal justice system. Information technology has further facilitated the piracy of software programs through the internet. This is causing a huge loss to private enterprise. The Software Publishers Association has estimated that \$ 7.4 billion worth of software was lost to piracy in 1993, with \$2 billion of that being stolen from the Internet.

Japanese participants pointed out that products using fake brand names are mostly smuggled into Japan from other Asian countries. This makes it difficult for investigators to collect evidence, i.e understanding the whole process of their production. So international co-operation is necessary to deal with the situation. Some of the participants proposed that there is need to protect the business interests of entrepreneurs and suggested that the regulatory apparatus should play a pro-active role, and punishments regarding infringement may be enhanced to deter perspective offenders.

**V. COUNTERFEIT CREDIT CARDS  
AND PREPAID CARDS**

**Algeria**

Credit cards are not commonly used in Algeria, and there is no special enactment to deal with fraud relating to credit cards. Few cases were cleared and prosecuted under the traditional provisions dealing with forgery, swindling and counterfeiting of securities.

**Brazil**

Some counterfeit credit card cases have been detected and investigated in Brazil, usually connected to organized crime. However, the prevalent form of credit card offence is related to the use of stolen cards and cards obtained through false information. Prepaid cards are not yet widely used.

**Costa Rica**

There are various types of credit card fraud in Costa Rica. Depending on the type of the fraud perpetrated, the sufferer of the loss can either be the issuer, card holder, bank or merchant. Counterfeit credit cards and prepaid card fraud are not known to have been reported.

**Japan**

There are few cases of the use of counterfeit credit cards. Most crimes relating to cards are cases in which regular cards issued to authorized holders were used by unauthorized persons. There are many cases in which used prepaid cards are counterfeited (especially telephone cards, cards for pachinko games and so on). Card crimes are sometimes committed by organized groups involving foreign organized crime group members. Statistics of cases relating to various card frauds are tabled below.

**Kenya**

The use of plastic money or cards in consumer spending has exerted considerable influence in the growth of financial transactions in Kenya. The major frauds so far experienced relating to credit cards are as follows:

- (i) Use of stolen and lost cards.
- (ii) Use of fraudulently acquired or issued cards.
- (iii) Running of extra vouchers (i.e.

merchants can bill the card company by fraudulently preparing extra vouchers of cards presented to them).

No case involving the use of counterfeit credit cards or prepaid cards has been reported.

**Pakistan**

Pakistan is still a cash economy and use of plastic money is still very limited. A few large stores and hotels located in big cities entertain credit cards. People belonging to affluent classes normally keep credit cards for use abroad. Prepaid cards of small denominations are used at telephone booths. There is hardly any cases reported to police regarding counterfeit cards.

**Other Countries**

Credit cards are widely used as a mode of payment in Korea. In most of the criminal cases related to credit cards, authorized card holders made excessive use of the card with the intention to evade payment, constituting a fraud under the Penal Code of Korea. However sometimes stolen or lost cards, and in a number of cases, counterfeit cards are used. Provisions of the Credit Card Act are invoked to punish offenders along with the Penal Code. A number of suspects are arrested and indicted every year. In the Philippines, credit card fraud has almost disappeared due to the adoption of new procedures by business establishments, i.e.

JAPAN		1991	1992	1993	1994	1995	1996	1997
Number of Cases Detected	Total	7,740	11,045	8,585	8,740	6,671	6,396	11,714
	Credit	6,195	9,596	7,056	7,173	4,951	4,282	8,594
	Cash	1,452	1,303	1,314	1,291	1,514	1,408	1,926
	Others	93	146	215	276	206	706	1,194
Number of Cases Cleared	Total	7,544	11,539	8,268	8,122	6,204	5,586	11,368(31)
	Credit	6,270	10,205	7,216	6,998	5,061	4,070	8,860(26)
	Cash	1,178	1,177	923	877	948	845	1,240( 1)
	Others	96	157	129	247	195	671	1,268( 4)

The numbers in parenthesis indicate cases using counterfeit cards (source National Police Agency of Japan).

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verification of credit cards passed onto them through an Omron Card Authorities Terminal (OCAT). Credit card companies have also introduced the system of requiring photographs of holder on the card itself for easy identification.

The problem of stolen and counterfeited cards is becoming serious in Thailand. As per the statistics from the Economic Crime Investigation Bureau of the Police, there were 58, 54, 57, 71, 79, and 87 cases regarding counterfeited credit cards in the years 1992, 1993, 1994, 1995, 1996, and 1997 respectively. In 1997 damage caused by these crimes exceeded USD\$ 561,000.

### **Case Study**

#### **1. Counterfeit Prepaid Card Case of Japan**

##### *Facts*

In June 1995, the suspects ran a counterfeiting machine in an apartment within Itabashi Ward in Tokyo. The suspects used the machine to counterfeit prepaid cards for accessing Pachinko machines. They collected used prepaid cards from various sources and copied the magnetic data of genuine cards, using the used prepaid cards, and the counterfeiting machine. Within two months they had succeeded in producing approximately three hundred thousand counterfeit prepaid cards, out of them one hundred thousand cards were used by the suspects and their agents, thereby causing the card company a loss of about 500 million yen. The suspects were indicted on allegations of forgery of securities.

##### *Difficulties / Problems raised by Participant*

The crime was committed by an organized gang involving a lot of suspects. They changed their place of residence frequently to perpetrate this crime.

##### *Countermeasures / Solutions shown by*

##### *Participant*

Co-operation of police from various jurisdictions was solicited to arrest members of the gang.

##### *Discussion in the Group*

Participants noted with concern that where credit cards have provided ease of transactions, at the same time they provide immense opportunity for criminals to use or appropriate cards, or the stored information in the card. According to one estimate, losses amounting to USD\$1.3 billion were caused to credit card companies in the year 1995.

The participant from Japan pointed out that counterfeit credit card crimes are dealt with under the normal provisions of Penal Code in Japan, such as illegal use or production of electromagnetic records, using forged securities and so forth. However it was pointed out by a participant that certain countries have amended their Penal Codes to provide for crimes related to credit cards. In Canada, section 342 (1) (c) of the Criminal Code provides that it is an offence to possess, use or traffic in a forged or falsified credit card, knowing that it was obtained, made or altered by the commission of an offence either in Canada or elsewhere. The participant from Pakistan pointed out that possession of counterfeit cards may be criminalized to discourage the forgery of cards. Participants from Japan were of the view that the public in general is not ready for such legislation in Japan.

The participant from Kenya pointed out that this crime has a transnational nature as the card issuer, card holder, merchant and offender may be in different jurisdictions. He suggested that laws in various countries need to be harmonized to facilitate trials in multiple jurisdictions. The participant from Brazil opined that the best countermeasures have to come

from the industry itself, by streamlining procedures regarding issuance and the use of credit cards and in improving the security features of the card. The participant from Japan stated that credit card crime is often perpetrated by organized gangs/ mafia. He suggested that end users may be provided immunity from prosecution to rope in the members of the organized gang.

It was agreed that the challenge can be met by a coordinated effort by industries and governments. The credit card industry should streamline procedures and improve security features, while cardholders and merchants should act more responsibly in handling the cards. At the same time, governments should enact necessary laws to keep pace with new technological challenges and finally, laws may be harmonized in various jurisdictions so that criminals may not take advantage of the discrepancies.

## **VI. COMPUTER RELATED CRIME**

The use of computer technology in business and governmental organizations has created unprecedented opportunities for the storage/dissemination of information in all areas of human activity. At the same time, it has created unprecedented opportunities for crime. It is perceived that the challenge is so great that the law enforcement apparatus in itself will not be sufficient to deal with the situation. Consequently, new forms of control and harnessing non-governmental organizations will become essential.

Various forms of crime have already surfaced; i.e. theft of telecommunication services where hackers get unauthorized access to the telephone facilities and make many millions in telephone calls. Electronic funds transfer assist in concealing and removing the proceeds of

crime. Given the fact that computer crime transcends national boundaries, effective countermeasures will also require enhanced international co-operation. It was agreed that for the purpose of this paper, computer crime may be defined as crime in which computer technology has been used to perpetrate the crimes.

### **Algeria**

There is no special provisions dealing with high-tech crime, so the few cases where the computer was involved were prosecuted and convicted under the ordinary stipulations of the Penal Code. However the draft of the new amendments of the Penal Code and the Code of Criminal Procedure, submitted to the parliament, prescribe new penalties and regulations related to computer crime and to data seizure, and to admissibility before the court.

### **Brazil**

Although legislation still lacks specific computer crime law, other legal provisions are being used to prosecute rampant computer-related offences. Brazil has witnessed a rapid expansion of computers connected to the Internet. Fraudulent purchases through this system are being perpetrated against credit card companies and other supplier of goods. All other forms of Internet-related offences, i.e. child pornography, hacking, etc are also being registered in increasing numbers.

### **Costa Rica**

Actually Costa Rica doesn't have a specific law to apply in respect to these cases, but at the moment computers and the Internet are very popular. Proliferation of computers is changing social life and bringing new forms of computer-related crime. Child pornography and hacking are prevalent. Offences relating to computers are punished under the Penal Code of Costa Rica.

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**Japan**

In 1987, the Japanese Penal Code was amended to enable punishment of three types of computer-related crime. The first is the illegal production of certain types of electromagnetic records. The second is the obstruction of business by destroying computers/electromagnetic records. The third is computer fraud, since under the former Japanese Penal Code, the article of the fraud was applicable only to human beings. However, unauthorized access to protected computers is not punishable under the current Japanese Penal Code. Computers are now indispensable tools in Japanese daily life. The following data shows the proliferation of information technology in Japan. The number of host computers connected with the Internet in Japan was 300,000 for 1995, 700,000 for 1996 and 1,150,000 for 1997. Increase in use of computers has resulted in a

**NUMBER OF HIGH-TECH CRIMES  
IN JAPAN**

YEAR	REPORTED NUMBER	CLEARED
1995	111	110
1996	178	176
1997	263	262

Note: cleared figures may contain reported cases from previous years (source: National Police Agency).

**BREAKDOWN OF HIGH-TECH CRIME IN JAPAN 1997**

CRIME TYPE	Reported	Cleared
Computer fraud	162	163
Illegal production of private electromagnetic record	4	5
Illegal production of official electromagnetic record	8	7
Obstruction of business by destroying a computer, etc.	4	2
Destruction of official electromagnetic record	1	1
Destruction of private electromagnetic record	0	0
Network using crime	83	83
Others	1	1
Total	263	262

(Source: National Police Agency of Japan)

tremendous increase in computer-related crimes. The following tables shows this trend.

**Kenya**

Computer-related crimes are on the increase. There is no statutory interpretation of the term 'computer crime', and for the purpose of investigations and prosecutions, provisions of the Penal Code are used to deal with these cases. So far the most prevalent cases reported are those that target the computer data and those which are committed using the computer as the instrument to facilitate the commission of the crime.

The Kenyan legal justice system, which is based on common law, has difficulties in addressing cases falling under the first category. In the first category of cases, the data exists as electric impulses which are not tangible objects. Common law only punishes acts against property which is tangible. Victims are normally advised to seek a civil remedy.

**Pakistan**

Computer technology is gaining ground in Pakistan and the use of computers is becoming more popular. However no new legislation has been enacted and cases, if

any, are tried under general penal laws. No serious cases involving computer technology has been reported so far.

### **Other Countries**

Computer-related crime is increasing in Korea. The Information Crime Investigation Center was established in the District Prosecutor's Office of Seoul in 1995, and the Information Crime Countermeasures Headquarters was established in the Central Investigation Office of the Supreme Prosecutor's Office in 1996. From April 1995 to August 1997, 263 cases were investigated and 75 suspects were arrested, out of them six suspects were arrested for hacking.

Computer technology is gaining ground in the Philippines but no cases have been reported so far. In India, 22,000 counterfeit share certificates of reputed companies which were allegedly prepared by using desk top publishing (DTP) systems were seized. Several cases of software piracy have been registered by Delhi police on the initiative of NASSCOM, India. South Africa has specific provisions in the South African Police Services Act 1995 which criminalizes unauthorized access or modification of computer material belonging to or under the control of the police service. However the practice of search and seizure is based on common law. The computer crime investigation unit of the South African police service deals with computer-related crime. There is no specific legislation regarding computer-related crime in Thailand and if any, cases are dealt with under normal penal laws.

### **Case Study**

#### 1. Online Computer Fraud in a Bank, Nagoya, Japan

##### *Facts*

A and B defrauded a bank in Nagoya by illegally using the bank's computer system. They pressurized C, a clerk of the bank, to

take secret data of the host computer, including descriptions of the bank customers. A and B, being outsiders, deciphered the data code and obtained passwords and account numbers of other companies. Posing as customers, A and B used their own computer to access the bank's computer system from a hotel room and sent false remittance information. They acquired illicit profits by producing false records. About 1.6 billion yen in total was remitted to accounts, which the other accomplice had established in other banks. The accomplice was able to withdraw about 140 million-yen from one bank.

However, when the other bank inquired of the bank in Nagoya regarding payment of the 1.5 billion yen, the fraud came to the notice of the Nagoya bank, which prevented payment and prompted reporting to the police. During police investigation, it transpired that C had acquired data from the bank in Nagoya. Next, police suspected A, since he had a close relationship with C. A often stayed in a hotel, where the telephone was suspected of being used to access the bank in Nagoya. The police finally acquired the telephone record and found that A, along with another accomplice B, were involved in this case.

##### *Difficulties/Problems raised by Participant*

- (a) Intense anonymity of offenders at the initial stages of investigation. Telephone records at the hotel had already been deleted and the telephone company did not volunteer information due to secrecy of communication.
- (b) Special knowledge of computer technology was required in gaining and examining evidence.

##### *Countermeasures/Solutions shown by Participant*

- (a) Search and seizure warrants for the

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bank's telephone records were carried out so as to identify the person who accessed the bank in Nagoya. This obtained necessary information which would not have been otherwise available due to the secrecy of communication.

- (b) Investigators to be provided better training in high technology.
- (c) Improve co-ordination/co-operation between private enterprises and law enforcement agencies.

## 2. K Securities Case of Kenya

### *Facts*

A was employed by K Securities Ltd as a computer operator. He was sharing his office with other employees. His duties included entering all data relating to the buying and selling of shares for the firm's clients. During the period between 1996 and early 1998, A colluded with B, the firm's dealer at the stock exchange, to form fictitious companies through which they perpetrated theft of the client's shares. Following frequent complaints by the clients, the matter was discovered by C, the executive director of K securities Ltd. However A destroyed all the data in the computer by invoking the delete command on all the contents of the computer's directory.

The latest backup of data was done late in 1997. The companies operations were paralyzed as the computer system held 85% of the information required to run the day to day operations. C enlisted the services of an expert who managed to recall most of the data from the computer database. Subsequent examination of the recalled data revealed that A and B had defrauded K Securities of about Ksh.5 million. They were arrested five months later and charged with the offence of 'stealing by servants'.

### *Difficulties / Problems raised by Participant*

- (a) It was difficult to recall the deleted data from the computer hard disk.
- (b) Both the director and the investigators had inadequate knowledge about the operating systems of computer.

### *Countermeasures / Solutions shown by Participant*

- (a) Regular training of law enforcement agencies to update their knowledge of modern technologies.

## 3. Computer Fraud Targeting KDD of Japan

### *Facts*

A, with a view to evade telephone fees, developed software which was capable of obstructing the KDD computer system from recognizing telephone calls and charging a fee. Later B and C shared in such software and evaded telephone fees individually. However KDD had an alarm system which was activated when a subscriber continuously engaged its line for more than two hours with more than two minutes silence during that hour. The suspect held the line for two hours, resulting in detection. So by this alarm system the case was found out and KDD reported it to the police in December 1993. Police found out that A, B and C had in total incurred a bill of 27 million yen which was not recorded by KDD, during a period of one year and seven months. A, B and C were arrested on allegations of computer fraud and all were convicted after trial.

### *Difficulties / Problems raised by Participant*

- (a) Though KDD was the victim, it was reluctant to volunteer evidence claiming its right to secrecy of communications.
- (b) The exhibits included personal computer and data which was very difficult to preserve. The computer



was special because one had to enter a password before switching it off, otherwise part of the data would be erased.

*Countermeasures/Solutions shown by participant*

- (a) The evidence was secured by search and seizure after the search warrant was issued by a judge.
- (b) Services of experts were solicited for preserving the computer data.

*Discussion in the Group*

It was generally agreed that crime involving high technology poses difficulties for investigators and requires special expertise and skill to successfully prosecute offenders.

The participant from Japan pointed out that under the usual interpretation of search and seizure, the target is supposed to be tangible, while computer data is intangible. It is also difficult to identify the exact location of the data in a computer system. Further, computers are multifunctional and hold large amounts of data. Seizure of entire mediums/systems containing evidence could affect the interest of others or obstruct the business of the enterprise. Network computers can be multi-jurisdictional. In most countries, prior judicial authorization is required to carry out searches and courts demand particularity, i.e. the location, the equipment to be searched (hard drive, diskettes etc ). He suggested that to solve this problem new legislation may be considered making it obligatory upon the computer operator to cooperate with investigation authorities, and new international arrangements (bilateral and multilateral) may be made to deal with emerging challenges.

Another participant from Japan reported that in the KDD case, the offender

destroyed significant evidence by one key-touch during the police search. He proposed that investigators should be accompanied by experts in computer technology during search and seizure operations, so as to ensure the preservation of data.

The member from Kenya observed that in common law countries, the best evidence during criminal proceedings is primary evidence and in multi-functional computers, seizure of the original medium may obstruct the business operations of an enterprise. He proposed that there is need to enact new legislation that would allow admissibility of computer generated copies as evidence, in special circumstances.

Members from Pakistan, Kenya and Costa Rica pointed out that computer-related crimes are dealt with under normal penal laws in their countries. Most common law countries prescribe punishment in relation to mischief to property, and as property is defined as something tangible, it may not be possible to punish an offender who, by tapping computer keys, destroys data, because data exists as electromagnetic impulses which are not tangible.

The participant from Japan stated that unauthorized access to the computer is not an offence in Japan, while some other countries have prescribed punishment for this offence. He opined that due to the dual criminality principle in international law, it may not be possible to extradite such an offender. He proposed the harmonizing of law by enacting new legislation.

The participant from Brazil expressed the view that in order to prevent computer-related crime, it is necessary to co-operate with industry to establish security systems, saving log data systems, and improvement of encryption. A participant pointed out

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the need to have informal contact between law-enforcement agencies of various countries to ensure better co-operation at the international level, especially in high-tech crime, as data can be destroyed very quickly.

It was observed that it is necessary to impart training to investigators in computer technology and co-opt the services of experts in these fields. Establishing special investigation departments for computer crime (Cyberpolice) may be considered. Countermeasures suggested by the participants are summarized as follows:

- (i) Training of investigators in computer technology.
- (ii) Establishing special investigation departments for computer crime (Cyberpolice).
- (iii) Soliciting services of experts in the relevant fields while investigating cases of a complicated nature.
- (iv) Better co-ordination between regulatory bodies and criminal justice officers.
- (v) New legislation regarding computer-related crimes, and search and seizure of electronic data in certain jurisdictions.
- (vi) Computer generated copies made admissible pieces of evidence in special circumstances.
- (vii) Unauthorized access to information made an offence.
- (viii) Mutual legal assistance among nations in the field of computer crime.
- (ix) Government and private industry to work in close collaboration to improve the security of information.

**VII. DIFFICULTIES COMMONLY  
FACED BY CRIMINAL JUSTICE  
OFFICERS AND SUGGESTED  
COUNTERMEASURES**

**A. Globalization of Crime**

1. Difficulties

The advent of technology has made it possible for a person sitting in one part of the globe to transact business thousands of miles away. The world is now characterized by unprecedented mobility of information, finance, goods, services and people. This globalization has also provided opportunity to criminals to operate transnationally. They commit crime in one country and find safe havens elsewhere in the world, where criminal justice officers cannot keep track.

Even if one is able to advance the law, the chances of locating the offender, obtaining extradition and launching successful prosecution or recovering compensation is almost impossible. The sheer cost of sending officers from one country to another for collection of evidence may be prohibitive. The operation of different laws in different countries further accentuates the problem.

2. Countermeasures

International cooperation in the field of Criminal Justice Administration should be enhanced. Governments should enter into bilateral and multi-lateral treaties for the extradition of offenders and to ensure mutual legal assistance. In the absence of treaties, governments may co-operate with each other on the basis of reciprocity. Informal contacts between law enforcement officers of various countries may be encouraged by having common training programs. The United Nations may assist member countries, when requested, by providing model treaties which have been already developed.

## **B. Lack of Technical Know-how**

### 1. Difficulties/Problems

Modern information systems provide an effective means by which offenders can communicate in order to plan and execute their activities. Emerging technologies of encryption and high speed data transfer can greatly enhance the capacity of criminal organization to place their communication outside the reach of police. The offenders are able to disguise their identities through the use of complex electronic technologies. Computer technology calls for knowledge beyond the expertise and skill of most investigating officers. Further, complex commercial and financial transactions require special knowledge of these laws/operations. So criminal justice officers find it difficult to successfully prosecute offenders.

### 2. Countermeasures/Solutions

Criminal justice officers may be trained in the latest technologies and provision may be made for hiring the services of experts in these fields to assist investigators. Services of investigators from regulatory bodies like SESC (Security Exchange and Surveillance Commission) may be co-opted to assist police investigators. Governments should encourage research in the field of computer technology so as to ensure the safety of data and its retrieval, when required by criminal justice officers.

## **C. External Influences in the Criminal Justice System**

### 1. Difficulties/Problems

Most of the developing countries have remained under the colonial yoke. The colonial rulers had designed the criminal justice system to ensure their rule over the population. The justice/rights of citizens were secondary to their predominant desire to rule. The political authorities in the developing countries inherited that legacy but political institutions being nascent

were not strong enough to put the system on its right track, i.e. ensuring the rule of law and democratic control of the criminal justice system. Instead they tried to gain control over criminal justice officers with a view to perpetuate their rule. Thus criminal justice officers were made to act as servants of the political executives rather than as custodians of the rule of law. This has bred corruption in the system and created a gap between the criminal justice officers and the public in general, resulting in loss of support/cooperation from the citizens.

### 2. Countermeasures/Solutions

Criminal justice officers should be provided operational autonomy by institutional arrangements, so as to insulate them from external interference. In Japan, operational autonomy of the police is ensured by the Public Safety Commission, where members of commission (five in number, not more than two from the same party) are selected by the Prime Minister with approval of both houses of Parliament. They have a fixed tenure and can only be removed by the Prime Minister with consent of both the houses of Parliament. This institution appoints the Commissioner General of Police, with approval of the Prime Minister, and also supervises the working of the National Police Agency.

The concept of accountability of officers, both external and internal, should be strengthened. Review of executive actions, by having the office of Ombudsman, will provide citizens a forum for redress of their grievances. This will restore public confidence and also help earn their cooperation in combating crime.

## **D. Lack of Cooperation by Victims to Criminal Justice Officers**

### 1. Difficulties/Problems

Business enterprises are reluctant to report crime committed against them to the

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police for fear of negative business repercussions. Employees of these organizations are not ready to report their colleagues/seniors. Further, corruption in the criminal justice system of developing countries erodes public confidence in the system. Witnesses will not come forward to depose as the inquiries by investigating agencies take a long time and protracted trials further tax their time and money. High rates of acquittal in developing countries further dampens the enthusiasm of plaintiffs and witnesses.

2. Countermeasures/Solutions

Close co-operation between government and industry will help in building the confidence of entrepreneurs in the criminal justice system. Better training of officers and operational autonomy will bring professionalism to criminal justice officers and earn them the confidence of the public.

**E. Poor Coordination Among Various Agencies**

1. Difficulties/Problems

It has been observed that at many times, regulatory agencies like the Central Bank, Corporate Law Authority, Income Tax Bureau and other financial bodies detect fraud/crimes but they do not pass on this information promptly to investigation agencies, resulting in destruction of evidence and losing material witnesses. At times, investigating officers hardly communicate with prosecutors during the investigation and prosecutors only learn about cases when the file is submitted to them. This can be detrimental to the successful prosecution of offenders.

2. Countermeasures/Solutions

Common training courses consisting of officers from various fields will promote understanding among various organs of the State. In Japan, various kinds of training courses, conferences and other inter-action activities are organized to

provide police officers, public prosecutors, national tax administration officers and officers of other agencies to promote understanding of the activities of various agencies and to improve technical knowledge in other fields. Such interactions also help to establish personal contact points in the event of actual investigation, and promote better coordination for the future among different organizations.

**F Search and Seizure of Digital Data**

1. Difficulties/Problems

Collection of digital data from computers poses problems to investigators, as the computers are not just storage mediums but are performing multiple functions in an organization and hold large amounts of data. The exact location of data in the computer system may not be known. Data may be stored in the server, hard drive, diskette or paper printouts. Data, at times, may be mingled with other irrelevant information. Courts in certain jurisdictions require that investigators should intimate the exact location of data for issuing search and seizure warrants. Further, the seizure of entire mediums/systems containing evidence could affect the interests of others and may cause obstruction to legitimate business. Selective retrieval of data may damage the information contained in the computer system. Problems can further be compounded where cross-border searches may be involved in the future.

2. Countermeasures/Solutions

To ensure proper search and seizure of data, investigation agencies may be staffed with computer experts for identification/safety of data. Courts should flexibly interpret the principle of particularity of data when issuing search and seizure warrants. Criminal procedure laws should also permit investigating authorities to search computer systems and seize data

under similar conditions as in the traditional powers of search and seizure. Computer generated copies may be made admissible as evidence in special circumstances.

Specific obligations should be imposed on service providers, who offer telecommunications services to the public either through public or private networks, to provide information to identify the user, when so ordered by the competent investigating authorities. International agreements should be negotiated as to how, when and to what extent, search and seizure should be permitted. Development of mutual legal assistance treaties may be encouraged.

### **VIII. CONCLUSION**

Economic crime is a complex phenomenon acquiring greater significance in this global era. Economic offenders do not act on the impulse of the moment, rather they carefully plan their crime and execute it in a manner so as to leave no trace. Present day technology has provided the opportunity to act transnationally with ease. It is imperative that governments, over the world work in close cooperation by entering into formal/informal assistance arrangements. Regulatory agencies may be strengthened to play a proactive role in combating such crime. It is important to enhance their investigative capacities, facilitate coordination of their tasks and encourage cooperation amongst them. Awareness of the problem in itself is only part of the solution.

## **GROUP 3**

### **ECONOMIC CRIME AGAINST CONSUMERS AND INVESTORS**

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#### **I. INTRODUCTION**

The group consisted of nine members from all pillars of the criminal justice system: one police officer (Gambia), three prosecutors (Japan, Korea and Thailand), three from the judicial branch (Bangladesh, Japan and the Philippines), one corrections specialist (Japan) and one rehabilitation official (Japan). This group workshop focused on frauds, cartels, and securities manipulation and insider trading. These crimes principally involve an individual or organization skilled or knowledgeable in business, taking advantage of the ignorance or gullibility of consumers and investors in business transactions through fraud, conspiracy, undue advantage, manipulation, or other deceptions. The complex and sophisticated methods with which these crimes are being committed pose serious problems for the criminal justice system which require more advanced and appropriate countermeasures than the traditional ones.

This study aims to (1) focus on and analyze actual situations, (2) identify the problems confronting the pillars of the criminal justice system, especially in the investigation, prosecution and trial stages,

and (3) propose countermeasures that will address such issues, not only in the countries represented by the group workshop members but likewise in all participating countries in this 110<sup>th</sup> International Training Course. For this purpose, the group members have conducted this study on crimes against consumers and investors, through surveys, interviews, examination of the individual country reports, experts' lectures and papers, and library and Internet research.

#### **II. NATURE OF CRIMES UNDER STUDY**

The group agreed to analyze the nature of the crimes under study as to the:

- (i) **Mode of Commission:** Crimes against consumers and investors are usually committed through non-violent means. No force or intimidation is employed. Generally, these crimes are committed by means of fraud: through deception, concealment, manipulation, and unjust advantage. Sometimes the organization or business enterprise may appear to be legitimate but would nevertheless be exposed eventually as illicit or fake,

only after the damage had become serious and widespread.

(ii) Offender: The offender, which may be a person, persons or organization, usually occupies a high status or is influential or wealthy. They capitalize on their specialized knowledge, skill or high position or influence in society or connection with politicians or businessmen. They generally employ fraud and other deceptions.

(iii) Victim: The victims, usually in large number, belong to the common mass of people like housewives, employees, senior citizens, etc who are gullible or ignorant about business procedures and/or transactions. The victims may also be motivated by greed to make fast money with the least or no effort at all.

(iv) Impact or Damage: These crimes cause damage detrimental to society, directly or indirectly. The individual loss may be small but the total damage to the various victims is great.

For the purpose of discussion, the Group decided to classify the assigned topics to three major categories with corresponding classifications and sub-classifications as follows:

**A. Fraud against Consumers and Investors**

- (1) Large Scale Fraud
  - (a) High Interest Investment Fraud
  - (b) Venture Capital Fraud
  - (c) Advance Fee Fraud
  - (d) Commodities Future Fraud
  - (e) Membership Fraud
  - (f) Fraud in Insolvent Stock Sale, and
  - (g) Misrepresentation in Advertisement
- (2) Pyramid Fraud

- (a) Pyramid Investment Scheme and
- (b) Pyramid (Multi-Level Sale) Fraud
- (3) Commodity Fraud through Telecommunication / Computer Networks

B. Unjust Enrichment through Unfair Price Fixing of Commodities (Cartel)

C. Illicit Manipulation of Stock Prices and Insider Trading

**III. ACTUAL SITUATION OF CRIMES DISCUSSED**

The group discussion on the actual situation of the crimes under study was not confined to the members' individual country experiences, but included those of the other participants' countries as well. Under the three categories of fraud, cartel/ monopoly, and stock manipulation, the group discussed specific cases and examples detailing the *modus operandi* used by the offenders. Where data is available, it has been cited for better illustration.

**A. Fraud against Consumers and Investors**

1. Large Scale Fraud

a) *High Interest Investment Fraud*

In this type of fraud, the criminals deceive the general public of money by false stories. The offender's *modus operandi* is to ask the prospective victims for a loan or money deposit and lure the latter with a promise of a high interest return at some future time. This type of fraud is becoming serious in Japan and Korea. In Japan, this fraudulent scheme is increasing as a result of the low interest rates. In 1996, there were 12 cases of high interest investment fraud in Japan where 6,000 people suffered a loss of around 45.5 billion yen and 48 offenders were arrested. In 1997, around 2,650 people similarly suffered a loss of over 89 billion yen in a scheme called

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“Orange Mutual-Aid Association.”

A variation of high interest investment schemes, commonly found in Thailand, is called a ‘chit fund’. A chit fund, or rotating credit as it is otherwise called, is one of the most common means of fund raising among individuals and small business enterprises. It is, in general, not illegal unless fraud is involved. The operator in this scheme promises a high interest return for loans borrowed from the general public. Such interest rate return is promised despite the fraudster’s knowledge that his/her business cannot yield sufficient profits to make such payment, or otherwise such interest payment is to be made through loans from new members. This chit fund will ultimately fail and the victims will suffer when no more new members can be recruited or there is a tight cash supply in the money market.

Before 1984, there was a scheme in Thailand called ‘oil share’ which promised to give lenders and investors 72% interest per year in return for deposits. It accumulated an aggregate fund of ten billion baht from the general public. In 1984, a tight cash supply in the money market rendered the operator unable to pay such an interest rate. The oil share chit fund scheme collapsed in 1985 and the principal operator was found guilty of the offense of contracting loans tantamount to public cheating and fraud under the Emergency Decree on Loans Amounting to Public Cheating and Fraud. However, the fraudsters had subsequently developed other schemes, such as membership fraud and commodity future fraud, to circumvent the law, thus creating new problems for law enforcers.

b) *Venture Capital Fraud*

Venture capital fraud is very similar to high interest investment fraud. However, venture capital fraud has a special feature

in that the fraudsters concoct a story about venture capital business. Usually the offenders lure their prospective victims with a promise of huge profits upon the success of the business undertaking. However, such a story is totally false because the fraudsters really have no plan to run their promised business at all. This venture capital fraud is increasing in Bangladesh, Japan and Korea. In 1997 in Japan, a loss of around 35 billion yen was sustained by about 12,000 victims in the KKC [Keizai Kakumei Club (Economic Revolutionary Club)] case; a large-scale venture capital fraud, where the head of the KKC made a false story that the new business would certainly succeed and make a lot of profit.

c) *Advance Fee Fraud*

The *modus operandi* of this fraudulent scheme, which originated in Nigeria, is for the fraudsters to inform the prospective victims in another country, through letters or faxes that the former are in possession of, about a huge amount of money which will be made available to the latter upon payment of some advance fees. However, upon collection of such fees from the unsuspecting victims, the fraudsters thereafter vanish into thin air. This type of fraud is becoming serious in Gambia, Japan and South Africa. It is also spreading to Canada and the United States.

In Gambia, the advance fee fraud scheme is structured to look as believable as possible. The fraudsters usually target a company or a person (the victim) outside Gambia, either by fax or mail, made to look official with appropriate government seals, stamps and signatures. They propose to transfer a huge amount of money or over budget money, usually in American dollars, to the account of the victim. They promise the victim a sizable percentage as a commission, sometimes between 30% and



35% of the money to be transferred, for using that person's bank account. To effect the transfer of the money, the fraudsters will ask the victim to forward a variety of data and blank forms like telephone and fax numbers, duly signed blank company letter heads, blank invoices and especially bank account details. Upon receipt of such information, the offenders will ask the victim to deposit money into a specified bank account to cover the expenses of the transfer including money to some government officials because of the large amount of money. Once the fee is paid, they will come up with another problem that requires immediate payment by the victim. Each problem is supported by official documentation. This fraudulent scheme may last as long as the victim stays gullible or the victim desperately desires to recoup losses. At some point during the fraud, the fraudsters will invite the victim to visit them and if the victim does, they will take the documents and force the victim to pay more money by threatening him with physical harm or even death.

As this type of fraud has a transnational character, considering that in most cases the offenders and the victims are situated in different countries, law enforcers face not only local investigation difficulties, but issues of jurisdiction and mutual cooperation as well. Variations of the Nigerian advance fee fraud have evolved.

d) *Commodities Futures Fraud*

Generally, in commodities futures fraud the offenders collect money from the victims by promising the individual investors huge profits through commodities futures transactions they pretend to be engaged in. Commodities futures transactions, being a business innovation, has provided new opportunity for fraudsters to victimize gullible customers. In Japan, thousands of people who are not well aware of commodities futures

transactions were victimized by this fraudulent scheme. In 1994, about 3,600 people suffered a loss of over 9.1 billion yen, while 16 offenders were arrested in this commodities futures fraud. In some countries, the lack of government regulation also contributes to the occurrence of commodities futures fraud. This type of fraud has started to take root in Bangladesh and Thailand.

e) *Membership Fraud*

The felons in membership fraud usually lure the general public into joining a club or association requiring a membership fee, with the promise of entitlement to the privilege of using club or association facilities on a limited basis, or otherwise obtain some discount on the cost of services. However, as it will eventually turn out, the members will not be able to take advantage of the promised privilege or service since the fraudsters rarely provide such facilities and services. This type of fraud exists in India, Japan, Kenya, Korea, the Philippines and Thailand.

In Japan, membership fraud cases were often reported during the economic boom. However, there has been a decreasing trend in recent years as a result of the Japanese economic downturn. In the Philippines, variations of membership schemes had been detected, such as membership in clubs for time sharing of apartments or condominiums or resort facilities, which do not exist in reality, and fraudulent raffles wherein facilities or services are offered as prizes to unsuspecting individuals who eventually end up paying membership fees but do not get the promised prizes.

In Thailand, one membership fraud case is on trial in the criminal court. The operator, Blissher International Co., advertised to the general public that it operated a time-share business whereby, through payment of a membership fee, the

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members would be able to use accommodation facilities without cost, and that any member able to bring in new members would receive a commission therefrom. At the end of the day, the company received a sum of 826, 266,000 baht from a large number of people who never got any benefit from the promised accommodation facilities.

f) *Fraud in Insolvent Stock Sale*

In Korea, several nearly bankrupt companies conspired with certified public accountants to make it appear on official documents that the former were in good financial condition. These companies, therefore, were able to sell their worthless stocks to the general public who, in the end, suffered the loss. This scheme involved fraud in insolvent stock sale. In 1992, the managing directors of 15 companies and five certified public accountants were prosecuted and convicted for such type of fraud.

In Bangladesh, one decaying company offered 135,000 shares in 1994. Out of those shares, only 31,590 were subscribed by the shareholders and the sponsors of that company accepted the rest. Investing nothing, that company again offered 540,000 shares in the money market but the shareholders subscribed only 79,570 shares in the same year. In 1996, with the help of stockbrokers, that company was able to transact all of their shares without remittance to the shareholders. The Security and Exchange Commission (SEC) initiated a case against that company in April 1997, which is now under trial.

g) *Misrepresentation in Advertisement*

False or exaggerated advertising (misrepresentation in advertising) is defined as an act which defrauds consumers by means of indicating the contents of goods and services, price, amount of supplier or competitor against

the real fact. It is difficult for consumers to file a complaint against the fraudster because of the low possibility of compensation and the vagueness of the misrepresentation. In Korea, false or exaggerated advertising is increasing. The fraud patterns of misrepresentation frequently occurring in Korea are as follows:

- (i) **Misrepresentation of Price:** This type of fraud is often committed in the course of special sale periods. Some department stores deceived consumers by attaching a false price tag to merchandise in order to make the consumers believe that the stores were selling the goods at a special price. For example, the department stores attached 400,000 won price tag to the goods which they offered to sell at a special price of 300,000 won, as if they really offered a discount of 100,000 won on the original. In 1989, the sales managers of six department stores were prosecuted and found guilty of fraudulent sale through misrepresentation of price.
- (ii) **Misrepresentation of Materials:** Falsely indicating synthetic fabric as natural fabric, belongs to the category of the misrepresentation of materials of goods.
- (iii) **Exaggerated Advertisement:** This type is in some sense acceptable in commercial transactions. However, according to the precedent established by the Supreme Court of Korea, false information on concrete facts related to important components of goods in transaction, against good faith, constitutes fraud.

2. Pyramid Fraud

a) *Pyramid Investment Scheme*

Under this scheme, the general public is induced to invest a fixed amount of money with a prospect of high return by recruiting new members through whom

that can earn percentage commissions. The process is repeated as the pyramid expands its base, as new members are recruited. No product is involved in this type of fraud. People invest their money in such a scheme with the prospect of earning enormous profits because each member is expected to recruit additional members and earn a commission in the process. The more additional members one recruits, the greater the profit a member makes. However, this fraudulent pyramid investment scheme is, of course, not sustainable indefinitely because of the limited number of the population. The people, particularly the bottom level investors, eventually suffer a loss where recruitment of new members has become impossible. In Japan, the pyramid investment scheme, itself, is prohibited by the Law on Prevention of Unlimited Chain Mutual Association (1978). Prior to this law, pyramid investment schemes were detected in Japan. After the above law was enacted, such a scheme has rarely occurred. Recently, however, the so-called Pentagono pyramid investment scheme, which is of transnational character, has been detected in Japan. Pentagono has also made its presence felt in Bangladesh and the Philippines where the scheme is not *per se* illegal, without a showing of fraud. This scheme originated in Italy where the supposed principals or masterminds are located; circumstances which create jurisdictional problems for investigators and prosecutors.

b) *Pyramid (Multi-Level) Sale Schemes*

Pyramid (multi level) sale schemes are a little bit different from pyramid investment schemes. The operator makes such a scheme similar to an ordinary sales transaction where a commodity or service is offered and purchased. In most cases, the product or service is of inferior quality. Nevertheless, the general public is still induced to buy the product at a high price

mainly because the fraudsters provide a sort of guarantee that they will make a lot of profit (or commission) if they can recruit more members or subscribers. In Japan, the pyramid sale scheme is not, in itself, illegal and does not correspond to fraud. However, if the intention to defraud on the part of the offender is demonstrated, the prosecution will be based on the Penal Code. Otherwise, the applicable law is the Door-to-Door Sales Law (of 1976), as amended, which prohibits concealment of material facts in a transaction coupled with inducement and receipt of payment of membership fees and the price of commodities or services. Like the pyramid investment scheme, the chance of success for every member is impossible because of the limited number of the population.

In Japan, about 0.6 million people suffered a loss of over 126.4 billion yen, and 131 offenders were arrested in 1994. In 1995, as a result of continuous efforts to crack down on this fraudulent practice, the number of pyramid sale frauds has been decreasing and only 4 cases where 27 people were arrested for the violation of the Door-to-Door Sales Law have been recorded.

3. Fraud through Computer Networks/ Telecommunications

Advances in computer and telecommunication technology brought forth many advantages, but the same time spawned disadvantages. From the late 1980's, inexpensive personal computers were distributed for sale to the public and became widely popular. Likewise, communication technology developments enabled personal computers to be connected to each other through networks. As a result, average people, as well as experts, had the opportunity to take advantage of computer technology which afforded easy access to information.

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As a result of this information technology development, fraud through computer networks has increased. In Korea the number of computer fraud cases increased to 123 in March 1997. The criminals often disguise themselves as a famous company by using an Internet address and defraud the general public through Internet or local Internet service companies such as "Hitel" and "Naunurii". Since computer networks allow the fraudsters to reach a large number of unspecified customers, they need less money from each individual customer than they do in cases where no computer network is involved. This in turn makes the individual victim more reluctant to report or cooperate with law enforcement officials, as the loss suffered is small.

In Japan, this type of computer network fraud is increasing. The fraudsters advertise on the home page of the Internet that they sell certain commodities. The customers make purchase orders of these commodities via e-mail. In 1996, 1,200 people were victimized; they suffered a loss of 11 million yen where the offender made false advertisements for the sale of audio equipment on a bulletin board through a computer network. In another case, one junior high school student committed fraud through the computer network. He opened his home page on the Internet and advertised that he was selling medicine, a tranquilizer, but he in fact had no such medicine. He was able to defraud his customers to send their payments to his fictitious account through the Internet. The student victimized 60 people who sustained a total loss of 1,200,000 yen.

**B. Unjust Enrichment through  
Unfair Price Fixing of  
Commodities (Cartels)**

Cartels are agreements among competitors that may result in the setting of higher prices, less efficient productions,

fewer innovations and less benefit to the ultimate consumers. Anti-monopoly or anti-trust legislation seeks to prohibit cartels, which are agreements among competitors, such as price fixing or limitations on production designed to eliminate or restrict competition among themselves, as these inflict damage on consumers and the national economy. Anti-trust laws exist in Algeria, Brazil, Japan, Korea, Pakistan, the Philippines, South Africa and Thailand. In Japan, cartels are classified by object, such as restriction via price cartels, volume cartels, market allocation cartels, and bid riggings. Likewise, the Japanese Anti-monopoly Act has special provisions to prohibit unreasonable restraint of trade formed by trade associations and cartels between domestic and foreign firms (international cartels)<sup>1</sup>. Monopoly is not by itself illegal, but "monopolizing" is. In some countries, administrative bodies play an active part in regulating cartels or monopolies, through sanctions like cancellation of business license, suspension, and imposition of fines and surcharges. In Japan, for instance, the Fair Trade Commission investigates about 200 cases per year under the Anti-Monopoly Law. Of these cases, only one or two are indicted. In 1997, in a case involving a cartel of 26 companies concerning an order from the Tokyo Metropolitan Government for water service meters, the defendants were imposing a surcharge, the total amounting to 385 million yen.

In Korea, collaborative acts like cartels are subject to the most severe punishments, among all the different types of unfair business practices. Even in the absence of clear agreements among corporations, when they engage in acts that substantially restrain competition, they are deemed to be engaging in undue collaborative acts, the most common of which is predetermination of price. In the

Philippines, it has been reported that the oil cartel of the three big oil companies had been overpricing products by 14 billion pesos per year.<sup>2</sup>

### **C. Illegal Manipulation of Stock Prices and Insider Trading**

The essence of illegal manipulation of stock prices is fraudulent conspiracy to affect either the upward or downward movements of the price of shares or other securities, or commodities sold on the exchange. On the other hand, insider trading consists of engaging in purchasing and selling securities by using information not available to the general public. Securities fraud undermines the public trust in the stock market, where the investing public is supposed to have an equal opportunity of profiting from securities transactions. Such erosion of confidence in the stock market reduces capital investment necessary to finance business needs and thereby affects the economic stability of the country. Moreover, the international standing and reputation of such countries will also suffer. There is, therefore, an imperative need to prevent or minimize the occurrence of anomalous transactions in the securities and exchange market.

In Bangladesh, during the period from October to November 1996, a handful of stockbrokers and some international securities swindlers and their accomplices filched millions of dollars by fraudulent manipulation of the share market. Regarding the scam, the Security and Exchange Commission conducted investigation into the matter and subsequently filed several cases against many securities companies, their directors and brokers, for the alleged commission of offenses under the Security and Exchange Commission Ordinance 1963. Since then, 17 cases have been pending in the courts because of delaying tactics by the

defendants, and use of political influence.

In Korea, the Security Transaction Law (1962) prohibits the manipulation of stock prices. In 1977, the Security Supervisory Board (SSB) was established to perform comprehensive surveillance of the security market. The problem of stock manipulation had become very serious in recent years especially with regard to the stock of small but promising companies. From January to July 1998, the prosecution has indicted more than five cases of stock manipulation and these cases are currently on trial in the Criminal Court. For example, in the Daehan Fabric Company case where the defendants were found guilty of stock manipulation in the district court, it was established that the following methods were used to effect manipulation: (i) increasing the stock price by purchase order at the highest price possible; (ii) placing purchase and sale orders intentionally at the same time to show that the transactions of Daehan stock were in a prosperous condition; and (iii) disseminating false information such as merger, acquisition and new development to increase the price of Daehan stock. Other co-conspirators, the so-called fund managers, purchased certain amounts of the floating supply of Daehan stock to maintain the inflated price for a considerable period of time during which the defendants would sell their holdings of Daehan stock in the market to reap the benefit of manipulation. The fund manager in turn received a high commission.

The number of insider trading cases has been rapidly increasing. In 1997, the Security Supervisory Board (SSB) detected 12 cases, 11 of which were settled administratively. The SSB filed only one accusation on insider trading with the prosecutor's office. Currently this case is on trial in the criminal court.

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In Japan, the securities business is regulated under the Securities Exchange Law. In 1992, the Securities and Exchange Surveillance Commission (SESC) was established as an independent agency charged with supervising the securities dealings. From 1981 to 1994, there were five stock manipulation cases, four of which occurred before the establishment of the SESC. Because of effective administrative supervision after the establishment of the SESC, only the case of "Nihon Unisys Stock" was prosecuted. In this case, two offenders were found guilty of stock manipulation. One of them was sentenced to two and a half years imprisonment with labor (with suspension for 4 years) and the other was sentenced to 2 years imprisonment with labor (with suspension for 3 years).

Six cases of insider trading were investigated from 1994 to 1998. Five cases were prosecuted and one was to be prosecuted later. In fact, the offenders in these cases were found guilty: one offender was penalized with 6 month imprisonment with labor (with suspension for 3 years) and 38 others (including juridical persons) were fined. However, the defendants in two of the five prosecuted cases have appealed the judgment of the District Court.

In Thailand, securities trading is regulated under the Securities Exchange Act (1992). Since 1992, there have been seven stock manipulation cases. Two of them were administratively settled and a fine totaling one million baht was imposed. Apart from these two relatively small-scale manipulation cases, the other five were large in terms of the number of offenders, the amount of money used to manipulate the stock price, and the number of adversely affected investors. Each of these cases involved the stock of the Bangkok Bank of Commerce, Krisada Mahanakorn Public Co. Ltd., First City Investment

Public Co. Ltd., Rattana Real Estate Public Co. Ltd, and Siam City Bank. The culprits in these cases manipulated the stock prices of these companies by the so-called "Pool Operation" scheme whereby they colluded with others to conceal their collective purchase or sale of the stock. For instance, from January to October, 1992 (before manipulation), the total volume of trading was 1.7 million shares a day. In October of the same year, during which the defendants manipulated the market for BBC stock through their concerted purchases, the total volume of trading was 14.15 million shares a day and the price was 40.75 baht on October 29, 1992.

The investigation revealed the existence of several connections among defendants such as "personal connection", "financial connection", and other connections like the use of same mailing address in securities trading, some trading accounts opened by the suggestions of others in the group, and trading orders effected by others in the group. Convinced that defendants collectively manipulated the stock of the Bangkok Bank of Commerce, the Office of Attorney General thus instituted criminal prosecution. However, the court dismissed the case for insufficiency of proof of complicity among the defendants.

Relying on the BBC decision, the Office of the Attorney General subsequently ordered no prosecution in the cases of First City Investment and Rattana Real Estate. However, criminal prosecutions have been filed with regard to the case of Krisada Mahanakorn and Siam City Bank, and these cases are presently on trial in the criminal court. The SEC had so far successfully dealt with insider trading problems. Seven cases were investigated and later settled in administrative proceedings where the offenders paid a fine to the Commission. In these cases, the Commission imposed a fine totaling

66,436,584.56 baht. No case has ever been criminally investigated, prosecuted or tried.

#### IV. PROBLEMS RELATING TO CRIMES UNDER STUDY

After deliberating on the actual situation of the crimes in the countries of all the Training Course participants, the Group Workshop members agreed to identify and discuss the problems that confronted these countries. First, the group focused the discussion on the common problems in the investigation, prosecution, and trial stages. Thereafter, the group deliberated on the problems commonly found at every stage of the criminal proceedings.

##### A. Common Problems

###### 1. Investigation

###### a) *Reluctance of the Victims to Report, Resulting in Difficulty in Detection and Delay of Investigation*

With regard particularly to fraud cases, the victims are generally reluctant to cooperate with the law enforcement agencies. This problem arises on account of disadvantages that the victims face in the prosecution of these frauds. In most cases, the victims are numerous and, while the total amount of the damage may be large, the individual damage is small. The time, effort and expense (official and incidental) involved in filing suit and pursuing the case in court far exceeds the damage suffered by individual victims. Therefore, there is very little incentive for the victims to report, or participate in, the investigation of fraud. This lack of interest and/or cooperation of the victims results in difficulty in detection and delay of investigation.

In the case of cartels, illegal stock manipulation and insider trading, the victim's report of the crime is helpful in the detection and investigation stages, but is

dispensable in the prosecution thereof. In some countries like Bangladesh, Japan, Korea, the Philippines and Thailand, the administrative agencies supervising such business activities, like the Fair Trade Commission and Securities Exchange Commission, play a far greater role in the prevention, detection and investigation of these crimes.

###### b) *Difficulty in Identification of the Offence/ Offender (Mastermind)*

There exists the general problem of identifying the offence and/or the offender, especially the mastermind, due to the complex and sophisticated nature of the economic crimes under study. Unless the specific statute makes the scheme itself illegal, such as pyramid investment schemes in Japan, it is not easy to identify whether the intent to defraud, necessary for an offence of fraud, exists. Many fraud cases appear to be merely civil in nature. Nevertheless, the fraudulent scheme in many cases is a combination of various kinds of fraudulent techniques, thereby making it difficult for law enforcers to detect whether a crime has been committed. In a pyramid scheme, the fraud is usually discovered only at the bottom of the pyramid where the immediate contracting parties are involved, as in the case of a buyer and seller. The real mastermind is too far up the ladder or pyramid to be identified. The difficulty is more marked where the transaction is initiated and consummated not on a face to face basis, but merely through an electronic medium such as a computer network or telecommunication system.

As for cartels, it is clearly difficult to establish that the offenders have agreed to fix the price of commodities. Even if the consumers have filed the complaint, the law enforcers still have to determine whether an agreement to such effect exists. Likewise, the case of stock manipulation,

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where generally several people are involved, presents similar difficulty. In these cases, it is not exaggerated to say that direct evidence of agreement is next to impossible to obtain. Circumstantial evidence, therefore, has to be carefully analyzed. This analysis of circumstantial evidence in most cases is very difficult and there is a high possibility of disagreement among law enforcement agencies.

c) *Difficulty in Evidence Collection*

Evidence collection poses a problem to investigating authorities as regards crimes against consumers and investors. Considering the nature and complexities of the crimes under consideration, the investigating officers, who are usually not familiar with and not specially trained for economic crimes, face great difficulty in collecting evidence to be used in the prosecution of the offender. In fraud cases, especially where a syndicate is involved, the lack of cooperation of the victims and witnesses (because of threat of reprisal) makes it even more difficult for investigators to gather evidence. In case of stock manipulation and insider trading, there may be a need for monitoring and/or surveillance for several days or weeks, aside from the great probability that evidence may be in possession of third persons, such as bankers or stockbrokers, who may not be willing to cooperate with law enforcement officials in gathering or providing all available evidence.

d) *Statute of Limitations*

The existence of statutes of limitations in many jurisdictions is also a common problem encountered in the investigation stage. Crimes against consumers and investors are generally complicated due to the fraudulent schemes employed by the felons, and usually involve large numbers of victims. Given these facts, it is to be expected that investigation would take more time and effort. Because of the

resulting delay in the detection of the crime and in collecting evidence, as well as the reluctance or lack of interest and cooperation of victims and witnesses, the investigation of criminal complaints drag on for many years without reaching resolution. Thus, the periods prescribed under the Statute of Limitations may expire even before the termination of the investigation stage. Both the time spent and efforts made by the investigating authorities may go to waste.

2. Prosecution and Trial

a) *Ineffective Coordination among the Administrative, Investigating and Prosecuting Agencies*

The group agreed that successful prosecution of large-scale fraudulent schemes, cartels, and securities fraud requires effective coordinated effort among the administrative, investigating and prosecuting agencies, particularly in the investigation stage, because of the complex and subtle nature, and *modus operandi* of such illegal activities. Poor coordination in the investigation stage frequently jeopardizes the collection of evidence that is of utmost importance in the cases. This problem may be more severe in countries where there is a complete separation between investigation and prosecution stages. Unless effective cooperation, such as sharing of information and technical know-how among administrative, investigating and prosecuting agencies in the early stage of investigation, is strictly observed, the prosecuting agencies in these countries hardly know about the case until receiving the investigation report. Such a lack of effective cooperation in the investigation process will adversely affect the prosecution.

b) *Failure of Witnesses to Testify or Change of Testimonies*

At the trial stage, the witnesses may either fail to testify or change their



testimonies. This negative attitude creates serious problems since the successful prosecution of the offender in a criminal case depends principally upon the testimony of the victims and other witnesses. It is not uncommon that various pressures and influences are made on complainants and/or witnesses to discourage them from giving testimonies in court. If the victims and/or the witnesses fail to testify or change their testimony, the case of the prosecution naturally crumbles or fails.

c) *Excessive Use of Delaying Tactics by the Defense*

The defendants in the types of crimes under study generally employs excessively dilatory tactics, for they know that it is to their great advantage if they can buy more time in the investigation, prosecution and trial of the cases against them. If the case is delayed, the victim and witnesses usually lose interest due to the increased time, effort and money expended. Where the complainant and the witnesses do not cooperate, the inevitable outcome is the dismissal of the case. Time is of utmost importance since justice delayed is justice denied.

d) *Difficulty in Proving Guilt beyond Reasonable Doubt*

The perpetrators of the economic crimes under scrutiny, being more intelligent and/or technically skilled, are able to cover their illicit tracks through elaborate and complex schemes. This makes it even more difficult for law enforcement and prosecution agencies, already burdened with the required proof beyond reasonable doubt in criminal cases. This high standard of evidence imposed on law enforcers and prosecutors works to the great advantage of the criminal offenders; who are already several steps ahead of their adversaries in skill and techniques in the commission of their nefarious activities. In general, it is

difficult to prove the intent to defraud as, in most large-scale fraud cases, the offenders have the tendency to make excuses arguing that their business could not otherwise be profitable to investors and that the failure of their business results from normal business risks. Likewise, the structure of the fraudulent scheme, like pyramid investments, makes it hard for law enforcers to determine the intent to defraud on the part of the lower recruits. The burden of proof being in the hands of the prosecutors, they are duty-bound to prove otherwise.

With regard to cartels, illegal stock manipulation, and insider trading, such a difficulty stems from the clandestine nature of the offences. No one but the offenders themselves know what is going on in the cases. Both direct and circumstantial witnesses are rare in such cases. The prosecution thus has to rely much on documentary evidence such as daily securities trading, financial statements, bank accounts and expert opinions. Such documentary evidence by itself, without further analysis, does not show the illegal nature of the transactions, thus making it even more difficult for the prosecution to prove the case.

4. Sentencing

a) *Too Lenient Punishment*

Some of the participants observed that the imprisonment provided by law is too lenient. It is usually within the range of sentence suspension as, for example, the two-year imprisonment for stock manipulation and insider trading in Thailand. Similarly, a maximum of three years for both cartel and insider trading in Japan is also within the range of sentence suspension. Furthermore in some cases, the criminals receive only a suspended sentence. For instance in Japan, six insider trading cases from 1994 to 1998 were prosecuted and one offender drew only 6

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months imprisonment with labor (with suspension for three years) and 38 others were only fined. In one stock manipulation case, two offenders were prosecuted and convicted; one of them was sentenced to two and a half years imprisonment with labor (with suspension for 4 years) while the other was sentenced to two years imprisonment with labor (with suspension for 3 years). In terms of fine, the maximum amount is fixed without regard to the loss suffered by the public and the benefit the offender derives. Under these circumstances, the offender will be motivated to take the risk in the commission of the offense, if the expected benefit is greater than the expected loss.

**B. Problems Commonly Found in Every Stage of Criminal Proceeding**

1. Shortage of Competent Personnel

The economic crimes involved in this study are just a few of the many crimes being dealt with by the entire criminal justice system. More controversial and serious cases get more attention and resources than economic crimes against investors and consumers. There are not enough personnel to tackle the fast growing crimes under study. The large number of victims and witnesses involved, as well as the complex nature of the crimes, requires a great deal of manpower to deal with the crimes in terms of monitoring, surveillance or investigation, prosecution, and trial. Therefore, adequate manpower needed for the successful investigation, prosecution and trial of the offenders should be provided, maintained and augmented to address the problem of the fast growing crimes of fraud monopolies and securities trading.

2. Lack of Expertise Among Criminal Justice Officials

Economic crimes have become more elaborate and complex with advances in

science and technology. The criminal justice officials' capability to deal with these types of crime against consumers and investors has lagged behind those of the criminal offenders, who are more skilled and knowledgeable in their nefarious trade. Fraudulent schemes, cartels and stock manipulations have grown more elaborate, complex and sophisticated. Therefore, there is an urgent need to train and equip criminal justice officials with the requisite expertise to effectively combat these new types of crime.

3. Political Influence

Because of the high status and well-placed political connections of the economic crime offenders under study, political influence makes significant impact on the investigation, prosecution and even sentencing of those criminals. Felons who have high learning/skills or influential status in society usually commit crimes against consumers and investors. In many developing countries, politicians interfere with the investigation, prosecution and even judicial stages of a the proceedings in cases involving cartels, stock manipulation and fraudulent schemes of a transnational character, wherein connections exist between politicians and the offenders. Fraudsters usually come from the ranks of people who are close to high government officials; big business cartels are in many cases benefactors of high-ranking politicians who rely on them for financial contributions during election campaigns; while crimes involving fraud or securities manipulation are committed by influential corporations or stockbrokers who derive protection from powerful politicians in exchange for bribes. In third world countries, politicians usually wield so much power and influence that subordinate bureaucrats, like law enforcers, prosecutors and even judges, who depend on political patronage for their career advancement or destruction, in several

cases yield to their mischievous wishes. Because of this situation, the offenders often escape punishment and continue with the commission of these types of offences.

## V. COUNTERMEASURES

The modern and sophisticated methods and means with which economic crimes against consumers and investors are being committed has outpaced the pillars of the criminal justice system, which have been lagging behind in terms of competence, manpower, logistics and skill, and technical knowledge. Therefore, it is the obligation of every country in the international community to find appropriate ways and means to respond to the challenge of combating the emergence of these new economic scourges. The group, after exhaustive deliberations, reached a consensus that the following countermeasures must be adopted, installed and enforced to appropriately address the corresponding issues or problems arising from the actual situation in the participating countries.

### A. Educating Consumers and Investors

In many instances, the general public becomes the victim of fraudulent schemes, including illegal stock manipulation and insider trading, because of ignorance of the existence and *modus operandi* of these types of crimes. Promoting public awareness is therefore geared toward the goal of prevention. To achieve this end, an effective channel of communication between law enforcement agencies and the general public must be established. For example, in Japan, there is a program called "Dial 110 for Fraudulent Commercial Practices" which entertains complaints and provides counseling to consumers through telephone calls. Mass media should also play an active role in exposing the nature, operation and the impact of these crimes. However, mass media must not directly or

indirectly induce the general public to have interest in such fraudulent schemes. Faced with this dilemma, ethical standards or regulations of association must be established, emphasized, and strictly observed. These countermeasures seeks to prevent the general public from being defrauded and to encourage victims to report cases to law enforcement agencies.

### B. Enactment of Adequate Laws

The advent of modern technology has created new benefits, but at the same time has ushered in corresponding problems that must be addressed accordingly. Economic crimes are being committed with more sophistication and complexity. The law however, has not been updated in many countries to keep up with the criminal mind, which has always been a step ahead of the law and law enforcers. The group recognized the need for adequate laws that would address the issues brought about by the new methods or schemes employed by fraudsters that victimize a large number of consumers and investors. For example, laws may be enacted to criminalize certain fraudulent schemes under specified conditions, to provide for extraterritorial jurisdiction and to provide for increased penalties sufficient to deter or discourage the commission of the crimes. Furthermore, the conspiracy offense (where criminal liability can be imposed upon only an agreement to commit, not the actual commission of, the crime) should be available in order to immobilize the criminals quickly, thereby effectively preventing the general public from being defrauded, injured or victimized. These laws may also provide for modification of the law on evidence, allowing the shifting of certain burdens of proof to the accused. Finally, to encourage the victims to testify in court, they should be entitled to increased allowances to cover official and incidental expenses for their appearance in court proceedings.

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1. Criminalizing New Offenses/Crafting Long-Arm Statutes

New technology always opens up new opportunities for criminals to victimize consumers and investors. Where certain frauds are exposed, the offenders think and employ new ways or schemes to swindle unsuspecting victims. Therefore, there is necessity for enactment of new laws that would criminalize such fraudulent schemes or activities of certain business establishments. For instance, in the Philippines, infringement of intellectual property rights are now punishable with imprisonment and/or fine under certain conditions. The pyramid schemes like the Pentagono, which is *per se* not criminal, has been criminalized in Japan. Moreover, so-called “long-arm statutes” like the Computer Misuse Act of Singapore, that would have extraterritorial reach, may be enacted to compliment bilateral or multilateral agreements to effectively deal with the growing transnational nature of these crimes.

2. Upgrading of Criminal Penalties

The gravity of the damage inflicted by economic crimes requires a corresponding increase in the penalties in order to deter or minimize the commission of such offenses. In many countries, at present the laws do not adequately address the problem of appropriate punishment to be imposed. The laws are outmoded and impose penalties not commensurate to the seriousness of the offense. It is therefore timely and proper to update these laws by increasing the penalties imposed for economic crime, which includes those under study.

3. Increased Use of Measures to Deprive Ill-gotten Benefits

Since the common motive of the economic crime under study is to gain profit, one of the effective countermeasures is to maximize the way in which such profit

deprivation can be effected. Private civil enforcement is one such process. Its purpose is to recover compensation for damage done, whether by way of the restitution of the property deprived of through illegal acts, or the value thereof. However, if the damage done to a particular plaintiff is less than the benefit derived from the illegal act, private civil enforcement does not rid the offender of all such benefit. To forfeit such benefit from the offender, it is necessary that the class action concept, under which a particular plaintiff stands for all injured by the same illegal act, must be recognized. Where the law requires the public prosecutor in a criminal suit to ask for restitution or compensation for the victim, such a civil enforcement will provide incentive to the victim to cooperate more with law enforcement as s/he is entitled to such restitution or compensation. A view was expressed that civil asset forfeiture is another effective method to deprive ill-gotten benefit. Civil asset forfeiture is different from its criminal counterpart in that it is an “*in rem*” instead of “*in personam*” proceeding. This means that asset forfeiture can be effected on the preponderance basis of evidence, and without regard to the conviction of the offender. It was opined that this system of forfeiture, would allow law enforcement to proceed against white-collar criminals more efficiently.

**C. Augmentation and Training of Criminal Justice Officials**

Except in highly developed countries, economic crimes do not get the same attention and resources as being focused on crimes against persons. In most countries this is due to the lack of awareness about the serious impact of such offences on society. The group members agreed that the time is ripe to give serious thought and attention to addressing the need for more resources and adequate

training in accounting, auditing, and computer techniques for criminal justice officials involved in the investigation, prosecution and trial of perpetrators of crimes against consumers and investors. Specialized training of all criminal justice officials involved in consumer and investors' crimes would address the problems of difficulty in identification of the offence/offender, evidence collection, shortage of competent personnel, and lack of expertise.

**D. Effective Coordination among the Administrative, Investigating and Prosecuting Agencies**

As collaborative investigation among the administrative, investigating and prosecuting agencies is required to successfully prosecute large-scale fraudulent schemes, cartels and securities fraud; it is necessary that a system to facilitate such cooperation be established. Such collaboration will guarantee that the expertise of all law enforcement agencies will be optimally utilized in the investigation, that promising avenues of investigation are not overlooked, that strategies for prosecution are fully exploited and that legal pitfalls are avoided.<sup>3</sup>

**E. Creation of Specialized Investigating Body**

The successful prosecution of economic crime depends largely on the investigation stage of the proceedings. Political interference in this early stage of investigation, during which evidence gathering is conducted, plays a crucial role in the outcome of the case. Some of the participants expressed the view that a specialized independent investigating body must be set up to deal with the political interference problem in economic crimes, including those involving consumers and investors. This specialized investigating body must be truly independent, meaning

free from the clutches of politicians or other types of influence or pressure. The investigators must have fixed and secure tenure in accordance with the laws of individual countries.

**F. Use of Special Investigative Techniques**

Recognizing the growing sophistication of the schemes and technology employed by individuals or crime syndicates in the commission of the economic crimes under study, the group fully agreed that law enforcement and investigating agencies must have the minimum capability and skills to “outfox the foxes”, so to speak. Regular and sustained training must be implemented to attain personnel preparedness, proficiency and efficiency in the fight against these crimes. Special investigative techniques may be employed to solve the problem of beating the prescriptive periods under the statutes of limitation. For example, law enforcement should be authorized to use wire-tapping and electronic eavesdropping as a means to detect and investigate economic crimes, and the evidence discovered therefrom should also be made admissible in court. However, because of its intrusive nature, such practices in some countries are in violation of the privacy rights of the individual. With that in mind, the group agreed that such electronic surveillance should be available only with judicial approval and in limited circumstances where the economic crime under study is committed by an organization. Moreover, undercover operations, traditionally used to infiltrate traditional organized crime groups, is now being used to fight economic fraudsters who operate under the veil of secrecy. For instance, in securities agencies, brokers are sometimes bribed by other competing companies, especially in initial public offerings, to engage in insider trading or stock manipulation activities. Undercover operations have a deterrent

effect by keeping the criminal elements off balance, since they can never be sure that the apparent collaborator may not actually be an undercover agent who may expose their criminal operations.<sup>4</sup> These innovative techniques, together with the offence of conspiracy, and immunity from prosecution given to a co-conspirator hereinafter suggested, will be a powerful arsenal for law enforcement agencies in the fight against organizational economic crime.

These countermeasures are designed to solve the issues regarding difficulties in identification of offence/offender (mastermind), evidence gathering, and restrictions of the statute of limitations, and also to detect the scope and *modus operandi* of the crimes.

#### **G. Setting-up of Witness Protection Programs**

A case is only as good as the evidence presented before the court. The successful prosecution of a crime depends largely on the availability of a credible witness. It is the natural tendency of a witness to be reluctant, or in extreme cases to refuse, to testify in a case where their life or safety would be placed in danger. Fear of reprisal, inconvenience and expense are among the factors that prevent or discourage a possible witness. Such a tendency is very likely in a case where an organization, syndicate or a high ranking public official is involved in the commission of an offence.

It is not uncommon that such a criminal syndicate is behind many large-scale fraudulent schemes, cartels and securities frauds. In some cases of cartels and securities fraud, the only probable witness is himself a participant or a co-conspirator in the crime. The covert nature of these crimes, together with the involvement of a criminal syndicate, makes it imperative to secure the availability of witnesses during

investigation and trial of the case. It is thus necessary to set up a witness protection program, the mechanics of which would be dependent on the system that may be adopted by each particular country, consistent with its laws. This program basically gives assurance of safety and security to the witness and/or their family through police protection, housing and financial assistance, in order to encourage them to come forward and testify against the principal offender or mastermind (so that the latter may finally be accordingly penalized for the offence). Many countries have adopted this program and many others, who have felt and recognized the seriousness of these types of economic crimes in their jurisdictions, are poised to make the same move. Bangladesh, Gambia and the Philippines have witness protection programs.

#### **H. Grant Indispensable Witnesses Immunity from Prosecution**

Some countries have adopted a system whereby key witnesses, mostly co-participants or co-conspirators or accomplices, are offered and granted immunity from prosecution so as to be able to strengthen the evidence against, and successfully prosecute, the principal offenders or masterminds. In some countries like Bangladesh, Gambia, and the Philippines, such immunity of material witnesses from prosecution is included in the Witness Protection Program, as a necessary benefit for the co-conspirator who turned state witness against the mastermind or principal offender, to secure the full cooperation of the witness.

#### **I. Admission of Hearsay Evidence**

In most participating countries, as a general rule, a statement of an eyewitness made before investigating officials pointing to the culpability/guilt of the accused is not admissible unless testified to by such a witness in open court. However, some of

the participants expressed the view that such a written statement should be made admissible under certain circumstances when proper foundation exists, even if such a witness reneges on the previous statement and does not appear in court. Nevertheless, the court should be careful in giving weight to such a written statement.

#### **J. Creation/Designation of a Specialized Court**

To complement the establishing of specialized investigating bodies, specialized courts should be established/designated with specific powers to deal exclusively with economic crimes against consumers and investors. In the Philippines and Thailand, some trial courts have been established as specialized courts to try and decide economic crimes, particularly intellectual property crimes, exclusively. This will promote and enhance the expertise of the judges and court personnel handling this type of crime. This system will likewise expedite the disposition of cases. In some countries the creation of special courts is not allowed, but some court divisions or branches have been designated to handle only specific types of serious economic crimes against consumers and investors.

#### **K. Shifting the Burden of Proof**

In order to ease the burden of prosecutors in proving intent to defraud and conspiracy in complex and sophisticated large-scale fraud, cartels and securities fraud, the group members fully agreed that the system of shifting the burden of proof upon the accused should be implemented. India, the Philippines and Thailand have adopted shifting the burden of proof of certain elements of the crime to the accused in some cases, like corruption, embezzlement, cheating and fraud. For example in Thailand, section 5 of the Emergency Decree on Loans

Amounting to Public Cheating and Fraud shifts to the defendant the burden of proving that s/he has no intention to defraud, after the prosecution has demonstrated the existence of certain facts constituting the elements of the crime. It provides in brief that “Whoever, in borrowing, propagates or publishes to the general public or circulates news by whatever means and pays or promises to pay to the lender a benefit at a rate higher than that payable by financial institutions under the law, shall be guilty of the offence of loan amounting to public cheating and fraud unless he can prove that his business will yield sufficient profits to make such a payment”.

To achieve this end, certain modifications in the procedural laws of some countries may be undertaken in order to keep pace with the technical skill and ingenuity of the criminal offenders in covering their tracks or hiding incriminatory evidence.

#### **L. Private Prosecution**

Some participants expressed the view that countermeasures against economic crime offenders should not be limited to public criminal prosecution, but may likewise include private prosecution through which alternative relief is given to the victims. Moreover, this kind of remedy supplements public prosecution and thus creates a greater deterrent effect upon the offenders. Under this system, a victim, who may have been dissatisfied with a non-prosecution order, may bring a criminal suit against the offender/s. This system exists in Thailand and in Commonwealth countries. In other countries like Japan and the Philippines, such private prosecution is not sanctioned by law; in these countries, a dissatisfied victim has the opportunity of review by the Prosecution Review Commission in the case of Japan, or by the Secretary of the

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Department of Justice in the case of the Philippines.

**M. International Cooperation and Coordination**

The fight against economic crimes, including those against consumers and investors, cannot be confined to individual countries. Considering the transnational and sophisticated nature of some of these crimes, every nation in the international community should play an active part in preventing, minimizing or controlling the problems spawned by such crimes. For instance, in large-scale fraud cases like the pyramid investment scheme and advance fee fraud, there must be effective international cooperation and coordination in order to combat these crimes successfully. The Pentagono pyramid investment scheme, which has its origin in Italy, is a case in point. In this scheme, the mastermind or principal, who occupies the top of the pyramid, is apparently in Italy and hence beyond the reach of other jurisdictions. Therefore countries which experience transnational fraud of this type should forge bilateral agreements and other forms of mutual cooperation and coordination to control this illicit activity, and bring the principal offenders to justice.

**VI. CONCLUSION**

To successfully combat formidable economic crimes, projected to reach serious proportions in the near future as information technology progresses, every country, whether developed or developing, must as a first measure of defense, strengthen all the pillars of its criminal justice system. This will ensure that necessary, adequate and efficient manpower and mechanisms are in place to detect, investigate, prosecute, try and penalize ingenious offenders or syndicates. Aside from the requisite expertise, full cooperation and close coordination among all the pillars of the criminal justice system

is imperative to prevent, minimize, or control the commission of economic crimes against consumers and investors. As a matter of policy, every government must see to it that its law enforcement and judicial system are a step ahead of the criminal mind, and not the other way around.

The transnational and complex nature of some economic crimes against consumers and investors, however, requires international cooperative action to effectively prevent, minimize, or control the commission of offences. One nation cannot be a successful crusader against economic crime offenders while others seek or allow themselves to harbor the criminals who spread this serious, global, economic menace. It is the responsibility of every country in the community of nations to play a crucial role in the global cooperative and coordinated effort to adopt and enforce countermeasures to effectively deal with these economic crimes.

**END NOTES**

1. Antimonopoly Act Guidebook, Fair Trade Commission, Lecture by Mamoru Izumisawa, Director, Management and Planning Division, Investigation Bureau, Oct. 7, 1998.
2. Philippine Daily Inquirer, August 3, 1998, p. 9.
3. Economic Crime and The Global Economy, *Understanding The Threat and Identifying Effective Enforcement Strategies and Countermeasures*, Paper presented at UNAFEI by Mr. John D. Arterberry, Deputy Chief, Fraud Section, Criminal Division, United States Department of Justice, on November 2, 1998, p. 11.
4. *Ibid*
5. USD \$ 1= 116.35 yen; 37.8 pesos; 36.02 baht; 1,057.62 won; as of November 4, 1998.



**PART TWO**  
**RESOURCE MATERIAL SERIES**  
**No. 55**

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*II. Work Product of the 111th International Seminar*  
***“THE ROLE OF POLICE, PROSECUTION AND THE JUDICIARY IN  
THE CHANGING SOCIETY”***

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**UNAFEI**

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## VISITING EXPERTS' PAPERS

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### THE ROLE OF POLICE, PROSECUTION & JUDICIARY IN THE CHANGING SOCIETY

*M. Enamul Huq\**

#### I. INTRODUCTION

Half a century ago, there was no systematic, objective information available on crime and criminal justice policies. Over the years, the relevant institutes of social defence in various countries have sponsored research that spurred an evolution of understanding of crime and its impact. Today, we recognise that the cost of crime is far greater, its effects on victims more traumatic and its corrosion more widely spread throughout our society than we realised, even three decades ago. Insights provided by research have set in motion a rethinking of how we view crime and criminal offenders.

The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders is a recently forged link in a chain of inter-governmental agencies concerned with the prevention of crime and the treatment of offenders:

“Setting aside the great need for more knowledge of the human causes of crime, and their treatment outside the penal system, one must perhaps place foremost the need to cut off persistent criminality at the source, first by the perfection of methods (already advanced in many countries) for the rational and human treatment of young offenders, then by the development of methods of treatment for early offenders which will avoid the necessity of imprisonment”.

In the above context, the present theme is not only quite appropriate but also time worthy. To quote UN Secretary General Thant “a social defense research policy must necessarily be shaped by continual research if it is to be dynamic and attuned to changing needs. There is, for example, a particular need for evaluatory research on crime prevention and treatment programmes, and for devising accurate indices of the extent and trends of crime and delinquency.”

The concept of law changes from time to time and consequently, the concept of crime also undergoes a transformation due to the passage of time. With the induction of the concept of social and economic equality in the realm of human thought, sociological ideas have undergone a sea change, and the concept of law and crime have been victim of this transformation. At the close of this century, and before the dawn of the next, the world is becoming more and more interdependent - so too is crime.

As Aldous Huxley said “never before have conditions been so appropriate for human beings achievement of happiness as our present times, due to the advancement of science, technology and other areas. But at the same time, to achieve this desideratum we have to overcome many obstacles, the main being crime.” Increasing development appears to create new opportunities for new forms of crime too. Today it is a truism to state that there is a relationship between crime and development. For many, crime and development are so closely interrelated that there is nothing more logical or

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\* President ACPF, Bangladesh, Ex- Inspector General of Police, Bangladesh.

natural than to look at them in a causative or at least highly associative manner.

One of the most important factors that needs to be emphasised is the moral issue. Economic growth should go hand-in-hand with stability of the moral standards of people. Thus the issue should be integrated in the national and economic plan; the root causes of criminal justice are from crime causation. The essential factors responsible for humanity's false views, eventually leading people to commit crime, as studied in Bangladesh, are mainly due to the following:

- i) Poverty, Greed, Hatred, Delusion, Frustration.
- ii) Bad Companions, Crime Victim, Inefficient Institutions.
- iii) Vulnerable Places, Drugs, Weapons or Arms Trafficking.
- iv) Polluted Environment, Migrant Forces, Jobless Educated Vagrants.
- v) Triads, Recidivist, Illegal Immigrants, Underground Cadres.
- vi) Political Patronage, Armed Goons, Violence and Terrorism.
- vii) Blackmoney, Bootlegging, Economic Crime Syndicates and Scams.
- viii) Political Victimization, Abuse of Power, Corruption, Nepotism.
- ix) External Interference, Smuggling, Illegal Trafficking of Women and Children.

## **II. CURRENT SITUATION, REASONS AND BACKGROUND OF CRIME**

In the backdrop of the position stated above, there has been research in social defence. Some developing countries have set apart quite a portion of their budgets for assessing the impact of technological development vis-a-vis moral degradation and the degeneration of the family structure. Unfortunately in developing

countries, especially in this region, not much importance has been attached to this aspect. Fortunately of late, United Nations agencies, the Asia Crime Prevention Foundation, UNAFEI Alumni Association and various NGOs and voluntary agencies have come forward to give serious thought and due consideration to sensitize this issue. To be specific, Bangladesh stands as a unique example where the unusual population boom within comparatively lesser habitable areas on the one hand, and dire poverty and innumerable jobless vagrants coupled with routine natural disasters on the other, have posed a serious threat to moral life. This has not drawn as much attention as it deserves from those who are concerned in perspective planning, objective law enforcement, desirable judicial process and welfare oriented rehabilitation of the incumbents. The result is that today we do not have the authority of the old guard and their moral values, who used to lead the family with age old norms and practices. Rather, abject poverty and avenues for abundance have made them forgetful of these values, making them prone to adventure, comforts and quick riches, irrespective of ethics and humane feelings.

From experience as a law enforcement officer over a period of four decades, it has been noticed generally that crimes have been committed comparatively more by rich and poor; whereas the middle class are rather more law abiding and respectful of conventions and customs. To illucidate through example, addiction to drugs is a new phenomenon which was not that prevalent a decade back. Statistics show that wards of the very well-to-do families, accompanied by their friends who are extremely poor, generally use and develop addiction unhesitatingly. This indicates that the "Haves" are associated with the "Have-Nots", in other words wealth and frustration, are mingled together to commit

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undesirable things without pricking of their conscience. Probably in both cases, guardians have not done much to control their dependents. Curiously enough, these offenders who often show muscle power and brandish illegal weapons, know that through undue influence they will mostly be immune of their misdeeds.

Confluence of legal justice and people's justice is the highway to a social justice state. Where the legislature, executive and the judiciary are well aware of their respective domain's rights and obligations to make the rule of law a reality of life and society. To keep society from falling apart, the first thing needed is law. And for law to be operational effectively, in the interest of cohesion of society, we have to have a sound system of criminal justice administration. Generally the members of police force are supposed to be the protectors of law. How they enforce it is the concern of the relevant authorities of the government. The police are one of the main functionaries for the entire criminal justice system - which is primarily composed of code (law), police (constabulary), courts (judiciary) and jail (corrections). The problems of criminal justice administration demand national action, where all the component partners are to duly play their role. Indeed they are supplementary and complementary to each other.

There is a feeling amongst a section of people that controlling crime is the sole responsibility of the police. This impression stems from the fact that the police occupy the front line in the efforts of a society to protect the life and property of its citizens. They are the people who directly confront the criminals and to whom the public look for personal safety. But it should be borne in mind that crime is a social problem and without the help and support of the community, the police can

not effectively check crime single handedly. It must be understood that the police do not keep public peace alone. Rather, an unconscious network of voluntary controls and standards among the people keeps it. This convention is more effective than the codes and law, as it is obeyed, not enforced.

Needless to say, we are in the midst of very trying times. Growing disrespect for law and order is reaching intolerable proportions. With new tension and conflict of power politics, greater responsibility has been thrust upon the police by this ever-increasing menace. We find increasing public concern over the decline of law and order, and defiance of rules and regulations. We also notice the declining public attitude towards the police and the reluctance of citizens to become involved in preserving law and order, especially to give evidence in court.

The police administration faces a dilemma when they are increasingly saddled with innumerable non-police jobs, which tell upon the efficacy of the enforcer. They are overworked, underpaid, undermined and underestimated. However, a certain group of people claim that the police always seem to be around when they are not wanted, and are often untraceable when desperately needed. However, police are found almost everywhere in the world. Even though most parties in power support the police on their behalf, generally the Opposition becomes very uncharitable towards them. The fact remains that because of some black sheep, excess and polarization, the whole department is often castigated and their image suffers a setback; reverting the good police to moral harassment and psychological disappointment, which is anything but desirable.

### III. RESPONSE OF THE CRIMINAL JUSTICE SYSTEM AND PROBLEMS THEREOF

Police, being the main organ of investigation, require not only special skills for their challenging job, but also public co-operation without which they cannot unearth clues to progress further bringing the real culprits to justice. For that, s/he needs to be a person of integrity and any sort of corruption is sure to mar the respect and confidence of citizens (which is gradually waning, even in the western countries). Unless the police force recovers the ground they have lost already, and do their best to establish their credibility, they will become less effective in their role as investigators. This is a matter of grave concern, especially in the crime control system, as certain civil liberties are sacrificed in order to secure the successful prosecution and conviction of the guilty persons - the investigator is allowed certain latitude to go astray to collect proof. This needs to be closely reviewed in the light of Article 31 of the Bangladesh Constitution "To enjoy the protection of law and to be treated in accordance with law"- the inalienable right of every citizen and every other person within Bangladesh. In particular, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken, except in accordance with the law.

The modern criminal justice system has evolved over the centuries to secure the rights of criminals, victims and society in general. Let us not forget that criminals are also human beings and deserve some rights, unless proved guilty of the offence charged.

As a crime is reported or suspected, it sets in motion the wheels of the system. Investigation is started, evidence is

collected; charge-sheets are framed for prosecution or final reports are given for not having the grounds to prosecute. The case may be sent to court either for trial or accepting the final report to close the issue. Here the police are both the investigator and also the decision-maker for prosecution. At the time of prosecution (generally for cases in lower court), court police, i.e. prosecuting sub-Inspectors, are authorized. Depending on the gravity of the case, the Government appoints an Assistant Public Prosecutor or Public Prosecutor, in collaboration with the Assistant Superintendent of Police (Prosecution), to work on behalf of the police cases, i.e. cases registered at the police station, either by the complainant or by the police themselves. In some exceptional cases, the Government hires a public lawyer/advocate of repute to conduct the case on behalf of the State. Similarly, in the absence of the accused or in case of pecuniary difficulties, the Government arranges a lawyer for the defendant so that no one goes unheard during trial, failing which may lead to a miscarriage of justice for not providing constitutional benefits to the aggrieved.

Presently, the picture of the criminal justice system and its administration does not give a very optimistic impression. The net result after all the stages are far from satisfactory. Here, among many other counts, there is a growing tendency to go for separate cadres of prosecutors, instead of engaging police officers for both investigation and prosecution. Many speakers, on different occasions, have remarked that the time has come to do away with the present system and that trained prosecutors should be utilized to serve the public interest better, to ensure that public money and judicial time are not wasted, and that police efforts should not go in vain. Hence prosecutors should weigh the evidence against the accused, the

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credibility, motive, character, antecedent, substance of evidence, reliability of witnesses and other relevant issues taken into consideration from a practical point of view. The Ministry of Law, Justice and Parliamentary Affairs is reportedly aware of the situation and some serious thinking is afoot on this issue.

Under the Code of Criminal Procedure, it is worth while to mention that cases are broadly categorized into cognizable and non-cognizable; with their classification effecting arrest, bail, compoundability, courts for trial, procedure of trial in complaint cases on First Information Reports or through cases registered directly at court. Foundation of the case is built during investigation, while the prosecution nurtures it thereafter; how the trial is to be conducted is the jurisdiction of the court. To get a fair and speedy trial is a fundamental right guaranteed in the Constitution, Article 35, protection in respect of trial and punishment; Article 33, safeguard's as to arrest and detention; and Article 31. The question of fair trial presupposes fair investigation and fair prosecution, and providing scope for the defense of the accused under legal dispensation.

In our criminal jurisprudence, a person accused of an offence shall be presumed to be innocent so long as he or she is not proved guilty by legal evidence beyond all reasonable doubt. The doctrine of reasonable doubt plays a vital role in our legal system as a safeguard against conviction of the innocent. Here though, it is expected that no crime should go unpunished - the law zealously guards the civil liberties of its citizenry. It insists that the prosecution, in order to secure conviction of an accused, must present acceptable evidence. A judge will exclude from consideration a piece of evidence which has been improperly obtained or

received. In this context, it is worth mentioning that statements made before the police under section 161 Cr.PC are not acceptable, while those made before a magistrate under section 164 Cr.PC are admissible in trial. This of course questions the efficacy of the investigative agencies performance, which deserves thorough reconsideration.

A special mention needs be made here that for the purpose of protecting social order and peace, by preventing prejudicial activities against the State, the Special Powers Act 1974 was enacted. There are many arguments for and against this Act, which curtails the fundamental rights of the citizen. Instances are not rare when the Government has sometimes used the provision of the law arbitrarily - though subsequently certain modifications have been made. Meanwhile, the Supreme Court took a commendable stand in checkmating arbitrary arrest and detention by granting anticipatory bail and directing the release of some detainees forthwith. However people's demand for repeal of the law remains as before.

'Justice delayed is justice denied' is an often repeated proverb. Again during martial law, another phrase was commonly used, 'Justice hurried is justice buried'. The whole drama of criminal proceedings ends with the verdict of the court, in which the police/investigator, the witness, the prosecutor and the judge/magistrate play their respective role. The judge is the keeper of the conscience of society, and prosecutors and defence lawyers are there to help them to come to the correct decision through an intricate battle of wits to thrash out the evidence and establish the truth (which may not necessarily be the whole truth). However in passing sentence, the court must have regard to the nature of the offence(s), status of accused and overall ends of justice. The crux of fair justice lies

in fair investigation, fair conduct of trial by prosecution and defence, proper application of law and impartial decision in the delivery of judgement.

But certain basic difficulties are real hindrances, like inadequate manpower for investigation. Police who are mostly busy with protocol duties, lack the modern equipment to help solve crimes. Public apathy to law enforcement, parochial appointment of public prosecutors, backlogs of cases (both in lower and higher courts), non-supervision of court proceedings, unnecessary adjournment, willful absence of the witnesses are significant impediments. Similarly, the unusual delay in getting reports from the lone chemical laboratory for the whole country, magistrate's other commitments, court logistics, inherent deficiencies in law and rules made during colonial regimes, fraudulent practice in the arena of judicial process, insufficient budget provisions and above all, the vested interests of the party in power and the opposition too need to be overcome.

#### **IV. COUNTERMEASURES TO IMPROVE AND ENHANCE REMEDIAL ASPECTS OF THE PROBLEMS IDENTIFIED**

These days, economic crimes like bribery and corruption are increasing at a fast rate, being organized, deep-rooted and systematized. In some cases, the practices go far beyond national geographic limits. With the expansion of foreign aid and investment, these groups are intent on reaping the harvest themselves. It is needless to say that instead of sustainable growth and development for the vulnerable segments, the rich are becoming richer and the vast majority are often deprived of the benefits of the so-called 'Pro-poor Agenda'. A disproportionate burden of the misery of poverty falls upon women and children. As

a corollary, there have been innumerable instances of illegal trafficking of women and children across the border.

The Constitution has an explicit "social equity" clause under Article 19 (2). Practically, one of the difficult problems is the very real gap between formal legal equality between citizens, and the real inequality in their actual conditions. Thus UNDP in their report states that "absence of an accountable system of democracy and good governance" is a "major cause of poverty". They also identified law and order as one of the priorities under good governance. Equal protection of law needs reasonable opportunities to access the course of law. Otherwise justice remains a myth. "justice is always advantageous to the rich" is equally applicable here. Major imbalances in progress often causes conflict among people and thereby increase unhappiness in the environment.

The study also noted that one of the fundamental problems was the dissonance between laws and their implementation. Good laws remain rarely implemented. Fundamental rights guaranteed by the Constitution and internationally adopted human rights legislation are also hardly translated into reality. All such covenants to which the country is a signatory must be implemented so that society does not fall into the grip of terrorists and political goons who commit violence anywhere they like.

There has been growing awareness amongst the public for improvement of the judicial process and prevention of the cycle of crime. A good many steps are in hand by government authorities for this purpose. To highlight some of these, the following are worth mentioning. The Ministry of Home Affairs has given serious thought to induct women police officers more actively in investigations for better detection of cases, especially in handling women

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accused of crimes.

As police personnel are mostly busy with non-police jobs, the question of investigating police, who will concentrate on criminal cases only is being considered.

The Ministry of Local Government has passed a bill for setting up Village Courts in rural areas and an Arbitration Council in municipal areas to dispose of petty cases, outside the formal courts. Besides this, the Family Court has also been set up to settle disparities between husband and wife, which also reduces the workload in police stations and courts.

The Local Government Institute building has been geared up to strengthen law and judicial aspects too. The Ministry of Law, Justice and Parliamentary Affairs has set up a Law Commission and Judicial Training Institute to update laws and to enlighten judicial officers with new laws and conventions. Steps are being taken to increase the number of chemical laboratories, juvenile remand homes, Courts for Violence Against Women and separate courts for metropolitan areas.

The Criminal Law Amendment Bill has been authorising District Judges to hear appeals for civil cases, which may lessen the burden of the High Court Division. Besides, new courts are being set up for metropolitan cities to dispose of cases only within the metropolitan jurisdiction.

The Ministry of Foreign Affairs has recently been more active in persuading regional neighbours to exchange delinquents, and information thereof, for facilitating the dispensation of justice. Moreover, the border conflicts and issues relating to illegal trafficking of women and children, especially unauthorized entry of susceptible citizens and arms dealers, are being taken care of.

The Government appreciates the endeavors of NGOs working in the relevant fields to make the concerned agencies more sensitized to vulnerable issues. Consequently, awareness creation and capacity building is progressing more than before to work hand-in-hand for a crime free society.

**V. EFFECTIVE GENERAL  
PREVENTIVE MEASURES TO BE  
IMPLEMENTED THROUGH BOTH  
THE CRIMINAL JUSTICE SYSTEM  
AND MORAL ENLIGHTENMENT**

There are many value systems in the changing world. Sometimes we think of our obligation to care for the old and provide them with social security as useful work. As senior citizens, they do deserve special consideration and hence care for the aging, elderly, infirm and handicapped needs to be ensured. All possible modes of co-operation between government and non-government organisations are explored to provide timely services in these fields. These days, we cannot ignore women (48% of total population). Gender mainstreaming for national growth is a must, and more so when we have the unique position of women at the top of both the party in power and the main opposition. Simple slogans will not do, there must be mental change in attitudes, to treat them well. To cite an example, the incidents of rape and immoral trafficking is very much on the increase. Law is there, but perhaps a special task force is needed to ensure that these laws are implemented well and the civil society, i.e. community as a whole and the media in particular, can do a lot to attain the goal of 'security and freedom'. This will help ensure the function of the legal frameworks, sound institutional arrangements, and capacity building for implementation of desirable aspirations for vulnerable groups.



The increasing mobility of the population, the growing communications and financial links among different countries of the developing and developed world, and internationalization, have caused significant change in criminality. For such transnational criminal activities, all concerned agencies could put their heads together. Lack of extradition treaties amongst various countries have posed serious problems. If it is not possible to go for formal treaties, at least some sort of mutual understanding among the international, regional and sub-regional areas, and cooperation through bilateral and multilateral schemes, could lead to this ultimate goal. To cite an example, Bangladesh and Thailand have already implemented an extradition treaty, and there is already some sort of agreement with Myanmar and Iran, particularly for drug-related offenders. Questions of repatriation of the accused in heinous cases is being studied and pursued vigorously with other countries, which may auger well in due course.

In the light of the above, volunteer organizations can come forward to help each other in containing the increased phenomenon of multi-national criminal incidence, through motivating their respective governments and representatives of parliament, besides the persons actually responsible at the policy level.

In the context of present day law enforcement and judicial process, the majority of taxpayers do want change. Familiar practices are disappearing and in their place unprecedented, productive and efficient client-oriented services have become the need of the hour. Today, the security industry is growing tremendously fast. Many of them are actively engaged in law enforcement responsibilities as an alternate force, especially in the private

sector (e.g. industrial projects, multinational organizations even in the protection of the VIP/CIP of these domains). Naturally, they need to be conversant with procedure and training to enlist the co-operation of public law enforcement services, and their relationship should be aimed at novel social conditions to provide maximum support to benefactors.

The important aspect of retribution and punishment deserves to be reconsidered. Offenders are punished because it is unavoidable, and to eradicate evils from the society. Instead of 'jail', many countries (as in Japan) call them 'correctional institutes' ; making the inmates repentant so that they can join their family and contribute as normal citizens. Perhaps the phrase "hate the sin - not the sinner" needs to be reminded, so that the social stigma is not made permanent to the inmates of prison, lest they become recidivists and make the situation worse.

With that end in view, the significance of prison administration could be a necessary and healthy adjunct of crime prevention and the treatment of offenders. The concept of prison administration as an institutional device for corrections and rehabilitation is gaining ground and deserves more serious and immediate attention from the legislature, executive and judicial policy makers, and social thinkers and experts thereof.

## VI. CLOSING WORDS

Like most social sciences, criminology uses knowledge and methods from many fields, such as law, sociology, psychology, medicine and statistics. This implies that research on criminological problems can take place at universities, as well as government or non-government

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organisations and voluntary agencies. But one thing must be kept in mind, like medical patients, prevention is better than cure; this is particularly applicable to deviants of law, juvenile delinquents, drug addicts or adventurers in the criminal arena. For that, the dissemination of knowledge through institutes like INTERPOL is preferred. The UNO, within its umbrella of functions, could look into how effectively it could cooperate with a particular country and its technical support system.

A well coordinated system of technical assistance needs to be evolved under the auspices of the UN to help detect crime and ensure follow-up action for bringing the culprits to justice, for the greater good of the nations. UNAFEI is acting as a clearing house for such methodologies and training in the Asian and Pacific regions, actively co-operating with the government of Japan and indirectly through the Asia Crime Prevention Foundation and other institutions. The community as a whole must also be acting as a responsible citizenry, to come forward with action programs against all social evils.

At this critical juncture of history, we need to get back our confidence in the essential rightness of our wisdom, to reassure ourselves that we have the capacity to bring our material and intellectual resources to bear on finding solutions in confronting crime. The organs of criminal justice administration should be left to do their job professionally, so that they are made more transparent, accountable and efficient through monitoring by the watchdog public (i.e. taxpayers).

Democracy can not work unless the rule of law is itself objectively and impartially observed. If the government does not themselves observe the rule of law, then

the whole international system collapses. This is what has been happening. In this situation the only effective protection we have is the will and determination of ordinary people to bring back sanity. In this task, each profession and each discipline, especially police, prosecution, judiciary and corrections, will have to become more involved in the process of securing a return to the rule of law and to the development of a greater sense of responsibility and political commitment on the part of the rulers and the people themselves.

Thus in the changing society of today, and in the future perspective, to break the cycle of crime, it is incumbent on the peacemakers of nations to join hands with the citizens they serve, employing their combined strength and dedication to make positive changes in the quality of life in our communities. That needs total co-operation of all concerned in general, and politician's sincere and serious commitment in particular, to enable the researchers and enforcers to meet expectations to face the challenge of the new millenium- which is only less than a year away.

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**ANNEXURE I**

**INVESTIGATION AND PROSECUTION OF CASES (TO JUNE 1998)**

Total Cases	Charge Sheet	Percentage	Final Report	Percentage	Pending	Accused	Arrested
54704	22846	73.45%	8260	26.55%	23598	150809	45692

**ANNEXURE II**

**INVESTIGATION, PROSECUTION AND TRIAL OF CASES (1997 & 1998)**

	Total	Charge Sheet	%	Final Report	%	Pending	Conviction %	Acquittal %	Pending Trial
1997	10261	67009	71.68%	26478	28.32%	8674	20.05%	79.95%	60791
1998	93310	63744	70.15%	27118	29.85%	2948	19.96%	80.04%	49472

# **TOWARDS A RESPONSIVE CRIMINAL JUSTICE SYSTEM IN THE PHILIPPINES**

*Judge Lilia C. Lopez\**

The criminal justice system of any society depends so much on the thorough, efficient and effective functioning of the all the principal actors involved in the dispensation of justice. The efficient and effective functioning of one component may be hampered by the inefficiency and incompetence of the others. Thus cooperation, and the coordinated and concerted action of the police, prosecution, the judiciary, as well as the correctional institutions, and most importantly, the community - the so-called pillars of the criminal justice system - is necessary. That is, however, easier said than done, especially in a country like the Philippines, where the governmental agencies involved are beset by financial, technological and institutional constraints, and where the citizenry are increasingly becoming alienated from each other. Though it may be a daunting task, the Government has continually instituted measures to responsibly address these problems.

The first part of this paper will deal briefly with the five pillars of the criminal justice system in the Philippines, under the framework of a republican government as enshrined in the Philippine constitution. This will involve discussion on the doctrine of separation of powers, the different branches of government involved and the delineation of their function. Particular emphasis will be placed of the police, the prosecutor and the judiciary. The second part will be a discussion of the procedure involved in law enforcement, prosecution and trial of offenders, the current situation

of and problems faced, respectively, by the police, prosecutors and the judiciary.

## **I. SEPARATION OF POWERS IN THE PHILIPPINES**

The Constitution of the Republic of the Philippines divides the government into three equal and co-ordinated branches, namely, the legislative, executive and the judiciary, each of which is supreme within their respective spheres. Neither of them may encroach upon the function or domain of the other. The law-making function is lodged in the Philippine Congress, composed of the Senate, whose members are elected by the voters of the whole country, and the House of Representatives, whose members come from districts chosen by the voters therein. The executive function, the duty to enforce the laws, falls on the President of the Republic. It is to the Supreme Court and the other courts created by law that the judicial function is lodged.

Among these three branches, those that are directly involved in the administration of justice are the executive branch through the police and other numerous law enforcement and prosecution agencies, as well as the correctional institutions, and the judiciary. The agency primarily in charge of law enforcement is the Philippine National Police, which is under the control of the Office of the President through the Department of Interior and Local Government. There are also specialized agencies dealing with specialized cases such as the Bureau of Internal Revenue,

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\* Executive Judge, Regional Trial Court, Philippines

in charge of matters relating to taxation, and the Immigration Department, on immigration matters. The National Prosecution Service, under the Department of Justice, is the principal agency in charge of the prosecution of offenders. There is, however, a unique agency of the government which is the Office of the Ombudsman, charged with the prosecution of certain crimes involving public officials or those connected with the performance of public functions.

## **II. THE FIVE PILLARS OF THE CRIMINAL JUSTICE SYSTEM**

### **A. The Law Enforcement**

The law enforcers are at the forefront of the criminal justice system of the country. They are the ones that directly deal with the citizenry and are directly exposed to the criminal elements. There is, therefore, the necessity for the members of these law enforcement agencies to be well oriented with, and trained in the ways of, the civil society.

Thus, the 1987 Constitution of the Philippines mandated the creation of a police agency that is national in scope and civilian in character. Pursuant to this constitutional provision, a law was enacted creating the Philippine National Police out of the defunct Philippine Constabulary and its civilian component, the Integrated National Police. The said agency is charged with the duties of crime prevention, law enforcement, preservation of peace and order, as well as the internal security of the government under the control and supervision of the Department of Interior and Local Government. Also performing law enforcement functions is the National Bureau of Investigation, which is under the control of the Department of Justice. These agencies are authorized to conduct investigations of crimes, gather evidence

with respect thereto, arrest suspects and refer cases to the prosecuting arms of the government.

Within the police organizations, there are departments tasked with investigating complaints against erring officers, and administrative tribunals that hear and decide the cases lodged against them. The efficiency and effectiveness of these bodies help polish the image of the police organization as a body that the people can rely on. There are also specialized agencies whose duties are to enforce special laws relating to highly specialized matters such as immigration, tax, land, air and water transport, and customs.

### **B. The Prosecution**

The prosecution function is lodged mainly with the National Prosecution Service, under the Department of Justice. It is composed of the Office of the Chief State Prosecutor, the Regional State Prosecutor's Office and the Provincial and City Prosecutor's Offices. The Office of the Chief State Prosecutor has the following functions:

- a) Investigate and prosecute crimes
- b) Decide appeals from decisions of the provincial and city prosecutors
- c) Investigate administrative charges against prosecutors

The Regional Prosecutor's Office is charged with the administrative task of supervising and coordinating the performance of the Provincial and City Prosecutors within the region. The Provincial and City Prosecutor's Office is the lowest in the administrative hierarchy, and is charged with the investigation and prosecution of all violations of penal laws and penal ordinances within their respective territorial jurisdictions.

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There have been innovations instituted by the prosecution department with regard to the handling of cases involving different crimes. These innovations have been geared towards a system of specialization in the handling of criminal cases. On the level of the Provincial or City Prosecutor's Office, a small number of prosecutors have been tasked with the prosecution of certain crimes, particularly those involving sensitive matters like rape. Task forces have also been set up in the Office of the Chief State Prosecutor like those involving abuse of minors, those affecting the economy, etc. This specialization hastens the prosecution of cases, as the prosecutors assigned are familiar with the intricacies and strategies in the handling of such cases.

There are also specialized agencies charged with prosecuting special cases. Among these is the Office of the Ombudsman, created under the constitution, and is independent of the executive branch of the government. This office is mandated among others, to investigate and prosecute cases involving public officials and employees who have committed crimes in relation to their employment. It is because of this function that its independence is of paramount importance - the reason being to insulate it from the political branches of the government.

Another agency is the Commission on Elections, charged with the enforcement and prosecution of all election offenses. This is also independent of the three main branches of the government. There are also public defenders being paid by the government to render legal services for those who cannot afford to pay their own. That agency of government is known as the Public Attorney's Office. There are also institutions or individuals outside the government that are offering legal

assistance to the needy, like the legal aid programs of law schools recognized by the Supreme Court, and the legal aid offices of Bar Associations in the country. There are also lawyers who do *pro bono* work for the underprivileged, aside from lawyers provided by the court when a litigant cannot afford the service of one.

These benevolent institutions and individuals help immensely in the administration of justice, as they facilitate the disposition of cases before the prosecutors or the courts, not to mention their very important function in safeguarding the constitutional rights of their clients.

### **C. The Judiciary**

The judiciary is the final arbiter of controversies, of competing claims and interests, including the determination of the guilt or innocence of a person charged with the commission of a crime. The judiciary in this country is composed of one Supreme Court, which is at the top of the judicial hierarchy, and the other courts created by law.

The independence of the judiciary has been strengthened under the 1987 Constitution by giving it fiscal autonomy; administrative supervision and discipline over its own personnel; and the appointment of the members thereof by the President alone, thereby shielding the appointees from the pressure of party politics which was prevalent in the past selection process (requiring the confirmation of the appointees by the Commission on Appointments, composed of the members of Congress). Further, the justices of the Supreme Court are only removable from office by impeachment and conviction of a culpable violation of the constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of the public trust. This enumeration is

exclusive and the power to impeach and convict lie with the Senate and the House of Representatives, respectively. Furthermore, the judiciary has a system of policing its own ranks so as to rid itself of incompetent judges and other erring court personnel.

The other courts created by law are, amongst others, the Court of Appeals and the constitutionally mandated Sandiganbayan, which are collegiate courts and exercise appellate jurisdiction over the Regional Trial Courts; the Municipal or Metropolitan Trial Courts; and lately, the Family Courts in appropriate cases. The Sandiganbayan and the Family Courts are specialized courts that deal with offenses involving government officials and those involving the family and minors respectively. These courts, due to their specialization, expedite the proceedings before them, because of the knowledge that the judges have acquired in the course of their service, and at the same time, serving the interests of the persons for which those courts were designed to protect. This is without prejudice, however, to the constitutionally protected rights of the accused.

#### **D. The Correctional Institutions**

The agencies involved in the punishment of convicts all fall under the executive department of the government, such as the Bureau of Jail Management and Penology, which is charged with the incarceration of non-minor convicts, and the Department of Social Welfare and Community Development, who run correctional institutions for youth offenders.

#### **E. The Community**

The members of the community play a very important role in the criminal justice system. It is from their ranks that the offenders come and it is with them that they will end up. The involvement of these

people in the programs and projects of the government, even those that are not necessarily connected with the administration of justice, contribute to the lessening of crimes, as their efforts are diverted to more productive matters. They can also contribute immensely in solving crimes by assisting in police investigations, giving testimonies, providing leads and the arrest of criminals. Included as part of the community are the government agencies not involved with the administration of justice, as well as the members of the private sector.

### **III. PROCEDURES IN THE ADMINISTRATION OF JUSTICE IN THE PHILIPPINES**

At present, the types of crime that have gained media prominence, and thus have been given particular importance, are those so-called heinous crimes involving the imposition of the death penalty. Included are the crimes of rape (committed under certain circumstance specified in the law), murder and illegal drug trafficking, amongst others. Regardless however of the type of crimes committed, be they heinous, serious or light, the procedure for the investigation, prosecution and trial of the cases is more or less the same, except for those triable under the rules of summary procedure, whereby no trial is conducted and the judgment is based merely on the affidavits submitted.

#### **A. The Law Enforcement Process**

The law enforcement process begins the moment the crime is reported or a complaint is filed before the police. The police then conduct an investigation of the crime, take the testimonies of the witnesses, collect the evidence available and take steps to apprehend the offender. The arrest of the perpetrator does not ordinarily happen without the warrant of

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arrest, as required by the Constitution, unless the arrest of the person suspected of the crime falls within the exceptions from the necessity of a warrant recognized under the law.

In cases where the offender is caught by the police in the act of committing, attempting to commit or having just committed the crime, the suspect is detained and is subjected to a process called an 'inquest'. An inquest is a procedure whereby a prosecutor is immediately available after the arrest of the suspect to determine whether a crime was committed and the person arrested is the one responsible. This process is sometimes called an abbreviated preliminary investigation.

When the prosecutor finds that a crime has been committed and the person is probably guilty, s/he prepares a recommendation to the provincial or city prosecutor for the filing of an information against the detained person. If on the other hand, no cause is shown to exist, or the person detained does not appear to be the one responsible for the crime, the prosecutor directs the officer in charge of the detention facility to set free the prisoner.

### **B. The Prosecution Process**

Once the police are through with their investigation of the case, they forward their findings to the prosecutor for the proper procedures. The prosecutor is, as a general rule, a passive subject, with the prosecution of the case being dependent largely on the efforts and determination of the complainant or the aggrieved party. The latter may dismiss the case outright if the facts do not warrant a *prima facie* case or, as is usually done, set the case for preliminary investigation.

Preliminary investigation is defined as the proceedings for the determination of whether there exists sufficient ground for believing that a crime, cognizable by the Regional Trial Courts, has been committed, and that the respondent is probably guilty thereof. At this stage, the suspect and the private complainant are given the opportunity to present their case before the prosecutor. The prosecutor usually does either of these:

- i) dismiss the case for lack of a *prima facie* case to charge the respondent for the alleged crime;
- ii) finds that a crime has been committed and that the respondent charged with the crime is probably the perpetrator.

When the first is done, the complainant may seek a reconsideration of the decision, or appeal the ruling to the Secretary of Justice, who may direct the prosecutor to file the case if they find merit in the petition or affirm the decision of the prosecutor.

Under the old rules of jurisprudence, the prosecutor has much leeway in deciding to file the case or not. The discretion lies solely on them such that no one, not even the courts, can substitute their judgment for that of the prosecutor, save on certain occasions when the latter may have gravely abused such discretion. This is true even in the case of a reversal of a dismissal order of the prosecutor by the Secretary of Justice, where the prosecutor is of the conviction that there is insufficient evidence to warrant the filing of the case in court. What is usually done in this case is that the Secretary of Justice appoints another prosecutor to handle the case. However, under the prevailing rule, as long as there is a finding of a *prima facie* case, the prosecutor is duty bound to prepare an information against the accused.



The action of the prosecutor on a case is, as a matter of practice, dependent largely on the evidence presented by the complainant and/or the police, and the determination of the latter to pursue the case. Otherwise, as is often done, the case is dismissed even when the evidence warrants a finding of the commission of a crime, even though it does not appear that the respondent charged by the complainant is the one probably guilty. It is only on rare occasions, and most of the time when pressured by the media, that the prosecutor would direct the police to collect more evidence to establish the perpetrator of the crime. This hesitation to, or predisposition not to, direct the police to further investigate the case stems from the fact that under our system, the police are not subordinate to prosecutors; not to mention the fact that they belong to different departments of the executive branch.

The dismissal of the case however does not constitute a bar to the re-filing of the same, especially when the grounds for re-filing is insufficiency of evidence. The effect of a dismissal of the case by the prosecutor is unlike that effected by a court, which may constitute a legal bar for the filing of the same case against the same accused - what is termed as 'double jeopardy'.

It is also at this stage that settlement of the case is greatly encouraged between the parties involved. Furthermore, the government has set up a mechanism called the Barangay Conciliation Panel for the settlement of cases between parties residing in the same town or city involving non-serious offences; specifically those crimes that the punishment for which does not exceed one year imprisonment. This program has been devised not only to limit the cases being filed in court, but more importantly, to preserve the good relations of the inhabitants within the same locality.

### **C. The Judicial Process**

In the Philippines, the very title of the criminal case is frightening. It is entitled: People of the Philippines versus [the name of the accused person]. The moment a prosecutor has made a determination that there exists a *prima facie* case, the information is then prepared and filed before the court, after which it undergoes a case processing system and is allocated to the proper court. Immediately thereafter, the court assesses the information, the record and the evidence submitted, and the judge then makes a determination as to whether or not the accused is probably guilty, warranting his/her arrest. It is therefore not the duty of the courts to issue a warrant of arrest. The court issues a warrant for arrest which is addressed to a peace officer. The officer then serves the warrant on the person named therein, and commits the latter into prison. In our jurisdiction, all accused persons have the right post bail, save in cases of crimes punishable by *reclusion perpetua*, life imprisonment and death, where the evidence of guilt is strong.

After the filing of the information, the court will, without delay, set the date for arraignment of the accused, which must be within thirty days from the filing thereof. At this stage, the accusation against the accused is read before them in open court (in a language known to them) and s/he is required to make a plea thereon. When the accused enters a plea of guilty, the court will painstakingly explain to the accused the consequences of their plea. If, despite such explanation, the accused still maintains their plea, the court directs the prosecutor to present the evidence against the accused, which does not require a prolonged trial. According to recent jurisprudence involving the death penalty, the court is duty bound to conduct a full trial to determine the exact participation of the accused in the crime charged. When

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the accused pleads not guilty to the crime charged, or refuses to enter a plea, or pleads guilty to a lesser offence, which is equivalent to a plea of not guilty, the court enters a plea of not guilty on the records.

Before trial of the case on its merits, it is now mandatory that the case is set for pre-trial conference, whereby efforts to amicably settle the dispute are exerted in order to avert trial, or matters are agreed upon to expedite the trial. This stage has recently been made mandatory under the newly enacted Speedy Trial Act of 1998 (Republic Act No. 8493). Matters for consideration during this stage of the proceeding are:

- (a) Plea bargaining;
- (b) Stipulation of facts;
- (c) Marking for identification the evidence of the parties;
- (d) Waiver of objections to admissibility of evidence; and
- (e) Such other matters that will promote a fair and expeditious trial (Sec. 2 R.A. No. 8493).

Matters agreed upon by the parties are inadmissible as evidence against the accused, unless the same is reduced to writing and signed by the accused and their counsel. Furthermore, non-appearance in the pre-trial conference by the counsel for the accused or the prosecutor will be subject to sanctions at the discretion of the judge.

The case is then set for trial which, according to the Speedy Trial Act, must be continuous and on a "weekly or other short-term trial calendar at the earliest possible time", but within thirty days from the date of the arraignment. There is also a time limit for the duration of the trial which is one hundred and eighty days from the first day of trial. These time periods have been imposed to counter delays in the dispositions of cases. However, the said

time period is not fixed, as the law allows certain delays that may be excluded from the required time limit. The circumstances whereby exclusions are allowed are numerous and may ultimately defeat the purpose of setting a time limit.

The order of trial of the case depends upon whether the accused interposed a negative or affirmative defence. If a negative defence is interposed, which is normally the case, the trial begins with the presentation by the prosecution of the case against the accused. The witnesses of the prosecution, after the presentation of their testimony, are cross-examined by the defence. After all the evidence of the prosecution has been presented, the defence present its case, with the presentation of all their evidence.

When the accused interposes an affirmative defence, the order of the trial is slightly changed, with the defence first presenting their case followed by the prosecution. Such inverted procedure is necessitated by the nature of an affirmative defence, which essentially admits the commission of the acts charged but advances certain circumstances which would serve to exculpate the accused from criminal liability.

It is also during the trial of the case that the parties must present evidence which may aggravate or mitigate the crime committed by the accused. Otherwise, they are waived and may not be considered by the judge in the sentencing of the accused. After all the evidence has been presented, the case is then submitted for decision, unless the court requires the submission of written memoranda or allows the counsel of the accused and the prosecutor to present their respective arguments orally.

It is during the trial that the rules of evidence come into play. The rules of

evidence however have not yet been adapted to the possibilities opened up by technological advances, particularly in the fields of computers and telecommunications. The use of this technology in the courtroom would speed up the trial of the case as there would be no need, for example, for the persons testifying to appear before the court personally. Thus, delays due to the unavailability of witnesses will be avoided, and precious resources of time and money will be saved.

During the trial of the case, a person included in the information may be discharged as an accused and become a witness for the State, if the testimony of the same is indispensable to the successful prosecution of the case against the other accused. The discharge must be agreed upon by the accused themselves and approved by the court. The discharged accused then becomes a State witness and qualifies under the witness protection program of the government if s/he applies for and meets the qualifications set by the law. In order to be admitted to the witness protection program, one does necessarily have to be an accused discharged from the information. They may be a witness in the commission of the crime and their protection is necessitated by considerations for their safety. Those admitted to the program are entitled to police protection and are most of the time, placed in a safe house. This arrangement facilitates and makes available the witness when called to testify before the court.

After the trial is finished and the case is submitted for decision, the court where the case is pending must render judgment within the time directed by the Constitution. Otherwise, the judge involved will suffer sanctions. The time limit for rendering judgment is twenty four months for the Supreme Court; twelve

months for lower collegiate courts, like the Court of Appeals and the Sandiganbayan; and three months for other lower courts. In deciding the case, the Constitution requires that judge set forth clearly and in writing the facts and law on which it is based, considering only the evidence presented in the proceedings.

#### **D. Remedies for the Accused**

When the court finds that the evidence against the accused is insufficient to convict, the accused is acquitted and no accusation based on the same act(s) can be filed against them, nor can an appeal be made therefrom because of the principle of double jeopardy.

If, on the other hand, the court convicts the accused because, in its view, guilt of the crime charged has been established beyond reasonable doubt, the latter may move for a new trial or reconsideration. The motion for a new trial may be based on either of the following grounds:

- (a) That errors of law or irregularities have been committed during the trial prejudicial to the substantial rights of the accused;
- (b) That new and material evidence has been discovered which the accused could not, with reasonable diligence, have discovered and produced at the trial, and which if introduced and admitted, would probably change the judgment.

The motion for reconsideration may be based on errors of law or fact in the judgment.

The accused may, in lieu of the aforementioned remedies, or after the denial of the motion, appeal to the Court of Appeals or the Supreme Court within the period set forth in the law. In cases involving the sentence of death, however,

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the law provides for automatic appeal of the same to the Supreme Court. In case the appeal is found to be without merit, and the conviction is affirmed, the case will be remanded to the court of origin for execution of the judgment. The court of origin will set a date for the accused to appear before the court for the enforcement of the judgment. The court will then issue an order committing the convict to a penal or correctional institution for serving their sentence.

**E. Other Functions of the Court**

In our jurisdiction, adjudication is not the sole function of the courts. It has other powers and duties as well.

The Supreme Court, under the Constitution, has administrative supervision over all courts and the personnel of the said courts. It has the power to discipline judges of lower courts and order their dismissal by a vote of a majority of the members who actually took part in the deliberation of the case and voted thereon. In the same manner, the Supreme Court has the power to discipline attorneys and may disbar, suspend or impose such penalty as it may deem proper, for violation of the Code of Professional Responsibility.

The Court of Appeals and the Regional Trial Court may suspend an attorney from practice for any of the following acts or omissions: lie, deceit, malpractice, gross misconduct in office, grossly immoral conduct, conviction of a crime involving moral turpitude, violation of the attorney oath, wilful disobedience of any lawful order of a superior court, or corruptly or willfully appearing as an attorney for a party to a case without authority so to do.

The Supreme Court of the Philippines, under the Constitution, has the power to promulgate rules concerning the protection

and enforcement of constitutional rights, pleadings, practice and procedure in all courts, admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules are intended to simplify and render inexpensive the procedure for speedy disposition, which shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights.

Special courts and quasi-judicial bodies have the same power to promulgate rules governing their procedure, and such rules shall remain effective unless disapproved by the Supreme Court. Other Courts may also lay down rules applicable to proceedings before them, or in respect to their premises and facilities.

**F. Delay and Inefficiency in Court Proceedings**

The Honorable Chief Justice, Andres Narvasa, in his handbook on courts, cited the following causes for case delay, namely:

- (a) an increase in the number of cases filed over the years due to the heightened awareness of people of their rights and privileges, the enactment of new laws and rules, as well as increased government actions affecting private individuals;
- (b) the lack of courts, and slowness or difficulty in filling up vacancies;
- (c) the small budget allocated to the judiciary;
- (d) the complexity of the rules of procedure;
- (e) the inadequacy or failure in cooperation of court-related agencies and officers.

These problems, according to the Honorable Chief Justice, are being dealt with. According to him, appeals to the Congress for increased funding have been answered favorably; "The Judicial and Bar

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Council continues to meet regularly to submit to the President nominations for vacancies in the judiciary. Coordination of the courts with other pillars of the CJS is pursued and fostered. The Supreme Court's Standing Committee on the Revision of the Rules of Court continuously review the procedural law with a view to amendment and refinement, so that procedures will be further simplified, rendered more inexpensive, and conducive to the speedy disposition of cases. Significant revisions to this end have been proposed by the Committee promulgated by the court, and are now in force," particularly the Rules on Civil Procedure.

Furthermore, according to him, "In the very nature of things, litigation takes time. Time is needed to serve the process by which parties are brought within the jurisdiction of the courts; to enable the parties to fully express to the court their basic theories of the case; to enable them to present evidence in proof of their averments, for the court to consider the proof after trial and render judgment; for a party adversely affected by a judgment to seek modification or reversal thereof by appeal or otherwise; for the appellate tribunal to be informed of the parties positions and proof, study the case and decide on it. The law sets definite periods for the various steps and processes in litigation; and so long as litigation moves apace with these periods, no matter how measured the movement, there can be no legitimate complaint about delay."

### **G. Strategies**

The courts pillars have adopted the following strategies under the 5-Year Master Plan of Action for Peace and Order:

- (a) The dissemination of information regarding the working and procedures of the courts;
- (b) The continuing revision, amendment

and/or modification of the Rules of Court for the purpose of attaining speedy administration of justice;

- (c) Work for the full realization of the constitutional autonomy of the Judiciary, in order to achieve its true independence; and
- (d) The grant of awards and/or recognition to deserving judges and court personnel through the merit system.

The first strategy was prioritized by the courts pillars and a series of symposia were conducted nationwide, which were test-piloted at the University of the Philippines Law Center in Diliman, Quezon City. Workshops were conducted during the symposia to find out the perception of participants of the workings of the courts and what the public could do to help in the administration of justice. The following recommendations were made:

- (a) Expansion of the jurisdiction of the Municipal Trial Court. The distance and travel time of litigants/respondents who come from far-flung areas hamper the speedy resolution of the case;
- (b) Provision in every municipality for a Municipal Trial Court and prosecutor;
- (c) Translation of case decisions in a dialect that will be understood by the accused/respondents;
- (d) Inclusion in the school curriculum subjects regarding the criminal justice system, particularly the operational system and workings of the courts, so as to inform the public on how the criminal justice system in the Philippines works;
- (e) Institutionalization of an indigenous system of settling disputes in the judicial system; and
- (f) Creation of a committee to monitor and determine the performance of

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judges and the number of cases assigned to a particular *sala vis-a-vis* the number of cases acted upon.

An assessment and evaluation of the symposia was made by the participants as follows:

- (a) The symposia provided more information and familiarization on the operational system and workings of the judicial system;
- (b) Similar symposia must be conducted from the provincial level down to the barangay level. Lectures should be translated into the dialect of the area;
- (c) The symposia enlightened the minds of those with negative beliefs about the judicial system and provided public awareness of the criminal justice system as a whole;
- (d) The symposia provided clear vision on the jurisdiction of the different courts such as the MTC, RTC, Court of Appeals and the Supreme Court;
- (e) Participants gained insights on the actual situation in the courts and the causes of delay in the disposition of cases; and
- (f) Participants from different sectors were given a chance to voice out their opinions and problems they are encountering in the judicial system.

Regarding the revision, amendment and/or modification of the Rules of Court for the purpose of attaining speedy administration of justice, the Supreme Court, after painstaking study, promulgated the New Rules on Civil Procedure April 8, 1997, made effective last July 1, 1997.

The Committee on the Revision of Rules, since 1997, continued its meetings for tackling the proposed amendments to the Rules on Criminal Procedure. The Committee likewise discussed the rules and

guidelines in the filing and prosecution of criminal actions under Batas Pambansa Bilang 22, otherwise known as the Bouncing Checks Law, and the court approved the circular in respect thereof. The following recently enacted laws were also discussed by the Committee:

- (a) Republic Act No. 8358, "An Act Expanding the definition of the crime of rape, reclassifying the same as a crime against persons".
- (b) Republic Act No. 8369, "An Act establishing Family Courts granting new exclusive original jurisdiction over child and family cases."
- (c) Republic Act No. 8493, "An Act to ensure a speedy trial in all criminal cases before the Sandiganbayan, RTC, MTC, MCTC, appropriating funds thereof and for other purposes."

For the full realization of judicial independence, the proposal of the Judicial Department to Congress for an increase in its budget has been favorably acted upon by the latter, and other departments of the government have respected the fiscal autonomy of the judiciary. The court will continue to ask the legislature for greater allocation for the Department to enable it to put in place constructive judicial reforms; continue judicial training and education programs in full operation; implement the Family Court system; provide more incentives to present incumbents at all levels of the court, as well as candidates for the bench; and for the completion of its computerization program.

To inspire members of the bench to excel in their chosen fields, an annual grant of awards for outstanding trial court judges, prosecutors and public defenders is given by a private foundation. The objectives of this merit system are to give honor and due recognition to outstanding judges, public prosecutors and public attorneys, and to

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encourage exemplary performance and  
conduct among public servants,  
strengthening citizen's faith and confidence  
in the rule of law.

# THE ROLE OF POLICE, PROSECUTION AND THE JUDICIARY IN THE CHANGING SOCIETY - THE SINGAPORE APPROACH

*Judge Suriakumari Sidambaram\**

## I. INTRODUCTION

We live in a world of constant change. Trade and technology interact to accelerate the rate of change. Science and technology of today may become history tomorrow, while the knowledge and skills we acquire now may fast become obsolete. As a result, the current operations in an ever-changing environment are constantly faced with new challenges. With the arrival of the information age, complex crimes such as computer crimes, phone cloning and other high-technology crimes have emerged. White collar crimes consequently increase. Constant training and upgrading to tie in with the overall social and economic advancement is the only way to adapt to changes very quickly.

Singapore has been transformed from a poor Third World city, to a highly industrialized economy within a short thirty year span. Coupled with better education and increasing influence, Singaporeans now expect a high standard of service quality and efficiency in their daily transactions with the public service. They have clear expectations that public officers will act correctly, decisively and with confidence.

Crime prevention and rehabilitation of criminals are two problems every society, including Singapore, has to contend with. Although the nature of crimes and approach to treatment of criminals may vary from country to country, the urgency of preventing crime and effectively rehabilitating criminals are common to law enforcement

and adjudication authorities in all countries. Singapore prevents and controls crime through two essential means :

- a. a body of penal legislation which prescribes which acts (and omissions) constitute crimes, the procedure by which suspected offenders may be apprehended and brought to justice, and the forms of punishment which may be imposed on proven offenders; and
- b. criminal justice system which administers and enforces this legislation, seeking to ensure its compliance. This system includes the public prosecutor, the police (and other law enforcement agencies), the judiciary and the prisons (and other correctional apparatus).

The aim of the Singapore criminal justice system is to reduce crime and encourage respect for and compliance with the criminal law through three basic approaches, namely, individual prevention, general prevention and incapacitation.

The crime rate in Singapore fell for the ninth consecutive year in 1997. Crime statistics for the period January - December 1998 indicate a slight increase in the overall crime rate. Seizable offences, however, decreased in the fourth quarter compared to the third quarter. It has however been pointed out that the slight increase should be viewed against the steady decrease of crime rates over the last nine consecutive years and against the intensified and effective enforcement action by the Singapore Police Force (SPF) on all

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fronts. Further, this slight increase could be likely be associated with the economic crisis and increasing retrenchment and unemployment rates in Singapore. It has also been noted that the number of arrests and cases solved had also risen, and that Singapore's crime rate still continues to be among the lowest in the world. The major proportion of crime in Singapore consists of housebreaking, theft of and from motor vehicles, snatch theft, molestation and robbery. Analysis shows that the majority of these crimes are committed in a random and opportunistic way.

## II. ROLE OF THE POLICE

The mission of the Singapore Police Force (SPF) is to uphold the law, maintain order and keep the peace in Singapore by working in partnership with the community to protect life and property, prevent crime and disorder, detect and apprehend offenders and preserve a sense of security in society.

In the turbulent years of the 1950s to the early 1970s, the SPF played a critical role in the quelling of labour, racial and political unrests that marked the era. The SPF has built in this sense of history of service and loyalty to Singapore in each and every individual officer. As such, in May 1996, the Hong Kong based company, Political and Economic Risk Consultancy (PERC) Limited, rated Singapore as the safest country in Asia. PERC attributed Singapore's enviable position as "one of the few cities in the world where it is possible for foreigners and locals alike to walk just about anywhere, at any time of the day or night, with little fear of being mugged by gangsters", to "a professional and well-paid police force". It attributed the political stability, high economic growth and affluence of Singapore in no small part to a competent and impartial police force which has the full confidence of the

community it serves. In the light of this trend, efforts to contain crimes have been stepped up.

The Singapore police are making great and tireless efforts to adapt to the changing society. In addition to their duties to eradicate crime in Singapore, the police also make people realize that they are co-producers of public safety. The days when the police were viewed as oppressors or persecutors are gone. Police-community relationships have been enhanced through community policing. About one-third of the arrests of major crimes are made with the assistance of members of public.

### A. Community Policing

The Neighbourhood Police Posts (NPPs) in Singapore, set up in densely populated housing estates since 1983, have served round-the-clock as bases for activities of patrol policemen and as a contact point between the police and the public. The aim of the NPP system is two-fold: to improve police-community relations in Singapore, and to prevent and suppress crime through the co-operation and support from the community. These police officers at the NPP are on constant alert to handle any emergency, thereby living up to the demands and expectations of local residents.

The NPP system has been successful and well received by the public since its inception in 1983. However, under the NPP system, the complainant or victim of crime who comes to the police has to be referred from one party to another. He or she sometimes may have to repeat his or her story to 4 different groups of officers, for instance, the officers who first respond to the case; the officers who guard the scene; the officers who collate the evidence, and the investigatorial officers who conduct the investigation. The system therefore has some drawbacks in that the best use is not

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made of the NPP officers and the strength of their local knowledge. The police have therefore come up with the revamped Neighbourhood Police Centre (NPC) system where the officers will be rotated among a wider and more challenging range of duties, with increased pro-active functions, so that the process is integrated into a single service delivery process. Each NPC will have about 100 to 150 police officers and will be in charge of 3 to 4 NPPs. Eventually, by June 2001, 32 NPCs will be set up island-wide. Each NPC will be responsible for about 10,000 residents.

With this change, the new NPC will become a one-stop total policing centre, carrying out the full range of front-line policing duties and providing quality one-stop service for the public. Among other things, officers from an NPC will man the counters at the NPPs, conduct patrols, respond to calls of distress, investigate crime, and make house visits.

The NPC system will also optimize the value contributed by police officers and places a lot of emphasis on proactive community policing. NPPOs will no longer perform mundane tasks. Instead, they will now be totally responsible for the safety and security of the neighbourhoods that they are in charge of. The NPCO is required to conduct an on-scene investigation for all cases he or she attends to. This reduces the time spent by the complainant at the scene, thus minimizing the trauma the complainant has to endure. The NPCO is competent in his/her job through comprehensive training, and many of the NPC work processes are IT-supported to provide the NPCOs with up-to-date information so as to enable them to carry out their tasks more efficiently.

Under the NPC system, the challenge is to work hand-in-hand with the grass-roots leaders and other voluntary agencies, to

mobilize the community to take on greater responsibility and leadership to ensure its own safety and security. The formation on 27 April 1997 of Neighbourhood Watch Zones (NWZs), a volunteer citizen organization formed by local residents for promoting crime prevention activities in the neighbourhood, is a big step towards this aim. It is intended that with the NWZs and the new NPC system, the community-police bond will be further strengthened.

The police and the community, including the NWZs, therefore have strived to provide total solutions to root problems by working closely in the joint planning and creation of Community Focus Plans (CFPs). The CFPs outline the joint initiatives, programmes and projects which will re-focus the police efforts to address specific safety and security needs of the community, and to nurture a strong bond between the police and the community. Grassroots liaison meetings are now characterised by open dialogue and discussion as opposed to the traditional reporting of cases. One of the steps involved in the creation of the CFPs is profiling the community's characteristics, and this is where their extensive network in the neighbourhood can be fully utilized. Being leaders, the NWZs can mobilize residents to take part in activities and programmes recommended in the CFP.

Singapore also has a Voluntary Special Constabulary (VSC) with part-time volunteer police officers who hold full-time jobs in other fields. The VSC officers often carry out patrols independently or in partnership with their counterparts in the regular and national service components. They execute their duties with a high level of professionalism, discipline and enthusiasm.

## **B. Juvenile Delinquency**

One of the challenges facing Singapore

is the rise in juvenile delinquency. The police hold frequent talks to students in schools and to juvenile delinquents in the courts regarding crime prevention, secret society activities, drug prevention and problems of juvenile delinquency. In order to help schools counter juvenile delinquency, the latest innovative measure taken by the SPF is the appointment of selected secondary school teachers as Honorary Volunteer Special Constabulary (VSC) officers. This is a system where some of the teachers in each school are given enhanced authority in their management of student behaviour, especially with regard to serious disciplinary cases. This scheme was launched on 16 July 1997. These "Hon VSCs", trained by the police, wear police uniforms and exercise certain police powers, such as powers of arrest. The teachers, who are also the Discipline Masters/Mistresses or National Police Cadet Corp instructors of their respective schools, attend a 2-week course where they are taught elementary law and defence tactics, the way to fill out police reports, call for backup (via PR sets), make arrests and organise crime prevention talks. In addition to being advisors and liaison officers between the school and the police, they are also advisors on all police matters in the schools.

The Ministry of Education conducted a survey on the scheme after 5½ months which showed some very positive results. The presence of police authority had deterred both recalcitrant and potential offenders from committing crimes in and around the school compound. The students were aware of the presence of police authority and tended to behave better. They were also aware that any breach of the law could result in immediate action from the Hon VSCs. The Hon VSCs were competent in dealing with difficult cases, parents and unsavoury strangers. They also displayed more confidence in advising

students, parents and teachers on police matters. This has resulted in Hon VSCs commanding greater respect and thus being able to perform their disciplinary role more effectively. The Hon VSCs also received better support from the NPPs such as in increased patrols around the school after school hours. It is expected that by the year 2000, this scheme will be extended with two Hon VSCs in each of the 147 Secondary schools and 11 institutes of technical education in Singapore.

### **C. Social Services**

The Singapore police have been providing the public with many kinds of services which are of benefit to the community in making and keeping good relationship between the public and the police. The "999" call is one of the most important facilities of the police social service. It is very useful for the detection of crime, as well as for the quick prevention of crime. The police also give the public the opportunity to see what the police are doing by organizing public exhibitions on crime prevention and distributing leaflets which give local residents very useful information on crime preventive measures and the services provided by the NPP.

The police are also engaged in social service work such as handling reports on lost and found articles, dealing with grievances and troubles of the local residents and running the Boys Club, where activities (including sports) are conducted for the youth. The police also disseminate information on crimes and seek the assistance of the public to solve these crimes through the media of the local newspapers as well as the production of a local television programme, Crime Watch. The police also provide such information via the Internet at <<http://www.spinet.gov.sg>>

The SPF also places great emphasis on

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victims by providing necessary psychological support and care. It collaborates with voluntary welfare organizations such as the Samaritans of Singapore (SOS), Pertapis Home, Marymount Centre, Singapore Council of Women's Organizations (SCWO) and the Association of Women for Action and Research (AWARE).

1. Foreigners

Foreigners joining the Singapore workforce often arrive with little or no crime prevention knowledge, creating opportunities for crime to take place. For example, some foreign nationals working in Singapore are known to have left their front doors, grille gates and windows open at times when most Singaporeans would have had them locked. The NPP therefore decided to make its foreign worker community more aware of the need for sensible crime prevention measures, for them to work peacefully in Singapore. House visits were maintained to project police presence, convey a sense of security to the residents, deter potential criminals and also to enhance crime prevention awareness among locals and foreigners. Crime prevention talks were organized for the foreign workers and newsletters were displayed at both their factory premises and on the notice boards of their apartment blocks.

On the other hand, although the vast majority of foreign workers in Singapore try to make an honest living, there are also those who seem to think that a life of crime is more profitable. Illegal immigration also continues to pose a threat to the security and social stability of Singapore. Lured by higher wages in Singapore, and affected by the deteriorating economic conditions in the region, many foreigners will continue to enter Singapore illegally, or enter legally and subsequently overstay.

Many of the illegal workers and overstayers have also contributed to the rise in foreigner crimes. An area of concern highlighted by the police is where foreign criminals, who targeted affluent Singaporeans, would commit crimes and flee the island immediately after, frustrating police attempts to capture them. The police have also stepped up operations against illegal immigrants. Careful panning and swift action by the police have resulted in highly successful rates of arrests. Those found without valid identification papers are cuffed and brought back to the station. Those unable to prove lawful entry and stay in Singapore are appropriately punished and repatriated. Harbourers and employers of illegal immigrants and overstayers, as well as those who facilitate or encourage these immigrants to enter and unlawfully remain in Singapore, are swiftly dealt with and upon their conviction, deterrent sentences are handed down to them.

Preventive measures such as frequent patrols of our territorial waters to intercept illegal entry into Singapore and spot checks, gathering intelligence, investigating and prosecuting offenders are some of the ways these criminals could be prevented from operating. Stronger international ties and collaboration with neighbouring countries are also required in order to track down and arrest such cross-border criminals and to solve crimes committed by foreign nationals.

**D. Case Management**

The emphasis of the SPF has shifted from individual investigation to team-based investigation and case management. Police officers can thus look forward to a more supportive working environment, besides benefiting from the cumulative knowledge and experience of the team. A new specialist CID unit, the Rape Investigation Squad, was launched in

September 1997. As part of the Major Crime Division of CID, the formation of the Rape Investigation Squad has resulted in all rape investigations being centralized at CID. This move is aimed at providing greater convenience and better service to the public, by having better-trained officers more sensitive to the trauma of rape victims and a more conducive environment to interview rape victims. Another new specialist CID unit launched in January 1997 was the Computer Crime Branch, officially under the Commercial Crime Branch of the CID. It is responsible for initiating computer crime and major telecommunications fraud investigations. Officers of the branch are also trained to conduct computer forensic examinations, in order to retrieve evidence contained in computers, to support the prosecution of offenders in police investigations. To-date, the Computer Crime Branch has handled cases of hacking, unauthorized access/modification of computer materials, computer fraud and pager/handphone cloning.

#### **E. Dedicated Service**

The Singapore police force also has dedicated police officers who are willing to make personal sacrifices to solve crimes in Singapore. A recent example is the case of murder of a Bulgarian, Iordanka Apostolova, whose bloated body was discovered in a canal in Tanah Merah on 12 January 1998. With the full attention of a group of CID officers to the case, catching little sleep during the period, they managed to solve the case within just 36 hours of discovery of the body. The case was brought to trial and the murderers were sentenced to death on 14 August 1998. The accused appealed but the appeal was dismissed by the Court of Appeal on 11 January 1999, just a year from the day the victim was killed. On 30 January 1999, an abettor in the murder, the wife of one of the accused who helped to cause the

evidence of the murder to disappear in various ways, was swiftly brought to justice and sentenced to 6 years imprisonment.

The Singapore Police Force has proven its mettle by providing incident-free security for international events such as the WTO Conference in 1996. Regionally, the SPF has taken the lead to enhance inter-police co-operation among the ASEAN countries. Internationally, the SPF men in blue have taken part in overseas United Nations peacekeeping missions, such as policing the former killing fields of Cambodia and ensuring fair elections at Namibia. The key factors for the SPF's success are enhancing investigative and crime-solving ability, community policing and the developing of a problem-solving approach; manpower planning and development; discipline, professionalism and rigorous training to maximize the full potential of the officers.

#### **F. Technological Improvements**

With the introduction of the NPC, selected NPPs will be closed during certain hours of the day where the demand for police services are low (eg. 11 pm to 8 am). The public will however continue to receive essential services and police assistance through the use of information technology from a "Virtual Cop". By leveraging on technology, the police have developed the Emergency Communication (EC) System and Police Kiosks to ensure that no cry for help will go unheard. A console called the EC is situated in a conspicuous, brightly lit spot outside each NPP which other passers-by can clearly see. A touch of a button puts the complainant in touch with an officer in an NPC. The console allows two-way interaction so the officer can quickly advise you on what to do while the nearest patrol officers are informed of the complainant's location and problem. The officer at the other end is even able to activate flashing emergency lights around

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the complainant (for instance where the complainant is being pursued) as well as a loud alarm to draw the attention of passers-by and to deter the pursuer from further action. The EC is easy to use, and a simple instruction panel in all four official languages of Singapore ensures that the instructions will be clear to most people. The console is designed to be vandal proof, and installed at a height to prevent misuse by young children. The NPC officer deactivates the EC when the NPP is open.

To prevent the significant reduction of the service level of the NPPs when they are closed, the police have developed the Police Kiosk. These kiosks have video conferencing capabilities and are linked to a manned service point. If the physical presence of a police officer is required, an officer from the patrol team will be dispatched to attend to the caller. Even when the NPPs are closed, members of the public will still have access to police services via the video conferencing kiosks. These police kiosks will provide facilities such as enquiry services for members of the public who wish to inquire on police-related procedures and policies. With the touch-screen capability of the kiosks, the public will be able to obtain directory services such as legal services and counselling services, locality maps to show the nearest NPP and information on operating hours. The kiosks will also provide advice and answer queries on police procedures and matters. The user will also be able to hold video conferences with the officer at the NPC if s/he needs further clarification or additional information that is not provided by the kiosk.

Besides enquiry services, the kiosks also provide reporting services. Members of the public can lodge police reports on crime, routine cases and traffic accidents without, the physical presence of a police officer. The kiosks can provide computerized lodging of

police reports and automatically generate report numbers. They can capture digital signatures, fingerprints and photographs, and store and retrieve all captured information. Above all, the system allows the user to hold a video conference with an officer at the NPC if s/he chooses to report the incident or cases, as in a "999" call.

The police have made successful use of new technology in their sophisticated Computerized Investigation Management System (CRIMES) - an electronic IP system going the way of a paperless work environment. Following the success of the pilot implementation, the system was implemented Force-wide on 1 July 1997.

The SPF introduced the Case Property System (CASPROS) which aims to replace the manual system for tracking case exhibits and found property, which is based on register books. CASPROS would be set up for the various divisional headquarters and will provide an electronic database to monitor case exhibits and found property, in order for all divisional headquarters to share this information, so that a better service can be provided to members of the public in locating their lost items.

The Automated Vehicle Screening System (AVSS) and the Optical Character Recognition (OCR) System were implemented at Singapore's Second link with West Malaysia. These two systems greatly enhance the capability of the SPF to detect vehicles wanted for HDB/URA summonses, road traffic offences, and other criminal cases.

In January 1998, the SPF commissioned the first computerized ticketing system, the Singapore On-The-Spot-Ticketing System (SPOTS) for the Traffic Police, and thereby displaced the manual issue of summonses. This greatly minimizes the data entry errors in the Traffic Computer System due

to illegible handwriting on the summons forms and also increases the efficiency of the Traffic Police Department.

The SPF Intranet launched in October 1997 provides an essential boost to the internal communications efforts of the police. Not only does the Intranet provide officers with up-to-date information and knowledge, it also serves as a depository of crucial information and best practices, making it an invaluable leaning tool.

### **G. Other Improvements**

In 1998, SPF procured a fleet of new generation riot control vehicles comprising of two new command vehicles and seven new riot buses for the Special Operations Command. These new vehicles are improved versions of the current vehicles. Painted an aggressive red, and with their windows protected with wire mesh, these vehicles arriving at a riot scene automatically will instil awe in even the most unruly mobs, and establish a psychological edge and impress on rioters that the police mean business. In the event of an emergency, the command vehicle serves as the forward command post and highly trained officers can quickly plan riot control strategies using the staff-aid provided in the vehicle, which includes detailed sector maps of Singapore. The turret on top of the command vehicle permits trained sharpshooters to station themselves at an advantageous elevated position to neutralize any foreseeable threats. The turret gives a better view of the riot scene, which enhances tactical decision making. The turret also carries the public address system which enables the police troop to warn troublemakers to disperse before action is taken to disperse them.

The Police Coast Guard of the SPF has also been relentless in its efforts to constantly upgrade and modernize its fleet

of patrol vessels to meet new challenges and to respond to the changing circumstances. It has acquired a fleet of 18 high speed patrol boats and 2 command boats at a total cost of \$58 million to apprehend and deter sea robbers, illegal immigrants and smugglers. These patrol vessels are propelled by water jets which are well-known for their propulsion power and low noise and less prone to damage by submerged objects as compared to conventional propellers. Apart from their high speed capabilities, these boats also come equipped with the latest technology such as the Integrated Command, Control and Surveillance (C2S) System and the Navigational, Communication and computerized Engine Monitoring Control System. These new boats, which replace the PX class boats that were commissioned in the early 1980s, will enhance the Police Coast Guard's ability to fight crime in Singapore waters, as well as help greatly in search and rescue operations.

Fast Response Cars (FRCs) ensure that the police arrive on the scene of a crime quickly in urgent cases, but like all cars, their arrival can be delayed if they are caught in heavy traffic. The SPF has come up with an effective solution to that contingency - Fast Response Motorcycles (FRMs) that can weave through traffic, and in emergencies, even hop onto pavements or take short cuts through alleys and any other available routes. On 1 December 1997, this programme was launched and it was found that the response time was faster compared to the FRCs. The FRMs are intended for urgent cases only and deployed during peak periods and at certain patrol sectors where traffic flow is heavy. They will conduct patrols and attend to urgent messages in pairs. FRM officers patrol with standard equipment including bullet-proof vests, breath-analyzers, fire extinguishers and first aid boxes. They are not bogged down by bulky

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equipment such as road block signs and shields.

**III. CORRUPT PRACTICES  
INVESTIGATION BUREAU**

It is also apt to mention here the Corrupt Practices Investigation Bureau (CPIB), which is an independent body which investigates and aims to prevent corruption in the public and private sectors in Singapore. Established in 1952, it derives its powers of investigation from the Prevention of Corruption Act (Cap 241). The bureau is headed by a director who is directly responsible to the Prime Minister.

The CPIB is responsible for safeguarding the integrity of the public service and encouraging corruption-free transactions in the private sector. It is also charged with the responsibility of checking on malpractices by public officers and reporting such cases to the appropriate government departments and public bodies for disciplinary action. Although the primary function of the Bureau is to investigate corruption under the Prevention of Corruption Act, it is empowered to investigate any other seizable offence under any written law which is disclosed in the course of a corruption investigation.

Besides bringing corruption offenders to book, the Bureau carries out corruption prevention by reviewing the work methods and procedures of corruption - prone departments and public bodies to identify administrative weaknesses in the existing systems which could facilitate corruption and malpractice, and recommends remedial and preventative measure to the heads of the departments concerned. Also in this regard, officers of the bureau regularly conduct lectures and seminars to educate public officers, especially those who come into contact with the public, on

the pitfalls of and the avoidance of corruption.

**IV. CENTRAL NARCOTICS  
BUREAU**

In 1971, the Central Narcotics Bureau (CNB) was formed as a result of increasing drug abuse among youths. The Misuse of Drugs Act (1973) provides executive power to detain a drug consumer for compulsory treatment and rehabilitation. In 1975, an amendment to the Misuse of Drugs Act provides the death penalty for trafficking of more than 15 grams of pure morphine. It was, however, with the mounting of Operation Ferret, on 1 April 1977, in which concerted efforts were directed against drug trafficking and consuming by the CNB, police and customs that success against the drug menace was clearly seen. Punishment meted out for drug offences are severe in Singapore.

The Singapore police are empowered to investigate into all kinds of criminal offences, and when they complete their investigation, they are required to refer the offences to public prosecutors who enjoy the exclusive right to prosecute offenders. On 12 April 1997, the Attorney General of Singapore, Mr Chan Sek Keong, during the opening of the newly renovated office of the Senior DPP Courts, paid tribute to police officers whose good investigative work had led to successful prosecution. The efficiency and effectiveness of the police in criminal trials are reflected specifically in the number of convictions obtained from guilty pleas or trials, and generally in the prevailing low crime rate.

**V. ROLE OF THE PROSECUTOR**

The control and direction of most criminal prosecutions and proceedings in Singapore rests with the Attorney-General as the Public Prosecutor (Section 336 of the Singapore Criminal Procedure Code). His



power, exercisable at his discretion, “to institute, conduct or discontinue proceedings for any offence”, has been given constitutional status by Article 35(8) of the Singapore Constitution. The Attorney General is independent in this role, and not subject to the control of the government. He is assisted by Deputy Public Prosecutors (DPPs) who conduct prosecutions in Subordinate and High Court trials, and Magistrate’s and Criminal Appeals, as well as appear in the Coroner’s Court and at Preliminary Inquiries. The Crime Division delegates certain matters, such as criminal trials in the Magistrate Courts, to the Police Prosecution Branch (PPB). Although not administratively part of the Crime Division, the PPB is functionally linked to the Crime Division.

The DPPs work includes prosecuting criminal matters in the courts, directing law enforcement agencies in their investigations, evaluating and giving directions on their investigation papers from the police and other enforcement agencies, replying to representations from accused persons, giving advice on criminal justice matters to other departments and agencies, and processing applications for private prosecution.

In addition, the Commercial Affairs Department (CAD) was established in 1984 under the Ministry of Finance (Revenue Division) to combat complex commercial fraud and white collar crimes in Singapore. DPPs in CAD carry out the role of the public prosecutor in respect of matters dealt with by CAD. The work of the CAD includes investigating and prosecuting commercial offences under the Securities Industry Act, the Companies Act, particularly in relation to financial institutions and providing advice on inter-agency projects, making applications for the production, confiscation and restraint orders under the Drug Trafficking

(Confiscation of Benefits) Act, and other offences disclosed in the course of investigation.

The role of the public prosecutor in crime prevention and control must therefore be viewed within the context of this criminal justice system, to be as follows:

#### **A. The discretion to Prosecute or Not**

The Constitution of the Republic of Singapore vests in the Attorney-General the “powers, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence” [Article 35(8)]. Section 336(1) of the Criminal Procedure Code (Cap 68) states that “the Attorney-General shall be the public prosecutor and shall have the control and direction of all prosecutions and proceedings under this Code.”

#### **B. Advising the Police**

The police and other law enforcement agencies responsible for investigating crimes refer their cases whenever necessary and practicable to the public prosecutor and DPPs for their instruction as whether to charge and, if so, under which provision of the law the charge should be made. The police are also advised on matters concerning their investigation, to ensure that procedures set by the law are properly followed. Where the need arises, suitable instructions and guidelines are also issued by the DPPs to the police in regard to particular types of offences.

#### **C. Bail Applications**

The objective of bail is to secure the accused person’s attendance at court proceedings, and at the same time, to set them at liberty before the trial or appeal. It is often a difficult question whether bail should be allowed. The prosecution takes a stand in each case where the accused person applies to the court for bail, whether

before trial or pending appeal, opposing such applications or agreeing to them (subject to a suitable quantum of bail being offered), according to the facts of the particular case and to the legal provisions and principles that govern bail.

#### **D. Trials**

Prosecution in court is a crucial stage of bringing an offender to justice, for it is at the trial that the evidence relevant to the alleged offence is presented and tested, that the charge must be proved and, if proved, the sentence pronounced. Singapore adheres to the principle that every person is presumed innocent until proven guilty, and the onus is on the prosecution to prove the charge beyond a reasonable doubt.

The public prosecutor and the DPP conduct all criminal prosecutions before the High Court. The DPPs also conduct a number of criminal prosecutions before the Subordinate Courts, which includes prosecutions for offences under the Penal Code, the Prevention of Corruption Act (Cap 241) and various commercial and financial crimes. A majority of Subordinate Court prosecutions, however, are undertaken by the police and government departments. The DPP's role here is to direct and advise these prosecutors.

#### **E. Sentencing**

Before sentence is passed on a particular offender, the defence mitigates on their behalf. The prosecution, in suitable cases, also addresses the court on sentence. This occurs when, in the prosecution's opinion, a deterrent sentence is necessary; often such a deterrence is required because of the prevalence and increasing rate of the type of crime for which the offender has been found guilty.

In deciding on the charge to be preferred, the DPPs also play a role in regard to sentencing because a more serious charge

generally results in a more severe sentence, and a reduced charge in a lesser one. In the case of an offender facing multiple charges, the DPPs may also decide to proceed on only one count or a number of counts, applying to the court either to take into consideration, for the purposes of sentencing the remainder of the charges or to withdraw them. In cases where the accused person pleads guilty, the gravity of the offence (as reflected in the prosecution's statement of facts) constitutes a factor in the sentencing process.

#### **F. Appeals**

The prosecution process does not always end with the conclusion of a trial, for an appeal to a higher court may be lodged against the decision of the trial court. In Singapore, the prosecution has the right to appeal against an order of acquittal, just as the defence has the right to appeal against a conviction. Both sides may also appeal against the sentence imposed.

Appeals from decisions of the Subordinate Courts, or "Magistrate's Appeals", are heard by the High Court exercising its appellate jurisdiction. Under Section 60(1) of the Supreme Court of Judicature Act (Cap 322), where in the course of such an appeal any question of law of public interest arises, any party may apply to the court for the question to be reserved for the decision of the Court of Criminal Appeal. Where the public prosecutor so applies, such an application shall be granted. Appeals from decisions of the High Court exercising its original jurisdiction in criminal cases are heard in the Court of Criminal Appeal.

All appeals filed by the prosecution in the High Court or the Court of Criminal Appeal are argued by the DPPs. They also appear to respond to appeals lodged by the defence. To succeed in an appeal against

acquittal, the DPP bears the onerous burden of persuading the appeal court that, on the basis of the evidence presented at the trial and on principles of law, an order of conviction should be substituted. Where s/he appeals against the sentence, the DPPs must establish that the sentence was manifestly inadequate and should be enhanced.

### **G. Initiatives**

To keep pace with the fast-changing world and the speedy progress of work processes in the SPF and in the courts, the Crime Division of the Attorney-General's Chambers has also set up a number of Specialized Committees to respond to the need for specialization in various aspects of their work. Officers in these specialist teams do in-depth research into, and serve as core personnel, in their respective areas of law. These committees also organize visits, seminars and training sessions. Among these are the CyberCrime Committee, which comprises of officers conversant with IT and serves as the in-house specialist team on Computer and Internet Crimes; the Extradition/Mutual Assistance Committee, which deals with international co-operation over crime related matters; and a Special Task Force on Immigration to deal with the increasing number of illegal immigrants.

ACES or "Advisor for Case Sentencing" was developed in 1996 with assistance from the Information Technology Institute. This system was introduced to assist DPPs in making submissions on sentences and to determine if appeals should be lodged where the sentences are inappropriate. The Formalized Accelerated System for Trial-or "FAST" - was also introduced. This scheme works by identifying cases which can be dealt with expeditiously at the earliest possible stage, placing them on the "FAST" track. Co-operation between the police and DPPs in the subordinate courts

ensures that cases on the "FAST" track are promptly resolved. This saves time and ensures more efficient case management.

A special Mentor Scheme was also introduced to ensure closer monitoring of junior officers, upkeeping the continuity and accountability for decisions taken, and to foster better rapport between junior and senior officers. All officers at Grade 16 or with 2 years or less legal service experience are now paired with a senior officer who will be responsible for ensuring their proper training, and will guide and supervise their work.

Likewise, the CAD has also used IT to enhance efficiency. The CAD has devised an on-line procedural manual or Aide Memoire. A database of relevant case law and legal resource materials was also created. Further, a computerized Case Tracking System was introduced to facilitate tracking of cases assigned to DPPs. This enabled efficient monitoring of the progress of the cases. The CAD also formed a committee to deal with matters relating to the security, storage and retrieval of critical operational information in its Department. In July 1997, the CAD had started an in-house, bi-monthly publication which contain write-ups on legal issues, investigative procedures and reports on social welfare issues.

The public prosecutor and the DPPs occupy an essential position in the criminal justice system and actively participate in every stage of the criminal prosecution process. Their vital role within the system serves the overall aim of controlling and reducing crime in society, and promoting respect for the criminal law.

## **VI. ROLE OF THE COURTS**

The judiciary is one of the three pillars of the State. It administers the law

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independently of the executive. The judiciary is a vital part of Singapore's legal and judicial system. In order to meet the needs of the changing demographic, social, political, economic and technological trends, the judiciary has engaged in future strategic planning for the 21st century.

In the administration of justice, the courts have focused on instituting a set of timeless values which include accessibility, expedition and timeliness; equality, fairness and integrity; independence and accountability; and public trust and confidence. These values serve as beacons for the administration of justice in Singapore. In line with their core values, the judiciary recognises the importance of obtaining feedback from the public to provide relevant performance benchmarks for the courts' strategic planning and policy development initiatives.

Recent surveys conducted by various organizations, such as the Singapore-based Forbes Research Pty Ltd (Forbes), the Hong Kong-based Political and Economic Risk Consultancy (PERC), and the Switzerland-based International Institute for Management Development (IMD), have all confirmed a high level of confidence in the Singapore judiciary by both local and international communities. The Singapore judiciary has scored top marks for the fair administration of justice and is perceived to contribute significantly to the public's sense of security, and to the competitiveness of the economy.

The main finding of a recent survey conducted by Forbes Research during May to July 1998, covering 1,519 households, showed that the Singapore public has full confidence in the fair administration of justice in Singapore. An impressive 97% of survey respondents agreed strongly that the courts administer justice fairly to all. The courts have also fared well in the public

perception of crime levels and the effectiveness of sentencing. A high 99% of respondents felt safe living in Singapore and affirmed that the judiciary has contributed much to their sense of security; while 93% felt that sentences meted by the courts are effective as a deterrent to potential offenders. The survey also affirmed that the Singapore judiciary meets the public's expectations of the effective administration of justice.

PERC is an international consulting firm specializing in strategic business information and analysis for companies doing business in East and South East Asia. In the August 1998 issue of its fortnightly newsletter, "Asian intelligence", PERC published the findings of its recent survey of over 400 senior business executives on the perceived quality of key institutions in certain countries. Singapore was rated as having the best national institutions in Asia. In the ranking of the judiciary and the police, Singapore topped again with a score of 2.87, improving from 3.07 in 1997. PERC also commented that "The Singapore courts are also efficient in dispatching both civil and criminal cases, using a legal system modeled on the British system of justice."

The core of Singapore's criminal justice system is its judicial system. The administration of justice is vested in:

- (i) The Supreme Court is a superior court of record, It consists of the the High Court; the Court of Appeal; and the Court of Criminal Appeal. The Honourable Chief Justice, the Judges of Appeals, the Judges of the High Court and the Judicial Commissioners, dispense and superintend the administration of justice in Singapore. The Supreme Court is supported by the Supreme Court Registry headed by the Registrar who, assisted by the Deputy,

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Senior Assistant and Assistant Registrars, engages in the day to day running of the Registry and perform judicial functions such as hearings of interlocutory applications as well as administrative functions. The Justices' Law Clerk, who works directly under the charge of the Chief Justice, assists the judges and judicial commissioners by carrying out research on the law, particularly for appeals before the Court of Appeal.

In criminal cases, the High Court generally tries cases where the offences are punishable with death or imprisonment for a term which exceeds 10 years. It also hears appeals from the Subordinate Courts Registrars, Magistrates and District Judges, as well as the Registrars of the Supreme Court. Proceedings in the High Court are normally heard and disposed of by a single judge. The Court of Appeal is the final appellate court in Singapore and the highest court in the land. The Court of Appeal consists of the Chief Justice and the Judges of Appeal. The Court of Appeal hears appeals from decisions of High Court in both civil and criminal matters.

- (ii) The subordinate courts consist of District Courts, Magistrates Courts, the Juvenile Court, the Coroner's Court, the Family Court and the Small Claims Tribunal. There are presently 27 criminal trial courts (including the Traffic Court) in the subordinate courts, apart from two Criminal Mentions Courts, one Centralized Sentencing Court and a Court handling Magistrates Complaints. The subordinate courts are headed by the Senior District Judge, and he is assisted by District Judges, Magistrates, Coroners, Small Claims Tribunals Referees, Registrars and

Deputy Registrars in the disposal of civil and criminal cases within the jurisdiction of the subordinate courts. In 1998, 53 District Judges and 14 Magistrates served in the subordinate courts. Some of the judicial officers concurrently hold appointments as Deputy Registrars, dealing with civil and criminal matters in chambers; Coroners and Referees of Small Claims Tribunals.

The subordinate courts introduced and formalized its four justice models in its 1997/1998 workplan, namely:

1. Criminal justice - protecting the public
2. Juvenile justice - restorative justice
3. Civil justice - effective and fair dispute resolution
4. Family justice - protecting family obligations

These justice models serve as reference points in the formulation of judicial policies.

Criminal cases make up about 70% of the cases that are dealt with in the subordinate courts. These include cases commenced by the public prosecutor, cases prosecuted by the various government agencies, and private prosecutions.

- (a) In criminal cases, the District Court has jurisdiction to hear most offences other than those which are punishable with life imprisonment or death. In general, it may impose a term of imprisonment not exceeding 7 years, a fine of up to \$10,000, caning of up to 12 strokes (for male offenders) or any lawful combination of these punishments. It may also impose probation. In cases of recalcitrant offenders, it may also impose

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reformatory or corrective training.

- (b) As compared with the District Court, a Magistrate's Court can try offences of a less serious nature where the maximum jail sentence does not exceed 3 years, or where only a fine can be imposed. In general, it may impose imprisonment for a term not exceeding 2 years, a fine not exceeding \$2,000, caning of up to 6 strokes (for male offenders) or any lawful combination of these punishments. It may also impose probation.
- (c) There are currently two Criminal Mentions Courts, which respectively exercise the jurisdiction of a District Court and of a Magistrate's Court. The Criminal Mentions Courts are involved in the initial management of criminal cases and ensure the smooth running of the criminal justice system. When accused persons are first charged, their cases are mentioned in one of the Criminal Mentions Courts. The Criminal Mentions Courts deal with a wide variety of applications including applications for bail, remand and adjournments.
- (d) If an accused person decides to plead guilty, their case will be dealt with immediately in the Criminal Mentions Courts. More serious cases will be sent to the Sentencing Courts. However, if the accused person claims trial, the Mentions Court will either fix a date for trial or for pre-trial conference. A video-conferencing facility for bail matters and remand of prisoners has been set up between the Mentions Court and the remand prison.
- (e) The Traffic Court manages the conduct of traffic cases, except in cases where death has been caused by a road traffic accident. One significant technological

innovation is the use of an Automated Traffic Offence Management System (ATOMS), which was launched on 1 November 1996 to enhance the efficiency and accessibility of the subordinate courts. This system allows first time offenders in many minor traffic offences to settle traffic tickets containing an offer of a composition fine at automated kiosks which are located throughout Singapore. In cases where the period for payment of the composition fine has expired, offenders may now plead guilty to the offence at an ATOMS kiosk, instead of having to appear in court. ATOMS is unique in that it is the first automated payment system in the world which allows the payment of court fines. It is unlike other similar systems in the United States, such as the one in the Long Beach Municipal Court which only handles payment of composition fines imposed by non-court agencies. The launch of ATOMS is the actualization of the subordinate courts' vision of a virtual courthouse. Since its launch, the service has been well received and utilized by members of the public.

- (f) The Coroner's Court is presided over by the State Coroner. The Coroner's main duty is to ascertain the cause and circumstances under which a deceased person came to their death, in cases where there is reason to suspect that a person died in a sudden or an unnatural manner, or by violence or where the cause of death is not known. The Coroner will also determine whether any person was criminally involved in the deceased person's death.
- (g) The criminal courts are supported by a Crime Registry which manages all criminal processes in the subordinate courts and monitors the progress of cases until final disposition (including

appeals). The Crime Registry also provides information on the status and progress of cases, crime trends and statistics.

- (h) Mediation has been introduced in private prosecutions, instituted by way of Magistrates Complaints. These cases relate mainly to neighbourhood and relational disputes, where parties are known to each other. Such cases include simple assaults and threats, nuisance and causing mischief. Many cases have been successfully concluded through mediation.
- (i) The Juvenile Court was created with the passing of the Children and Young Persons Ordinance in 1949. This court deals with all types of criminal offences by young offenders under the age of 16, and focuses not only on punishment, but also on the correction, counselling and rehabilitation of the juvenile offender. The Juvenile Court deals with three categories of cases, namely:
- juvenile offenders;
  - children and young persons beyond parental control;
  - children and young persons in need of protection.

The Juvenile Court's approach is based on a restorative model of justice. In dealing with juveniles, the Court works closely with the offender, their parents, peers, teachers and principals, and the various care giving agencies. The paramount concern of the Juvenile Court is that of rehabilitation and reformation. Essentially, this means it has to consider how best to use its powers and available programmes to rehabilitate or socially reintegrate the juvenile constructively back into society. In choosing the appropriate "instruments of reform", the Juvenile Court has to be mindful of the individual strengths and limitations of the offender who appear

before it. To this end, the Juvenile Court has introduced innovative measures which involve the active participation of the community in the justice process, such as Family Conferencing, Family Care Conferencing and Bootcamp Training.

#### A. Family Conferencing

Family conferencing has its underpinnings in the phenomenon of "shame" and "re-integrative shaming". The conference brings together the offender and their family, and the victim and their family, the offender's schoolteacher or employer, the prosecution, the probation officer and any other significant person. The judge is assisted by a facilitator, who, through skilled interview techniques, facilitate the session in a manner to have the offender realize the impact of their offending behaviour on those near and dear to them. The facilitator explores reasons for the negative behaviour and for the parent's lack of control. The facilitator will also formulate concrete steps, through the input of participants, which the offender can take to make good their offending act to those affected by it. After the conference, the offender and their parents appear in court for the judge to make an order on the case. The most common order following a family conference is a probation order for 12 to 36 months with or without residency.

A family conference is convened for selected offenders who have supportive and concerned parents. Furthermore, these offenders must not be hard core delinquents and must be remorseful. Since its implementation in June 1998, a total of 130 family conferences have been conducted. Only 6 out of the 130 (5%) offenders who underwent family conferencing have re-offended. This shows that the programme also helps to minimize the likelihood of juvenile re-offending. The Juvenile Court of Singapore has been referred to as the only jurisdiction in the

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common law world that makes re-integration of the child offender an integral part of the juvenile justice system.

**B. Family Care Conferencing**

The family care conference is also another integral component of the Juvenile Court programmes. Its philosophy is similar to that of the family conference, except that it is targeted at juveniles who are beyond parental control. These may include instances where parents have exhausted all means of disciplining them, like seeking professional help from a social service agency, liaising with school authorities, etc. The aims of the family care conference include the need:

- To strengthen family units and empower parents and the community to regain control of the juvenile;
- To encourage the juvenile to take responsibility for the delinquent behaviour;
- To reduce the placement of such a juvenile in institutions accommodating offenders;
- To reduce the likelihood of the juvenile committing an offence.

**C. Youth Family Care Programme**

The Juvenile Court, in liaison with TOUCH Community Services, runs the youth family care programme where volunteer families are matched with dysfunctional young persons placed on probation or statutory supervision. These families act as positive role models for the juvenile and their families. A volunteer family will meet the assigned young person to befriend and encourage them for as long as the probation or statutory supervision order subsists, or until the court otherwise orders. The programme is targeted at helping juvenile offenders and children beyond parental control, but who are remorseful and do not have ingrained

delinquent traits.

**D. Community Service Orders**

A Community Service Order ("CSO") is an order of the court compelling the offender to perform unpaid work for a specified number of hours. This is implemented as a term of the probation order. Through such an order, the offender is given an opportunity to make amends for the offending behaviour by performing services for the community or its less fortunate members. Over and above depriving the offender of leisure time, the CSO also aims to develop a sense of empathy and respect in the offender towards people and property, as well as broaden their perspective of the world around them.

A survey was conducted in August 1998 to obtain feedback on the CSO placement. On the whole, the probationers found the CSO placement a worthwhile and enriching experience, while all the parents expressed the view that the CSO scheme was beneficial for their child. The CSO has also been effective as a rehabilitative measure, as the responses showed that the CSO experience had helped the probationers to develop empathy and consideration for others, while gaining meaningful social experiences. Most probationers felt that their CSO placement had a positive impact on their relationship with their families and have helped them personally in the development of their personality and character, and that they have acquired new skills/knowledge/traits. All the agencies were also satisfied with the performance of the probationers. The CSO scheme as a condition of probation has been effective and has provided the probationer with a different perspective on life. They did not encounter any major problems when assigning work to them.

The Community Service Unit (CSU) was



set up on 7 December 1996 to implement the CSO scheme in close consultation with the subordinate courts, participating agencies on the CSO scheme, and investigating probation officers. The Juvenile Court imposed its first CSO on 17 December 1996. The first CSO for an adult probationer was imposed by a subordinate court on 22 June 1997.

E. Peer Advisors Programme

In this programme, students from selected secondary schools are given a chance to sit in court proceedings, as well as take part in discussions with a Juvenile Court judge in chambers before judgement is passed. The aims of the programme are to give the Juvenile Court a contemporary peer group perspective of the offending criminal act. The peer advisors' participation, together with the teachers, will also benefit them through a better understanding of the justice process and the consequences of involvement in criminal activities.

F. Teen Development Programme

This is a 16 week "After School Care" programme which the court can incorporate into a community-based option for certain offenders. It aims at non-hardcore offenders who have been experiencing problems at home and at school. It targets youths residing in the western part of Singapore. This is a non-residential programme aimed at providing an alternative to institutional care for teens with delinquent traits at home and at school, and who may have committed offences. The programme aims to provide an environment that is safe, structured and conducive for the development of positive and socially acceptable attitudes and behaviours like perseverance, self-control, respect, trust and honesty. It also serves as a platform to counsel the juvenile and his/her family.

G. Boot Camp

The subordinate courts conducted their first "boot camp" in 1996. Unlike the boot camps in other jurisdictions (that are court sentences), this boot camp was deliberately conducted as a pre-sentence evaluation process. Apart from the strict physical regime of the boot camp, counselling sessions are held for the juveniles and their parents. Programmes at the boot camp are designed to bring about behaviour changes under a controlled environment, so that the supervised behavioural changes will remain with the participants once they are referred back to society.

An integral aspect of this programme is the intensive post-camp follow-up component designed to address the offending behaviour of the participants and to prevent them from committing offences in the future. This aftercare component also aims to develop self-esteem, responsibility, discipline and good work ethics in participants, and to increase their academic and job related skills through personalized supervision by counsellors.

H. Streetwise Programme

The Streetwise Programme commenced in 1997. This is a government funded project and is a developmental programme aimed at changing the behaviour of youths who have unwittingly drifted into gangs. It is an intensive 6 month structured programme which incorporates elements of counselling, family conferencing, peer support, recreation and academic activities. The programme aims to help these youths "turn around" and gain a fresh start in life.

I. Pre-complaint Counselling: Early Intervention

The Juvenile Court recognizes that the family unit has the primary responsibility of disciplining the child. At the same time, the Children and Young Persons Act allows

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parents to seek the Court's intervention where their children are beyond their control. In fulfilling its restorative role of promoting parental responsibility, the Juvenile Court has successfully utilized community resources to intervene in families with children who are beyond parental control, as an intermediate step before the matter is brought into the juvenile justice system. This is to avoid the situation of having parents lodging complaints against their children in moments of desperation without first seeking the help of the extended family or the resources within the community. This also seeks to ameliorate the undesirable impact on the "pre-delinquent" child, as the latter will likely be remanded in the Boys/Girls Home, pending the social report, after the complaint is laid by their parents. This is to ensure that parents have exhausted all available avenues to help their children before they are brought into the juvenile justice system as a last resort.

Pre-complaint counselling is an initiative devised by the Juvenile Court as a diversionary measure to keep borderline 'beyond parental control cases' away from the court system. Essentially, the Court utilizes community intervention at the pre-complaint stage. The Court will refer borderline BPC cases to the Family Service Centres when the complaint is laid by their parents. The Family Service Centres will do a preliminary assessment of the case to decide if they can work with the family to help them with the child. In the meantime, the case will be adjourned. If the Family Service Centre is able to work with the family, the case will be closed in the Juvenile Court when the family returns on the adjourned date. If the Family Service Centre is unable to help the family, the matter proceeds on in the juvenile justice system.

J. Peer Mediation

On 14 April 1997, the Juvenile Court introduced the Peer Mediation programme in selected secondary schools, as part of its preventive and restorative measures. Peer mediation encourages the use of non-adversarial conflict resolution as an effective alternative to violence and other forms of anti-social behaviour, peer mediation aims to undercut disciplinary problems in schools before they start, by imputing practical skills to manage and resolve conflict before it escalates into a behaviour which requires intervention by the schools, police or the courts. In the peer mediation programme, the students receive special training to enable them to act as third party mediators between two or more of their peers in the same school who are involved in petty quarrels and want to see it resolved constructively. The results of the inaugural peer mediation scheme have been very encouraging.

K. Typology of Youth Rioters

Besides a number of preventive measures undertaken by various government and voluntary organizations to deal with this problem, the courts have also been getting tough with rioting cases. To gain further insight into the profile of juvenile delinquents, the Research and Statistics Unit conducted a study in 1998 on the profile of youth rioters. The mean age of a young rioter was 16.9 years. Studies show that in Singapore's case, the lack of positive parental guidance, sense of alienation, powerlessness and low self-esteem because of a lack of traditional support structures such as the family and school, and built up feelings of frustration and anger, and a desire to obtain support outside the traditional institutions, lack of common ground between the offenders and their parents, and negative peer influence, seem to be the risk factors for the youths' violent, delinquent behaviour. While spending time with negative peers, the

youth picks up bad habits like smoking, alcohol consumption and drugs. Case studies show that the family structure and socio-economic status of the family have little impact on the youths' moral values and delinquent behaviour. The study revealed that in general, the sentences meted out by the courts were mainly rehabilitative in nature. In most cases, youth rioters were remorseful of their offending acts. Tougher sentences had been meted out to hard core offenders. To-date, the breach rate of these youth rioters remains low.

The Juvenile Court, with its restorative justice philosophy, has made deep inroads in the management of juvenile offenders. It has been, and will continue to be, the catalyst in the development and implementation of innovative juvenile justice measures. It seeks to forge effective links with community resources to address juvenile crime and delinquent behaviour both in the present and as we move into the next millenium.

One of the objectives of the subordinate courts is the enhancement of access to justice for the public through improved court services. A large majority of the cases that come before the subordinate courts are for offences like littering in public, offences against environmental public health and minor traffic violations. For most Singaporeans, it is in the subordinate courts that they come into direct contact with the various processes of the law. For example, Night Courts were established in April 1992 to deal with the huge volume of regulatory and traffic offences. These courts function for the convenience of the working public who would otherwise have to take time off from work in order to attend court. These courts function from 6 pm to about 9 pm, Mondays to Fridays. There are two Night Courts, each with its own profile of cases. One (Court 13N) deals with

summons issued by the various government departments such as the Housing and Development Board, the Urban Redevelopment Authority, Central Provident Fund Board, the Registry of Companies and Businesses, and the Inland Revenue Authority of Singapore. The other (Court 23N) deals with road traffic offences brought by the Traffic Police and regulatory offences brought by the Land Transport Authority.

Section 137(2) of the CPC also provides that in any case relating to an offence punishable by fine only or by imprisonment not exceeding three months, and in which the presence of the accused has been required by a summons issued by a Magistrate, such an accused desiring to plead guilty to the offence and be sentenced in their absence may, by letter addressed to the court, plead guilty and submit to pay any fine which may be imposed in respect of such offences. Public awareness of this provision would result in less caseloads and unnecessary attendance.

A Multi-door Courthouse (MDC), the first such courthouse in the Commonwealth and Asia-Pacific region, was established on 2 May 1998. The MDC is a one-stop service centre for the screening and channelling of cases. Thus, it seeks to increase public awareness of dispute resolution processes, offer and co-ordinate a selection of high quality dispute resolution programmes, and assist parties in selecting the most suitable dispute resolution process. The MDC pairs a dispute within the jurisdiction of the subordinate courts, with an appropriate solution forum. It renders information to enable members of the public to make informed decisions in respect of their justice needs in the area of civil, criminal, family and juvenile law, etc. It aims to be a centralized intake and diagnostic centre to screen cases to the most appropriate type

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of dispute resolution process. It serves to enhance a paradigm shift from the traditional adversarial adjudication of disputes to management of disputes through the use of alternative dispute resolution mechanisms.

The MDC launched the Vulnerable Witness Support Programme in August 1998. This programme provides support to vulnerable witnesses who have to testify in public prosecution of criminal cases. "Vulnerable Witness" refers to victims of crimes, such victims of rape or molestation or family violence cases, or witnesses under the age of 16 or those having intellectual capacity below the age of 16 years. Amendments have also been made to the Singapore Criminal Procedure Code (Cap 68) for the evidence of vulnerable witnesses, in certain types of offences, to be heard through video or television links. With the assistance of the Singapore Children's Society, a support group is being put into place. In each instance, a support person will help the vulnerable witness walk-through the court environment before the trial, to allow him/her to understand court procedures so as to alleviate the stress levels of such witnesses. This will cut down the anxieties of the vulnerable witness. Volunteers will not discuss any matter of the case with the witness or his/her parents or guardians. Referrals under the programme are from two sources, namely, the Attorney-General's Chambers and/or the police. Referrals to the MDC are also made by the counsellors in the Family Court of victims in family violence cases.

As part of the sentencing process, Victim Impact Statements for sexual offences have now become a feature of the criminal justice process in the courts. A victim impact statement is a statement made by the victim of a crime detailing how the crime has affected the victim physically,

emotionally and financially. This has effectively introduced into our criminal jurisprudence a balance between the rights of the accused and the victim. The statements are used judiciously, and as part of the mitigation process. The first victim impact statement was presented in court on 30 June 1997.

In order to assist the community in accessing justice easily, the subordinate courts, in collaboration with the Ministry of Law, the National Council of Social Service, People's Association and Singapore Police Force, launched the "Strengthening Community Links Project". The primary objective of the project is to institutionalize and operationalize various community-based programmes and initiatives in order to strengthen community links. This is done via the integration of the respective primary roles of the various participating agencies, and through the provision of a co-ordinated service package to members of the public to enhance their welfare, security and community bonds.

L. Problems Relating to Court Congestion and Trial Delays

Aside from improving court services, a prime objective of the courts has been to maintain a responsive justice system, as measured by the timely and effective disposition of cases. In his speech at the Singapore Legal Opening 1999, the Honourable the Chief Justice said "In 1998 alone, the subordinate courts dealt with, in round numbers, a total of 364,000 cases and other matters. Compared to the 1997 caseload, there is an increase by 28.1%... Strict case disposition and judgement timelines continued to be maintained for all cases. The subordinate courts have no backlog." His Honour also added that "The subordinate courts went further in 1998 to offer, what they called a "Hotwash"; an opportunity to members of the Bar, the public prosecutor and the other prosecuting

and enforcement agencies to have their civil or criminal cases heard before the end of the year and expedited earlier than the prescribed timelines. This invitation was initiated along with other pro-active measures as part of the subordinate courts' desire and commitment to keep ahead of the flow of cases and work, and to commence 1999 afresh and on top of things. It was also an attempt by the courts to meet the special needs of the parties."

Court congestion, trial delays, protracted hearings and rigid trial procedures are ailments which afflict most judicial systems. The resulting impression is that the machinery of justice is mismanaged and inefficiently run. Singapore is mindful of such pitfalls and solutions are constantly sought and reforms introduced to streamline the court administration to ensure continued fair and speedy trials.

In the years 1992 to 1993, the courts focused on the problems of clearing the backlog of cases awaiting hearing dates and on improving the waiting periods for the disposal of cases. In 1993 and the years following, the focus shifted from problem solving to overhauling the organizational structure and work systems of the courts to guide judicial officers in the administration of justice and the fine-tuning of the justice system. In March 1997, the Chief Justice of Singapore in his Keynote Address during the Introduction of the Subordinate Courts Sixth Workplan for 1997 and 1998 said : "... our vision should be for the subordinate courts to become world-class; among the best in the world. This vision will further strengthen public confidence in the justice system. On a broader front, it will enhance Singapore's reputation for the rule of law."

The courts have a duty to the State and all persons involved in legal proceedings to facilitate the timely and expeditious

disposition of cases. Justice delayed is justice denied. As such, the stand taken has been that the pace of litigation and case disposition must be set by the courts. Reforms have been instituted in the subordinate courts on the premise that judges have a major role to play in the timely and expeditious disposition of the cases before the courts.

Unlike in the past, where judges were expected to play a non-interventionist role, case management is now a legitimate judicial function. The challenge facing all courts is to dispose of their cases efficiently and expeditiously, without affecting the quality of justice. This is of primary importance in the area of criminal case management, where there is a constant tension between the aim of preventing an unnecessary waste of time in the hearing and determination of criminal cases and the need to keep intact the basic rights of an accused person which ensure that s/he is given a fair trial.

In April 1993, a group management of cases ("GMC") system for criminal cases was introduced in the subordinate courts. Under this system, trial courts are divided into four groups and a senior judge is appointed group manager for a number of judges, with the task of managing a court calendar for their group, to expeditiously dispose the criminal cases allotted to that group. The disposal of the assigned number of cases within specified time periods is the responsibility of the group manager and the judges in that group. At the time of its inception, its first aim was to clear the backlog of cases which had accumulated. Since then, the GMC scheme has proven to be a success in clearing the backlog of cases and making it a thing of the past. The disposition rate attained by the GMC groups has been consistently high.

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The introduction of Pre-trial Conferences (PTCs) in 1993 coincided with the implementation of the GMC scheme and marked a paradigm shift in the philosophy of the courts towards case management. The courts now play an active role in the management of cases, by ascertaining the status of the case and defining and clarifying the contentious issues of the trial. At PTCs, parties are urged to disclose the nature and extent of their case, their lists of witnesses and physical evidence. Where parties can agree on facts which are not in dispute, the court will direct for the preparation of statements of agreed facts, so that the trial will focus only on contentious issues. Parties are encouraged to tender conditioned statements (these are statements prepared under conditions that will enable the statements to be admitted during the trial, to the same extent as oral evidence). This cuts down on the time for hearing and saves witnesses the inconvenience of attending court, when their evidence will not be disputed by the other party. Issues and areas of dispute are identified and reasonably accurate assessments, in respect of the time required for the trial, can then be made.

In May 1997, a Differentiated Case Management (DCM) Scheme has been instituted for two categories of criminal cases in the subordinate courts, to ensure effective, efficient and expeditious management and disposal of such cases. The first is for cases initiated by the CPIB, and the second relates to immigration cases involving foreign witnesses. A special court has been set up to manage each of these categories of cases. After these cases are mentioned in the Criminal Mentions Court (Court 26), where the accused claims trial in such cases, they are fixed for a PTC in their respective special court within one to two weeks from the date of first mention in Court 26. Where the accused elects to

plead guilty, these cases would be transferred immediately to the Centralized Sentencing Court (Court 24) for sentencing.

In both civil and criminal matters, a strict "no adjournment" policy is adopted. Applications for the adjournment or vacation of hearing dates are scrutinized carefully, and these applications would be refused unless there are good grounds. Strict control is exercised for even those applications for adjournments made on medical grounds. With effect from 15 February 1997, only medical certificates, which state certain prescribed details such as the diagnosis, full name and designation of the medical practitioner, and a statement that the patient is to be excused from court attendance and not merely from work attendance, are accepted. Lawyers and litigants are now aware that they will have to be prepared for the trial to proceed at the assigned hearing dates. In addition, efforts are taken to ensure that part-heard cases are kept to a minimum. The Court's policy is that cases should be heard and disposed of within the hearing periods allotted for the trial. Judges are also vigilant in ensuring that there is no misuse of the legal process through unnecessary and prolonged questioning by counsel, resulting in protracted trials.

Besides ensuring that waiting periods for trial dates are favourable, the pace of case disposition is monitored by the courts from the time a case is commenced in court. In criminal cases, the progress and disposition of a case is monitored from the time the accused is first charged in court through the mechanism of pre-trial conferences leading up to the trial. As of January 1999, the following waiting periods for trials were maintained:

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### Criminal Trial Cases

District Arrest Cases	2 to 4 weeks from last Pre-trial Conference (PTC)
Magistrate's Arrest Cases	1 to 4 weeks from last mention of PTC
Police and Private Summonses	1 to 4 weeks from last mention
Traffic Cases:	
General	1 week from last PTC
Drink and Drive	2 weeks from last PTC
Coroner's Cases:	
General	8 weeks from date of death
Special	4 to 6 weeks from date of death

### Crime Registry

Magistrate's Complaints	2 weeks from filing of Notice
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### Juvenile Court

Juvenile Arrest Cases (Hearing)	2 weeks from last mention
Juvenile Arrest Cases (Sentence Report)	4 to 6 weeks from order of sentence report
Family Conferencing	2 weeks from submission of sentence report
Family Care Conferencing	2 weeks from submission of social report

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### M. Harnessing of Technology

In his keynote address at the Technology Renaissance Courts Conference on 24 September 1996, the Honourable Chief Justice of Singapore, Mr Yong Pung How, said: "As the technology revolution unfolds, there will be implications for the judicial system. Judges will have to deal with countless new ways to acquire, receive and process data, contend with old information that is being expanded by the new, and adjust to changing expectations. And as society changes, so will conflict. The judiciary must take the lead in assessing technological and scientific advancements to ensure that the law can address the legal issues of tomorrow. The judiciary must be the first to understand advancements in biotechnology, molecular biology, robotics, and artificial intelligence and assess the new legal issues which these changes will bring. The rapid rate of innovation and

diffusion of technology will also mean that judges and court administrators will have to conduct on-going technology assessments of the vast opportunities offered by technology to the administration of justice. For example, the subordinate courts are already using video conferencing technology to conduct remote bail hearings from prisons. And through a video link, vulnerable witnesses are able to give evidence away from the courtroom, thereby avoiding direct confrontation with the accused person...."

The Chief Justice also said at that conference: "Whatever changes the future brings, we must always remember that justice must be assisted, not dominated, by technology. Technology alone does not improve the system. It is people, assisted by technology, who make the justice system work. We must be careful not to blindly

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substitute technology or become slaves of technology. Neither should technology be used to avoid human contact for what is technically feasible, may not always be desirable. Efficiency, as an objective, should never replace thoughtful consideration. Instead, improvements generated by technology should complement tested and proven methods of administering justice. Justice should never be on the "cutting-edge" of technology, for dignity and due process are too important to jeopardise through potential systems failure or malfunction."

In its efforts to enhance the efficiency of the courts and to improve standards of service to the public, the subordinate courts have attempted to harness the rapid advances of cutting-edge technology. The courts have made extensive use of technological advances to improve court services for lawyers and court users, and to enhance the efficiency of the courts. Technology will enable the subordinate courts to offer new and more convenient services to the public. Court services could progressively be made available without the public having to physically come to court. Over time, with information technology it would be possible for the operation of "virtual" courts, which would allow businesses and individuals to transact court matters from their offices and homes. The subordinate courts have certainly come a long way since the days when it struggled to put a computer on the desktop of every officer.

The courts have adapted such technological advances for use in the justice system to further enhance the court's productivity, and these have had a major impact on the justice process and work systems. For instance, the ATOMS launched by the subordinate courts in November 1996, allows the payment of fines for minor traffic offences through the

more than 100 automated teller machines located at convenient public locations. This dispenses with the need for defendants to appear personally in court to answer the charges against them.

In the Criminal Mention Courts (in Court 26), we have utilized video-link technologies to connect the courtroom to the remand prisons, so that applications for bail can be made through a Bail Video-Link without the need for the prisoner to be brought physically to the courtroom. A Witness Video-Link (in Court 16) enables vulnerable witnesses, such as child witnesses or victims of sexual offences, to give their evidence without being physically present in the courtroom to face the accused. Similarly, video conferencing has also been introduced to hear family violence cases (in Court 46). These cases can be heard with the witness testifying through video-link instead of in the courtroom. By testifying through video conferencing, the trauma of the family violence victims can be reduced.

Technological innovations have also been used to improve the work systems within the courts to assist the judicial officers. In addition to being able to carry out legal research from their personal computers, a judicial officers' database was launched in early 1998. Judicial officers are now able to access through their personal computers bench manuals and other papers in the courts database. This has enhanced the dissemination and sharing of resource materials among judicial officers.

The Technology Court was launched in 1995 in the Supreme Court. Various technologies to facilitate the presentation of evidence and other information have been installed. Within this Court, there are video conferencing facilities, an integrated audio-visual system together with a litigation support system. Evidence



is recorded digitally as computer files. This enables transcription to be done much faster than previously with audio tapes. Almost all judges and judicial commissioners have presided over hearings in the Technology Court and it has been in considerable demand. Likewise, a criminal trial court in the subordinate courts has been converted into a Technology Court. The subordinate courts also has 10 Digital Recording Courts and a Technology Chamber. In lengthy trials, the judges may use the digital recording machines to record the evidence of witnesses. All these courts are linked up by a computer network which in turn are linked to the subordinate courts network with security protection.

In August 1998, the Chief Justice and the Judges of Appeal spearheaded the transition into the age of the paperless court with the introduction of the electronic hearing of all Magistrates' Appeals and Appeals to the Court of Appeal in both civil and criminal matters. This year, it is planned for electronic hearing to be extended to trials in both civil and criminal matters also. The conduct of appeals in the electronic environment has been found to be much faster and more efficient than in a non-electronic environment, as documents referred to in the appeal hearings could be retrieved and projected over the monitor screens instantaneously and effortlessly for all present in the courtroom.

The subordinate courts are currently working on the Singapore Case Recording Information Management System (SCRIMS), a fully computerized file tracking and information management system for criminal cases. The system will house databases containing all vital information concerning criminal cases dealt with in the subordinate courts. Also in the pipeline is the Integrated Criminal Justice Information Management System

(ICJS) which essentially involves the setting up of an integrated networking between the subordinate courts and agencies such as the Attorney-General's Chambers, Prisons Department and the Police Criminal Records Office. The network will enable these organizations to share information and common operational data.

The Supreme Court Internet website is at <http://www.gov.sg/judiciary/supremect.>. All significant speeches of the Honourable Chief Justice delivered since 31 July 1996 are now posted there. The subordinate courts launched its Internet website located at <http://gov.sg/judiciary/subct.> on 1 March 1997 which accords with the subordinate courts' strategic plan to maximize the use of information technology to enhance its services to the public. A highlight of the website using "photobubble" technology, is a virtual "walk through the courts". This segment takes the viewer on a visual 360 degrees walk through of the subordinate courts.

#### N. Family Violence

The amendments to the Women's Charter took effect from 1 May 1997. Pursuant to the amendments, applications for Personal Protection Orders (PPO) at the Family Court can be made not only for spousal or domestic violence involving children, but also by family members such as parents, siblings and other family members as deemed fit by the court. The amendment has therefore resulted in a change in the profile of persons seeking protection from family violence at the Family Court. The scope of family violence was expanded to include causing hurt knowingly, restraining a family member against their will, placing a person in fear of hurt and continual harassment.

Further, "family violence" now includes non-physical acts of violence that amount

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to abuse of the complainant. The powers of the Family Court have also been increased such that parties can be ordered to attend counselling. Breach of a PPO is also a criminal offence. These changes give greater protection to all members of the family.

The time taken for the issuance of a PPO is of utmost importance to a victim of family violence. Once an application for a PPO is received by the Court, the Court will take cognizance of the complaint. In cases where there is imminent danger of family violence being committed against the applicant, the Court will issue an expedited protection order immediately after the lodgement of the complaint. In other words, the victim will have the benefit of a protection order on the very day when an application for protection is made. Such a protection order is effective from the date of service and is valid for 28 days or until the hearing or mention date.

With regard to the application for a PPO, the application is fixed for mention within one week. Where parties wish to instruct counsel, the case may be fixed for further mention. PPOs may be granted on the mention date in suitable cases. Where a trial is necessary to ascertain the veracity of a complaint, the trial will be fixed within one to two weeks. In the interim, counselling sessions may be fixed in suitable cases. Unlike an expedited protection order, there is no fixed duration for a PPO which is granted on the mention date or after trial. The PPO remains valid until the order is rescinded or set aside.

Since 1 November 1997, the Family Court has set up the Family Protection Unit, which is a dedicated and specialized unit to handle applications for protection orders. Professional court counsellors are attached to the Unit. They conduct intake interviews of victims of family violence,

carry out risk evaluation (including assessment of the severity of the acts of violence), and offer support and advice to victims on safety measures. Victims of family violence who require long-term emotional support will be referred to welfare agencies or crisis shelters in the community for counselling support, shelter and other assistance. They may also refer parties requiring legal advice to the Family Court Legal Clinic, which is manned by volunteer lawyers who offer legal advice at no charge. Since December 1998, the Unit even houses a medical clinic operated by volunteer doctors working on roster from the Association of Women Doctors (Singapore) to provide free medical examination to applicants for PPOs. This service enables applicants to procure medical evidence for the hearing when applying for PPOs. Previously, such applicants were referred to designated hospitals for expeditious medical examination, after which, the medical examination form would be forwarded to the Court before the next hearing.

With the setting up of the Family Protection Unit, the Family Court also processes applications for PPOs within a shorter timeframe. In cases where there is imminent danger of family violence being committed against the applicant, the Court will issue an expedited order upon application. The expedited order is served on the same day or by the next working day. All applications for PPOs are also fixed for mention in the Court within one week. In other words, parties are brought before the Court expeditiously so that the application can be dealt with at the earliest opportunity. Thereafter, the Court will closely monitor the progress of a case to ensure that the necessary orders are made quickly. All these add up to a system whereby protection is afforded to a victim without undue delay.

## VII. PLANNING FOR THE FUTURE

The Singapore court system is continually evolving to meet the needs of society. To ensure that the Supreme Court is well prepared for the challenges ahead, departmental workplans have been set out annually since 1992 and presented to all staff at the Supreme Court and Subordinate Courts Workplan Seminars, respectively. The departmental work plans set out our specific work targets, strategies for achieving these goals, and the indicators or checklist of tasks that we will use to benchmark our performance in the work year. The Seminar serves as a compass in our continuing journey towards higher levels of excellence and to guide us with greater precision and accuracy. As the workplans are conceptualized annually, they enable the courts to reset and map out immediate goals and targets against the courts' long term strategic direction and policies. These workplans are not just mandatory, but fundamental to our goal of being a world-class judiciary. In fact, in his speech at the Opening of the Legal Year 1999, the Chief Justice of Singapore remarked that "the subordinate courts have realised their vision of becoming world class."

## VIII. THE JUSTICE STATEMENT

The vision of the Sixth Workplan Seminar of the Subordinate Courts 1997/1998, held on 1 March 1997, was to become world-class in the 21st Century. More emphasis was placed on enhancing Singapore's reputation for the rule of law and strengthening public confidence in the justice system. To provide a framework of values for the judges of the subordinate courts bench, it is necessary that timeless core values are established to guide the judiciary in the administration of justice. At the Seminar, the Justice Statement of the Subordinate Courts was also unveiled. It sets out the mission, objectives, core

values and principles for the discharge of judicial duties. This Justice Statement serves as a constant reminder to judicial officers of their duties, and a written commitment by the courts of their duties to the public.

"Vision without action is merely a dream. Action without vision just passes the time. Vision with action can change the world", Joel Arthur Baker. Mere target setting is not enough to inspire true passion and commitment. It is big goals and challenges, and a common purpose, that brings on excitement and the sense of fulfillment which makes life worthwhile. The core values determine the means of reaching the destination and are the soul that guide and align our actions. They are the compass by which we navigate through challenges and rapid changes, and advance towards our ultimate goal. With the core values as our faithful commandments, the courts will be serving the public good with conscience. Faithful adherence to these principles is therefore necessary for the courts to become *Dignus Honore*, or worthy of honour, of the public trust which the nation and community have bestowed upon the institution and its officers.

## IX. CODE OF ETHICS FOR JUDICIAL OFFICERS

Another management challenge is the inculcation of judicial ethics in judicial officers. It is crucial to any justice system that the judicial officers are committed to honour the spirit and letter of their judicial oath. A Code of Ethics for Judicial Officers has been prepared and will provide guidance and a framework for regulating the conduct of judicial officers, and will also enhance the public accountability of the judiciary. The areas covered range from personal propriety to judicial duties, as well as extra-judicial activities. The provisions in the Code reflect the values of judicial

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oaths of office and allegiance. The Code does not seek to govern but to guide judicial officers, and as such, it does not impinge on independence in judicial decision making.

**A. The Strategic Framework**

To ensure that the subordinate courts remain focused on achieving their mission of administering justice faithfully in the evolving environment of the next millennium, the courts established a strategic framework. In his Keynote Address at the Introduction of the Seventh Workplan Seminar of the Subordinate Courts 1998/1999, the Honourable Chief Justice, Mr Yong Pung How, set out the elements of such a framework to be as follows:

- (a) The public perception of the Singapore justice system must be one of confidence in and respect for Singapore courts and the rule of law.
- (b) The justice system must maintain human dignity, uphold the rule of law, and enhance access to justice;
- (c) All persons will have ready access to justice in the subordinate courts, which will provide a range of effective and expeditious means of dispute resolution, without undue cost, inconvenience or delay;
- (d) The subordinate courts will ensure independent, fair and equal application of the judicial process and administer justice in accordance with the law;
- (e) The subordinate courts will be administered in accordance with sound court governance principles which foster the efficient use of public resources and enhance performance;
- (f) Technology will be strategically employed to increase access, convenience and ease of use of court services, and to assist the courts in enhancing the quality of justice;
- (g) The impact of socio-economic and

legal forces will be closely monitored in order that the subordinate courts can effectively lead and manage change amidst a rapidly changing national and global environment;

- (h) The subordinate courts will be adequately staffed by the best judges and court personnel, who will be supported by continuing education and performance evaluations.

This framework, together with the Subordinate Courts Justice Statement, provides a reference or benchmark against which future activities should be assessed.

**B. The Courts Charter**

On 15 February 1997, the judiciary launched a charter for court users ("The Courts Charter") in an effort to further increase public understanding of our court system and to enhance its accessibility. Copies of the Charter are distributed free to the public at the various service counters. There is overwhelming demand for copies of it. The Charter is also available on the Supreme Court's website. The Charter sets out the mission of the courts as professionalism and excellence in the expeditious and efficient dispensing of justice in accordance with the law. It also lays out our values to be accessibility, expedition, equality, fairness and integrity, independence and accountability, and public trust and confidence. The Charter describes the range of services and the response or processing time for these services. It will serve as a useful performance indicator of the effectiveness and efficiency of the judicial system. As the Chief Justice of Singapore, Mr Yong Pung How, said at the Opening of the Legal Year 1997, "For without public trust and confidence in the justice system, the rule of law will not have any practical meaning."

The Courts Charter was also included in the Creativity 27, by the US-based "The

Creativity Annual”, a publication which records outstanding international creative works. The Charter was chosen among 77 entries from the United States and countries around the world.

#### **X. THE JUSTICE POLICY GROUP**

The Singapore judiciary recognizes that as one of the institutions in the justice system, it must remain relevant to the society which it operates within. The courts must be prepared to deal with the challenges resulting from changes in the conditions and environment within which it operates. The anticipation of future challenges, and the measures to be taken, are important components in the long-term strategic planning and direction of the courts, and the formulation of judicial policies. The courts have taken a pro-active approach in this respect. Future planning for the century ahead has commenced and a Justice Policy Group (JPG), serving as a think-tank, has been formed. The JPG will advise on and assist in the formation of judicial policies. It is also concerned with the charting of strategic directions for the subordinate courts. The JPG's chief role is to facilitate research and development in various disciplines. It also sources pertinent ideas from eminent foreign experts in this respect. The results of this research will then form a credible basis from which informed policy decisions emanate.

#### **XI. ANNUAL REPORTS**

The Supreme Court and the subordinate courts jointly issue a report annually. The annual reports set out all the developments and achievements for the past year, together with the milestones for future activities. The annual reports not only enhance the efforts of the courts towards public accountability and commitment, but also shape and mould the perception of our constituents and the public.

#### **XII. THE CENTRE FOR JUDICIAL EDUCATION AND LEARNING (CJEL)**

The Centre for Judicial Education and Learning (CJEL) was established in mid-1996. Programmes and lectures during the year focused on enhancing bench skills, professional knowledge, case management, ethics and good practice, and social context education. Some of these courses were also extended to court administrators.

The criminal justice system embodies and secures the rule of law and protects the public. The openness of our economy cannot prevent us from insulating against regional crime trends. The range of crimes is becoming increasingly broad and complex. The subordinate courts continue to anticipate the changing trends of crime. Sentences and sentencing philosophy are reviewed. Effective deterrent and severe punishments are imposed on offenders who commit crimes of particular concern to the public, as well as dangerous and chronic offenders.

The courts will adopt appropriate measures to further enhance and extend the quality and scope of their services to the public. More attention and resources will also be focused on public awareness programmes to reach out to the public. The level of public awareness of the programmes implemented by the Singapore courts is relatively high. The main sources of information for such programmes were gathered through the media of newspapers and the television. The feedback obtained will also be relevant for setting performance benchmarks for the judiciary.

#### **XIII. CONCLUSION**

In the face of news of countries where drugs, crime and violence seem commonplace, Singapore has been able through the

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efforts of the police, the prosecutors and the courts, managed to keep its crime rates down for nine successive years. As the Chinese saying goes, "To develop a business is difficult, to keep the business going is even more difficult." Success management is therefore a challenge for our community. The police, the prosecutors and the courts can constantly survey their service quality and public perception of and confidence in their organizations. The officers in these organizations should uphold their core values, mission, goals, objectives and key priorities. Management in these organizations should be effectively engaged in strategic planning and, at the same time, work with their subordinates to discover ways to provide quality service to the public. If an organization's structure fails to serve its purpose, it needs to be changed.

The future depends on initiative. It depends on people taking action, reflecting on the consequences, and finding ways of doing it better next time. Learning fast enough to survive is becoming an essential requirement for success. This requires the police, prosecutors and the courts to be in a position to change its services and processes to reflect what is learned. Creating the future, which once lay in the hands of others, has become the responsibility of all. Therefore, the potential of all officers, be it the police, prosecutors or judges, should be developed and utilized, so that instead of being passive observers of events unfolding before them, they may be active participants in exploring and finding better ways in the future, so that the country and its people can really benefit from their energies and capabilities.

The most important task is to anticipate crisis. To wait until crisis hits is already abdication. Management in the police and public prosecutor's offices, as well as in the courts, are engaged in strategic planning

to anticipate and plan ahead for any crisis. In this respect, the subordinate courts place strategic goals and milestones into their annual workplans. As the Honourable Chief Justice, Mr Yong Pung How, said at the Asia - Pacific Courts Conference in August 1997: "As leaders, there are three errors which I think we must avoid at all cost. They are the failure to learn from the past, the failure to adapt to the present, and the failure to anticipate the future."

With fast changing technology, the nature of crime, especially in the commercial world, will become complex and sophisticated. We must be alert to harness such advances in technologies to help us in achieving better performance to benefit our society. By constantly applying and testing such advances in our work environment, we can explore the greatest value of technological advancement. Officers will therefore need to have the knowledge to deal with high-tech crime as the new century unfolds. Moreover, the nature of crime usually involves the police, prosecutors and the courts, it may be necessary to harness the knowledge of these strategic partners with the aid of modern technology.

Combating crime is not only the responsibility of the police, but the public prosecutor and the courts as well. Crime will continue to occur and evolve in more sophisticated and complex ways. Criminal minds manoeuvre within the loopholes of the law and policies, using their expertise and positions. The competency of the police, the prosecutors and the judges is vital to handle sophisticated crimes. Training is fundamental to gain the expertise and resources to be in a position to battle complex and especially, white-collar and computer crimes.

As Singapore becomes an even more global, cosmopolitan city in the 21st

century, drawing talents from around the world, the social composition and structure of the country will inevitably change. To add fuel to the engine of our economic growth, Singapore has to compete to attract foreign talents to its shores. The public will therefore no longer remain homogeneously local. Foreign professionals and workers alike will bring with them their different expectations and culture. In turn, Singaporeans might follow this new benchmark. To meet the challenges ahead, the Singapore police, prosecutors and the courts should be trained to better relate to and communicate with the public.

International ties with police forces all over the world are essential as crime goes international; a result of the growing affluence and information age. International ties could be in the form of inter-forces games, liaison meetings, training work attachments, joint operations and criminal arrests. As a result of such close ties, more exchange of intelligence, networking of liaison officers of direct contact and shared database systems can be made possible. In the same way, closer ties with other departments of the home team can also be established.

The widespread unemployment and rising prices in South East Asia will have a ripple effect on the crime situation in Singapore, with the threat of illegal immigrants entering Singapore and committing crimes. Being a mere city-state, Singapore's margin for error is extremely small and therefore there is a constant need to improve and upgrade services for its people, who are its most important asset, in whatever they do and to continue to enhance their capability to meet the challenges that lie ahead. The ability of its people to change quickly is essential.

The Singapore Prime Minister, Mr Goh Chok Tons, has said that "We, cannot afford a mindset that instinctively shuts off challenges to the existing status quo. We must always be willing to look at issues afresh. From time to time, when a particular strategy or policy has served its usefulness, we must dare to break the mould and start anew."

In today's fast changing world, yesterday's successful practices may no longer be effective today. Our organizations must not be complacent about their past successes and start to rest on its laurels. As the saying goes, "Success is a journey, and not a destination." The path is never-ending; human competitive nature to better yesterday's achievements and to reign supreme in the rat-race provides strong impetus to continually raise the standards of performance, and to reach for that pot of gold at the further end of the rainbow. Besides valuing the past, the leadership must keep challenging existing assumptions and existing ways of thinking and acting.

Scenario planning, which is not trying to predict the future but perceiving the future in the present for each organization, i.e., on what to do if a certain event takes place, may be useful to better prepare for the future. To operate in an uncertain world, we need to question the assumptions about the way the world works, so as to have a clear view of the world and how the world may impact on the police force. The end result for scenario planning is not to present an accurate picture of tomorrow, but to provide better decisions about the future and how worldwide events affect us.

The challenges ahead for the police, the prosecution and the courts as they move into the 21st century, with their impressive and successful track records so far, perhaps resonates with the broader challenge for

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our government on how the three arms of justice can continue to attract the best and optimize the development of our officers as a vibrant organization. The future seems to be pointing towards the trend of global learning. Therefore, a much wider perspective than the past is required and emphasis on organizational learning and service excellence will propel us to greater heights of success and achievement. Organizational learning is where the organization continually enhances its capabilities, and through innovative thinking on different ideas and approaches, discover how to create results it truly desires for its future. In reality, learning and training are the two sides of the same coin. The purpose of training is to help someone to learn, and to learn how to learn. Learning is said to have taken place when a person acquires new skills, knowledge and behaviour. Gandhi once said “we must become the change we want to see.”

- The Singapore Judiciary Annual Reports 1997 & 1998.
- The Singapore Police Force Annual Report 1997/1998.

Therefore, as we prepare for the dawn of the new millenium, the three arms of criminal justice should be spurred by their achievements and milestones to continue their hard work and effort in the journey towards an even brighter and better tomorrow.

**Sources**

- Keynote Address of the Chief Justice at the Introduction of the Subordinate Courts Workplan for the years 1997/1998 and 1998/1999.
- The Chief Justice’s Speech at the Opening of the Legal Year 1997, 1998 and 1999.
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# PUBLIC PROSECUTORS IN THE CHANGING SOCIETY

*Suchart Traiprasit\**

## I. INTRODUCTION

We are in a changing world, with the advent of the 21st century only a year ahead. The new era will witness many substantial changes which have already been experienced by the passing decade. Apart from some scientific and technological complexities, such as the problems of Y2K and environmental protection, to cope effectively with the rising rate of modern crime is another challenge to be addressed by the changing society. The advance of technology and communications between countries during the 20th century not only introduced development in terms of expanding commerce, cultural exchange, and other cooperation, but also brought with it some negative results such as the rising of crime, which has become more complex both in the form and mode of commission.

Under the free trade liberalization of the current society, competition seems to be unmerciful and inevitable. For the loser of this contest, it means no employment, which in turn gives rise to an increase of property crime, as well as other related criminality. The economic crisis recently undergone by several countries in the Asian region, is more than an illustration in this regard. In Thailand alone, the rate of crime has been shockingly rising during this decade.

Technological advances, while bringing much progress to the world, have become an advantage for criminals in committing certain complex or innovative crimes. These are very difficult to prevent or

suppress, due to legal loopholes or inferior technology on the part of the law enforcement officials. Computer crime, economic crime, and crime related to financial institutions are included in this context.

Convenience in travelling abroad, perhaps by the expansion of the tourist industry and international business investment, not only provides more potential for transnational organized crime to be committed, but also allows the offender to flee conveniently from one jurisdiction to another. This, of course, directly affects domestic justice administration and calls for the strengthening of international cooperation.

Another phenomenon prevalent in the changing society of today is the worldwide recognition of human rights promotion and protection, which has also generated new concept towards the rights and obligations of people, and thereby gives rise to review and restructure of criminal justice in many countries.

Amidst the various changes of this transitional period, criminal justice will certainly be even more influenced in the future, since it is correlated to all factors of alteration. Many problems regarding criminal justice already exist under globalisation, either in the field of technical questions (such as legal loopholes in dealing with the complexity of the newly emerged crime) or in the administrative area (such as the determination of the new roles and direction of law enforcement officials). These are believed to continue at least into the early stages of the next century.

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As one component of law enforcement and criminal justice, the public prosecutor plays a crucial and active role in controlling and suppressing crime, both at the domestic and international level. Prosecution services, like other things, can not ignore the trend of the changing society. To encounter the phenomenon of challenges under the new dimension of crime and its steering, the public prosecutors have to reappraise and adjust their roles and direction to cope with the forthcoming situation. To this end, many changes in the prosecutorial service have already occurred in some countries, while in other countries the tendency of adjustment is becoming more and more apparent.

The public prosecution service in Thailand has been developed for more than a half millennium. The first restructuring of the Thai public prosecutor institution took place around a hundred years ago, and the most recent one occurred in 1993. Like its counterparts in many countries, Thai public prosecution has experienced many changes to date. Development of its role, function, and attitude regarding criminal justice and crime control usually responds to the dynamic changes of Thai society.

## II. GENERAL OBSERVATIONS ON THE PUBLIC PROSECUTOR

### A. Traditional Characteristics of the Public Prosecutor

Perhaps the most striking description of the public prosecutor is as Prince Sakolwannakorn Worawan, a famous Thai scholar, defined long ago in his lecture at Thammasart University:

“If the criminal proceeding is a play, then the public prosecutor is the hero because the accomplice of the case is completed by his part. In some countries, the public prosecutor takes an even more crucial role than the

judge. He is the one required by the law to shoulder the exercising of discretion as to proceed with the criminal case or to halt it. Prosecutorial function should, therefore, be discharged with a high spirit and great pride. Responsibility and prestige of the public prosecutor should be respected as no less crucial than that of the judge in terms of remuneration, dignity, and trust of integrity. Particularly in the jury system, whether the defendant will be guilty or not is up to the performance of the public prosecutor rather than the judiciary. Integrity of the public prosecutor is, therefore, more crucial than other elements.”

To view the public prosecutor as the hero of criminal proceeding is not an overestimation. The public prosecutor is a unique figure in criminal justice upon whom is the important task of acting as the principal representative of the State in criminal litigation. They are answerable to the success or failure of the case, from the outset until finalisation. In some countries, such as Korea, the public prosecutor is viewed as a quasi-judicial official<sup>1</sup>, while in France s/he is even deemed as a judicial member (*magistrat de bout*)<sup>2</sup>. The public prosecutor is the one who exercises quasi-judicial power at the initial stage to prosecute or release the suspect, and eventually to check the court's decision and appeal or uphold it. Discretion of the public prosecutor as to instituting or dropping criminal cases is recognized everywhere, and in any legal system, as exclusive and independent.

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1. “Criminal Prosecution System in Korea”, Supreme Public Prosecutor's Office, p.32, printed in 1997.

2. David & de Vries, “The French Legal System (1938)”, p.21, as cited by Jitti Tingsabhat in “The Legal Profession”, Thammasart University, 1986, p.155.

In Thailand, the public prosecutor is a career-oriented official belonging to the Office of the Attorney General. After the restructuring of the former Public Prosecution Department into an independent public body known as the Office of the Attorney General in 1993, the public prosecutor is also called the State Attorney. According to the Public Prosecutor Act B.E. 2498(1955), the Criminal Procedure Code, and various legislation concerned, the Thai public prosecutor is regarded as the State Counsel or the Public Lawyer who represents the State in criminal proceeding to regulate criminality and give effect to its sanctions.<sup>1</sup>

Significance of the public prosecutor is derived from their function and responsibility, which may take many forms. In addition to criminal justice steering, the public prosecutors in many countries are entrusted with keeping the public interest in civil matters, namely; to represent the State in civil and commercial litigation, as well as to give legal advice.

In the United States, the prosecuting attorney is also charged with some other functions, as Joan E. Jacoby pointed out:

“Although the general focus of the prosecuting attorney is on criminal case processings, he is not simply a criminal litigator. More and more the prosecutor has been assigned other duties by the legislature. Three out of four prosecutors have civil responsibility for representation of the county Board of Commissioners or for the local governing agency. The prosecutor’s

duties have been extended to include involvement in juvenile matters, in family and domestic relations court, in answering or responding to citizen complaints, in conducting non-support programs, in handling traffic, consumer, or environmental protection projects, and in pursuing appeals. Their interests and jurisdiction have been extended to cover a wider avenue of community problems.”<sup>2</sup>

In Thailand, the public prosecutor is also designated to review draft commercial contracts of the government agencies, as well as to revise or propose some new laws. The tendency of the Thai public prosecutor to participate more actively and directly than before, in other fields such as the protection and promotion of human rights, is also on the rise. Yet, as the chief legal official, the public prosecutor is normally regarded as the legal figure to fight against crime, to maintain peace and order, and to secure social justice and fairness.

In the technologically advanced and globalisation age of today, where international cooperation to combat transnational organized crime is urgently called for, it seems unavoidable for the public prosecutors to internationalize their roles and functions in all respects beyond that once traditionally practiced at the domestic level. This is also apparent with prosecutors in Thailand.

From general survey, it may be said that the traditional characterising of the public prosecutor is as a government official who is entrusted to institute prosecution in criminal cases. However, under dynamic changes in society, the public prosecutor may have been or will be designated to discharge other functions as well. This may set the public prosecutor on a new path of wider responsibility in the future.

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1. “Thai State Attorney”, introductory document of the Thai State Attorney Museum, 1998, Office of the Attorney General.

2. “The American Prosecutor : A Search for Identity”, Lexington Books, 1980, p.xx.

## **B. Functions of the Public Prosecutor**

Taking the model of Thailand as an example, the traditional functions of the public prosecutor are threefold. These functions are: (1) to provide criminal justice; (2) to protect public interest; and (3) to protect civil rights and provide legal aid.

### 1. To Provide Criminal Justice

The main objective of crime prevention and suppression is to bring the offender to justice. Bringing the offender to justice, in the broad sense, means to put them under investigation, prosecution, adjudication, punishment, correction, or rehabilitation. In other words, the suspect must be tested of their guilt or innocence by the process of criminal justice administration or the case proceeding. Once a person has been prosecuted, it means their freedom is limited. Prosecution is, therefore, a difficult task requiring high responsibility. The law and public entrust the public prosecutor to assume this function.

The prosecutorial function includes all processes related to the criminal proceeding, such as;

- (i) to review the evidence derived from investigation;
- (ii) to exercise discretion regarding the admissibility and adequacy of the evidence, as well as other reasons and appropriateness so as to institute prosecution or not to prosecute the suspect;
- (iii) to pursue the trial in the court;
- (iv) to adduce evidence and question witnesses; and
- (v) to review judgment of the court and appeal or drop the case.

As for the investigation, in Korea, Japan, and the United States, the public prosecutor is entitled to conduct

investigation either in cooperation with the police or on their own initiative. In Thailand, this is not currently practiced. According to the Criminal Procedure Code, the investigation is conducted by the investigation officials; commonly, senior police and some high-ranking administrative officials. The only public prosecutor vested with the investigation powers in regard to criminal cases which have been committed outside the territory of Thailand is the Attorney General or the Acting Attorney General. However, the separation of the prosecution process from the initial stage of fact finding or investigation has become an impediment to the effective proceeding of some complicated cases. In particular, with new dimensions of criminality, alteration in investigation process is now apparent. Participation of the public prosecutor at the initial stage of investigation has been mentioned during the drafting of the new Criminal Procedure Code, which is now under consideration of the drafting committee.

Apart from conducting prosecution on behalf of the State, the public prosecutor may also take charge as the defending attorney for an official who has been prosecuted by a private individual in connection with the performance of their duty. This Thai public prosecutor is required by the Public Prosecutor Act B.E.2498 to defend the government official in criminal cases instituted by private individuals, however, it is the sole discretion of the public prosecutor to take action or not.

### 2. To Keep the Public Interest

In many countries, the idea of using public prosecutors for purposes beyond the scope of criminal proceedings may be uncommon. Yet in some countries, like the United States and Thailand, the public prosecutor is also entrusted to assume

responsibility of protecting the interests of society. As regards this function, the public prosecutor performs their work in three ways:

- (i) By representing the government agencies, state enterprises and some specific public entities in civil and commercial litigation of all kinds, as the state lawyer;
- (ii) By reviewing draft contracts to be entered between government agencies, state enterprises or some specific public entities on the one hand and the private sector on the other;
- (iii) By giving legal views, rendering advice and performing other duties as the legal consultant for the government, state enterprises and some other public entities in accordance with the law.

3. To Protect Civil Rights and Provide Legal Aid

Generally speaking, the public prosecutor in any system has responsibility to protect the public in terms of crime control and criminal proceedings. Under the changing society of today, he or she may be warranted to go far beyond this responsibility. In Thailand, for instance, the public prosecutor also directly participates in the protection of civil rights and providing legal aid. This function was initiated around 16 years ago. At that time, there was a dramatically high rate of litigation where poor people, in particular the farmers, had fallen victim to fraud by some more powerful merchants (who snatched the opportunity of legal illiteracy and incapability to afford lawyers on the part of the poor, to cheat them). Realizing its responsibility to keep social peace and fairness, the then Public Prosecution Department launched a project to rectify the situation. Three categories of services were rendered, namely:

- (i) Dissemination of legal knowledge to the public in order to make them aware of their rights and duties, and to decrease

the possibility of disadvantage due to legal blindness;

- (ii) Giving legal advice to the poor free of charge;
- (iii) Providing legal aid to the poor and needy people who have no capacity to afford their own lawyers in litigation, free of charge.

**III. PHENOMENON OF THE CHANGING SOCIETY**

Change in society is not a new phenomenon. In fact, it occurs and develops at all times. Since criminal justice, in particular the role of the public prosecutor, is influenced by the changing society, it is appropriate to overview this phenomenon as a general background to better understand developments in the public prosecution service. Perhaps an incident that took place in Thailand some time ago might be a good illustration in this regard.

Thailand was influenced by Western culture, which brought in many rudimentary changes in the society for the first time, during the colonization age. Although saved from being colonized, Thailand had to give away many parts of her territory as well as to conclude unfair agreements with various European countries to establish "Extra Territoriality"; the practice whereby the Thai court had no power to try the subjects of foreign countries who committed crimes within the territory of Thailand. Consequently, many aspects of Thai tradition, in particular justice administration, were reformed and modernized to cope with the western requirements in order to prevent accusations of "unsatisfied standard" by the western nations. In this regard, the former practice of the public prosecution service in Thailand was restructured and systematized to establish the Public Prosecution Department for the first time

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during the reign of King Chulalongkorn in 1893.

During these decades, drastic changes in society again occurred. With the arrival of globalisation, the transfer of technology, movement of information, and communications between people, new influences were brought from abroad. This is, of course, the main factor that forces nations to adjust themselves in compliance with the global situation. For those who can keep pace with the sweep of changes, it means development and more benefit; yet for those who can not, it means being left behind and getting hurt. Keeping pace with change may be accessed by different avenues and styles, depending on national assessment and the decision of particular countries; the outcome of which may be the pros and cons. However, the undeniable truth in this regard is that countries can no longer ignore the phenomenon of the changing world and society.

Therefore, under the contemporary period, all states have no other option but learn how to adjust their national policy and practice to conform to the influx of changes as best as possible. Experiences from the past may be understood as good lessons, however this is not totally true, even there might be some truthfulness behind this presumption. The policy to promote a more open and freer society, although appearing to deteriorate the vitality of the economic and financial systems of many developing countries, has somehow encouraged the public to be aware of their rights and positive values, such as the maintenance of democracy and the significance of international cooperation. Despite the recent economic retreat, the promising tendency towards political reform is still bright. In Thailand, for instance, the passage of the new Constitution in October 1998 has induced many developments regarding the

administration of justice, which in turn related to the prosecution service. Beside indirectly setting the grounds for public prosecutors to reassess their roles, the Constitution also imposes upon them more responsibility to guarantee the rights and freedom of the people and to take part in the process of review of the integrity of politicians and high-ranking officials.

With regard to the role and function of the public prosecutor in the context of the changing society, there are many topics of particular interest. However, this paper will limit its scope to the following:

- (i) Public prosecutors and their increasing role in the protection of human rights;
- (ii) Public prosecutors and a new role regarding suppression of corruption;
- (iii) Public prosecutors and international cooperation.

**IV. PUBLIC PROSECUTORS AND THEIR INCREASING ROLE IN THE PROTECTION OF HUMAN RIGHTS**

It is no doubt that in the daily handling of criminal cases, the public prosecutor is required by the law, as well as their inherent realization, to regard the fundamental rights of every party concerned. The requirement for the public prosecutor to protect human rights is either clearly enshrined or indirectly implied in various provisions of the Criminal Procedure Law and other related legislation. In most countries, the fundamental human rights of the suspect and the accused is recognized by their constitutions. Under the changing society of today, the current constitutions of various countries not only confirm such recognition, but also stresses it as the cornerstone for the development of criminal justice. In Thailand, provisions regarding the recognition of human dignity, equality under the law, prohibition of discrimination, protection of life, body,

liberty and encouragement of freedom, are clearly spelled out in Chapter 3 of the present Thai constitution. Essentially, the Human Rights Commission is required by the Constitution to be established within two years. The necessity and profitability of having the public prosecutor in the protection and promotion of human rights has been increasingly recognized. The changing trend that places the public prosecutor in closer and greater involvement in this regard may be illustrated from the recent phenomena in Thailand.

### **A. Protection of Civil Rights**

With regard to the protection of the civil rights of an individual in general, and the victims of the crime in particular, the provisions concerned are as follows:

- (i) Section 31 of the current constitution clearly provides in the first paragraph that:

“A person shall have the right and liberty in his or her life and person...A torture, brutal act, or punishment by cruel or inhumane means shall not be permitted; provided, however, that punishment by death penalty as provided by law shall not be deemed punishment by cruel or inhumane means under this paragraph. No arrest, detention or search of person or any acts affecting the right and liberty under paragraph one shall be made except by virtue of the law.”

- (ii) Section 34 provides that:

“A person’s family rights, dignity, reputation or the right of privacy shall be protected. The assertion or circulation of a statement or picture, in any manner whatsoever to the public, which violates or affects a person’s family rights, dignity, reputation or the right of privacy, shall not be made except for the case which

is beneficial to the public.”

- (iii) Section 35 provides that:

“A person shall enjoy the liberty of dwelling. A person is protected for his or her peaceful habitation and for possession of his or her dwelling place. The entry into a dwelling place without consent of its possessor or the search thereof shall not be made except for the case which is beneficial to the public.”

These provisions have been operated by the Penal Code, which embraces in its content similar provisions, but together with the imposition of penalty for those who violate them. Upon these provisions, whenever the right of any person is violated in one way or another, an offence is said to have been committed, and to institute a criminal case against the offender by the public prosecutor is somehow considered as the discharge of the function to protect the human rights of the victim.

### **B. Protection of the Rights of Suspects and the Accused**

As for the suspect and the accused, various rights are recognized by the provisions of the constitution, as follows:

- (i) The right not to be arrested without judicial warrant in accordance with Section 237, which provides that “In a criminal case, no arrest and detention of a person may be made except where an order or a warrant of the Court is obtained, or where such person commits a flagrant offence, or where there is such other necessity for an arrest without warrant as provided by law. The arrested person shall, without delay, be notified of the charge and details of such arrest, and shall be given an opportunity to inform, at the earliest convenience, his or her relative, or the person of his or her confidence, of the arrest. The arrested person

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being kept in custody shall be sent to the court within forty eight hours from the time of his or her arrival at the office of the inquiry official, in order for the court to consider whether there is a reasonable ground under the law for the detention of the arrested person or not, except for the case of *force majeure* or any other unavoidable necessity as provided by law.”;

- (ii) The right to be released on bail in accordance with Section 239 which provides that “An application for bail of the alleged offender or the accused in a criminal case must be accepted for consideration without delay, and an excessive bail shall not be demanded. The refusal of bail must be based upon the grounds specifically provided by law, and the alleged offender or the accused must be informed of such grounds without delay... The right to appeal against the refusal of bail is protected as provided by law... A person being kept in custody, detained or imprisoned has the right to see and consult his or her advocate in private and receive a visit as may be appropriate.”;
- (iii) The right not to be subjected to arbitrary detention in accordance with Section 240 which provides that “In the case of the detention of a person in a criminal case or any other case, the detainee, the public prosecutor or other person acting in the interest of the detainee has the right to lodge with the court having criminal jurisdiction a complaint that the detention is unlawful. Upon receipt of such complaint, the court shall conduct forthwith an *ex parte* examination. If, in the opinion of the court, the complaint presents a

*prima facie* case, the court shall have the power to order the person responsible for the detention to produce the detainee promptly before the court, and if the person responsible for the detention can not satisfy the court that the detention is lawful, the court shall order an immediate release of the detainee.”;

- (iv) The right to speedy investigation and trial under Section 241 which provides that “In criminal cases, an alleged offender or an accused has the right to a speedy, continuous and fair inquiry or trial... At the inquiry stage, an alleged offender has the right to have his or her advocate or person of his or her confidence attend and listen to interrogations against such person... An injured person or an accused in a criminal case has the right to inspect or require a copy of his statements made during the inquiry, or documents pertaining thereto when the public prosecutor issues a final non-prosecution order, an injured person, an accused or an interested person has the right to know a summary of the evidence, together with the opinion of the inquiry official and the public prosecutor, with respect to the making of the order for the case, as provided by law.”;
- (v) The right to access to legal aid under Section 242 which provides that “In a criminal case, an alleged offender or an accused has the right to receive aid from the State by providing an advocate without delay. In a civil case, a person has the right to receive a legal aid from the State, as provided by law.”;
- (vi) The right not to give statements or testify against themselves under



Section 243 which provides that “A person has the right not to make a statement incriminating himself or herself which may result in criminal prosecution being taken against him or her. Any statement of a person obtained from inducement, a promise, threat, deceit, torture, physical force, or any other unlawful act shall be inadmissible in evidence.”;

- (vii) The right to be presumed innocent according to Section 33 which provides that “An alleged offender or an accused in a criminal case shall be presumed innocent... Before the passing of a final judgment convicting a person of having committed an offence, such persons shall not be treated as convicts.”
- (viii) The right to apply for review of the case after conviction and to be compensated in the case of misleading adjudication pursuant to Section 247 which provides that “In the case where any person was inflicted with a criminal punishment by final judgment, such person, an interested person, or the public prosecutor may submit a motion for review of the case. If it appears in the judgment of the court reviewing the case that he or she did not commit the offence, such persons or their heir shall be entitled to appropriate compensation, expenses and the recovery of any right lost by virtue of the judgement, upon the conditions and in the manner provided by law.”

Upon recognition of those rights of the suspect and the accused, various provisions of the Criminal Procedure Code are grounded in correspondance to the Constitution. It is remarked also that the

new Constitution has emphasized even more strongly the rights and liberty of the suspect who might have been abusively arrested and detained by the police. The Constitution puts an end to the authority of the senior administrative or police officer in arresting any suspect without a judicial arrest warrant formerly permitted by the Criminal Procedure Code. It requires future arrests to be conducted under the warrant of the court, which is issued upon the application of the public prosecutor. This means that the public prosecutor, from now on, will take part more directly in checking the reasonableness of the grounds to apply for the judicial warrant.

In the case of abusive detention, where the Constitution has slightly changed the principle under Section 90 of the Criminal Procedure Code, the public prosecutor is required by law to inspect and apply to the court for the release of the victim of the abuse. Far beyond the provisions of the Criminal Procedure Code, the Constitution guarantees non-conviction for the innocent through review of the case after a final judgment inflicting penalty upon the accused, and to compensate the injured if there is such misleading judgment. In this regard, the public prosecutor is designated by the Constitution to be the public authority to initiate the process by submitting a motion to the court. This, of course, is a new dimension to the role of the public prosecutors, to cope with the rising trend of stressing fundamental human rights protection.

### **C. Participation in the Drafting of Human Rights Protection Laws**

Apart from developments in daily practice regarding the fundamental rights of individuals, as well as those directly concerned in criminal case proceedings, the recent Government’s designation of the Attorney General to chair the Drafting Committee for the “Act on the Promotion

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and Protection of Human Rights”, and the Office of the Attorney General to facilitate the drafting process, is another example of the increasing role of the public prosecutor regarding human rights in modern society.

**V. PUBLIC PROSECUTORS AND  
THE SUPPRESSION OF  
CORRUPTION**

Experience from the past always tell us about the tragedy of developing countries as regards the adjustment of their economic settings to cope with the contemporary world. Disintegration of the social structures of these countries, mostly from agricultural to industrial or commercial, usually results in the unfair distribution of wealth and eventually encourages an extreme materialism preference, instead of ethnic or religious. Consequently, the practice of corruption, in particular by politicians and high-ranking officials, has become fashion and has undoubtedly undermined the stability and progress of the community. In this globalisation age, the problem of corruption has spread all over the world and become an issue of common concern in the international community. Yet, the question still awaiting answer is in what way and how the public prosecutor can contribute in tackling this social disease. In this context, again, perhaps the recent efforts of Thailand in the campaign against corruption may be a good example.

Like other developing countries, Thailand has for long been weakened by the practice of corruption among politicians and some high-ranking officials. For each year, the national interests have been cheated far beyond estimation. It is very difficult to detect the crime or trace misappropriated property because corrupt

criminals are very shrewd and never leave any clues. Just recently, research on “Corruption and Democracy in Thailand”, conducted by the Faculty of Economic Study of Chulalongkorn University<sup>3</sup>, revealed that corruption in the Thai bureaucracy includes four aspects, namely: (1)Syndicate corruption; (2)Procurement kickbacks; (3)Bribery for monopoly transactions; (4)Corruption related to bidding. The key factor of corruption, according to the research, is the lack of “good governance” and integrity upon which the line between the personal and public interest is drawn. One suggestion made by the research is to install effective “integrity tests” for politicians and high-ranking bureaucrats.

In this regard, the former Counter Corruption Board, a body set up under the Prime Minister Office to examine and forfeit unclearly obtained assets of high-ranking officials alleged of being unusually rich, can do little of its job due to its limited authority and independence. With the rising awareness of the public regard to their rights, the need to check and review the integrity of politicians and high-ranking officials has been responded to by the new Constitution. The Counter Corruption Board has been restructured and changed to the National Counter Corruption Commission, an autonomous public body with more power and independence by virtue of Section 297, Section 301, and Section 302. In addition, a specific means to control the integrity and ethics of politicians has been established by virtue of Section 308 which provides that:

“In the case where the Prime Minister, a minister, member of the House of Representatives, senator or other political official has been accused of becoming unusually wealthy, or of the commission of malfeasance in office according to the Penal

3. Pasuk Ponpaichit, “Resolution of Corruption in the Thai Bureaucracy”, Thai Post newspaper, 15 December, 1998.

Code, or malfeasance in duties, or corruption according to other laws, the Supreme Court's Criminal Division for Persons Holding Political Positions shall have the competent jurisdiction to try and adjudicate the case... The provision of paragraph one shall apply to the case where the said person or other person is a principal, an instigator or a supporter.”

To put these provisions into effect, again, the public prosecutor is designated to take part. Section 305 clearly mentions this in paragraph 4 and paragraph 5 as follows:

“If the National Counter Corruption Commission passes a resolution that the accusation has a *prima facie* case, the holder of the position against whom the accusation has been made shall not, as from the date of such resolution, perform his or her duties until the Senate has passed its resolution. The President of the National Counter Corruption Commission shall submit the report, existing documents and its opinion to the Attorney General for instituting prosecution in the Supreme Court's Criminal Division for Persons Holding Political Positions. If the National Counter Corruption Commission is of the opinion that the accusation has no *prima facie* case, such accusation shall lapse... In the case where the Attorney General is of the opinion that the report, documents and opinion submitted by the National Counter Corruption Commission, under paragraph 4, are not so complete as to institute prosecution, the Attorney General shall notify the National Counter Corruption Commission for further proceedings and, for this purpose, the incomplete items shall be specified on the same occasion. In such case, the National Counter Corruption Commission and the Attorney General shall appoint a working committee, consisting of their representatives in an equal number, for collecting complete evidence and submit it to the Attorney

General for further prosecution. In the case where the working committee is unable to reach a decision as to prosecution, the National Counter Corruption Commission shall have power to prosecute by itself or appoint a lawyer to prosecute on its behalf.”

To institute prosecution of a criminal case and to handle it may be considered as the traditional function of the public prosecutor. However, to institute a criminal case against a corrupt politician under an exclusive machinery and process is somehow viewed as recent. The role and responsibility of the Thai public prosecutor has extended to cover functions as a public body to participate in the checking and review of politician's ethics and integrity.

## **VI. PUBLIC PROSECUTORS AND INTERNATIONAL COOPERATION**

The necessity of states to render assistance to foreign nations in the prevention and suppression of crime was attested long ago. Today, when crime has become an excessively complicated transaction, committed by transnational criminal organizations, international cooperation between and among countries to regulate world peace and order seems to be even more significant.

In a broad sense, international cooperation means all assistance regarding the criminal proceedings one state provides to an other state upon request. Assistance may take many forms, such as collecting evidence, providing documents, taking statements of persons, testimony of witnesses, initiating criminal cases, and forfeiting properties, etc. It also includes extraditing a fugitive to a foreign country for prosecution, trial, conviction, or to serve punishment. International cooperation has been viewed as conforming to the era of change, as it includes technical cooperation between or among states either on the

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bilateral or multilateral basis. At the level of the United Nations, the effort to encourage international cooperation has culminated in the form of various international instruments such as the UN Model Treaty on Extradition, UN Model Treaty on Mutual Assistance in Criminal Matters, UN Model Treaty on the Transfer of Proceedings in Criminal Matters, etc. In spite of the non-mandatory character at present, all international guidelines form a good basis for member states of the United Nations to make their laws conform to the model. This may give clear light on the changing norms and standards in domestic practice regarding international cooperation in the future.

In Thailand, international cooperation is conducted in two directions; one through mutual assistance in criminal matters, the other through extradition. In both directions, the public prosecutor takes very broad roles and responsibility. Of course, the role played by the Thai public prosecutor is more or less similar to that of their counterparts in many countries. Observation of the development in function and responsibility of the Thai public prosecutor in the area of international cooperation is, therefore, deemed a good illustration in this regard.

**A. Mutual Assistance in Criminal Matters**

The main legislation concerning mutual assistance in criminal matters in Thailand is the Act on Mutual Assistance in Criminal Matters B.E.2535(1992). Those parts not covered by the Act are governed by the Criminal Procedure Code. According to Section 6 of the Act, the Attorney General or the person designated by him is the "Central Authority" who, by virtue of Section 7, is charged with the following functions:

- (i) To receive the request for assistance from the requesting state and transmit it to the Competent Authorities;
- (ii) To receive the request seeking assistance presented by the agency of the Royal Thai Government and deliver it to the requested state;
- (iii) To consider and determine whether to provide or seek assistance;
- (iv) To follow and expedite the performance of the Competent Authorities in providing assistance to a foreign state for the purpose of expeditious conclusion;
- (v) To issue regulations or announcement for the implementation of this Act;
- (vi) To carry out other acts necessary for the success of providing or seeking assistance under the Act.

The request for assistance from the country having a mutual assistance treaty with Thailand shall be submitted directly to the Central Authority, while the request from those who have no treaty shall be submitted through diplomatic channels. Affirmation of reciprocity is the prerequisite for execution of the request from non-treaty requesting states. All requests are reviewed and executed by the Central Authority, empowered to exercise discretion to refuse execution of requests which are ineligible.

In practice, the public prosecutors of the International Affairs Department, Office of the Attorney General, are the task force for the Central Authority in this regard. The increase in number of the requests from abroad, as well as the complexity of legal issues, is a time consuming factor which renders problems to the whole process in general, and to the public prosecutor (as the practitioner) in particular. This is related, of course, to the question of manpower and technical arrangements the public prosecutor has to cope with.

## B. Extradition

Extradition in Thailand is conducted on a dual basis, that is to comply with the Extradition Act B.E. 2472, as well as the provisions of the treaty. Unlike those treaty prerequisite countries, Thailand has no difficulty in surrenderring the fugitive upon request from the requesting state which has no treaty with Thailand. However, in the case of no treaty, an official confirmation of reciprocity is required. Execution of extradition requests from foreign countries are also subject to general requirements such as non-contradiction of the principle of “dual criminality”, “*non bis in idem* (double jeopardy)”, “rules of speciality”, and so forth.

The role and function of the public prosecutor in extradition is clearly envisaged. According to Section 141 of the Criminal Procedure Code, the public prosecutor is charged with the duty to request extradition from a foreign country where the offender fled abroad. As regards extradition requests from foreign countries, the Extradition Act B.E. 2472 provides it is the responsibility of the public prosecutor to litigate extradition cases in the court. Although the final decision whether to extradite the fugitive or not belongs to the government, which in practice means the Cabinet, the public prosecutor exercises discretionary power on behalf of the State, including the government, for technical matters, while the Ministry of Foreign Affairs deals with foreign relations policy.

Various problems connected to extradition have emerged. Awareness of the necessity to cooperate with each other in the suppression of the fast-growing transnational organized crime has induced states to endeavor to eradicate all barriers in extradition between countries, in particular those arising from discrepancy between legal systems, a serious problem until now. To harmonize diversity,

attempts have been made on several occasions either at the global or regional level by international organizations, associations and NGOs. The adoption of the United Nations Model Treaty on Extradition in 1990, as the uniform guidelines to facilitate conclusion of extradition treaties between states, is an explicit illustration of these efforts. It is expected therefore that in the future, extradition, in responding to the changing society, will be more convenient than now.

In Thailand, perhaps the most conspicuous response in regard to extradition is the overhaul of the Extradition Act B.E. 2472. The Act has been in use for nearly 70 years since its passage in 1929, thus it could not cope with modern concepts and new forms of problems, and eventually required revision. So far, the new Act is under drafting by the Drafting Commission appointed by the Cabinet and chaired by the Attorney General. The new extradition law is expected to be capable of answering various questions arising from uncertainty in practice among the authorities concerned, such as those related to political offences, extradition of Thai nationals, capital punishment, *prima facie* cases, simplified procedure, etc.

One of the new concepts which directly involves the role of the public prosecutor is the trend to establish a “Central Authority for Extradition”. Presently, extradition in Thailand is commonly handled by various authorities, namely, the Ministry of Foreign Affairs, the Ministry of Interior, the Office of National Police, the Office of the Attorney General, and the court. This often brings some difficulty in terms of delay, inconvenience, disharmony of interpretation and different practices among the authorities concerned. The introduction of a “Central Authority” is therefore, based on the need to settle these

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problems. According to the new draft of the "Extradition Act", the Attorney General is proposed to be the "Central Authority", which means that the role and function of the public prosecutor in extradition will be more concentrated in the future.

ignoring the tendency of change. Adjustment of the prosecution service for the effective control of crime is expected to be established and continued in the forthcoming century.

## VII. CONCLUSION

Upon general survey of the current situation, it is undeniable that the world is undergoing a great change in all aspects. Globalisation has brought with it positive and negative results in terms of development. For many countries, the influx of modern concepts and new forms of economic settings has become the cause of an increasing rate of both traditional and innovative crimes. Advancement of technology has been exploited often by criminals to commit complex or high-tech crime. The effect of these crimes is even more serious when committed across borders, becoming transnational in character.

To cope with these circumstances, criminal justice administration must be reviewed and adjusted to conform to the trend of change in society nowadays. This, of course, includes the role and function of the public prosecutor.

Traditionally, the public prosecutor is deemed as a state official who renders prosecutorial functions, i.e, to prosecute the offender or to drop the criminal case. The future public prosecutor may be set on a new direction, i.e more responsible for a wider scope of function such as checking and investigating the integrity of politicians and high-ranking officials (against corruption), protecting human rights, and encouraging international cooperation, etc.

One thing for sure is that under the changing society of today, no public prosecutor of any country can stand alone

# AN OVERVIEW OF THE RIGHT TO SPEEDY TRIAL IN CRIMINAL CASES IN THE UNITED STATES

*Rya W. Zobel\**

## I. CONSTITUTIONAL MANDATE

Article 37 of the Constitution of Japan and the Sixth Amendment to the Constitution of the United States guarantee to all criminal defendants the right to a speedy and public trial. It is in both documents a right granted to the defendant; it cannot be invoked by the prosecution. In neither is the right in any way detailed or defined. That is, the Constitutions do not explain what constitutes “speedy” or rather, what period of time is too long, nor do they describe the consequences for exceeding that undefined time.

In the United States, relatively few Supreme Court cases have interpreted this Constitutional provision. However, in 1967 the Court established that the right to a speedy trial is “fundamental”, *Klopper v. North Carolina*, U. S. 213. 223 (1967), and in 1972, it set out the criteria by which the assertion of the right is to be judged, *Barker v. Wingo*, 407 U. S. 514 (1972). It is interesting to review the facts of the *Wingo* case as they explain the difficulties inherent in fashioning a rule for all cases.

On July 20, 1958, an elderly couple was beaten to death in a rural county in Kentucky. Two suspects, Silas Manning and Willie Barker, ultimately the petitioner in the Supreme Court, were arrested shortly thereafter and were indicted on September 15, 1958. Two days later, counsel was appointed for Barker. For

reasons not clear in the record, the Commonwealth did not try the defendants jointly and chose to proceed first against Manning on the theory that once convicted, he could be required to testify against Barker. The theory encountered numerous difficulties in practice. Manning’s first trial ended in a hung jury; the second resulted in conviction, but reversal on appeal; the third, again conviction and again reversal on appeal; the fourth once more a hung jury. Finally, on the fifth try, in March 1962, the Commonwealth succeeded in convicting Manning of murdering one victim, and on the sixth attempt, the second. It was December 1962. In the meantime Barker’s trial, which had initially been scheduled to start in September 1958, was continued again and again. Although he had been held in jail after his arrest, he was released on bail in June 1959, ten months after his arrest and he remained at large until his conviction and sentence.

Barker’s counsel did not object to the first eleven continuances; his objection to the twelfth and his motion to dismiss the indictment were overruled; he again failed to object to numbers 13 and 14, but did assert his right when the Commonwealth sought twice more thereafter to postpone his trial in March and June 1963. He was finally tried and convicted in October 1963, more than five years after the murder and the filing of the indictment against him.

On appeal from that conviction he argued, among other things, that his right to a speedy trial had been violated and that the conviction should therefore be set aside and the indictment, dismissed. He lost the

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argument in the courts of Kentucky and in the lower federal courts. The Supreme Court agreed to consider his case. Incidentally, the delay from conviction to the hearing and decision of the case in the Supreme Court was due entirely to Barker's delay in requesting review by the Supreme Court - nearly eight years.

Justice Powell, writing for a unanimous court, pointed out that the right to a speedy trial, although a fundamental right, is nevertheless different from the others in the Constitution. It is, of course, a right of the defendant, but, unlike the others, it also protects a societal interest in the swift disposition of criminal cases. Backlogs in the court's docket enable defendants to manipulate the system by, for example, negotiating more lenient plea. From the standpoint of the trial itself, time plays tricks with witness' memories. Defendants released on bail for long periods of time may pose a danger to the community if they commit additional crimes. On the other hand, lengthy pretrial detention is not only unfair to the defendant, but also very expensive.

Finally, the Supreme Court points out, "the right to a speedy trial is a more vague concept than other procedural rights" (at p.521). It is vague because there exists no fixed time after which the right has been denied. The violation of the right also necessarily, that is, for lack of alternative remedies, leads to an unsatisfactory and severe remedy, namely dismissal of the indictment. Given the inherent lack of clarity, the Supreme Court declines to prescribe any rules of thumb, but rather instructs that trial courts are to balance the conduct of the prosecution and defence, case by case. In so doing, they are to consider the length of the delay (one month clearly not enough, five years too long), the reason for the delay (the convenience of the prosecutor does not justify delay, the illness

of a crucial witness might), the defendant's assertion of their right (Barker failed to protest the postponements of his trial for more than three years), and prejudice to the defendant from the delay (the disappearance of crucial defence witnesses may so hobble the defence that relief is appropriate). Barker, however, was not so fortunate. The delay was, in the Court's words, "extraordinary", but Barker had not only failed to object to the postponements of his trials over a very long time, he clearly did not want a speedy trial. When he finally did object, the delay was excusable in that it was caused by the illness of an important witness. Finally, Barker could show no harm from the long wait. Such was the law until Congress passed the Speedy Trial Act of 1974.

## II. STATUTE AND LEGISLATIVE HISTORY

The Speedy Trial Act of 1974 was prompted by a number of concerns, some overlapping, some conflicting. The Eighth Amendment to our Constitution prohibits the imposition of "excessive" bail. As a practical matter, most persons accused of an offence are released pending their trial. As the United States experienced an ever greater increase in violent crimes and drug offences, the criminal justice system became overburdened, the courts' dockets became overcrowded and, given the right to bail, large numbers of persons accused of crimes remained on the street. The crowded dockets in the courts not only delayed trials, but the delay, in turn, often hampered the efforts of the prosecution. Witnesses' memories diminished, witnesses disappeared, evidence was lost. This allowed defendants to negotiate more effectively for pleas of guilty to lesser offences and to lower sentences. At the same time, defendants awaiting trial demonstrably often continued their antisocial activities. Thus the defendant's



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right to a speedy trial also became the public's right. The Supreme Court in the Barker case referred to the "societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused" (at p.519).

Congress was clearly aware of all of these cross-currents as it began to address what had become very real problems for the society and the criminal justice system. The first Speedy Trial Bill was introduced into to the United States Senate in 1970 by Senator Sam Ervin Jr., the Chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Rights. Many state legislatures had already adopted their own versions of speedy trial mandates. While early federal efforts failed, in 1973, Senator Ervin reintroduced a bill, S. 754,93d Cong., 2d Sess., 120 Cong. Rec. 24668 (1974), that eventually was negotiated, with some changes, to become the Speedy Trial Act of 1974. Echoing the Supreme Court's view, Senator Ervin described the bill as a balance between the needs of society and the Sixth Amendment right to a speedy and fair trial. He summarized the purpose of the bill as follows:

Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The overworked courts, prosecutors, and defence attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for

trial, because he wishes to delay his day of reckoning as long as possible. 120 Cong. Rec. 41618 (1974).

Congress, when considering the bill, was confronted by several major policy choices. The first was what the time limit should be for bringing a criminal matter to trial. Should there be one timeline - from arrest to trial - or a multifaceted system that might take into account the way in which the process normally proceeds, from arrest to indictment by a grand jury, to arraignment, pretrial motion practice, trial and, upon conviction, sentence? That is, should the statute fix one period or a series of separate periods for each part of the process? Should the time periods be fixed irrevocably by statute or should the courts be given a measure of flexibility? Finally, one of the most contentious issues was sanctions. It was well recognized that the only effective sanction for violating speedy trial constraints is the dismissal of the indictment, indeed dismissal with prejudice. That means, of course, that a defendant, no matter how guilty, would truly get off on a technicality. The defendant could not be tried then, or ever, for the offence for which s/he had been indicted, simply because the system had failed to bring him/her to trial on time.

From the point of view of a trial judge, who has to work with the limitations imposed by the statute, the Congress did a masterful job of resolving these, at the time, highly contentious matters. It chose a series of time limits for the several parts of a criminal case, beginning the count with the arrest and indictment. It fixed ultimate limits for each period, and ultimately for the entire case, but it added flexibility by a device called "excludable time". Certain time periods did not count toward the total of 70 days from arrest to conviction. It gave full discretion to the trial judge to impose the ultimate sanction of dismissal, with or

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without prejudice, depending on the circumstances of the case and the reasons for the violation of the Act. Finally, the Congress allowed for a lengthy period of transition before the statute would take effect to allow the courts, the litigants and the lawyers ample time to plan and adapt to the new regime.

**III. SUMMARY OF PROVISIONS OF  
STATUTE**

It is important to remember that the Speedy Trial Act was designed to implement, enforce and define the Constitution's Sixth Amendment right to a speedy trial. It provides specificity where none existed before. It does not, however, supplant or diminish the requirements of the Sixth Amendment. Thus one can imagine a situation where compliance with the Act is achieved while the Constitution is nevertheless violated, as might happen if excessive excludable time orders are entered over the defendant's objections. The following is a brief outline of the Act.

First, the Speedy Trial Act specifies that any information or grand jury indictment must be filed within thirty days of an arrest or service of a summons (see 18 U.S.C. §3161(b)). Note that this requirement, and indeed the entire statute, apply only to federal prosecutions. Subject only to the same Sixth Amendment constraints applicable in the federal courts, the states retain sovereignty over their judicial processes. In fact, a defendant arrested by federal authorities is not subject to the Act if turned over to state authorities. Only if the defendant is held in federal custody, or is served a federal arrest warrant, does the Act take over (see *United States v. Beede*, 974 F.2d 948, 949 (8th Cir. 1992)). Conversely, a defendant held in federal custody while awaiting state charges is not subject to the time clock of the federal Speedy Trial Act (see *United States v.*

*Johnson*, 815 F.2d 309, 312 (5th Cir. 1987)). It is also the case that a formal arrest or summons is necessary to trigger the Act. The temporary seizure of a person, without formal charges, does not trigger the time limitations under the provisions of the Act (see *United States v. Sayers*, 698 F.2d 1128, 1131 (11th Cir. 1983): temporarily taking a defendant into custody or control while photographing or fingerprinting, and then releasing to defendant, does not trigger the Act's time clock; see also *United States v. Davis*, 785 F.2d 610, 614-15 (8th Cir. 1986); *United States v. Walker*, 856 F.2d 26, 27 (5th Cir. 1985)).

Second, after being charged with a crime, the defendant must be brought to trial within seventy days from the filing date of the indictment or information, or the date the defendant first appears before a judicial officer, whichever is later (see 18 U.S.C. § 3161(C)(1)). Within that time frame, the statute nevertheless provides the defendant with a guaranteed time of thirty days to prepare. Thus, the trial may not commence less than thirty days after the defendant first appears in court through his or her attorney (see 18 U.S.C. § 3161(C)(2)). The beginning of the trial means the start of the jury selection process in a given trial (see *United States v. A-A-A Electronic Co., Inc.*, 788 F.2d 242, 246 (4th Cir. 1986); *United States v. Howell*, 719 F.2d 1258, 1262 (5th Cir. 1983)). As noted earlier, these exceedingly rigid and short time periods are much tempered by the device of excludable time, which in practice, provides great flexibility.

Third, "excludable time" means nothing more than time that is not counted. The statute is specific and clear about the contingencies that stop the count and the length of the time out (see 18 U.S.C. § 3161(h)). It lists four basic categories of delays that stop the clock: 1) delays from pretrial motions and interlocutory appeals;

2) delays relating to the defendant's condition or actions, 3) delays caused by the unavailability of witnesses or defendants; and 4) delays granted "in the interest of justice", when the court determines that the ends of justice outweigh the interest of the defendant or the public in a speedy trial.

Virtually every case calls for counsel to seek information, challenge the indictment or shape the case to his/her client's advantage. Thus counsel will file motions for discovery, to dismiss, to sever and the like. These motions are generally necessary and not trivial. They take time to consider and therefore give rise to excludable time. Interestingly, the statute seemingly allows unlimited time from filing to hearing, but limits the time for deciding to 30 days. The case law has, however, built into the unlimited portion a requirement of reasonableness (see *Henderson v. United States*, 476 U.S. 321, 326 (1986)).

Several provisions toll the time for delays that relate to the defendant, including an agreement by the defendant to defer prosecution or delays resulting from a mental examination of the defendant. So also a delay due to the defendant's mental incompetence or physical ailment is deemed reasonable and consequently excludable. Time may even be excludable if needed by one defendant over the objection of another.

Delays caused by the absence of an essential witness to the trial should, and do, give rise to excludable time. However, the government must always exercise "due diligence" in making the witness available (see *United States v. Barragan*, 793 F.2d 1255 (11th Cir. 1986)). This provision applies with equal force to the defence.

Finally, the Court is empowered to grant delays as the "ends of justice" require.

Because this provision grants broad discretion to the judge, s/he is required to explain their reasons for any orders under this section (see *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990); *United States v. Vasser*, 916 F.2d 624 (11th Cir. 1990)). The Act sets forth four factors for courts to consider when determining whether to grant a continuance to serve the ends of justice: 1) whether to grant a continuance would make the continuation of the proceedings impossible or result in a miscarriage of justice; 2) whether the case is so unusual or complex that the parties could not reasonably prepare for trial within the Act's time limitation; 3) whether the delay in filing an indictment is because it was difficult for a grand jury to indict with the time limits, including whether a grand jury is in session when the defendant was arrested; and 4) the failure to grant a continuance would deny the defendant reasonable time to obtain counsel, or time for counsel to properly prepare for trial, which may occur in very large complex criminal cases.

Violations of any of the provisions of the statute may lead to sanctions. As mentioned earlier, the only possible and realistic sanction is dismissal of the case. The serious question then remaining is whether the dismissal is to be with or without prejudice. Since the right to a speedy trial is the defendant's right, the statute assumes implicitly that a defendant cannot violate the Act, and it provides no remedy against a defendant other than continuation of the criminal proceeding against them. In deciding the severity of the sanction, the judge is to evaluate the matter according to three enumerated factors: 1) the seriousness of the offence; 2) the facts and circumstances of the case which led to the dismissal; and 3) the impact of a reprosecution on the Act and the administration of justice. As a matter of practical reality, the trial court has great

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discretion to dismiss a case with or without prejudice, as the factors are fairly open-ended for the trial judge to use to determine this.

The Act also requires that District Courts adopt plans for prompt disposition of criminal cases, including the formation of a working group consisting of the Chief Judge, United States Attorney, the Federal Public Defender, and other skilled individuals from the criminal justice community (*see* 18 U.S.C. § 3165). The purpose of the group is not to develop its own Speedy Trial Act, but to provide local procedures to implement an efficient court system, taking into consideration the needs of the individual district court region. Since the federal judicial system has 94 district courts, and since each has a unique culture and tradition, the working groups were most useful in facilitating the transition to the new system of counting in the several courts. They enabled those who had to implement this system to buy into it, and to gain a stake in making it succeed.

#### IV. SOME CONCLUSIONS

Several aspects of the Act are worth noting specially. First, as described above, Congress showed a concern for the trial courts, not always present in legislation, that prescribe and proscribe the manner in which the courts do their work. Both houses of Congress acknowledged that they did not know the reasons for pretrial delay in criminal cases, and both recognized that a speedy trial mandate, if it were to have any teeth, would have a serious impact on the courts and would severely test their ability to achieve compliance with the proposed statutory provisions. The Act as passed, and all earlier versions, would effectively give preferential treatment to criminal cases by putting them always at the head of the queue of a judge's or a court's docket. Courts had to devise

mechanisms, perhaps change rules, to accommodate this now expedited criminal docket without delaying the disposition of civil cases. Congress was not alone in its ignorance. Little research had been done on these questions within or without the judiciary.

Two responses emerged. First, full implementation of the statute was delayed, ultimately by nearly four years, to allow the courts, indeed the criminal justice system as a whole, to prepare for the impending change. Second, Congress tried to foster knowledge and understanding of the criminal justice process. Thus the Act includes several provisions that require the Courts to develop plans not only for implementation, but also for the collection of a wide range of information and statistics about the administration of criminal justice within each court. Much of the data to be collected was to inform the courts and, by means of periodic reports, Congress, about the causes of pretrial delay, the cost of compliance with the Act, and the effects of the speedy trial provisions on the management of the courts' entire docket, criminal and civil.

The courts did collect vast amounts of data and they did report to Congress. However, not much use was made of the data. The studies and insights to be derived therefrom simply did not materialize. It is the case that implementation of the Speedy Trial Act requirements was, in the end, remarkably uneventful. Perhaps because of the long transition period, or because the courts had to plan for implementation, trial judges, prosecutors and defence counsels were quite ready to accept these new requirements and to make the statute work. Indeed, the most interesting fact about this piece of legislation is how quickly and totally it was accepted by those most affected by it, and how well it has worked.

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One of the areas of concern and contention had been the matter of sanctions. Yet dismissals, particularly dismissals with prejudice, have been rare and with few exceptions, the courts have managed to dispose of criminal cases within the time frames established by the Act, without unduly delaying the civil docket. The lesson I would draw from this experience is that the judicial system, bound as it may be to custom and unwilling to change, is nevertheless able to accommodate even major adjustments if they are properly managed and the goal is one the judges and lawyers accept.

# AN OVERVIEW OF THE UNITED STATES SENTENCING GUIDELINES\*

*Rya W. Zobel\*\**

## I. INTRODUCTION

In the United States, sentencing rules have historically been influenced by four objectives: punishment, incapacitation, rehabilitation, and deterrence. Over time, one or another of these objectives has gained or diminished in importance. The Sentencing Reform Act of 1984 created the United States Sentencing Commission and authorized it to promulgate sentencing guidelines for the federal courts. With one stroke, the U.S. Congress replaced an indeterminate sentencing system - based on the goal of rehabilitation and implemented through parole release - with a determinate system emphasizing deterrence and just deserts. This new guidelines system was the result of more than a decade of reform efforts, and the unlikely coalition of liberals and conservatives in the United States Congress. When he introduced the legislation in 1983 that ultimately resulted in the 1984 Sentencing Reform Act, Senator Edward Kennedy stated:

“Federal criminal sentencing is in desperate need of reform. ...The current system is actually a non-system. It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public

that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served.<sup>17</sup>

This was not the first time that Congress had turned its attention to federal sentencing, nor would it be the last. The legislation introduced by Senator Kennedy in 1983 was substantially the same as the legislation that the Senate had agreed to in 1979, which in turn was based on earlier Senate bills, one introduced in 1974 and another by Senator Kennedy in 1975, to create a judicial commission to promulgate sentencing guidelines. This round of federal sentencing reform can be traced back to 1966 when, upon the recommendation of President Johnson, Congress created the National Commission on Reform of Federal Criminal Laws. This commission, commonly known as the Brown Commission, after its chair, Edmund G. Brown Sr., former governor of California, issued its final report in 1968 and Congress began hearings on the report in early 1971.<sup>2</sup> Legislation based upon the Brown Commission's recommendations for a model criminal code was introduced in 1973, but was not passed by Congress.

Not long after Congress began its hearings on the Brown Commission report, Judge Marvin E. Frankel<sup>3</sup> gave a series of

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\* I wish to acknowledge the significant contribution to this paper of David E. Rauma, Senior Research Associate at the Federal Judicial Centre, Washington D.C..

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<sup>1</sup> 129 Congressional Record p. S2090 (Mar. 3, 1983) (daily ed.).

<sup>2</sup> National Commission on Reform of Federal Criminal Law, Final Report (1968).

<sup>3</sup> U.S. District Judge for the Southern District of New York (since retired).

lectures, later published, in which he proposed the creation of a sentencing commission to develop rules for sentencing.<sup>4</sup> In Judge Frankel's proposal, these sentencing rules would be presumptively applied, but could be appealed to higher courts. This proposal became arguably the most influential concept in sentencing reform for the next decade or more. In the 1970's, Minnesota and Pennsylvania created sentencing commissions and several other states, California for example, replaced their indeterminate sentencing systems with statutorily specified sentencing rules. By 1996, 20 states had sentencing guidelines and new sentencing commissions were at work in three more.

Judge Frankel's proposals, following soon after the Brown Commission and the Congressional hearings on its report, helped form the basis for the legislation introduced in Congress during the mid-1970s that would eventually result in the Sentencing Reform Act of 1984. Along the way, this idea of a sentencing commission gained adherents, each with different goals who viewed the concept of an administrative sentencing agency as a solution to the problems each saw in federal sentencing. Early proponents, such as Senator Kennedy, were concerned about sentencing from a civil rights perspective. They were troubled by the potential for discrimination and disparity in sentencing within an indeterminate sentencing system. Sentencing guidelines would eliminate the possibility of discrimination in sentencing by the application of sentencing rules. Later proponents were concerned about rising crime rates and what they viewed as the leniency of the federal courts. A sentencing commission could address this problem by crafting sentences designed specifically to deter crime and deliver punishment with certainty. By 1979, liberals and

conservatives in the Senate, led by Senators Kennedy and Thurmond respectively, had agreed to the reform package, but it was not until 1984 that the House of Representatives passed the legislation and President Reagan signed it into law.

The remainder of this paper will discuss federal sentencing before and after the federal sentencing guidelines that went into effect on November 1, 1987. The next section will examine pre-guidelines sentencing and how it became an impetus for reform. Following that will be a section that examines how the federal sentencing guidelines operate in practice. The next section will discuss some real and potential impacts of the federal sentencing guidelines. The final section will look toward the future and what might be in store for federal sentencing.

## II. FEDERAL SENTENCING PRIOR TO THE GUIDELINES

Before the introduction of the sentencing guidelines in 1987, sentencing in federal district courts was based on an indeterminate sentencing system. Federal judges had the discretion to sentence within, sometimes very broad, statutory ranges. An offence such as bank robbery had a statutory maximum sentence of 20 years, with no minimum sentence.<sup>5</sup> If the offender assaulted someone in the course of the robbery, or jeopardized someone's life by the use of a dangerous weapon, the maximum sentence was increased to 25 years.<sup>6</sup> The judge thus had the discretion to impose on the bank robbery defendants

<sup>4</sup> Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cinn, L. Rev. 1 (1972). See also: Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972).

<sup>5</sup> 18 USC § 2113(a) (1984).

<sup>6</sup> 18 USC § 2113(d) (1984).

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any sentence from straight probation to 20 and 25 years incarceration, respectively. Very few offences carried minimum sentences, and those that did were often specified as "any term of years." The sentence imposed by the court could not be appealed, nor did the court have to specify the reasons for the sentence.

The heart of this indeterminate system was parole release, created in the federal system in 1910. Offenders sentenced to prison could be released on parole supervision before the expiration of their term. The parole release date was set by the U.S. Parole Commission according to the imposed sentence and the Parole Commission's assessment of the offender's readiness for release. By statute, an offender sentenced to prison for a fixed term greater than one year would be eligible for release on parole after serving either one-third of the sentence, or ten years of a life sentence or a sentence greater than 30 years.<sup>7</sup> However, at sentencing, the court could also specify a minimum sentence to be served before parole eligibility, if that minimum was one-third or less of the maximum also specified by the court.<sup>8</sup> The court could also specify a maximum term and leave the determination of parole release entirely to the Parole Commission.<sup>9</sup> In 1974, the Parole Commission began to use its own parole decision-making guidelines for release decisions, and the Parole Commission and Reorganization Act of 1976 required that parole guidelines be used for all parole release decisions.<sup>10</sup>

It is in this context that the Congress began to consider an alternate system of determinate sentencing. The report of the Senate Judiciary Committee on the original 1983 legislation described the prevailing view in Congress of federal sentencing:

"In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really determine whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.<sup>11</sup> "

Although rehabilitation would remain a stated goal of federal sentencing after the introduction of sentencing guidelines and the abolition of parole,<sup>12</sup> the view remained that the rehabilitative model underlying American criminal justice efforts, since the early part of this century, was wrong. By the late 1970's, many criminal justice experts in the United States had come to the conclusion that the rehabilitation of offenders was uncertain at best. An influential review of the research on rehabilitation programs in the federal and state criminal justice systems, published in 1975, concluded that "nothing works."<sup>13</sup> The authors of this review found no

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<sup>7</sup> 18 USC § 4205(a) (1984).

<sup>8</sup> 18 USC § 4205(b) (1984).

<sup>9</sup> *Ibid.*

<sup>10</sup> Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976).

<sup>11</sup> Senate Commission on the Judiciary, Sentencing Reform Act of 1983, S. Rep. No. 98-223, at 34.

<sup>12</sup> 18 USC § 3553(a)(2) (1998).



systematic evidence that specific types of correctional treatments reduced recidivism.

An equal or greater skepticism existed about the indeterminate sentence practices that typically were used to implement this model. Indeterminate sentencing decisions and parole release decisions were, many experts felt, too often abused or were too often poorly made. Judges and parole boards had wide latitude to make decisions about imprisonment. The end result, many felt, was a tremendous potential for discrimination and disparity in sentencing practices, and uncertainty for all concerned, including prosecution and defence attorneys, judges, and offenders. As Senator Kennedy stated, there could be no reasonable expectations about the certainty and length of punishments.

How serious was the problem of sentencing disparity? A Special Panel on Sentencing Research, created in 1980 at the request of the National Institute of Justice and the National Academy of Sciences, assessed the quality of existing sentencing research. With regard to sentencing disparity and discrimination, the Panel found that the research findings on discrimination in sentencing were mixed.<sup>14</sup> Some studies showed evidence of racial, socio-economic, and/or gender discrimination, although most studies to that point had one or more methodological problems that cast doubt on their conclusions. In contrast, the research on disparity in sentencing decisions could systematically account for only a small amount of the variation in judicial decisions. This result is not surprising, since an indeterminate system addresses unique aspects of each offender's situation. The Panel noted that, stripped of its justification for rehabilitative purposes, this variation in sentencing had become a rationale for reform efforts.

### III. THE SENTENCING REFORM ACT OF 1984

#### A. The Structure of the United States Sentencing Commission

The Sentencing Reform Act of 1984 established the United States Sentencing Commission, a panel of sentencing experts appointed by the President of the United States. Judge Frankel's original proposal called for a judicial commission to set sentencing rules. The Sentencing Reform Act specified that the Commission would have seven voting members, one of whom would be the chair of the Commission. The Attorney General of the United States, or his/her designee would be an *ex officio*, non-voting member of the Commission. The voting members would be appointed for six-year terms. At least three of the voting members had to be federal judges recommended to the President by the Judicial Conference of the United States. No more than four of the voting members could be members of the same political party.

The original set of Commissioners consisted of one district court judge, also designated as the chair; two circuit court judges, a former member of the United States Parole Commission; and three academics. The original Commissioners were appointed for staggered terms of two, four, and six years, in order to promote continuity by preventing complete turnover in membership every six years. As the original Commissioners left or their terms expired, the number of judges on the panel has been maintained.

<sup>13</sup> Douglas Lipton, Robert Martinson, & Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975).

<sup>14</sup> Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, and Michael H. Tonry (eds.), *Research on Sentencing: The Search for Reform* (1983) at 64.

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**B. Directives to the Sentencing Commission**

When the Sentencing Commission began its work in 1985, its task was to promulgate guidelines that meet the purposes of sentencing outlined in 18 USC § 3553(a)(2): just punishment, deterrence, incapacitation, and rehabilitation. In outlining the tasks of the Commission, Congress had three goals: honesty, uniformity, and proportionality. Honesty in sentencing would be achieved by the specification of the sentence at the time of sentencing. The indeterminate sentencing system that guidelines had replaced gave the authority for determining the time served in prison to the United States Parole Commission. An offender sentenced to prison would not know the exact length of his/her incarceration until after a parole hearing, and that hearing might not occur until the offender had served a third of the sentencing imposed by the court. The Sentencing Reform Act specified that the full term of imprisonment imposed by the court would be served, minus up to 15 percent of the sentence that could be subtracted for good behavior, in prison.<sup>15</sup>

Uniformity would be achieved by the avoidance of unwarranted sentencing disparity among offenders with similar criminal records convicted of similar criminal offences.<sup>16</sup> Although there was scant empirical evidence on which to base it, there was a widespread belief that federal sentencing practices varied widely between judges and that these practices were sometimes based on illegitimate factors such as gender and race.<sup>17</sup> To achieve this goal of uniformity, Congress gave the Sentencing Commission a number of directives. For one, Congress directed the Commission to ensure that the guidelines and their policy statements be entirely neutral with regard to race, gender, national origin, creed, and socio-economic status.<sup>18</sup> Further, the

Commission was instructed to at least consider whether certain offences and offender characteristics are relevant to sentencing. The Commission's response to this directive is discussed in a later section. Congress specified, however, that the guidelines should reflect the "general inappropriateness" of considering an offender's education, vocational skills, employment record, family ties and responsibilities, and community ties when recommending a prison term or its length.<sup>19</sup>

Proportionality would be achieved by a system of guideline sentences that recognized and incorporated differences in both an offender's criminal behavior and his/her criminal background. In other words, punishment should be proportional to the real or potential harm of an offence and to the offender's history of criminal behavior. Congress gave no detailed instructions as to types of sentences nor their lengths, but did give the Commission guidance as to what it should consider during the development of the guidelines. Consistent with the goal of proportionality, Congress directed that the guidelines should: (1) specify "substantial" terms of

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<sup>15</sup> 18 USC § 3624(b) (1998).

<sup>16</sup> 28 USC § 991(b)(1) (1998).

<sup>17</sup> One of the studies most frequently cited as evidence for sentencing disparity is a study done by the Federal Judicial Center: Anthony Partridge and William B. Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges* (1974). Fifty judges in the second circuit were given the same 20 offence/offender scenarios and asked to impose a sentence for each. The study showed quite a bit of variation, particularly for the most serious offences. For example, the range for bank robbery was 5 years to 18 years in prison, with a median sentence of 10 years. The study did not examine the possible role of illegitimate factors in these judges' sentencing decisions.

<sup>18</sup> 28 USC § 994(d) (1998).

<sup>19</sup> 28 USC § 994(e) (1998).

imprisonment for certain offenders, such as those with prior convictions or who committed the offence while on pretrial release<sup>20</sup>; (2) reflect the “appropriateness” of imposing incremental penalties for multiple offences, whether committed at different times or as part of the same course of conduct<sup>21</sup>; and (3) reflect the “inappropriateness” of imposing consecutive penalties for conspiracy to commit an offence and the actual offence.<sup>22</sup> At the same, the Commission was instructed to take into account the capacity of the penal facilities and other services in the federal system and make recommendations, if necessary, for changes or expansion needed as a result of the guidelines. Congress tempered this somewhat by also directing that the guidelines be formulated to minimize the possibility that the federal prison population will exceed the capacity of the federal prison system.<sup>23</sup>

### C. The Development of Empirical Guidelines

In the absence of any prior sentencing rules, the development of a sentencing guideline system is a daunting task, particularly for a criminal code as diverse as the Federal Code. Congress stated that the starting point for guidelines development should be the average sentences imposed before the creation of the Commission, including the average time served for offenders sentenced to prison.<sup>24</sup> Congress prefaced this instruction with the directive that the Commission should ensure that the guidelines reflect the fact that, in many cases, these sentences do not accurately reflect the seriousness of the offender’s crime.<sup>25</sup> As a result, the Commission’s starting point was an assessment of then-current sentencing practices in the federal courts, including release decisions by the United States Parole Commission. As part of this assessment, the Commission collected data

on a sample of 10,500 cases sentenced in the federal courts between October 1, 1984 and September 30, 1985. From the Administrative Office of the U.S. Courts, the Commission obtained automated data that included offence descriptions, information about each offender’s background and criminal history, the method of disposition (i.e., guilty plea, conviction after trial), and the sentenced imposed. To augment this data with more complete offence and offender information, the Commission requested and received information from the Probation Division of the U.S. Courts that included the presentence investigation reports prepared for judges by U.S. Probation Officers.<sup>26</sup> Finally, the Commission obtained this information from the Bureau of Prisons on offenders in the sample who had been sentenced to a term of imprisonment:

- (1) Time actually served in prison, or
- (2) Time scheduled to be served in prison if a parole date had been set, or
- (3) An estimate of the time to be served in prison if no parole date had been set.

In order to have an empirical basis for developing the guidelines, the Commission analyzed this data to answer these questions:

- (1) How much time is served on average

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<sup>20</sup> 28 USC § 994(i) (1998).

<sup>21</sup> 28 USC § 994(l)(1) (1998).

<sup>22</sup> 28 USC § 994(l)(2) (1998).

<sup>23</sup> 28 USC § 994(g) (1998).

<sup>24</sup> 28 USC § 994(m) (1998).

<sup>25</sup> *Ibid.*

<sup>26</sup> U.S. Probation Officers are employees of the federal courts. Their duties include the supervision of offenders on probation and the preparation of investigative reports for use by judges at sentencing.

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- by convicted federal offenders?
- (2) How does this average vary with characteristics of the offence, the offender's background and criminal history, and method of disposition?
  - (3) How much of this variation cannot be attributed to the offence and the offender's background (i.e., how much disparity exists)?

The goal of this analysis was not to replicate judicial decision-making, but to obtain information about the range of judges' sentencing practices, on an offence-by-offence basis. In particular, the Commission would have information about the relationship between offence, offender characteristics and sentences imposed on one hand, and time served on the other. At the very least, it was expected that this analysis would provide material for policy deliberations.

At the same time the Commission was analyzing the sentencing data, it collected information and input from a wide variety of other sources. During the guidelines development period, the Commission conducted public hearings in Washington D.C. and in other regions of the United States, solicited written comments from hundreds of criminal justice practitioners and other interested parties, and established advisory groups of federal judges, U.S. attorneys, federal public defenders, U.S. probation officers, state district attorneys, private defence attorneys, and academics. The Commission's goal was to involve as many interested parties as possible, so as to better inform its policy deliberations.

#### **D. The Commission's Policy Decisions**

##### **1. The Relevance of Offence and Offender Characteristics**

Congress gave the Sentencing Commission broad authority to develop a

guideline system, although, as noted earlier, it also gave a good many instructions as to how those guidelines should function. Among other considerations, the Commission was to decide the relevance of certain offences and offender characteristics for sentencing:

##### *Offence Characteristics*<sup>27</sup>

- (1) Grade of the offence (e.g., misdemeanor or felony);
- (2) Aggravating and mitigating circumstances;
- (3) The nature and degree of harm caused by the offence;
- (4) The community view of the gravity of the offence;
- (5) The public concern generated by the offence;
- (6) The potential deterrent effect of a particular sentence for the offence; and
- (7) The current incidence of the offence in the community and in the nation as a whole.

##### *Offender Characteristics*<sup>28</sup>

- (1) Age;
- (2) Education;
- (3) Vocational skills;
- (4) Mental and emotional condition as a mitigating factor or as otherwise relevant;
- (5) Physical condition, including drug dependence;
- (6) Employment record;
- (7) Family ties and responsibilities;
- (8) Community ties;
- (9) Role in the offence;
- (10) Criminal history; and
- (11) Dependence upon criminal activity for a livelihood.

The Sentencing Commission decided that, with the exception of the role in the offence, criminal history, and dependence

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<sup>27</sup> 28 USC § 994(c) (1998).

<sup>28</sup> 28 USC § 994(d) (1998).

upon criminal activity for a livelihood, none of the offender characteristics listed above are relevant to the purposes of sentencing. The offence characteristics were, however, incorporated in various ways into the structure and substance of the sentencing guidelines ultimately issued by the Commission.

## 2. Real vs. Charged Offence Sentencing

The guidelines issued by the Commission in 1987 are described as a modified real-offence sentencing system, modified by incorporating some elements of a charge-based sentencing system. A pure charge-based system would tie the sentence directly to the charges on which the offender was convicted. To the extent that these charges captured features of the offence (e.g., assault with a deadly weapon), these features would be reflected in gradations in the sentence. In contrast, a pure real-offence system would catalog the harms caused by the offence conduct, and the offender's sentence would be based on those harms and aspects of the offence conduct regardless of the specific conviction charges.<sup>29</sup> One benefit of such a system, compared to a charge-based system, would be its potential effect on prosecutorial discretion. Prosecutors would not be able to shape sentences directly through their charging practices. Rather, the court would base the sentence on the offence as it occurred.

A drawback of the real-offence system is the level of complexity and detail it can require to represent a set of offences with an inventory of generic harms, particularly in the federal system's very diverse criminal code. Before issuing guidelines in 1987, the Sentencing Commission considered a real-offence system but concluded that it was too complex; that it risked reintroducing the sentencing disparity Congress sought to eliminate; that it jeopardized the certainty of

punishment; and that it might mute the guidelines' deterrent effects. The modified real-offence system that the Commission did adopt is organized around statutorily-defined offences, just as a charge-based system would be, but catalogs on an offence-by-offence basis the harms that are the most common for each offence. This guideline system goes on to address a set of more generic features of criminal offences, such as the offender's role in the offence, the nature of the victim, obstruction of justice, and multiple counts of conviction. For example, robbery is a category in the sentencing guidelines, as defined by statute, and the robbery guidelines enable the sentencing judge to take account of the most common features of robbery. A more detailed example will be described later, including the more generic features, such as the role in the offence, but here are some of the characteristics of a robbery that are incorporated into the robbery guideline:

- (1) Did the offender have a weapon?
- (2) How was that weapon used?
- (3) Was a victim injured?
- (4) Was a victim taken hostage or abducted?
- (5) What was the value of the property taken in the robbery?

One of the more controversial aspects of this modified real-offence system is the concept of relevant conduct. Relevant conduct is what makes this a real-offence rather than a charge-based system. Here

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<sup>29</sup> Offence conduct may be incorporated into a real-offence system in several ways. For example, a fraud of \$1,000 could be treated as a more serious offence if the victim was considered especially vulnerable because of age or infirmity. Alternatively, the offence conduct could increase the potential harm, such as in a sophisticated scheme that, before it was detected, was intended to defraud large numbers of victims.

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is the definition of relevant conduct in the 1998 Sentencing Guideline Manual:<sup>30</sup>

- (1) (a) all acts and omissions committed, aided, abetted, counselled, commanded, induced, procured, or willfully caused by the defendant; and
- (b) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offence of conviction, in preparation for that offence, or in the course of attempting to avoid detection or responsibility for that offence;
- (2) solely with respect to offences of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(a) and (1)(b) above that were part of the same course of conduct or common scheme or plan as the offence of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

Relevant conduct, as defined in the sentencing guidelines, takes the offender's accountable behavior beyond that represented by the conviction charges, to include for example, the behavior of others in jointly undertaken criminal activity and the criminal behavior for which the offender was neither charged nor convicted. For example, an offender could be charged

with multiple counts of larceny, totalling several thousand dollars but plead guilty to a single count of larceny involving less than \$500. At sentencing, the relevant conduct standard would have the judge total all of the losses, including those for dropped counts, and use that total amount to determine the sentence. The guidelines for other offences such as drug trafficking also total the harm for convicted, dropped and uncharged counts, to arrive at a total harm.

### 3. Uniformity and Proportionality

The tension between the goals of uniformity and proportionality is one of the keys to understanding the choices made by the United States Sentencing Commission concerning the structure and content of the sentencing guidelines. Too much of either uniformity or proportionality would be at the expense of the other. In a system of uniform sentences where, all offenders convicted of bank robbery receive a five-year sentence and all offenders convicted of fraud receive a three-year sentence, could avoid sentencing disparity and eliminate many or most differences between judges. But that uniformity could undermine proportionality by, for example, ignoring gradations in the harm caused by the offence, the offender's criminal history, or aggravating and mitigating factors such the offender's role in the offence. While a system of proportional sentences would be important for the purposes of deterring more serious criminal behavior and repetitive criminal behavior, too much variation could undermine the effort to reduce disparity in sentencing.

The analysis of the 10,500 cases provided one basis for negotiating between these two goals. The Commission used the empirical data to: (1) set narrow sentence ranges that centered on the average current sentencing

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<sup>30</sup> USSG §1B1.3 (1998).

practices for individual offences; and (2) identify relevant aggravating factors, such as monetary loss or injuries to victims, and their relationship to the sentence. Where the data for individual offences was inconclusive, the Commission read presentence investigation reports and consulted with practitioners and U.S. probation officers to develop a rationale for setting sentencing ranges. In some other instances, such as for white-collar and drug offences, the Commission had received directives from Congress to increase penalties over current practice, but the Commission still used data analyses to identify relevant aggravating factors for these offences.

#### 4. Probation and Supervised Release

Before the guidelines, judges had broad authority to sentence offenders to probation as a means of controlling and supervising their conduct, without confinement. The Sentencing Commission, through the guidelines, curtailed the use of probation. This was a response by the Commission to the Congressional directive to ensure that the guidelines reflect the fact that pre-guideline sentences do not always accurately reflect the seriousness of the offence. The Commission accomplished this through the structure of the guideline sentencing table, which will be described in more detail in a later section. The result was that fewer offenders would be eligible for probation. During the statistical year 1987,<sup>31</sup> just prior to the effective date of the guidelines, 36.5 percent of the 43,942 offenders convicted in federal courts received probation as part of their sentence.<sup>32</sup> A decade later, during fiscal year 1997, 21.2 percent of the 55,648 convicted offenders received a probation sentence.<sup>33</sup>

The Sentencing Reform Act of 1984 abolished parole release from prison, and therefore parole supervision after release,

but Congress directed the Sentencing Commission to consider whether a term of imprisonment should include a term of supervised release.<sup>34</sup> The Commission decided that a term of supervised release should be imposed in all cases with a sentence of one or more years of imprisonment and in all other cases at the court's discretion.<sup>35</sup> The length of the term of supervised release can vary from one to five years, depending on the seriousness of the conviction offence.<sup>36</sup> Unlike parole release, the term of supervised release is served after the completion of the full term of imprisonment, less good time credits. The released offender is subject to a number of mandatory conditions<sup>37</sup> and is supervised by a U.S. Probation Officer who reports to the sentencing judge.

#### 5. Mandatory Minimum Sentences

While the Sentencing Commission was creating the sentencing guidelines, Congress passed the Firearm Owner's Protection Act<sup>38</sup> and the Anti-Drug Abuse Act of 1986.<sup>39</sup> The former instituted a new, mandatory 5-year penalty for the use of a firearm during the commission of a drug felony; the latter added mandatory

<sup>31</sup> Until 1991, the Administrative Office of the U.S. Courts compiled data on a statistical year basis, from July 1 to June 30 of the following year. Statistical year 1987 refers to the period July 1, 1986 to June 30, 1987. In 1992, the Administrative Office switched to fiscal year reporting. Fiscal year 1997 refers to the period October 1, 1996 to September 30, 1997.

<sup>32</sup> Administrative Office of the United States Courts, *Annual Report of the Director* (1987) at 282.

<sup>33</sup> Administrative Office of the United States Courts, *Annual Report of the Director* (1997) at 217.

<sup>34</sup> 28 USC § 994(a)(1)(C) (1998).

<sup>35</sup> USSG §5D1.1 (1998).

<sup>36</sup> USSC §5D1.2 (1998).

<sup>37</sup> USSG §5D1.3.

<sup>38</sup> Pub. L. No. 99-308, 100 Stat. 449 (1986).

<sup>39</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986).

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minimum penalties that tied the minimum penalty for certain drug offences to the amount of drugs involved in the offence. Two years later, in the Omnibus Anti-Drug Abuse Act of 1988, Congress enacted additional penalties for drug offences, including a five-mandatory minimum sentence for possession of 5 grams of crack cocaine.<sup>40</sup>

This was not the first time that mandatory minimum penalties for drug offences had existed in the federal system. The Narcotic Control Act of 1956<sup>41</sup> created mandatory ranges for most drug importation and distribution offences. Judges were required to select a specific sentence within the range, and parole release was prohibited for the covered offences. Congress repealed most of these mandatory minimum sentences after finding that the sentence increases had not been shown to reduce the number of drug law violations.<sup>42</sup>

The creation of mandatory minimum sentences so soon after the Sentencing Reform Act clearly conflicts with the goal of the guidelines created by a panel of experts. The Commission's response during the guideline development process was to incorporate the mandatory minimum penalties as baselines in the drug guidelines. The drug guidelines tie penalties to drug amounts as a measure of harm, and the drug amounts that trigger mandatory minimum penalties (e.g., 5 grams of crack cocaine) result in an identical or greater guideline sentence.

6. Just Deserts vs. Crime Control

As noted earlier, the 1984 Sentencing Reform Act elevated the notion of punishment over the then prevalent objective of rehabilitation. Still, one philosophical dispute the Sentencing Commission had to address involved the purposes of punishment. Some observers

argue that punishment should follow a "just deserts" model, in which punishment is keyed to the harm caused by the offence and the offender's culpability. Others argue that the goals of deterrence and incapacitation should take precedence in sentencing, that the primary purpose of punishment is the control of crime and sentences should be designed to achieve this purpose. The Commission's solution to this debate was to declare that the application of either model would achieve the same results in most sentencing decisions.

**IV. THE FEDERAL SENTENCING  
GUIDELINES**

**A. Structure**

The guidelines are structured according to broad offence categories such as offences against the person, property offences, drug offences, fraud, and a variety of other offences that are unique to the federal system (e.g., immigration and national defence). Most of these categories are broken down further into major subcategories such as homicide, robbery, and drug trafficking. These sub-categories are linked to specific criminal statutes and utilize a scoring system for determining the harm caused by the offence and, ultimately, the sentence the convicted offender will receive. Under this scoring system, offences are assigned levels based on specific offence characteristics such as bodily harm to victims, financial loss, and the methods used to commit the offence.

**B. An Example: Bank Robbery**

1. The Adjusted Offence Level

Consider this example: an offender convicted of one count of bank robbery (18

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<sup>40</sup> Pub. L. No. 100-690, 102 Stat. 4377 (1988).

<sup>41</sup> Pub. L. No. 84-728, Title I, Sec. 103. 70 Stat. 651, 653-55 (1956).

<sup>42</sup> S. Rep. No. 613, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. 2 (1969).



USC § 2113) would be sentenced under the robbery guidelines (USSG §2B3.1). The guideline calculation begins with a base offence level of 20. An unarmed robbery of a person, with no harm to the victim and a loss of no more than \$10,000, is assigned an adjusted offence level of 20. No enhancements are made to the base offence level. Because the example is a bank robbery, 2 levels are added for robbery of a financial institution. If the offender had a weapon, 3 to 7 levels are added depending on the nature of the weapon and its use during the robbery. Three levels are added if a dangerous weapon (e.g., a firearm or a knife) was possessed, displayed, or brandished. More levels are added to represent greater levels of threat, up to 7 levels if the weapon was a firearm and it was discharged during the robbery. Bodily harm to victims adds 2 to 6 levels depending on the degree of harm, but the combined adjustment for weapon use and harm to victims is capped at 11 levels in the robbery guideline. Financial loss adds 0 to 7 levels, again depending on the amount of loss. If a victim was taken hostage to facilitate escape, another 4 levels are added to the total. Thus, a bank robbery in which the offender fired a gun, wounded a victim, stole \$500,000 and took a hostage will have an adjusted offence level of 41.

Other categories of offences are structured similarly, with a base offence level and adjustments to that level according to specific offence behaviors. Most of these adjustments are increases, because the base offence level is intended to describe a basic or unsophisticated form of an offence, with minimal harm. Occasionally, an adjustment will be statutory and not related directly to the offence behavior, or the base offence level will itself be scaled. The drug trafficking guideline assigns a base offence level according to the amount of drugs involved in the offence. Multiple counts of

convictions are handled by “grouping” related counts, selecting the group with the greatest adjusted offence level, and making adjustments to that level based on the additional groups of counts.

Once the conviction offence has been scored according to its specific features, further adjustments are made for more general offence features. These adjustments, which may result in increases or decreases in the adjusted offence level, and which may be applied to any offence, are for the nature of the victim (e.g., was the victim vulnerable?), the offender’s role in the offence (e.g., organizer as opposed to a minimal participant), obstruction of justice, and the offender’s acceptance of responsibility for the criminal behavior. Further adjustments are made to the offence level for offenders defined by statute as career offenders<sup>43</sup> or whose livelihood is derived from criminal conduct. For example, an offender with two prior felony convictions for drug offences or crimes of violence may have his or her adjusted offence level increased if that level is below levels specified in the guidelines.<sup>44</sup>

## 2. The Criminal History Score

The next step is the scoring of the offender’s criminal history. The calculation of the criminal history score is done on the basis of the length of prior sentences of imprisonment (not the amount of time actually served) in any jurisdiction, local, state or federal. For example, 3 points are added for each prior sentence exceeding one year and one month; 2 points are added for each shorter sentence of imprisonment that is of at least 60 days; and 1 point is added for each sentence of imprisonment that did not receive 2 or 3 points. A sentence is

<sup>43</sup> 21 USC § 841 (1998). See also 28 USC § 994(h) for directives to the Commission regarding the sentencing of career offenders.

<sup>44</sup> USSG §4B1.1 (1998).

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counted only if that sentence was imposed no more than fifteen years prior to the beginning of the offence of conviction. Points are also added if: (1) the offence was committed while the offender was under any type of criminal justice sentence, including not only imprisonment but also any form of community supervision; (2) if the offence was committed within two years after release from imprisonment on a sentence worth 2 or 3 points; or (3) if the offender was convicted of a crime of violence whose sentence did not receive any points as described above.

### C. The Sentencing Table

The calculation of the adjusted offence level and of the criminal history score are outlined in a presentence report prepared for the sentencing judge by a U.S. probation officer. This report is typically shared with the U.S. Attorney's Office and defense counsel, both of whom may dispute the probation officer's recitation of facts and application of the guidelines. These objections, if not resolved prior to sentencing, are included as appendices to the report. The sentencing judge will, either in a separate hearing or during the sentencing hearing, rule on any disputes. After determining in court the final offence level and criminal history score, the judge uses the sentencing table in Annexure 1 to determine the type of sentence possible and its length.

The sentencing table has two dimensions: offence levels are listed on the vertical axis and criminal history categories (i.e., groupings of criminal history scores) are listed across the horizontal axis. Within each of the table's cell is a range of months of imprisonment. When formulating the table, the Sentencing Commission followed three principles. First, the ranges in adjacent cells overlap. The goal was to reduce the potential for litigation over the exact

guideline application. If the same sentence could be have been imposed whether the offender received one or two fewer (or additional) levels, there is no ready basis for appealing the sentence. Second, the lower ends (and the upper ends) of the sentencing ranges were designed to increase at an increasing rate.<sup>45</sup> This feature produces wider ranges as offence levels and/or criminal history categories increase. However, the width of these ranges is bound by the third, statutory principle: the maximum of a sentencing range cannot exceed the minimum of that range by more than 25 percent of the minimum range or six months, whichever is greater.<sup>46</sup> The exception is that ranges with minimum sentences of 30 years or more may have a maximum sentence of life imprisonment.<sup>47</sup>

The sentencing table specifies months of imprisonment, but depending on the region of table, some form of probation may be a possible sentence. The table is divided into four zones, A to D. Zone A consists of all ranges for which zero is the minimum sentence, allowing the sentencing judge to impose a sentence of probation rather than imprisonment for offenders whose combined offence level and criminal history score places them in one of these ranges. Offenders in Zone B (minimum sentence of 1 - 6 months) or Zone C (minimum sentence of 8 - 10 months) may, with certain restrictions, be sentenced to some combination of imprisonment and supervision, referred to as a "split sentence." Offenders in Zone D have a minimum sentence of 12 months and must receive a sentence of imprisonment.

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<sup>45</sup> With some exceptions, the lower and upper ends of the ranges increase logarithmically.

<sup>46</sup> 28 USC § 994(b)(2) (1998).

<sup>47</sup> *Ibid.*

At sentencing, after determining the applicable sentencing range, defined by the intersection of the adjusted offence level and the criminal history score, the judge must impose a specific sentence within that range. If the sentence is probation, or includes a term of probation, the judge can impose a term of 1 to 5 years, depending upon the adjusted offence level.<sup>48</sup> A defendant serving a sentence of 12 months or greater is entitled to a credit of up to 15 percent of the sentence for good behavior in prison.<sup>49</sup>

**D. Departures from the Sentencing Range**

One of the features of this sentencing system that sets it apart from the previous, indeterminate system is the ability of both offenders and the government to appeal sentences that do not fall within the applicable sentencing range or which the appellant claims are based on an erroneous interpretation of the guidelines. Presupposing sentences outside the prescribed range is the power of the judges to depart from that range. Judges may depart from that range under either of two circumstances: (1) if the offender has provided assistance to the government,<sup>50</sup> or (2) if there are characteristics of the offender or the offence that were not, in the opinion of the judge, adequately considered by the Sentencing Commission in the creation of the guidelines.<sup>51</sup> In the case of assistance to the government, this type of departure can only be made after a motion by the government (i.e., the U.S. Attorney). Once the motion is made, the judge may sentence anywhere below the specified sentencing range, even below statutory minimum sentences. If the judge determines that there is some characteristic of the offender or the offence that was not adequately considered by the Sentencing Commission, the judge may sentence above or below the applicable range, although not below the statutory

minimum. A judge may never exceed the statutory maximum sentence.

As noted above, the Commission decided that most of the factors Congress asked it to consider are not relevant to sentencing, and therefore, there may not be very many characteristics the Commission has not considered. However, the guidelines do include instructions that describe circumstances in which judges may consider a departure. For example, the guidelines include a policy statement that if an offender's criminal history score does not adequately represent the seriousness of the offender's criminal history, the judge may consider departing from the specified sentencing range.<sup>52</sup> The theft guideline includes an instruction that if the monetary loss to victims underrepresents the harmfulness of the crime, particularly the nonmonetary loss, the sentencing judge may consider an upward departure.<sup>53</sup> Case law developed since 1987 has further broadened the discretion of sentencing judges. During fiscal year 1997, 19.2 percent of guideline sentences were departures for substantial assistance, 12.1 percent were downward departures for reasons other than substantial assistance, and 0.8 percent were upward departures.<sup>54</sup>

**V. THE IMPACT OF THE FEDERAL SENTENCING GUIDELINES**

After more than ten years of sentencing guidelines in the federal courts, their impact can be seen in a number of changes

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<sup>48</sup> USSG §5B1.2 (1998).

<sup>49</sup> 18 USC §3624(b) (1998).

<sup>50</sup> USSG §5K1.1 (1998).

<sup>51</sup> USSG §5K2.0 (1998).

<sup>52</sup> USSG §4A1.2 (1998).

<sup>53</sup> USSG §2B1.1, comment (n. 15) (1998).

<sup>54</sup> United States Sentencing Commission, *1997 Sourcebook of Federal Sentencing Statistics* (1997) at 53.

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throughout the federal criminal justice system. The federal prison population has more than doubled since the guidelines' introduction. Under the guidelines, offenders are being sent to prison more often and to serve longer sentences. Criminal appeals have also doubled. As offenders sentenced to terms of supervised release are released from prison, particularly after long sentences, the number of supervised released revocation hearings has increased.

#### A. The Federal Prison Population

During the period from 1986 to 1997, the federal prison population grew from 40,505 to 101,845.<sup>55</sup> In 1986, drug offenders accounted for 38.1 percent of newly sentenced offenders. By 1997 this figure had grown to 59.5 percent. The majority of these drug offender are first-time offenders who have been sentenced to prison under the mandatory minimum statutes.<sup>56</sup>

As noted earlier, the use of probation has declined from 36.5 percent of all sentences in 1987 to 21.2 percent in 1997. This means that a greater proportion of convicted offenders are going to prison under the guideline system, some of them for considerably longer periods of time. The average time served in prison increase from 15.6 months in 1986<sup>57</sup> to 26.5 months in 1995<sup>58</sup>. Drug offenders released from federal prison in 1986 had served an average of 19.5 months. Time served by drug offenders increased to an average of 37.6 months by 1995. The effect of mandatory minimum sentences and the guidelines has been to double the average time served by drug offenders. This is the most dramatic increase in average time served, but average time served may mask the equally important change in the proportion of offenders sentenced to prison. Offenders who once received probation may now be serving short prison terms. For

example, the average time served for fraud increased only slightly from 13.6 months in 1986 to 15.6 months in 1995, but the percentage of fraud offenders sentenced to prison during this period increased from less than 50 percent to about 60 percent.

#### B. Appeals

During statistical year 1987, there were a total of 5,260 criminal appeals commenced in the U.S. Courts of Appeals.<sup>59</sup> During this same year, 41,087 criminal cases were terminated in the U.S. District Courts.<sup>60</sup> During fiscal year 1997, the number of criminal appeals commenced had increase to a total of 10,521.<sup>61</sup> During this year, 46,887 criminal cases were terminated.<sup>62</sup> Thus, while there was a 100 percent in criminal appeals commenced from 1987 to 1997, the number of criminal cases terminated increased by only 14 percent. Although we have no data showing the nature of these appeals, the bulk of this increase is almost certainly attributable to appeals of guideline sentences.<sup>63</sup>

#### C. Supervised Release Revocations

An impact of the sentencing guidelines that is only now beginning to show is the increase in the numbers of persons under supervised release and the concomitant revocations of supervised release. On

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<sup>55</sup> *Ibid.* at 506.

<sup>56</sup> Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?* 7 Fed. Sent. Rep.22 (1994).

<sup>57</sup> Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics-1988* (1988) at 647.

<sup>58</sup> Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics-1997* (1997) at 507.

<sup>59</sup> Administrative Office of the United States Courts, *supra* note 32 at 142.

<sup>60</sup> *Ibid.* at 234.

<sup>61</sup> Administrative Office of the United States Courts, *supra* note 33 at 81.

<sup>62</sup> *Ibid.* at 178.

September 30, 1997, 51,036 persons were serving a supervised release term, compared to 33,006 persons on probation.<sup>64</sup> Supervised release is now the largest supervision category, but it did not even exist prior to the guidelines. Persons under supervised release are subject to mandatory conditions such as reporting and maintaining employment, and may be subject to additional, court-imposed conditions such as drug testing and treatment. Violations of those conditions could result in a return to prison, much as violations of probation conditions can result in a prison sentence. During fiscal year 1997, 5,455 persons were removed from supervised release for violations of conditions.<sup>65</sup> This figure represents approximately one-third of all individuals removed from supervised release during that period (e.g., their term expired). In contrast, only about one-sixth of persons removed from probation supervision were removed for violations of probation.

An examination of violations of supervised release and of probation shows that the proportion of major violations was 2-3 times higher among the supervised release population compared to the probation population. Defendants released after lengthy terms of confinement often emerge from prison to a hostile environment without support of family and the ability to maintain employment and navigate a greatly changed social environment.

Supervised release is intended to keep offenders who have committed serious offences under some type of control after release from prison. But this is also a population with, on average, more extensive and more serious criminal histories than offenders serving a term of probation. As a result, supervised release gives additional responsibilities to both probation officers and to the courts. These

responsibilities are certain to increase because an ever-growing prison population has to result in an ever-growing population on supervised release.

#### **D. The Purposes of Punishment**

What has been the impact of the sentencing guidelines in terms of the purposes of sentencing - just punishment, deterrence, incapacitation, rehabilitation? Certainly, the sentencing guidelines achieve incapacitation. The use of probation has been reduced and prison terms have been increased for many or most of the offences under federal jurisdiction. Deterrent effects are difficult to measure and will probably remain so. Offences prosecuted in federal courts represent a very small and, in some instances, a unique portion of all offences prosecuted in the courts of the United States. Deterrent effects of the guidelines are likely to be masked by the much larger state criminal justice systems. Rehabilitation, although a stated purpose of sentencing, is not vigorously pursued at either the state or the federal level.

Just punishment has been, from the start, a major goal of the reform efforts that led to the Sentencing Reform Act of 1984. If one defines just punishment narrowly in terms of the process by which sentences are imposed, the guideline system is closer, in general, to fulfilling this purpose of sentencing than was the indeterminate system it replaced. Convicted offenders can

<sup>63</sup> The Sentencing Commission's 1997 Annual Report contains data on 3,691 sentencing appeals during 1997. This is almost certainly an undercount because the Commission collects only opinions and orders issued by the courts of appeal. United States Sentencing Commission, *1997 Sourcebook of Federal Sentencing Statistics* (1997) at 103, A-1.

<sup>64</sup> Administrative Office of the United States Courts, *supra* note 33 at 243.

<sup>65</sup> *Ibid.* at 256.

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know before sentencing the type of sentence they will receive and will have some idea of its approximate length. If a term of imprisonment is imposed, the offender can expect to serve at least 85 percent of it. However, a broader view of just punishment might lead to questions about other factors outside the narrow scope of guideline application.

For one, many observers argue that the mandatory minimum sentences for drug trafficking, specifically those for crack cocaine, have a disproportionate impact on Black offenders. For example, the five-year mandatory minimum sentence for cocaine trafficking is triggered by 500 grams of powder cocaine but only by 5 grams of crack cocaine. Since Blacks are more likely to be charged with trafficking crack cocaine than are Whites, they receive a mandatory sentence for much smaller amounts of cocaine.<sup>66</sup> Even the Sentencing Commission has found that Blacks are disproportionately affected by this mandatory minimum sentence.<sup>67</sup> Nevertheless, Congress rejected the Commission's recommendation for greater parity between crack and powder cocaine for triggering a mandatory minimum penalty. If the statutory penalties that the Sentencing Commission is required to implement are perceived as unjust, no amount of procedural fairness in the application of the guidelines can compensate.

At the other end of the process, judges are able to depart from the guidelines under circumstances described in the guidelines and noted earlier. One of those circumstances is substantial assistance to the government in the prosecution of others. If an offender has provided such assistance, and the government makes a motion for a departure, the court may depart downward, even below mandatory minimum penalties. A potential for

sentencing disparity clear exists in these instances, and it is of two sorts. For one, the guidelines do not define what constitutes substantial assistance, and a study by Sentencing Commission staff shows that definitions of substantial assistance and prosecutorial practices vary across U.S. Attorney offices.<sup>68</sup> Two offenders convicted in different districts of the same offence, with similar backgrounds, who provided the same assistance to the government, can receive very different sentences depending on how the U.S. Attorney's office in each district defines assistance. Once the motion for a substantial assistance departure is made, no guidelines define for judges the limits of a reasonable departure, nor are judges required to explain their reasons in this context. Although the limits on other departures are also undefined, except by statutory minima and maxima, they do require justification by the sentencing judge. In these instances, as required by statute, the judge will have a rationale for the departure that can form the basis for the degree of departure. No such rationale is needed for substantial assistance departures. This again raises the question whether the process invariably leads to a just punishment. Since substantial assistance departures were made in approximately 19 percent of cases sentenced during fiscal year 1997, this is not an issue limited to a few cases.

Finally, the issue of variation across U.S. Attorney Offices, with respect to substantial assistance, raises a larger

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<sup>66</sup> United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1995) at 156.

<sup>67</sup> *Ibid* at xii.

<sup>68</sup> Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (1997).

issue: how variation in definitions, procedures, and practices across federal court districts, as well as the courts of appeals, may produce sentencing disparity. At present, the extent of such variation and how it interacts with the application of the guideline system is unknown. The guideline system is designed to accept a certain amount of disparity, hence the overlapping and increasingly wider sentencing ranges in the sentencing table. The extent of disparity due to inter-district or inter-circuit differences in guideline application, the precursor to the sentencing table, is unmeasured. Even if it were known, the Sentencing Commission has limited authority to make adjustments to reduce disparity of this sort. For example, the Commission can amend the guidelines, perhaps to resolve conflicts in case law between circuits over guideline application. When the amendment results in a reduction in a term of imprisonment and it deems it necessary, the Commission can apply the result retroactively to reduce the terms of imprisonment of offenders already sentenced.<sup>69</sup>

## VI. THE FUTURE OF FEDERAL SENTENCING

What does the future hold for federal sentencing? Reform efforts tend to be cyclical, as problems with the current system are recognized and there emerges a consensus that something must be done. These cycles seem to take 15-20 years to complete. The federal sentencing guidelines may be in the middle of their cycle. Issues concerning the growing prison population, the increased number of appeals, and the increasing numbers of persons on supervised release have apparently not reached a crisis point, at least not in the U.S. Congress. One aspect of the picture that has changed in the last decade is the increasing politicization of the reform process. The politicization of crime

probably began 30 years ago when national political campaigns began to emphasize rising crime rates and the dangers they posed to the average citizen. The politics of crime have become increasingly sophisticated, to the point of focusing on much narrower issues such as school uniforms as a means to combat juvenile gang violence.

Another change is the greater hands-on nature of Congress' efforts at reform. Congress now typically issues directives to the Sentencing Commission to study or adjust specific offence levels. Congress has also considered federalizing offences that have traditionally been prosecuted in state courts, and the prospect of more rather than fewer mandatory minimum sentences for drug offences is a real one.

Whatever the future may hold, judges have clearly found ways to work with the guidelines. One measure of comfort might be the departure rate. During fiscal year 1997, 12.1 percent of imposed sentences were downward departures for reasons other than substantial assistance and 0.8 percent were upward departures.<sup>70</sup> During fiscal year 1991, these figures were 5.8 percent and 1.7 percent, respectively.<sup>71</sup> The downward departure rate has doubled in six years, indicating that judges are finding ways to craft sentences they feel are appropriate but are not provided by the sentencing guidelines. To put this result in a slightly different context, the 12.1 percent downward departure rate for 1997 represents 5,574 cases. With slightly less than 900 active and senior district court judges in the federal system, the odds are high that all or most district court judges

<sup>69</sup> USSG §1B1.10 (1998).

<sup>70</sup> United States Sentencing Commission, *supra* note 63 at 53.

<sup>71</sup> United States Sentencing Commission, *Annual Report* (1991) at 139.

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who sentenced criminal cases that year departed downward in at least one case.

The departure rate may indicate some dissatisfaction with mandatory sentencing rules if not with the idea of guidelines generally. A 1996 survey of federal judges and others by the Federal Judicial Center yielded this result: 73% of district judges who responded to the survey said that they thought mandatory guidelines were not necessary.<sup>72</sup> When asked what they would prefer in their place, two-thirds preferred advisory guidelines.<sup>73</sup>

While the Congress has shown no inclination to abolish the sentencing guidelines, or make them advisory, the Sentencing Commission has shown interest in guideline reform. In 1995, Commission staff began a study of the guidelines, aimed at considering how they might be refined and simplified. To focus staff attention and facilitate this review, the Commission declared a one-year moratorium on guideline amendments. Hearings were held in Washington, D.C. and Denver, Colorado, and Commission staff prepared a series of working papers to examine relevant conduct, the level of detail in specific offence guidelines, sentencing options, departures, and the Sentencing Reform Act itself. Due to turnover in Sentencing Commissioners, this review effort has stalled. But its initiation suggests that the most likely source of incremental sentencing reform is the Sentencing Commission. Refinement and simplification do not constitute revolutionary change, but they may help deal with critical issues such as the prison population, until the next round of sentencing reform.

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<sup>72</sup> Molly Treadwell Johnson and Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* (1997) at 3.

<sup>73</sup> *Ibid* at 4.



RESOURCE MATERIAL SERIES No. 55

ANNEXURE I

UNITED STATES SENTENCING COMMISSION  
SENTENCING TABLE

Offence Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	120-150	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-Life
38	235-293	262-327	292-365	324-405	360-Life	360-Life
39	262-327	292-365	324-405	360-Life	360-Life	360-Life
40	292-365	324-405	360-Life	360-Life	360-Life	360-Life
41	324-405	360-Life	360-Life	360-Life	360-Life	360-Life
42	360-Life	360-Life	360-Life	360-Life	360-Life	360-Life
43	Life	Life	Life	Life	Life	Life

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## **PARTICIPANTS' PAPERS**

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### **THE ROLE OF POLICE, PROSECUTION AND THE JUDICIARY IN THE CHANGING SOCIETY**

*Rebeka Sultana\**

#### **I. INTRODUCTION**

Crime prevention means the elimination of criminal activity before it occurs. Prevention of crime is being effected/enforced with the help of preventive prosecution, arrest, surveillance of bad characters etc by the law enforcing agencies of the country concerned. Crime, and the control of crime throughout the world, has been changing its features rapidly. Critical conditions are taking place when there is change. Nowadays, causes of crime are more complex and criminals are becoming more sophisticated. With the increase of social sensitivity to crime, more and more a changing social attitude, particularly towards the responsibility of the citizenry to law enforcement, arises. Existing legal systems and preventative measures for controlling crime have to be changed correspondingly. There should be an attempt to devise the ways and means to equip the older system of crime prevention and criminal justice to face these new challenges.

#### **II. GENERAL FEATURES OF CRIME IN BANGLADESH**

Crime throughout the world has been changing its feature rapidly. The causes of crime in Bangladesh may be generally attributed to some of the inherent socio-economic features of the country. Sociologists and criminologists consider the high level of social deprivation; increase of population at a rate incompatible with basic human needs; socio-economic

resentment due to uneven economic prosperity; unstable public order intensified by feud, illiteracy, unemployment etc, as the fundamental causes of the high escalation of crime in Bangladesh.

Due to radical changes taking place in the livelihood of people in the recent past, criminals have also brought remarkable changes in their style of operation in committing crimes. The crime preventive/prosecution systems are not equipped accordingly. As the existing prosecution cannot render appropriate support to the law enforcing agencies in controlling crimes, the criminals are indulged and consequently, crime trends increase in society. Besides, due to insufficient preventive intelligence, crime prevention, particularly preventive prosecution, does not achieve much.

It has been noticed that the younger generation in this part of the world is being influenced at an alarming rate by crime-movies, films showing the commission of crimes, and magazines and other literature containing such material. 67.54% of the arrests made by the police in connection with different crimes during the last five years fall within the age group of 18 to 30 years.

Unemployment, particularly of the young people, provides ample opportunity for an idle mind to think about ways and means not only of getting something legally or illegally, but of doing something exciting. The commission of a crime may provide satisfaction to the youth who find in it a

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means of expressing their personality. However, national catastrophes, family feuds and the relatively easy availability of firearms are also a factor responsible for many crimes. Acts of terrorism, arms-dacoity, extortion, rape, murder, illegal export of manpower, smuggling, trafficking of drugs, economic crimes etc are occurring very frequently, raising alarm in the public mind. The crimes are planned and executed by experts, and ordinary preventive systems are increasingly found inadequate to halt the trend.

### III. CRIME TREND OF BANGLADESH

The crime trend in Bangladesh may be seen from a review of the last quinquennial criminal statistics (1993-97) and for the period from January to November, 1998 of the country, is shown in the table below. This reveals that major crimes in connection with property and the human body have shown an upward trend. This upward trend is attributed to understandable socio-economic factors, and is in the line with world crime scenario.

Year	Dacoity	Robbery	Murder (including riot with murder)	Rioting	Rape	Cruelty to Women
1993	889	1125	2596	8651	501	1234
1994	834	1118	2567	5044	499	1206
1995	907	1399	2991	4827	556	1688
1996	924	1660	3131	5988	525	3121
1997	933	1765	3084	4967	1336	4507
Jan-Nov 1998	949	1603	3240	3858	2728	4072

Year	Cruelty to children	Kidnapping /abducting	Burglary	Theft	Arms Act	Explosive Act
1993	4	1503	5169	9123	1229	304
1994	18	1629	4938	8652	1200	443
1995	79	1705	5110	9807	1635	832
1996	202	1050	5177	10273	2519	748
1997	453	1025	5425	10041	1969	550
Jan-Nov 1998	635	1112	5044	9871	1972	667

Year	Drugs Act	Smuggling	Other	Total
1993	1824	2433	37284	72069
1994	2784	2198	42179	75306
1995	3024	2430	45941	82931
1996	3586	3146	51262	93310
1997	4431	2763	58912	102161
Jan-Nov 1998	4818	2770	60932	104271

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It would appear that there is a considerable decrease in crimes, relating to rioting during the last five years, whereas for other crimes, the trends display an increase. The number of cases regarding cruelty to women and children has increased, which indicate a conscious community grappling with a social problem. The increase in the number of cases relating to abuse of drugs has two aspects. On the one hand, it indicates increased abuse of drugs. On the other hand, greater number of cases indicate more efforts directed towards arresting the trend. As compared to 1993, the percentage of increase in crime was 4.5% in 1994, 15.07% in 1995, 29.47% in 1996 and 41.75% in 1997. In 1997 the crime rate per 1,00,000 population was 81.04%.

#### IV. CRIMINAL JUSTICE SYSTEM

The criminal justice system comprises of the police, prosecution and the judiciary, who are vested with crime control of the society. The role of the criminal justice system is twofold: control and prevention. It is needless to say that issues of crime control include identifying the commission of crimes; clearing of cases; conducting prompt and appropriate investigations; collection of sufficient evidence; ensuring fair and efficient judicial proceedings; and punishing offenders.

The criminal justice system of Bangladesh is also exerting effort to counter crime. But the statistics reveal a low clearance rate of offenders. There are difficulties in the collection of evidence, and thereby preventing exhaustive investigations and trial delays; which contribute to low conviction rates. Over the past few years, crime such as violence against women, rape, trafficking of women, acid throwing, cruelty to children, trafficking of children and abuse of drugs is very alarming. Another matter that is

international co-operation regarding mutual assistance, such as the transfer of offenders, is not implemented in a timely manner. So it could be said that the criminal justice system of Bangladesh is not fully meeting its expected functions.

#### V. ROLE OF THE POLICE

The general function performed by the police can be divided into three main categories; law enforcement, order maintenance, and service. Law enforcement is the police mission of seeing that there is compliance with the provisions of the law, detecting breaches of the laws, and apprehending alleged violators. Order maintenance, on the other hand, is the task of preserving peace and security. Service functions consist of the services for the public. Bangladesh police perform a variety of roles; the role ascribed by law; the role desired by their superiors, including the government, the role expected by the people, particularly the victim; and the role which they think they ought to perform. These roles may be categorised as

- (i) Maintenance of law and order; and
- (ii) Non police jobs (which change with social attitudes and moral values).

The police population ratio does not compare favourably with other countries of Asia. In 1997 the total population of Bangladesh was 120.49 million and police strength was 98033. The police population ratio is 1:1274. So with this limited strength, the prime function of prevention and detection of crime is difficult. The police personnel are unevenly distributed with the need and priority of the task. Nearly 65% of the total police power is committed to maintenance of law and order, only 19% to investigation, 3.47% to traffic management, 0.85% to prosecution, and 0.8% to training. There are only

around 929 officers at supervising level for a force of about one hundred thousand, which seems to be disproportionate (see Table 3).

The police have a professional responsibility to maintain the highest standard of conduct, particularly honesty, impartiality and integrity. It is unfortunate that the police in modern society are looked upon with fear, suspicion and distrust by the people. Public apathy towards the police demoralises them and ultimately they lose self-confidence, making them hesitant to take firm steps to prevent violations of the law. Political interference is another cause which make them corrupt, dishonest and inefficient. So the presence of these impediments in a society can not create fearless administration of law and justice. It is not an exaggeration that the present deterioration in law and order is due to these forces which have demoralised the police force. Serious violation of law occur right under the nose of the police and they (police) take the role of silent spectator.

The development of modern techniques has created new challenges. Modern scientific devices have made law-breakers more successful. The police should have a through knowledge and should be conversant with the new techniques of crime control. Use of computer systems and augmentation of the existing communication system would be useful for boosting police efficiency.

Public apathy towards the police is also due to the fact that quite a large number of cases prosecuted by the police result in acquittal of the accused, due to procedural or technical flaws, defects, or omission by the police officials. The efficiency of police function is generally measured on the basis of legal functions, i.e. either on the basis of the number of arrests or on the rate of

conviction for cases brought to trial by the courts. The decision to arrest a person may not always be on the *bonafide* belief of suspicion and many arrests may be made to shield inefficiency. Conviction may not always based solely upon the merit of the prosecution, since appreciation of evidence by the presiding judge is based on other factors also, such as the changing of statements by witnesses or witnesses turning hostile and so on.

The preventive function of the police is to arrest law-breakers and suspected criminals, and take them into custody in order to prevent crime. The legal limits of arrest and detention of suspects are clearly defined in the Criminal Procedure Code. Statistical analysis reveals that preventive measures can not create the desired impact on offences. The punishment of preventive prosecution is only limited to the executing of a security bond, which could not successfully prevent the crime. In the changing society and with the advancement of humanity, it could be said that society is approaching another dimension where to arrest anyone, it may be reasonably required by the law that the basis of arrest should be intimated, so that necessary arrangements for release on bail may be made by the person concerned. For investigation, police may seek an order for remand of the accused or arrest of the person. Here again, the law prevents the function of the police, and an order of remand is conditional upon satisfaction of a judicial magistrate.

The police may arrest a person on a warrant issued by the court, and also on observation of the commission of a crime, or where there is reason to believe that a crime has been committed by the suspected person. Here, the direction of the law is that the arrested person must be taken promptly before a magistrate without any loss of time.

Interrogation of criminals or suspects is an important legal process for collecting evidence against the offender. But there is a question on the limitation of interrogation. The police must observe certain civilities while interrogating a suspect. The questioning must not be 'coercive' or too intimidating. They should not extract admission or confession by coercive or "third degree" methods, so that no sad incidents happen in the custody of police, and so that the real offenders can be prosecuted.

Besides making arrests, the police must also actively assist the prosecutor to conduct prosecution of cases in law courts. The success of prosecution largely depends on the promptness and ability with which the investigation is conducted by the police. It is therefore, necessary that the police and the prosecutor should have a thorough knowledge of substantive and procedural criminal law. The legal requirement for trial of an accused is that the prosecution must come forward with all material evidence, complete in all respects, to prove the charge against the accused. The witnesses should be appraised of the points on which the prosecutor desires to examine them, before they are actually brought into the witness stand.

To meet the needs of developing society, the role of the police is no longer confined to the maintenance of law and order, and the prevention and detection of crime. It is required to play a significant role in development activities by providing basic security and control of economic crimes for sustained economic growth of the country. The police have a vital role in dealing with insurgency, women and child trafficking and smuggling, which impedes development activities and threatens the security of society.

## VI. PROSECUTION

Under the criminal administration of justice, offences are broadly categorised into cognizable and non-cognizable with their classification as to arrest, bail, compoundability, courts by which to be tried, procedure of trial etc. Criminal proceedings are usually initiated either by complaint of the complainant or by the First Information report by the police. In cognizable cases, police can arrest the alleged offenders without warrant from the court. Prosecution in cognizable cases is the State's responsibility, and in the complaint case, responsibility lies with the complainant. A criminal proceeding comprises of investigation and trial ending either in conviction or acquittal of the offenders. In cases of cognizable offences, the police are entrusted with the investigation of the offence and detection of offenders, collection of evidence, and then the case will be ready for trial. The foundation of the case is built during investigation. Success of the prosecution depends up on the efficient handling of the case by the investigators. Detection of the real criminals and collection of proper evidence is the foundation of the prosecution. Ensuring fair and efficient judicial proceedings and punishing real offenders enables the criminal justice system to strongly counter crime.

The success of prosecution largely depends on prompt and correct investigation, and speedy trial. So time limits for investigation and trial play a vital role here. Another point is the relationship between the police and magistracy, and between the bench and the bar. Lack of these relationships is noticed in developing countries. Needless to say, there is a need for these groups/agencies of the criminal justice system to work in close harmony and to trust each other. Lack of accountability towards the people of these

agencies, creates concern about the criminal justice system of the society, which will ultimately reflect on the clearing of cases, fair and speedy trial, and the punishing real offenders.

## VII. THE JUDICIARY

The present day civilization is largely founded on law and justice. To seek and to get justice is the birth right of every human being, without discrimination, like other fundamental rights. For administering justice, the system of judiciary has developed in various forms in different countries; the standard of perfection being at varying degrees, depending on various factors such as socio-economic and religious-political conditions etc. Nevertheless, a sound and independent judiciary is the *sine-qua-non* of a healthy society. The more the judiciary is independent and sound, the more the people of the nation will reap the benefits of safety, liberty and prosperity. The judiciary is the guardian of law, protector of individual rights and medium for social equilibrium. So remarks could be drawn that the judiciary is the barometer of civilization. With the march of civilization and more improved technology and ideas, closer co-operation between various nations and their legal systems may also be enriched, thereby benefitting by providing justice for all.

## VIII. LEGAL SYSTEM OF BANGLADESH

The Constitution of the Peoples Republic of Bangladesh, adopted in 1972, contains a separate part (part VI articles 94-117) dealing with the judiciary. The hierarchy of the judiciary comprises of the Supreme Court of Bangladesh and the subordinate courts below. The Supreme Court is the highest court of the country and comprises of the Appellate Division and the High Court Division headed by a Chief Justice.

Besides appellate and revisional jurisdiction on civil and criminal matters, the High Court Division has extraordinary jurisdiction commonly known as "writ jurisdiction" under article 102 of the Constitution for enforcement of fundamental rights. The Appellate Division of the Supreme Court is the apex court which, besides having jurisdiction of appeals arising out of the decisions of the High Court Division under article 103, has been vested with the jurisdiction of overseeing complete justice under article 104 of the Constitution, to prevent miscarriages or failures of justice. The Appellate Division also has advisory jurisdiction on legal matters of public importance, under article 106 of the Constitution, whenever sought by the President. The Supreme Court has the jurisdiction to decide the constitutionality of any law and also can strike down any law which is *ultra vires* or inconsistent with any provision of the Constitution. The decisions of the Appellate Division are binding upon the High Court Division, as well as on the subordinate courts, and the decisions of the High Court Division on all courts, subordinate to it.

The subordinate judiciary consists of the courts of the District Judges, Additional Judges, Subordinate Judges, Assistant Judges and Magistrates. The District, Additional and Subordinate judges, apart from their civil jurisdiction, are also vested with criminal jurisdiction for trying cases and are classified as Courts of Session Judges, Additional Session Judges and Assistant Sessions Judges. Magistrates have exclusive and original criminal jurisdiction classified as Magistrate class-I, class-II and class-III, having power to try cases which are not triable by the Courts of Sessions. In the metropolitan area, the Magistrates Courts are classified as Courts of Metropolitan Magistrates, headed by the Chief Metropolitan Magistrate who is

appointed by the Government. Besides the metropolitan area, the District Magistrate is the Chief of the Magistracy under which trial magistrates work. District Magistrates and other magistrates, besides their judicial jurisdiction, also have executive functions. The Chief Metropolitan Magistrate, and the magistrates below, have exclusive judicial function. Against the judgements of conviction and sentence passed by magistrates there lies appeal to the Court of Sessions and to the High Court Division against the judgement by the session judges.

Under the criminal administration of justice, offences are broadly categorised into cognizable and non-cognizable with their classification as to arrest, bail, compoundability, courts by which to be tried, procedure of trial etc. Criminal proceedings are usually initiated either by complaint or First Information Report. In cognizable cases, police can arrest the alleged offenders without warrant from the court. Prosecution in cognizable cases is the State responsibility. A criminal proceeding comprises of investigation and trial, ending either in conviction or acquittal of the offenders. Mainly the police are entrusted with the investigation during which offenders are detected and apprehended, evidence is collected and the case is made ready for trial. The foundation of the case is built during investigation. Detection of the real criminals and collection of proper evidence lay the foundation of a criminal case, because the success of the prosecution depends on the efficient handling of the case by the investigators. How investigations are to be conducted, statements of witnesses, confessional statements of accused, dying declarations are to be recorded, are all regulated by specific provisions of law.

### **A. Independence and Separation of the Judiciary**

According to the provision of article 94(4) of the Constitution, the Chief Justice and other judges of the Supreme Court are independent in the exercise of their judicial functions. Similarly, all persons employed in the judicial service and all magistrates are independent in the exercise of their judicial functions, as provided under article 116A of the Constitution. The independence of the judiciary is the pre-condition of fair trial and justice. Another pre-requisite of a sound and independent judiciary is the separation of the judiciary from the executive organs of the State. Article 22 of the Constitution contains fundamental principles of State policy to the effect that "the State shall ensure the separation of the judiciary from the executives organs".

At present, the judges of the subordinate courts are under the administrative control of the Ministry of Law, Justice and Parliamentary Affairs which, according to article 116 of the Constitution, exercises this control in consultation with the Supreme Court. However, the magistrates are under the administrative control of the Ministry of Establishment. The magistrates perform both executive and judicial functions. The dual administrative control over the judges and magistrates have some adverse effects on the independence of the judiciary, sometimes affecting fair trial.

### **B. Constitutional Provisions for Fair Trial**

To get a fair and speedy trial is a fundamental right guaranteed in the Constitution. Article 35 reads as follows:

"35. Protection in respect of trial and punishment

(1) No person shall be convicted of any offence except for violation of a law



in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

- (2) No person shall be prosecuted and punished for the same offence more than once.
- (3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.
- (4) No person accused of any offence shall be compelled to be a witness against himself.
- (5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.
- (6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.”

The question of fair trial presupposes fair investigation, fair prosecution and fairly providing scope for the defence of the accused under legal dispensation. In our criminal jurisprudence, a person accused of an offence shall be presumed innocent so long he or she is not proved guilty by legal evidence beyond all reasonable doubt. The doctrine of reasonable doubt plays a vital role in our legal system as a safeguard against conviction of innocent persons, meaning thereby that even ten accused may be acquitted but not a single innocent person should be convicted. That a person shall have the protection of law is an inalienable right guaranteed in the Constitution, articles 31 and 33 which read as follows:

*“Article 31, Right to Protection of Law-* To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty body, reputation or property of any person shall be taken except in accordance with law.”

*“Article 33, Safeguards as to Arrest and Detention*

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice.
- (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

For the purpose of protecting social order and peace by preventing prejudicial activities against the State, the Special Powers Act 1974 was enacted. Meanwhile, this law has been largely modified. There are a lot of argument and criticism for and against this law, which curtails the fundamental rights of the citizen. Instances are not rare where concerned agencies of the government sometimes use the provision of this law arbitrarily. However, continuing demand persists for the repeal of the Special Powers Act 1974, from the conscious section of the people.

### **C. Provisions for Bail**

Bail of the accused in a criminal proceeding, either during investigation or trial, occupies an important chapter. In the case of a bailable offence, bail may be granted as of right. In the case of non-bailable offences, grant of bail is at the discretion of the court. In the traditional concept of our jurisprudence, grant of bail is a rule, and refusal is an exception. As the question of bail involves curtailment of freedom of movement, this should be dealt with judiciously and in accordance with consistent norms and standards. In the case of grave offences such as murder; dacoity with murder; rape with murder; high treason; grievous hurt causing permanent disfiguration of face and vital parts of body of corrosive substance; drug trafficking and the like involving capital punishment; the accused are refused the privilege of bail. Even in such cases, bail may be granted to an accused who is a woman, or a sick or infirm person, or a minor below 16 years of age, under section 497 of the Code of Criminal Procedure. Unless there is anything which may cause prejudice to the prosecution, the accused may be granted bail in usual practice.

### **D. Exclusion of Evidence made in Police Custody**

Exclusionary provisions in the evidence law is of great significance. In criminal trials, statements made to the police are not admissible in evidence. Similarly, confessional statements of the accused, made in police custody or under threat, duress or coercion, are not evidence and cannot be used against the accused for the purpose of conviction. Only the statements made to the magistrate, in pursuance of which incriminating materials are recovered, are admissible in evidence under section 27 of the Evidence Act 1872. In order to prove the charge in a criminal trial, there must be direct and reliable evidence. Hearsay evidence of reliable and impartial

witnesses carries weight towards proving the guilt of accused. Circumstantial evidence of a strong nature, leading unerringly to the irresistible exclusion of any other hypothesis as to the guilt of the accused, may well form the basis of conviction.

### **E. Public Prosecutor and Legal Aid**

Prosecution on behalf of the State is conducted by the public prosecutor before the Court of Session and by the Court Police Inspector before the magistrate. The police are entrusted with the task of investigation and are responsible to produce witnesses before the court during trial. The accused may plead guilty or not guilty of the charge. In the event of pleading guilty, the accused may be convicted accordingly. The prosecution is fully liable to prove the charge with cogent and reliable evidence beyond all reasonable doubt. Only in the case of criminal breach of trust and misappropriation, can an accused offer themselves as a witness, to give an account of the money or things given to them in trust.

The accused is entitled under law to freely consult and be defended by a lawyer of their choice. Where the accused cannot provide for their defence by engaging a lawyer due to poverty, s/he can have legal aid at the expense of the State. In every district a Legal Aid Committee, constituted at the behest of the Government, has been providing legal aid to the poor and distressed.

### **F. Forensic Department**

The Forensic Department have an important role in relation to criminal justice involving murder, rape, grievous hurt, kidnapping and abduction. As birth registration of children is not made in most cases, the determination of the age of victim frequently becomes a subject of controversy. In the face of growing socio-

economic complexities, crime of the above nature has increased manifold. The lack of adequate forensic facilities results in the delay of forensic examination in many cases, which adversely reflects on fair and speedy trial.

### **G. Juvenile Justice**

Juvenile justice has, of late been a global concern. For the purpose of securing the best interest of the child, the United Nations adopted the Convention on the Rights of the Child (CRC). Children below seven years are exempted from criminal liability under section 82 of the Penal Code 1860. The age between 7 and 12 years, with regard to the criminal liability of a child, depends on the nature of understanding, to be determined by the judge. The joint trial of a child with an adult accused is prohibited. In the Children Act 1974, the upper limit age of a child has been fixed at 16 years. Juvenile offenders below the age of 16 must be tried by the Juvenile Court under the procedure laid down in the Children Act 1974. This Act mostly confirms the norms and standards set forth in the CRC. Besides the magistrates, District Judges are performing the functions of juvenile courts as additional duties. In the whole country there are only two reformatory schools - one at Tongi and the other recently established at Jessore. Although there is strict provisions for keeping the child offender in segregation, very frequently they are kept in ordinary jail custody with adult offenders. Sufficient remand homes and separate juvenile courts need be established in every district so that child offenders are humanely dealt with during trial, with focus on reform and social re-integration to lead a dignified life in the mainstream of society as worthy citizens.

### **H. Sentencing Process**

Sentencing, being the final and concluding part of trial in a criminal case, occupies an important position in relation

to fair trial and fair justice. Generally our sentencing system is deterrent and retributive in nature. The whole drama of a criminal proceeding ends with the verdict of the court in which the police/investigators, witnesses, prosecutors and judges/magistrates play their respective roles. Apparently, a criminal charge against a person in society carries a certain stigma, and for that, people generally try to avoid criminal charges or otherwise being entangled in criminal proceedings.

Sentence of death, imprisonment for life, imprisonment rigorous or simple, forfeiture of property and fine are prescribed by section 53 of the Penal Code, which may be awarded to offenders according to the nature of the charges. By Ordinance XLI of 1985, the term "transportation for life" has been substituted by the words "imprisonment for life", equivalent to thirty years rigorous imprisonment under section 57, which the Government may commute into imprisonment not exceeding twenty years, as provided under section 55 of the Penal Code (Ordinance XLI of 1985). Sentences of death passed by the Court of Sessions have to be confirmed by the High Court Division under section 374 of the Code of Criminal Procedure. Within the prerogative of the President is the grant of pardons, reprieves, respites, remit, suspend or commute any sentence passed by any court, tribunal or other authority, under article 49 of the Constitution.

Under no circumstances can a person be awarded punishment in excess of what is prescribed by law. Except in cases involving the sentence of death and imprisonment for life, the courts are given wide discretion in passing sentences of various terms. The cardinal principle is that the sentence must not be excessive or disproportionate to the nature and gravity of the offence. In practical experience it is found that different courts pass different

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terms of sentences in similar types of cases, which prick the conscience. The judicial norms must not be at unreasonable variance, which would shake the people's confidence in the judiciary. The purpose of the law is that the real offenders must be punished according to the degree of the offence, and the law must not be instrumental or tainted with personal motive or otherwise, which may serve criminals in the proliferation of crimes at the cost of social security and peace. Accountability in such a situation must be ensured for all who are engaged in the task of administering justice, no matter whether they are investigators, prosecutors, judges or magistrates.

### IX. CONTROL AND PREVENTIVE MEASURES

With the 21st century knocking at the door, and with modernization and advancement of society, social values are changing. New ideas and dimensions should be considered for administering the criminal justice system of the society concerned. "Justice delayed is justice denied" is a very well known term which speaks for speedy and prompt trial. The current situation of Bangladesh is that, due to heavy caseloads on the judges and magistrates, and the non-appearance of defendants and witness, an innumerable number of cases remain pending year after year. Criminal cases investigated and tried in the years 1996 and in 1997 (Table 1 and 2) show that 49472 cases under trial were pending at the end of 1996, and in 1997 this was raised to 60791 cases. Countermeasures may be considered as:

- Increase in the number of judges/magistrates.
- Separate investigating and prosecuting agencies.
- Simplification of the judicial trial system.
- Improvement of case management,

information systems should be simplified. Adoption of computerised systems and computerised record keeping systems.

- Modification of Evidence Act. Strict rules for taking witness evidence could be a positive step.
- Time limits for adjournment and disposal/trial of cases.
- Emphasis on co-operation and harmony between bench and bar.
- Accountability for all concerned.
- Fullfillment of extradition agreement and international co-operation towards control of crime.

From the perspective of the whole criminal justice system, the rate of conviction should be scrutinised to guarantee the effectiveness and efficiency of the system. A high conviction rate is indicative of successful investigation and prosecution. If we see the statistics of conviction and acquittal for the years 1996 and 1997, they reveal that the acquittal rate is 4 times greater than that of conviction. The excessively low rate of conviction reflects that there are some underlying problems in criminal justice proceedings. Reasons and countermeasures may be:

- Separate set of investigators trained in accordance with the law for quality investigation.
- Separate set of prosecutors.
- Supervision by the higher judiciary.
- Escalation from power, influence, money, for all concerned.
- Speedy trial.
- Accountability of all concerned.

The Code of Criminal Procedure provides the legal framework for running the criminal administration, including court procedures, police functioning etc. It also contains certain legal provisions for preventive actions of the police in maintaining law, order peace, and

tranquillity in society. Besides this, the following are the preventive laws:

- (a) Section 106 Criminal Procedure Code: security for keeping the peace on conviction.
- (b) Section 107 Criminal Procedure Code: security for keeping the peace in other cases and security for good behaviour.
- (c) Section 108 Criminal Procedure Code: security for good behaviour from persons disseminating seditious matters.
- (d) Section 109 Criminal Procedure Code: security for good behaviour from vagrant and suspected persons.
- (e) Section 110 Criminal Procedure Code: security for good behaviour from habitual offenders.

Section 149 of the Criminal Procedure Code reads: "Every police officer may interpose for the purpose of preventing crime and shall to the best of his ability prevent the commission of any offence". Section 54 and 151 Criminal Procedure Code has given police officers the power to arrest any person without a warrant, only to prevent cognizable offences. The Police Act 1861 also has similar provisions that emphasizes the preventive role of police. Nowadays, in preventing crime, the police enforce the authority of preventive detention as per the provisions of section 3 (2) of the Special Powers Act 1974.

It appears from the legal provisions mentioned above that the police have enough scope to deal with the prevention of crime in society. From statistical analysis however it appears that preventive prosecutions are not creating the desired impact on the mainstream of offences in the country. The punishment of preventive protection is only limited to the execution of a security bond. As such, it can not successfully prevent the commission of crime. Due to the radical

changes taking place in the livelihood of people in the recent past, criminals have developed remarkable systems, becoming absolutely impractical for police controlling the crimes. Besides this, due to insufficient preventive intelligence, crime prevention, particularly preventive prosecution, does not achieve much.

## X. CONCLUSION

There is no society in the world without the problem of crime and criminals. In Bangladesh, the combating of crimes and administration of the criminal justice system is the shared responsibility of the police, the prison and the judiciary. With a view to overcoming the deficiencies of preventive measures, it is essential to frame some deterrent provisions of the law incorporating punishment of imprisonment and fine for preventive prosecutions. Prevention of crime is the collective responsibility of the society. It should not be left to the police or judiciary alone. Only the concerted effort of police and the people can combat this social crisis. Awareness and knowledge by the people of the law is necessary.

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**TABLE 1**  
**CRIMINAL CASES INVESTIGATED AND TRIED 1996**

Crime	No. of Cases	CHARGE SHEETED			FINAL REPORT		INVESTIGATION NOT COMPLETED
		No. of Cases	No. of Accused	%	No. of Cases	%	
Dacoity	924	425	3532	49.88%	427	50.12%	72
Robbery	1660	796	2128	51.29%	756	48.71%	108
Murder	3131	2102	12339	----	829	----	200
Rioting	5986	4612	53678	78.08%	1295	21.92%	79
Rape	525	400	1064	76.19%	125	23.81%	0
Cruelty to Women	3121	2178	7320	----	849	----	44
Cruelty to Children	202	173	551	86.07%	28	13.93%	1
Kidnapping /Abduction	1050	626	2453	65.21%	334	34.79%	90
Burglary	5177	1728	4101	33.63%	3410	66.37%	39
Theft	10273	4112	9708	----	5677	----	484
Arms Act	2519	2276	3960	92.07%	196	7.93%	47
Explosive Act	748	493	1709	72.18%	190	27.82%	65
Drugs Act	3586	3050	4314	94.52%	177	5.48%	359
Smuggling	3146	2828	4866	90.99%	280	9.01%	38
Other	51262	37895	190015	...	12545	----	822
Total	93310	63744	301738	70.15%	27118	29.85%	2448

**CRIMINAL CASES INVESTIGATED AND TRIED 1996**

PUNISHMENT			ACQUITTAL			CASE UNDER TRIAL	
No. Cases	No. of Accd.	%	No. of Cases	No. of Accd.	%	No. of Cases	No. of Accd.
7	28	25%	21	86	75%	397	2371
23	49	22.33%	80	177	77.67%	693	1846
53	136	----	147	700	----	1902	60151
62	444	5.37%	1093	10153	94.63%	3457	5766
26	45	18.57%	114	339	81.43%	260	1073
120	241	----	536	1825	----	1572	7346
8	9	----	26	86	----	139	526
12	26	9.30%	117	461	90.70%	497	2603
143	255	28.95%	351	799	71.05%	1234	3394
235	459	----	721	1807	----	3156	8723
123	201	35.76%	221	399	64.24%	1932	3703
11	21	25.00%	33	157	75.00%	449	2232
158	230	40.20%	235	374	59.80%	2657	4260
271	458	34.61%	512	852	65.39%	2045	4643
1596	5117	----	7217	35748	----	29082	169421
2848	7719	19.96%	11424	54153	80.04%	49472	278058

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**TABLE 2**

**CRIMINAL CASES INVESTIGATED AND TRIED 1997**

Crime	No. of Cases	CHARGE SHEETED			FINAL REPORT		INVESTIGATION NOT COMPLETED
	No. of Cases	No. of Accused	%	No. of Cases	%		
Dacoity	933	338	2376	57.00%	255	43.00%	341
Robbery	1765	706	1828	50.28%	698	49.72%	361
Murder	3084	1683	10213	----	581	----	820
Rioting	4967	3685	40098	83.90%	707	16.10%	575
Rape	1336	901	2500	69.90%	388	30.10%	47
Cruelty to Women	4507	2834	9244	----	1073	----	600
Cruelty to Children	453	346	858	83.17%	70	16.83%	37
Kidnapping/ Abduction	1025	494	2105	61.44%	310	38.56%	221
Burglary	5425	1656	4145	33.66%	3264	66.34%	505
Theft	10041	4133	10539	----	4978	----	930
Arms Act	1969	1709	2969	95.58%	79	4.42%	181
Explosive Act	550	280	1051	79.32%	73	20.68%	197
Drugs Act	4431	3075	4248	94.41%	182	5.59%	1174
Smuggling	2763	2274	3835	92.25%	191	7.75%	298
Other	58912	42895	193812	----	13629	----	2388
Total	102161	67009	289821	71.68%	26478	28.32%	8674

**CRIMINAL CASES INVESTIGATED AND TRIED 1997**

PUNISHMENT			ACQUITTAL			UNDER TRIAL CASE	
No. Cases	NO. of Accd.	%	No. of Cases	No. of Accd.	%	No. of Case	No. of Accd
1	6	33.33%	2	7	66.67%	335	2400
1	2	12.50%	7	20	87.50%	698	2197
4	5	----	12	59	----	1667	11252
12	95	4.17%	276	2453	95.83%	3397	41998
17	30	21.25%	63	157	78.75%	821	2894
43	93	----	237	1040	----	2554	6641
5	11	27.78%	13	36	72.22%	328	934
2	10	11.76%	15	58	88.24%	477	2723
42	83	27.10%	113	283	72.90%	1501	4162
88	166	----	262	706	----	3783	9508
11	18	30.56%	25	40	69.44%	1673	3568
0	0	0.00%	3	19	100.00%	277	1883
70	101	56.45%	54	94	43.55%	2951	4945
51	109	39.84%	77	118	60.16%	2146	4201
900	3255	----	3812	20007	----	38183	205446
1247	3967	20.05%	4971	25096	79.95%	60791	304752

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**TABLE 3**  
**TOTAL STRENGTH OF BANGLADESH POLICE**

<b>Rank</b>	<b>Number</b>
I.G.P	1
Addil. I.G.P	10
DIG	21
Addil DIG	15
S.P	154
Addil. S.P	136
Sr. A.S.P	144
A.S.P	490
Inspector (Unarmed)	1131
Inspector (Armed)	459
Sub-Inspector (Unarmed)	4843
Sub-Inspector (Armed)	1502
Sergeant	963
T.S.I	70
A.S.I	3493
Head Constable (Unarmed)	1399
Head Constable (Armed)	4608
Naik	4668
Constable (Unarmed)	36136
Constable (Armed)	37992
<b>Total</b>	<b>98,236</b>



# **THE ROLE OF THE POLICE, PROSECUTION AND THE JUDICIARY IN THE CHANGING SOCIETY**

*So Chit-Kwan, Isabel\**

## **I. INTRODUCTION**

In the 1960's, Hong Kong was still an entrepôt, with a population of 2.2 million. Nowadays, it has grown into a modern city of over 6.5 million population. During the years, the society has undergone rapid changes in terms of social, economic, technological and also political changes. As part of these changes, crimes of concern arised from time to time, at different periods. The government, including legislators, policy makers, the judiciary and law enforcement agencies, have responded to such changes for the effective control and prevention of crime.

This paper will briefly outline the recent changes in society and crimes of concern brought about by it in Hong Kong. Detailed discussion of the current situation of particular crime, responses of the government; in particular the police, judiciary and legislative changes, to combat and prevent such crimes. Some problems encountered, and the success brought about in the process of controlling and preventing such crimes, are also discussed.

## **II. THE DIFFERENT ROLES OF THE POLICE, PROSECUTION AND JUDICIARY IN HONG KONG**

The roles of the police, prosecution and judiciary in Hong Kong are separate. To ensure fairness and justice, they work independent of each other. The judiciary is independent from the executive and legislative branches of government. The

courts make their own judgements, whether disputes before them involve private citizens, corporate bodies or the government itself. Judges make decisions and findings on their own judgement, according to the laws which are mostly written down in ordinances.

The Department of Justice is the legal adviser of the Hong Kong government. All government departments seek legal advice from it, for all legal actions. It is responsible for the drafting of all legislation, representing the government in court to institute and conduct prosecutions. The Hong Kong police are the only police force in Hong Kong. It has operational responsibility for crime prevention and detection, the maintenance of public order and traffic matters.

## **III. CHANGE OF SOCIETY IN HONG KONG AND RESULTANT CRIME**

As the population rapidly grew, the government tried to build cities in the sub-urban areas to diverge the population from the centre of the city to less populated areas. The family structure also changed from large extended families to small nuclear families, mostly with a husband, wife and two children. Most of the young families in Hong Kong have both parents working, leaving children unattended after school. The education system is also a problem. There is free education provided by the government until Form 3, i.e. children around 15 years. The curriculum emphasizes mainly academic subjects. Technical schools are not welcomed by

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parents. Students who are under-achievers in school do not go to work, but just wander the streets with peer groups. The possibility of association with bad characters and committing crime becomes higher. Juvenile crimes relating to shop theft and drug abuse are matters of concern in the 1990s.

Economically, since post World War II, Hong Kong grew from a small light plastic and textile industrial city to a service trading centre in South East Asia, and became one of the world's financial centres. Servicing trade between China and the rest of the world has traditionally been the fundamental reasons for Hong Kong's growth and prosperity. Since the adoption of open door policies by China in the late 1970's, economic relations with mainland China have undergone rapid growth and development. In line with its well established trade, Hong Kong has a well-developed banking system. The government also adopted a laissez-faire approach to the economy. International money flows in and out of Hong Kong freely. The convenience and low tax policy attracts investment in Hong Kong or through Hong Kong. All these are elements of Hong Kong's success in maintaining good economic growth. However, the free economy (with minimum government intervention) created problems for law enforcement, prosecution and the judiciary. Commercial crime is always on the upsurge and causes the most loss in terms of money.

Hong Kong went through the most prominent political change in July 1997; the change of sovereignty from Britain to China. Before the handover, people would expect an increase in cross-border crime and corruption because people believed mainland Chinese are more inclined to corrupt cultures. However, the statistics do not support this hypothesis and there is no record of crime increases. In fact, the

common cross-border crimes, such as stolen vehicles and violent crime with the use of firearms, are decreasing.

New technology emerges everyday and changes rapidly, giving convenience to society as well as criminals. This also brings about problems for law enforcement, prosecution and the judiciary, as the law and knowledge of technology of the government officials concerned is always behind the latest development of technology. Computer crime is one of the prominent crimes which is expected to create huge losses and trouble in the near future.

#### IV. JUVENILE CRIME

##### A. Present Situation

Similar to most of the urban cities in the world, juvenile crime is always a problem, but is not serious in Hong Kong. However, it is a priority of concern to the Hong Kong government and community. In Hong Kong, there are two ordinances to deal with and to protect juveniles :

- (i) *Juvenile Offenders Ordinance CAP 226*  
This ordinance is particularly important as it allows juveniles under 16 years to be tried in juvenile court, which restricts the presence of people in court and the extent of matters to be reported in the news media.
- (ii) *Protection of Women & Juveniles Ordinance CAP 213*

The importance of this ordinance is that it makes provisions for a juvenile court to issue 'Care and Protection Orders'. On the application of the police or Social Welfare Department, the court may consider a juvenile under the age of 18 years in need of care and guardianship. This includes protection if his/her parent/guardian is unfit or unable to exercise care and

guardianship, and he/she is beyond control, falling into bad associations or exposed to moral or physical danger. The court may appoint the Director of Social Welfare Department as legal guardian, commit the child to the care of any person or institution, order the parents/guardian to enter into a recognisance to exercise proper care or make an order for supervision by a probation officer (a professional social worker).

During 1997, there were 5964 juvenile offenders aged between 7 and 15 arrested for crime. In comparison to the total arrests of 41714 persons, juveniles only contributed 14.3% of the arrested persons for the year. A comparatively large proportion of them were arrested for offences such as shop theft, miscellaneous thefts, wounding and serious assault. 82.5% of juvenile offenders were students involved in minor offences.

The overall crime reported in the last ten years in Hong Kong is quite constant and there has been a decrease since 1996. The decrease in crime was mainly attributable to drops in burglary, minor thefts (including shop theft), serious narcotics offences and robberies. The statistics do not imply that more juveniles were arrested for crime in the last ten years, but rather there was an upsurge in committing minor offences such as 'shop theft' by them.

Narcotic activities involving juveniles is of concern in recent years. Between 1983 and 1991, juveniles arrested for drug offences was quite constant. However, since 1992 there has been a significant increase. In 1992, 14.1% of the total number of drug arrests were juvenile offenders. It increased to 17.5% in 1995. On the type of drugs abused, there is an upsurge of abuse of soft drugs such as 'ice' and cough medicine.

## **B. Control and Preventive Initiatives**

The Hong Kong government is determined to fight against narcotic offences, especially regarding young people. In 1995, the government took the initiative of opening the first Governor's Summit meeting, followed with further meetings in 1996, to co-ordinate the relevant government departments in solving the problem by a multi-agency approach. Subsequently, the Action Committee Against Narcotics was set up to tackle the problem. Action plans were formulated to combat drug abuse by juveniles, as well as juvenile crime, at three levels.

### 1. Law Enforcement Levels

#### (i) *Amendments to Legislation*

- Amendment to the Drug Trafficking (Recovery of Proceeds) Ordinance in September 1995 makes it even more difficult for drug traffickers to launder and retain their illicit profits from drug trafficking. Heavier sentences can be imposed on adults who are found to involve juveniles in the illegal drug trade.
- Amendment to the Pharmacy and Poisons Ordinance to increase the maximum penalties for offences of illegal or improper sale of drugs.

#### (ii) *Control of Drugs by Law Enforcement Agencies*

- Extend statutory licensing controls to 21 more chemicals used in the illicit manufacture of drugs. The new control system commenced operation from early 1996 by the Customs and Excise Department.
- The Department of Health increased inspection of pharmacies from 560 to 700 per month since September 1995, to clamp down on the illegal sale of prescription drugs. A special task force was set up to help the prosecution of offending drug

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- retailers.
- Additional manpower and resources were given to the police to increase surveillance activities.
- (iii) *Police Initiatives to Combat Juvenile Crime and Drug Abuse*
- Police regions make their own action plans to step up proactive enforcement actions at drug blackspots (such as housing estates), and youth gang blackspots (e.g. amusement game centres, billiard halls, parks etc). Special attention is paid to cases in which youth are employed by adults as drug couriers; every effort is made to gather sufficient evidence to prosecute the adults involved.
  - School teams of police continue to visit schools, arranged talks in the schools to deliver messages that are anti-triad and anti-drug abuse.
  - Police Missing Persons Units contribute more effort to make follow-up enquiries on the associates of young persons, with a view to locate them earlier. Care and Protection Orders under the Juvenile Protection Ordinance will be applied for in every suitable case, for proper follow-up by professional social workers on the problem youth.
  - The police extended the Superintendent's Discretion Scheme to allow police officers of or above the rank of Superintendent to issue a caution to a juvenile rather than taking criminal prosecution. The caution is given to those who have not yet reached the age of eighteen and have only committed minor offences. Close supervision and an aftercare program will be followed by social workers and police after the caution.
2. Prevention and Education Level
- Publicity through news media and exhibitions to increase the awareness of the drug problem and to warn the juvenile to keep away from drugs or any criminal offences, such as shop theft.
  - Through schools and teachers, to educate students as well as their parents to steer the juveniles away from crime.
  - All police regions and different government departments formulate their own programs, which are in line with the action plans of the government, to fit the local situation of different areas.
  - Apart from enforcing the law, the police have to involve themselves in community activities. The police will present and arrange community activities involving youth or schools in order to send out messages of combating and preventing crimes.
3. Treatment and Rehabilitation Level
- The government has allocated greater resources to establish more residential treatment centres and drug abuse clinics for young drug abusers.
  - Involvement in criminal proceedings can be a very distressing experience for a juvenile, and criminal conviction and the consequent sentence may constitute the destruction of his or her future. The police Superintendent's Discretion Scheme is an alternative to criminal proceedings and an effective rehabilitation program for young offenders. In 1997, 35% of juvenile offenders under the age of 18 were cautioned under this scheme, rather than criminal proceedings being instituted.
  - The Juvenile Offender's Ordinance also allows the young person's criminal record be removed by the police after a certain period of time

after the sentence.

### **C. Multi-agency Approach**

The multi-agency approach to control and prevent juvenile crime and drug abuse has proved to be a success. In less than three years, the overall crime rate dropped by 14.8% between 1996 and 1997. Juvenile offenders arrested for crime dropped by 9.1% and there was a drop of almost 11% of drug addicts in Hong Kong.

The efforts of police officers in community education, publicity, enforcement, and rehabilitation, together with the effort of the legislators to amend the relevant legislation, as well as the efforts of other government agencies, such as social welfare and the Department of Health, combine together in forming effective interdiction to stop the upsurge trend of juvenile crime, especially in connection with drug abuse.

## **V. COMMERCIAL CRIME**

### **A. Present Situation**

Hong Kong was an entrepot in the 1980's and transformed into an international financial centre in 1990's. Money can both come into and out of Hong Kong freely. Investment comes from all over the world. Together with a highly efficient banking and financial system, Hong Kong is a haven for the money laundering of crime proceeds. Commercial crimes committed have involved international criminals and different kinds of investment tools.

In the past years, the total number of reports of deception, fraud and forgery cases is on the upsurge, but the number of fraud reports to the Commercial Crime Bureau has remained relatively steady. This may be explained by the change in charter by the Commercial Crime Bureau in 1995, to take up more complex cases involving loss over HK\$5 million. Although

the number of fraud reports remains quite steady, investigations have become increasingly more complex and international.

### **B. Problems in Investigation and Prosecution**

Unlike violent crime, most victims of commercial crime reported their case merely with a view to recover their money/loss. Many of them are not willing to appear in criminal court to punish the suspect(s) with imprisonment or fine. Most of the commercial crime cases are very complicated, involving voluminous documents. Usually, it takes a much longer time to complete these investigations than other crimes. Always, by the time the investigation has been completed and is ready for prosecution, the suspect(s) have already disappeared. For prosecution, it is also very difficult as the voluminous documentary exhibits are to be presented in court one by one by witnesses standing in the box, thus it is a time consuming process. Not all the judges and juries can fully understand and remember the contents of each document after a long trial. Moreover, many commercial crime cases were committed internationally. These involved a number of different jurisdictions and different judicial systems. This makes the investigation and prosecution very difficult. To gain a conviction is even more difficult and takes a very long time.

### **C. Solutions**

#### **1. Legislation**

The Organised and Serious Crimes Ordinance, which was enacted in April 1995, widens the police and judiciary's power to investigate and combat organised crime, including organised commercial crime and money laundering. The following are the aims of the law:

- (i) assist police to investigate organised crimes and to trace the proceeds of

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- crime. Restraining orders can be drawn out from the court to safeguard the crime proceeds before any prosecution can be instigated in court;
- (ii) impose heavy penalties and enhance sentences for members of syndicates if they do not return the proceeds of crime;
  - (iii) disintegrate syndicates by the use of strong forfeiture provisions and impose punishment for those who assist in money laundering; and
  - (iv) financial institutes have the duty to report suspicious money laundering activities.

The Complex Commercial Crime Ordinance, which was enacted in 1988, can assist in reducing the length of trial in complex commercial cases. The important feature of the ordinance is that the judge has the power to order a preparatory hearing before the jury is empanelled, for the purpose of:

- (i) identifying issues which are likely to be material to the verdict of the jury;
- (ii) assisting the jury's comprehension of any such issues;
- (iii) expediting the proceedings before the jury, by making legal argument and admissibility of evidence before the trial; or
- (iv) assisting the judge's management of trial.

The Hong Kong police are heading towards computerisation. Advanced technology can assist the documentation and analysis of a large number of documentary exhibits during the investigation, and the presentation of exhibits in court.

## 2. International Liaison and Mutual Legal Assistance

Strengthening liaisons with overseas law enforcement agencies and the judiciary

can greatly improve the efficiency of investigation. Being a sub-bureau of the China National Central Bureau, the Hong Kong police are a member of the International Criminal Police Organisation (ICPO) - Interpol, performing the same duties as before the transfer of sovereignty. Through the Interpol Channel, the police can make requests for assistance from law enforcement agencies overseas, to assist enquiries on overseas witnesses, locating suspects and dealing with criminal information. The Hong Kong police also maintain close contact with the overseas liaison offices of foreign law enforcement agencies in Hong Kong, and liaison offices in mainland China. The speedy assistance provided by our overseas counterparts is invaluable in police investigation.

In order to present overseas evidence in court, mere liaison is not enough. The Evidence Ordinance (Cap. 8) of the law in Hong Kong allows evidence taken by the Supreme Court, and exhibits tendered to it, to be provided to foreign courts in certain circumstances. The Ordinance also enables Hong Kong to seek evidence from abroad, and admit it in legal proceedings in Hong Kong. This ordinance is only suitable for cases with a view to prosecution.

In addition to the mentioned international assistance on investigation and prosecution, the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), law of Hong Kong enacted in February 1998, enables Hong Kong to make and respond to requests to and from other jurisdictions in relation to criminal matters which are serious enough to warrant a sentence of 12 months or more in prison in the country in which they occur. The followings are such requests, which may cover :

- (i) Taking of evidence and production of documents before a magistrate;

- (ii) Application for the service of the summons;
- (iii) The search for and seizure of exhibits;
- (iv) The production of relevant documentary evidence;
- (v) The service of documents by a bailiff;
- (vi) Matters pertaining to the confiscation of the proceeds of crime;
- (vii) The transfer of persons (including prisoners) to other jurisdictions to provide assistance.

With the power given under this ordinance, it can reduce the physical case enquiries made overseas, and the investigations made by overseas agencies can be admissible as evidence in future court proceedings, to reduce the duplication of work by the police and judiciary. The assistance provided to overseas jurisdictions is a reciprocal assistance.

There are many different types of commercial fraud in Hong Kong. The common ones are Long Firm Fraud, letter of credit (documentary credit) fraud, employee fraud and Forex/Loco-London Gold Leveraged Trading Fraud. Forex Leveraged Trading is a good example that the change of legislation and vigorous enforcement actions can almost completely remove this crime. The enactment of new legislation in September 1994 to control leveraged foreign exchange trading (Forex), forced unethical companies out of the Forex business in Hong Kong. Unfortunately, many of the fraudsters who previously operated Forex companies have now targeted the new and currently unregulated areas of gold and silver trading. Therefore, consideration is being given to controlling the unregulated gold and silver trading to prevent fraud being perpetrated by this type of investment tool. Proper legislative change, responding to certain ways of committing crime, can be very effective.

## VI. COMPUTER CRIME

### A. Present Situation

The use of computers is very common nowadays. As technology advances, it is no longer used as a wordprocessor or a storage tool for information, but as a communication tool. Communication between computers using the Internet has created 'cyberspace', in which people can talk, exchange information, trade and provide services. Within cyberspace there are no geographic or jurisdictional boundaries. The information, electronic money or goods can be transferred from one jurisdiction to another within seconds, leaving no trace.

The efficiency and convenience of computers has been used to commit crimes. Hacking into others computers to obtain information or cause damage; and within the Internet, gambling and publishing obscene articles, are common computer-related crimes in Hong Kong. As the use of computers and the magnitude of cyberspace is expanding by multiples, computer-related crime, in terms of the number of reports and losses, has also expanded at the same pace. The number of reports on computer-related crime increased by eight times, whilst the amount of losses increased by more than 3 times since 1993. At present, the loss of HK\$2 million this year is minimum in comparison with the total amount of loss of HK\$2377 million in commercial crime cases. However, the growth is of concern to the law enforcement and judicial system in Hong Kong. The magnitude of cyberspace has expanded tremendously in the last few years and is expected to grow at a faster speed in the near future. Police records show that most computer-related crimes were committed by students who were mostly doing it for mischief. However, with the growing popularity of E-commerce in Hong Kong, such as shopping on the

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Internet and Internet Banking, it is expected that more crime will be committed by sophisticated criminals through computers and internet communication networks. The loss and damage can be very significant. Therefore, pro-active actions are required to prevent this.

### **B. Legislation**

To cope with the new problems arising from new technology, the law also needs to keep abreast of the development of new technology. In Hong Kong, the Computer Crimes Ordinance was enacted on 23 April 1993 in order to clarify and amend the law relating to the misuse of computers. Apart from creating some offences to address new problems, this new legislation consists of a number of amendments to the existing legislation at that time; namely the Telecommunication Ordinance, the Crimes Ordinance and the Theft Ordinance. In fact, at that time, most of the computer-related offences could be addressed by the existing law, but it is unable to interpret the latest technology. The computer ordinance bestows on the judiciary a system to cope with changes in technology.

### **C. Control and Preventive Initiatives**

In 1993, the Hong Kong Police took the initiative to respond to the change of technology. The Computer Crime Section of the Commercial Crime Bureau of the Hong Kong police was established in 1993 to enforce the Computer Crime Ordinance. The Section is responsible for the following:

- (i) making investigations into all reported computer crime;
- (ii) examining and retrieving data for evidential value from computers;
- (iii) studying new developments with a view to highlighting problem areas and;
- (iv) identifying potential solutions to prevent the occurrence crime.

In 1997, the Hong Kong government started to see the risk and opportunity given by the computer-related technology. The government also takes the initiative to open the market as well as preventing any fault. There is a vision for Hong Kong to become a digital city in the 21st century. HK\$173 million was allocated from the budget in 1997 to research and set up a program on Electronic Service Delivery. The purpose is to provide an environment, infrastructure, security and control on developing electronic commerce. The following are the initiatives of the government:

- By 1999, new legislation on E-Commerce will be drafted for 'Certification Authority' to be established. The authorised users will be required to register and obtain digital keys to ensure the confidentiality and trustworthiness of information;
- Set a requirement of encryption security.

Academics in the educational institutes of Hong Kong are at the forefront of technology. Seeing the rapid growth of cyberspace and its possible risks, they took the initiative to form informal working groups with members from government law enforcement agencies, government policy makers and legislators, hoping find effective ways to identify problems, control and prevent them.

### **D. Problems and Preventive Measures**

Most of the law enforcement officers and the general public have very little knowledge of this new area of technology. On the side of law enforcement agencies, we ask how can we capture or retrieve data in cyberspace, which can be destroyed within a second? As a member of the public, we ask how can we secure information and



prevent damage? The following measures should be considered or continued:

- (i) We all need to be educated on new technology.
- (ii) The law which is always behind technology, needs to be amended or created to keep abreast of the problem.
- (iii) There are no geographic or jurisdictional boundaries within cyberspace. Local legislation, as well as international resolutions, are needed to address this problem.

### **VII. POLITICAL CHANGE**

The change of sovereignty of Hong Kong from the United Kingdom to China in July 1997 was a prominent political change. Long before the handover, people in Hong Kong and overseas worried about the increase in crime prior to and after the handover. Fortunately, the statistics do not support this. In fact, the overall crime rate for 1997 reached the lowest level in 24 years. The decrease of overall crime is attributed to a decrease of violent crime, robbery, burglary and missing vehicles.

After the handover, without the hurdle of different jurisdictions (i.e. between China and Britain), as part of China, there is continuous improvement in co-ordination between Hong Kong and mainland law enforcement agencies on intelligence exchange, assistance on case investigations and joint efforts in combating cross border crimes. As a result, the tight control on smuggling firearms into Hong Kong from the mainland, and the smuggling of stolen vehicles into the mainland, attributed to the obvious drop in robberies connected with firearms, and 24% reduction in the theft of vehicles.

### **VIII. CONCLUSION**

Our role as the police is to respond to the changes which are brought about by

the change of society, and to find a way to combat crime. Because the judicial system in Hong Kong is independent, the roles of prosecutors and the judiciary are very passive. They can only react to the changes of law and make decisions according to the law.

The changes in politics, economics, social structure and technology in society can give rise to particular crimes. The change in the economic environment can also give rise to commercial crime which is more globalized; committing greater loss in terms of money in Hong Kong. Better international liaisons, streamlining court procedures for complex commercial cases, and change of legislation, can improve investigation, and enhance the chance to apprehend and convict the offenders, so as to suppress crime.

The social change gives rise to juvenile crime on minor offences. It is the role of the police to identify the trend of crime, jointly with other government departments; the role of legislators to identify the causes of these crimes committed by juveniles, and to assist in the reform of offenders by involving all parties in rehabilitation programs, rather than merely in prosecution. The society is now much more vocal and has higher demands for quality service. The police have to involve themselves in the community and listen to the demands of the public in order to combat crimes, as well as providing a better service.

The police, prosecutors and judges have to keep themselves abreast of advances in technology, as computer crime in cyberspace will be a problem in the foreseeable future. To cope with change, the efforts of the police cannot be alone. The government should provide the infrastructure, environment and education to control the possible rise of computer

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crime; such as amendments to legislation to keep abreast of new technology and the launching of the Electronic Delivery Service program.

During political change, the most important role of the police is to maintain public order and control any rise of crime. The roles of the prosecutor and the judiciary are to maintain justice and exercise the power bestowed to them in ordinances. In Hong Kong, during the transition and after the transfer of sovereignty, the police, prosecutors and judiciary have done their utmost to successfully maintain law and order, with a declining trend in overall crime.

# THE ROLE OF POLICE, PROSECUTION AND THE JUDICIARY IN THE CHANGING SOCIETY

*Muhammad Arif Chaudhry\**

## I. INTRODUCTION

Pakistan is a South Asian country with an area of 796,095 square kilometers. It came into being as an independent state on 14<sup>th</sup> August 1947, and its population is estimated at over 130 million. Pakistan is a Federal State consisting of 4 provinces (Punjab, Sind, North West Frontier Province and Baluchistan) and 3 federally controlled territories (Islamabad Capital Territory, Northern Areas, and Tribal Areas). The Constitution stipulates that in the provinces, the responsibility for crime prevention and control, and the administration of justice, primarily rests with the respective provincial governments. The Federal Government, however, has jurisdiction over matters such as the enactment of criminal laws, the training of certain categories of criminal justice personnel, and research, apart from the direct law and order responsibility it has for the federally controlled territories.

## II. CURRENT CRIME SITUATION IN PAKISTAN

Like other third world countries, only a minority of incidents which are recognised as 'crimes' by their 'victims' end up in the official statistics. It has been observed that the present picture presents a considerably different pattern of crime. This is quite striking, even among officially recorded offences: for example, crimes involving motor vehicles, relatively rare in the 1950s when there were few cars on the roads, now make up a substantial part; offences of

criminal damage to property, then an almost negligible category, were over 52,313 in 1997. Crimes of violence against persons, although still one of the smaller categories, has greatly outgrown in number. It is important to note that, while numerical representation of criminal behaviour has a considerable impact on our perceptions of crime, it is by no means the only, or necessarily the most influential, source of information or insight about crime. In fact, systematic data collection often follows, rather than generates, new insights and perspectives. Figure I (below) will help to understand the amount of all reported crime.

**FIGURE I**  
**Crime Figures of Pakistan**

YEAR	1995	1996	1997
CRIMES REPORTED TO POLICE(in million)	0.33	0.32	0.48
CRIMES AGAINST PERSONS	13.23%	14.09%	9.91%
CRIMES AGAINST PROPERTY	14.20%	13.88%	10.78%
REGULATORY OFFENCES	18.70%	21.20%	20%
OTHERS (PETTY OFFENCES)	53.87%	50.87%	57%

The official figures do not include offences recorded by other forces for which the police are not responsible, notably, the Ministry of Defence Constabulary. These figures also do not include the numerous cases of tax and loan fraud known to agencies such as the Revenue Department, Customs and Excise, Sales Taxation, and

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the Department of Forestry, which have investigative and prosecutorial functions, but which deal with the vast majority of cases by using their administrative powers to impose financial penalties. Such agencies keep internal records of the number of people dealt with in these ways, or of the total amount of revenue saved, but not of the total number of 'offences' coming to their notice. The crime figures of the Federal Investigation Agency and the Anti-Narcotics Force have been discussed separately.

**FIGURE II**  
**Police/Population Ratio**  
**& Literacy Rate**

Country	Population	Police / Population Ratio	Literacy Rate
Pakistan	130m	1.517	40%
U.K.	51.75m	1.386	99.9%
Sri Lanka	18.34m	1.564	96%

Figure II (above) shows the comparative population, police-population ratio and literacy rate of different countries. This will reflect how much each part of these factors can play in understanding criminal behaviour. Insufficient strength of the police force creates opportunities for offenders, which are further aggravated due to lack of education; which is indeed the biggest factor in offending behaviour, because most offenders are unaware of the damage they are causing to society. Illiterate people often never know their rights and responsibilities towards the community.

### III. BACKGROUND OF CRIME IN PAKISTAN

#### A. Drugs

Illicit drugs and proliferation of arms are major problems, besides others, which pose a serious threat to our society. The former is damaging the social fibre of the nation,

while the latter has resulted in a setback to law and order, which in turn hampers economic activity (adding to the existing financial crunch). Both problems are relatively new, but in a short time have assumed alarming proportions. In fact, in more than one way, both problems are inter-linked. They mostly originate from the same region, i.e. the tribal belt separating Pakistan and Afghanistan, and both result in an up-surge in violent crime.

The illicit trade in drugs certainly needs gun-totting protectors and thus sponsors trafficking in arms. Heroin was unknown in Pakistan in 1979, but it has spread alarmingly. The number of known heroin users rose from 5000 in 1980 to 365,000 in 1985, and crossed the million mark in 1988. The number stands at over 1.92 million approximately in 1993. It is the most popular drug used by 51% of the drug users.

#### B. Proliferation of Arms

It is generally believed that crime increase correlates to the proliferation of arms. This fact is now emphatically gaining rapid and wide acceptance in the minds of public, since we witness, almost daily, either through electronic or print media, recurring violent and brutal crime in which all kinds of arms are brandished openly and brazenly.

The proliferation of arms in Pakistan has its legal and illegal roots. The problem of the legal proliferation of arms is the result of the generous arms policy of successive governments. The other aspect of this proliferation, the illegal one, is the result of mass smuggling by underworld racketeers of weapons freely available in the Tribal Belt of Pakistan, because of the Afghan War. As in the case of drugs, the weapons also originate from the same region.

**C. Low Literacy Rate**

Apart from drugs and the proliferation of arms, the low literacy rate, which is just 40%, is also one of the main reasons for the soaring crime in Pakistan. We are lagging behind many nations of the world in this aspect, multiplied by a rapid growth in population, which is consuming most of our resources.

**D. Slow Court Procedures**

There is a universally accepted principal of law that “Justice delayed is Justice denied”. Unfortunately, the court proceedings in Pakistan often go at a snail’s pace. The victim has to wait a long time to get justice. As a result, people try to settle their disputes on their own, because the slow process of the courts normally does not produce any result and is deemed as a wastage of time. On the other hand, this encourages the offenders and results in violent crime. Figure III (below) shows the percentage of the disposal of cases in courts.

**E. Urbanisation**

The overall urban population at the national level has increased from 28.3% in 1981 to 32.5% in 1998 which shows that every third person now lives in a city or town. There are 23 major urban centres having a population of 0.2 million and above. The biggest city in Pakistan is Karachi, with a population of 9.269 million, followed by Lahore (5.063 million). Almost

half of the total urban population lives in the seven big cities of Pakistan.

Urbanisation leads to an extraordinary pace of transformation of human society, affecting almost every form of human organisation and behaviour. It leads to a variety of complex problems, not least of which is urban crime. As more and more dwellers confront the bitter reality of a sharp and widening disparity between their life styles and the standard of life enjoyed by some individuals; the resultant frustrations leads to tension, at times resulting in all sorts of deviant behaviour. The problem is further exacerbated due to the limited availability of legitimate opportunities for social advancement. Not only is there an acute scarcity of jobs, even bare shelter is often hard to get. Indeed the dysfunctional and unplanned urbanisation, leading to a myriad growth of slums and services, results in an ideal setting for breeding a criminogenic environment.

The pattern of urban crime is also very complex. This includes organised criminal gangs, drug trafficking, armed robberies, frauds or land grabbing. Existence of large scale racketeering in liquor, gambling, prostitution, illicit arms, terrorism, black marketing and other corrupt practices is an inevitable concomitant of unregulated or inadequately regulated urbanisation.

**FIGURE III**  
**Duration of Trial in the Courts (1992-96)**

YEAR	AT FIRST HEARING	WITHIN 15 DAYS	WITHIN 1 MONTH	WITHIN 3 MONTHS	WITHIN 6 MONTHS	WITHIN 9 MONTHS	OVER 9 MONTHS
1992	1.5	4.8	8.1	18.3	19.2	21.0	27.1
1993	1.7	4.9	8.3	18.6	19.8	20.7	26.0
1994	1.9	5.1	8.6	18.7	20.1	21.5	24.1
1995	2.1	5.7	9.3	18.9	21.2	22.4	20.4
1996	2.2	6.1	9.8	17.6	22.1	23.1	19.1

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Moreover, urban industrialisation also results in contamination of air, water and soil, causing environmental pollution.

**IV. THE CRIMINAL JUSTICE  
SYSTEM OF PAKISTAN**

The criminal justice system of Pakistan, like most countries, consists of 4 sub-systems: police, prosecutors, courts, and corrections. In the following paragraphs, I will briefly discuss the main features of each sub-system.

(i) *Police*

- Investigating crime.
- Preventing crime.
- Arresting and detaining suspects.
- Maintaining public order.
- Traffic control.
- Responding to criminal and non-criminal emergencies.
- Some of these tasks are also carried out by private and other public law enforcement agencies, such as Customs & Excise, Anti-narcotics Force, Forest Department and departments of local authorities.

(ii) *Prosecution*

- Preparing cases for prosecution.
- Prosecuting cases in the high courts.
- Preparing cases for trial in the Supreme Court, through liaison with advocates for the prosecution before and throughout the trial.

(iii) *Courts*

- Handling and processing cases efficiently.
- Deciding on bail, remands and mode of trial.
- Protecting the rights of the defendant.
- Deciding on guilt.
- Passing sentence.
- Hearing appeals against conviction and sentence.
- Providing a public arena so that justice can be seen to be done.

(iv) *Prisons*

- Holding persons remanded in custody by the courts.
- Holding sentenced offenders.
- Maintaining proper conditions for those held in custody.
- Preparing inmates for release.
- Attempting to rehabilitate offenders.

**A. Police**

In each province, in the Islamabad Capital Territory, and in the Northern Areas, the Inspector General of Police (IGP) is responsible for the command and control of the police force under him (there is no regular police force in the federally administered Tribal Areas). The Inspector General is also responsible for advising the federal and provincial governments on all matters concerning the police. In the discharge of his duties, the Inspector General is assisted by Additional Inspectors General, Deputy Inspectors General (DIG), and Assistant Inspectors General (AIG), as the government may from time to time appoint. The organisation of the police department is shown at Annexure A.

For operational purposes, every IGP's area of responsibility is divided into ranges, districts, sub-divisions, and police stations, each headed by a Deputy Inspector General of Police, a District Superintendent of Police, a Sub-Divisional Police Officer (Assistant Superintendent or Deputy Superintendent of Police) and a Station House Officer (Inspector or Sub - Inspector), respectively. The total area of Pakistan has been divided into 23 ranges, 107 districts, 356 sub-divisions and 1218 police stations. In addition, in each IGP's jurisdiction, there is a Special Branch, a Crime Branch, a Training College and/or Police Training School(s).

**B. Prosecution**

Unlike many other countries, there is as

yet no separate prosecution service in Pakistan, nor do prosecutors have any role in the investigation of criminal cases as they do in Japan. However, prosecutors do offer advice to the police on defects, if any, in the State's cases.

The Chief Prosecutor in the Federal Government is the Attorney General of Pakistan, who is assisted by a number of Deputy Attorney Generals. Similarly, each province is represented by an Advocate General, assisted by a number of Deputy Advocates General and Assistant Advocates General.

Criminal cases in the high courts are generally presented on behalf of the State by the office of the Advocate General, while the office of the Attorney General represents the State in the Supreme Court or in the special courts and tribunals set up by the Federal Government. In district and sessions courts, the prosecution of criminal cases is conducted by District Attorneys and Deputy District Attorneys. They belong to the law department of their respective provincial or federal government.

In the lower courts (i.e. magistrates' courts), prosecution of criminal cases is conducted by the prosecuting inspectors, who are employees of the Police Department. In other words, whereas those who prosecute cases in the district and session courts function under the provincial law departments, the prosecuting inspectors at the level of the magisterial courts are subject to the administrative control of the District Superintendent of Police.

In Pakistan, there are presently 70 District Attorneys, 168 Deputy District Attorneys, 392 Assistant District Attorneys, 299 Prosecuting Inspectors, and 144 Prosecuting Sub-Inspectors. The

Prosecuting Deputy Superintendents of Police act primarily as legal advisers to the District Superintendents of Police.

### **C. Courts**

Besides the Supreme Court, the Federal Appellate Court, the Federal Shariat (Islamic) Court, and the High Court, there are four other classes of criminal courts known as Courts of Sessions and Courts of Magistrates 1st, 2nd and 3rd class. The Supreme Court acts as the ultimate appellate court, while the Federal Shariat Court and the High Court both have original and appellate jurisdictions. The structure of criminal justice courts is shown at Annexure B.

Courts of Sessions are working in every district and sessions' judges can pass any sentence authorised by law. In every district, judicial magistrates are appointed and they are subordinate to sessions' judges and may try all offences not punishable with death. A number of special courts have also been constituted from time to time to deal with specific offences like terrorism, banking offences, smuggling, evasion of taxes, corruption and so on.

### **D. Prisons**

The Federal Government has established a Central Prison Training Institute, while the provincial governments are responsible for the maintenance and development of prisons. The prison system has a total of 76 jails, consisting of 19 central jails, 48 district jails, 4 special jails, and 5 open/sub-jails. Central jails can accommodate more than 500 prisoners and prisoners with more than two years imprisonment are normally detained in these jails, while those sentenced to imprisonment of up to two years are confined in district jails. Special jails are designed for the purpose of confining such prisoners as the government may order. Sub-jails and judicial lock-ups are meant

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for prisoners under trial.

Pakistan is in the category of a large number of countries, where neither the prison facilities were expanded, nor diversionary measures were adopted, in the face of increasing crime and population rates. The present situation is grave. At many places, the number of inmates is three times greater than the available, authorised prison accommodation. Double the number of prisoners than the capacity to house is common. Given below in Figure IV is the situation of jails in the most densely populated province of Pakistan.

**V. RESPONSE OF THE CRIMINAL JUSTICE SYSTEM**

Following are the existing laws regulating our criminal justice institutions to control crime in Pakistan.

**A. Pakistan Penal Code of 1860**

The Indian Law Commission in 1837, transplanting Anglo-Saxon legal concepts in our socio-cultural milieu, framed the Pakistan Penal Code, 1860. By this Code, the colonial masters curbed crime. It has been kept updated with many subsequent amendments. Major categories of offences include:

- (a) Offences against the State;
- (b) Offences against public tranquillity;
- (c) Offences by or relating to public servants;
- (d) Offences relating to elections;
- (e) Offences affecting the human body; and
- (f) Offences against property.

Following the process of Islamization, the penal laws that have been added over the past 15 years are as follows:

- (a) Offences against Property (Enforcement of Hadood) Ordinance, 1979;
- (b) Offence of Zina (Enforcement of Hadood) Ordinance, 1979;
- (c) Offence of Qazf (Enforcement of Hadood) Ordinance, 1979;
- (d) Prohibition (Enforcement of Hadood) Order, 1979;
- (e) Qisas and Diyat Ordinance, 1992.

In addition to the Penal Code and Islamic Law offences, there are also many offences covered under "local and special laws". These include drug offences, gambling offences, and minor traffic offences.

**B. Criminal Procedure Code**

The main law of criminal procedure is the Code of Criminal Procedure of 1898. The Code classifies offences into two categories: Cognizable Offences and Non-Cognizable Offences. A police officer is empowered to arrest the accused without warrant only where the allegation concerns the commission of a cognizable offence. The Criminal Procedure Code also categorizes some offences as bailable and other as non-bailable, depending on the seriousness of the offence. Likewise, some offences are compoundable and other non-compoundable. Under the Qisas and Diyat Ordinance of 1992, all offences affecting the human body, which were earlier covered by the Pakistan Penal Code, has been made compoundable.

**FIGURE IV**

<b>Jail Population &amp; Literacy Rate of Prisoners in Punjab 1997</b>			
No. of Jails	Authorised accommodation	Present population	Illiterate prisoners
28	17271	59492	63.5%



### **C. Law of Evidence**

The issue of admissibility and relevance of evidence in criminal cases are governed by the Qanun-e-Shahadat (Law of Evidence) Order of 1984. A peculiar feature of the Law of Evidence is that any statement made before a police officer is not admissible as evidence (except that portion which leads to the discovery of a material fact).

## **VI. COUNTERMEASURES TO ENHANCE THE CRIMINAL JUSTICE SYSTEM**

Crime impairs the overall development of nations, undermines people's spiritual and material wellbeing, compromises human dignity and creates a climate of fear and violence that erodes the quality of life. Therefore, all crime prevention policies should be co-ordinated with strategies for the social, economic, political and cultural development of a nation.

Criminal justice systems in many parts of the world are increasingly lagging behind. More sophisticated and efficient ways of committing crimes, evolved by criminals, are on the increase as a result of technological developments and modernization. Rapid advances and modernisation in communication, travel, trade, and technology have spurred the growth and internationalisation of crimes. Piecemeal approaches are insufficient to deal with the full scope of the problem. Furthermore, criminal justice processes often suffer from obsolescence and are not sufficiently flexible to cope with the new forms and ever-widening dimensions of crime.

Along with traditional crimes, we are concentrating on tackling crimes committed on the national and international level, such as drug-trafficking, economic crimes, bribery and corruption, terrorism, abuse of power,

violations of human rights, and other detrimental practices which may severely damage an economy or cause widespread social disruption. Such crimes often victimise large segments of the population and create a climate of fear and insecurity which impairs the quality of life, impedes harmonious development, and diminishes the possibility of increasingly interdependent nations living together in peace.

Some of the important special crimes include terrorism, banking frauds, drug-trafficking and white-collar crimes/corruption. The Government has established many agencies and courts to tackle such problems, and these strategies have not only achieved positive results, but have also been appreciated by other countries, particularly in tackling drug-trafficking.

### **A. Legislative Measures**

#### **1. Control of Narcotics Substances Act**

"Drugs are the most profitable commodity in the world today", affecting the health of international markets and even local economies. Drug trafficking is an evil acknowledged by all nations. Like many countries and international bodies, Pakistan has declared 'a war on drugs' by passing laws providing severe punishments, including capital punishment. A number of measures have been adopted to fight this multi-dimensional problem. Simultaneous efforts on the legislative, administrative and enforcement side have yielded positive results. Briefly these measures are:

- (i) Control of Narcotics Substances Ordinance promulgated on 5th January 1995, and it was made an Act in 1997.
- (ii) Progressive punishment from two years to death have been prescribed.
- (iii) Money laundering declared as a distinct crime.

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- (iv) Comprehensive provisions for civil and criminal forfeiture of assets.
- (v) Creation of special courts for speedy disposal.
- (vi) Provision for registration of drug addicts.
- (vii) First time detoxification and treatment made a statutory obligation of government.
- (viii) National fund for drug abuse control set up.
- (ix) Extension of drug laws to Tribal Areas.
- (x) Special Courts of Magistrates to try petty offences. Higher Special Courts would therefore focus more on important cases.
- (xi) Compulsion to include public witnesses in narcotics seizures dispensed with.
- (xii) No bail for offences punishable with five years or more. For other offences, no bail if public prosecutor so certifies.
- (xiii) Anti-money laundering provisions reinforced.
- (xiv) Controlled delivery operations legalised.
- (xv) Comprehensive provisions to enhance international co-operation added.

2. Anti-Terrorism Act 1997

- (i) Armed/civil forces may be called for the prevention/punishment of terrorist activities.
- (ii) Progressive punishment from seven years imprisonment, life imprisonment and the death penalty.
- (iii) Protection of witnesses by the court.
- (iv) Two years conviction and fine after summary procedure for threatening witnesses.
- (v) Special courts to decide cases within seven days (day to day hearings).
- (vi) Adjournment up to two working days, only if required in the interest of justice.

- (vii) Transfer of cases beyond territorial jurisdiction in the interest of justice or for the protection of witnesses.
- (viii) Confession before Deputy Superintendent of Police and above are admissible before the court. Court may call for video tape, together with devices used for the recording of the confession.
- (ix) Punishment up to two years for defective investigation.
- (x) Appeal to the appellate tribunal of two judges, in each High Court.

**B. Administrative Measures**

- (i) Constitution of Policy Review Board and Narcotics Interdiction Committee.
- (ii) Establishment of Anti-Narcotics Force with the following charter of duties:
  - Inquire/investigate and prosecute drug offences.
  - Inquire/investigate into assets of drug barons.
  - Co-ordinate activities of all enforcement agencies in the field of interdiction.
  - Take over important drug trafficking cases from other agencies.
  - Liaison with the international drug control related agencies.
  - Train own staff and other allied agencies.
  - Assist in elimination of the means of production.
- (iii) The area for poppy cultivation has been reduced from 32,2100 hectares in 1978 to 5215 hectares, and poppy production from about 800 metric tons in 1978-79 to 109 metric tons in 1996; which has now been reduced to 28 metric tons. Pakistan is thus no longer a producer country of opium.

**C. Enforcement Measures**

1. Federal Investigation Agency

The Federal Investigation Agency was constituted with the promulgation of the

F.I.A. Act 1974(Act VIII of 1975) “for investigation of certain offences committed in connection with matters concerning the Federal Government, and for matters connected therewith”. It mainly deals with corruption cases of federally administrated departments, white-collar crime, economic crimes and illegal immigration offences. It also performs duties of an immigration agency and INTERPOL in Pakistan. The performance of FIA and NCB-INTERPOL is shown at Annexures C and D respectively.

## 2. Anti-Narcotics Force

The Anti-Narcotics Force is dealing particularly with offences relating to drug production, manufacturing, offering for sale or delivery on any terms, organising, trafficking in or financing the trafficking of narcotic drugs, psychotropic substances or controlled substances. The performance of the Anti-Narcotics Force, as shown at Annexure E, would indicate the quality of output of this agency.

## **D. Judicial Measures**

### 1. Anti-Terrorist Courts and Banking Tribunals

The Government has set up anti-terrorist courts for speedy trial of offenders, to punish and convict them and to save the community from the fear of re-offending. These courts normally hold trials without any breaks. These courts also include the courts for speedy trials of narco-barons. Banking tribunals have also been set up to deal with banking frauds and money laundering cases.

## **E. Correctional Measures**

The main step towards correctional measures is the establishment of a National Fund for Control of Drug Abuse. The fund will depend on grants from the Federal Government or provincial governments, the sale proceeds of any assets forfeited, the sale proceeds of

unserviceable commodities and vehicles provided by the donors for narcotics control purposes, any grants made by any person or institution, and any income from the investment of the amount credited to the Fund. The Fund shall meet the expenditure incurred in connection with the control and eradication of trafficking, or in the treatment of drug addicts, and for all or any of the related purposes, as may be specified by the Federal Government.

## **VII. PROPOSED PREVENTIVE MEASURES**

Anyone who has put any thought to policing will be aware that the police discharge a complex variety of interlocking functions. Most elements of police work have a preventive function. Contrasts are often made between crime prevention and enforcement - though the strategy of the deterrent threat which underlines the enforcement process is obviously only one of several modes of prevention. Investigative work is no less preventive in intent than patrolling, for example.

Another commonly made distinction is between the prevention of crime and the maintenance of order. Despite its long historical pedigree, this contrast seems to be unhelpful. Thus I have taken a broad definition of ‘crime’ in this report, to embrace not only crime against persons and property, but also all those forms of disorder for which the police have powers to arrest - excluding motoring offences and regulatory offences. There are different types of prevention. None is completely satisfactory. Some crime prevention techniques have offender based measures and a few aimed at the situation, while some measures are targeted at criminal motivation and some are known to reduce criminal opportunity. One only needs a measure which is good enough for the

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current purpose, rather than one that will fit for all time.

Now we must distinguish between crime prevention and criminality prevention. The former includes enforcement activities, which are designed to deter or incapacitate offenders, and situational measures to reduce opportunities for crime; while the later, which are community or social prevention measures, are intended to block the development of criminal motivation, and rehabilitation. So the proposed crime prevention programme includes:

- (a) Crime prevention
  - 1. Enforcement
  - 2. Situational prevention
  
- (b) Criminality prevention
  - 1. Community/Social/Developmental prevention
  - 2. Rehabilitation

Crime prevention is not the sole prerogative of the police. Other key 'preventers' include local authorities, centrally or locally funded bodies from the voluntary sector, private security firms, other commercial organisations and members of the public. Whilst prevention increasingly involves joint working amongst these groups, the police are involved (to different degrees) in all four forms of prevention. They have a near monopoly on enforcement; though others also have a role, most obviously local authorities and private security companies. They also have an important role in situational prevention; in identifying problems and solutions, and implementing these or in persuading others to take action. They have tended to be involved to a much lesser degree in criminality prevention.

A crime prevention strategy describes the provisions made for systematically assigning action to pre-empt criminal

behaviour. Preventive action takes a vast array of differing physical and social forms: from architectural design to zoning differing land uses, and of course, zero tolerance. The aim of any strategy is to target preventive activities where they will be effective. Crime prevention strategies can be put into four categories - enforcement, situational prevention, community/social prevention, and rehabilitation - these are sometimes not implemented in isolation, but as a package. The summary of the proposed preventive measures package is shown at Annexure F. Similarly, Figure V shows the role/functions of various organs in proposed crime prevention programme.

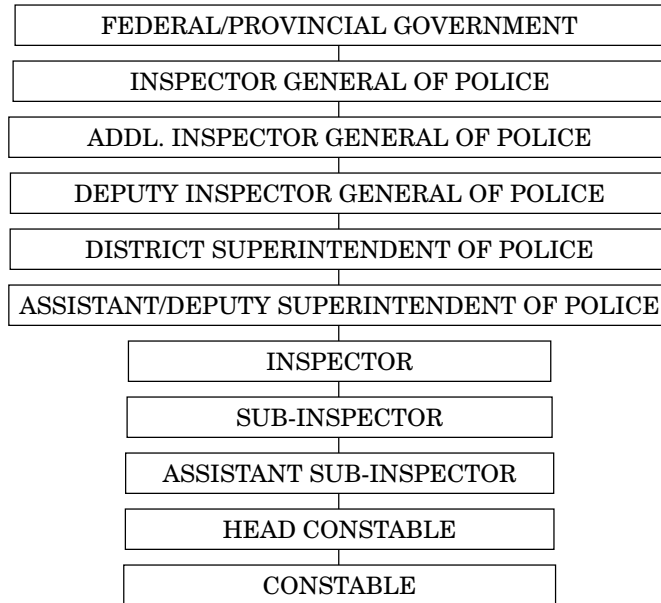
**FIGURE V**  
**Local Crime Prevention Strategies**  
**Who does what?**

<b>Strategy</b>	<b>Police</b>	<b>Partnership</b>	<b>Non-police</b>
<b>Enforcement</b>	Routine patrol Zero tolerance Detective work Intelligence-led Targeting	Security guards	Town guards
<b>Situational prevention</b>	Targeted patrol	Public CCTV scheme Architectural design Advice Neighbourhood watch	Private CCTV Improving car security Architectural design Land use decisions
<b>Community/Social/ Developmental prevention</b>	Police operated Youth schemes	Community action Group youth work Drug education	Diversion schemes Citizenship schemes Mediation schemes
<b>Rehabilitation</b>	Cautioning	School liaison Arrest referral	Drug treatment Mentoring schemes

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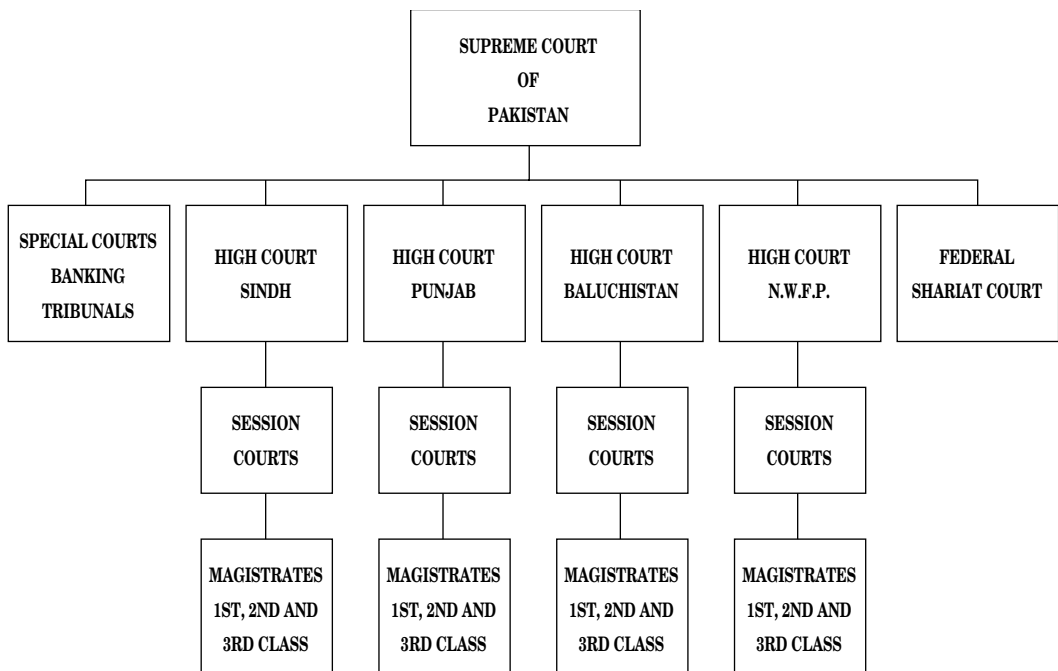
**ANNEXURE A**

**ORGANIZATION CHART OF THE POLICE**



**ANNEXURE B**

**STRUCTURE OF CRIMINAL JUSTICE COURTS**



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**ANNEXURE C**

**ACTIVITIES AND ACHIEVEMENTS OF FIA**

<b>Break up of Cases</b>	<b>Cases Registered(1995-97)</b>		
	<b>1995</b>	<b>1996</b>	<b>1997</b>
Brought forward	2326	2541	4090
Registered	1751	2742	2057
Total(1+2)	4077	5283	6147
Challenged	1272	930	1339
Closed	100	97	219
Referred to other departments	112	136	306
Referred for departmental action	52	36	57
Total cases finalized	1536	1199	1921
Cases pending at the end of year	2541	4090	4226
Recoveries (Rupees in million)	71.33	58.93	128.67
Loss avoided (Rupees in million)	12.15	07.26	251.70

**ANNEXURE D**

**PROGRESS OF INTERPOL (1995-97)**

<b>YEAR</b>	<b>REFERENCES RECEIVED</b>	<b>REFERENCES ISSUED</b>	<b>DEPORTEES ARRIVED</b>	<b>OFFENDERS EXTRADITED</b>	<b>RED NOTICES ISSUED</b>
1995	4673	5674	139	02	-
1996	4565	5439	185	02	-
1997	4370	4554	334	-	17

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**ANNEXURE E**

**ACHIEVEMENTS AGAINST DRUGS**

**Seizure of Narcotics**

<b>Year</b>	<b>Opium (Kgs)</b>	<b>Heroin (Kgs)</b>	<b>Hashish (Kgs)</b>
1996	7385.59	5797.20	192447
1997	8358.66	5069.39	108841
1998	3123.84	1619.76	32866.4

**Freezing of Assets of Narco-Barons**

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No. of cases: ..... 50

Value of assets: ..... Rs. 3539.6 million

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**Extradition of Drug Barons**

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Extradited ..... 14

Pending in court ..... 11

To be arrested ..... 02

Total ..... 27

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### TOPIC 1

#### EFFECTIVE MEASURES FOR BETTER DETECTION OF CRIME AND MORE THOROUGH INVESTIGATIONS

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#### I. INTRODUCTION

Effective measures for better detection of crime and more thorough investigations was taken up as the topic of this General Discussion group. Irrespective of the differences in social, cultural and political systems, an upsurge in criminality is evident among all the societies in the world, at the various stages of their development. The fast pace of urbanization and industrialization; greater and more efficient means of communication; internationalization of certain crimes like drug-trafficking and terrorism; emergence of white-collar criminality; also organised crime, computer crimes, environmental crimes and the evasive nature of some crimes, are some of the factors/hallmarks of the crime scernrio today, which most law enforcement agencies have to contend with.

Crime prevention is a much larger/wider subject of police specialization/professionalism than mere detection/investigation of crimes, their prosecution and trial. The real success of the law enforcement machinery lies in preventing crime before it takes place, which many police forces have developed into an art. These are skills they successfully practice day-in and day-out, and are largely responsible for the maintenance of law and

order in society. It is only when crimes have already taken place that the police are confronted with the problems of investigation, either in terms of inadequate systems, skills or equipment, to which this topic is addressed. No doubt however, thorough investigations and successful prosecution of cases also have a preventive impact on the crime situation in society; since this results in not only putting offenders behind bars and preventing them from committing further crimes, but also acts as a deterrent to other potential criminals.

Problems in detection and investigation of crimes were identified in the following two broad areas:

- (a) Enhancing investigative systems; and
- (b) Enhancing better detection of crime and more thorough investigation.

#### II. ENHANCING INVESTIGATIVE SYSTEMS

Investigation in any country is done within the framework of the related systems that have evolved in that country over the years, as a response to the challenges posed by crimes and criminals. No investigative system can be deemed to be perfect, and there has to be constant

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effort to improve the systems or to institutionalize new systems as effective countermeasures to neutralize and control the ever growing threat of crime, endangering the peace of society. Keeping these ends in view, and the ultimate objective of enhancing investigative competency, the following general problems hindering effective investigation were selected for study and discussion, in order to recommend suitable countermeasures.

**A. General Problems of Police Investigation**

**1. Political and Administrative Influences**

One of the most serious problems of the police in most developing countries is political interference with their work. Often, political bosses bring pressure on the police to drop proceedings against accused persons. Oral orders to the police and their transfer from one place to another, are the most common instruments of pressure exerted by politicians and government executives/administrators. Some typical situations where pressure is brought to bear on the police in the detection and investigation of crimes by political or executive sources are as below:

- (i) The arrest or non-arrest of a person against whom investigation is carried out by the police.
- (ii) Release or non-release on bail after arrest.
- (iii) Suppression of material evidence that becomes available during searches.
- (iv) Inclusion or non-inclusion of various items in the charge-sheet placed in court on conclusion of investigation.
- (v) Foisting false criminal cases against political functionaries for achieving political ends.
- (vi) Managing political intervention by exaggerating a non-cognizable offence or engineering a false complaint to gain advantage over another party in a situation which will be outside the domain of police

action in the normal course.

- (vii) Not detecting and registering cases against criminals having a clandestine nexus with political bosses in power.

Interference with the statutory duties of the police has to be deprecated at all times, and more so perhaps in the performance of their duties in the investigation of crimes. This is not to suggest that there exists no safe-guards already in the legal systems of different countries to prevent illegal interventions by political or administrative bosses. However, the fact remains that most police officers are not able to withstand the fierce political and administrative pressure due to their careers being at the mercy of political/administrative bosses, often due to the low calibre of police personnel. Hence, there exists a dire need in most countries to institutionalize further safe-guards so that the framework within which the police operate and investigate crimes is made immune to illegal political/administrative interventions. There is a crying need for this, since the forces of organized crime, terrorism of different hues and other multifarious crime syndicates are threatening to destabilize society. There is a pressing need to meet the challenge of such forces by professional police work in the fields of investigation and other related fields.

**2. Sub-standard Investigative Personnel**

**(a) *Sub-standard Investigative Personnel***

In most countries, the quality of police personnel leaves much to be desired. Apart from other duties, the police personnel have to detect and investigate complex/difficult crimes, investigate cases thoroughly, collect the right type of evidence and ensure successful prosecutions in court. To accomplish these tasks successfully, and to match the menace of the modern/sophisticated crime of today, a good knowledge of law, procedures, forensic

science and psychology is required for the investigators, apart from a multiple of other skills. The investigating officer must be a person of stature, educated, intelligent, alert, truly interested in work, possessing good judgement, initiative and courage. In many countries, unattractive conditions of service, low requirements of eligibility qualifications, poor recruitment procedures, substandard training, absence of in-service training etc, all contribute to sub-standard police service personnel. Suitable countermeasures are required to improve the quality of investigative personnel.

(b) *Inadequate Investigative Personnel*

While crimes are generally increasing in volume and complexity, most countries are afflicted with the problem of inadequate investigative personnel. While this adversely affects the quality of investigations, it also leads to delay in completion of investigations, both of which have an adverse impact on the crime situation. Hence, suitable countermeasures need to be adopted to ensure that the number of investigative personnel are increased periodically, to match the growing crimes.

3. Lack of Equipment and Scientific Aids to Investigation

Investigations in most developing countries are badly handicapped by a lack of basic equipment. Adequate numbers of forensic science laboratories are not available, police stations are not equipped with fingerprint kits or cameras to take photographs. Even typewriters are not available in police stations, apart from computers, photocopiers, fax machines, communication equipment and vehicles etc, which are all so necessary these days to ensure expeditious and effective investigations. Hence, suitable countermeasures need to be adopted to equip the police/investigating officers with

the required minimum equipment and facilities for ensuring adequate scientific aids to investigation.

4. Lack of Cooperation and Coordination among Investigative Agencies

Apart from the investigating officers in police stations, a number of other investigating agencies also exist in every country to investigate specialized crimes such as drug-trafficking, terrorism, smuggling etc. Further, the police have become a large agency and consequently consist of several departments or sections within it. Since all such investigative agencies and departments come to possess considerable data on crimes and criminals, and there is a lack of close co-operation amongst all such investigative agencies, duplication of work takes place and the information/data available within one agency is not always made available to the other. It is felt that systems need to be strengthened or created to enhance co-operation and co-ordination on a regular basis.

**B. Recommended Solutions**

1. Political and Administrative Influence

In several countries, there are insufficient structural safeguards to make the police/investigative machinery immune from political and administrative influences, and to ensure that the police function strictly as per the law. Due to direct control over the police by the political executive, many investigations can just not see the light of the day, as potentially grave cases involving political or other high-ups are never allowed to be detected or proceeded with. This can have extremely adverse implications to the crime situation in a country, as many organized crime king-pins or drug mafia etc, having political connections, can be shielded from the law. The police in some countries are also subject to control by Executive Magistrates at the district level, which also thwarts

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independent/professional functioning and makes them vulnerable to extraneous influences. The political/administrative executive can abuse its powers to arm-twist the law enforcement agencies to yield to its will, as the power to transfer, promote and punish rest with it. There is, therefore, an emergent need to establish foolproof systems to ensure that the police are answerable only to the law of the land, through the judiciary, i.e., the courts, and that the administrative/political control over the police is exercised so that it cannot deflect it from functioning in accordance with the law. The following countermeasures are therefore recommended:

(a) Adoption of such a police model whereby the political executive does not have unhindered/direct control over the police organization, wherein, institutionalized safeguards exist to insulate the police organization from undue political/administrative influence. The central idea of the recommendation is that the political executive exercise control over the police organization through a suitably constituted body, which can ensure its political neutrality and independent/professional functioning. In this connection, the Japanese police model is suggested for serious consideration and adoption with suitable modifications to suit local conditions, wherever required. The salient features of the Japanese police model are as below:

- In Japan, there is a National Public Safety Commission and National Police Agency at the national level, to oversee/monitor the functioning of the police, and Prefectural Public Safety Commissions for every prefecture. The National Public Safety Commission and the National

Police Agency constitute Japan's national police organization. The National Public Safety Commission exercises administrative supervision over the National Police Agency, within its authority.

- While the Commission is under the jurisdiction of the prime minister, the prime minister is not empowered to directly command or control it. This guarantees the Commission's independence and ensures its political neutrality.
- The Commission formulates basic policy and regulations, coordinates police administration on matters of national concern, and authorizes general standards for training, communications, criminal identification, criminal statistics, and equipment. The Commission appoints the National Police Agency's Commissioner General and senior officials of prefectural police organizations. The Commission indirectly supervises prefectural police organizations through the National Police Agency.
- The Commission consists of a Chairman and five members. The Chairman is a state minister who presides over Commission meetings. Members, who serve five year terms, are appointed by the prime minister with the consent of both Houses of the Diet. They must be persons who have not served within five years of appointment as police officers or public prosecutors. To ensure political neutrality, no more than two members may belong to the same political party.

(b) The police chiefs of a state/province should have fixed tenures so that they

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don't always have to work under the threat of transfer.

- (c) Promotions and disciplinary matters relating to the higher ranking police officers should be under the control of such bodies as recommended in sub-para (a) above, so that the same introduces the required confidence in them to ensure the fair and independent functioning of the police organization, which ultimately will ensure that the investigations are carried out without fear or favour.
  - (d) Establishment of specialized independent or autonomous investigative organisations which may investigate complex crimes of a more important nature, including corruption, terrorism, serious commercial fraud etc. It is felt that such specialized and independent investigative organizations, which have strong procedural sub-systems within them to ensure their free and fair functioning in strict conformity with law, have the effect of insulating the investigative machinery from political/administrative influences, at least in the investigation of the more important/sensitive cases which they deal with. Such specialized investigative organizations could function within the overall police organization, or outside the same, as already exists in some countries. In case they function outside the purview of the overall police organization, control by the political executive over them should again be through such bodies as recommended in subparagraph (a) above, in order to insulate them from any extra-legal interventions. The Independent Commission Against Corruption (ICAC) in Hong Kong is a successful example of combatting corruption by an independent investigative agency.
2. Sub-standard and Inadequate Investigative Personnel
- (a) *Sub-standard Investigative Personnel*  
The following countermeasures are recommended to improve the quality of investigative personnel:
    - (i) Attractive conditions of service and salaries must be ensured for police personnel, so that better quality candidates are induced into the organization.
    - (ii) Recruitment at many levels in the police hierarchy reduces promotion chances, demoralizes the service and degrades service conditions. In the United Kingdom, recruitment is only at one level, i.e. the police constable, who can aspire to the highest police post. This not only attracts candidates of better quality to the police service, but also keeps them in a high state of motivation, as there is a great incentive to excel in their job and to maintain high standards of integrity. Recruitment at only one level may not be possible in developing countries in the near future. Hence, endeavours should be made to achieve two levels of recruitment for the police, i.e., one at the police constable level and the other for higher police functionaries. The minimum educational qualifications could be gradually enhanced to graduation, even for police constables, as they will have higher positions in due course and handle intricate investigations and other sensitive police functions.
    - (iii) Suitable systems must be established to ensure that recruitment of the police is fair and strictly on merit, without any political or other influence, to ensure that candidates with the right

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qualifications are selected. For this, independent/autonomous Police Recruitment Boards should be established, which must specialize in making quality recruitment and must constantly evolve more modern methods of selection, so that suitable candidates with the right aptitude enter the police service. The recruitment/selection process by such Boards must be so systematized, with foolproof checks/controls, so that the chance of tampering with the process becomes extremely remote. The recruitment must also be done as per fixed annual schedules, and *ad hoc* bulk recruitments, which severely upset promotional avenues and training standards, must not be allowed.

- (iv) After the right recruitment of police personnel, their training, both at the time of joining service and later through in-service training/refresher courses and on-the-job training, can go a long way in making available better quality police personnel/investigators. To ensure this, modern training institutions must be established in sufficient numbers, which can adequately cater to the needs of training in multifarious disciplines, to meet the complex challenges of modern crimes. Attractive training allowances must be granted so that better quality personnel man such training institutions. Training methods in different countries should be studied by such training institutions, so that the best methods/systems are adopted to suit local conditions. For specialized crimes requiring intricate handling, special courses must be devised and constantly upgraded to keep pace with changing situations/times. The services of specialists from other departments, insights into whose functioning can aid police investigators,

must be obtained to enrich the training process.

(b) *Inadequate Investigative Personnel*

The following countermeasures are recommended to tackle the problem of inadequate investigative personnel:

- (i) Police-public ratio in such countries where it is low, must be constantly upgraded through periodic sanctions of new posts and through systematic annual recruitment, so that adequate manpower is available for the different police functions, including investigations. Realistic assessment of the requirements of annual recruitment must be made and systematic initiatives taken to ensure that necessary funds are made available for this purpose.
- (ii) Separate crime investigative wings must be established at every police station level, district level etc, so that investigating officers and other staff are earmarked for concentrated/specialized investigations and they are not disturbed and diverted for other police duties relating to the maintenance of law and order.
- (iii) The services of civilian volunteers for assisting in police duties must be harnessed, so that the police can be saved for and diverted to investigative functions. The examples of Crime Prevention Volunteers in Korea, Auxiliary Police Force in Hong Kong, Home Guards in India, and Qaumi Razakars in Pakistan are cited in this connection. Such institutions must be strengthened and put to optimum use.
- (iv) Workloads of investigating officers must be constantly assessed and yardsticks evolved regarding the workload an investigating officer can

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really shoulder. Constant endeavors must be made to ensure that the workloads of investigating officers are in accord with the yardsticks, so that they can pay adequate attention to the cases and to ensure better quality and expeditious investigation.

### 3. Lack of Equipment and Scientific Aids to Investigation

In modern times, proper equipment and scientific aids to investigation are vital to the success of investigations. Since most developing countries are badly lacking in this aspect, the following countermeasures are recommended:

(a) The system of Annual Modernization Schemes, as in India, must be introduced and strengthened so that comprehensive assessments of the requirements for different types of equipment by the police force are systematically made every year, and earmarked funds released for the same annually. Endeavors must be made to have the release of such modernization grants increased every year to meet the growing needs. Under such a modernization scheme, vehicles, communication equipment, computers, fax machines, photocopiers, bomb detection and disposal equipment, document scanners, video cameras, fingerprint kits etc, should be acquired and equitably distributed to meet the requirements of police/investigating officers. Necessary equipment for digital/computerized storage of fingerprints could also be acquired. Modern Interrogation Centres, equipped with the latest equipment, should also be established in a phased manner through such modernization schemes.

(b) Adequate number of forensic science laboratories must be established as the

workload of such laboratories is generally very heavy, which contributes to delay in investigations. The workloads of such laboratories must be assessed and proposals initiated for establishing more laboratories. Further, such laboratories must be constantly modernized with the latest equipment. Endeavours should also be made to improve the quality of scientists manning such laboratories and to ensure that such laboratories function independently and fairly.

(c) Adequate number of mobile forensic science laboratories, suitably equipped, as available in every district of some states in India, must be acquired for on-the-spot assistance to the investigators as scientific aids at the scenes of crime.

(d) Adequate number of Bomb Detection and Disposal Squads must be established in cities and field areas for immediate assistance to the investigators in defusing/disposing of bombs, and for safe-guarding valuable evidence at the scenes of crime.

(e) Advanced scientific testing facilities, such as for DNA testing, are not available in many countries. Such countries which don't find it economical to establish such facilities should be able to make use of the facilities available in this regard in neighboring countries. For this, necessary bi-lateral agreements could be worked out between the concerned countries.

### 4. Lack of Cooperation and Coordination among Investigative Agencies

In order to promote co-operation and co-ordination amongst different investigative agencies, the following measures are recommended:

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(a) Establishment of Co-ordination Committees, in which all investigating agencies are represented, that meet at regular intervals. This will enhance knowledge of the different investigative agencies, their personnel, the work being turned out by them, and result in an exchange of information/intelligence, which would be helpful to the investigating officers of different agencies. Many problems amongst different agencies can be sorted out during such meetings/conferences. Separate Co-ordination Committees can be set up to deal with such subjects as drug trafficking and terrorism. Regional Co-ordination Committees could also be set up to promote co-ordination amongst adjacent regions/provinces/States, since criminals no longer stick to one area. Joint investigation teams could also be set up for particular cases, whenever required. Joint operations could also be organized by the members of such Co-ordination Committees, whenever required. In Japan, the Public Prosecutors Office leads and coordinates different prefectural police jurisdictions and different specialized investigation units on joint investigations.

(b) Establishment of joint training programs amongst different investigative agencies can be a useful exercise in not only promoting investigative skills, but also in educating each other about the roles of the different agencies, and promoting harmonious relations and understanding. These should improve the efficiency of investigating officers and result in better detection and improvement in the quality of investigations. Such pooling of resources is particularly required in developing countries which face a

resources crunch.

(c) Exchange of data on crimes and criminals amongst the different investigating agencies should regularly take place by sharing periodical reviews/hand-outs etc. These will be valuable aids to investigation.

**III. ENHANCING BETTER  
DETECTION OF CRIME AND MORE  
THOROUGH INVESTIGATIONS**

**A. General Problems on Better  
Detection and Investigation of  
Crimes**

1. Insufficient Development/Use of  
Available Data/Measures

(a) *Lack of Systematically Organized  
Data/Records and Intelligence on  
Crimes and Criminals*

When a crime takes place, the immediate guide available to the investigator is the data/records regarding similar earlier crimes, criminals and criminal organizations involved in them. These can be extremely useful tools to the investigator for detection of the crime, provided the data on previous crimes and criminals is readily available in a systematically organized form; whereby vital clues to the present crime in question can be obtained and the line of investigation decided. Further, there is a vast and dark area of unexposed crimes and criminality, which is often, nevertheless, quite active, for which no records/data may exist, since these are undetected crimes and criminals. For such vast and dark areas of unexposed crimes and criminality, the only guide can be 'Intelligence', and systematized/readily available data/information on that. However, most police agencies lack systematically organized data/records on exposed crimes, criminals and criminal organizations, and also intelligence on unexposed crimes and criminality. These



handicap the investigators, as they are compelled to grope in the dark since the benefit of organized records systems, so vital in today's crime scenario, are not available to them. Hence, we need suitable countermeasures to meet this major problem.

(b) *Insufficient Use of Available Investigative Methods/Measures*

Another related problem area in the detection and investigation of crimes is that certain investigative methods/measures, which are available to the investigators, are not being put to adequate use as tools for effective detection/investigation. These available investigative methods/measures, which are not put to sufficient use are: fingerprint identification systems; blood/semen tests; DNA testing; surveillance techniques through physical covert shadowing, through sources, wiretapping, undercover operations; computerized portrait building/identification systems; controlled delivery; timely searches etc. Suitable countermeasures need to be adopted to ensure that such available methods/measures are put to optimum use.

2. Problems Related to Interrogation, Eliciting Confessions and Unearthing Leads for Investigation

(a) *Difficulties with Regard to Eliciting Confessions*

- (i) Lack of skills amongst investigative officers.
- (ii) Lack of safeguards to ensure voluntariness of confessions.
- (iii) Failure to obtain corroborative evidence.

(b) *Lack of Interrogation Skills amongst Investigators for Eliciting Leads from Accused / Suspects / Witnesses for Further Investigation*

Lack of interrogation and related skills amongst investigating officers is a major handicap in the detection and investigation

of crimes, with regard to eliciting leads for further investigations from the accused/suspects/witnesses. Skillful interrogations by the investigating officers can make all the difference in solving a case and in strengthening it with suitable evidence for successful prosecution. Hence, this area of investigative work requires special attention for evolving suitable countermeasures for enhancing detection of crime and for achieving more thorough investigations.

3. Lack of Co-operation from the General Public and Witnesses

- (a) Lack of trust in the police and a lack of a helpful attitude by the police.
- (b) Fear of revenge from the accused.
- (c) Inconvenience to witnesses and indifference of witnesses.

Should active public co-operation be available to the police/investigating officers, the whole investigative effort becomes much easier. Not only can information about crimes and criminals be passed promptly to the police by members of the public (which they generally fail to do) but they can also come forward to depose as witnesses, for which they are deterred by factors as indicated in subparagraphs (a) to (c) above, for which we need to look for countermeasures.

4. Internationalization of Crime as a Hindrance to Investigation

- (a) Difficulties in gathering information/background data from overseas on criminals and crimes.
- (b) Difficulties in collecting evidence from overseas.
- (c) Difficulties in securing extradition of the accused.

In modern times, due to the great increase in communications,

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transportation facilities, mobility, and the trend towards the globalization of economies, crimes are increasingly assuming international ramifications. A criminal/terrorist/drug trafficker may quickly escape to a foreign land after committing a heinous crime, and go out of view. Conspiracies for major organized crimes or terrorist acts may be hatched in one country, firearms/explosives procured from another country, funding done by co-conspirators from yet another country and the criminal/terrorist acts committed in a fourth country. Detailed directions can be given for conducting such crimes over the telephone, sitting in distant lands. Though Interpol is available for co-ordinated police action, in practice, there are many difficulties in ensuring this, which is making things very easy for criminals, especially for international crime syndicates/druglords/terrorists. The problems faced by the law enforcement/investigative agencies, in this regard, are already grave, and are likely to assume still more serious dimensions in the near future. Utter lack of co-operation and co-ordination amongst most countries of the world results in failure to get information/background data from overseas on criminals and crimes, failure to collect evidence in foreign lands and failure in securing extradition of the accused. Hence, suitable countermeasures are called for to meet the challenges posed by the globalization of crime.

**B. Recommended Solutions**

1. Insufficient Development/Use of Available Data/Measures

(a) *Lack of Systematically Organized Data/Records and Intelligence on Crimes and Criminals*

The following countermeasures are recommended to develop the record systems relating to crimes and criminals, and to improve their quality, so that they become a effective aids for investigation:

- (i) To prescribe carefully devised record systems, including photographs of criminals whenever available, or improve their quality so that they are available in easily retrievable form for different types of crimes, for different *modus operandi* of crimes, for different criminal gangs/organisations. Alphabetical indexes of criminals, their areas of operation, their descriptive rolls, their associates/relatives etc.
- (ii) Drives for exhaustive classified documentation of crimes and criminals (which have come to notice in the previous ten years) at the district, state/province and national level. The criminals who have been active in the previous ten years are likely to be active now.
- (iii) To have suitable computer software designed for sub-paragraphs (i) and (ii) above, and launch drives for simultaneous computerisation of all crimes and criminals for the previous ten years.
- (iv) To strengthen the intelligence organizations so that they are able to provide well organised information about important criminals, criminal organisations and their activities, especially in the areas of unexposed crimes and criminals, and to have such information/data constantly computerised, for ready retrieval and up-dating. Such well-organised intelligence should be available at the local, state/province and national level.

(b) *Insufficient Use of Available Investigative Methods/Measures*

With regard to the problems areas detailed above, the following countermeasures are recommended:

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- (i) To have suitable inservice refresher courses devised with regard to the suitability/usefulness of the existing investigative methods/systems/measures, which are not being put to optimum use by the investigators due to their inadequate knowledge/appreciation about them.
- (ii) To associate the investigators with such expert investigators/investigating organisations as are making optimum use of the existing investigating methods/techniques, for periodical technical training.
- (iii) To have comprehensive handouts of various investigative methods/techniques/systems available circulated amongst the investigating officers and read-out by superior officers periodically, so that they are suitably sensitised to put such methods/techniques to optimum use.
- (iv) To have periodic lectures delivered by experts in the different areas mentioned above, to the investigating officers to sensitise them about different up-to-date systems/techniques available to the investigating officers.

### 2. Problems Related to Interrogation Skills in Eliciting Admissible Confessions and Unearthing Leads for Investigation

#### (a) *Difficulties with Regard to Eliciting Confessions Admissible as Evidence*

The difficulties of eliciting confessions admissible as evidence fall under three primary areas:

##### (i) *Lack of skill amongst Investigative Officers*

Lack of skill amongst investigating officers in effective interrogation and sensitive/psychological handling of the

accused is major obstacle to investigations, solving cases and unearthing their full ramifications. Lack of those skills also results in the use of third degree methods/torture by the police, which apart from causing serious human rights violations and complicating problems, also have the potential of derailing investigations for considerable lengths of time, as these could cause admissions of some facts due to fear. These could also result in deaths in police custody, which frustrate and upset investigations almost completely. Hence, developing/sharpening skills for interrogation and sensitive/psychological handling of the accused amongst the investigating officers is of utmost importance, as any resultant confession can be admissible in evidence only if it meets the test of voluntariness and credibility. Hence, the following countermeasures are recommended in this regard:

(a) To have regular refresher courses in interrogation skills organised for investigating officers where they could be exposed to the most skillful successful interrogators, and to well prepared videos, films and documentation in this regard.

(b) Interrogation skills can only develop if it is clear that third degree methods/torture of the accused will not be allowed, at any cost. Hence, the superior officers must take criminal/disciplinary action if any instance of the use of third degree methods/torture is reported.

(c) Since interrogation skills are more an art than a science, and often difficult to impart through conventional teaching/training, investigating officers should be attached to acknowledged experts in interrogation, so that they also

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imbibe the same and gradually come to practice it.

(ii) *Lack of Safeguards to Ensure Voluntariness of Confessions*

Confession made by an accused to a police officer is inadmissible in evidence in some countries like India, Pakistan and Bangladesh; though any part of such confession, as relates to any fact discovered in consequence of the information provided during such confession, is admissible in evidence in such countries. In most countries like Japan, Korea, Hong Kong and Malaysia, confessions made to police officers are admissible under some conditions. However, all such confessions, whether made to police officers or others, have to meet the test of voluntariness and credibility/trustworthiness. The confession should not appear to the court to have been caused by any inducement, threat or promise. There are various safeguards already instituted in the systems or practices of different countries in this regard. Keeping all those in view, the following recommendations are made in this regard, which may be adopted, keeping in view the local conditions and local provisions of law:

- (a) As regards confessions made by an accused on the spot, soon after the commission of a crime: clear and detailed instructions should be available to the investigating officers as to how such a confession must be recorded on the spot, and such confessions must be corroborated by entries in the notebooks of the police officers concerned.
- (b) Detailed and clear instructions must exist and be available to the investigating officers regarding the precautions to be taken while recording the confession of an accused, such as regarding the

administering of a caution, regarding entries on the spot in lockup registers, general diary of the police station etc.

- (c) Presence of independent witnesses during the interrogation/recording of a confession is required in some countries, while in some other countries, like Malaysia, the presence of independent witnesses has been dispensed with. It is felt that should the witnesses be respectable and of credible stature, their evidence will enhance the credibility of confessions.
- (d) Videotaping of a confession can be a very good safeguard to prove the voluntariness of a confession. Regarding the methodology of such videotaping, detailed standing instructions need to be institutionalized, as already exist in Hong Kong.

(iii) *Failure to Obtain Corroborative Evidence*

In order to make the confession meaningful as evidence, sincere and exhaustive efforts must be made to prove the contents of the confession wherever possible. For example, if an accused has stated in the confession that s/he purchased a particular item, having bearing with the offence, from a particular shop and a particular person; the shop must be traced, as also the person, and the statement of the bills/records seized. Broadly, the following countermeasures are suggested:

- (a) To identify and list all the verifiable points in the confessions, regarding which, there is the possibility of letting in corroborative evidence.
- (b) Without delay, investigators should be dispatched to verify the aforesaid

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listed points and to collect evidence with regard thereto.

- (c) The aforesaid exercise should be enforced in a strict manner so that investigative officers get into the habit of doing the same without fail, in every case.

(b) *Lack of Interrogation Skills amongst Investigators for Eliciting Leads from Accused / Suspects / Witnesses*

The lack of interrogation skill amongst investigating officers may result in failure to elicit leads, not only from the accused but also from suspects and witnesses. The following countermeasures are suggested in addition to the aforementioned recommendations:

- (i) Systematic identification of the points on which the investigative officers should raise questions to elicit more leads for further investigation.
- (ii) Every new lead unearthed during such interrogations must be immediately followed up with the required steps for further investigations, such as conducting further searches, apprehending new suspects etc.

3. Lack of Co-operation from the General Public/Witnesses

(a) *Lack of Trust in the Police and Lack of a Helpful Attitude of the Police*

In order to improve the attitude and image of the police with the public, and thereby inspire trust so that the public comes forward to actively assist in investigations, the following recommendations are made:

- (i) Every effort must be made to institutionalize measures that can ensure fair and impartial

functioning. The countermeasures suggested in this report regarding the problem of undue political and administrative influence can go a long way in ensuring the independent, fair and impartial functioning of the police, thereby inspiring confidence in the public.

- (ii) Every effort must be made to improve the quality of police personnel and their performance, and to institutionalize systems/measures in this regard. The recommendations made in this report with regard to the problem of sub-standard police personnel and with regard to developing interrogation skills are some of the measures which can improve the police image. Developing interrogation skills, will also help in preventing custodial deaths which badly mar the police image.

- (iii) An attitudinal change must be brought about in the police through periodic, specially designed, refresher courses and through constant on-the-job instruction. Effective supervision/leadership by the superior officers will also help to adopt a humane/helpful attitude towards the public.

- (iv) The electronic media and the press must be effectively used to highlight the good deeds/achievements of the police, so that the public gradually comes to acquire greater confidence in the police.

- (v) Enhanced contact of the police with people at different levels will inspire confidence in the police. Establishment of Police-Public Co-operation Committees, in which heads of educational institutions, representatives from prominent service organisations, respectable

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members of the public and the press/ electronic media could be represented, would go a long way in inspiring confidence in the police. Such Police-Public Co-operation Committees could lead to the effective enforcement of Community Policing measures, including assistance by volunteers in traffic enforcement etc, all of which can enhance the police image. The Police Box (Koban) system in Japan is also a good measure in community policing, as also the Neighbourhood Police Posts in Singapore, which should also be considered.

(vi) Systems must be established whereby complaints against police personnel must be effectively heard by superior officers and acted upon. Strong disciplinary or criminal action against instances of abuse of power, corruption etc, must be ensured. For this, it is necessary that superior officers must be highly accessible to the public. For example, in Hong Kong, the Complaints Against Police Office is a delegated police unit to investigate all the complaints against the police, and the results of investigations are scrutinized by non-police officials.

(vii) Fair administration of the police must be ensured whereby, while the wrongdoers are not spared from punishment, those who excel in their work, especially in eliciting public co-operation through their humane/helpful attitude, are suitably rewarded.

(b) *Fear of Revenge from the Accused*

Since witnesses often do not come forward to depose against criminals due to fear of revenge, the following countermeasures are recommended in this

regard:

(i) Witness Protection Programs such as in Brazil, Colombia, Hong Kong, must be established whereby suitable protection is provided to the witnesses, according to requirements, at the expense of the State.

(ii) Victim Assistance Committees may be set up to extend psychological/ other support to victims of crime, who also will happen to be the prime witnesses in a case. For sexual crimes, women police officers can be assigned as detectives, as in Japan, so that victims of sexual crimes feel comfortable in reporting to the police and during investigations. The Vulnerable Witness Support Programme, as in Singapore, whereby support to vulnerable witnesses who have to testify in criminal cases is extended, is also recommended for adaptation as per local conditions. Amendments have also been made to the Singapore Criminal Procedure Code (Cap 68) for the evidence of vulnerable witnesses in certain types of offences to be heard through live video or television links.

(iii) In case of any attack on a witness by a criminal, it must be ensured that exemplary punishment is imparted.

(c) *Inconvenience to Witnesses and Indifference of Witnesses*

Witnesses are also reluctant to come forward to assist the police in detecting/ investigating a crime, and to depose as witnesses, as it can cause considerable inconvenience and harassment to them and result in a wastage of time. Consequently, they are indifferent towards the police. To meet this problem, the following countermeasures are suggested:

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- (i) Adequate conveyance, boarding and lodging monies must be provided to witnesses, for which necessary provisions must be made.
- (ii) It must be ensured that witnesses are treated by the police with sensitivity, so that they do not have to face harassment in terms of being called to police stations frequently, or having to visit courts frequently, due to avoidable adjournments, keeping in view the time constraints which a witness may have. Every witness must be made to feel important, as the minimum reward for their effort/sacrifice. Any other reward may not be legally acceptable.
- (iii) Mass media must be effectively used to raise awareness amongst the public that without their co-operation, it is very difficult for the police to fight crime; and that the public, themselves are the co-producers of public safety.

#### 4. Internationalization of Crime as a Hindrance to Investigations

##### (a) *Difficulties in Gathering Information / Background Data from Overseas on Criminals and Crimes*

In view of the problems posed by the internationalisation of crime, as indicated above, the following countermeasures are recommended with regard to gathering information/background data from overseas on criminals and crimes:

- (i) Interpol, of which most countries are members, must be put to effective use for obtaining data on crimes and criminals from foreign countries. For Interpol to be effective, the message/queries received from it must receive adequate attention, so that prompt replies can be assured.
- (ii) Liaison officers posted abroad may be made optimum use of to collect the required *bona fide* information on crimes and criminals, and to keep the police agencies of the concerned countries suitably informed.
- (iii) To maximize participation of police officers in international conferences on crimes/criminals so that all concerned are suitably sensitised, mutual apprehensions (if any) dispelled, and harmonious workings towards common objectives facilitated.

##### (b) *Difficulties in Collecting Evidence from Overseas*

Since investigations are often required to be carried out in foreign countries and evidence is required to be collected, this process is fraught with acute difficulties. The following countermeasures are recommended:

- (i) The available treaties on Mutual Assistance in criminal matters must be put to optimum use, as also the available diplomatic channels.
- (ii) Active efforts must be made by police agencies to have necessary diplomatic or legislative initiatives taken by their governments to conclude bilateral/multilateral treaties with different countries regarding mutual assistance in criminal matters. Pending the conclusion of such treaties, most countries may enact legislation whereby a country that has no treaty with it, can also request assistance under the principle of reciprocity. In this connection, the Act on Mutual Assistance in Criminal Matters passed by Thailand in 1992 is cited.
- (iii) To constantly endeavour to extend

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maximum co-operation to the execution of "Letters Rogatory" received from different countries, to identify the recurring problems faced in this regard, and to seek lasting solutions.

(iv) To utilise the personal rapport achieved with officers of other countries during conferences/seminars to smooth matters, and to elicit co-operation to solve knotty problems in investigations abroad.

(v) Necessary amendments in the law of evidence, wherever necessary, should be considered, in order to make admissible the evidence collected by foreign officials, without the foreign witnesses having to depose in court.

(c) *Difficulties in Securing Extradition of the Accused*

Since in many countries, the trial of an offender in the requesting State cannot proceed without the presence of the offender in the court of criminal trial, extradition is a vital legal mechanism. However, in many countries, for want of the required provisions in their extradition Acts, or if enacted, for want of mutual extradition treaties, the extradition of offenders wanted by a country is often a major problem. In this connection, the following countermeasures are recommended:

(i) The available extradition laws, treaties and diplomatic channels must be made optimum use of to achieve extradition of offenders.

(ii) Necessary extradition Acts must be enacted by most countries so that the concerned country can extradite an offender to the requesting State, even if the requesting State does not have a treaty with it.

(iii) All countries facing the problem of internationalisation of crime must conclude extradition treaties with all such countries with which they have frequent problems of extradition.

**IV. CONCLUSION**

It is hoped that with the aforesaid countermeasures recommended for better detection of crime and more thorough investigations, a definite impact on the crime situations in different countries can be made for the ultimate objective of effectively preventing crimes in our changing societies.



## TOPIC 2

### THE ROLE OF PROSECUTION IN THE CHANGING SOCIETY

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#### I. INTRODUCTION

The criminal justice system comprising of the police, prosecution, judiciary, probation officers and the prison authorities are important in administering justice to the society. Amongst the above named components of the criminal justice system, the prosecution is the backbone of a successful system. It would not be an exaggeration to state that the prosecution is pivotal to the practical functioning of the criminal justice system. The prosecution plays a balancing act between the apprehension of criminals by the police and the finding of guilt as well as punishment by the judiciary.

In many jurisdictions, the police, apart from maintaining law and order, also conduct investigations as provided by law. Upon completion of the investigation, the police then turn to the prosecution. The prosecution at this juncture, in many countries, advises further investigation or makes a decision on whether to proceed to the trial stage or not. The prosecution ought to play a major role in ascertaining that justice is done not only for the society but also for the accused, as the case may be. In any jurisdiction, the prosecution fails to play its role in the criminal justice

system if the prosecutor does not maintain control of prosecutions. In order to maintain equilibrium, the prosecution must ascertain whether a particular criminal case should be proceeded with to prosecution, or whether some other alternative steps should be taken. The prosecution at all times should consider the necessity and effect of a prosecution or non-prosecution.

In the changing society where new types of crime, such as organized transnational crimes, large scale economic crimes, money laundering, etc, are emerging and prevailing, we should think about whether the prosecution can cope with these new phenomena and, if not, effective tools should be provided for the prosecution to cope with these new type of offences. Furthermore, the quality of public prosecutors is an issue of our discussion. Whether the high quality of public prosecutors is maintained or not is the foremost question in order for them to fulfill their important duties.

This report will discuss and identify problems faced by the prosecution in the changing society. It will also propose solutions to the problems raised.

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**II. INEFFECTIVE AND  
INEFFICIENT PROSECUTION**

**A. General Observations**

In practice, there are many causes of ineffective and inefficient prosecution. However, all these causes may be grouped into two main problems namely:

- (a) Low conviction rate; and
- (b) Overloading of courts and prosecution.

In dealing with the issues of low conviction rates and the overloading of the courts, it is inevitable that the public prosecutor plays a major role in most jurisdictions. Amongst the participant countries in this seminar, varying methods to commence prosecution are adopted.

In countries such as Bangladesh, Hong Kong, Pakistan, India and Sri Lanka the decision to prosecute at the lower courts rests with the police. Meanwhile in all other countries, the decision to prosecute at lower courts lies with the public prosecutor. The other main practical issue in prosecution is the basis of initiation of criminal prosecution. In practice, public prosecutors, apart from satisfying that there is sufficient evidence to prosecute, would also consider the issue of the standard of evidence for the commencement of prosecution. In this regard, countries such as Algeria, Bangladesh, Japan, China, Colombia, Pakistan and Republic of Korea require evidence which is beyond reasonable doubt as a basis to commence prosecution. Meanwhile, in Malaysia, Indonesia, Laos, Peru and Viet Nam there must be 80% chance for conviction in order to commence prosecution. Public Prosecutors in Hong Kong, Mozambique, Nepal and the Seychelles would commence prosecution if there exist more than 50% chance to obtain conviction. Lastly, in Brazil and Sri Lanka

prosecution is initiated even if there is less than 50% chance for conviction.

**B. Low Conviction Rate**

One of the measurements of the effectiveness and efficiency of any prosecution system is the conviction rate. If the prosecution system of any country produces too low a rate of conviction it could be seen as a symptom of a serious problem within. It must be stressed at the outset that low conviction rates *per se* might not be the only objective of prosecution. However, since this report is mainly interested in the quality of prosecution, then naturally the rate of conviction should be considered as one of the measurements of the quality of prosecution. In this regard, in some countries the prosecution is conducted by either the police or the prosecution under the direction and control of the Attorney General/Prosecutor General. The conduct of prosecution by both these arms of the criminal justice system depends upon the nature of the offence, and the jurisdiction within which the case would be tried. In countries like Japan and the Republic of Korea, all prosecutions, irrespective of the jurisdiction of the courts and the nature of the offence, are prosecuted by the public prosecutors. However, in countries like India, Sri Lanka, Hong Kong, and Bangladesh, cases at the lower courts, which carries lighter punishment of imprisonment, are conducted by the police prosecutors. In this regard the police prosecutors are under the direct supervision of the Superintendent of Police or the senior police officer of each district. As such, the public prosecutor does not play a major role in the conduct and direction of prosecutions in these jurisdictions. Meanwhile, in Hong Kong, the prosecution is conducted by lay prosecutors.

For the purpose of this report, a survey was conducted among the participants of

each country as to their respective conviction rates in recent years. Countries such as Japan (99.9%), China, Republic of Korea (99.6%), Indonesia, Malaysia and Vietnam obtained a conviction rate of above 80%. Meanwhile, India (77.6%), Thailand, Nepal, Peru (65%) and Pakistan obtained a conviction rate of between 80% and 40%. Bangladesh, Laos and Sri Lanka obtained a conviction rate below 40%, and in some countries, the conviction rate is becoming lower. It is to be noted that these are the rates of conviction upon completion of trials. As such, the rate of percentage as above does not include cases concluded with a conviction summarily or upon a plea of guilt.

It is evident that countries attaining low rates of conviction would face serious difficulty in the changing society. In countries where there is a low conviction rate, the problems are manifold. There are questions on the integrity of the prosecution, the cost of maintaining the

criminal justice system, i.e. the police and the prosecution. The result of the low rate of conviction reflects unwarranted prosecution; a waste of judicial time and money; unnecessary expense incurred by the defendant or accused in preparing for trial; the mental agony suffered by the accused; possibility that the wrong person was charged or indicted; possibility that the true culprit of the offence was not brought to justice; ineffective investigation; ineffective prosecution; and that justice was not attained for the benefit of the victim. As such, in any criminal justice system, the prosecution, in order to be effective and efficient, should strive to attain a high rate of conviction.

### **III. LOW CONVICTION RATE: COUNTERMEASURES**

#### **A. Screening**

The participants in general propose screening as a method to solve the problems stated above. For the purposes of this

#### **Diagram 1**

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report, screening is defined as a process where available evidence in the cases is evaluated from the viewpoint of whether there is a reasonable chance of conviction; if not, the case is dropped (before filing charges) or withdrawn during trial. The application of a screening process is further shown as in diagram1 (below).

The process of screening is applied only where there is the insufficient evidence to prosecute. Screening can be done before indictment or charge, or even during trial but before the court delivers its judgment. It has come to light that screening is done by the public prosecutor in all participant countries except Bangladesh, Pakistan and Sri Lanka. However in Bangladesh, Colombia, Mozambique, Nepal, Peru, Sri Lanka and Thailand, screening is done by the inquiring magistrate.

It must be noted that even though screening is done in most countries in one way or another, there still exists a low conviction rate in most countries such as Thailand, Mozambique, Pakistan, Nepal, Peru, Bangladesh, Laos and Sri Lanka. The inevitable conclusion is that there are weaknesses in the screening process.

The participant from India expressed an opinion that dropping too many cases by screening does not realize justice, even if the conviction rate becomes higher. In his view, the charges should be sheeted for the maximum cases, and conviction should be obtained for the maximum cases. It was also stated that the percentage of cases charged, and the conviction rate, should both be the criteria to ascertain the efficiency of prosecution. However, in general, the participant's of this seminar acknowledge the importance of screening as a solution for low conviction rates. In general they agreed on the need for screening, for the following reasons,

namely:

- (a) as a tool to overcome the existing problem of low conviction rates;
- (b) as a tool to avoid unwarranted prosecution in the courts;
- (c) to ensure that society's trust in the criminal justice system is not diminished by acquittals; and
- (d) to ensure convictions.

**B. Practical Approach to Screening**

Screening, being acknowledged as a solution, is not sufficient. There is a need for a practical approach to screening. The participant from Indonesia informed this seminar that in Indonesia, the public prosecutor, upon receiving the dossier or investigation paper from the police, has to fill out two types of checklists, namely;

- (a) formal- dealing with the Criminal Procedure Code ; and
- (b) material- dealing with the Penal Code.

It was informed that upon completing the said checklist, the public prosecutor must ensure that there is 90% sufficient evidence before prosecution can be initiated. It was also to be noted that the public prosecutor, in screening, should study the following factors:

- (a) statement of the relevant witnesses.
- (b) age of the witnesses.
- (c) the need for corroboration (if any).
- (d) the requirement of the evidentiary rule for admissibility.
- (e) existence of the relevant exhibits recovered by the police.
- (f) all investigations have been completed by the investigation officer.
- (g) the value to be attached to each piece of evidence.
- (h) the value of the confession or statement of the suspect (where applicable) ; and

- (i) whether investigation has been conducted towards the possible defence of the suspect.

The above list is not exhaustive.

### **C. Safeguards of Screening**

The participants agree that there must be a method to avoid abuse of the screening process. In dealing with the safeguards, it is accepted that the superior officers in the Public Prosecutors Office can play a role as a safety valve to ensure non-abuse.

An independent review body of the screening process, such as the Committee for the Inquest of Prosecution in Japan, can also be a safeguard. The Committee, on receiving a complaint from the victim about the decision of prosecution, reviews the case and if necessary, recommends prosecution to the Public Prosecutors Office. Further, in Japan, where offences are committed by public officials, if not prosecuted, the victims have other recourse. The victim can complain to the court. The court, based upon the complaint, would ascertain whether there is sufficient evidence for trial. Apart from this recourse, the victim can also lodge a complaint at the High Public Prosecutors Office. Possible abuse may also be dealt with by usage of private prosecutions as is currently being used in many countries.

### **D. Advice to Investigators**

It is acknowledged that in the majority of the participant countries, the manner and method of investigation rests solely in the domain of the police. The police officers are trained and possess sufficient knowledge as regards how to investigate. However, it cannot be disputed that laws constantly change, especially certain special legislation or the law of evidence. The problem arises that despite investigation, the task is to adduce the investigated evidence without

infringement of the law of evidence. The public prosecutor is in a position to know what is lacking or necessary, based on the situation of the trial court and what is admissible as evidence in the court. In such regard, the necessity arises where the public prosecutors might have to advise the investigator of the need for further investigation.

It has been acknowledged by participants from India, the Seychelles, Japan, Republic of Korea, Thailand and Hong Kong that advice from public prosecutors is needed and appreciated by the police. However, it was cautioned that such advice should not be in a manner which would be construed as direction or instruction. The feeling amongst the participant countries is that the police and public prosecutors should work hand in hand and show a high degree of cooperation. The aim of both these bodies is to combat crime. However, the feelings and office of one another should be respected.

### **E. Admissibility of Confessions**

Confession is important for the following purposes:

- (a) to overcome the low conviction rate;
- (b) to reduce unnecessary prosecution in the courts; and
- (c) to know the possible defence, or the suspect's version, which would assist in screening.

In Algeria, Bangladesh, Colombia, Peru, India, Indonesia, Pakistan and Sri Lanka confession or statement given by the suspect or accused is not admissible if it was made to a police officer. However, in all other participant countries, a confession or statement is admissible even if made to police officer, provided certain conditions are met. The prosecution must prove that the confession or statement was made

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without any inducement, threat or promise, as a condition for admissibility.

In Algeria, Colombia and Peru, a confession or statement is only admissible if it is made before a public prosecutor. In the Republic of Korea, in order to ensure admissibility of the confession, it must have been made to the prosecutor and must have been made voluntarily. In the Republic of Korea, confessions may also be made to the police. However, such a confession is only admissible if the accused admits to the contents of the said confession.

In India and Bangladesh, a confession or statement is only admissible if it was made before a magistrate. However, in Malaysia, Thailand and Hong Kong, a confession or statement is admissible if it was made before a police officer, provided it was voluntary. Meanwhile, in Pakistan and Sri Lanka, a confession made to a police officer above the rank of Deputy Superintendent is admissible only in cases of terrorism.

Most participants were concerned with the use of force by police officers in some countries, and this is the first and foremost problem to be solved before the confession is made admissible. As a safeguard to ensure voluntariness of a confession or statement, certain measures can be put in place. For instance, in Hong Kong, video recording is done while the confession or statement is being made. In other countries, members of the public are present when the confessions are being recorded.

However, the participants in general agreed that legislation should be amended so that a confession or statement can be made to a police officer above the rank of Inspector. However, as a safety measure, such a confession should only be made admissible if it is proved at the trial to have

been made voluntarily. It is generally accepted that admissibility of a confession or statement of the suspect or accused would be a tool to overcome the problem of low conviction rates. All participant countries agreed that it would be good to allow for admissibility of a confession or statement, so long as it was made voluntarily.

**F. Securing Appearance Before the Court and Testimony of Witnesses**

One of the main causes for the low conviction rate and overloading of the courts and prosecutors is the problem of witnesses. In most countries, the courts have to postpone trials due to the unavailability of witnesses, thus causing delays. In other countries, courts acquit the accused persons since the witnesses are missing and cannot be found, in order to prove the charge.

In all participant countries, except Mozambique, there seems to be a problem in securing witnesses for trial. Amongst the reasons are:

- (a) witnesses refuse to attend trial to avoid enmity.
- (b) no protection for witnesses who testify.
- (c) no allowances or transportation costs paid to witnesses.
- (d) frequent adjournments cause witnesses to lose interest in trials.
- (e) hesitation to testify in front of the accused.
- (f) witnesses don't understand the rule of law.
- (g) mobility of witnesses and difficulty in tracing them.
- (h) witnesses regard testifying as a waste of time; and
- (i) no trust in the police and unfriendly environment of the court.

Due to the reasons mentioned above, there is a need to educate society about the

legal system. Further, in most countries except Brazil, Colombia, Hong Kong, Laos, Nepal, Pakistan, Republic of Korea and Viet Nam, there does not exist a witness protection program. A witness protection program would enable the State to place the witness in a safe house and this would ensure that the witness is present in court in order to testify. In Colombia, the witness protection program is very effective and the State plays a major role to ensure that the witness is equally safe after testifying. In countries where there is no witness protection program, such as Algeria, Bangladesh, Japan, China, Indonesia, Mozambique, Peru, Sri Lanka and Thailand, they support the creation of such programs in their jurisdiction. However, the participants from Malaysia and the Seychelles find that the need does not arise for the creation of witness protection programs in their country.

#### **G. Immunity**

The provision of immunity would be useful to ensure an increase in the conviction rate. In crimes involving two or more persons, the prosecution may provide immunity against prosecution for the accomplice. In the United States of America, immunity is being accorded to co-accuseds where there is no independent witness, in order to obtain conviction. In the United States, immunity is being given formally and informally. Formal immunity must obtain the sanction of the Attorney General. However, this is a long and time consuming process. On the other hand, the prosecutors in the United States also apply informal immunity whereby the sanction of the Attorney General is not required. Once the prospective witness is prepared and willing to reveal the truth as a witness, a formal document is executed.

In Sri Lanka, a similar system is used and known as a conditional pardon. This is only done with the sanction of the

Attorney General. However, a person is conditionally pardoned on the condition that s/he testifies against the co-accused. It is to be noted that this is only used in very rare cases involving heinous crimes. In Pakistan, the principle of immunity is equally applied, but it is known as an approver system. Meanwhile in Hong Kong, immunity is given to the co-accused depending on whether the co-accused's prospective evidence is worthy of credit. However, it is only done if there is sufficient corroborative evidence. On the other hand, in Malaysia and Hong Kong, the principles of this system are used but the public prosecutors would prefer the co-accused to plead guilty and later be used as a witness. In Thailand, there is no specific law as regards immunity, but in practice the prosecution applies the immunity principle. However, it is hoped that usage of an immunity system and witness protection program would ensure that the problem of low conviction rates could be solved.

#### **IV. OVERLOADING OF COURTS AND PROSECUTORS**

It has been noticed that in some jurisdictions there is a principle of mandatory or compulsory prosecution. This is a situation where as long as there is sufficient evidence, the public prosecutors should or are compelled to institute criminal proceeding without any discretion. On the other hand, there are some countries such as Thailand, Indonesia, Malaysia and Peru, which allow the public prosecutor discretionary powers of non-prosecution of certain categories of cases. However, this discretionary power is not exercised as a rule but rather as an exception.

Apart from these two categories, there are some countries which allow for discretionary prosecution such as in Japan

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and the Republic of Korea. Even though this discretionary power is exercised, it is done with stringent conditions and counter-checks, so as not to be abused.

Against the background of the abovementioned prosecutorial system, there exist a severe problem of overloading of the courts and the prosecutors with minor, petty and unwarranted prosecutions. Where prosecutions are instituted without exercising discretionary powers, inevitably the result would be overloading of the courts. When the courts are overloaded with criminal cases, the consequential effect would be delayed trials. This would lead to unhappy victims who would further suffer the agony of waiting for justice to be meted out. It is of utmost importance that the public prosecutor should, at all times, ensure that the interest of society or the public, for whom s/he acts, is their main priority.

**V. OVERLOADING:  
COUNTERMEASURES**

**A. Alternative Measures**

In the changing society it is acknowledged that the criminal justice system needs some overhaul. Most of the cases in our courts, at the present time, which end up with fines could be disposed of in a much speedier manner. As such, this could reduce the biggest problem of overloading of the courts and prosecutors. In this regard, we propose two solutions namely;

- (a) Summary procedure; and
- (b) Administrative measures.

1. Summary Procedure

At present, this mode is being practiced in the Republic of Korea and Japan. When the public prosecutor examines the dossier or investigation paper, s/he would be able to form an opinion as to whether such an

offence is suitable to be dealt with by fine or formal trial. When the prosecutor forms the opinion that the criminal case could be disposed of with a fine, then the proceeding is conducted as a summary procedure. In cases where summary procedure is followed, the documents involving the case are sent to the judge. The judge examines the documents and issues an order to the accused or the defendant as to the amount of fine imposed. If the accused or defendant is not satisfied with the fine imposed, the accused may request a formal trial; only then is a formal trial held. In the Republic of Korea, a total of more than 1 million cases are registered, out of which 85% are disposed of by the courts through summary procedure. This percentage reflects that about 900,000 cases are dealt with summarily. As such, the adoption of summary procedures can and does, to a great extent, reduce the overloading of the courts and prosecutors.

2. Administrative Measures

In Japan for instance, about 2.1 million cases involve offences of traffic violations. These offences are: driving beyond the speed limit, marginal overloading of trucks and cars, and other minor traffic violations. Such cases are disposed of with offenders being allowed to pay an administrative fine. If such an administrative fine is paid, then the matter ends. However, where the administrative fine is not paid within the stipulated time, or without reasonable cause, the matter is then taken up as a criminal case to the court. Such a system is also being used in Malaysia, India, Indonesia and Sri Lanka.

**B. Plea Bargaining**

Plea bargaining is an effective method to obtain conviction rather than acquittal. In this system, counsel for the accused would correspond with the public prosecutor for the charge to be reduced on certain cogent grounds, such as the



problem of adducing evidence and the existence of strong mitigating factors. Upon examination of the written request, and studying the investigation paper, the public prosecutor might agree to reduce the charge or alternatively withdraw some charges and merely proceed on one charge, on the condition that the accused pleads guilty. This process contributes in reducing the problem of overloading and to ensure that justice is done. This process is being applied, for example, in Malaysia, the United States, the Seychelles and Sri Lanka. However in Malaysia and the United States, plea bargaining is done between the prosecution and the defence, without any role of the judge, so as not to prejudice the mind of the court in sentencing. On the other hand in Sri Lanka, plea bargaining is conducted between the prosecution and the defence, however they must obtain the approval of the judge. It must be admitted that only a small number of cases are disposed of through plea bargaining. However, there is room for prosecutors and defence counsel's to utilise plea bargaining for the interest of justice to all. In dealing with this issue, participants did not raise objection to the usage of plea bargaining.

### **C. Discretionary Suspension**

Discretionary suspension is being practiced in Japan and the Republic of Korea. Discretionary suspension is applied in cases where there is sufficient evidence, however the prosecutor might prefer not to charge a suspect (please refer to diagram 1). In the application of this system, despite sufficient evidence for conviction, a charge is not preferred or instituted against the suspect when considering the following instances:

- (a) minor offence/less serious crime;
- (b) first offender;
- (c) age- whether young or old;
- (d) little criminal tendency of the suspect;

- (e) restitution has been made to the victim;
- (f) the suspect has repented; and
- (g) contributive factor of victim, eg. provocation.

This system has proven to be useful to correct criminals, to protect society, to reduce overloading of the courts and also to prevent overloading of the prisons. However, if the same suspect commits another crime then, as in Japan, s/he would face prosecution for the offence which s/he was not prosecuted for before. The same system is also being practiced in Hong Kong in relation only to juvenile offenders, as compared to Japan and the Republic of Korea, where it is being applied for adult offenders. In the Republic of Korea, about 10% of the total number of cases end up with suspended prosecution, which amounts to about 199,000 cases. Meanwhile in Japan, about 30% of cases are classified as suspended prosecution. In Hong Kong, about 35% of the total number of juvenile offenders are not prosecuted under this system, and rehabilitation of juvenile offenders is done through the Superintendent Discretion Scheme. As a safeguard against possible abuse, the victims can lodge an appeal with the High Public Prosecutors Office or the High Court or the Constitutional Court against the decision of the public prosecutor, as in the Republic of Korea. In Japan, the Committee for the Inquest of Prosecution in Japan acts as a safeguard. The Committee, on receiving a complaint from the victim about the decision of non-prosecution, reviews the case and, if necessary, recommends prosecution to the Public Prosecutors Office.

### **D. Discretionary Withdrawal**

Discretionary withdrawal is an instance where there exists sufficient evidence for prosecution and the accused is indicted or charged for an offence. However, between

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the indictment period and the judgment or sentence, the charge is withdrawn by the prosecution in the exercise of its discretionary power. The application of discretionary withdrawal is shown in diagram 1.

However, participants from Brazil, Sri Lanka and Hong Kong raised much reservation about the usage of discretionary suspension and withdrawal, on the grounds that it would lead to impunity and corruption. The participant from Hong Kong feels that all adult offenders must be punished and that the prosecution must uphold justice. Meanwhile, the participant from Sri Lanka stated that the public would lose confidence in the criminal justice system if this proposal is applied.

On the other hand, the participant from Indonesia suggested this proposal is very useful to avoid overloading of the courts. However, he suggested that there must exist some form of countermeasure in order to avoid abuse, this was eventually supported by the participants from Hong Kong and Malaysia. However, it is agreed that there might exist some form of probable abuse, but countermeasures would help the application of this system. Victims of crime may lodge an appeal with the Attorney General or the Public Complaints Bureau, as in Malaysia.

The main aim of this system is to prevent overloading of the courts and to correct first time offenders. This system has been proven to be successful in the Republic of Korea and Japan. Currently, all countries except Algeria, Bangladesh, Brazil, China, Indonesia and Mozambique apply discretionary withdrawal. Meanwhile, as regards discretionary suspension, it is only being used in Japan, the Republic of Korea, the Seychelles, Viet Nam and Hong Kong (only for juvenile cases).

**VI. LACK OF EFFECTIVE  
COUNTERMEASURES AGAINST  
NEWLY EMERGING OR  
PREVAILING CRIMES IN THE  
CHANGING SOCIETY**

In most countries, the current laws were enacted between the 1880's and 1970's. The society then and now has changed. Thus the types of crime has changed, together with the changing society. As we approach the 21st century, newly emerging crimes are seen to be prevalent. In some countries, with the opening of multi-media super-corridors related to high technology, there emerge new crimes relating to computers. Sadly, the criminal justice system cannot keep pace with the newly emerging and prevailing crimes. The members involved with the criminal justice system are not equipped either technologically or with knowledge as to how to combat these emerging crimes. Society now sees itself facing crimes such as organized crime, economic crime and computer crime.

**A. Organized Crime**

As the name speaks for itself, this type of crime is organized in nature. Various types of crimes are committed by members of an organized group. These crimes range from theft, robbery, kidnapping to murder. The members of these organizations use violence and collect protection money from businesses. In Japan, these organized groups are known as '*boryokudan*'. In other countries, there are various triad groups carrying out criminal activities with their own trademarks.

In Japan for instance, the Japanese government, realizing this growing problem, enacted the Anti-boryokudan Law in 1991, aimed at combatting crimes committed by these organized criminal groups. The main objective of this law is to maintain peace and order within society. The mere fact of such a specific law being

enacted clearly shows the seriousness of this crime. In Colombia, these organized groups of criminals involve themselves with crimes relating to drugs, kidnapping and murder. Realizing the seriousness of these crimes, the Attorney General of Colombia has set up a group of special officers to investigate offences such as drugs, kidnapping and murder involving organized groups. There have been instances where public prosecutors have had to flee Colombia due to threats by these organized groups.

The characteristics of these organized groups impede proper and thorough investigation. It would be difficult for investigators to obtain detailed information about these groups. The members of organized crime are always bound by secrecy. This is usually done by *boryokudan* members by cutting off their fingers to show alligence to the said group. More often than not, the activities of the organized groups are only within their own knowledge. Therefore, it is important to combat this type of crime in new way.

### **B. Economic Crime**

Economic crime has exisred for a long time in many jurisdictions. However, the manner and seriousness of this crime in the past years have been different compared to the 1980's. Thus since the 1980's, the authorities noticed new complexity in investigation this type of crime. Economic crimes range from deception to fraud, forgery, using false document as genuine, and criminal misappropriation of property. As regards Hong Kong, in 1990 there was a total of reported cases of deception, business fraud and forgery amounting to 2,017 cases; 637 cases of fraud and 448 cases of counterfeit/forgery. The total amount involved (in 1990) was HK\$348 million. However in 1997, the total reported cases of deception, business fraud and forgery was 3,240 cases.

Meanwhile, 313 cases of fraud and a total of 668 cases of counterfeit and forgery were reported to the Commercial Crime Bureau. The total amount involved was HK\$1,165 million. This clearly shows the growing trend of these cases. However, the complicated nature of these offences and the voluminous documents involved, causes great problems not only to investigators, but also to public prosecutors and judges. Apart from this, economic crimes are committed internationally and involve different jurisdictions. Thus, legal issues arise, namely, jurisdiction, which law is to be applied etc. Therefore a solution needs to be found for these issues.

### **C. Computer Crime**

Crime involving the usage of computers has been a recent problem not only for investigators, but also prosecutors. The invention of the computer in the early days was merely as a word processor. However in recent years, every home in most countries has not only a computer, but also the Internet. Most countries are expanding the usage of computers into Internet and E-commerce. Society can use the computer for business transactions between one part of world and another. Electronic money and goods can be transferred from one jurisdiction to another within seconds, leaving no trace to track. Further, there are no documents being used in these transactions. In recent years, some countries such as Hong Kong have been planning for the implementation of banking, purchase of goods and related activities through the computer.

However, problems will arise if computers are not used for the correct purpose. In the changing society there is bound to exist some who will misuse computers, such as by hacking, Internet gambling and publishing obscene articles. In Hong Kong, there were only 4 reported cases relating to computer crimes in 1993.

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However in 1998, this figure rose to 32 cases. Meanwhile, the total value of loss in 1993 was HK\$600,000 and in 1998 it had risen to HK\$2 million. Even though the number of cases in 1998 is not big in terms of figures, it clearly shows a large increase from the 4 cases in 1993 to the 32 cases in 1998. As such, time is ripe for countries to address this issue and find practical solutions to overcome and curb this crime.

### **D. Special Legislation**

As regards organized crime, there is a need for the enactment of special legislation. This special legislation should enact provisions for the criminalization of organized crime groups and their membership.

In Japan, the Anti Boryokudan Act has been legislated to combat and suppress criminal organizations known as '*Boryokudans*'. This Act designates certain groups as mobster groups or *boryokudan*. A special procedure has been devised for hearings to be conducted by the police in order to inform the group that such a group has been designated as an organized group. The police, by using this Act, can regulate these organizations by giving them a time period of three months and a further extension of one month. This Act forbids the groups from expanding and the imposition of tattooing among juveniles. The police are permitted to issue a suspension order. This suspension order would, in effect, order the groups to stop its activities. If such order is ignored, then the police may issue a re-occurrence order, failing which the criminal justice system would be activated and the group or members would be detected. In Tokyo, between January and November 1998, the police issued 268 suspension orders, 7 re-occurrence orders and 1 case of detection.

In other jurisdictions, such as Malaysia, legislation has been used to prevent

organized criminal groups from mushrooming. The Emergency (Public Order and Prevention of Crime) Ordinance 1969 was enacted for suppression of violence or prevention of crimes involving violence. This law provides for the members of organized crime to be detained for a period not exceeding two years. However, such detained persons may make representations for a review of detention by the Advisory Board. The members of the Advisory Board are appointed by His Majesty, the King. As far as Malaysia is concerned, the enactment of this legislation has proven to be successful in curbing not only the spread of organized crime, but also the activities of its members.

In some jurisdictions such, as Colombia, laws have been legislated providing severe punishments for criminal activities conducted by organized criminal groups and their members. The Penal Code has been amended for increased imprisonment from 25 to 40 years for the offence of kidnapping. Meanwhile, the same applies in cases of homicide involving organized groups and their members. It is hoped that legislation, such as in Japan, Malaysia and Colombia, would be effective in curbing the activities of organized criminal groups and the members thereof.

### **E. Anti-Money Laundering Legislation**

Anti-money laundering legislation is found to be an effective tool in fighting against organized and economic crime. This type of legislation has been enacted in Hong Kong. However in Japan, Malaysia, the Seychelles, Pakistan and Thailand, such legislation has been enacted to seize ill-gotten proceeds of criminal activities connected to drugs. Such legislation proposes to seize all ill-gotten proceeds and property acquired by persons involved with certain crime, as envisaged by the specific legislation. In Hong Kong,

the Organized Serious Crime Ordinance provides the mechanism for investigating and seizing all ill-gotten proceeds of criminal activities. This Ordinance plays the role of anti-money laundering legislation. The said law in Hong Kong prescribes a transaction reporting system, where the banks are duty bound to report transactions. Such a system would alert the authorities and thereby cause an immediate response.

However, this legislation would not be of much assistance without mutual assistance from other countries. In practice, a criminal organization would operate its criminal activities in one country and transfer the proceeds thereof to another country, or even in some cases, acquire property in a third country. In such cases it involves the question of jurisdictional and national sovereignty of the individual country. Therefore, countries should enact legislation for mutual legal assistance such as in Hong Kong and Thailand. In Hong Kong, such legislation has been enacted in 1998 to enable authorities in Hong Kong to make and respond to requests to and from other jurisdictions in relation to criminal matters. However, such provisions have been enacted in Malaysian law only as regards drug-related offences. The mutual legal assistance ranges from the taking of evidence, search and seizure, confiscation of the proceeds of crime and transfer of suspects.

The time is ripe for all countries to negotiate and enact provisions such as anti-money laundering legislation and for the provision of mutual legal assistance, bearing in mind the primary goal of the prevention of crime.

#### **F. Confiscation of Illicit Proceeds**

Provision for confiscation of illicit proceeds would be applicable for offences

related to organized and economic crime. Many jurisdictions such as Japan, Malaysia, Pakistan, the Seychelles and Thailand have already enacted provisions within their laws in relation to the confiscation of illicit proceeds connected with drug-related crime. However, such provisions should be extended to a multitude of crimes committed by organized groups.

Laws should make it possible for all ill-gotten proceeds of crime to be confiscated or forfeited. This is to ensure that criminals should not be able to enjoy the fruits of their crime after being punished by way of imprisonment. However, the only problem faced by countries is the difficulty in proving the hidden assets. Another hindrance is the banking secrecy laws in many countries. Participants from Malaysia, Thailand and the Seychelles argued that banking secrecy should not be invoked during forfeiture proceedings by the authorities. These jurisdictions have legislated for the non-applicability of banking secrecy laws for forfeiture proceedings involving ill-gotten proceeds from criminal activities.

#### **G. Presumption Against the Accused: Shift of the Burden of Proof**

Offences in relation to organized crime, such as the trafficking of drugs and economic crime such as deception and corruption, are difficult to prove. In many jurisdictions, the relevant laws require the prosecution to prove the mental element or *mens rea*. This causes many problems for the prosecution in proving the mental element. In the commission of crimes such as the trafficking of dangerous drugs, deception and corruption, only the offenders would be able to reveal the mental element. As such, the need arose in certain jurisdictions like Malaysia, Viet Nam and Bangladesh for enacting the

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provision of presumption. For instance, for offences such as trafficking in dangerous drugs, in Malaysia the prosecution would have to prove:

- (i) it was a dangerous drug; and
- (ii) the accused was in custody thereof, as well as the weight of the drug.

Automatically, the law presumes that the accused was trafficking the said drug. It would be incumbent upon the accused to rebut the said presumption on the balance of probabilities. Similarly, provisions for shifting of the burden of proof can be applied to offences relating to organized crime and economic crime. Thus, this would assist the prosecution in obtaining convictions. Provisions like shifting of the burden of proof can also be useful for proceedings involving forfeiture. Such provisions are being applied in the Malaysian Dangerous Drugs (Forfeiture of Property) Act 1988. Participants generally agreed that such provisions be incorporated in existing legislation, as this would enable them to combat this problem.

#### **H. Admissibility of Evidence Gathered by Electronic Surveillance**

It is to be noted that in many countries, surveillance is being used by the investigative agencies. However, in some countries it is not being utilized due to constitutional constraints. There are some countries where electronic surveillance is being done in a discreet manner. In such jurisdictions, any evidence obtained through electronic surveillance is not produced in court as evidence in the event that the suspect is indicated or charged. Meanwhile in some countries, electronic surveillance is provided for in certain specific legislation.

Electronic surveillance can take the form of telephone tapping, bugging and also

other visual aids. The need for electronic surveillance arises because of the complexity and secrecy in the commission of such crimes. In countries such as Malaysia, Brazil, the Seychelles and Mozambique, electronic surveillance is allowed. However, in the Seychelles and Brazil evidence of electronic surveillance is only allowed with the permission of the judge. Meanwhile in Malaysia, electronic surveillance is only allowed with the approval of the public prosecutor. Nevertheless, the underlying reason for such usage is to fight against crime. In this regard, countries should balance the right of the particular individual as against the right of the society. Even though laws might allow for electronic surveillance, we should also address our mind as to whether such evidence can be admitted by virtue of the relevant evidence laws. For instance, when telephone tapping is done, more often than not such conversations would be tapped. The practical problems for the prosecutor is to ensure that such evidence would be ruled admissible in a trial. As such, question arises as to whether such a tape could be construed as a document. In this aspect, the definition as provided for in the respective evidence laws must be looked into. Therefore, where the need arises, all penal and evidentiary laws must be amended accordingly to keep abreast with the complexity of crime.

#### **I. Admissibility of Evidence Gathered by Undercover Operations**

In dealing with crime committed by organized groups in particular, it is very difficult to obtain inside information or evidence of such movements. As such, the authorities would need to conduct undercover operations or use agent provocateurs. When such operations in apprehending the criminals are successful, the next problem would be for successful prosecution. In the majority of cases, the

prosecution is faced with the task of proving its case beyond reasonable doubt. In dealing with this issue, the courts either:

- (i) refuse to admit evidence of agent provocateurs on the grounds that it was illegally obtained evidence; or
- (ii) require corroboration or independent evidence to support the evidence of the agent provocateur.

In dealing with the first problem of inadmissibility, the legal position in the United States and the commonwealth jurisdictions were the same until the decision of the Privy Council in *R v Kuruma*. This landmark decision allowed for illegally obtained evidence to be admitted. In recent years, the courts in the United States are moving closer to the Privy Council decision. As regards the second problem, the need for corroboration, some jurisdictions such as Malaysia and Singapore have enacted specific provisions in some legislation, such as corruption laws, doing away with the need for corroborative evidence.

If countries fail to enact specific laws as regards the admissibility of evidence, there would arise a situation of unfairness in the criminal justice system. This is mainly because the authorities might apprehend criminals who would either not be prosecuted or, if prosecuted, they would be acquitted by the courts. As such, laws must be enacted that keep abreast with the nature of the crime being committed.

## VII. LOW QUALITY OF PROSECUTORS

In many jurisdictions, prosecutors are either the police or public prosecutors. In such situations where the prosecutors are from the police, they are known as police prosecutors. Police prosecutors in general do not possess legal qualifications. In some

cases, even if they possess legal qualification, this is not reflected in their work. This can also be the same with some public prosecutors. In some jurisdictions, public prosecutors are appointed amongst fresh law graduates. The problem of low quality of prosecutor leads to the main problem of low rates of conviction. This problem leads to other consequential problems such as:

- (i) insufficient screening before commencement of prosecution;
- (ii) not knowing how to draft a proper charge or indictment;
- (iii) insufficient preparation for a criminal prosecution ; and
- (iv) ultimately not being independent but being controlled by the police.

It is to be noted that the issue of the low quality of prosecutors is serious. If this problem is left unchecked, it would inevitably cause other issues namely :

- (i) society would lose faith in prosecutors;
- (ii) the dignity of prosecutors would be questioned;
- (iii) time, money and hard work of the investigators would be wasted;
- (iv) would result in a lot of acquittals;
- (v) actual criminals would be out in society; and
- (vi) failure to obtain justice for the victim.

Realizing the seriousness of this problem, we propose the following.

### A. Recruitment

Countries should formulate a transparent system of recruitment. This is to ensure that fit and proper individuals are appointed as prosecutors. Apart from the system of recruitment, persons of high calibre should be appointed as prosecutors. Further, countries should stop the practice

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of recruiting fresh law graduates as prosecutors but require further specific training, as being practiced in Peru. legislators and policy makers.

**B. Training**

Relevant authorities should establish legal and/or judicial training institutes such as in Japan, the Republic of Korea, Malaysia, Indonesia and Peru for providing courses during the employment of such prosecutors. This would enable the prosecutors to keep abreast of the changes in law, as well as to learn and understand newly emerging crimes.

**C. Increase in Salary and Benefits**

The most important solution is to increase salaries and to provide other benefits to prosecutors. This would surely motivate qualified people to join the prosecution service. This is important in order to recruit the best people to join the service. It must be realized that most legally qualified persons would rather venture into private legal practice, which brings higher remuneration. Prosecutors should also be provided with benefits such as interest free loans for housing, medical services and so on. This would ensure quality prosecutors for the wellbeing of society.

**VIII. CONCLUSION**

The main problem at hand, being the low rate of conviction and overloading of the courts and prosecutors, must be addressed immediately. Undivided commitment must be shown by governments and prosecutors to ensure that justice is done, and is seen to be done. Prosecutors should keep themselves abreast of the constant changes in law. They must also be sensitive to the needs of society. Prosecutors should regard themselves as the custodians of the criminal justice system. Prosecutors should initiate changes in outdated laws and not merely leave it in the hands of



## TOPIC 3

### EFFECTIVE COUNTERMEASURES FOR SPEEDY TRIAL

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#### I. INTRODUCTION

Speedy administration of justice is the theme of many seminars held these days in most of the countries. In some countries, trial delays have reached alarming proportions and this phenomenon has far reaching consequences. The consequences of a delayed trial are numerous. If the trial is delayed, there is a danger that the real culprit may escape justice due to scattered evidence, and that the innocent must suffer unnecessary pains. If the defendant is under detention, the damage is more irrecoverable. Furthermore, delayed trial will deprive the deterrent effects of criminal judgment on the offender. The sense of retribution loses its significance when the judgment is delivered after a long passage of time. Additionally, trial delay will increase the number of remand prisoners and cause overcrowding. Therefore it is in the public interest to encourage speedy trial.

Speedy trial is considered a fair process conducted within a reasonable period of time. It is difficult to determine a precise time frame for a speedy trial, since it depends on the nature of the case, the legal framework and infrastructure related factors. However, speedy trial means not only the commencement of trial within a

statutory prescribed time frame from the time the suspect is arrested, it also encompasses the completion of the trial within a reasonable time frame.

The reasons and causes of delay are manifold. Various parties are responsible for the delay: the court, prosecution, defence counsel or the criminal justice system itself. These factors are interrelated. To achieve speedy trial, the police, prosecutor, defence counsel and court must do their duty properly. The police play a pivotal role in ensuring speedy justice by completing investigations expeditiously. Similarly, the prosecution would have to do the screening of cases and file charges or indictment in court without delay. At the trial stage, the prosecutor and the defence counsel should refrain from moving for frequent adjournments. Finally, there is a duty cast upon the judge to ensure that the trial is concluded without delay and deliver judgement as early as possible.

In this paper we have identified some common problems faced by the participating countries, with regard to trial delay. We have also proposed some recommendations to these problems.

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**II. HEAVY CASELOAD ON JUDGES/  
MAGISTRATES**

**A. Problem**

With the increasing mobility of the population and with the advancement of communication and financial links, the modern world is facing significant change in criminality. An increasing number of economic crimes like bribery, corruption and computer crimes have led to a considerable number of new cases in the courts at all levels, in addition to the already overcrowded cases of the courts. Too many cases are fixed for a given trial date and it is impossible for the trial judge to hear them all, so only a few cases are heard on one trial date. Others result in postponement and are re-scheduled for hearing on other dates.

An insufficient number of judges to handle so many cases, and also the dual role of the judges in dealing both in civil and criminal cases, leads the court to divide the days for both criminal and civil cases. Besides this, some judges have to do administrative work too. In addition, due to heavy caseloads, judges have little time to write and deliver judgments. It is found that in some countries, because of a shortage of time or the dual role of judges hearing trials of both civil and criminal cases, delay in writing and delivering judgments has become a serious problem in practice.

**B. Overview of the Current  
Situation in Some Countries**

1. Bangladesh

Statistics of trial cases show that 49,472 cases were pending in 1996 and 60,791 in 1997. An insufficient number of judges/magistrates is one of the main causes of trial delay. All reported cases go for trial, and there is no screening methods at the investigation level.

2. India

Statistics reveal that in 1996, 6,296,562 cognizable crimes were reported in the country, which is an increase of 43.3% over the year 1986, with a compound growth rate of 2.55% per annum. Among the reported cases, 76.9% were sent for trial. Another report indicates that the percentage of trials completed in a year is going down steadily. While about 30% of trials were completed in 1971, the percentage came down to 23.9% in 1981 and to 16.8% in 1991. This percentage has further come down to 15.5% in 1994. The number of pending trial cases under the Indian Penal Code was 5,280,000 in 1995, which increased to 5,620,000 in 1996. Out of these, 21.6% cases have been pending for more than 8 years. The number of cases pending trial for more than 8 years increased from 1,070,000 in 1995 to 1,211,000 in 1996, showing an increase of 13.3%.

3. Japan

Statistics of 1997 show that 74.3% of district court cases were disposed of within three months, and 93.5% within six months after institution of the prosecution. In summary courts, 88.1% were adjudicated within three months and 97.5% within six months.

4. Malaysia

With regard to the total number of criminal cases at each court until the month of October 1998, statistics show that 4169 cases were registered, 2247 cases were closed. 1922 cases were pending in high courts, 7061 cases were registered, 4174 cases were closed. 2887 cases were active in sessions courts, 1,197,778 cases were registered, 636,563 cases were closed. 561,215 cases were active in magistrate's courts.

In most cases, high courts and subordinate courts deal both in civil and

criminal cases. Thus, the courts have to divide the days to handle both civil and criminal cases. In some cases, subordinate courts allocate only two days in a week to conduct criminal matters, and within those two days the court has to dispose of cases where the accused pleads guilty, call the probation officers and conduct criminal trials. Despite these constraints, subordinate courts still fix about two cases for hearing on a given criminal list day.

#### 5. Pakistan

The court proceedings often go at a snail's pace. As to the percentage of disposal of cases in courts, statistics show that in 1996, 35.7% cases were disposed of within three months and 80.9% cases were disposed of within nine months.

### **C. Countermeasures**

#### 1. Increase of Judges and Courts

In order to reduce the heavy caseload on judges, the number of judges and courts should be increased. In addition, a specialized court may be established in order to effectively handle particular types of cases like tax evasion and banking offences, which require judges to have expertise. However this solution is easier said than done. Budgetary constraints may prevent a nation from establishing new courts or increasing the number of judges. Additionally, there was opinion expressed in the general discussion sessions that this is a only short-term solution, and it will not function well in the future. Some participants suggested that civil and criminal cases should be handled by separate courts to avoid the dual role of judges.

#### 2. Reduction of Cases - Diversion

The judges' caseload will decrease if the number of cases is reduced. Diversion, such as traffic infractions and suspension of prosecution before the trial stage, are some of the effective measures to be taken

in order to reduce caseload. In addition, proper consideration should be given to utilize conciliation or mediation in criminal proceedings. In fact, various forms of conciliation or mediation are applied in different countries, either before the cases are filed in the court or even when they are pending in court. For example, in Singapore, Bangladesh and Sri Lanka, relatively minor offences are listed as compoundable in the Criminal Procedure Code. Such offences may be compounded by the victim with the consent of the court, only after the defendant has been indicted. Compounding has the effect of an acquittal, and the defendant is discharged from the court proceedings.

#### 3. Introduction of Arraignment

Some countries like Britain and the United States have an arraignment system. Under this system, if the accused pleads guilty in the opening proceedings, fact-finding can be omitted and the sentence can be rendered immediately. We all agreed that this would save a lot of the court's time. However, at the same time, as expressed by some Japanese participants, the court wishes to be satisfied that the accused has really committed the offence charged.

### **III. LACK OF KNOWLEDGE AND EXPERIENCE OF JUDGES**

#### **A. Problem**

Incompetence and ignorance of law, and lack of experience of some judges/magistrates were considered as factors in the delay of trial. Judges exercise their discretion, in respect of law, in various ways. The scope and methods of examining witnesses, prolonged and irrelevant cross-examination, determination of the admissibility and probative value of the evidence, the extent of admissibility of hearsay evidence, the degree of proof required for applicability of conflicting

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rules, requires a high degree of professionalism. Failure to keep abreast of the law and jurisprudence, and lack of expertise and training of the judges/magistrates may cause delays in trial.

**B. Countermeasures**

1. High Qualifications and Standards for Appointment

Various matters should be taken into consideration at the appointment level to improve the quality of judges. We all agreed that mere graduation from a law university is not enough for the appointment of judges. The candidate judge should pass a qualifying examination, and the qualifying standards should be set fairly high. For instance, in Japan, a person being qualified in the national bar examination has to receive two years intensive training in the Legal Training and Research Institute of the Supreme Court, and has to undergo 16 months of practical training in the courts, prosecutors office and private law offices. After completion of all those requirements, the legal apprentice has to qualify by final examination for appointment as an assistant judge. The Republic of Korea also has a similar appointment system.

2. Training

Basic training is essential to induct all persons appointed as judges into the profession, including those selected from the Bar. Additionally, to keep judges abreast of the trends in jurisprudence, they should undergo periodical training programmes. In this connection, the Japanese training system may be one of the models. The assistant judge system in Japan is aimed at providing professional experience through on-the-job training for an assistant judge, before qualifying as a fully-fledged judge. For the first five years, the judicial authority of an assistant judge is restricted. He or she can be an associate judge of a three-judge court, but as a single

judge, s/he can decide only limited matters such as detention at the investigation stage. After five years experience, an assistant judge is qualified as a senior assistant judge to preside over a trial in a single-judge court. Joint seminars of police, prosecutors and judges should also be held periodically for better cooperation and mutual understanding

**IV. LACK OF RESOURCES IN THE COURT**

**A. Problem**

Because of the tremendous increase of crime and backlog of cases, there has been an enormous rise in the number of criminal cases, but court personnel have not been expanded to meet this demand. Lack of professional and technical skills, and low salary for court personnel, are also serious problems. For example, the shortage of court interpreters is one problem which the court is facing in many countries. Also, the lack of equipment may lead to trial delay. For instance, the method of recording evidence in some counties is slow and tedious, because they do not use tape recorders to record the testimony of witnesses. This may delay the completion of recording of witnesses examination or proceedings. Besides this, limited financial resources are also a grave problem.

**B. Overview of the Current Situation in Some Countries**

1. Algeria

Cases are registered manually and this creates a serious problem in case management. Court personnel sometimes intentionally do not register the cases properly and parties face problems in finding the case schedule.

2. Malaysia

Courts are experiencing an acute shortage of Chinese interpreters. The Chinese prefer to speak in their mother

tongue during trials. Low salary is the main reason why Malaysian Chinese are not interested in the job as interpreters, since they can obtain better pay in the private sector.

### **C. Countermeasures**

#### **1. Adequate Support Services**

Adequate support services to judges by court clerks, court stenographers, court interpreters and research officials should be provided. Judges should closely supervise them to ensure that they perform their functions in an appropriate manner.

#### **2. Modern Office Equipment**

As well as human resources, modern office equipment such as tape recorders, computers, faxes and copy machines should be also provided in the court. For example, the use of tape recorders to record court proceedings could save the courts' time, instead of laboriously recording the testimony of witnesses testifying before court.

In most advanced systems, such as Singapore's, the courts have made extensive use of technological advances to enhance the efficiency of the courts. A Witness Video-Link enables vulnerable witnesses, such as child witnesses or victims of sexual offences, to give their evidence without physically being present in the courtroom to face the accused. The Technology Court was launched in 1995 in the Supreme Court to facilitate the presentation of evidence and other information. Within this court, there are video conferencing facilities, an integrated audio-visual system together with a litigation support system. Evidence is recorded digitally as computer files. This enables transcription to be done much faster than previously done with audiotapes.

## **V. TRIAL PROCESS - FREQUENT ADJOURNMENTS**

### **A. Problem**

In most of the participating countries, cases are generally tried on a piecemeal basis. This means that the trial proceedings are conducted in sessions spread out over a period of time. Hearing is set on one day and continued or postponed to another day until each party completes the presentation of evidence. For instance, one witness testifies for an hour or two for direct-examination in one hearing, and then continues at the next hearing for cross-examination. Consequently, particularly in complicated cases in which many witnesses are examined, it takes a long time to complete the trial.

### **B. Overview of the Current Situation in Japan**

It is evident that in Japan the difficulties lie not in designating the first public trial date, but in scheduling subsequent trial dates. The courts are constantly grappling with problems created by the continuous trial requirement. The court cannot always schedule continuous trial dates when confronted with complicated cases, such as those requiring the examination of many witnesses or defendants.

One of the obstacles to the implementation of continuous trial is the lack of cooperation between the Bench and the Bar. The court faces great difficulty persuading defence counsels to accept continuous trial dates. Although the presiding judge has sole authority regarding the designation of public trial dates, the court cannot proceed realistically and smoothly without the cooperation of all parties. The court must consider a defence counsel's heavy schedule and opinion when fixing a case for trial.

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Defence counsel argue that continuous trial dates prevent them from handling other cases, especially civil cases, and may cause them to lose work. In addition to this workload problem, counsel always claim that it is almost impossible for them to prepare adequately for trial if the court opens trial continuously. As a result, the practice of intermittent trial hearings has not changed.

**C. Countermeasures**

1. Continuous Trial

The court should make appropriate schedules for trials by seeking the cooperation of the parties concerned. More than one court session should be allocated in advance, and most desirably on consecutive trial dates. On the other hand, there is another view on this point. Intermittent hearings will bring about equal treatment among cases, while continuous or concentrated hearing will bring about more speedy disposition of a case once its trial has begun. However, if the latter is selected, it will inevitably delay the other cases pending in the trial roll. In this regard, it may be recommended that cases of special importance should be handled as fast as possible. For example, cases where many witnesses will be anticipated to be examined at trial should be handled as fast as possible.

2. Strict Non-adjournment Policy

A party might request the adjournment of a hearing based on improper reasons, such as insufficient preparation. Ordinarily, the court assumes a party makes a motion in good faith. Consequently, the court should carefully examine motions and should not easily grant adjournment of a trial date without strong grounds.

In Singapore, a strict “no adjournment” policy is adopted. Applications for the adjournment or vacation of hearing dates

are scrutinized carefully, and these applications would be refused unless there are good grounds. Strict control is exercised for even those applications for adjournment made on medical grounds. With effect from 15 February 1997, only medical certificates, which state certain prescribed details such as the diagnosis, full name and designation of the medical practitioner, and a statement that the patient is to be excused from court attendance and not merely from work attendance, are accepted.

3. Time Limits for Completing Trial

Providing a time limit for completing trial is a more straightforward method for speedy trial. However, difficulty lies in the fact that not all cases have the same level of complexity. Some cases are extremely complicated and need a longer period of time to examine witnesses. In the Republic of Korea, for example, there is a provision which limits the time period for the pronouncement of judgment. It stipulates that the pronouncement of judgment in cases where the defendants are in custody must be delivered within two months. If the court fails to follow the time limit, the defendant in custody has to be released, though non-completion of trial in the above time frame does not prejudice the trial.

**VI. LENGTHY PRELIMINARY  
HEARINGS**

**A. Problem**

In some countries, there is a preliminary hearing or preliminary inquiry by a magistrate before the case is referred to the trial court. Its purpose is to see whether there are grounds for the accused being put to trial. However, some problems can be pointed out. The hearing takes a long period of time, amounting to about one to two years, to complete. The preliminary hearing creates a lot of unnecessary work, which is a duplication of the trial. These

problems should also be within the scope of the issue “speedy trial”.

**B. Overview of the Current Situation in Some Countries**

1. Sri Lanka

Magistrates hold preliminary hearings in all cases, which are triable exclusively by the High Court, and in some other cases on request of the Attorney General. In the preliminary hearing, witnesses are examined and cross-examined relating to the offence, and evidence is recorded by the magistrate. This preliminary hearing takes a long period of time, sometimes two years. It is noted that in Sri Lanka, preliminary hearings were abolished once in the past, but revived again subsequently.

2. Thailand

After institution of a criminal case by the injured party, the court must order a preliminary hearing to see whether or not there is *prima facie* case. In preliminary hearings, the accused are not allowed to present their own witnesses. Thus preliminary hearings results in a long delay in certain cases.

**C. Countermeasures**

Some participants expressed the view that preliminary inquiries are not held in most countries. However, our group was view that the preliminary hearing could act as a method of screening. It also serves as an additional check by the courts on the prosecution. Consequently, in order to overcome some of these problems, some improvements should be made to the existing procedures.

1. Disallowing Cross-examination at the Stage of Preliminary Hearing

In the general discussion sessions, some participants argued on this point. If the defence is not given a chance to cross-examine the witness at the time of the preliminary hearing, it will be an injustice.

Since the prosecution will support the *prima facie* value of the case, cross-examination is necessary for ‘check and balance’. In Singapore, the defence counsel does not cross-examine the witness. But in order to counter-check, the defence is allowed to clarify some points.

2. Restricted to Complicated or Controversial Cases

Some participants stated in the general discussion sessions that this method is contradictory to the judicial system of some of the participating countries, as most of these cases are tried by High Courts. In other words, if a preliminary hearing is conducted in these cases, it takes even longer to conclude the hearing since these cases are difficult to handle.

3. Abolition

Some participants expressed that the preliminary hearing should be abolished. This has been done in Malaysia. However, others are of the view that preliminary hearings should not be abolished totally, but could be limited in certain ways to reduce delay. In this regard, limiting the cross-examination of witnesses to material points was suggested by some participants.

**VII. INADEQUATE PREPARATION BY THE PROSECUTOR AND DEFENCE COUNSEL**

**A. Problem**

Heavy caseloads of prosecutors will lead to inadequate preparation for trial. Thus inadequate preparation or non-preparation would lead to postponement, which causes delay in disposition of cases. Similarly, in many countries, heavy volume of cases handled by defence counsels lead to scheduling conflicts, and inadequate preparation results in adjournments. Moreover, failure by prosecutors to show a clear outline with regard to how they intend to present their cases, make it

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difficult for the court to allocate sufficient time to hear and determine cases.

**B. Countermeasures - Pre-trial Conference**

The pre-trial process in criminal proceedings has drawn much attention recently. At pre-trial conferences, the prosecution and defence are urged to disclose their respective cases and evidence, and are urged to agree on facts which are not in dispute. By conducting the conferences, the courts, as well as both parties, can identify real factual and legal issues, and will have reasonable prospects for the trial. There is also a likelihood that in the course of this process, the accused will plead guilty when faced with the prosecution's case and evidence. Moreover, last minute proposals for witness examination can be avoided, and witness examination can be made concentrating on the necessary issues of the case. The court should:

- (i) require, when it deems proper, both parties to attend a pre-trial conference to determine trial dates, allocation of time to both parties, etc;
- (ii) designate trial dates necessary beforehand, based on a plan made during the pre-trial conference, and shorten the interval between trial dates;
- (iii) encourage the parties to discuss as many problems as possible beforehand, in order to prevent unnecessary disputes at trial; and
- (iv) exclude improper questions and statements by the parties.

For instance, in Singapore, pre-trial conferences were introduced in 1993. The courts now play an active role in the management of cases, by ascertaining the status of the case and defining and clarifying the contentious issues for trial. This cuts down on the time for hearing and

saves witnesses the inconvenience of attending court, when their evidence will not be disputed by the other party. Issues and areas of dispute are identified, and reasonably accurate assessments in respect of the time required for the trial can then be made.

**VIII. DILATORY TACTICS OF DEFENCE COUNSELS**

**A. Problem**

In many countries, some defence counsels use dilatory tactics by filing unnecessary motions for the review of court orders, and prolonging the cross-examination of a material witness, presentation of corroborative witnesses to prove matters that have already been established, etc. By these dilatory tactics, the defence counsel hopes that the victim's feelings will decline, the public will lose interest in the case, and the witnesses will become tired and disappear. Moreover, the defendant has to come before the court so long as the trial continues, and on each trial date the defence counsel takes money from the defendant. So for financial gain also, defence counsels desire postponement of the trial.

**B. Countermeasures - Sanctions against Defence Counsels**

In addition to the utilization of the above mentioned pre-trial conference, sanctions against defence counsels should be considered. For dilatory tactics, the court can award costs against the defence counsel and the court can take steps to report the defence counsel to the Bar Council. Article 303 of the Rules of Criminal Procedure of Japan states the measures available against an act of a defence counsel causing delay of a trial. It says that the court, if it deems necessary, shall notify the Bar Association to which the defence counsel concerned belongs, or the Japan Federation of Bar Associations, requesting appropriate steps be taken.



## **IX. DELAY OF EXPERT REPORTS**

### **A. Problem**

In cases where a trial is based on chemical or medical reports, a trial can be delayed if it takes time for these reports to be supplied. Delay of these experts reports occurs quite often in some countries.

### **B. Overview of the Current Situation in Some Countries**

In Sri Lanka, submission of chemical and medical reports in connection with criminal cases before the court is always delayed, which is a strong cause of trial delay. Waiting for these reports, most of the 'heinous offence' cases remain pending for years before the court. Some participants pointed out in the general discussion sessions that expert reports are submitted at the time of investigation, for which often investigation is delayed. In very controversial and complicated cases, the court may ask for a second opinion of the expert report, which has been submitted by the investigating officer. That may cause trial delay. Additionally, forensic reports are often not submitted by the expected time, since most of the developing countries do not have facilities for forensic laboratories etc.

### **C. Countermeasures - Time Limits for Submitting Reports**

On this point, some participants expressed that, in reality, it is almost impossible to provide time limits for experts, since experts are very limited in their countries. Additionally, there was a negative view on this point, since the accuracy of reports is more important than mere early submission. One participant recommended that meetings with experts should be conducted from time to time in order to see progress, and the format of the expert report should be provided to easily respond to questions.

## **X. CONCLUSION**

The role of judges in dispensing justice is a sacred one, which demands that justice is meted out to everyone concerned in the legal process as speedily as possible. It is often said that "justice delayed is justice denied". However for the sake of achieving speedy justice, the quality of justice should not be sacrificed. There is a need to maintain a balance between speedy trial and fair trial. Public confidence in the fair administration of justice is very important.

It is our considered view that causes for delay in concluding trials are common to many countries. We fully understand that some of the issues which have been discussed in this paper are interrelated. Consequently, the countermeasures discussed are also interrelated. For instance, time frames for trials could not be implemented unless the problem of overloading is solved. The investigating officers, public prosecutors, defence counsel and the judiciary should all do their best to ensure that trials commence as soon as possible, and once commenced, every case should be disposed of impartially and without undue delay.

The recommendations proposed may not be acceptable to all the participating countries, due to the social and economic conditions prevailing in those countries. Our intention has only been to suggest some effective countermeasures for the problems discussed in this paper.

# APPENDIX

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## *COMMEMORATIVE PHOTOGRAPHS*

- *110th International Training Course*
  - *111th International Seminar*
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UNAFEI

# THE 110th International Training Course



## **Left to Right:**

### **Above:**

Redo (Course Counsellor), Lee (Visiting Expert), Soh (Visiting Expert), Arterberry (Visiting Expert)

### **4th Row:**

Takagi (Chef), Imai (Staff), Kai (Staff), Matsuda (Staff), Sisaykeo (Laos), Mao (Cambodia), Bali (India), Ogura (Japan), Ueta (Staff), Tezuka (Staff), Satoh (Staff), Kanai (Staff), Okeya (Staff), Komatsu (Staff)

### **3rd Row:**

Miyamoto (Staff), Todaka (Staff), Gohda (Staff), Saitoh (Staff), Nakamura (Japan), Iwayama (Japan), Nagakura (Japan), Narikawa (Japan), Maeda (Japan), Tohyama (Japan), Shabangu (South Africa), Matsushita (Staff), Mitsui (Staff), Choi (Republic of Korea), Tatsumi (Staff)

### **2nd Row:**

Mahfuzur (Bangladesh), Saadi (Algeria), Machado (Brazil), Taniguchi (Japan), Motoyoshi (Japan), Ono (Japan), Lepitan (Philippines), Obimo (Kenya), Torsak (Thailand), Paudel (Nepal), Dibba (Gambia), Nawaz (Pakistan), Wang (China), Sagot (Costa Rica), Ohta (Japan), Yokota (Japan), Aratani (JICA Coordinator)

### **1st Row:**

Imafuku (Professor), Kurosawa (Chief of Research, Professor), Akane (Professor), Iitsuka (Chief of Training, Professor), Mrs. Amarnathan, Amarnathan (Course Counsellor), Piragoff (Visiting Expert), Fujiwara (Director), Grabosky (Course Counsellor), Kaspersen (Expert), Tauchi (Deputy Director), Satoh (Professor), Konagai (Chief of Information and Library Service, Professor), Ferrazzi (Linguistic Adviser)

# THE 111th International Seminar



**Left to Right:**

**Above:**

Sidambaram (Visiting Expert)

**4th Row:**

Takagi (Chef), Komatsu (Staff), Kai (Staff), Imai (Staff), Okeya (Staff), Matsuda (Staff), Tezuka (Staff), Matsushita (Staff), Todaka (Staff), Kanai (Staff)

**3rd Row:**

Saitoh (Staff), Tatsumi (Staff), Satoh (Staff), Arimitsu (Japan), Kawarazuka (Japan), Gohda (Staff), Balate (Mozambique), Chalerm Sak (Thailand), Situmeang (Indonesia), Kaneda (JICA Coordinator), Sequeira (Brazil), Takeda (Staff), Miyamoto (Staff)

**2nd Row:**

Denda (Japan), Fuentes (Peru), Deng (Laos), Naomoto (Japan), Chen (China), Kubota (Japan), Ocampo Eljaiek (Colombia), Nakada (Japan), Trong Ngu (Viet Nam), Lee (Republic of Korea), Chaudhry (Pakistan), Selvanathan (Malaysia), So (Hong Kong), Singh (India), Thabrew (Sri Lanka), Karki (Nepal), Morin (Seychelles), Rebeke (Bangladesh), Mansouri (Algeria)

**1st Row:**

Itoh (Chief of Secretariat, Staff), Watanabe (Professor), Konagai (Chief of Information and Library Service, Professor), Akane (Professor), Tauchi (Deputy Director), Zobel (Visiting Expert), Mrs. Huq, Huq (Visiting Expert), Fujiwara (Director), Suchart (Visiting Expert), Mrs. Traiprasit, Lopez (Visiting Expert), Iitsuka (Chief of Training, Professor), Satoh (Professor), Kurosawa (Chief of Research, Professor), Imafuku (Professor), Ferrazzi (Linguistic Adviser)