# ANNUAL REPORT FOR 1999

# and

# RESOURCE MATERIAL SERIES No. 57

**UNAFEI**

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# CONTENTS

# INTRODUCTORY NOTE

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. 57.

This contains the Annual Report for 1999, the work produced in two UNAFEI international training programmes: the 114th International Seminar (conducted from 17 January to 18 February 2000) and the 115th International Training Course (conducted from 15 May to 7 July 2000). The main themes of these training programmes were "International Cooperation to Combat Transnational Organized Crime - with Special Emphasis on Mutual Legal Assistance and Extradition", and "Current Issues in Correctional Treatment and Effective Countermeasures", respectively.

As an affiliated regional institute of the United Nations, UNAFEI has paid utmost attention to the priority themes identified by the UN Commission on Crime Prevention and Criminal Justice. The United Nations has given special attention to the issue of transnational organized crime. Particularly, pursuant to the General Assembly resolution 53/111 of 9 December 1998, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime was created, for the purpose of drafting a comprehensive international convention on transnational organized crime. Last month (July 2000), the Ad Hoc Committee completed its intensive drafting work which it embarked on in January 1999. Taking this into consideration, UNAFEI decided to undertake a series of training programmes in fall and winter courses for the coming few years under the general subject of "transnational organized crime". The 114th International Seminar was the first of those to be conducted. Discussions in the Seminar focused on mutual legal assistance and extradition as the main tools of international cooperation.

UNAFEI took up correctional treatment as the main theme of the 115th International Training Course, considering that many countries are confronted with important issues such as overcrowding in correctional facilities, improvement of prison conditions, an increase of drug-related offenders and a shortage of effective treatment programmes. During

discussion in the Course, the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, were often referred to, to remind the participants of the importance of benchmarking best practices in correctional treatment.

In this issue, papers contributed by visiting experts, selected individual presentation papers 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. 57, Mr. Hiroshi Iitsuka (Chief of Training Division) and Ms. Rebecca Findlay-Debeck (Linguistic Adviser), who so tirelessly dedicated themselves to this series.

August 2000

Mikinao Kitada
Director of UNAFEI

# PART ONE

# ANNUAL REPORT FOR 1999

- ***Main Activities of UNAFEI***
- ***UNAFEI Work Programme for 2000***
- ***Appendix***

**UNAFEI**

# MAIN ACTIVITIES OF UNAFEI
# (1 JANUARY 1999 - 31 DECEMBER 1999)

## 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 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., transnational organized crime, corruption, economic and computer crime and the re-integration of prisoners into society) 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 (three months duration) and one international seminar (one month duration). 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 39 years of existence, UNAFEI has conducted a total of 113 international training courses and seminars, in which approximately 2700 criminal justice personnel have participated, representing 98 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.

## A. The 111th International Seminar

1. Introduction

From 18 January to 19 February 1999, 25 participants from 20 countries attended the 111th International Seminar to examine the main theme of "The Role of Police, Prosecution and the Judiciary in the Changing Society."

2. Methodology

Firstly, the Seminar participants respectively introduced the current position regarding the role and function of criminal justice agencies in their country. Secondly, General Discussion Sessions in the conference hall examined the subtopics of the main theme. In sum, the participants comprehensively examined recent manifestations of crime which have been transformed by social developments such as industrialization, urbanization and advancements in science and technology. How modern criminal justice agencies are to respond to this change was analyzed in order to seek concrete recommendations. In order to conduct each session efficiently, the UNAFEI faculty provided the following three topics for participant discussion:

Topic 1: Effective measures for better detection of crime and more thorough investigations;
Topic 2: The role of prosecution in the changing society; and
Topic 3: Effective Countermeasures for Speedy Trial.

The chairperson, co-chairperson, rapporteur and co-rapporteur, who were elected for each topic, organized the discussions in relation to the above themes. 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 the said discussions, and were ultimately adopted as the reports of the Seminar. These reports have been printed in their entirety in the UNAFEI Resource Material Series No. 55.

3. Outcome Summary

Of grave concern worldwide is the prevalence and complexity of transnational organized crime, which seems to be growing yearly. The manifestations and seriousness of transnational organized 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, transnational organized 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. Countermeasures and recommended solutions to this problem may include:

(i) Adoption of a police model whereby the political executive does not have unhindered or direct control over police organizations.
(ii) Established recruitment/appointment criteria and incentives to increase the calibre of investigative, prosecuting and judicial personnel, including attractive conditions of service; adequate equipment, training and facilities; promotion and higher education opportunities.
(iii) Cooperation and coordination with the public and between investigative agencies.
(iv) Introduction of specific legislation relating to the admissibility of evidence gathered by electronic surveillance and covert operations; confiscation of illicit proceeds and anti-money laundering provisions; establishing a presumption against the accused (shift in the burden of proof) in certain cases.
(v) Strategies to address the overloading of courts, including possible use of summary proceedings, plea bargaining, and discretionary withdrawal and suspension.
(vi) Establish guidelines to facilitate speedy trial, including strict non-adjournment policies; time limits for submission of expert reports and for completing trial; sanctions against dilatory tactics of counsel; limiting the scope of preliminary hearing activities.

While crime control is an issue concerning society as a whole, the criminal justice system – especially the police, prosecution and judiciary - is vested with a particular responsibility in this regard. Thus it is imperative that relevant agencies address these changing issues from a proactive, as well as a reactive, position.

## B. The 112th International Training Course

1. Introduction

UNAFEI conducted the 112th International Training Course from 12 April to 4 July 1999 with the main theme, "Participation of the Public and Victims for More Fair and Effective Criminal Justice Administration." This Course consisted of 27 participants from 18 countries. The Institute's selection of this theme reflects its concern regarding the often limited participation of the public and victims in criminal justice processes. Facilitating meaningful inclusion and involvement requires the establishment, proper implementation, and strengthening of programmes and services from the pre-trial through to post-trial stages, and from a crime prevention perspective.

2. Methodology

The participants identified the obstacles to the participation of victims and the public in criminal justice procedures and policies, and searched for effective measures to facilitate involvement. In this regard, the underlying tension between the need to protect the rights of the accused and the need to recognize victims' and the public's interest, was acknowledged and explored with a view to reducing disparities.

The objectives were primarily realized through the Individual Presentations and 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 discussion, the participants were divided into the following three groups under the guidance of faculty advisers:

Group 1: Victim Assistance: Public Participation for More Effective Crime Prevention and Law Enforcement;
Group 2: Participation of the Public and Victims for More Effective Administration in the Prosecution and the Judiciary; and
Group 3: Participation of the Public and Victims for More Effective Administration in the Treatment of Offenders.

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. Fourteen sessions were allocated for Group Discussion. In the sixth, eighth and ninth 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 tenth 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 full texts of the reports have been published in the UNAFEI Resource Material Series No. 56.

3. Outcome Summary

Public participation and cooperation is an essential element of all aspects of criminal justice administration, from crime prevention to the treatment of offenders. Regrettably, many countries have not successfully obtained such participation and cooperation due to a lack of public confidence in, and relevant policies related to, criminal justice administration.

In order to obtain public confidence and cooperation, the recognition, protection and incorporation of the rights and interests of victims of crime ('victims') in criminal justice administration is fundamental. Assistance and protection of the rights of victims is necessary at all stages of the criminal justice process, from pre-trial to post-trial. In this context, there are growing concerns that the current administration of the criminal justice system has often resulted in the unfair treatment of victims.

Although assistance to, and the protection of, the rights and interests of victims and the public are, in some jurisdictions, established; many countries (including Asian and African) are still lacking in this regard. The following initiatives are some measures that may be taken to enhance public and victim involvement in the criminal justice process:

(i) Improving community policing through sensitivity training and organizational re-structuring of the police services; and through public education campaigns.
(ii) Increasing victim services including crisis intervention, counseling, and advocacy assistance and support.
(iii) Introduce a notification system for victims and, where necessary, the right to attend

trial as a spectator.
(iv) Expand victim participation in the criminal prosecution process and provide opportunities for input on sentencing and appeal.
(v) Provide monetary redress/compensation to victims through accessible means.
(vi) Avail public support for both the penal and community-based treatment of offenders, particularly by use of volunteer probation officer (VPO) systems, victim-offender panels and work release programs.

Many countries have recently seen an increase in the number and seriousness of crime. However the prevention and control of crime, through the fair and effective administration of criminal justice, cannot be achieved by governments alone. Public and victim participation and cooperation play a pivotal role in crime prevention. Without improvement in the means to facilitate this involvement, a fair and effective criminal justice system will not be achieved.

## C. The 113th International Training Course

1. Introduction

From 30 August to 18 November 1999, UNAFEI conducted the 113th International Training Course with the main theme, "The Effective Administration of Criminal Justice for the Prevention of Corrupt Activities by Public Officials." This Course consisted of 30 participants from 19 countries.

2. Methodology

The 113th Course endeavored to explore the best means to more effectively combat corruption in public officials through the development of transparency and accountability, and by strengthening the criminal justice system. This was accomplished primarily through the 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 this problem, so as to improve the global fight against corruption.

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 corruption cases, as well as the problems and difficulties encountered in that regard. Discussions also highlighted the importance of establishing more efficient systems and effective countermeasures, and the need to increase international cooperation in this field in order to eradicate such crime.

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: Current Situation and Recent Trends in the Corrupt Activities of Public Officials and Criminal Legislation against Corruption;
Group 2: Current Problems in Responding to the Corrupt Activities of Public Officials at the Investigation and Trial Stages, and Solutions for them; and

Group 3: General Preventative Measures against the Corrupt Activities of Public Officials.

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. Seventeen sessions were allocated for Group discussion.

In weeks five to ten, 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 tenth 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 the UNAFEI Resource Material Series No. 56.

3. Outcome Summary

Corruption is a social phenomena escalating in magnitude and form. Its activities can manifest as bribery, undue influence or misuse of professional status for personal gain, incorporating a range of traditional, punishable offences, including breach of trust and embezzlement.

Corruption undoubtedly disrupts the integrity and neutrality of public officials in performing their duties. It breeds a feeling of distrust and unfairness toward the national or local government by the citizenry, and may ultimately weaken gravely or collapse the national or local ruling government and economic structure of a country. It is also suggested that organized crime groups are involved in many corruption cases.

There are many common problems in responding to the corrupt activities of public officials at the level of detection, investigation, prosecution and trial, although legal frameworks and systems vary from country to country. One of the most important tasks for the criminal justice system is to expose the corrupt activities of public officials and to punish the wrongdoers effectively. The following countermeasures are suggested as a means of achieving this goal and developing a preventative framework:

(i) Clarify the responsibilities of public officials and educate them in matters including conflict of interest, transparency and accountability.
(ii) Implement internal inspection programs, auditing and disciplinary actions, preferably conducted by outside agencies.
(iii) Introduce substantive domestic legislation against corruption, including broad interpretation of the offence; increased punishment provisions; confiscation/ forfeiture of assets; and criminalize bribe-giving.
(iv) Improve investigative tools including the use of covert operations and wire-tapping for corruption offences, and enhance co-ordination between different investigating organizations.
(v) Seek the cooperation of financial institutions and introduce mandatory disclosure provisions for financial transactions.

(vi) Introduce an ombudsman system and increase public awareness of the adverse effects of corruption

With the globalization of economic activities, many countries have recently seen a corresponding increase in the number of corruption cases of a transnational nature. The acknowledged difficulties of detecting, preventing and punishing corrupt activities are increased in the international arena. In this context, including extradition provisions for corruption offences in bi-lateral and multi-lateral agreements is one solution.

Needless to say, the prevention and exposure of corrupt activities are vital. The clandestine nature of such activities obscures the ability of investigators to detect and expose them. Other obstacles include the difficulty in securing the cooperation of the people involved in the case during investigation and trial; the scarcity of personnel and material resources in the criminal justice system; laws limiting the authorized methods of investigation; and the limited skill and/or low morale of the investigators. Without meaningful commitment to the eradication of corruption by governments and individual agencies/departments, through practical measures and legislative support, the combat of corruption in public offices will not be achieved.

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

UNAFEI hosted the second Experts Meeting on Crimes Related to the Computer Network from 25 October to 28 October 1999 in preparation for the Workshop on Crimes Related to the Computer Network, as part of the Tenth United Nations Congress for the Prevention of Crime and the Treatment of Offenders. To this end, UNAFEI welcomed representatives from all world regions to our institute to discuss Workshop issues in terms of their significance to Member States.

UNAFEI willingly assumed responsibility to organize and host the Experts Meetings, as well as to act as coordinator for the Workshop at the Congress, 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, 1997. The first Experts Meeting was held at UNAFEI in October 1998. The work product of this initial meeting was submitted to the eighth session of the Commission on Crime Prevention and Criminal Justice in April 1999. The second Experts Meeting was organized to finalize preparations for the Workshop, based on the outcome of the first Experts Meeting and subsequent administrative changes.

## IV. TECHNICAL COOPERATION

### A. Joint Seminars

Since 1981, UNAFEI has conducted 20 joint seminars under the auspices of JICA and in collaboration with host governments in Asia and the Pacific. 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. Thailand-UNAFEI Joint Seminar

The Thailand-UNAFEI Joint Seminar was held in Bangkok under the theme of "Community and Victim Involvement in Criminal Justice Administration" from 13 to 16 December 1999. The Government of the Kingdom of Thailand, through the Office of the Attorney General, and UNAFEI organized the Joint Seminar. The Joint Seminar was attended by high-ranking Thai government officials, representing all sectors of the criminal justice system. The UNAFEI delegation comprised of the Director, Deputy Director, four professors and an official from the National Police Agency of Japan. The Joint Seminar concluded with a summary of each session and an oral presentation of the resulting recommendations for the betterment of the Thai criminal justice system, as formulated by each session.

## B. Regional Training Programmes

1. Costa Rica

In February 1999, the Preliminary Survey for the Regional Seminar on Effective Measures for the Improvement of Prison Conditions and Correctional Programmes was 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 (ILANUD), will now organize and host the Costa Rica Regional Seminar, with the support of JICA and UNAFEI, as a result of the Preliminary Survey's findings. This seminar will be held annually for five years and will target correctional officers in Latin America. Under this scheme, two UANFEI professors attended the 1st International Training Course on the Improvement of Prison Conditions and Correctional Programmes, from 7 to 21 August 1999.

2. Kenya

From 15 August to 5 October 1999, two UNAFEI professors were 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 and the prevention of crime by children and young persons.

3. Thailand

From 18 to 29 January 1999, two UNAFEI professors represented the Institute at the Seventh Regional Training Course on "Effective Countermeasures against Drug Offences and Advancement of Criminal Justice Administration", hosted by the Office of the Narcotics Control Board, in Bangkok, Thailand.

## C. Special Seminars for Senior Criminal Justice Officials of the People's Republic of China

1. Fourth Special Seminar for Senior Criminal Justice Officials of the People's Republic of China

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

## V. COMPARATIVE RESEARCH PROJECT

Reflecting its emphasis on the systematic relevance of training activities and priority themes identified by the UN Commission, the research activities of the Institute are designed to meet practical needs, including those for training materials for criminal justice personnel. For example, in 1999 UNAFEI updated its research by requesting several experts from countries in the Asia-Pacific region to report on their respective probation systems. UNAFEI subsequently compiled and published these reports in a book entitled "Adult Probation Profiles of Asia" and distributed copies internationally.

## 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.

## 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 courses and seminars. In 1999, the 54th edition of the Resource Material Series was published. Additionally, issues 98 to 100 of the UNAFEI Newsletter were published, including a brief report on each course and seminar (from the 111th to the 113th respectively) and providing other timely information.

## VIII. OTHER ACTIVITIES

### A. Public Lecture Programme

On 10 February 1999, 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 111th 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 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 Mr. Suchart Traiprasit (Attorney General, Office of the Attorney General, Thailand) and Judge Rya W. Zobel (Judge, U.S. District Court for the District of Massachusetts and Director of Federal Judicial Centre, United States of America). Their lectures were entitled "The Role of Thai Prosecutors in the Fight against Transnational Crime" and "An Overview of the United States Sentencing Guidelines," respectively.

**B. Assisting UNAFEI Alumni Activities**

Various UNAFEI alumni associations in several 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 crime situation internationally.

**C. Overseas Missions**

Mr. Chikara Satoh (Professor) and Mr. Ryosuke Kurosawa (Professor) represented UNAFEI at the 7th Regional Training Course on "Effective Countermeasures against Drug Offences and Advancement of Criminal Justice Administration", hosted by the Office of the Narcotics Control Board, in Bangkok, Thailand, from 18 to 29 January 1999.

Ms. Kayo Konagi (Professor) and Mr. Shinya Watanabe (Professor) visited the Republic of Costa Rica from 14 to 27 February 1999 for the purpose of formulating an International Training Course on the Improvement of Prison Conditions and Correctional Programmes.

Mr. Chikara Satoh (Professor) participated in the ACPF Working Group Meeting on "The Role of Public Prosecutors in the Changing World" in Bangkok, Thailand, from 15 to 18 February 1999.

Mr. Mikinao Kitada (Director) and Mr. Keiichi Aizawa (Professor) represented UNAFEI at the 8th UN Commission on Crime Prevention and Criminal Justice, Vienna, from 26 April to 8 May 1999.

Mr. Masahiro Tauchi (Deputy Director), as a member-representative of UNAFEI and the Japanese delegation, attended the Subgroup on High-tech Crime of the G8 Senior Experts' Group on Transnational Organized Crime, held in Paris, France, from 17 to 22 May 1999.

Mr. Mikinao Kitada (Director), Mr. Akihiro Nosaka (Professor) and Mr. Kazuhiko Kawasaki (Director of 2nd Training Division, Research & Training Institute of Ministry of Justice) visited the Peoples' Republic of China, from 19 to 26 July 1999, for the purpose of fostering international exchange in criminal justice administration.

Mr. Shinya Watanabe (Professor) and Mr. Chikara Satou (Professor) represented UNAFEI at the 1st International Training Course on the Improvement of Prison Conditions and Correctional Programmes, San Jose, Costa Rica, from 7 to 21 August 1999.

Mr. Shoji Imafuku (Professor) and Mr. Hiroshi Tsutomi (Professor) visited Kenya as short-term visiting experts, as part of a JICA international assistance scheme for the Prevention of Crime by Children and Young Persons, from 15 August to 5 October 1999.

Mr. Hiroshi Tsutomi (Professor) represented UNAFEI at the 19th Asia and Pacific Conference of Correctional Administrators (APCCA), Shanghai, the People's Republic of China, from 24 to 29 October 1999.

Mr. Keiichi Aizawa (Professor) attended the International Association of Prosecutors 4th Annual Conference General Meeting in Beijing, the People's Republic of China, from 5 to 11 September 1999.

Mr. Keiichi Aizawa (Professor) represented UNAFEI at the International Conference for Combatting Child Pornography on the Internet in Vienna, Austria, from 28 September to 2 October 1999.

Mr. Mikinao Kitada (Director) attended the 14th Co-ordination Meeting of the Network of United Nations Institutes, 18 November 1999, and the ISPAC International Conference on Responding to the Challenges of Corruption, 19-20 November 1999, in Milan, Italy.

Mr. Masahiro Tauchi (Deputy Director), Mr. Shoji Imafuku (Professor) and Mr. Chikara Satou (Professor) attended the ACPG International World Conference in New Delhi, India, from 21 to 26 November 1999.

Mr. Chikara Satou (Professor) attended the ILEA Senior Criminal Justice Executive Program on Organized and Transnational Crime in Bangkok, Thailand, from 29 November to 1 December 1999.

Mr. Mikinao Kitada (Director), Mr. Masahiro Tauchi (Deputy Director), Mr. Hiroshi Iitsuka (Professor), Mr. Chikara Satou (Professor), Mr. Shinya Watanabe (Professor) and Mr. Shoji Imafuku (Professor) attended the Thailand-UNAFEI Joint Seminar in Bangkok, Thailand, from 13 to 16 December 1999.

### D. Assisting ACPF Activities

UNAFEI cooperates and corroborates with the ACPF to further improve crime prevention and criminal justice administration in the region. Since UNAFEI and the 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 the ACPF working group meeting on prosecution held in Thailand in February 1999.

b. UNAFEI dispatched faculty members to India to attend the ACPF International World Conference in November 1999.

## IX. 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 staff members, who are appointed from among officials of the Government of Japan, and a linguistic adviser.

# UNAFEI WORK PROGRAMMME FOR 2000

## I. TRAINING

### A. The 114th International Seminar

The 114th International Seminar, "International Cooperation to Combat Transnational Organized Crime - with Special Emphasis on Mutual Legal Assistance and Extradition", is scheduled to be held from January 10 to February 20, 2000. The extensive international discussion, culminating in the drafting of the United Nations Convention against Transnational Organized Crime, currently in process, prompted the selection of this theme. The 114th Seminar purports to explore the ways and means of strengthening and improving international cooperation in the fight against transnational organized crime, particularly through effective implementation of the mechanisms of mutual legal assistance and extradition. Sharing practical information and experience on how other countries tackle common issues will facilitate our efforts in the fight against transnational organized crime.

### B. The 115th International Training Course

The 115th International Training Course, entitled "Current Issues in Correctional Treatment and their Effective Countermeasures", is scheduled to be held from 15 May to 7 July 2000. The shortened duration of this course is a result of UNAFEI's participation in the Tenth United Nations Congress for the Prevention of Crime and Treatment of Offenders in Vienna, Austria, from 10 April to 17 April 2000. The 115th International Training Course will examine current trends and issues in correctional treatment, including the improvement of prison conditions and the effective transfer of prisoners through the development of bilateral and multilateral treaties.

### C. The 116th International Training Course

The 116th International Training Course, tentatively entitled "Effective Methods to Combat Transnational Organized Crime", is scheduled to be held from 28 August to 17 November 2000. The 116th International Training Course will examine current trends and issues in investigating transnational organized crime, particularly the expansion of investigative techniques in the areas of electronic surveillance, controlled delivery, undercover operations and tracing crimes.

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

The Fifth Special Seminar for Senior Officials of Criminal Justice in the People's Republic of China, "Participation of the Public and Victims in Criminal Justice Administration", is scheduled to be held at UNAFEI from 28 February to 17 March 2000. Ten senior criminal justice officials and UNAFEI faculty will discuss contemporary problems faced by China and Japan in relation to the above theme.

## III. TECHNICAL COOPERATION

### A. Nepal-UNAFEI Joint Seminar

In December 2000, the Nepal-UNAFEI Joint Seminar is scheduled to be held in Katmandu, Nepal. The Ministry of Home Affairs of the Kingdom of Nepal and UNAFEI will organize the Seminar.

### B. Regional Training Programmes

1. Thailand

In January 2000, 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 Eighth Regional Training Course on "Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration."

2. Costa Rica

In August 2000, two UNAFEI professors will represent the Institute at the 2nd International training Course on the Improvement of Prison Conditions and Correctional Programmes, San Jose, Costa Rica.

3. Kenya

From July to August 2000, 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. Additionally, in response to a request made by the Children's Department, UNAFEI is planning to hold a special seminar (under the auspices of JICA) on treatment systems for juvenile delinquents, to be attended by Kenyan officials working in this field.

## IV. OTHER ACTIVITIES

### A. Preparation for the Workshop at the Tenth United Nations Congress

UNAFEI, as coordinator, will continue to prepare 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 in Vienna, April 2000. UNAFEI is acting as coordinator for the 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.

# APPENDIX

## MAIN STAFF OF UNAFEI

| | |
|---|---|
| Director | Mr. Mikinao Kitada |
| Deputy Director | Mr. Masahiro Tauchi |

**Faculty**

| | |
|---|---|
| Chief of Training Division, Professor | Mr. Hiroshi Iitsuka |
| Chief of Research Division, Professor | Mr. Shinya Watanabe |
| Chief of Information & Library Service Division, Professor | Mr. Akihiro Nosaka |
| Professor | Mr. Keiichi Aizawa |
| Professor | Mr. Chikara Satou |
| Professor | Mr. Hiroshi Tsutomi |
| Professor | Mr. Shoji Imafuku |
| Linguistic Adviser | Ms. Rebecca Findlay-Debeck |

**Secretariat**

| | |
|---|---|
| Chief of Secretariat | Mr. Tadashi Ito |
| Deputy Chief of Secretariat | Mr. Miyoshi Chishima |
| Chief of General and Financial Affairs Section | Mr. Wataru Okeya |
| Chief of Training and Hostel Management | Mr. Yoshinobu Gohda |

**Affairs Section**

| | |
|---|---|
| Chief of International Research Affairs Section | Mr. Koji Imai |

**<AS OF 31 DECEMBER 1999>**

APPENDIX

# 1999 VISITING EXPERTS

## THE 111TH INTERNATIONAL SEMINAR

| | |
|---|---|
| Dr. Enamul Huq | President, ACPF Bangladesh, Bangladesh |
| Judge Suriakumari Sidambaram | District Judge, Singapore |
| Mr. Suchart Traiprasit | Attorney General,<br>Office of the Attorney General, Thailand |
| Judge Rya W. Zobel | Judge, U.S. District Court for the District of Massachusetts & Director of the Federal Judicial Centre, United States of America |

## THE 112TH INTERNATIONAL TRAINING COURSE

| | |
|---|---|
| Mr. John Brian Griffin | Chief Executive Officer,<br>Core- Public Correctional Enterprise Department of Justice, Victoria, Australia |
| Mr. Jarmal Singh | Deputy Director Operations, Police Headquarters, Singapore Police Force, Singapore |
| Dr. Uglijesa Zvekic | Deputy Director,<br>United Nations Interregional Crime and Justice Research Institute (UNICRI), Rome, Italy |
| Dr. Ezzat A. Fattah | Professor Emeritus, School of Criminology, Simon Fraser University, British Columbia, Canada |
| Ms. Heather Cartwright | Attorney Advisor for Director,<br>Office of Victims of Crime, Office of Justice Programs, Department of Justice, United States of America |
| Mr. Eberhard Siegismund | Deputy Director General,<br>Ministerialdirigent Bundesministerium der Justiz, Bonn, Germany |

## THE 113TH INTERNATIONAL TRAINING COURSE

| | |
|---|---|
| Mr. Donald Kenneth Piragoff | General Counsel of Criminal Law Policy Section,<br>Department of Justice, Ontario, Canada |
| Mr. Thomas C. S Chan | Director, Corruption Prevention Department,<br>Independent Commission Against Corruption,<br>Hong Kong |
| Dr. Laurence Giovacchini | Administrateur Civil,<br>Service Central de Prevention de la Corruption,<br>Paris, France |
| Mr. Tunku Abdul Aziz | Vice-Chairman of the Board,<br>Transparency International, Kuala Lumpur, Malaysia |
| Prof. A. Didrick Castberg | Professor of Political Science,<br>University of Hawaii at Hilo, Hawaii, United States of America |

APPENDIX

# 1999 AD HOC LECTURERS

| | |
|---|---|
| Mr. Michael A. DeFeo | Assistant Director, Office of Professional Responsibility, Federal Bureau of Investigation, Washington D.C, United States of America |

## THE 111TH INTERNATIONAL SEMINAR

| | |
|---|---|
| Mr. Fumitaka Horiuchi | Director of Criminal Investigation Planning Division, Criminal Investigation Branch, National Police Agency, Japan |
| Judge Yasuro Tanaka | Presiding Judge, Chiba District Court, Japan |
| Mr. Kunihiro Matsuo | Director General of Criminal Affairs Bureau, Ministry of Justice, Japan |

## THE 112TH INTERNATIONAL TRAINING COURSE

| | |
|---|---|
| Mr. Hayato Takagi | Deputy Director Police Superintendent, Police Policy Research Center, National Police Agency, Japan |
| Mr. Hiroyuki Ohta | Director of Office for Crime Victims, National Police Agency, Japan |
| Mr. Takeyoshi Hongo | Director-General of the Rehabilitation Bureau, Ministry of Justice, Japan |
| Mr. Yoshio Suzuki | Professor, Kokushikan University, Japan |
| Mr. Haruhiko Higuchi | Deputy Director, International Research & Training Institute for Criminal Investigation, National Police Academy, Japan |
| Mr. Osamu Ito | Judge, Tokyo District Court, Japan |
| Mr. Ichiro Sakai | Director-General, Corrections Bureau, Ministry of Justice, Japan |
| Mr. Kazuaki Morimoto | Attorney, Legislative Affairs Division, Criminal Affairs Bureau, Ministry of Justice, Japan |

| | |
|---|---|
| Mr. Minoru Yokoyama | Associate Professor, Kokugakuin University, Japan |
| Mr. Tatsuya Ohta | Associate Professor, Faculty of Law, Keio University, Japan |
| Ms. Takako Konishi | Professor, Musashino Women's University, Japan |
| Dr. Kouichi Miyazawa | Professor, Universal Policy Department, Chuo University, Japan |
| Mr. Juichi Kobayashi | Senior Researcher, National Research Institute of Police Science, Japan |

## THE 113TH INTERNATIONAL TRAINING COURSE

| | |
|---|---|
| Mr. Haruhiko Higuchi | Deputy Director, International Research & Training Institute for Criminal Investigation, National Police Academy, Japan |
| Mr. Shigeru Yotoriyama | Assistant Director, Second Investigation Division, Criminal Affairs Bureau, National Police Agency, Japan |
| Mr. Kunihiro Matsuo | Director-General of the Criminal Affairs Bureau, Ministry of Justice, Japan |
| Mr. Haruo Kasama | Director of the Special Investigation Department, Tokyo District Public Prosecutors Office, Japan |
| Mr. Takashi Nonoue | Counselor, Criminal Affairs Bureau, Ministry of Justice, Japan |
| Mr. Masayuki Watanabe | Deputy Director, Research and International Division, Board of Audit, Japan |
| Mr. Toshikazu Oobuchi | Judge, Tokyo District Court, Japan |
| Mr. Shigeru Edane | Associate Professor, Japan Industrial University, Japan |
| Mr. Minoru Shikita | Chairman, Board of Directors, Asia Crime Prevention Foundation, Japan |

| | |
|---|---|
| Mr. Hiroshi Yokoyama | Assistant Director, Administrative Management Bureau, Management and Coordination Agency, Japan |
| Mr. Yoichiro Ueno | Senior International Affairs Officer, National Personnel Authority, Japan |
| Mr. R. K Raghavan | Director, Central Bureau of Investigation, India |
| Mr. Toshiya Kawahara | Attorney, Public Security Division, Criminal Affairs Bureau, Ministry of Justice, Japan |

## THE 111TH INTERNATIONAL SEMINAR

***Overseas Participants***

| | |
|---|---|
| Ms. Mansouri Djahida | Magistrate, Ministry of Justice, Algeria |
| Ms. Rebeka Sultana | Senior Assistant Secretary, Ministry of Home Affairs, Bangladesh |
| Mr. Carlos Antonio Gimar_es de Sequeira | Director, Identification Institute, Brazil |
| Mr. Wen-Xing Chen | Deputy Chief, Information Division, Institute of Procuratorial Theory, Supreme People's Procuratorate, China |
| Mr. Ocampo Eljaiek Libardo Augusto | Coordinator, Human Rights Unit, Attorney General's Office, Colombia |
| Ms. Chit-Kwan So | Chief Inspector of Police, Commercial Crime Bureau,Hong Kong |
| Mr. Paramvir Singh | Inspector General of Police, Criminal Investigation Department, Tmil Nadu, India |
| Mr. Mangasi Situmeang | Chief of Intelligence Section, Tangerang District Public Prosecutors Office, Indonesia |
| Mr. Deng Phomsavanh | Public Prosecutor, Vientiane Prefectural Public Prosecutors Office, Laos |

# 1999 UNAFEI PARTICIPANTS

| | |
|---|---|
| Mr. Selvanathan Shanmugham | Deputy Director, Legal Aid Bureau, Selangor, Malaysia |
| Mr. Dias Francisco Balate | Inspector, Dire__o Nacionalia Polici_ de Investiga__o Criminal (C.I.D.), Mozambique |
| Mr. Karki, Mohan Bahadur | Government Advocate, Appellate Government Advocate Office, Nepal |
| Mr. Muhammad Arif Chaudhry | Additional Director General, Federal Investigation Agency, Islamabad, Pakistan |
| Ms. Fuentes Rivera, Ana Maria | District Attorney, Public Ministry of Arequipa, Peru |
| Mr. Lee, Hong-Hoon | Assistant Chief Prosecutor, North Branch of Seoul District Prosecutor's Office, Republic of Korea |
| Mr. Maurice Benoit Tyte Morin | Assistant Commissioner of Police, Seychelles Police Force, Mahe, Seychelles |
| Mr. Thabrew Mahadura Thilak Ravindra | Judge/Magistrate, District/Magistrate's Court, Homagama, Sri Lanka |
| Mr.Chalermsak Pattarasumantg | Chief Judge, Prakranong Kwaeng Court, Thailand |
| Mr. Ho Trong Ngo | Chief of Science Department, People's Police University, Hanoi City, Vietnam |

***Japanese Participants***

| | |
|---|---|
| Mr. Morio Kubota | Public Prosecutor, Tokyo District Public Prosecutors Office |
| Mr. Hideharu Arimitsu | Deputy Warden, Treatment Division, Morioka Juvenile Prison |

| | |
|---|---|
| Ms. Takako Naomoto | Director of General Affairs Division, Chubu Regional Parole Board |
| Mr. Kazunori Nakada | Professor (Attorney), Research & Training Institute of the Ministry of Justice |
| Mr. Yoshihisa Denda | Judge, Tokyo District Court |
| Mr. Shigeru Kawarazuka | Police Superintendent, The 3rd Mobile Investigation Unit, Metropolitan Police Department |

## THE 112TH INTERNATIONAL TRAINING COURSE

***Overseas Participants***

| | |
|---|---|
| Ms. Wang Ping | Judge, High People's Court of Beijing, China |
| Mr. Alvaro Caro Melendez | Lieutenant Colonel, National Police, Colombia |
| Mr. Moustafa Ahmed Genidy Abdin | Major/ Criminal Investigation Officer, General Department for Giza Investigation, Egypt |
| Mr. Mansa Ram | Officer in Charge, Suva Prison, Fiji |
| Mr. Pa Hamady Jallow | Officer, Commanding Farefenni Division, Gambia Police Force, Gambia |
| Mr. Tai Kin Man | Superintendent (Staff Relations and Welfare), Hong Kong Correctional Services Department, Hong Kong |
| Mr. Jyotirmoy Khosla | Additional Legal Adviser, Department of Legal Affairs, Ministry of Law, Justice and Company Affairs, New Delhi, India |
| Mr. Sh. Darmawel Aswar | Public Prosecutor, Attorney General's Office, Directorate of Economic & Finance, Deputy Attorney General for Intelligence Affairs, Jakarta, Indonesia |

| | |
|---|---|
| Mr. John Isaac Odongo | Deputy Provincial Prisons Commander, Provincial Prisons Commander's Office Eastern, Embu, Kenya |
| Mr. Ghazali Bin Hj.Md.Amin | Superintendent of Public Relations (Public Relations Branch), Royal Malaysia Police Bukit Aman, Malaysia |
| Mr. Nawaz Ul-Huq Nadeem | Assistant Director, Officer-in-Charge, NCB Pakistan-Interpol, Islamabad, Pakistan |
| Mr. Mathew Peter Himsa | Assistant Commissioner of Correctional Service, Personnel Management & Training, P.N.G. Correctional Service, Papua New Guinea |
| Ms. Donna Lynn Caparas | Project Evaluation Officer V, Division Chief, Criminological Research Division, Crime Prevention & Coordination Service, National Police Commission, The Philippines |
| Mr. Ha Young-Hoon | Correctional Officer, Taejeon Regional Correctional Headquarters, Republic of Korea |
| Mr. Maxim Antoine Tirant | Assistant Superintendent, Seychelles Police Force, Mahe, Republic of Seychelles |
| Mr. Ravi Wijegunawardena | Assistant Superintendent of Police, Colombo Office, Sri Lanka |
| Ms. Pornpitr Norapoompipat | Director, Personnel Administration Division, Department of Corrections, Nonthaburi Province, Thailand |

***Japanese Participants***

| | |
|---|---|
| Mr. Hideki Igeta | Assistant Judge, Tokyo District Court |
| Ms. Noriko Komori | Probation Officer, Tokyo Probation Office |
| Mr. Takehiko Mukaigawa | Professor, Training Institute for Correctional Personnel |
| Ms. Chikako Nakajima | Specialist (Medical and Classification Section), Tokyo Regional Correction Headquarters |
| Mr. Nobuo Nakamura | Public Prosecutor, Fukushima District Public Prosecutors Office |

| | |
|---|---|
| Ms. Tokiko Sugawara | Senior Immigration Control Office,<br>Tokyo Immigration Office, Yokohama Branch |
| Mr. Hisashi Uruga | Family Court Probation Officer, Nagano Family Court |
| Mr. Kouji Yamada | Probation Officer, Hiroshima Probation Office |
| Ms. Emi Yoshida | Public Prosecutor,<br>Tokushima District Public Prosecutors Office |
| Mr. Haruhiko Ishida | Police Inspector, National Police Agency |

## THE 113TH INTERNATIONAL TRAINING COURSE

***Overseas Participants***

| | |
|---|---|
| Mr. Md Kamal Uddin Bhuiyan | Senior Assistant Secretary, Ministry of Home Affairs, Bangladesh |
| Mr. Luis Fernando Viana Artigas Jr. | Police Chief, State of Parana, Civil Police Department, Brazil |
| Mr. Li Hai-Teng | Section Chief, Research Division,<br>Economic Crime Investigation Department,<br>Ministry of Public Security, China |
| Mr. Ruben Anthony Maitland | Inspector, Criminal Investigation Department, Royal Grenada Police Force, St Georges, Grenada |
| Mr. Chandrashekara | Inspector General of Police, Corps of Detectives, Police Department, Government of Karnataka, India |
| Mr. Yudi Handono | Head of Public Criminal Section,<br>Bandar Lampung District Attorneys' Office, Indonesia |
| Mr. Omur Nogoyev | Consultant, the Constitutional Court of the Kyrgyz Republic, Kyrgyzstan |
| Mr. Asmadi Bin Hussin | Assistant Director, Legal Aid Bureau of Malaysia, Malaysia |

| | |
|---|---|
| Mr. Onuoha Emmanuel Ifeanyi | Officer-in-Charge, Management Information Systems, Interpol Section, Criminal Investigation Department, Nigeria Police Force, Nigeria |
| Mr. Justice Sardar Muhammad Raza | Judge, Peshawar High Court, Pakistan |
| Mr. Joma J.A.Zidan | Crime Scene Expert, Preventive Security Organization, Palestine |
| Mr. Roderick Kamburi | Acting Director, Leadership Division, Ombudsman Commission of P.N.G, Port Moresby, Papua New Guinea |
| Mr. Nelson Nogot Moratalla | Deputy Director / Dean of Academic, Philippine National Police Academy, Philippine Public Safety College, The Philippines |
| Mr. Nihal Sunil Rajapaksa | Additional District Judge, District Court, Colombo, Sri Lanka |
| Mr. Errol Ozil Hinson | Inspector of Police, Criminal Investigation Department, Royal Saint Vincent Police Force, Saint Vincent, West Indies |
| Mr. Pravit Roykaew | Senior State Attorney, International Affairs Department, Office of the Attorney General, Thailand |
| Mr. Hector Efrain Castillo Guevara | Chief of Police, Disciplinary Division of Judicial Police, Venezuela |
| Mr. Nguyen Thanh Hai | Senior Inspector, The State Inspection of Viet Nam, Viet Nam |

***Japanese Participants***

| | |
|---|---|
| Mr. Tamotsu Hasegawa | Public Prosecutor, Tokyo District Public Prosecutors Office |
| Mr. Hiroshi Matsui | Public Prosecutor, Yokohama District Public Prosecutors Office |
| Mr. Yuji Suzuki | Public Prosecutor, Hiroshima District Public Prosecutors Office |

APPENDIX

| | |
|---|---|
| Mr. Naoki Ujita | Chief Program Supervisor, Osaka Prison |
| Ms. Kyoko Fujino | Chief Specialist, Hachioji Juvenile Classification Home |
| Ms. Yoko Nihei | Probation Officer, Urawa Probation Office |
| Mr. Yoji Tanaka | Probation Officer, Yamaguchi Probation Office |
| Mr. Masaki Kitahara | Immigration Inspector, Osaka Immigration Office, Kyoto Branch |
| Mr. Yasushi Hatayama | Assistant Judge, Osaka District Court |
| Mr. Yasuhiro Muraki | Judge, Tsu District Court |
| Mr. Tetsuya Yamaji | Maritime Safety Officer, 1st Regional Maritime Safety Headquarters |
| Mr. Masahiro Okamura | Professor, Institute of Public Security Investigation Agency, Public Security Investigation Agency |

## FOURTH SPECIAL SEMINAR FOR SENIOR CRIMINAL JUSTICE OFFICIALS OF THE PEOPLE'S REPUBLIC OF CHINA

| | |
|---|---|
| Mr. Xian-Ding Pei | Judge,<br>Supreme People's Court of the People's Republic of China |
| Mr. Hua Dong | President of FengTai District Court,<br>Beijing FengTai District Court |
| Ms. Yun-Shan Bai | Chief Judge of No.2 Criminal Justice Division,<br>Beijing High People's Court |
| Mr. Ai-Dong Jiang | Division Chief, General Office, Ministry of Justice |
| Mr. Zheng-Guo Zhao | Vice-Director of the Research Office,<br>The Research Office of the Prison Administration Bureau, Ministry of Justice |
| Mr. Yi Zhao | Vice-Section Chief, Rehabilitation-Through-Labor Bureau, Ministry of Justice |
| Mr. Jian-Ping Zhao | Public Prosecutor, Supreme People's Procuratorate of the People's Republic of China |
| Mr. Jie Xian | Vice-Section Chief, Assistant Procurator,<br>Office of Law and Policy Research,<br>Supreme People's Procuratorate of the People's Republic of China |
| Ms. Ni-Na Lin | Section Chief of the General Office,<br>Department of Public Safety,<br>Ministry of Public Security of the People's Republic of China |
| Mr. Yong-Sheng Wang | Vice-Section Chief of Police Legislation,<br>Police Legislation Department,<br>Ministry of Public Security of the People's Republic of China |

APPENDIX

# DISTRIBUTION OF PARTICIPANTS BY PROFESSIONAL BACKGROUNDS AND COUNTRIES

(1st International Training Course-115th International Seminar,
U.N. Human Rights Courses and 1 Special Course)

| Professional Background / Country | Judicial and Other Administration | Judges | Public Prosecutors | Police Officials | Corrctional Officials (Adult) | Correctional Officials (Juvenile) | Probation/Parole Officers | Family Court Investigation Officers | Child Welfare Officers | Social Welfare Officers | Training & Research Officer | Others | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Afghanistan | 7 | 8 | 5 | 3 | | | | | | | | | 23 |
| Bangladesh | 19 | 11 | | 11 | 4 | | 4 | | | 5 | | 2 | 56 |
| Bhutan | | | | 3 | | | | | | | | | 3 |
| Brunei | 4 | | | | 2 | | | | | | | | 6 |
| Myanmar | 3 | | | 2 | | | | | | | | | 5 |
| China | 11 | 3 | 5 | 9 | | | | | | | 7 | | 35 |
| Hong Kong | 14 | | | 11 | 24 | 3 | 9 | | 1 | 3 | 1 | | 66 |
| India | 13 | 10 | | 46 | 7 | 1 | 1 | | | 2 | 6 | 3 | 89 |
| Indonesia | 18 | 20 | 19 | 19 | 14 | | 3 | | | 5 | | 1 | 99 |
| Iran | 5 | 11 | 8 | 8 | 6 | | | | | | 2 | 1 | 41 |
| Iraq | 5 | 3 | 3 | 5 | 5 | 5 | | | | | 2 | | 28 |
| Jordan | | | | 4 | | | | | | | | | 4 |
| Cambodia | 1 | 2 | 1 | 4 | 1 | | | | | | | | 9 |
| Oman | | | | 2 | | | | | | | | | 2 |
| Korea | 12 | 3 | 53 | 6 | 19 | 4 | | | | | 3 | | 100 |
| Kyrgyz | 1 | | | | | | | | | | | | 1 |
| Laos | 4 | 4 | 4 | 10 | | | | | | | | | 22 |
| Malaysia | 18 | 1 | 3 | 40 | 31 | 7 | 3 | | 1 | 5 | 3 | | 112 |
| Maldives | | | 1 | | | | | | | | | | 1 |
| Mongolia | 1 | | | 1 | | | | | | | | | 2 |
| Nepal | 27 | 12 | 6 | 31 | | | | | | | | 2 | 78 |
| Pakistan | 17 | 10 | 2 | 25 | 7 | 1 | 2 | | | | 2 | 1 | 67 |
| Palestine | 1 | | | 1 | | | | | | | | | 2 |
| Philippines | 17 | 7 | 21 | 33 | 8 | 3 | 9 | 3 | 1 | 6 | 3 | 5 | 116 |
| Saudi Arabia | 4 | | | 6 | 3 | | | | | | 1 | 1 | 15 |
| Singapore | 10 | 18 | 5 | 12 | 10 | 3 | 10 | | | 3 | 1 | 1 | 73 |
| Sri Lanka | 21 | 20 | 11 | 20 | 18 | 1 | 10 | | 1 | 2 | | 1 | 105 |
| Taiwan | 12 | 4 | 2 | 2 | 1 | | | | | | | | 21 |
| Thailand | 21 | 29 | 36 | 13 | 14 | 7 | 10 | 1 | | 8 | 4 | 1 | 144 |
| Turkey | 2 | 1 | 1 | 2 | | | | | | | 1 | | 7 |
| United Arab Emirates | 1 | | | | | | | | | | | | 1 |
| Uzbekistan | | | | | | | | | | | | 1 | 1 |
| Viet Nam | 10 | 5 | 2 | 7 | | | | | | 4 | 1 | | 29 |
| **ASIA** | 279 | 182 | 188 | 336 | 174 | 35 | 61 | 4 | 4 | 43 | 37 | 20 | 1,363 |

| Professional Background / Country | Judicial and Other Administration | Judges | Public Prosecutors | Police Officials | Corrctional Officials (Adult) | Correctional Officials (Juvenile) | Probation/Parole Officers | Family Court Investigation Officers | Child Welfare Officers | Social Welfare Officers | Training & Research Officer | Others | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Algeria | | 3 | 2 | | | | | | | | | | 5 |
| Botswana | 1 | | | 2 | | | | | | | | | 3 |
| Cameroon | 2 | | | | | | | | | | | | 2 |
| Cote d'Ivoire | | 1 | | 1 | | | | | | | | | 2 |
| Egypt | 1 | | | 1 | | | | | | | 2 | 1 | 5 |
| Ethiopia | 3 | | | 1 | | | | | | | | | 4 |
| Gambia | | | | 2 | | | | | | | | | 2 |
| Ghana | 1 | | | 3 | 1 | | | | | | | | 5 |
| Guinea | | | 1 | 2 | | | | | | | | | 3 |
| Kenya | 6 | 4 | 1 | 10 | 7 | | 6 | | | | 2 | | 36 |
| Lesotho | | | | 1 | | | 2 | | | | | | 3 |
| Liberia | | | | | | | | | | | 1 | | 1 |
| Madagascar | | | | 1 | | | | | | | | | 1 |
| Mauritius | | 1 | | | | | | | | | | | 1 |
| Morocco | | | 1 | 4 | | | | | | | | | 5 |
| Mozambique | 1 | | | 1 | 1 | | | | | | | | 3 |
| Nigeria | 1 | | | 4 | 5 | | | | | | | 1 | 11 |
| South Africa | | | | 1 | | | | | | | 1 | | 2 |
| Seychelles | | | | 3 | | | 1 | | | | | | 4 |
| Sudan | 2 | | 1 | 13 | 1 | | | | | | 2 | | 19 |
| Swaziland | | | | 2 | | | | | | | | | 2 |
| Tanzania | 4 | 3 | 4 | 2 | 1 | | | | | | | | 14 |
| Zambia | | 1 | | 6 | | | | | | | | | 7 |
| Uganda | | | | 3 | | | | | | | | 1 | 4 |
| Zimbabwe | 1 | | | 2 | | | | | | | | | 3 |
| **AFRICA** | 23 | 13 | 10 | 65 | 16 | 0 | 9 | 0 | 0 | 0 | 8 | 3 | 147 |
| Australia | | | 1 | | | | 1 | | | 1 | | | 3 |
| Vanuatu | | | | 1 | | | | | | | | | 1 |
| Fiji | 6 | 1 | 8 | 19 | 13 | | | | | 1 | | | 48 |
| Kiribati | 1 | | | | | | | | | | | | 1 |
| Marshall Islands | 1 | | | 3 | | | | | | | | | 4 |
| Micronesia | | | | | | | 1 | | | | | | 1 |
| Nauru | | | | 1 | | | | | | | | | 1 |
| New Zealand | 1 | | | 1 | | | | | | | | | 2 |
| Papua New Guinea | 10 | | 3 | 11 | 9 | | 2 | | | 1 | | 2 | 38 |
| Solomon Islands | 3 | | | 2 | | | | | | | | | 5 |
| Tonga | 2 | 1 | | 6 | 2 | | | | | | 1 | | 12 |
| Western Samoa | 1 | | | 1 | | | 1 | | | | | 1 | 4 |
| **THE PACIFIC** | 25 | 2 | 12 | 45 | 24 | 0 | 5 | 0 | 0 | 3 | 1 | 3 | 120 |

APPENDIX

| Professional Background / Country | Judicial and Other Administration | Judges | Public Prosecutors | Police Officials | Corrctional Officials (Adult) | Correctional Officials (Juvenile) | Probation/Parole Officers | Family Court Investigation Officers | Child Welfare Officers | Social Welfare Officers | Training & Resarch Officer | Others | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Argentina | 2 | 2 | | 1 | | | | | | | | | 5 |
| Barbados | | | | 1 | | | | | | | | | 1 |
| Belize | 1 | | | 1 | | | | | | | | | 2 |
| Bolivia | | 1 | | | | | | | | | | 1 | 2 |
| Brazil | 2 | | 3 | 13 | | | | | 1 | | | | 19 |
| Chile | 1 | | | 2 | 2 | | | | | | | | 5 |
| Colombia | 3 | 1 | 2 | 3 | | | | | 1 | | | 1 | 11 |
| Costa Rica | 3 | 4 | 3 | | | | | | | | 1 | 2 | 13 |
| Ecuador | | | 1 | 4 | | 1 | | | | | | | 6 |
| El Salvador | 1 | | | | | | | | | | | | 1 |
| Grenada | | | | 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 | 4 | 1 | 1 | | | | | | 1 | 2 | 23 |
| Saint Lucia | 1 | | | | 1 | | | | | | | | 2 |
| Saint Vincent | | | | 1 | | | | | | | | | 1 |
| Trinidad and Tobago | 1 | | | | 1 | | | | | | | | 2 |
| Venezuela | 1 | | 1 | 7 | | | | | | | 1 | | 10 |
| U. S. A. (Hawaii) | | | | | | | | 1 | | | | | 1 |
| **NORTH & SOUTH AMERICA** | 24 | 19 | 15 | 49 | 7 | 2 | 0 | 1 | 2 | 0 | 3 | 7 | 129 |
| Bulgaria | | | | 1 | | | | | | | | | 1 |
| Hungary | 1 | | | | | | | | | | | | 1 |
| Macedonia | 1 | | | | | | | | | | | | 1 |
| Poland | | | | 1 | | | | | | | | | 1 |
| Lithuania | | | | 1 | | | | | | | | | 1 |
| **EUROPE** | 2 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 |
| **JAPAN** | 102 | 132 | 217 | 86 | 78 | 70 | 165 | 55 | 38 | 2 | 47 | 50 | 1,042 |
| **TOTAL** | 455 | 348 | 442 | 584 | 299 | 107 | 240 | 60 | 44 | 48 | 96 | 83 | 2,806 |

# PART TWO

# RESOURCE MATERIAL SERIES
# No. 57

**Work Product of the 114th International Seminar**

**"INTERNATIONAL COOPERATION TO COMBAT TRANSNATIONAL ORGANIZED CRIME – WITH SPECIAL EMPHASIS ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION"**

**UNAFEI**

# VISITING EXPERTS' PAPERS

## MERITS OF MULTILATERAL TREATIES ON EXTRADITION AND ON MUTUAL LEGAL ASSISTANCE INCRIMINAL MATTERS; THEORY AND PRACTICE

*Hans G Nilsson**,***

### I. INTRODUCTION

Co-operation in criminal matters has developed at rapid pace in Europe over the past 5-10 years. The major contributing factor to this development has been the incorporation of criminal law co-operation into the objectives of the European Union by the adoption of the so-called Treaty of Maastricht (entry into force on 1 November 1993), which defined, in its article K.1, judicial co-operation in criminal matters as a question of "common interest" to the Member States of the European Union.

Until then, criminal law co-operation in Europe had taken place, since 1957, within the framework of the Council of Europe, an international, intergovernmental organisation which has its seat in Strasbourg and has currently 41 Member States, including all 15 Member States of the European Union and a number of Central and Eastern European States such as Hungary, Poland, the Russian Federation and Ukraine.

With the advent of a number of terrorist organisations in (among other States) Italy, Spain and Germany, co-operation intensified in relation to certain types of offences already in the 1970s. In the middle of the 1980s, however, some of the Member States of the European Union decided to intensify their co-operation through more formalized channels. This took the form of the creation of some working groups within the framework of the European Political Co-operation set up under the Single European Act in 1987 and, in particular, by the adoption of the so-called Schengen Implementation Agreement (often referred to as "the Schengen Convention") in 1990. This latter agreement has now become part and parcel of the general legal framework of the European Union (in principle binding on 13 of the 15 Member States - the exceptions are UK and Ireland) with the entry into force, on 1 May 1999, of the Treaty of Amsterdam.

The idea behind the Schengen co-operation, which largely joins the objectives of the European Union, is to create one single "area" where all border controls are abolished and there is free movement of persons, goods, capital and services. However, in order to attain that objective, it is also necessary to ensure that the opening up of the borders do not create uncontrolled immigration or increased possibilities for criminals to commit their deeds without punishment. Therefore, so-called "compensatory measures" needed to be adopted, *inter alia* in the field of mutual assistance in criminal matters and in respect of extradition. I will deal with the significance of these compensatory measures to international co-operation later.

In spite of the developments that have taken place within the European Union over the past 5-10 years, it is fair to say

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**The views expressed are those of the author and do not necessarily represent the views of the institution for which he works.

that a substantial part of judicial co-operation in criminal matters is still based to a large extent on the instruments of the Council of Europe, although in practice some 75 -90 % of all requests for mutual assistance are made between the Member States of the EU. This is likely to change within the next 10 years with the intensified co-operation with the 13 applicant States that wish to become members of the European Union.

The European Conventions on Extradition and on Mutual assistance in criminal matters, drawn up in 1957 and in 1959, respectively, have been ratified by all 15 Member States of the European Union (the Extradition Convention has been ratified by an additional 24 States and the MLA Convention by another 22 States, figures which show their importance to co-operation in criminal matters within the wider family of European States). The additional protocol to the MLA Convention has been ratified by 13 of the Member States of the EU whereas the two additional Protocols to the Extradition Convention have been ratified by 6 and by 11 Member States of the EU, respectively.

## II. MUTUAL ASSISTANCE IN CRIMINAL MATTERS

### A. Basis for Mutual Assistance within the European Union

The single most important instrument in this context is, as previously indicated, the Council of Europe Convention of 1959 on mutual assistance in criminal matters, as modified by the additional protocol of 1978. At the time when it was adopted it was a very innovative instrument, and it has certainly proved its value over the years. In principle, all requests for mutual assistance made within the European Union are made on the basis of the Convention (exceptions are found in Nordic co-operation, Benelux co-operation and in relation to the 1990 Laundering Convention of the Council of Europe).

The Convention is designed to cover the widest measure of mutual assistance in criminal proceedings. It provides, in general, that the requested party shall execute letters rogatory for the purpose of procuring evidence or transmitting articles to be produced in evidence in criminal proceedings. It also provides for service of different types of procedural documents and the appearance of witnesses, experts and prosecuted persons for the purpose of criminal proceedings.

Regarding procedure, the main rule is that requests are dealt with between the Central Authorities, i.e. in principle the Ministry of Justice, of the parties. In urgent cases, the judicial authority may address the letter rogatory directly to its counterpart in the requested State and may, for that purpose, use Interpol channels. The return of the letter rogatory must however be made through the Central Authority. In principle, requests may be sent in any of the official languages of the Council of Europe (i.e. English or French although reservation possibilities exist).

The Convention does not require that a request for mutual assistance must be granted in every case. In particular, parties may refuse to execute requests which are linked to essential interests and to political or fiscal offences and on the grounds of national security. However, the exception for fiscal offences has been eliminated by the 1978 Protocol. In addition, parties having made a declaration to that effect, may refuse requests for search and seizure on the grounds of:

(i) double criminality,
(ii) non-extraditable offence, or
(iii) non-compatibility with its law.

The 1959 Convention is supplemented by a number of instruments or arrangements. There are, for example, the special arrangements between the Nordic countries and the Benelux Treaty of 1962, as modified by a Protocol of 1974. There are also mutual assistance provisions in, for example, the 1990 Council of Europe Convention on money laundering, search, seizure and confiscation of the proceeds from crime. There are also the mutual assistance provisions of the 1990 Schengen Convention.

It should in this context be noted that the relevant Schengen provisions do not so far apply to the UK and Ireland. However, that will almost certainly change in the future.

The mutual assistance provisions of the Schengen Convention are designed to supplement and facilitate the application of the 1959 Convention and the Benelux Treaty. The Schengen Convention provides, in particular, for the following:

(i) Mutual assistance in relation to certain administrative proceedings which may lead to criminal proceedings and certain proceedings which are linked to criminal proceedings (Art. 49),
(ii) Mutual assistance regarding excise duties, VAT and customs duties (Art. 50),
(iii) The possibility of refusing requests for search and seizure is limited as compared with the 1959 Convention (Art. 51),
(iv) Procedural documents may to a large extent be sent directly by post to persons in the territory of other Contracting Parties (Art. 52),
(v) Requests for mutual assistance may, as a rule, be processed directly between the judicial authorities involved (Art. 53).

It is in particular in relation to the last mentioned article where it can be said that the Schengen Convention has changed, or is about to change, mutual assistance within the European Union.

As the 1959 Convention only provided for the possibility of direct contacts between judicial authorities in cases of urgent requests, this leads in practice to the use of direct contacts in relatively few cases. The judicial authorities preferred to send their requests via the "normal channel". This could in practice mean that a request from an investigating judge would be given to the local prosecutor, who would send the request via the hierarchy to the prosecutor at the Court of Appeal who would forward the request to the General Prosecutor who, in turn, would forward the request to the Ministry of Justice, which perhaps would ensure translation of the request via the Ministry of Foreign Affairs. In the requested State the request would possibly be dealt with in the same (inverted) order and the end result would be that the mere process of sending the request and translating the documents would take 6-12 months.

The Schengen Convention has radically changed the situation in a number of Member States of the EU and is in the process of changing it in others, although it may be said that "old habits die hard" for some judicial authorities who still prefer to use the old procedures.

A country like the Netherlands receives some 26,000 letters of request on a yearly basis. Only about 10 % are received at the Central Authority (mostly from non-EU Members) and the remaining part is dealt with directly by the judicial authorities. The situation in other countries, such as Belgium and France is similar and changes are under way in Spain, Portugal and Italy. The Nordic co-operation has for decades

been based on direct contacts between judicial authorities and has, to some extent, served as a model and a precursor to the developments in the rest of Europe.

### B. Achievements of the European Union

Within the EU a lot of work has been carried out in the area of mutual assistance since the introduction of formalised co-operation in the field of justice and home affairs following the entry into force of the Maastricht Treaty. In particular, the following steps have been taken:

(i) The EU Council adopted in 1997 an Action Plan to combat organized crime. The plan is multidisciplinary and it applies to police, customs and judicial co-operation as well as preventive measures. Regarding mutual assistance, the importance of the adoption of the draft EU Convention on that topic has been stressed. The fight against money laundering is also an essential element in the plan.

(ii) Further strategic elements have been added by the 1998 Action Plan of the EU Council and the Commission on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice. That Action Plan also attached great importance to improving and speeding up judicial co-operation, especially in view of the development of intensified police co-operation.

(iii) In December 1997, the EU Council adopted a Joint Action establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime as part of the implementation of the 1997 Action Plan. Under that instrument, a number of Member States have already been evaluated in relation to mutual legal assistance and urgent requests for the tracing and restraint of property. The procedure followed is that, first, a questionnaire is issued and replied to by each Member State regarding the issues to be examined. Then independent teams of experts visit the relevant authorities of the Member States to gather further information. This typically involves visiting the Ministry of Justice, the prosecution authorities and the police (Interpol office). On that basis, the experts draw up a draft report containing a description of the facts and conclusions with recommendations. The report is then finalised in collaboration with the Member State visited and adopted by the Multidisciplinary Working Party on Organized Crime, which is a Council working group specifically mandated to deal with the Action Plan on organized crime. The report remains confidential unless the Member State evaluated decides to make it public, which, so far, always has been the case. The process has proved to be extremely useful. In this way all Member States gain information on how the systems of other Member States work in practice and by the end of the process a kind of handbook on how MLA works in practice will have been drafted. Certain problems are identified to be addressed, not only in the Member State visited but also at more general level. The evaluation programme is a good example of focusing not only on the need to have

strong legal provisions on mutual assistance in international agreements, but also on the need to take appropriate legislative and administrative measures at national level for the purpose of ensuring efficient co-operation.

(iv) In December 1998, the EU Council adopted a Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. This instrument has, in particular, as its purpose to ensure efficient implementation of the 1990 Council of Europe Convention on money laundering, bearing in mind also the EU Directive of 1991 on money laundering and the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances.

(v) In June 1998 the Council adopted two instruments:

- A Joint Action on the creation of the European Judicial Network. The purpose of the instrument is to set up a network of judicial contact points and Central Authorities in order to facilitate judicial co-operation and to help establish direct contacts between authorities involved in mutual assistance. The Network has regular meetings in Brussels and in Member States for contact points to get to know each other and for discussing practical and legal problems encountered. Where appropriate, experience gained may be fed into the relevant working parties of the EU for discussion and for the development of further legal and practical measures.

  The Network, which so far has met 5 times, has its own website where legal instruments and ratification status can be found (see http://ue.eu.int/JAI) and is in the process of creating its own Virtual Private Network - an Intranet - which can be used for transmitting requests, information and for creating discussion groups. A CD-ROM has been produced containing the same information and another is being produced which contains information on special investigative techniques, judicial organisation and contact data for the contact points.

- A joint Action on good practice in mutual legal assistance in criminal matters. The instrument requires each Member State to provide a statement of good practice, which must include certain minimum undertakings (e.g. to acknowledge requests where requested to do so, to give priority to requests marked "urgent" etc.). These statements have been prepared by Member States and have been made available to the European Judicial Network. Member States are also obliged to periodically review their compliance with their statements of good practice.

(vi) It would also be appropriate to mention in this context that the EU Council in 1997 adopted the Convention on mutual assistance and co-operation between customs authorities (Naples II). This Convention contains provisions on the relationship with mutual

assistance provided by judicial authorities. The principle involved is that where a criminal investigation within the area covered by the Convention is carried out by or under the direction of a judicial authority, that authority decides whether requests for mutual assistance should be made under the Convention or under arrangements for mutual assistance in criminal matters. The provisions of the Convention on controlled deliveries, joint investigation teams and covert investigations have, to a wide degree, served as a basis for drafting similar provisions in the draft EU Convention on mutual assistance.

(vii) A further EU instrument which is particularly relevant in relation to mutual legal assistance is the Joint Action adopted in April 1996 establishing a framework for the exchange of liaison magistrates to improve judicial co-operation within the Union. The main objective in creating that framework was to increase the speed and effectiveness of judicial co-operation. Liaison magistrates currently operate in France, Germany, Italy, the Netherlands and Spain.

### C. Current Work on Legally Binding Instruments on Mutual Assistance in Criminal Matters within the European Union and elsewhere

The EU Council Working Party on co-operation in criminal matters has, for some time, worked on the elaboration of a Convention on mutual assistance in criminal matters between the Member States of the European Union. The draft (to a large extent in the way already agreed) has recently been published in the Official Journal of the European Communities and submitted to the European Parliament for consultation.

The main objective of the Convention is to supplement what already exists. That means, in particular, the 1 959 Convention, the Benelux Treaty, and the 1990 Schengen Convention. That all sounds very simple. But it is not. The integration of the Schengen *acquis* into the EU implies in particular the following: All provisions of the draft Convention related to the Schengen *acquis* must be examined with Norway and Iceland (which was part of Schengen but are not Member States of the EU) before adoption of the instrument. In addition, the Schengen *acquis* does not for the time being apply to the United Kingdom and Ireland (which are Member States of the EU). These elements have given rise to complicated procedural discussions in Brussels.

The draft EU Convention contains in particular the following provisions :

(i) Further Development of Schengen:

*Article 2*: Mutual assistance shall be afforded in administrative proceedings which may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters, in cases involving natural as well as legal persons.

*Article 5*: Procedural documents to be sent from one Member State to another shall be sent by post. There are certain limited exceptions to that obligation.

*Article 6*: Requests for mutual assistance shall be made directly between the judicial authorities concerned. However, it is possible in specific cases to make use of central authorities. Also, a Member State may declare that requests addressed to it should be sent to its central authority. Only

the UK and Ireland will make use of this option, which for these countries simply will mean the maintenance of the status quo (one could, however, question if this provision is fully compatible with the Schengen convention) .

*Article 7*: Spontaneous exchange of information.

*Article 12*: Controlled deliveries.

(ii) Non-Schengen

*Article 4*: The requested Member State shall comply with procedures indicated in a request unless doing so would be contrary to its fundamental principles of law. This is a new development in international mutual legal assistance practice and will considerably render mutual legal assistance more efficient as it lays down the principle of "*Forum Regit Actum*". Deadlines for execution set by the requesting State shall be respected to the maximum extent possible (see also the previously mentioned Joint Action).

*Article 8*: This Article is optional and provides that Member States may place articles obtained by criminal means at the disposal of another Member State with a view to their return to their rightful owner. It specifically provides that where, on request, property has been handed over to another Member State for the purpose of criminal proceedings under the 1959 Convention or the Benelux Treaty, the Member State supplying the property may waive the right to have it back for the purpose of its restitution to its rightful owner.

*Article 9*: The 1959 Convention is concerned with cases where the requesting State wants a person in custody transferred to it from another State. Article 9 deals with the situation where the requesting Member State wants to transfer a person in custody to the requested Member State for the purpose of criminal proceedings.

*Article 10*: This Article concerns the hearing of evidence by video conference and is one of the major achievements in the context of the convention. It provides that a Member State must comply with a request for hearing experts or witnesses by video conference unless it would be against its fundamental principles of law or it does not have the relevant technical facilities. The provision may, by mutual agreement, also be used for hearings involving accused persons.

*Article 11*: This Article is optional and concerns hearing witnesses and experts by telephone conference.

*Articles 12, 13 and 14*: The provisions on controlled deliveries, joint investigation teams and covert investigations have, to some extent, been based on provisions of the Naples II Convention. The articles are in particular of relevance in relation to the fight against organized crime and illustrate how the gap between traditional judicial co-operation and police co-operation is about to lessen.

*Articles 15 to 20*: Interception of telecommunications. This part of the Convention is considered to be very important by all Member States. The advantages of having clear legal provisions on co-operation in this very sensitive area are obvious. But more importantly, new technology; such as satellite telecommunications, has created new opportunities for organized crime to avoid interception and at the same time new challenges for law enforcement. Negotiations in respect of these provisions are still on-going.

It is possible that the draft Convention

also will contain some provisions relating to the protection of personal data. The EU Council took a decision recently to aim at drafting some provisions in that respect. Discussions are on-going.

### D. Other Work of Relevance to Mutual Assistance within the European Union

Work is also going on in relation to mutual assistance in other fora. In the Council of Europe a draft Second Additional Protocol to the 1959 Convention is currently under discussion. That draft contains many provisions corresponding to those of the draft EU Convention and the draft EU Convention has of course to a great extent inspired the drafting of the Council of Europe Second additional Protocol. It will however have to be remembered that reservations possibly may be made to the Council of Europe Protocol whereas reservation possibilities in the EU Convention will be extremely limited.

Another important draft international instrument containing mutual assistance provisions is the proposed UN Convention on transnational organized crime. It is to be expected that this Convention will be adopted by the end of the year, if negotiations are carried out as planned.

### E. Final Remarks on Mutual Assistance

There is a considerable amount of activity in Europe for the purpose of improving mutual assistance in criminal matters. This applies both in respect of the need for appropriate legal provisions as a basis for co-operation and as regards the need to ensure efficient use of the relevant instruments at the practical level. One of the difficulties that has been experienced in Europe is that the borderline between what is regarded as mutual assistance in criminal matters and what is considered to belong elsewhere, be it police co-operation or customs co-operation, can be different from one Member State to another. This may make it difficult to agree on where in the system a particular issue should be dealt with (e.g. joint investigation teams). However, that is a problem that we simply have to live with and tackle as best as we can.

Another challenge is how to ensure that the situation in so far as the legal provisions are concerned is sufficiently clear and easy to access for practitioners. A practitioner will in a specific case need to know.

(i) what are the legal provisions governing mutual assistance in the case concerned, and
(ii) to whom does he have to address himself to get the assistance?

Of course, the proliferation of instruments, the possible conflict between instruments adopted in different fora and the variable geometry regarding the territorial application of the different instruments may sometimes make life a little difficult for practitioners. However, it is clear that significant progress has been, and continues to be, made in the development and operation of mutual legal assistance and it is undoubtedly an area where further improvements will take place in the future.

## III. EXTRADITION

### A. Basis for Extradition within the European Union

As with the mutual assistance in criminal matters, the single most important instrument for extradition within the European Union in this context is the Council of Europe Convention of 1957 on extradition, as supplemented and modified by the additional protocol of 1975

and the Second additional Protocol of 1978. At the time when the European Convention was adopted it was also considered to be a very innovative instrument, and it has been reported that it replaced some 200 bilateral Treaties at the time. All extraditions within the European Union are in principle based on the Convention which is a major achievement of the Council of Europe.

It should be recalled that the Convention has been ratified by all Member States of the European Union and is thus, in the same manner as the MLA-Convention, considered to be an inseparable part of the *acquis* of the Union. In fact, it is considered that the applicant States of Central- and Eastern Europe seeking membership of the European Union cannot become members of the Union unless they have ratified these two Conventions of the Council of Europe.

The Convention lays down an obligation for the Contracting Parties to surrender to each other, subject to certain conditions, persons against whom proceedings are commenced or who are wanted for the carrying out of sentences or detention orders. Extraditable offences are those which carry prison sentences in both States of at least one year or where the punishment awarded is at least 4 months imprisonment. The Convention thus avoids the so-called list method by which specific offences are enumerated.

The condition of double criminality must be fulfilled, although it can be argued that, on the side of the requested State, double criminality *in abstracto* may be sufficient.

The Convention makes a number of exceptions to the general obligation to extradite. Although some of these exceptions are in the form of a facultative possibility of refusing extradition, it is clear that some of them restrict the applicability of the Convention. It will later be shown how the European Union has sought to limit the exceptions between the Member States of the EU.

Extradition may be excluded by reason of the nature of the offence, for procedural reasons or for reasons relating to the person.

The exceptions concern (i) political offences, (ii) offences for which the requested State has "substantial grounds for believing" that the request was made for prosecution or punishment on account of race, religion, nationality or political opinion, (iii) military offences, (iv) fiscal offences, (v) own nationals (coupled with the principle of *aut dedere, aut judicare*), (vi) the place of commission of the crime, (vii) pending proceedings for the same offences, (viii) *non bis in idem*, (ix) lapse of time, and (x) capital punishment.

The Convention provided initially, in principle, for the forwarding of requests through diplomatic channels, although it allowed for exceptions to this rule. But in practice nowadays, because of article 5 of the Second additional Protocol to the Convention, within the European Union requests are in principle directly forwarded between Ministries of Justice.

The Protocols to the Convention amends the Convention in respect of certain offences such as crimes against humanity, certain fiscal offences, judgements *in absentia* and offences for which amnesty has been given.

### B. Achievements of the European Union

The practitioner knows that extradition procedures are extremely slow and cumbersome. Also in cases where extradition is consented to by the person sought, extradition may take up to one year

because of internal procedures in the requested State.

This state of affairs cannot be considered satisfactory. Justice delayed is justice denied and in particular in the interest of the victim it is of importance not to delay extradition unnecessarily where the suspect consents to his extradition.

It was in recognition to these types of considerations that the European Union decided to supplement the 1957 Convention by the drafting of two Conventions; one dealing with simplified extradition and the other of a more general kind. It may be noted that according to some estimations made by extradition experts, within the European Union extradition requests are consented to in about 30 % of the cases and that the average time for extradition in such cases has been some 8 months for extradition.

The Convention on simplified extradition, adopted in 1995 and ratified to date by 6 Member States (more ratifications soon to follow), provides that the person sought may be returned without a formal court hearing, subject to the finding by a judicial authority that the consent has been expressed voluntarily and in full understanding of the legal consequences thereof.

The Convention has also addressed the question whether consent to extradition and waiver of a court hearing implies a waiver of the protection by the speciality principle. Since no agreement could be reached on this issue during the drafting of the Convention, the States which want to preserve the right to submit the extradition to the guarantee that the speciality principle shall be respected can do this through a declaration made at the time of ratification of the Convention. In principle, however, consent to be extradited implies consent to the possibility to be prosecuted also on other charges than those contained in the extradition request, or in the request for provisional arrest.

The second Convention, adopted in 1996 and currently ratified by 6 Member States (also here more ratifications will soon follow) addresses a number of the exceptions to extradition provided for in the 1957 Convention and seeks to lift a number of taboos in relations between the Member States of the European Union. It has been considered that between the Member States, which seek to create an area of freedom, security and justice by the entry into force of the Treaty of Amsterdam, traditional obstacles to extradition should be reduced as much as possible.

It has therefore been provided in the Convention as general principles that extradition should not be refused in relation to certain of the exceptions mentioned above under the 1957 Convention. These concern:

(i) political offences,
(ii) fiscal offences,
(iii) the requirement of double criminality for certain organized crime offences,
(iv) extradition of own nationals,
(v) speciality principle, and
(vi) time limitations.

During the negotiations on this Convention, it was not possible to reach full consensus even within such a closely integrated area as the European Union. Some of these issues, such as the non-extradition of own nationals, are dealt with in the constitutions of the Member States, and for that reason reservations have been made possible but with the clearly expressed intention that these reservations be lifted in due time. In particular in relation to the non-extradition of own nationals, this is clear as a specific system

of temporary reservations has been set up which must be extended from time to time, if they are not to lapse automatically.

The Convention states as a general rule that the political offence exception shall not apply between the Member States. It is, however, possible to enter a reservation to this provision, but not with respect to offences which are covered by the Council of Europe Convention on the suppression of terrorism from 1977. These include not only offences defined in a number of UN Conventions (on high-jacking, the safety of civil aviation and the taking of hostages) but more generally serious offences of violence affecting the life, physical integrity or health of persons.

Similarly, the Convention provides as a general rule that the fiscal offence exception shall not apply between Member States of the EU. Again, it is possible to enter a reservation, but not in respect of offences concerning customs duties, turnover tax and other indirect taxes. It is unlikely that more than one Member State will make a reservation in this context.

On double criminality in relation to certain serious offences, a new avenue has been explored. In principle the requirement has been retained, even if the existing thresholds of punishability have been lowered; it suffices that the offence carries as a maximum one year imprisonment in the requesting State and only six months in the requested State.

However, with a view to be able to better counter various forms of organized crime, and more particularly the various forms of participation in the activities of organized groups as they have been criminalized in the Member States, the Convention provides that with respect to these forms of participation a strict requirement of double criminality shall not apply. This is irrespective of whether the offence has been defined a conspiracy or an association of wrongdoers, or as an affiliation to mafia-type organisations or as membership of criminal organisations or as acts of participation in offences committed or to be committed by others.

Reservations are also in this case allowed for, but only if the Member State in question have criminal legislation in place criminalizing forms of participation or preparatory acts as defined in the Convention with respect to a wide range of serious offences, in particular those which are commonly committed by way of cross-border organized crime. This provision should reduce problems of double criminality to a minimum.

This solution to extradition in relation to certain serious crimes took quite some time to develop but may be seen as an interesting development in the field of extradition law. It is a way of reconciling the necessity of co-operation in relation in particular to serious crime with a drive towards greater harmonisation of the criminal laws of the Member States; something which was also debated in the meeting of the Heads of State and Govermment at Tampere referred to below.

The non-extradition of own nationals is commonly recognized as a principle of extradition law by States belonging to the civil law tradition whereas countries belonging to the common law tradition often extradite their own nationals. Coupled with these differences is the policy relating to the establishment of extraterritorial criminal jurisdiction over offences committed by nationals where common law countries usually take a more restrictive approach.

In view of the constitutional obstacles in some Member States such as Germany,

it was felt necessary during the drafting of the Convention to allow for a system of temporary reservations to be able to be submitted. The temporary reservations will have to be prolonged and if they are not they will lapse. Through the creation of this system, it became clear that the political will of the Member States is to make no distinctions, within the Union, between citizens of the Union something which can be seen as a rupture with concepts which have been taken for granted for centuries.

On the speciality principle the Convention has in the first place clarified which actions by the requesting Member State are not considered as falling under the actions which can only be performed subject to the consent of the requested State. In the second place the Convention has given the right to the person concerned to waive his claims to protection under the speciality principle, irrespective of the views held on this by the requested State.

On time limitations, finally, the Convention provides as a rule that provisions on time limitations in the law of the requested State should in principle be ignored, unless that State has, according to its laws, also jurisdiction over the offence for which extradition is requested.

### C. Schengen Developments

The Schengen Convention of 1990 contains also provisions on extradition, some of which have been taken over in the previously mentioned two EU Conventions. These provisions relate, for instance, to amnesty, time limitation, certain simplified extradition, certain fiscal offences and channels for sending requests. One important consequence of the adoption of the Schengen regime is that an "alert" entered into the Schengen Information System, a computerized system which is available in all 13 Schengen Member States, has the automatic effect of a request for provisional arrest under article 16 of the European Convention on Extradition. This means in practice that if a border control officer finds out, when he controls a person in the SIS computers that an "alert" has been introduced in the system, he shall immediately arrest the person or ensure that the competent police authorities proceed to his arrest. It was in such a way that the Italian authorities arrested Mr Öçalan, the Kurdish leader for whom Germany had entered an "alert" on the basis of arrest warrants made by German judicial authorities. It is another matter that the German authorities thereafter did not proceed to a formal extradition request.

### D. Current Work on Legally Binding Instruments on Extradition within the European Union

There is at present no work relating to extradition ongoing within the European Union. However, the Treaty of Amsterdam specifies expressly that work should be started to further facilitate extradition and the conclusions of Tampere also indicate that more work should be undertaken. Therefore, it is to be expected that new avenues will continue to be explored. Moreover it is possible that within the framework of the system set up for mutual evaluation of international undertakings, a new topic on extradition might be selected within the next 1-2 years. This would seem to be a logical consequence of the evaluations which have been carried out on mutual assistance in criminal matters and urgent requests for seizure of assets referred to above.

### E. Final Remarks on Extradition

Extradition is still seen as a matter which is very close to the sovereignty of the Member States. However, it is clear that within the European Union there is a drive towards simplifying and speeding up

extradition, although we are probably still far away from the creation of an area of extradition law where the formalised extradition procedures are replaced by a simple system of return of fugitive offenders, based on simple mutual recognition and enforcement of arrest warrants, with only very limited cases left in which refusals to co-operate in this field would be justified.

Every time when calls have been made for more simple and rapid procedures, human rights lawyers have protested and claimed that the rights under the Geneva Convention would be violated if a simple system of rendition would be adopted and that not even within the European Union one can forego court procedures in spite of the fact that all Member States have subscribed to the European Convention on Human Rights and should have procedural legislation which is in conformity with that convention. The debate on this issue is by no means closed and will continue in particular in the light of the results of the Tampere Summit referred to below.

## IV. THE EUROPEAN COUNCIL AT TAMPERE

The entry into force of the Treaty of Amsterdam on 1 May 1999 has by many been seen as a qualitative leap for the European Union in the area of Justice and Home Affairs. For the first time, the objective of creation of "An area of Freedom, Security and Justice" was spelled out in the Treaty and specific actions to that end were provided for in the Treaty which is a kind of Constitution for the European Union. It was therefore not surprising that the European Council, consisting of the Heads of State and Government of all Member States decided to convene, only for the second time in the history of the EU, a special meeting to discuss the realisation of the new objectives.

This special meeting of the European Council was held at Tampere (Finland) under the Chairmanship of the Finnish Prime Minister who then held the Presidency of the Council. It debated three main themes: A common EU Asylum and Migration Policy, A Genuine European Area of Justice and A Unionwide Fight Against Crime and adopted the so-called 10 "Tampere Milestones".

These milestones contain specific decisions which are relevant to MLA and to extradition. Paragraphs 33, 35 and 36 of the conclusions provide:

*"Enhanced mutual recognition of judicial decisions and judgements and the necessary Approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters between the Union. The principle should apply both to judgements and to other decisions of judicial authorities.... It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons... Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial.... The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable...."*

In the background to these decisions was a proposal in particular by the United Kingdom to intensify work on mutual recognition in relation to MLA and to

extradition. As a result of the Tampere decision, it is probable that we will see a development whereby it is explored if extradition could be made more automatic, at least where a person has been finally convicted of an offence and then seeks to evade the consequences of his conviction. Work will also begin on the very difficult issue of freezing of assets in another country where there is a risk that the asset may be transferred out of the jurisdiction (for instance funds on bank accounts which may be quickly dissipated). It is probable that such work needs to be coupled with the question of certain minimum standards which must be adhered to and thus be extremely sensitive and difficult.

The discussion on the principle of mutual recognition should also be seen in conjunction with another decision of the European Council, namely the setting up of a unit called EUROJUST, composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. This unit would have the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organized crime cases. A legal instrument on the setting up of this unit will have to be adopted before the end of 2001. One of the ideas which will be discussed in the context of EUROJUST is whether these national magistrates, which will probably be detached to The Hague as Europol also has its seat there, will be able to take provisional measures and freeze for instance bank accounts in their own countries in accordance with their national legislation.

## V. CONCLUDING REMARKS

As will be understood from this brief exposé, which by necessity must be made in a cursory manner, the legal situation concerning both mutual assistance in criminal matters and extradition within the European Union is extremely complex. It has in fact become so complex so that also specialists have difficulties in fully understanding the law and grasping all the details. The practitioner will have to know a number of multilateral treaties (Council of Europe, EU, UN, Schengen, Benelux...), various Joint Actions of the EU and also internal legislation, guidelines, instructions and directives in order to be able to use efficiently all possibilities.

Moreover, since the tendency, in particular in mutual assistance, is to have more and more direct contacts between judicial authorities, it is clear that for instance a prosecutor who only deals with a few letters rogatory per year will have difficulties in carrying out his tasks efficiently. This has in turn led to measures in some countries whereby specific training, in particular in languages, has been given to certain prosecutors and clustering of prosecutors made so that only those specialised in mutual assistance actually send and receive requests. Computerised systems are also under way, whereby police and prosecutors are assisted in the drafting of mutual assistance requests, so that nothing is forgotten in the processing of the request and all translations of necessary legislation can be provided immediately by the system. An example of such a system is the so-called KRIS system developed in the Netherlands. At the same time, efforts undertaken by the European Union not only to set standards for norms but also actually to deal in practice with judicial co-operation are bearing fruit (setting up of the European Judicial Network, providing access to telecommunications, production of CD-Roms and creation of websites, standards of good practice, mutual evaluations...).

Although one can be reasonably optimistic about the future and about the fact that much finally is being done to bring judicial co-operation at least up to the same standards as police co-operation, one can still question whether the measures which are being taken are enough to ensure an efficient fight in particular against organized crime which has extremely powerful resources at its disposal. In any case, efforts at multilateral level, be it the European Union, Council of Europe or UN, are encouraging and should be intensified.

# EXTRADITION AND LEGAL ASSISTANCE: THE PHILIPPINE EXPERIENCE

*Severino H. Gaña, Jr.*,**

## I. INTRODUCTION

Before embarking on a discussion of substantive extradition law issues and procedures in the Philippines, I would like to describe briefly the International Affairs Division (IAD) of the Philippine Department of Justice. The Division is composed of State Prosecutors and State Counsels. The Division is responsible for international extradition submitted by local authorities and is the principal office handling all requests for extradition of individuals who have fled to the Philippines. The IAD is also the central office in charge of all matters relating to mutual legal assistance in criminal matters. In addition, within the IAD we have the Refugee Processing Unit (RPU) which implements our obligations pursuant to the 1951 Refugee Convention and its 1967 Protocol. A fourth function of IAD is to assist in handling requests for transfer of sentenced persons/prisoners, although at the moment the Philippines has only two treaties - one with Hong Kong and another with Thailand - but neither have been ratified to date. Finally, the IAD also participates in treaty negotiations.

At present the Philippines has extradition treaties with Australia, Canada, the Federated States of Micronesia, Hong Kong, Indonesia, Republic of Korea, Switzerland, the United States of America, and the Kingdom of Thailand, and treaties on mutual legal assistance on criminal matters with Australia and the United States of America.

As already mentioned, the Philippines has two treaties on Transfer of Sentenced Persons, one with Hong Kong and another Thailand, but both are still pending in the Senate.

The IAD is not a big office. All in all there are about fifteen (15) of us. We are directly under an Undersecretary of Justice. So far this small group is sufficient considering the low number of cases being handled.

The year 1999 was a challenging year for the IAD. The year saw most of the lawyers of the IAD battling cases from the Regional Trial Court, Court of Appeals and the Supreme Court. Foremost among these cases was the United States appeal for the extradition of Mark Jimenez, a presidential adviser. This case put extradition in the limelight and awareness to its importance was focused as it saw publicity in the headlines.

With this brief introduction about the IAD, I would now like to begin a discussion about the extradition experience in the Philippines. I will not discuss the legal principles applicable to extradition, except maybe in passing, since numerous materials abound in this area. Instead, my discussion will be limited to sharing our practical experiences in extradition and cooperation and some of the problems facing us. My discussion will be divided into two, namely, our experience in those cases where we have treaties, which I

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would label as "formal extradition procedures", and those where we do not have any formal treaties, which I call, "informal cooperation".

## II. FORMAL EXTRADITION PROCEDURES

### A. The Philippine Extradition Law

In the Philippines extradition is governed by Presidential Decree No. 1069, "The Philippine Extradition Law", and by the applicable extradition treaty in force. PD No. 1069 was enacted by then President Ferdinand Marcos in 1977, shortly after the Philippines concluded its first extradition treaty with the Republic of Indonesia. As can be seen the law is more than twenty (20) years old, and has not been amended since. PD No. 1069 is intended to "guide the executive department and the courts in the proper implementation of the extradition treaties to which the Philippines is a signatory". Under the law extradition is defined as :

> "The removal of an accused from the Philippines with the object of placing him at the disposal of foreign authorities to enable the requesting state or government to hold him in connection with any criminal investigation directed against him or the execution of a penalty imposed on him under the penal or criminal law of the requesting state or government."
>
> The definition approximates the international definition of extradition which is:
> ... the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. It applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and to those who have been convicted in absentia."

Philippine law provides that the Secretary of Foreign Affairs has the first opportunity to make a determination on whether the request complies with the requirements of the law and the relevant treaty, such as the submission of the original or authenticated copy of the decision or sentence imposed upon an accused; or the criminal charge and the warrant of arrest; a recital of the acts for which extradition is requested containing the name and identity of the accused; his whereabouts in the Philippines; the acts or omissions complained of; the time and place of the commission of those acts; the text of the applicable law or a statement of the contents; and such other documents or information in support thereof. Once all of these are complied with, the request and supporting documents are forwarded to the Secretary of Justice who shall then designate a panel of attorneys from the IAD to handle the case.

In practice, the role of the Department of Justice (DOJ) is not limited to filing and handling the case in court. If it deems necessary, the DOJ may also request the foreign state to submit additional supporting documents particular to Philippine procedures. This is done to make sure that only those requests that comply with both treaty and domestic requirements are processed. For example, we usually request for certified copies of the affidavit of witnesses and do not merely rely on the affidavit of the prosecuting attorney which merely synthesizes the statements of the witnesses. Relying solely on the affidavit of the prosecuting attorney may be dangerous because it would be considered already a double hearsay under

Philippine laws.

Once all the supporting documents are in order, the State Counsel will prepare the extradition petition which is then filed with a Regional Trial Court. The judge may then issue a warrant of arrest if in the court's opinion the immediate arrest and temporary detention of the accused will best serve the ends of justice. It has been the practice of the IAD to request for the arrest of an accused upon the filing of an extradition petition/application.

Under Section 20, provisional arrest can be granted but the period of detention is only twenty (20) days. The law also contains a provision for the appointment of a *counsel de oficio* if on the date set for the hearing the accused does not have a legal counsel.

In addition to PD No. 1069, the Philippine Rules of Court, although not a law, apply in extradition cases but only insofar as practicable and when not inconsistent with the summary nature of the proceedings.

On the issue of the degree of evidence required, under PD No. 1069, what the petitioner must establish is a *prima facie* case. The standard generally used in treaties is probable cause. An issue arises on which standard is higher. Under Philippine jurisdiction there is some distinction between the two but it is a thin line that is often blurred. It would appear however, that probable cause is a higher standard.

Decisions of the Regional Trial Courts are appealable to the Court of Appeals, and may also be raised by certiorari to the Supreme Court.

**B. Crimes Covered by Treaty**

For crimes covered by treaty, the Philippines adopts both the listing approach - where specific crimes are enumerated, and the dual criminality, or what I would call the conduct approach, where what is important is the underlying conduct of an accused.

To satisfy dual criminality, the name by which the crime is described in the two countries need not be the same, nor should the scope of liability for the crimes be similar. As to the period when dual criminality must exist, it may be worth noting that in the recent case of *Regina vs. Bartle and the Commissioner of Police*, more commonly known as the Pinochet extradition appeal case, the House of Lords opined that dual criminality must exist at the time of the commission of the act and not at the time of the request.

The listing approach is adopted in the extradition treaties with Hong Kong, Indonesia, and Thailand. While those treaties with Australia, Canada, the Republic of Korea, Micronesia, Switzerland, and the United States of America adopt the dual criminality approach.

**C. Jurisprudence on Extradition**

To my mind, there is only one (1) case decided by the Philippine Supreme Court regarding extradition. This is the case of *Wright vs. Court of Appeals*. This case involved the extradition of an Australian, Mr. Paul Wright, back to Australia to face charges of obtaining property by deception. The case is significant because our Supreme Court, in upholding the conclusion of the Honorable Court of Appeals, held that the RP-Australia Extradition Treaty is neither a piece of criminal legislation nor a criminal procedure. The Honorable Supreme Court stated that extradition "merely provides for

the extradition of persons wanted for prosecution of an offense or a crime ..." The decision states in categorical terms that extradition is not a criminal procedure in the Philippines. Consequently, all the strict safeguard measures attendant in a criminal case are not readily applicable in extradition.

It is accurate to state that extradition is not a criminal procedure. The purpose of an extradition hearing is not to determine the guilt of the accused - that is the role of the court where the primary case is pending - but merely to determine whether there is probable cause to believe that the accused committed the offenses charged in the requesting country. As such, the extradition court is not the venue to raise defenses against the offense/s charged.

The case also made it clear that the provisions of an extradition treaty which make it applicable to offenses committed prior to its entry into force are not in the nature of an *ex post facto* law.

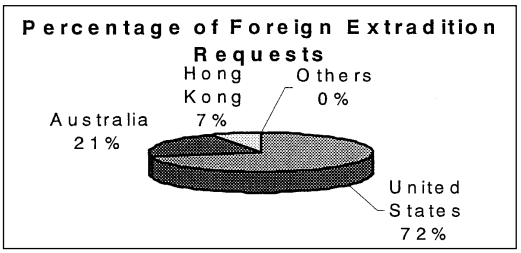
Finally, the decision holds that the phrase "wanted for prosecution" which is used in the treaties does not mean that there is a criminal case pending against the accused in the requesting State. This requirement is complied with as long as there is a warrant for the arrest of the accused. In that instance the person can be said to be "wanted for prosecution". Holding otherwise, it would be very easy for an accused to render an extradition treaty ineffective by the mere fact of absconding before a case is actually filed.

**D. Breakdown of Extradition Requests**

The breakdown of the extradition requests is as follows:

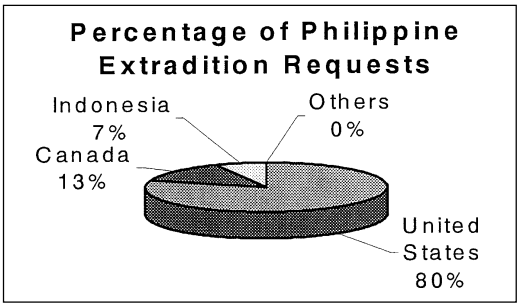
- Requesting State: USA, 10 (4 detained, 1 extradited)
- Requesting State: Australia 3 (3 extradited)
- Requesting State: Hong Kong 1 (detained)

**CHART 1**




- Requested State: USA, 12
- Requested State: Canada, 2
- Requested State; Indonesia, 1

**CHART 2**




The data show that the Philippines receives most requests from the United States. Correspondingly, the Philippines sends most of its requests to the United States. This may be due in part to the large number of Filipinos who reside in the United States. It can also be seen that out of a total of 14 foreign requests, the Philippines already extradited the subjects in four (4) of these cases. That would translate to 29% extradition rate. All the other cases are still pending.

For requests made pursuant to treaties on mutual legal assistance, the breakdown is as follows :

- Requesting State: USA, 4
- Requesting State: Australia 2

## E. Current Major Issues Encountered

Generally, most of the objections raised against extradition are constitutional ones. This is understandable considering the infancy of the proceedings in the Philippines. Grounds for arguing that extradition/extradition treaties are unconstitutional are the following:

1. It violates human rights
2. It is ex post facto
3. It is a denial of due process
4. It does not supersede domestic law and that it in effect allows extraterritorial application of foreign laws.

In ordinary cases these issues could easily be resolved. However, as this is connected with a novel matter, there is some difficulty in resolving the constitutional issues because of the dearth of jurisprudence on the subject. Additionally, extradition and mutual legal assistance are topics that are generally new to both bench and bar. We therefore, often rely on US jurisprudence, which have been of great assistance to us. Hopefully, we will soon have our own jurisprudence on the matter.

Some of the specific issues we encountered are the following:

### a. Provisional Arrest

When an alleged fugitive has been located in a foreign country it is often important to effect his arrest at once to prevent his further flight. For this purpose, most extradition laws and treaties provide that the alleged fugitive may be arrested and temporarily detained for a period of time to enable the requesting State to furnish the necessary documentation in support of its request for his extradition. It is therefore, standard for extradition treaties to contain a provision on provisional arrest. Considering the time factor, our implementing law, PD No. 1069 allows a request for provisional arrest to be sent either through diplomatic channels or by post or telegraph. Through practice this has evolved to include requests sent through fax. This is not without problems. In a couple of cases, the accused has questioned the validity of requests that are sent through fax arguing that there is no guarantee that fax copies are certified copies of the original. Basically, the argument hinges on the issue of authentication and certification. It is the position of the IAD that if the law allows telegraph, which are often brief statements then with more reason should fax copies, which are reproductions of the original, be allowed.

Also under PD No. 1069, the period for detention under a provisional arrest pending the receipt of the extradition request is twenty (20) days. The treaties however, provide generally from 45 to 60 days detention. There is a case now pending before our Supreme Court on the issue of whether later treaties are deemed to have amended the period so provided under the domestic statute. It is the position of the IAD that, where there is a conflict, a later treaty prevails over an earlier enacted statute. This is so because under Philippine jurisprudence, a treaty once ratified is on equal footing with a domestic law.

### b. Issue of Bail

An issue that arises once an accused has been provisionally arrested is the question of bail. Individual's interest in pre-hearing liberty has been recognized under the principle of due process and consequently, have been denied only in limited circumstances. Moreover, in the Philippines, the right to bail is enshrined in our constitution.

It has been commented that in extradition cases, the individual interest in pre-hearing liberty is arguably even stronger than in domestic cases, because in addition to the imprisonment, there is also present the transportation of the individual to another jurisdiction. Despite this interest, most extradition treaties are silent on the provision of bail. In the Harvard Research in International Law, Draft Convention on Extradition, the issue of the right to bail was deliberately left out. At that time it seemed best to "leave to the municipal law of each State to determine whether enlargement upon bail is a safe means of detention under any circumstances, and, if so, the circumstances which shall justify such action."

In the cases pending now in various courts in the Philippines, the IAD puts forward the argument that the Constitutional Right to Bail is not an absolute right. This argument hinges on the principle that as a general rule the constitutional right to bail is available only in criminal proceedings committed against the state. This is supported by the text of Section 13, Article Ⅲ, of the 1987 Constitution which states that:

> All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of Habeas Corpus is suspended. Excessive bail shall not be required. (underscoring supplied)

Since, extradition is not a criminal proceeding, bail as a matter of right does not exist, if at best, it may exist only as a matter of discretion. Or to put in differently, in extradition proceedings, there is a presumption against bail.

The absence of a right to bail does not mean that the accused would be left unprotected. It has been noted that in those situations where the right to bail does not exist, emphasis has been given to the right to speedy trial. It would appear that this counterbalancing of rights would reduce whatever harshness may exist by the absence of a right to bail. It is notable that both in the Philippine Extradition Law and the extradition treaties entered into by the Philippines there are no provisions on bail. What the Philippine Extradition Law provides is that the extradition proceedings are summary in nature.

However, as lawyers, we always have an alternative argument. Assuming that the courts have the authority to grant bail in extradition proceedings even in the absence of specific provision in PD 1069 and the RP-US Extradition Treaty, this power must be exercised only for the most special of circumstances. In Philippine jurisprudence there are examples of special circumstances; that is: to prolong detention under a protracted trial with no indication of early termination; or health reasons necessitating special hospitalization.

We are also arguing that if bail exists as a matter of discretion, the showing of a reasonable risk of flight is sufficient ground for denying bail. In the Philippine setting, this argument is novel since the practice is that the risk of flight is not a ground for denial, the remedy being to merely increase the amount of bail. The reason for the presumption against bail in extradition proceedings is one that carries international repercussions for the requested state. As enunciated in the case of Wright vs. Henkel:

> the demanding government, when it has done all that the treaty and the

> law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might deem impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

Unlike in ordinary domestic cases wherein the damage caused by an accused who absconds is contained within the domestic plane, in extradition, releasing an extraditee on bail, which provides an opportunity to abscond, puts at risk the interest of the government to comply with international obligations. This is a very real danger. We have a case wherein a foreigner out on bail had fled to the Philippines.

There is still no definitive Philippine jurisprudence on this issue as all the cases regarding bail in extradition are pending in different courts.

**c. Politically Motivated**

I understand that in the United States the determination of whether a crime is of a political nature rests with the courts, while the question of the political motivation of the country requesting extradition is to be made by the executive branch. In the Philippines there is still no clear jurisprudence on this matter although there is a case pending in court which may indirectly address this issue. In that case the person sought to be extradited requested the IAD for copies of the request and supporting documents. The IAD refused him access on the ground that it was still processing the request and that at that stage there is still no right of access, and at any rate he will be furnished all the documents once the petition for extradition is filed in court. The stand of the subject person was that he had a right of access to the documents at anytime in order that he would be able to show before the executive authorities that the request was politically motivated. The issue therefore, appears to be whether the government is duty bound to notify a person at the soonest possible time, even prior to filing a petition in court, that his extradition is sought. One danger we see in this is that this would give such person an opportunity to flee since the executive authorities at this stage do not yet have access to any judicial safeguards that would prevent flight.

I noticed that the tenor of the provisions on politically motivated requests/political offenses are similar to that which is used in International Refugee Law, particularly the 1951 Convention Relating to the Status of Refugees, and the 1967 Protocol relating to the Status of Refugees, to which the Philippines acceded to in July 22, 1981. Consequently, the issue of political motivated requests should be understood in the context that it is used in International Refugee law, as referring to an ordinary criminal offence applied in politically suspicious circumstances .

**d. Extradition of Nationals**

Philippine law allows the extradition of its nationals subject to the usual exceptions as contained in the relevant treaties. Out of the four cases wherein extradition was granted, one of them was a Filipino.

**F. MLAT**

Unlike in extradition, mutual legal assistance in the Philippines does not have any implementing laws for the treaties. Through practice we have considered both treaties to be self-executory and therefore, even in the absence of any local law, these treaties have been enforced. MLAT are

used in order to aid government prosecutors in gathering evidence located overseas even at the investigatory stage. In a way this would substitute for letters rogatory.

At present, most requests for legal assistance involve having to examine bank records. Legally, this is a problem because the Philippines has a strict bank secrecy law. This is particularly true of foreign currency deposits. It may be argued that the treaties supersede the bank secrecy deposit law as the treaties came at a much later time. However, in the treaties there is no express repeal made and therefore, counter-arguments are made that there is no repeal or amendment on the bank secrecy law.

We have a theory, following the case of *Salvacion vs. Central Bank of the Philippines*, that the bank secrecy laws do not protect "illegitimate" deposits or fraudulent investments. As the Solicitor General argued:

> It is evident from the above [Whereas clauses] that the Offshore Banking System and the Foreign Currency Deposit System were designed to draw deposits from foreign *lenders* and *investors* (Vide second Whereas of PD No. 1034; third Whereas of PD No. 1035). It is these deposits that are induced by the two laws and given protection and incentives by them.
>
> Obviously, the foreign currency deposit made by a transient or a tourist is not the kind of deposit encouraged by PD Nos. 1034 and 1035 and given incentives and protection by said laws because such depositor stays only for a few days in the country and, therefore, will maintain his deposit in the bank only for a short time.

The reason for the protection was to increase our links with foreign lenders and to facilitate the flow of desired investments into the Philippines. Therefore, if the funds or the accounts can be identified by an outside source as not being used for legitimate purposes, then the bank secrecy laws do not apply.

At any rate, once a request for legal assistance is received, the IAD files an application in court with a prayer to examine the documents requested, and to freeze the target accounts. We have been fortunate that the banks we sought to gather evidence and freeze accounts from were cooperative, and immediately complied with the court orders. To date, we have recovered approximately thirteen million pesos (P 13,000,000.00) from laundered drug money. Probably, it will be easier to target laundered drug money as we could then use the 1988 Convention of Psychotropic Substances also as a legal basis as it has provisions on mutual legal assistance and on extradition.

We are cautious in the implementation of MLATs as we are walking a tight rope because of the absence of any definitive jurisprudence. Slowly, however, we are gathering materials and formulating possible arguments against the bank secrecy laws.

Regrettably however, and maybe due to lack of adequate information and resources, the Philippines has not taken advantage of the MLATs. As the data shows, the requests have been one sided, with the Philippines being the requested State.

## III. INFORMAL PROCEDURES: COOPERATION WITH JAPAN

As mentioned earlier, we have had a number of requests from Japan for assistance in gathering testimonial evidence, and sometimes object evidence as well. We have also in a number of instances deported Japanese nationals who fled to the Philippines in the hope of avoiding prosecution in Japan.

There are no hard and fast rules governing our cooperation with Japan. While the requests are normally coursed through the appropriate diplomatic channels, it is not unusual for an advance copy to be sent directly to my office so that by the time we receive the official request, the documents requested or person sought is already available or in custody.

To better illustrate the workings of this "informal procedure" I would like to narrate a few actual examples.

**ACTUAL CASES A.**

On January 18, 1993, defendants Kosumi Yoshimi and Pablito Franco Barlis conspired with William Gallardo Bueno and Joemarie Baldemero Chua, and with murderous intent, knocked down Kosumi Shozaburo, defendant Kosumi Yoshimi's father (87 years old) on his back, pushed beddings against his face, tightened an electrical cord around his neck and stabbed Shozaburo in the neck with a sharp blade thereby causing Shozaburo to die from excessive bleeding due to punctured wounds in his neck at the victim's residence at Nagoya-shi, Japan. Furthermore, the defendants sprinkled kerosene from the heater found in the living room over the bedding etc., ignited the kerosene with a lighter one of them was carrying and allowed the fire to spread through a Japanese foot warmer (Kotatsu) to the house, thereby causing the entire house to be burned down.

The applicable provisions of law violated were

a) Article 199, Penal Code of Japan, which states that:
   A person who kills other person (s) shall be liable to death or imprisonment with labor for life or imprisonment with labor for a minimum period of three years

b) Article 108:
   A person who sets fire to and burns an architectural structure used as a residence or inhabited by other person(s) steam train, electric train, ship or more shall be liable to death penalty or imprisonment with labor for life or imprisonment with forced labor for a minimum period of five years.

c) Article 60:
   Two or more persons who act jointly in the commission of a crime are all principals.

In February 1994, the Japanese Police requested the Philippine National Police through the International Criminal Police Organization (ICPO) to interrogate Joemarie Baldemero Chua an accomplice who had fled to the Philippines. During the course of the trial proceedings, accomplice William Gallardo Bueno's testimony at Nagoya District Court conflicted with Joemarie's statement taken by an investigator of the Criminal Investigation Unit of the Philippine National Police on the following crucial matters :

1. The time when the conspiracy to commit murder and arson was formed;
2. The details of the conspiracy;

3. The person(s) among the three Filipino accomplices including Joemarie, who actually murdered Shozaburo by winding and tightening an electrical cord around his neck and stabbing Shozaburo in the neck with a sharp blade.
4. The person who sprinkled kerosene from a heater set fire to the house and so on.

Due to the above-mentioned discrepancies, it was difficult to determine whose statement was true. Therefore, it became necessary to request a Public Prosecutor in the Philippines to interrogate Joemarie again, in the presence of a Japanese Public Prosecutor, about the particulars and circumstances of the conspiracy to commit murder and arson including the roles of the three Filipino accomplices, the reward and the details of the actual execution of above-mentioned crimes.

On February 5, 1996, Mr. Hirosi Shimizu Chief Prosecutor of the Nagoya District Public Prosecutors Office of Japan wrote a letter to the judicial authorities of the Republic of the Philippines requesting for assistance in criminal investigation for the criminal cases of Murder and Arson to Inhabited Structure against Mr. Kosumi Yoshimi and Pablito Franco Barlis, which were all under trial procedure at Nagoya District Court.

A note verbale, no. 88-96, was issued by the Embassy of Japan in Manila to the Department of Foreign Affairs requesting the cooperation of the authorities of the Philippine Government in the said investigation. Philippine Department of Foreign Affairs endorsed all documents to the Department of Justice. On March 25, 1996, then Secretary of Justice Teofisto T. Guingona Jr., issued a Department Order designating this representation to assist the Japanese Public Prosecutor in Iloilo City on March 26 to 28, 1996 in interviewing one Joemarie Baldemero Chua in relation to the said criminal cases.

Immediately, we all proceeded to Iloilo City and I personally conducted clarificatory questioning on the person of Joemarie Baldemero Chua. He was assisted by a lawyer from the Public Attorney's Office. Joemarie Chua voluntarily and freely narrated the incident that happened on January 18, 1993. The Japanese Public Prosecutor and his assistant went back to Japan with the sworn statement of Joemarie Chua.

Kosumi Yoshimi was sentenced to life imprisonment for Murder and Arson to Inhabited Structure at Nagoya District Court on November 11, 1997 and his Koso-appeal was dismissed at Nagoya High Court on November 19, 1998. His Jokoku-appeal is pending at the Supreme Court. Pablito Franco Barlis was sentenced to imprisonment with labour of thirteen years for Murder and Arson to Inhabited Structure at Nagoya District Court on February 26, 1998 which judgment has now become final. William Gallardo Bueno was sentenced to imprisonment with labour of fifteen years for Murder and Arson to Inhabited Structure at Nagoya District Court on May 11, 1995 which judgment has now become final.

**ACTUAL CASES B.**

On January 12, 1990, the Osaka Maritime Police and the Osaka Customs Police arrested Akira Fujita in Manila who had been wanted for purchasing and shipping handguns from the Philippines in connection with the smuggling of 40 handguns by a Yamaguchi-gumi (Yakuza) syndicate member from the Philippines. Police investigation revealed that Fujita conspired with one Hironori Takenouchi, of lzumi City, a Yakuza member. Fujita

allegedly purchased 40 handguns and 800 rounds of ammunition with one million and several hundred thousand yen he received from Takenouchi and concealed the guns and ammunition inside the furniture he shipped to Japan. Fujita was subsequently convicted and was sentenced to seven years imprisonment on July 19, 1990.

On October 8, 1997, Interpol Tokyo informed Interpol Manila that Akira Fujita departed from Japan on the Pakistan Airlines flight bound for Manila on October 7, 1997. An official of the Japanese Embassy in Manila requested this representation for assistance with the information on the whereabouts of Fujita.

I immediately referred the case of Fujita to the Chief of the Intelligence Division of the Bureau of Immigration, and two days later, or on October 9, 1997, at about 6:30 PM of the same date, Fujita was arrested by Immigration agents. After one week, he was deported back to Japan.

**ACTUAL CASES C.**

On March 8, 1999, Mr. Norio Ishibe, the Chief Prosecutor of the Akita District Public Prosecutors' Office requested the judicial authorities of the Republic of the Philippines for assistance in a criminal investigation. The facts of the case are as follows:

Defendants Akihito Ishiyama was a postmaster of Tokiwa Post Office in Akita, Japan. He handled and was in charge of handling cash at the Tokiwa Post Office as part of his work responsibilities. At around 6:00 P.M., October 23, 1998, the defendant appropriated cash in the amount of 32,305,500 yen from Tokiwa Post Office for his own use.

> The applicable provisions of law violated :
> Penal Code of Japan
> Article 253
> A person who wrongfully appropriates another property which has come into his possession in the course of business shall be punished with imprisonment with labor for not more than 10 years.
> Article 235
> A person who steals the property of another commits the crime of larceny and shall be punished with imprisonment with labor for not more than 10 years.

Defendant Ishiyama stated before an investigator that he left Japan for the Philippines with cash totaling about 33,000,000 yen and gave 970,000 yen to Lody's sister, Mina, and left 30,000,000 yen with Sunny Laxa, the common-law husband of Mina.

In order to confirm the defendant' s statement and to ascertain how the money he got was spent, one Japanese Public Prosecutor and an assistant were dispatched to conduct interviews of witnesses. This representation was designated by the Chief State Prosecutor of the Philippines to assist them. With this designation, this representation together with the Japanese Public Prosecutor and his assistant found the witnesses in one of the provinces. They voluntarily and freely gave their respective sworn statements.

Akihito Ishiyama was sentenced to imprisonment with labour of four years and six months for embezzlement, larceny and fraud by the Akita District Court on September 1, 1999 which judgment has now become final.

**ACTUAL CASES D.**

On September 1, 1998, Mr. Hideo Iida, the Chief Public Prosecutor of the Osaka District Public Prosecutors' Office wrote a letter to the Judicial authorities of the Republic of the Philippines requesting for

assistance in criminal cases of Abandonment of Corpse and Violation of the Firearms and Swords Control Law against Chow On Park who intended to abandon the body of one Haruo Nishikawa murdered by Ho Ji Chong alias Hiroshi Matsuda by shooting, and placed the corpse into the trunk of the victim's passenger car parked in the parking lot on the first floor of Dainichi Building at Kadoma-shi, Osaka at around 6:00 PM on November 28, 1997 and drove that car to the parking lot of Hoshigaoka Kosei Nenkin Hospital located at Hirakata-shi, Osaka and left the body there.

The defendant received about 30 million Japanese yen in cash as a reward for the criminal act from the accomplice Ho Ji Chong alias Hiroshi Matsuda on November 28, 1997. The defendant's wife, Marucilla Park Ruby Cristina alias Ruby Arai, entered the Philippines with the said cash on December 6, 1997 upon defendant's order. Said Marucilla asked her cousin Bernardo Marilou y Rivera to keep ¥5,480,000 in the safe-deposit box at Westmont Bank and ¥19,000,000 in a safe-deposit box at China Banking Corporation. Since the defendant got the said money in reward for the criminal act of this case, the money had to be seized and confiscated as evidence.

The applicable provisions of law violated :
Penal Code of Japan
Article 190 and Article 60
Abandonment of Corpse

Article 31-3 paragraph 1 and Article 3 paragraph 1 of the Firearms and Swords Control Law and Article 60 of the Penal Code shall be applied to the offense described above as a violation of the Firearms and Swords Control Law.

Japanese Public Prosecutor Haruhiko Fujimoto and his assistant were dispatched to Manila. This representation was designated by the Chief State Prosecutor to assist them. I was able to persuade Ruby Marcilla Arai to turn over the money kept in the safe deposit box of China Bank Corporation. She personally handed to me ¥24,480,000. I delivered the said amount to the Department of Foreign Affairs (DFA). The DFA turned over the money to the officials of the Japanese Embassy in Manila who turned over the said amount to the Osaka District Public Prosecutors Office.

Chow On Park alias Haruhiko Arai was sentenced to imprisonment with labour to two years for Abandonment of Corpse and violation of the Firearms and Swords Control Law as well as the confiscation of 24,480,000 yen and a hand gun at Osaka District Court on April 30, 1999, and his Koso-appeal was dismissed on November 4, 1999. His Jokoku-appeal is pending at the Supreme Court.

It may be worth noting that the average time it took us to comply with requests for assistance is about one (1) week. The absence of any procedure in these cases helped reduce bureaucratic red tape and thereby, cut down on the time element. Also, it appears that most witnesses were willing to cooperate once it was explained to them that only their testimony would be needed and that they would not be extradited or charged. Furthermore, after explaining to potential witnesses or accessories that only the proceeds of the crimes would be confiscated but no charges will be brought against them, they willingly gave up the proceeds.

It is important therefore, that those involved in legal assistance be able to meet potential witnesses in order to be able to allay their fears. Once this initial fear was

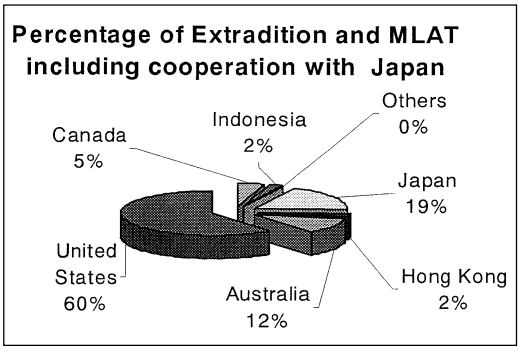
properly addressed, the witnesses became cooperative.

On the aspect of "surrender", the procedure used was basically deportation. The legal justifications for deportation would be their illegal entry, i.e. usually through falsified documents; or that they were previously blacklisted and therefore, even if they were able to enter, they are still legally subject to deportation when found.

Probably, this cooperation setup with the Japanese government works because of the peculiarities of the Japanese legal system whereby affidavits executed overseas are admissible as evidence. But what these cases show is that even outside a formal framework, where two governments are willing to share resources and expertise, and have developed close working relations, real feasible solutions can occur.

It will be noticed that the Philippines does not have any extradition or mutual legal assistance treaty with Japan. This however, has not stopped us from cooperating with Japan in the effort to enforce criminal law. If we factor the number of cases we cooperated with Japan (both for legal assistance, and for deportation) the statistics would be as follows:

**CHART 3**




## IV. CONCLUSION

Extradition and Mutual Legal Assistance in the Philippines is still at the infancy stage. There is little local jurisprudence or writings on the subject. This may be a reason why we still use informal approaches.

We still have a long way to go. Being a developing country we are still way behind. However, this will give us the unique opportunity to develop the law and blaze new trails. Often, we are mere players in a field that has been set by our forebears, but here, as we play we make the rules. Very few are given this opportunity.

We are fortunate that we have seminars such as this one, whereby government officials are exposed to the experiences of different countries. We can benefit from knowing the laws and legal systems that work, and can adopt the same to fit our own country's legal peculiarities as we develop the law. More important, fora such as these help foster lasting friendships among those who will one day be involved in extradition and legal assistance. In my personal experience, my friendship with UNAFEI Director Kitada, has been a positive factor in Philippine-Japanese cooperation. Let us then use these opportunities to work for more effective and lasting solutions to the problems facing us. It is precisely here where we can mutually benefit by sharing our resources, ideas and expertise and thereby contribute to world peace and harmony. And may the product of the work we do here contribute to a better generation in the future with less crime and more prosperity and justice.

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- *De la Rama vs. People's Court*, 77 Phil 461 {1946}.
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# CONTEMPORARY PROBLEMS OF EXTRADITION: HUMAN RIGHTS, GROUNDS FOR REFUSAL AND THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

*Michael Plachta**

## I. EXAMINATION OF HUMAN RIGHTS IN THE CONTEXT OF EXTRADITION

The growth and expansion of the human rights concept have inevitably led it to cover the vast area of international cooperation in criminal matters whose most renowned form, extradition, has been for centuries dominated by considerations and concerns deeply rooted in state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc. Human rights have been granted protection only in so far as that would correspond with these stated priorities. The human rights movement with its unequivocal emphasis on their protection as such, has changed that perspective.

This development coincided with the tendency towards strengthening the position of individuals through the recognition of their personality in international law, albeit in a very limited scope and yet still contested by some authorities, and acknowledgment that they should have their say in international matters involving their interests. Stipulations of recent multilateral conventions regarding the rule of speciality illustrate this tendency. One example can be found in the 1995 Convention on Simplified Extradition Procedure, elaborated within the European Union.[1]

Since the mutual relationship between extradition and human rights has raised a lot of interest[2] recently which, in turn, produced a number of publications on this subject,[3] this paper offers some general comments which may become a "food for thought" and a basis for further discussion.

Mutual relationships between human rights and extradition are often characterized as a "tension" between protective and cooperative functions of this form of international legal assistance. Generally, this problem can be approached and viewed from three perspectives. First, these relationships can be described in the

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1 *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union*, 10 March 1995, O.J. 30.03.1995, No. C.78/1.

2 In the eighties, the problem of extradition and human rights was discussed by the Institute of International Law at its Dijon session which adopted a resolution, following a report submitted by K. Doehring, 60 Yearbook of the Institute of International Law 211, 306 (1983). In the nineties, this problem was a subject of a conference held by the International Association of Penal Law in Rio de Janeiro in 1994, 41 Revue internationale de droit pénal 67 (1995). In the most recent years, the International Law Association has devoted much of its attention to this problem, producing three reports elaborated by Ch. Van den Wyngaert and J. Dugard and adopting three resolutions. See Report of the 66th Conference of the International Law Association (Buenos Aires, 1994), 4, 142; Report of the 67th Conference of the International Law Association (Helsinki, 1996), 15, 214; Report of the 68th Conference of the International Law Association (Taipei, 1998).

"rule-exception" terms. Second, it could be argued that only one side sets the goal or the objective while the other has to yield by making necessary concessions. One of the issues that would have to be resolved here refers to the starting point in this analysis: should it be the needs of law enforcement or the protection of human rights? Third, and the most appropriate, the coexistence between the interests, needs and values involved in the international cooperation in criminal matters, on the one hand, and the protection of human rights, on the other, should be sought and based on a reasonable compromise which would avoid the "critical point" beyond which human rights become unbalanced and, therefore, constitute an obstacle to an effective cooperation in the fight against crime.

Reaching a compromise is a difficult task, for it requires recognizing, taking into due consideration, assessing and weighing many various factors and components. The process of balancing all the interests involved should be carried out on two levels: first, human rights *versus* needs of law enforcement and international cooperation; second, human rights of the requested person (fugitive) *versus* human rights of others (and society).

In addressing and evaluating the relevancy of human rights in the context of extradition, two criteria could be employed. One would emphasize the nature of a specific right as vital or necessary. This approach requires sorting out all human rights in order to "designate" the appropriate ones. It is here that the concept of "fundamental human rights" has emerged and is gaining a widespread acceptance. This concept is based on the understanding that out of all human rights a group has been recognized as non-derogable in all universal and regional instruments and, therefore, has to be granted protection the specificity of extradition notwithstanding. An obvious disadvantage of applying this criterion is that it offers a very restrictive scope of human rights which are covered under the notion of "fundamental human rights". At present, there are only four such rights which are regarded as non-derogable: the right to life; the prohibition on torture and other forms of cruel, inhuman and degrading treatment and punishment; the prohibition on slavery; and freedom from ex *post facto* or retroactive criminal laws.

The second criterion points to the scope, degree and severity of the violation rather than the nature of the right. By emphasizing the threshold, this approach indicates that controlling is not the right as such but the way it was, or likely to be, violated. There seems to be a general agreement that this threshold must be sufficiently high to justify the refusal of the extradition request. Such standard was

[3] See e.g. J. Dugard, Ch. Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AJIL 1 87 (1998); Ch. Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandoras Box?*, 39 International and Comparative Law Quarterly 757 (1990); O. Lagodny, S. Reisner, *Extradition Treaties, Human Rights and "Emergency Brake"-Judgments: A comparative European Survey*, 2 Finnish Yearbook of International Law 237 (1994); O. Lagodny, W. Schomburg, *International Cooperation in Criminal Matters and Rights of the Individual from a German Perspective*, 2 European Journal of Crime, Criminal Law and Criminal Justice 379 (1994); A.H.J. Swart, *Human Rights and the Abolition of Traditional Principles*, in: A. Eser, O. Lagodny (eds.) *Principles and Procedures for a new Transnational Criminal Law* 505 (1992); G. Gilbert, *Aspects of Extradition Law* 79-93 (1991); C.H.W. Gane, *Human Rights and International Cooperation in Criminal Matters*, in: P.J. Cullen and W.C. Gilmore (eds) *Crime Sans Frontieres* 186 (1998).

elaborated by the European Court of Human Rights in its seminal judgment in the *Soering* case where the Court held that the United Kingdom, acting as the requested state, must have not extradited a fugitive "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".[4]

The "real risk" test was followed by the UN Human Rights Committee in Ng v. Canada.[5] Also the national courts seem to be going along the similar lines when they ground the refusal of extradition on the notions of a "blatant unjust", "violation to the principles of fundamental justice", "shock to the conscious of Jurists", offensive to the conceptions of "ordre public", "gross violation", "flagrant breach", etc. An appropriate scrutiny is called for by the recommendations adopted by both the International Law Association at its Taipei Conference in 1998 and the participants of the Oxford Conference on International Cooperation in Criminal Matters, convened by the Commonwealth Secretariat and held in 1998. Both documents propose that extradition be refused if there is substantial evidence that if a fugitive were returned there is a real risk of a serious violation of human rights. The "real risk" test is, therefore, qualified and combined with the requirement of a "serious violation".

Besides "fundamental human rights", there is another category which raises a difficult question: are the fair trial rights relevant and applicable to extradition, and if so, which ones and to what extent? This problem should be discussed in two separate contexts as it generates different issues when the application of the right to fair trial is analyzed from the point of view of the requesting state and the requested state. In the context of the former, two situations (or scenarios) must be distinguished depending on whether there has been an actual violation of fair trial rights in the proceedings that have led to the conviction and sentence, or there is merely a potential for such a violation. The following flowchart represent an attempt to point out and illustrate major problems involved in the process of examination as well its methodology.

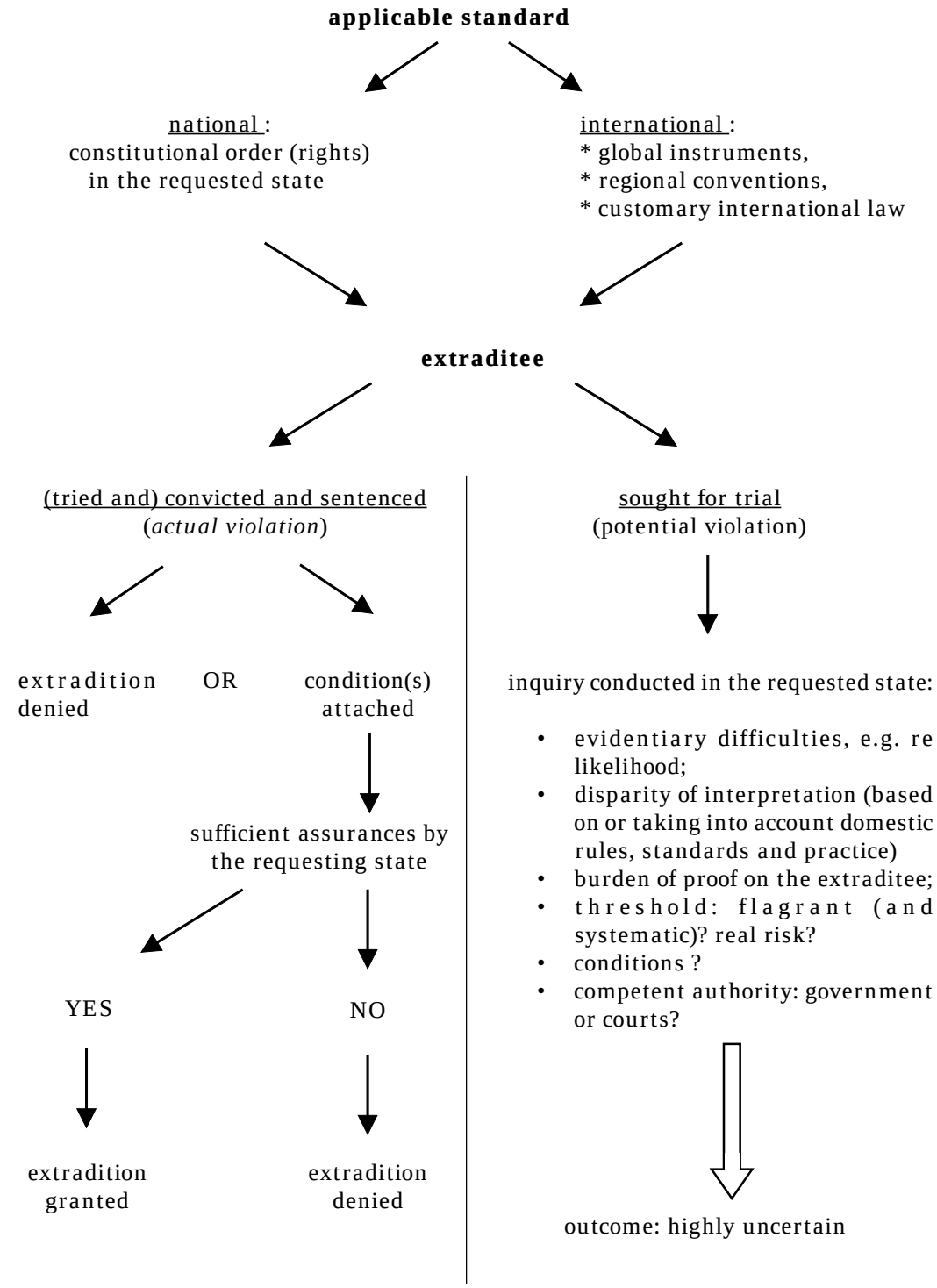
FLOWCHART

The questions raised in the context of the requested state are different. They relate to the nature of the extradition proceedings carried out by the competent authorities of that country. The disparity of domestic legislation and state practice is striking. The solutions adopted in various parts of the world range from purely administrative procedure, judicial or mixed procedures, criminal proceedings to the procedure *sui generis*. Given such a disparity it does not seem advisable or feasible to propose a uniform procedural and organizational system that would be acceptable to all states. Instead, efforts should concentrate the elaboration of a list of "core fair trial rights" that must be guaranteed to the *extraditurus* by the requested state no matter which procedural system it has adopted. Although the International Covenant of Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6) might offer a good "starting point" an examination should not stop there: the rights embodied therein have to be tailored to the specific nature and needs of extradition.

[4] Soering v. United Kingdom, E.C.H.R. Series A, No. 161 (1989); 28 ILM 1063 (1989).

[5] Ng v. Canada, H.R.C., Communication No. 469/ 1991, 5 November 1993, 98 ILR 479 (1994).

**Flowchart:** *examination of a fair trial objection to extradition*



## II. GROUNDS FOR REFUSAL OF EXTRADITION: A CRUCIAL AND YET CONTENTIOUS ISSUE

### A. Criteria for the classification of grounds for refusal of extradition

**1. Binding Force:**

A. Mandatory,
B. Optional,

**2. Source:**

A. International law:
  1. treaty and convention stipulations,
  2. customary norms,
B. Domestic legislation:
  1. constitution,
  2. statutes,
C. Jurisprudence of the judiciary:
  1. domestic courts,
  2. international tribunals,

**3. Subject Matter:**

A. Nature of the offence:
  1. political,
  2. military,
  3. fiscal,

B. Requested person:1
  1. nationality,
  2. immunity (under):
    a) international law,
    b) doctrine of state,
    c) domestic statutory or case law,
  3. refugee status,
  4. humanitarian considerations,
  5. discriminatory treatment,

C. Obstacles to prosecution or punishment:
  1. substantive:
    a) principle of legality (*nullum crimen sine lege*, non-retroactivity),
    b) statute of limitation (prescription),
    c) other,
  2. procedural
    a) *ad hoc* or extraordinary tribunal,
    b) trial (judgment) *in absentia*,
    c) *res judicata* (*ne bis in idem*, double jeopardy):
      (i) final judgment in the requested state,
      (ii) final judgment in the third state,
    d) *lis pendens* (pending prosecution),
    e) declining to prosecute,
    f) amnesty and pardon,
    g) lapse of time (unreasonable delay),
    h) immunity under:
      (i) international law,
      (ii) doctrine of state,
      (iii) domestic statutory or case law,
    i) other,

[Note: obstacles under "a" and "b"— extradition-specific, obstacles under "c" through "i" — general.]

D. Punishment:
  1. death penalty,
  2. other sanctions,

E. Jurisdiction:
  1. concurrent jurisdiction,
  2. extraterritorial jurisdiction,

F. Human rights:
  1. prohibition of cruel, inhuman or degrading treatment or punishment,
  2. other:
    a) direct application of international instruments,
    b) indirect application - *via* domestic legislation,

**4. State's Interests Involved:**

A. Rooted predominantly in the requested state:
   1. nature of the offence,
   2. requested person,
   3. *lis pendens* (pending prosecution),
   4. declining to prosecute,
   5. amnesty and pardon,
   6. immunity under domestic statutory or case law,

B. Rooted predominantly in the requesting state:
   1. *ad hoc* or extraordinary tribunal,
   2. trial (judgment) *in absentia*,
   3. punishment,
   4. human rights,
   5. lapse of time (unreasonable delay),

C. "Neutral" (or any of the states involved):
   1. statute of limitation (lapse of time),
   2. *res judicata* (*ne bis in idem*, double jeopardy),
   3. immunity under:
      a) international law,
      b) doctrine of state,

**5. Rationale :**

A. Mistrust among states and the lack of confidence in one another's justice system,
B. Political considerations,
C. International undertakings of a state,
D. Protection of human rights,
E. Sovereignty,
F. Tradition,
G. Notions of fundamental justice and fairness embodied in the domestic legal system,
H. Discrepancies between legal systems.

**B. Comments on the grounds for refusal of extradition**

Admittedly, both the size of the catalogue and the length of the list of the grounds for refusal of extradition are impressive. Not only have they grown significantly over the last hundred years but, more importantly, still have a considerable potential for further growth (refer to section III of the Chart: C.1 .c, C.2.g, D.2, F.2). This tendency worries many government officials and people directly involved in the extradition process who fear that, if upheld and strengthened, the continuous expansion of defences, exceptions, exemptions, and exclusions may, in the long run, seriously undermine this mechanism and frustrate efforts aimed at bringing fugitive offenders to justice. Besides, the grounds for refusal are a "double dulled sword": while it is rightly argued that their existence is a *conditio sine qua non* for each and every form of international cooperation in criminal matters because they give an assurance to the states involved that their vital interests will be respected, at the same time, it must not be ignored that frequent or, viewed from the perspective of the requesting state, unwarranted resort to refusal may have adverse effects on international relationships. Undeniably, the longer the list of grounds for refusal, the weaker the extradition may become.

To prevent the deterioration of the mechanism of international rendition of offenders and to strengthen its effectiveness, one of the available options is to improve this process itself through the optimalization of its treaty and statutory regulation. One way to proceed would be to downsize the catalogue of grounds for refusal, or at least, to stop or slow down the process of its further growth. However, since the possibilities for improvement in this way are naturally limited the resources have to be sought elsewhere. This is where the principle *aut dedere aut judicare* comes into play as an alternative solution. The properly designed mechanism for "*judicare*" may become an effective countermeasure that will, to a

certain degree, compensate for the expansionist approach towards the grounds for refusal.

It must be made clear that the chart does not cover all situations where the request submitted for extradition is denied. It is limited to the categories which, by way of tradition and linguistic convention falls under the "grounds for refusal".[6] In addition to them, there are all the conditions and requirements pertaining, e.g. to the definition of an extraditable offence, which, if not met or fulfilled, also result in the request being denied.

The first criterion used in the classification, the binding force of a particular ground for refusal, is of utmost importance for the states involved in the extradition process, especially for the requested state. In countries where the courts have been empowered to inquire into the legal admissibility of the surrender, the contents of the catalogue for mandatory refusal is the most valuable guide, for it delimits the scope of situations where the court will issue a negative opinion regarding extradition. It is then only logical that the executive organ authorized to make the final decision is bound by this kind of court's ruling which says that the extradition is not (legally) allowed.

However, this classification presents little value and help for those whose efforts focus on modifying and improving the treaty and domestic regulations in this area. Shuffling the grounds for refusal between the two catalogues back and forth is not very promising, nor does it bear any valuable fruits, especially in terms of common acceptance of a particular solution; therefore, we have to reach deeper into the problem and examine the nature and meaning of each ground, irrespective of legal consequences it produces.

To carry out this task successfully, we have to start from elaborating distinct categories that could accommodate all of the existing (and potential) grounds for refusal. Section III of the Chart raises a number of problems, questions and doubts. For example, are all these categories fully disjunctive, i.e. do they not overlap? Should "human rights" be, as they appear in the chart, placed separately, or — as some authors maintain[7] — no separate-category is needed as they can, and should, be accommodated in other categories, most notably under the "obstacles to prosecution and punishment"? Why are some categories left open (C.1.c C.2.g, D.2, F.2)? Two reasons: first, the author did not have an opportunity to conduct a full-scale comparative analysis of all international treaties and domestic legislation, otherwise chances are that these blank spaces would have been filled in; second, the author sees them as a "potential for growth".

Section IV represents yet another attempt aimed at examining and analyzing this problem. If we consider extradition as a process based on bipartite relationship between the requesting state and the requested state, then the question arises concerning the side on which the obstacle to which the particular ground for refusal relates is located. When the requested state refuses to surrender the person sought, does it so because the real problem lies within its borders and its own jurisdiction, or, maybe, the invoked ground for refusal points to the requesting state? While seeking answers to these questions, the distinction was made between grounds

[6] A.H.J. Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, 23 Netherlands Yearbook of Int'l L. 175 (1992).

[7] See e.g. M. Ch. Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 496 (3rd ed. 1996).

for refusal which are based on circumstances for which the responsibility are borne predominantly by the requested state and those which fall predominantly within the realm of the requesting state. The third category was also distinguished as there are a few instances where the ground for refusal, as defined in general and abstract terms, is "neutral" in the sense that it there is not an inseparable link between the underlying obstacle and only one of the states concerned. An analysis carried out along these lines should generate further arguments in favor of mandatory or optional nature of some grounds for refusal. It should also contribute to the elaboration of a more efficient mechanism based on the principle *aut dedere aut judicare* by indicating where it may be reasonable to expect from the requested state to proceed with "*judicare*" when its authorities deny the extradition request.

An attempt was also made to get to the heart (or roots) of the problem by asking the question: WHY does the requested state deny extradition when its executive authority invokes this or that ground for refusal? This question has nothing to do with the problem of legal and factual justification of the negative decision in any given case. Nor does it imply any sort of assessment or evaluation of the propriety of the refusal. Rather, it suggests that it may be more instructive to move this inquiry further back to see why that particular ground for refusal was included in a treaty or domestic law in the first place. Therefore, when it comes to the application of that legislative enactment or treaty stipulation in practice the rationale behind it in many cases either is not fully realized, or lies somewhere in the "shadow". It is this author's strong belief that only by bringing the true motives and reasons to light can we challenge them, and only by challenging them, better still removing some of them, can we make any meaningful changes within the framework of the grounds for refusal possible, thereby modernizing and re-shaping the existing system of international extradition. The proposed inquiry does not necessarily have to confirm the *status quo*; instead, it may indicate either that the rationale, although well founded and valid in the past (e.g. in te 19th century), has out-lived, and is not sustainable today as completely incompatible with the evolved international relationships, or, conversely, that the need has emerged calling for new exceptions and exemptions.

Section V of the Chart summarizes the results of the preliminary investigation into this problem. The classification based upon the rationale behind the grounds for refusal is far from perfect, and the resulting picture is not as clear-cut as in the case of other criteria. Several factors have contributed to this. First, the grounds for refusal usually are not analyzed from this perspective; its examination is carried out in legal terms, and is limited to treaty and/ or legislative regulation. Second, the real significance and role of the rationale for refusal are downplayed, if not completely ignored, by the governments and their authorities involved in the process of extradition. Third, since no inquiry into these matters is being made as irrelevant to the rendition it is not an easy task to "translate" each and every category of rationale into one (and only one) ground for refusal, and *vice versa*.

The mutual relationships between the grounds for refusal and the rationale are somewhat "muddled" due to the fact that there does nor exist a logical link between them, the result being that the categories of rationale do not have their specific counterparts within the grounds for refusal which could be easily identified and established by way of necessity. The

opposite is true: a ground for refusal may be based on more than just one rationale and, based on one category of rationale, more than one ground for refusal may be invoked. For example, the political offence exception (section III, A.1) may be rooted in at least the following categories of rationale (section V): mistrust among states and the lack of confidence in one another's justice system (A), political considerations (B), and notions of fundamental justice and fairness embodied in the domestic legal system (of the requested state)(G). Similarly, the mistrust and the lack of confidence (section V, A) may result in refusing extradition on one of the many grounds (section III), such as nationality of the requested person (B.1), discriminatory treatment (B.5), some procedural obstacles to prosecution (C.2), and the protection of human rights (F).

It is submitted that this rather unexplored territory should become a subject of further and more detailed studies. A report from such an analysis, especially when drafted in a comprehensible language and formulated in practical terms, may constitute a much more effective tool that could be used to convince both the government officials and the politicians, most notably the members of the national parliaments, that, possibly, the time has come to change their approach to and their way of thinking about extradition and the grounds for refusal thereof. Most importantly, such a study should contribute to the common understanding that the so-called traditional grounds for refusal, based on the rationale which itself is rooted in the "old days'" concepts and notions, may be preserved and accommodated insofar as they are compatible with the modern approach to extradition.

## III. THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

### A. Present status of the principle *aut dedere aut judicare* under international law

If the possibility of an offender's impunity is recognized as the most serious danger caused by the practice of non-extradition of nationals, then from the point of view of criminal justice it should not matter in the territory of which state he is prosecuted and punished as long as the justice is done. This was the underlying idea of the maxim *aut dedere aut punire* as it was originally formulated by Hugo Grotius in 1625:

> "The state in which he who has been found guilty dwells ought to do one of two things. When appealed to, it should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal. This latter course is rendition, a procedure more frequently mentioned in historical narratives (...) All these examples nevertheless must be interpreted in the sense that a people or king is not absolutely bound to surrender a culprit, but, as we have said, either to surrender or to punish him".[8]

When interpreting these words today, it must be remembered that the scope of application of this maxim was limited to "crimes which in some way affect human society" as a whole, and which in contemporary language can be identified, to a certain extent, as international crimes.[9] Moreover, the rule presupposed an existence of a "triggering mechanism",

[8] H. GROTIUS, DE IURE BELLI AC PACIS, Book II, Chapter XXI, para. III-1,2, IV-1,3;*transl.* F. W. Kelsy (ed.), THE CLASSICS OF INTERNATIONAL LAW 526-529 (1925).

or "appeal", which today would be translated as an extradition request. Finally, while in the original wording an alternative to *dedere* was *punire*, it cannot be held that Grotius really meant exacting punishment without first establishing guilt.[10] The accused fugitive may turn out to be innocent. Thus, the most that can rightly be demanded from the requested state in lieu of extradition is to put him on trial, or prosecute him (*judicare*).[11]

Under the aegis of this maxim, instead of it being a last resort if extradition is refused on the grounds of nationality of the fugitive offender, prosecution and trial in the requested state would be elevated to a more pro-active status in international criminal law. At present, the prevailing view hold that extradition, or some variant thereof, is the exclusive way of bringing fugitive offenders to justice. It is accepted that the principal aim must be to prosecute the fugitive and that international public order requires international cooperation and mutual assistance, then a more positive acceptance of trial in the extraditee's home country is necessary. To determine the effectiveness of the system based on *aut dedere aut judicare* with respect to the extradition of nationals, the following three problems have to be addressed: first, the status and scope of application of this principle under international law; second, the hierarchy among the options embodied in this rule, provided that the requested state has a choice; third, practical difficulties in exercising *judicare*.

Despite persuasive arguments advanced by leading authorities in international criminal law to the contrary,[12] the principle *aut dedere aut judicare* has not gained the status of a norm of international customary law. In order to qualify as a customary rule of international law binding on the international community and to satisfy the requirements of Article 38, paragraph 1 (b) of the Statute of the International Court of Justice concerning sources of international law, two elements have to be proved: (1) a material element manifested by a general practice, and (2) *opinio juris sive necessitatis*, that is the conviction that the practice is "accepted as law". However, contemporary practice furnishes far from consistent evidence of the actual existence of a general obligation to extradite or prosecute with respect to international offences.[13] The most it can be said about *aut dedere aut judicare* is that it constitutes a "general principle of international law",[14]

[9] Generally, two methods have been proposed to define an international crime. One is to use a concise and general definition, the other is to employ a set of criteria ("penal characteristics") for identifying such offences. The former is advocated by E.M. Wise, *International Crimes and Domestic Criminal Law*, 38 DePaul L. R. 923-933 (1989), while the latter is supported by M. C. BASSIOUNI, A DRAFT INTERNATIONAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT 21-65 (1987).

[10] In fact, GROTIUS himself seems to have been cognizant of the principle of fundamental justice, for he added the following note: "For surrender should be preceded by judicial investigation; it is not fitting 'to give up those who have not been tried'". GROTIUS, *supra* note 144. Book II, Chapter XXI, para. IV(1).

[11] M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5(3rd ed. 1996): G. Guillaume, *Terrorisme et droit international*, 215 Hague Rec. 287, 371 (1989-III): "the true option which is open to states is necessarily *aut dedere aut prosequi*".

[12] M.C. BASSIOUNI & E.M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 22-26, 5 1 -53 (1996).

[13] J.J. LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW 190 (1990).

[14] BASSIOUNI, EXTRADITION, *supra* note 7, at 9.

although some authors go further by arguing that it belongs to the *jus cogens* norms.[15] The latter proposal would mean that this principle is an overriding or "peremptory" norm which cannot be set aside by treaty. The consequences of such a proposal might be quite dramatic: if every state under any circumstances had this alternative obligation (either to surrender or to prosecute) treaty stipulations notwithstanding, that would invalidate both international instruments providing exclusively for "*dedere*" and treaties providing for the extradition of nationals.[16]

In his dissenting opinion in the *Lockerbie* case, Judge Weeramantry in his characterization of this principle as a "rule of customary international law" seems to have equated it with the proposition that a state is entitled "to try its own citizens in the absence of an extradition treaty".[17] In this sense, the principle is "an important facet of a State's sovereignty over its nationals".[18] However, the proposition that there is no duty, absent treaty, to extradite nationals whom a state is prepared to try itself can be relevant only in the face of an obligation to surrender. But, as the practice of contemporary international law demonstrates, there is no duty to extradite in the absence of treaty.[19]

The uncertainties surrounding the status of this principle under international law directly affect both the scope of its application and its effectiveness. Practically, the alternative obligation of states either to surrender or to prosecute exists insofar as has been expressly spelled out in an international instrument or, only exceptionally, in the domestic legislation. It has been a standard policy to have the principle *aut dedere aut judicare* included in general extradition treaties, either bilateral or multilateral,[20] especially with respect to the refusal of surrender of nationals.[21] In addition, such a stipulation appears in almost all conventions aimed at defining international offences as well as securing international cooperation in the suppression of such acts.[22] It is feared that an unrestricted, or absolute, principle *aut dedere aut judicare* might imply that all states are obliged to prosecute any offence committed in any place by any person found in their territory, unless an offender is extradited.[23]

All the difficulties concerning the scope of application and the contents of an obligation envisaged by various formulas in which this principle appears notwithstanding, the validity of the system based on *aut dedere aut judicare* has been confirmed not only in numerous international instruments, but also in domestic jurisprudence in many states.

[15] BASSIOUNI & WISE, *supra* note 12 , at 25.

[16] E.M. Wise, *The Obligation to Extradite or Prosecute*, 27 Israel L. R. 268, 280 (1993).

[17] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992. I. C. J. Reports 1992*, 50 at 51.

[18] *Ibid*., at 69.

[19] H. WHEATON, ELEMENTS OF INTENIRATIONAL LAW 188 (5th ed. 1916).

[20] I. SHEARER, E.XTRADITION IN INTERNATIONAL LAW 116-117, 124-125 ( 1971).

[21] See the formula recommended for inclusion in bilateral treaties which appears in Article 4 of the United Nations Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A Res/45/116 (1991).

[22] For a list of such conventions, see BASSIOUNI & WISE, *supra* note 12, at 75-287.

[23] See e.g. N. Keijzer, *Aut dedere aut judicare*, in NETHERLANDS REPORTS TO THE XIth INTERNATIONAL CONGRESS OF COMPARATIVE LAW 412 (H.U. JESSURUN D'OLIVEIRA ed. 1982).

For example, the Austrian Supreme Court held that where the extradition of a national has been refused "the right to prosecute must, as a general rule and without prejudice to the continued existence of the right to prosecute of the State in whose territory the offence has been committed, be offered to the home State of the offender".[24] On some occasions, the principle *aut dedere aut judicare* is relied upon to demonstrate that it works "both ways". In the Pesachovitz case where an extradition request was submitted to the Israeli authorities under the European Convention on Extradition, the court assuming that Israel is obligated to do one of two things: either to extradite Pesachovitz or to punish him[25] decided to order the extradition the fugitive on the grounds that prosecution was precluded under Israeli law.[26]

### B. Hierarchy of obligations or a matter of discretion?

One of the most intriguing and delicate questions in the context of the principle *aut dedere aut judicare* is whether both alternative obligations embodied in this maxim are placed on equal footing. If that was the case, then the requested state, that is, the *forum deprehensionis*, would have a completely free choice as to which alternative it will elect to pursue. On the other hand, it could be argued that *dedere* and *judicare* are not really equal alternatives to the effect that the duty to extradite should be regarded as primary, with the duty to prosecute arising only if the domestic legislation contains a bar to extradition. A corollary of the latter proposition is a view that the state *loci delicti commissi* has the primary responsibility to prosecute and punish the offender, whereas the prosecuting authorities and courts of the custody state, i.e. the country in whose territory an offender has been found, have only a secondary duty. Such a conclusion could be based on several treaty stipulations and domestic laws making *judicare* conditional on: (1) the submission of the extradition request; (2) the refusal of surrender, and (3) the requesting state's specific demand that the case be submitted to the competent authorities of the requested state for the purpose of prosecution.

The rationale for an *a priori* hierarchy of the alternative obligations embodied in the principle *aut dedere aut judicare* with extradition being preferred over prosecution, seems to be grounded in three considerations: first, the state where the offence was committed, has the primary interest in seeing the offender brought to justice; second, in most cases, mainly due to the evidentiary issues, the *forum delicti commissi* is the most convenient place for investigation, prosecution and trial; third, there may be cases where prosecution in the *forum deprehensionis* will appear to be ineffective or unfair. Although it is argued that "whenever possible, extradition should take priority, at least in cases in which the requesting state asserts territorial jurisdiction over the offence",[27] the formula containing the principle *aut dedere aut judicare* that can be found in almost all multilateral conventions prescribing international crimes as extradition treaties, is formulated in such language that does not seem to accord any special priority to extradition. A purely theoretical

[24] *Service of Summons in Criminal Proceedings (Austria Case)*, 21 February 1961, 38 I.L.R. 133, Ö.J.Z. 95 (1961) at 134

[25] European Convention on Extradition, 1957, E.T.S. No. 24, Article 6.

[26] Criminal Appeal 308/75, Supreme Court Decision of 21 March 1977, Israeli Law Reports (1977), vol. 31, II, p.449. See also C. Shachor-Landau, Extra-territorial Penal Jurisdiction and Extradition, 29 Int'l & Comp. L. Quarterly 274-279 (1980).

[27] BASSIOUNl & WISE, *supra* note 12, at 57.

attempt based on an interpretative distinction between "alternative" or "disjunctive" and "co-existent" obligation to prosecute or extradite does not seem to be successful in this context either.[28]

Thus, it is submitted that, absent treaty stipulation to the contrary, the present status of this principle does not warrant an assertion that *judicare* is "subordinated" to *dedere* to the effect that the requested state's first obligation is to deliver up the offender sought, and that it is allowed to institute its own criminal proceedings only after it has showed that extradition is prohibited on legal grounds.[29] However, one qualification has to be put on this proposition: efforts must be made to solve a problem that comes up in a situation where an offender holds the citizenship of the requested state, while at the same time, the investigation, prosecution and trial in the territory of that state appears to be not merely inefficient, but simply impossible for practical, evidentiary and political reasons.

In the henceforth international practice, the only attempt to effectively end the ensuing stalemate (and the total frustration to criminal justice as well) has been made in a concerted action by the governments of the United States and the United Kingdom in the *Lockerbie* case. Frustrated by Libya's refusal to extradite its two nationals suspected of having blown up Pan Am Flight 103 over Lockerbie, Scotland, and determined not to submit all the evidence that have been gathered as a result of the three-year extensive investigation, the United States and the United Kingdom (joined by France) presented the case before the UN Security Council and the General Assembly.[30] In January and March 1992, the Security Council adopted two resolutions in this matter: the first was urging Libya to respond fully and effectively to the requests[31] of the United States, the United Kingdom and France,[32] while the second imposed economic sanctions on Libya.[33] Libya brought the case before the International Court of Justice seeking provisional measures to prevent the United States or the United Kingdom from taking any action to coerce Libya into handing over the two suspects or otherwise prejudice the rights claimed by that country.[34] On April 14, 1992, the Court declined (by a vote of 11 to 5) to indicate

[28] BASSIOUNl, EXTRADITION, *supra* note 7, at 10.

[29] In essence, this was the position Libya held in the *Lockerbie* case. See e.g. Letter dated 18 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, *reprinted* in 31 I.L.M. 728-729 (1992).

[30] See UN Doc. A/46/825; S/23306; 31 Dec.1991. 75

[31] The requests consisted of the following demands: to

- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation." See , U.N. Doc. S/23308 (1991).

[32] S.C. Res. 731 (1992) 21 Jan. 1992.

[33] S.C. Res. 748 (1992) 31 March 1992. In 1993, the Security Council adopted a further resolution extending previously imposed sanctions on Libya. See S.C. Res. 883 (1993) 11 Nov. 1993.

[34] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), provisional Measures, Order of 14 April 1992*, I.C.J. Reports 1992 at 114. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)), provisional Measures, Order of 14 April 1992*, I.C.J. Reports 1992 at 3.

the provisional measures thereby confirming the validity and binding force of Resolution 748.[35] The following three interpretations of the of the U.N. Security Council involvement in the *Lockerbie* case are possible:

(a) Libya failed to demonstrate convincingly that it is capable of fulfilling the obligation which it claimed under the Montreal Convention, that is, to make a good faith effort to prosecute the crimes itself.
(b) The resolutions signal a substantial loss of faith in the Montreal Convention's authority and efficacy in bringing the offenders to justice.
(c) The Security Council offered an extraordinary remedy which, while upholding the existing extradition system, at the same time, supplemented it with the recourse to that organ for intervention in exceptional situations, especially where the traditional treaty model proves unworkable.

The latter seems to be the most persuasive. The Court's ruling means that under Article 103 of the U.N. Charter the Resolution 748 takes precedence over any other international agreement, including the Montreal Convention. In one sense, the genuine choice between extradition and prosecution has been brought down to an alternative: extradite or extradite. On the other hand, given the U.N. Charter's Chapter VII exceptions to Article 2(7), the security Council has the authority to determine whether a situation is so severe that it constitutes a threat to the peace, a breach of the peace, or an act of aggression. Therefore, the Security Council has the authority to take up such matters. In order to reconcile both the Security Council resolutions and the decision of the International Court of Justice in the Lockerbie case, it was suggested that the international extradition law has not been violated or altered because in exceptional cases, "the law merely operates at a different level through the internationally sanctioned ways and means of the United Nations".[36]

It is doubtful, however, whether *Lockerbie* could and should be viewed as the most appropriate mechanism designed to end the stand-off in other similar cases. Rather, it is submitted that in seeking the solution, a rigid approach should be abandoned in favour of a more flexible one which, in turn, should be based on modifications to *judicare*, so that it can constitute a viable option which, more importantly, would be acceptable also to the requesting state. Such a system, called "substituting prosecution", was proposed by the Institute of International Law in 1981:

1. "The system of substituting prosecution should be strengthened and amplified.
2. The system of substituting prosecution should be completed by stipulating detailed methods of legal assistance.
3. When governments acts in substituting prosecution, the interested governments-and in particular the government of the territory in which the offence was committed-should be entitled to send observers to the trial unless serious grounds, in particular with respect to the preservation of State security, would justify their non-admittance.
4. In cases of substituting prosecution, if the tribunal concerned determines that

[35] *Ibidem* para. 39.

[36] C.C. Joyner & W.P. Rothbaum, *Libya and the Aerial Incident at Lockerbie; What Lessons for International Extradition Law?*, 14 Mich. J. Int'l L. 222, 256 (1993).

the accused is guilty, an appropriate penalty should be imposed, similar to that which would be applied to nationals in a cognate case".[37]

Instead of having a fixed hierarchy of alternative obligations embodied in the principle *aut dedere aut judicare*, it is more desirable to base the decision whether to prosecute, or not to prosecute in the requested country and surrender the person sought, on mutual consultations between the appropriate authorities of the states involved. There may be cases in which it will be preferable for an accused to be tried in a foreign state rather than in his home country. The problem becomes even more delicate where an offence was committed in the territory of both the requesting and the requested states, both of which are, therefore, entitled to claim jurisdiction based on the principle of territoriality. A general and rigid rule of refusing to extradite nationals in such cases would reduce the effectiveness of extradition as a major tool in combatting transnational crime. To allow the particular circumstances of each case being given due consideration in the process of making a decision regarding the principle *aut dedere aut judicare*, one of the Canadian courts suggested that the following factors should be included:

- where was the impact of the offence felt or likely to have been felt;
- which jurisdiction has the greatest interest in prosecuting the offence;
- which police force played the major role in the development of the case;
- which jurisdiction has laid charges;
- which jurisdiction has the most comprehensive case;
- which jurisdiction is ready to proceed to trial;
- where is the evidence located;
- whether the evidence is mobile;
- the number of accused involved and whether they can be gathered together in one place for trial;
- in what jurisdiction were most of the acts in furtherance of the crime committed;
- the nationality and residence of the accused;
- the severity of the sentence the accused is likely to receive in each jurisdiction.[38]

Moreover, due regard should be also given to the question as to whether prosecution would be equally effective in the requested state, given its domestic law and international instruments for the cooperation in criminal matters.[39]

No matter how persuasive and reasonable such recommendations are, they seem to be much easier to follow by the common law countries. It is more than doubtful whether they can become equally attractive and compelling for countries whose domestic legislation has traditionally opposed the idea of extradition of their own nationals. For example, narcotic offences involving Colombians have often been committed in Colombia but the effects of these crimes have been felt in the United States and have constituted crimes under United States law. In such instances the United States may have the greater interest in the prosecution of the crime, especially if the crime did not cause much injury in Colombia. However, it is rather unlikely that this argument is powerful enough to convince the Colombian government and

[37] Resolution adopted by the 12th Commission at its session in Dijon. See 59 Institute of Int'l L. Yearbook 176-177 (1981).

[38] Swystun v. United States of America (1988), 40 C.C.C. (3d) 222, 227-228 (Man. Q.B.).

[39] United States v. Cotroni (1989), 48 C.C.C. (3d) 193, 194 (S.C.C.).

legislature that they should lift the ban on extradition of nationals.

### C. Practicality of prosecution in lieu of extradition

Practical problems in fulfilling its obligation under *judicare* do not necessarily have its source in the lack of good will on the part of the requested state. Rather, the impunity of an offender and the frustration of justice should be viewed as a result of their inability to break with the rule of non-extradition of nationals, on the one hand, and to overcome difficulties inherently involved in prosecuting and punishing offenders for crimes committed abroad, on the other hand. Admittedly, in some instances the requested country may be unwilling or unable, because of legal or other reasons, to prosecute its national whose extradition has been requested by another state. Moreover, even when the requested state institutes criminal proceedings, problems may arise. At the least, the refusal to extradite may strain relations between the requesting and the requested states. Furthermore, the former may believe, and the facts may in some instances support this belief, that the latter will inadequately pursue the prosecution, with the result that the accused will be acquitted or will receive a too lenient sentence.[40] In 1938, the United States Secretary of State Hull complained that "such punishment as has been inflicted upon nationals of other countries in the own lands for offenses committed in the United States has, in general, been much lighter than the offenses committed appeared to warrant, and in many cases no punishiment as all has been inflicted and the trials held have resulted in acquittals"[41]. Much earlier, Lewis held that since a government has not substantial interest in punishing crimes committed in the territory of another state, prosecution and trial in such cases will be conducted in a "careless, indifferent and intermittent manner".[42]

Even where the competent authorities of the requested state have instituted criminal proceedings against the national of that country whose extradition was refused, frequently they cannot to carry them out because to pursue their investigation they need evidence which, obviously, can only be found in the territory of the requesting state where the offence was committed. The latter, however, is either not in a position or unwilling to put such evidence at the disposal of the requested state. Worse still, the problem may not always be satisfactorily corrected through the use of mutual (legal) assistance for it may be precluded on the grounds of *ordre public*, especially where the state seeking such an assistance exercises its own inherent criminal jurisdiction over an offence.[43] Even to the extent that seeking evidence abroad is legally possible, that operation creates three types of problems: first, bringing witnesses from distant countries imposes a heavy financial burden on both them and the accused, not to mention serious practical difficulties; second, some evidence are not available at all, such as the viewing of the scene of the

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[40] See M.P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1 Duke J. Comp. & Int'l L. 135, 151-152 (1991).

[41] Secretary of State Hull to Robert W. Rafuse, letter, April 20, 1938, MS. Department of State, file 200.00/893. See 6 WHITEMAN, DIGEST 883. Hull admitted that there may be "the tendency, perhaps natural, to refrain from punishing a fellow countryman for an offense he committed in a distant country and as to which there may be in the minds of his fellow countrymen who pass in judgment upon him a feeling that there may have been extenuating circumstances". *Id*.

[42] LEWIS, FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 30 (1859).

[43] See P. Wilkitzki, *Inclusion of the principle "aut dedere aut judicare" in the European Convention on Extradition*, in EUROPEAN COMMITTEE ON CRIME PROBLEMS PC-OC 9 (1987).

crime; third, if the evidence were taken abroad the court might have troubles to use them at the trial due to possible procedural restrictions on such evidence. To overcome the latter impediment, the law of evidence would have to be substantially changed, especially in the common law countries.[44] However, the possibility of such a "revamping" has met with skepticism [45] Generally, government declarations and treaty (convention) stipulations notwithstanding, prosecution of nationals in lieu of extradition is viewed as a sort of "second class" criminal proceedings,[46] although this was not always the case.[47]

## IV. APPROACHES TO THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

| | | "**Traditional**" | | **Proposed** |
|---|---|---|---|---|
| | | *I* | *II* | |
| **Scope of Application** | *ratione criminis* (offences) | limited | unrestricted | unrestricted |
| | *ratione exceptionis* (grounds for refusal) | unrestricted | limited to one | limited |
| **Nature of the Stipulation** | | offence-related (derivative of the gravity and definition of an offence) | nationality-related | grounds-for refusal-related (logical supplement of the duty to extradite) |
| **Applicability** | | prior state's jurisdiction as a precondition | | "self-executing" |
| **Scope of "*judicare*"** | | • Prosecution<br>• Trial | | • prosecution<br>• trial<br>• enforcement of a sanction (*aut dedere aut poenam persequi*) |
| **Ne bis in idem** | | no | | yes |

[44] For example, in Israel it was proposed that evidence lawfully taken abroad should be accepted as *prima facie* evidence and that the court should not allow the examination of the witnesses for the prosecution, unless the accused had requested that such an examination be held and had established to the satisfaction of the court that it was required in order to prevent a denial of justice. See T. Meron, *Non-extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 Is. L. R. 215, 221 (1978).

[45] See e.g. M.D. Gouldman, *Extradition from Israel*, Michigan Yearbook of Int'l Leg. Studies 173, 198 (1983); *Cotroni*, *supra* note 39, at 224.

[46] See E.A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N. Y. U. J. Int'l. L. & Politics. 813, 856 (1993).

**A. Traditional approaches**

Generally, from the available legislative pronouncements and treaty stipulations, two basic approaches to the principle *aut dedere aut judicare* can be discerned: one is based on an inseparable link between duty to prosecute and the offence as defined in the international instrument while the other relates this duty to the grounds for refusal: only one has been singled out, i.e. the nationality of the requested person, as a relevant and appropriate basis for this obligation. The former can be called the "offence-oriented approach" and the latter- the "offender-oriented approach".

**1. "Offence-oriented approach"**

The traditional, "offence-oriented", approach has been widely applied in multilateral conventions prescribing international crimes. Typically, the solution adopted in those instruments consists of two provisions which are of interest here. The chronologically first one either confers a jurisdictional competence on the signatory states to prosecute the respective offence or obliges them to establish such a jurisdiction. The jurisdictional clause is usually followed by a separate stipulation on the principle *aut dedere aut judicare*.

As regards national court jurisdiction, the former provision can be seen as a corollary of the former which establishes the obligation of a state party to extradite or prosecute an individual who is allegedly responsible for the crime defined in the convention. In this regard, the jurisdictional "component" of this system is intended to secure the possibility for the custodial state to fulfil its obligation to extradite or prosecute by opting for the second alternative with respect to such an individual. This alternative for the custodial state consists of the prosecution of that individual by its competent national authorities in a national court. It is meaningful only to the extent that the courts of the custodial State have the necessary jurisdiction over the crimes set out in the particular instrument to enable that state to opt for the prosecution alternative. Failing such jurisdiction, the custodial state would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial state does not have an absolute obligation to grant a request for extradition. Moreover, the alleged offender would elude prosecution in such a situation if the custodial state did not receive any request for extradition which would seriously undermine the fundamental purpose of the *aut dedere aut judicare* principle, namely, to ensure the effective prosecution and punishment of offenders by providing for the residual jurisdiction of the custodial state.

One of the new examples of the "offence-oriented approach" to this principle is represented by the DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, adopted by the International Law Commission at its 48th session in 1996[48].

[47] In 1910, the British Foreign Office advised the United States' Ambassador that "according to the experience of His Majesty's Government, the result of the prosecution of foreign subjects by their own Governments in lieu of surrender to this country has been, generally speaking satisfactory". Foreign Office to Mr. Whitelaw Reid, 25 July 1910, F.O. 372/ 262.

[48] Report of the International Law Commission on the work of its 48th session, U.N. G.A. Official Records 51st session (A/51/10) at 14. See also T.L.H. McCormack, G.J. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 Crim. L. Forum 1 (1994).

*Article 9 - Obligation to extradite or prosecute*

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 1 8, 19 or 20 is found shall extradite or prosecute that individual.

The crimes defined in the Draft Code are: aggression (Article 16), genocide (Article 17), crimes against humanity (Article 18), crimes against United nations and associated personnel (Article 19), and war crimes (Article 20).

The obligation to prosecute or extradite is imposed on the custodial state in whose territory an alleged offender is present. The custodial state has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that state or by another state which indicates that it is willing to prosecute the case by requesting extradition. The custodial state is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial state has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction.

The custodial state has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial state may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other state or by prosecuting that individual in its national courts. Article 9 does not give priority to either alternative course of action. The custodial state has discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to try the alleged offender in its national courts. The custodial state may fulfil its obligation under the first alternative by granting a request received for extradition and thereby transferring to the requesting state the responsibility for the prosecution of the case. However, the custodial state is not required to grant such a request if it prefers to entrust its own authorities with the prosecution of the case.

This kind of approach to the principle *aut dedere aut judicare* has been adopted in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft[49] and several international instruments patterned after it. The Convention does not subordinate the duty to prosecute to the requested state's rules of competence regarding the extraterritorial jurisdiction. The obligation to prosecute arises whenever the extradition is not granted:

*Article 7*

"The Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of the that state".

This mechanism for the implementation of the rule *aut dedere aut judicare* has been replicated in several subsequent

[49] Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 860 U.N.T.S. 105.

conventions for the suppression of international offences concluded under the auspices of the United Nations or its specialized agencies[50]. The following two variants of the Hague Convention formula can be discerned:

a) the alternative obligation to submit a case for prosecution is subject, where a foreigner is involved, to whether a state has elected to authorize the exercise of extraterritorial jurisdiction[51];

b) the obligation to submit a case for prosecution only arises when a request for extradition has been refused[52].

**2. "Offender-oriented approach"**

The other traditional approach the "offender-oriented approach", presupposes that the scope of application of the principle *aut dedere aut judicare* should not be limited to the most serious international crimes; instead it should encompass all extraditable offences. This approach focuses on the situation where the requested state refuses to surrender its own nationals and perceives such a case as extremely frustrating to the whole system of international extradition. To avoid the most blatant abuses whereby that state might take advantage of this exception in order to grant protection against punishment to its citizens, it is only logical to demand from that state that it institute the criminal proceedings against the requested persons and subject them to its domestic criminal justice system. In this approach, it is not the offence that matters and is decisive - it is the offender himself that is the "triggering element" for the mechanism *aut dedere aut judicare*.

Examples of this approach can be found in both multilateral conventions and bilateral treaties on extradition. The 1957 European Convention on Extradition[53] provides one of them. Its Article 6, paragraph 1 (a) confers on the contracting states a right to refuse extradition of their nationals. Consequently, paragraph 2 of this article stipulates that:

> "If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request".

Some bilateral treaties also contain provisions to the same effect. For example, Article 44(a) of the 1992 Treaty on Legal Assistance in Criminal Matters, Transfer of Sentenced Persons and Extradition[54] between Poland and Egypt has been modelled on the European Convention on

[50] By way of example, the following instruments can be mentioned: Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, 974 U.N.T.S. 177 (the Montreal Convention); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973, 1035 U.N.T.S. 167 (the New York Convention); International Convention Against the Taking of Hostages, 1979, 18 I.L.M. 1456 (1979).

[51] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 493 (1989), Article 6, paragraph 9.

[52] See e.g. the European Convention on the Suppression of Terrorism, 1977, E.T.S. No. 90, Article 7.

[53] E.T.S. No. 24. See also Explanatory Report on the European Convention on Extradition, Council of Europe 1969 at 17.

[54] The Treaty was signed on May 17, 1992, and entered into force on February 20, 1993 (DZ.U. [Journal of Laws, Polish] of 1994, No. 34, Item 129).

Extradition. Also the United Nations Model Treaty on Extradition incorporated a clause formulated along the similar lines[55].

### 3. A compromise position

A variant formula has been worked out by drafters of some international conventions which represents a compromise between the two approaches referred to before. The "middle position" takes account of differing views among states on whether the exercising criminal jurisdiction over offences committed abroad is proper, useful, and reasonable, the extradition notwithstanding. The compromise formula allows the states involved to consider and evaluate such factors.

This formula was adopted in the 1929 Convention for the Suppression of Counterfeiting Currency[56] whose drafters abandoned the rigid clause embodied in the international instruments discussed above under A, and favored a more flexible solution which confers, to a certain extent, a discretion on the requested state with respect of exercising its jurisdiction to prosecute in lieu of extradition. To accommodate both the variety of views and the discretion, two different procedures have been provided for depending on the nationality of the requested person. If that person is a national of the requested state and his status is the only ground for refusal of his surrender, that is, if there are no other obstacles to extradition, Article 8 provides that he "should be punishable" in his home country for an offence committed abroad. On the other hand, the Convention has imposed a slightly diminished burden on the requested state with respect to foreigners. They "should be punishable" for offences committed outside the borders of the requested state only if it has been established that the domestic law of that country "recognizes as a general rule the principle of prosecution of offences committed abroad" (Article 9). Furthermore, the obligation to prosecute is conditioned on two other circumstances: first, the extradition request has been submitted by another state; second, the grounds for refusal are not offence-related[57].

## B. Proposed approach

The mechanism for the implementation of the principle *aut dedere aut judicare* envisioned by the new approach can be characterized as follows:

1. The scope of application of this principle *ratione criminis* should remain unrestricted to the effect that the duty to prosecute should arise with respect to all extraditable offences.
2. The scope of application *ratione exceptionis* should be limited to certain grounds for refusal of extradition where, after a careful analysis, it is both realistic and reasonable to expect the requested state to institute and conduct criminal proceedings in the case at hand. In making this assessment, two sets off actors have to be taken into account: first, the rationale behind each ground for refusal, especially any political over-or undertones; second, the legislative enactments, most notably the constitution, in the requested state pertaining to the admissibility of the criminal prosecution.

[55] United Nations Model Treaty on Extradition, G.A. Res. 45/1 1 6, U.N. Doc. A/Res/45/1 16 (1991).

[56] International Convention for the Suppression of Counterfeiting Currency, April 20, 1929, 112 L.N.T.S. 371.

[57] *Article 9*

"The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence".

3. While the typical stipulation of this principle rooted in the traditional approach can be seen as a derivative of the gravity and the definition of an offence the new approach postulates that the rule is a logical supplement of the duty to extradite.
4. As opposed to the existing system under which the requested state's criminal jurisdiction and "*judicare*" are treated not only as two separate elements but, more importantly, as the former being a necessary precondition for the latter, the new approach suggests that stipulation of the principle *aut dedere aut judicare* itself constitute sufficient jurisdictional basis for the competent authorities of the requested state to prosecute and punish the offender. In a sense, the proposed mechanism would be similar to the system of the socalled "vicarious administration of Justice"[58] based on the "principle of representation"[59].
5. The "*judicare*" option should be interpreted in functional and not strictly legal ("legalistic") terms. Consequently, the meaning of this alternative should not be limited to two stages of the criminal process, i.e. prosecution and trial. The requested state should be allowed to fulfill its obligation under the rule *aut dedere aut judicare* by undertaking to enforce the final sentence imposed on the offender whose extradition was requested. This rule should, therefore, be supplemented by a new clause: a*ut dedere aut poenam persequi*[60].
6. Last but not least, all the efforts towards treaty and legislative regulation of the principle *aut dedere aut judicare* notwithstanding, the rule is at present an "open end concept". A crucial element is missing which would make this mechanism fully operational and, at the same time, considerably contribute to this principle being treated seriously; this is the rule *ne bis in idem* as the most logical consequence of both prosecution and trial (sentence). The inclusion of the protection against double jeopardy in this context[61] is required not only by the need to secure the effectiveness of this system but also, and more importantly, by the considerations of human rights, world public order, and the most fundamental notions of justice. As the Romans used to say: *finis coronat opus*. This "finishing touch" on the principle *aut dedere aut judicare* is overdue[62].

[58] See J. Meyer, *The Vicarious Administration of Justice; An Overlooked Basis of Jurisdiction*, 31 Harv. J. Int'l L. 108-116 (1990).

[59] The basic elements of this principle have been adopted in the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, Articles 2 and 3, E.T.S. No. 73. Se also S.Z. Feller, *Jurisdiction Over Offences with a Foreign Element*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 34-37 (BASSIOUNI & NANDA eds. 1973); D. OEHLER, INTERNATIONALES STRAFRECHT 497-518 (2nd ed. 1983).

[60] See PLACHTA, TRANSFER OF PRISONERS UNDER INTERNATIONAL INSTRUMENTS AND DOMESTIC LEGISLATION. A COMPARATIVE STUDY 191-193 (1993).

[61] Similar proposal was submitted by J.E. Schutte, *Enforcement Measures in International Criminal Law*, 52 Revue internationale de droit pénal 441-453 (1981).

[62] This author is fully aware that the proposed concept may be considered a "*teoria prematura*" as long as the mistrust persists in the relationships between states, not necessarily limited to the politically, geographically, and culturally distant ones. It is quite clear that, given the lack of confidence in the administration of justice frequently demonstrated by the states involved in the practice of extradition, the non-inclusion of the rule *ne bis in idem* in the principle *aut dedere aut judicare* is treated as an "emergency valve" which may be turned on and off depending on whether or not the requesting state is satisfied with the results of the requested state's efforts to bring an offender to justice. Also, since on the one hand, the procedures falling under "*judicare*" are governed exclusively by the domestic law of the requested state, and on the other, the striking discrepancies between the national legislation of various countries continue to exist, it is understandable why the governments are extremely unwilling to give up what might be perceived as a "final assurance" that the offender, one way or another, will eventually be punished in terms consistent with the rules and notions of justice as adopted in the country concerned. To include the rule in this system, and then to implement it, would amount to giving up hope.

# INTERNATIONAL COOPERATION IN THE DRAFT UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL CRIME

*Michael Plachta**

## I. SYSTEM OF COOPERATION

A complete system of international cooperation in criminal matters consists of the following forms:

1. extradition;
2. mutual legal assistance;
3. transfer of criminal proceedings;
4. recognition of foreign criminal judgments;
5. enforcement of foreign criminal sentences:
   (a) transfer of prisoners,
   (b) transfer of supervision of persons conditionally sentenced or conditionally released;
   (c) enforcement of other sanctions;
6. search, seizure and confiscation of proceeds of crime.

The draft Convention against Transnational Crime (hereinafter the "TOC Convention") will likely be the most comprehensive instrument of international cooperation in criminal matters as it will contain and regulate all of the above forms, except for the transfer of supervision. On the other hand, the degree of specificity of the relevant provisions varies significantly. The most general terms which are void of any measure of obligation, have been used to define the transfer of sentenced persons (Article 10 bis) . It provides that States Parties "*may consider*" entering into bilateral or multilateral agreements, either ad hoc or general, on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty, in order that they may complete their sentences there.

Similarly, Article 16 foresees merely a possibility of the transfer of criminal proceedings: States Parties shall give considerations to the possibility of transferring to one another proceedings for the criminal prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where more jurisdictions are involved, with the view to concentrating the prosecution.

Nevertheless, it should be pointed out that the TOC Convention has a chance to become the most modern instrument, for its drafters, while relying on solutions adopted in the existing multilateral conventions, make efforts to take into consideration and, wherever possible, to include new ideas, options and measures. Of particular interest are provisions on extradition and mutual legal assistance. These two forms of cooperation have been elaborated to the point that while Article 10 can be called a "mini extradition treaty", Article 14 has become a "comprehensive MLAT within the TOC Convention".

As opposed to offences covered by the Convention, the category of "offences established under the Convention" is limited to the following four offences: (i) participation in an organized criminal group as well as organizing, directing, aiding, abetting, facilitating or counselling

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the commission of serious crime involving an organized criminal group (Article 3); (ii) laundering offences (Article 4); (iii) corruption in the context of organized crime (Article 4 ter); (iv) obstruction of justice (Article 17 bis).

## II. WHAT'S NEW IN THE TOC CONVENTION?

Extradition:

- simplified extradition;
- strengthening of the principle *aut dedere aut judicare*;
- principle *aut dedere aut poenam persequi*;

Mutual legal assistance:

- extended scope of application, covering legal persons;
- mechanism of a spontaneous communication of information;
- bank secrecy - no bar to granting assistance;
- limited scope of dual criminality;
- transfer of persons in custody;
- modem techniques of transmission of requests;
- legal regime of the execution of requests;
- video-link and modern means of communication;
- rule of speciality;
- confidentiality of requests;
- political and fiscal offences;
- consultations.

## III. COMPREHENSIVE SYSTEM OF COOPERATION IN THE TOC CONVENTION

Another reason why the draft TOC Convention has a potential to "make a difference" in the international system of cooperation is its comprehensiveness. The Convention is not limited to the traditional forms of cooperation. Instead, it will include the methods, forms and measures in the following areas (levels):

I. judicial cooperation,
II. law enforcement cooperation,
III. technical cooperation and assistance.

In addition to that, the TOC Convention will address the problem of prevention and the cooperation of its signatories in this area.

The effectiveness of the new Convention as a tool in the fight against organized crime will depend to a large degree on whether the provisions on law enforcement cooperation will really enable, facilitate and encourage police and other agencies to undertake cooperative initiatives. Article 19 provides that the Convention may be considered by its Parties as the basis for mutual law enforcement cooperation in respect of any offence covered by this instrument. Moreover, whenever appropriate, its signatories should make full use of agreements or arrangements, including international (such as INTERPOL) or regional organizations (such as EUROPOL or BALTCOM), to enhance this cooperation.

One of the forms and manifestations of such cooperation are joint investigations. However, in view of the diverging opinions among delegations on the appropriateness of such "ventures", the drafters of the TOC Convention had to proceed with caution. They only managed to encourage States Parties to consider, on a reciprocal basis, concluding bilateral or multilateral agreements or understandings for this purpose; any form of obligation or even a stronger language were not acceptable.

Based on such agreements or arrangements, in cases where criminal proceedings are being carried out in one or more countries, the judicial authorities

concerned may, where necessary with police authorities, after informing the central authority established for the purpose of mutual legal assistance, act together within joint investigative bodies. In the absence of such agreements or understandings, the joint investigations may be undertaken by agreement on a case-by-case basis, In carrying out such joint operations, the states involved will have to ensure that the sovereignty of the state in whose territory the investigation takes place is fully respected.

Another area and example of law enforcement cooperation envisioned by the TOC Convention are special investigative techniques, such as controlled delivery, electronic or other forms of surveillance or undercover operations. Here, again, States Parties are encouraged to make appropriate bilateral or multilateral arrangements for using such techniques in the context of international level. Such arrangements have to comply with and be carried out in accordance with the principle of sovereign equality of states. It was agreed that decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the states concerned.

Additionally, the States Parties shall adopt effective measures to enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services as well as to cooperate with one another in conducting inquiries concerning the identity, whereabouts and activities of persons suspected of involvement in organized criminal groups, the movement of proceeds or property derived from the commission of such offences, and the movement of intrumentalities used or intended for use in the commission of such offences. For this purpose, in appropriate cases and if not contrary to domestic law, the States Parties should establish joint teams, taking into account the need to protect the security of persons and operations.

Finally, the TOC Convention provides that States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in various areas, such as collection of evidence, modern law enforcement equipment and techniques, methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology, detecting and monitoring of the methods used for the transfer, concealment or disguise of proceeds derived from such offences.

States Parties shall promote training and technical assistance that will facilitate extradition and mutual assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities or relevant agencies. States Parties may conclude bilateral or multilateral agreements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by the Convention to be effective and for the prevention and control of transnational organized crime.

States Parties shall make concrete efforts to the extent of their capacities and in coordination with international agencies to establish a special United Nations fund for technical cooperation in order to provide technical assistance to developing countries and countries with economies in

transition to assist them in meeting their needs for the implementation of the TOC Convention. States shall endeavour to make adequate and regular voluntary contributions to the fund. States Parties shall also consider, in accordance with their domestic legislation, contributing to the fund a percentage of the money or of the corresponding value of illicit assets confiscated in accordance with the provisions of the Convention.

An importance of the proposed provisions on technical cooperation and assistance cannot be overestimated. Their significance derives from the fact that one of the weakest links in the system of tools and measures to fight organized crime is the education and training at the local level. Public administrators who are aware that organized crime exists in their community, are not spending sufficient time on educating and training citizens, law enforcement officers and other members of the criminal justice system. Consequently, local persons with interest in curbing organized crime are left to their own resources in securing information about those engaged in organized crime. There are three modus for transmitting information to those concerned with organized crime control. These are: (1) education in academic institutions; (2) specialized training for law enforcement officers; and (3) greater publie cooperation. Ideally, all three of them should be developed as a harmonious system.

## IV. SHORTCOMINGS, GAPS AND RESTRICTIONS

### A. Extradition

- no provision on concurrent requests;
- no provision on the extradition of persons sentenced *in absentia;*
- rejected proposal on political and fiscal offence exceptions - according to the proposal, the offences established under the Convention would not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political offence, nor as a fiscal offence;
- rejected jurisdictional clause - it was proposed that the offences established under the Convention be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the state that have jurisdiction in accordance with the provisions adopted in the Convention;
- rejected proposal aimed at extending the scope of application of Article 10;
- provision on accessory extradition;
- rejected proposal regarding consultation between the requesting state and the requested state before the latter refuses to surrender the person sought;
- unclear scope of the principle *aut dedere aut judicare.*

### B. Mutual legal assistance

- repetition of clauses referring to domestie legal system (1egislation) as well as clauses designed to protect state sovereignty;
- lack of harmonization with some other articles of the Convention (e.g. with Article 24: *Relation with other conventions*);
- possible practical difficulties in the implementation of the Article 14 caused by the abolition of the dual criminality rule;
- unclear final version of the provision on the temporary transfer of persons in custody;
- controversies over the functions of central authority;
- traditional provision on the contents of a request for mutual legal

assistance;
- unclear final version of the provision on video link;
- extended catalogue of grounds for refusal, e.g. anti-discriminatory clause and political offence;
- unwillingness of delegations to abolish the fiscal offence exception;
- unclear final version of the provision on the disclosure of government records, documents or information, available to the general public.

## V. PROPOSALS ADOPTED AT THE XVIth CONGRESS OF AIDP

The last Congress of the Association Internationale de Droit Penal (International Association of Penal Law), which was held in September 1999 in Budapest, Hungary, was devoted to the fight against organized crime. Its Section IV debated international cooperation in this area. Below are the most pertinent resolutions which were not only adopted, but also addressed to the UN Ad Hoc Committee for the elaboration of the TOC Convention for its consideration.

### A. Concurrent jurisdiction

- Where more than one state has jurisdiction to prosecute an offender for the same offence, the choice of the forum should be made by an international pre-trail chamber. This new body should also have jurisdiction to decide in cases of transnational organized crime where two or more states have jurisdiction and the authorities of one of those states wish to settle the case by means of an out-of-court settlement.

### B. Judicial cooperation

- Dual criminality as a condition of extradition should be retained. For mutual legal assistance, it should be maintained in so far as the assistance is requested for coercive measures.
- States should adopt the "transformative interpretation method" in interpreting this requirement.
- In order to make judicial assistance effective, the collecting of evidence in the requested state should satisfy the requirements of the requesting state, as long as this is not incompatible with the fundamental principles recognized in the requested state and the basic rights of the defendants.
- Direct contact between the judicial authorities of the requesting and of the requested state is recommended.
- New technologies, such as video-links to take evidence abroad, should be encouraged.
- Where appropriate, it should be possible for judges to transport themselves to other states, not only in the pre-trial stage of proceedings, but also during trial. The practice of "travelling national courts" should be encouraged.

### C. Police cooperation

- Police cooperation should be formalized through international conventions regulating recent developments in this area, such as new communication channels (e.g. liaison officers), new investigative activities (e.g. joint investigative teams), and new technologies and techniques (e.g. international wiretapping, cross border observation by satellite).

- International proactive policing should abide by the principles of legality[1], proportionality[2] and subsidiarity[3]. Such activities should be monitored by the authorities in charge of criminal investigations at the national level of the countries the participating police officers belong to.
- Unilateral actions on the territory of another state (i.e. investigative or operational actions undertaken by police officers without authorisation of the local authorities) should be prohibited. Evidence obtained in violation of the local rules and/or without proper authorisation of the competent local authorities should be excluded only if the *lex forum* would also require the exclusion of evidence obtained in this manner in a purely domestic manner.
- When police officers operate or act in whatever capacity on foreign soil, this should take place only on the condition that the foreign officers will be under an obligation to testify in court should they be called on to give evidence. Foreign police officers should have the same obligations and privileges in proceedings before the courts in which they are acting as the police officers of that country.

1 That means, proactive techniques must be based pronouncements.

2 That means, such actions may only be undertaken and measures used if there is sufficient reason to suspect that serious and determined offences relating to organized crime will occur in the near future.

3 That means, proactive techniques may not be used if alternative means of obtaining evidence can be applied to detect and investigate such offences.

# THE LOCKERBIE AFFAIR: WHEN EXTRADITION FAILS ARE THE UNITED NATIONS' SANCTIONS A SOLUTION? (THE ROLE OF THE SECURITY COUNCIL IN THE ENFORCING OF THE RULE *AUT DEDERE AUT JUDICARE*)

*Michael Plachta**

## I. STATEMENT OF FACTS

On December 21, 1988, Pan American Flight 103 took off from London's Heathrow Airport on its transatlantic flight to John F. Kennedy Airport in New York. At 6:56 P.M. EST, at an altitude of 10,000 meters, the Maid of the Seas made its last contact with ground control. Seven minutes later, the green cross-hair at air traffic control split into five bright blips as Pan Am Flight 103 exploded in midair. Her fiery skeleton, laden with the bodies of passengers and crew, rained down on the people of Lockerbie, Scotland. Within the hour, 243 passengers, 16 crew members, and 11 townspeople were dead.

Between January 1989 and November 1991, a joint USA-Scottish team tracked down leads in fifty countries, questioned 14,000 people, and combed some 845 square miles around Lockerbie. The fruits of their search: a shard of circuit board smaller than a fingernail, a fragment of an explosive timer embedded in an article of clothing, and a few entries in a private diary. These three pieces of physical evidence led investigators to two Libyan nationals, Abbel Basset Ali al-Megrahi and Lamen Khalifa Fhimah. That country's involvement was apparently confirmed with a forensic scientist's discovery of a tiny microchip of the bomb's trigger mechanism. This "technical fingerprint" was embedded in a shirt that had come from the suitcase containing the bomb. The most significant link, however, came from two Libyan intelligence agents arrested in Senegal in 1988. At the time of their arrest, they were discovered carrying Semtex (plastic explosives) and several triggering devices. The connecting link between the Lockerbie timer and the two Libyan suspects came from Fhimah's own notebook.

Nearly three years later, the cumulative evidence led to the indictment of the two Libyan intelligence officers by a federal grand jury in Washington, D.C. The 193-count indictment accusing Fhimah and al-Megrahi with planning and carrying out the Lockerbie bombing represented the most extensive investigation ever conducted for an act of terrorism. Handed down on November 14, 1991, the indictment supplied the final piece of a multinational jigsaw puzzle that took three years to complete. On the same day, a similar indictment was handed down in the United Kingdom.

## II. LEGAL ACTION AND LIBYA'S RESPONSE

Although neither formal diplomatic relations nor a bilateral treaty existed between the United States and United Kingdom, on the one hand, and Libya - on the other, informal extradition requests were forwarded through the Belgian Embassy to Tripoli. Two weeks later, the two governments issued a joint declaration in which they demanded Libya to:

- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;

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- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation [1]."

Libya's response to these demands has evolved since November 1991, taking the following forms:

1. The first reaction was predictable: the Libyan government refused to grant extradition, asserting that such an act constituted direct interference in Libya's internal affairs. At times, Colonel Qadhafi was trying to laugh out the whole matter.
2. After a while, Libya started its own judicial investigation. The competent authorities officially instituted criminal proceedings in this case. The Libyan examining magistrate ordered the two suspects to be taken into custody.
3. Later on, Libya went even a step further by offering to admit both the British and American observers to the Libyan trial, or, in the alternative, to have the International Court of Justice determine which nation has the proper jurisdiction.
4. The Libyan government has also indicated, at various times, that it might surrender the suspects for trial in a "neutral" forum.
5. Finally, that government suggested that it would not object if the two suspects voluntarily surrender for trial in Scotland. (After consultation with Scottish counsel, the two suspects apparently decided not to surrender themselves.)

Since the domestic criminal investigation conducted by the Libyan authorities is of crucial importance in this case as the only viable alternative to extradition ("*judicare*" as opposed to "*dedere*") under the Montreal Convention of 1971, this matter warrants a closer look and a more detailed elaboration.

On November 18, 1991, the Libyan authorities issued a statement indicating that the indictment documents had been received from the United States and the United Kingdom and that, in accordance with the applicable rules, a Libyan Supreme Court Justice had already been assigned to investigate the charges. The statement also, *inter alia*, asserted that Libyan judiciary's readiness to cooperate with all legal authorities concerned in the United Kingdom and the United States.

Ten days later, the Libyan government issued a communiqué in which it was stated that the application made by the United States and the United Kingdom would be investigated by the competent Libyan authorities who would deal with it seriously and in a manner that would respect the principles of international legality, including, on the one hand, Libya's sovereign rights and, on the other, the need to ensure justice both for the accused and for the victims. In the meantime, the Libyan investigating judge took steps to request the assistance of the authorities in the United Kingdom and the United States, offering to travel to these countries in order to review the evidence and cooperate with his American and British counterparts.

Since these offers were either explicitly rejected in public (parliamentary debates) or ignored, remaining without response, two identical letter were addressed in January 1992, to the United States Secretary of States and the British Secretary of States for Foreign Affairs by their Libyan counterpart in which he

[1] Statement Issued by the Government of the United States on November 27, 1991, Regarding the Bombing of Pan Am 103, U.N. Doc. S/23308 (1991).

pointed out that Libya, the United states, and the United Kingdom were all parties to the 1971 Montreal Convention[2]. He then indicated that as soon as the charges had been made against the two accused, Libya had exercised its jurisdiction over them in accordance with Libyan national law and Article 5(2) of that Convention which obligates each contracting state to establish its jurisdiction over offences mentioned in the Convention where the alleged offender is present in its territory and it does not extradite him.

The letter went on to note that Article 5(3) of the Convention did not exclude any criminal jurisdiction exercised in accordance with national law. Recalling the stipulation adopted in Article 7 of the Convention (*aut dedere aut judicare*), the two letters indicated that Libya had already submitted the case to its judicial authorities and that an examining magistrate had been appointed. The letters then observed that the judicial authorities of the United States and the United Kingdom had been requested to cooperate in the matter but instead, had threatened Libya while not ruling out the use of armed force.

## III. A STALEMATE: WHERE TO GO FROM HERE?

Typically, under normal circumstances, the vast majority of cases in which extradition was denied for whatever reasons, ends here - in a stalemate. Chances for it being resolved to the satisfaction of both (or all) of the parties involved are close to null. This reality makes some countries think twice before authorizing their competent authorities to submit the extradition request to another state. Some sort of practical wisdom (or pragmatic approach) suggests that this is a situation to which the popular saying "*it doesn't hurt to ask*" simply does not apply. Instead, there is so much to loose and so little to win. Both experience and knowledge of even the basic rules and principles of extradition clearly indicate that once this mechanism is formally set in motion it will take its own course which represents an uneasy marriage between law and politics. Consequently, some states rather try to find a way around the extradition while others ignore it altogether and resort to *fait accompli* instead.

The Lockerbie case is unique in that it did not stop where it could have stopped, and where, possibly, it was expected to come to the "dead end". Interestingly enough, both sides involved in the conflict contributed to next stages by undertaking further actions in this case.

Clearly, the two parties were on a conflicting course. While Libya relied on the codified rule of *aut dedere aut judicare* (Article 7 of the Montreal Convention), as the governing principle which entitles it to prosecute its own nationals especially in the absence of an extradition treaty, both the American and British governments categorically demanded the surrender of the two suspects, and made it clear that nothing less than an unconditional compliance with their request will satisfy them. While Libya declared that it will try the accused, and invited the United States and the United Kingdom to send their officials and lawyers to observe the trial, arguing that it was thus satisfying its obligations under the Montreal Convention, the two other governments demanded that the suspects be tried in their courts. While Libya contended that its domestic law forbids the extradition of its nationals, the U.S.A. and the U.K.

[2] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 974 U.N.T.S. 177.

denied that this is a valid excuse for not surrendering them.

### A. The Case: Security Council and International Court of Justice

Determined not to submit all the evidence that have been gathered as a result of the three-year extensive investigation, the United States and the United Kingdom (joined by France) presented the case before the UN Security Council and the General Assembly.[3] In January and March 1992, the Security Council adopted two resolutions in this matter: the first was urging Libya to respond fully and effectively to the requests of the United States, the United Kingdom and France,[4] while the second imposed economic sanctions on Libya.[5] The sanctions were extended in 1993.[6] Libya brought the case before the International Court of Justice seeking provisional measures to prevent the United States or the United Kingdom from taking any action to coerce Libya into handing over the two suspects or otherwise prejudice the rights claimed by that country.[7] On April 14, 1992, the Court declined (by a vote of 11 to 5) to indicate the provisional measures thereby confirming the validity and binding force of Resolution 748.[8] The following three interpretations of the of the U.N. Security Council involvement in the Lockerbie case are possible:

(a) Libya failed to demonstrate convincingly that it is capable of fulfilling the obligation which it claimed under the Montreal Convention, that is, to make a good faith effort to prosecute the crimes itself.
(b) The resolutions signal a substantial loss of faith in the Montreal Convention's authority and efficacy in bringing the offenders to justice.
(c) The Security Council offered an extraordinary remedy which, while upholding the existing extradition system, at the same time, supplemented it with the recourse to that organ for intervention in exceptional situations, especially where the traditional treaty model proves unworkable.

The latter seems to be the most persuasive. The Court's ruling means that under Article 103 of the U.N. Charter the Resolution 748 takes precedence over any other international agreement, including the Montreal Convention. In one sense, the genuine choice between extradition and prosecution has been brought down to an alternative: extradite or extradite. On the other hand, given the U.N. Charter's Chapter VII exceptions to Article 2(7), the security Council has the authority to determine whether a situation is so severe that it constitutes a threat to the peace, a breach of the peace, or an act of aggression. Therefore, the Security Council has the authority to take up such matters. In order to reconcile both the Security Council resolutions and the decision of the International Court of Justice in the Lockerbie case, it was suggested that the international extradition law has not been violated or altered because in exceptional cases, "the law merely operates at a

[3] See UN Doc. A/46/825; S/23306; 31 Dec.1991.

[4] S.C. Res. 731 (1992) 21 Jan. 1992.

[5] S.C. Res. 748 (1992) 31 March 1992

[6] S.C. Res. 883 (1993) 11 Nov. 1993.

[7] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), provisional Measures, Order of 14 April 1992,* I.C.J. Reports 1992 at 114. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom ), provisional Measures, Order of 14 April 1992,* I.C.J. Reports 1992 at 3.

[8] *Ibidem* para. 39.

different level through the internationally sanctioned ways and means of the United Nations".[9]

It is doubtful, however, whether Lockerbie could and should be viewed as the most appropriate mechanism designed to end the stand-off in other similar cases.

**B. Inquiry Into Other Options**

**1. JURISDICTIONAL level:**

- establishing of the hierarchy of jurisdictional principles (or order of priorities) (apart from obvious advantages that could be gained through this solution it also has some inherent problems; just to mention a few: any proposed hierarchy will be perceived as an arbitrary act - unless agreed upon in an international instrument; if a proposition contains clear-cut rules in an attempt to avoid any ambiguity and eliminate discretion and arbitrariness it may soon prove inefficient as the rules may become too rigid and inflexible, and therefore, unable to accommodate any set of specific circumstances which may appear in a case in hand; if, however, to avoid this problem, the rules would allow some flexibility the question immediately arise as to a body or an organ called upon to decide in these matters by conferring jurisdiction on the particular state, in other words: who would be the "keeper of the rules"?)

  **Examples**: (Draft) *Convention Benelux concernant l'applicabilité de la loi pénale dans le temps et dans l'espace* (1979); Consultative Assembly of the Council of Europe, *Recommendation 420 (1965) on the settlement of conflicts of jurisdiction in criminal matters*; (Draft) *European Convention on Conflicts of Jurisdiction in Criminal Matters*, id.

**2. PROSECUTORIAL and TRIAL level:**

A. *Conditional Surrender (Extradition):*

1. the requested state's duty to repatriate the sentenced person, i.e. to send him/her back to his/her home country to serve sentence;
   **Example**: the Dutch Extradition Law as amended in 1988, Article 4, paragraph 2;

2. Consent of the Extraditee;
   **Example**: the Swiss Law on Extradition and International Assistance in Criminal Matters of 1981, Article 1, paragraph 1 (the consent must be in writing);

B. *"Neutral" Forum:*

1. third state;
2. international criminal tribunal;
3. a variant: "Secretary General custody" over the two suspects in the Lockerbie case; It was suggested by Libya that the Secretary General should attempt to create some "mechanism" whereby Resolution 731 could be implemented.

C. *Transfer of Criminal Proceedings Combined with Rendering Legal Assistance*

D. *abduction or other illegal or irregular forms of apprehension of the would-be-extraditee*

**3. ENFORCEMENT level**

- enforcement of foreign criminal sentences

[9] C. C. Joyner & W. P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 Mich. J. Int'l L. 222, 256 (1993).

## IV. SETTING THE STAGE: SECURITY COUNCIL RESOLUTION 1192 (1998)

The first breakthrough in bringing the suspects to justice came at a meeting in Tripoli in April 1998 between government officials, lawyers and British representatives of the bombing victims at which the Libyans confirmed that they would accept a plan devised by Robert Black, professor of law at the University of Edinburgh. His proposal involved the case being tried in a neutral country, operating under Scottish law. Instead of a jury there would be an international panel of judges presided over by a senior Scottish judge. While agreeing in principle to a neutral venue Robin Cook, British Foreign Secretary, rejected in August 1998 Black's proposal for an international panel and opted for an all-Scottish judges panel.

But an agreement over the venue and make-up of the court was not the final obstacle. A number of issues had to be addressed and resolved before the men would agree to leave Tripoli. These included guarantees about their safe custody from Libya. If they are acquitted there will also have to be guarantees about their safe custody back. Other questions arose: what will the conditions of their detention be? what access will they have to their legal team? how long are they expected to remain in custody before the trial takes place? what access will the defence be given to the prosecution evidence? how much time will the defence have in order to get properly prepared?

In an effort to make the trial in Scotland (or by Scottish judges) and under Scottish law more attractive to Libya, on 31 October 1997, the Permanent Representative of the United Kingdom to the United Nations addressed a letter to the President of the Security Council (S/1997/845) in which he invited representatives of the United Nations to visit Scotland and to study the Scottish judicial system. After consulting with the Security Council, Secretary-General Kofi Annan accepted the invitation and requested two scholars to undertake this study. In their report on the Scottish judicial system, they concluded that the Libyan accused would receive a fair trial in Scotland (S/1997/991, Annex ). Their rights during the pre-trial, trial and post-trial proceedings would be protected in accordance with international standards. The presence of United Nations and other international observers can be fully and easily accommodated.

As time passed without resolution of the matter, support for the economic sanctions against Libya began to erode. Proposals by Libya and by regional organizations, such as the Arab League, suggested a trial of the two suspects by international, or perhaps Scottish, judges sitting in the Netherlands.

In a letter addressed to the UN Secretary-General dated August 24, 1998, the Acting Permanent Representatives of the United Kingdom and the United States proposed an arrangement for a trial in the Netherlands by Scottish judges.[10] After noting prior assurances that had been given regarding the fairness of a trial in their jurisdictions and their "profound concern" at Libya's disregard of the Security Council's demands, the two Governments stated:

3. "Nevertheless, in the interest of resolving this situation in a way

[10] Letter Dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, UN Doc. S/1998/795 (1998).

which will allow justice to be done, our Governments are prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Netherlands. After close consultation with the Government of the Kingdom of the Netherlands, we are pleased to confirm that the Government of the Netherlands has agreed to facilitate arrangements for such a court. It would be a Scottish court and would follow normal Scots law and procedure in every respect, except for the replacement of the jury by a panel of three Scottish High Court judges. The Scottish rules of evidence and procedure, and all the guarantees of fair trial provided by the law of Scotland, would apply. Arrangements would be made for international observers to attend the trial.

4. The two accused will have safe passage from the Libyan Arab Jamahiriya to the Netherlands for the purpose of the trial. While they are in the Netherlands for the purpose of the trial, we shall not seek their transfer to any jurisdiction other than the Scottish court sitting in the Netherlands. If found guilty, the two accused will serve their sentence in the United Kingdom. If acquitted, or in the event of the prosecution being discontinued by any process of law preventing any further trial under Scots law, the two accused will have safe passage back to the Libyan Arab Jamahiriya. Should other offences committed prior to arrival in the Netherlands come to light during the course of the trial, neither of the two accused nor any other person attending the court, including witnesses, will be liable for arrest for such offences while in the Netherlands for the purpose of the trial.
5. The two accused will enjoy the protection afforded by Scottish law. They will be able to choose Scottish solicitors and advocates to represent them at all stages of the proceedings. The proceedings will be interpreted into Arabic in the same way as a trial held in Scotland. The accused will be given proper medical attention. If they wish, they can be visited in custody by the international observers. The trial would of course be held in public, adequate provision being made for the media.
6. We are only willing to proceed in this exceptional way on the basis of the terms set out in the present letter (and its annexes), and provided that the Libyan Arab Jamahiriya cooperates fully by:
   (a) Ensuring the timely appearance of the two accused in the Netherlands for trial before the Scottish court;
   (b) Ensuring the production of evidence, including the presence of witnesses before the court;
   (c) Complying fully with all the requirements of the Security Council resolutions".

Annexed to the letter was the proposed agreement between the Netherlands and the United Kingdom as well as the proposed UK legislation. On the same day, Secretary of State Madeleine Albright released a statement in which she declared:

> "We note that Libya has repeatedly stated its readiness to deliver the suspects for trial by a Scottish court sitting in a third country. This approach has been endorsed by the Arab League, the Organization of African Unity, the Organization of the Islamic Conference and the Non-Aligned Movement. We now challenge

Libya to turn promises into deeds. The suspects should be surrendered for trial promptly. We call upon the members of organizations that have endorsed this approach to urge Libya to end its ten years of evasion now.

Let me be clear — the plan the US and the UK are putting forward is a "take-it-or-leave-it" proposition. It is not subject to negotiation or change, nor should it be subject to additional foot-dragging or delay. We are ready to begin such a trial as soon as Libya turns over the suspects".[11]

On the next day, in a letter to the Security Council, Libya stated:

1. "Libya is anxious to arrive at a settlement of this dispute and to turn over a new page in its relations with the States concerned.
2. Libya's judicial authorities need to have sufficient time to study [the proposal] and to request the assistance of international experts more familiar with the laws of the States mentioned in the documents.
3. We are absolutely convinced that the Secretary-General of the United Nations, Mr. Kofi Annan, must be given sufficient time to achieve what the Security Council has asked of him, so that any issue or difficulty that might delay the desired settlement can be resolved".[12]

Nonetheless, the Security Council passed a resolution 1192 on the matter on August 27, 1998, in which it fully endorsed the plan and procedure devised and proposed by the United States and the United Kingdom.

Throughout the fall of 1998, Libya reacted ambivalently to the proposal, on the one hand welcoming the "evolution" in the U.S. and UK position, while on the other hand expressing concern about the trial's proposed location in the Netherlands, a former U.S. air base, which was agreed upon by the Dutch and British Governments. The Libyan Government announced that it would need to inspect the location before assenting to holding the trial there.[13] In a speech to the UN General Assembly, Libya's ambassador to the United Nations criticized other aspects of the proposal, insisting that the accused should serve their sentences in either Libya or the Netherlands — and not in Scotland — if convicted. Moreover, three top Libyan intelligence officials reportedly were tried, convicted, and jailed in Libya in connection with the Lockerbie incident, possibly as a means of blocking their testimony in the trial in the Netherlands. Although in December 1998, the Libyan parliament reportedly approved the handing over of the two suspects for trial, Libyan leader Col. Muammar el-Qaddafi informed the Dutch media on the tenth anniversary of the bombing that the solution lay in having an "international court" consisting of "judges from America, Libya, England and other countries."[14]

On September 30, 1998, President

[11] Secretary of State Madeleine K. Albright, Statement on Venue for Trial of Pan Am # 103 Bombing Suspects (Aug. 24, 1998), available in <http://secretary.state.gov/www/statements/1998/980824a.html>.

[12] Letter Dated 25 August 1998 from the Charge d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/803 (1998).

[13] See, e.g., Letter Dated 26 August 1998 from the Charge d'Affaires AI. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/808 (1998); see also UN Doc. S/PV.3920, at 4 (1998).

Clinton authorized the use of approximately $ 8 (USD) million to support the establishment and functioning of the court in the Netherlands.[15]

## V. *AUT DEDERE AUT JUDICARE AUT TRANSFERERE*: A NEWLY EMERGING RULE OF INTERNATIONAL LAW OF EXTRADITION?

On 5 April 1999, more than a decade after Pan Am Flight 103 exploded over Scotland, the two Libyans charged with planting the bomb arrived in the Netherlands to face trial for the crime. As a result, the United Nations immediately removed severe sanctions on the Government of Col. Muammar el-Qaddafi of Libya. The end of those sanctions allows international air travel and the sale of vital industrial equipment to resume. The step will also release Libyan assets that had been frozen in a number of countries.

The Scottish judges will have to weigh the still secret evidence provided by the United States and Britain and decide whether the two Libyans are guilty of planting the suitcase bomb. The judges will then face the fundamental questions of who gave the orders to blow up the plane and why. The British and Americans have outlined the main conclusions of their case, but have withheld the particulars.

The operation of transporting the two Libyans was intricate, complex and above all secret. No one except Hans Corell, the chief legal counsel for the United Nations — not even Secretary General Kofi Annan — knew the details surrounding the logistics for the surrender of the two Libyan suspects. All the legal and logistical problems were resolved by mid-November. He and Mr. Corell even asked Italy to lend the United Nations a Boeing 707 jet on which United Nations markings were painted. Mr. Corell located and interviewed trustworthy pilots, personally approved the flight plan to the Netherlands and recruited doctors and nurses to accompany the two "passengers", as he called them. He even ordered appropriate food — no ham, shellfish or alcohol, in light of Muslim dietary prohibitions — and took steps to insure that the food would not be poisoned. Then Col. Muammar el-Qaddafi, Libya's leader, balked at the deal.

So Kofi Annan orchestrated a discreet but relentless political campaign to persuade Colonel Qaddafi, including a hitherto secret appeal by Prime Minister Yevgeny M. Primakov of Russia. As part of this appeal, the United States assured Libya that the trial would not be used to undermine the colonel's rule. One of the reasons why the high officials of the United Nations were involved in this case was their growing awareness and concern that the sanctions imposed on Libya do not work. Libya was slowly persuading the Organization of African Unity, the Arab League and other countries that the two Libyan suspects, Abdel Basset al-Megrahi and Al-Amin Khalifa Fahima, would never get a fair trial in Britain or the United States. Chad, Niger and Gambia, among other African states, began flouting the United Nations sanctions by flying their leaders or senior officials into Tripoli airport. And in summer 1998 the 53 members of the Organization for African Unity voted to stop abiding by the sanctions. At the same time, by rejecting every Libyan proposal, the United States and Britain had found themselves in a situation of being the stubborn negative

[14] Barbara Crossette, 10 Years After Lockerbie, Still No Trial, N.Y. TIMES, Dec. 22, 1998, at A14.

[15] Memorandum on Funding for the Court to Try Accused Perpetrators of the Pan Am 103 Bombing, 34 WEEKLY COMP. PRES. DOC. 1939 (Sept. 30, 1998).

ones.

In December, Kofi Annan flew to Libya to meet with Colonel Qaddafi. After several hours of one-on-one discussions in the leader's tent outside Sirte, his desert capital, he left convinced that the colonel had realized that a deal "had to be done". The chance that Colonel Qaddafi would surrender the suspects as promised increased substantially only after President Mandela announced it on March 19, 1999, in a speech at Colonel Qaddafi's side in Tripoli.

An Italian plane took the two Libyans, each accompanied by a relative and a lawyer, to the Dutch military air base. Dutch authorities at first took the two Libyans into custody after they arrived this afternoon but hours later formally extradited them to Britain - on paper, that is - so the Scottish police could take over. Dutch military helicopters then took the Libyans to Camp Zeist, a former military base a few miles outside Utrecht. Some of the camp's buildings are being converted to include a detention unit for the suspects and a room for the Scottish court that will be sitting here.The camp, once used by American military and then taken over by the Dutch, is kept under tight guard by Scottish police officers. From now until the end of the trial, Camp Zeist is legally Scottish soil. The suspects will be tried by Scottish judges under Scottish law, accused by Scottish prosecutors, defended by Scottish lawyers and watched over by more than 100 Scottish police and prison officers. The trial itself will be open to the public. The trial will be held before three Scottish judges. But the start may be postponed for several more months because defense lawyers have asked for extra time to prepare their case. The trial has, in fact, been postponed.

The cost of converting the base and holding the trial has been estimated at close to $200 million, which will be shared by Britain and the United States. Some of the work was held off until the Scottish authorities were reasonably sure that the two men would be handed over. In addition to this figure, an estimated cost of the trial will be rather high - the cost can go over £10 million. From a legal perspective, the trial will be unique. The only comparable cases have been war crimes trials but they have all been held under international legislation.

**Roadmap: from Lockerbie through Tripoli to Zeist** - key dates in the efforts to bring two Libyans to trial in the bombing of the Pan Am flight near Lockerbie, Scotland:

DEC. 21, 1988 — Pan Am flight 103 from London to New York is blown up over Lockerbie, Scotland.

NOV. 14, 1991 — United States and Britain accuse Abdel Basset al-Megrahi and Al-Amin Khalifa Fahima of Libya of involvement. Libya denies any involvement.

MARCH 23, 1992 — Libya's United Nations delegate says the suspects will be handed over to the Arab League, but the West rejects Libya's conditions.

MARCH 31 — Security Council Resolution 748 tells Libya to surrender the suspects by April 15 or face a worldwide ban on air travel and arms sales.

APRIL 30 — The Libyan leader, Muammar el-Qaddafi, says that Libya will not hand over the two suspects.

NOV. 11, 1993 — The Security Council tightens sanctions.

MARCH 23, 1995 — The F.B.I. offers a record $4 million reward for information leading to the arrest of the two Libyan suspects.

APRIL 19 — Libya sends a flight of Muslim pilgrims to Saudi Arabia despite the air embargo.

JUNE 11, 1997 — Libya says in a letter to the United Nations Secretary General that sanctions had caused losses to Libya of $23.5 billion.

MARCH 20, 1998 — The Security Council debates the Lockerbie issue, with widespread support for a trial in a neutral country.

APRIL 22— After a visit to Libya, representatives of victims' families say the Government has agreed to a trial in the Netherlands under Scottish law.

AUG. 24 — Britain and United States agree two suspects can be tried in The Hague under Scottish law.

AUG. 27 — The Security Council unanimously endorses the plan.

FEB. 13, 1999 — A South African envoy meets with Colonel Qaddafi and says there is an accord.

MARCH 19 — President Nelson Mandela of South Africa goes to Libya and, with Colonel Qaddafi, announces that the two suspects will be handed over by April 6.

APRIL 5 — The suspects are handed over to the United Nations, and the sanctions are suspended.

With the two accused Libyans awaiting trial in the Netherlands, the question arises as to whether the Lockerbie case has modified the law governing the international cooperation in criminal matters. Specifically, has the "third alternative" been added to the traditional rule *aut dedere aut judicare - aut transferere*? Under this principle, the requested state has had only two options: either to submit the case to the competent authorities for prosecution, or to surrender the person to the authorities of the requesting state. Since Lockerbie, has the discretionary power of the requested country increased and broadened by encompassing also the "middle path": neither extradition, nor prosecution, but "delivery" of the accused to a third state? Or, maybe, one could argue that the "delivery" (or whatever other names are used for that purpose) is a *de facto* extradition, particularly from the perspective of the requested state and its domestic law. However, if we assume, for the sake of an argument, that "delivery" is a substantially new element then one would be compelled to acknowledge that the Security Council started playing a new role of an "enforcer" of the principle *aut dedere aut judicare*. Such realization raises further questions, such as the scope *ratione materiae* of the modified principle. It is to be assumed that the intervention of the Security Council in extradition may be justified, in so far as the situation constitutes a threat to international peace and security, thereby legitimizing the action of the Security Council under Chapter VII of the UN Charter. But then again the question arises as to whether such an intervention would have to be restricted to terrorism, terrorists and terrorist acts.

## VI. OSAMA BIN LADEN: AN AFTERMATH OF LOCKERBIE OR THE LOCKERBIE RULE, CONTINUED?

Encouraged by a clear success of a strategy employed in the Lockerbie case, the Government of the United States has been trying to use the same tactic in the most recent case of Osama bin Laden.

Roving from camp to camp in fear of American missiles, reduced to communicating with minions through hand-carried computer disks, strictly watched even by his Afghan "hosts," Osama bin Laden is one of the world's most sought-after fugitives for his suspected role in the bombings of U.S. embassies in Kenya and Tanzania last year. Bin Laden, the messianic heir to a Saudi Arabian construction fortune, wants to eliminate

the U.S. presence in Islamic lands. He is on the FBI's most wanted list and has a $5 million bounty on his head. He is under federal indictment in New York, and Afghanistan's Islamic fundamentalist Taliban government is the target of U.S. economic sanctions for harboring him. The United States remains publicly committed to his capture. In secret meetings in 1999 in Washington, New York and Pakistan, U.S. representatives have continued to press Taliban officials to turn over bin Laden.

In Summer 1998, Saudi Arabia and Afghanistan's Taliban militia reached a secret deal to send Osama bin Laden to a Saudi prison, nearly two months before deadly bombs devastated two American embassies and put the suspected terror mastermind on the FBI's 10 most wanted list. But the deal crumbled as the US embassies in Kenya and Tanzania were bombed and was dead by the time U.S. forces retaliated two weeks later with missile attacks on camps linked to bin Laden.

Prince Turki al-Faisal, the Saudi chief of intelligence, led a small Saudi delegation to Taliban headquarters in Kandahar, Afghanistan, in June 1998. They sought either bin Laden's ouster from Afghan territory or his custody for trial in Saudi Arabia for advocating the government's overthrow. During their three-hour meeting, Taliban supreme leader Mullah Mohammed Omar and his ruling council agreed to end the sanctuary bin Laden has enjoyed in Afghanistan since 1996. But the surrender would have to be carefully orchestrated so that it "would not reflect badly on the Taliban" and would not appear to be "mistreating a friend," according to Turki. The key to that initial deal, Turki said, was a Saudi pledge that bin Laden would be tried only in an Islamic court — a condition of surrender that would have precluded his extradition to face any U.S. prosecution. Final terms for the bin Laden hand-over were being hammered out between Taliban and Saudi envoys, according to Turki, during the same period that authorities now believe the embassy attacks were being plotted. Those negotiations ended amid a flurry of recriminations in the aftermath of the bombings. The embassy bombings were linked immediately to bin Laden by Western authorities, with the apparent side effect of rallying support for bin Laden within the Taliban. Subsequent retaliatory U.S. missile attacks on bin Laden's Afghan training camps only hardened that support.

In Summer 1999, a Taliban spokesman told that bin Laden will never be forced out of Afghanistan against his will. The spokesman specifically ruled out any future surrender deals with the U.S. or Saudi Arabia. However, the Taliban are willing to turn the matter over to a committee of Islamic scholars from Saudi Arabia and other countries in the region who would act as arbitrators. Moreover, they proposed asking international group of Islamic scholars to look into the case and perhaps find a way to meet the American request. But they have always stopped short of actually agreeing to place Osama in American custody.

On July 6, 1999, President Clinton banned all commercial and financial dealings between the United States and Afghanistan's ruling Taliban militia, accusing the Taliban of continuing to provide refuge to Osama bin Laden. Clinton's executive order freezes all Taliban assets in the United States, bars the import of products from Afghanistan and makes it illegal for U.S. companies to sell goods and services to the Taliban, whose militant Islamic fighters control about 85 percent of the mountainous, war-torn country. U.S. officials said the measure is intended to put

pressure on the Taliban to surrender bin Laden.[16] In a letter to Congress explaining his order, Clinton said: "The Taliban continues to provide safe haven to Osama bin Laden allowing him and the [al Qaeda] organization to operate from Taliban-controlled territory a network of terrorist training camps and to use Afghanistan as a base from which to sponsor terrorist operations against the United States". Clinton's order does not address trade between Afghanistan and other countries, and its immediate effect is likely to be modest. Moreover, on August 20, 1998, an executive order froze U.S. assets of bin Laden and forbade any financial transactions between U.S. companies and his entities.[17]

U.S. government officials argue that nabbing bin Laden is feasible and morally necessary. They point to Libya's surrender last April, after years of political and economic pressure, of two suspects in the bombing of a Pan Am airliner over Lockerbie. A federal grand jury in New York has indicted bin Laden on murder and conspiracy charges for allegedly directing the embassy attacks. The indictment also links bin Laden to deadly attacks on U.S. military personnel in Saudi Arabia and Somalia.[18] Specifically, he is charged with conspiracy, bombing of U.S. embassies, and 224 counts of murder. Bin Laden was said to be the leader or emir of a group called "al Qaeda" or "the Base," a terrorist group "dedicated to opposing non-Islamic governments with force and violence."

The Southern District indictment charged that the al Qaeda leadership was headquartered in Afghanistan and Peshawar, Pakistan between 1989 and 1991, and in Sudan from 1991 until 1996, returning to Afghanistan in 1996. U.S. support for the governments of Saudi Arabia, Egypt, and Israel, and the United Nations and U.S. involvement in the 1991 Gulf War and in Operation Restore Hope in Somalia in 1992 and 1993, "were viewed by al Qaeda as pretextual preparations for an American occupation of Islamic countries." According to the indictment, bin Laden formed an alliance with the National Islamic Front in the Sudan and with representatives of the Hezbullah, issuing fatwas (orders) to other members of al Qaeda that U.S. forces in Saudi Arabia, Yemen, and Somalia should be attacked, as well as a general fatwa in May 1998 warning that all U.S. citizens were targets. The indictment also charged that bin Laden sought to obtain chemical and nuclear weapons and their components.[19]

It is argued that there are four strategies that are being used by the United States in their fight against terrorism: (1) procedures and measures inherent in the criminal justice system; (2) seeking treaty agreements to establish new international norms and enforcement mechanisms; (3) disruption of terrorist structures through civil sanctions; (4) the prudent use of military force to prevent terrorist attacks and to degrade terrorist infrastructures.[20] It should be noted, however, that,

[16] John Lancaster, Afghanistan Rulers Accused Of Giving Terrorist Refuge; Clinton Bans Trading With Taliban Militia, THE WASHINGTON POST, July 7, 1999, A15.

[17] See Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (1998); see also Continuation of Emergency Regarding Terrorists Who Threaten to Disrupt the Middle East Peace Process, 64 Fed. Reg. 3393 (1999) (continuing sanctions).

[18] Indictment, United States v. Osama bin Laden, S(2) 98 Cr. 1023 (LBS), (S.D.N.Y. Nov. 4, 1998), available in http://www.feroes.net/pub/heroes/indictments.html.

[19] See also US Indicts Osama bin Laden on Embassy Bombing Charges, Agence Fr.-Presse, Nov. 4, 1998, available in LEXIS, News Library, Wire Service Stories File.

particularly in the nineties, the US Government tried, with success, another method, that is, to engage the Security Council in the law enforcement operations. The Osama case illustrates this strategy.

In its resolution 1214, adopted at the 3952nd meeting, on 9 December 1998, the Security Council stated, *inter alia* :

"Deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts, and reiterating that the suppression of international terrorism is essential for the maintenance of international peace and security,

13. Demands also that the Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice".

Finally, in October 1999, the United States asked the Security Council to impose economic sanctions on the Islamic Taliban Government in Afghanistan, demanding that the Afghans turn over Osama bin Laden.[21] In the operative part of the resolution 1267 (1999), adopted at its 405lst meeting, on 15 October 1999, the Security Council, among other things,

"2. Demands that the Taliban turn over Osama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice".

At a time when the United Nations Security Council often has trouble reaching agreement on whether one crisis or another constitutes a threat to international peace, the 15-member panel has been able to coalesce solidly on the growing dangers of international terrorism. The council voted unanimously to wage a common fight against terrorists everywhere.[22] Remarkable is not only an accord in this matter, but also the fact that two Islamic countries voted in favor. As pointed out by the US representative during the debate, the resolution will send a direct message to Osama bin Laden and terrorists everywhere: "You can run, you can hide, but you will be brought to justice".[23] He added that this action will bring new pressure on the Taliban to turn over Osama bin Laden to authorities in a country where he will be brought to justice. The Taliban in Afghanistan continue to provide bin Laden with safe haven and security, allowing him the necessary freedom to operate, despite repeated efforts by the United States to persuade the Taliban to turn over or expel him and his principal associates to responsible authorities in a country where he can be brought to justice.

The resolution gives the Taliban a clear choice. It has 30 days to turn over bin Laden. If the Taliban do not turn him over within that period, the sanctions will take effect. Those sanctions will restrict foreign landing rights on aircraft operated by the Taliban, freeze Taliban accounts around the world and prohibit investment in any undertaking owned or controlled by the

[20] Ruth Wedgwood, Responding to Terrorism: The Strikes Against bin Laden, 24 Yale Journal of International Law 559 (1999).

[21] Barbara Crossette, U.S. Presses Security Council for Sanctions against the Taliban, N.Y. TIMES, 7 October 1999, A9.

[22] Barbara Crossette, U.N. Council in Rare Accord: Fight Terrorism, N.Y. TIMES, 20 October 1999, A8.

[23] S/PV.4051 (1999).

Taliban. The draft resolution also establishes a Committee to monitor the implementation of sanctions.

Shortly after the adoption of the resolution 1267 (1999), the Taliban representatives expressed their willingness to discuss the most contentious issue with the Americans, that is, the hand-over of Osama.[24] He himself made the offer in a letter to the Taliban chief Mullah, Omar, on condition that the Taliban insure safe and secret passage to a third, unidentified country.[25] It is unlikely, however, that the United States will find this move satisfactory as the pertinent operative paragraph in the resolution makes it clear that the main point is that Osama be brought to justice, not necessarily in the United States.

Let me end by asking a provocative question (before anyone else addresses it to me): after the Lockerbie and bin Laden cases, do other countries have a reason to fear an intervention of the Security Council in their extradition relations?

[24] Taliban Willing to Talk, N.Y. TIMES, 24 October 1999, A8; Barbara Crossette, U.S. Steps Up Pressure on Taliban to Deliver Osama bin Laden, N.Y. TIMES, 19 October 1999, A7.

[25] Taliban Ponder Bin Laden Offer, N.Y. TIMES, 31 October 1999, A10.

# EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN THAILAND

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## I. INTRODUCTION

Traditional criminal justice usually begins with the tracing of clues and gathering of evidence after the occurrence of a crime, then to arresting of a suspect, putting him under custody, enquiring witnesses and, unless the investigation is conducted by the prosecutor, to refering the case to the prosecutor for screening and institution of prosecution or dropping it and letting the suspect go. In case of prosecution, the prosecutor then resumes his function in the court throughout the whole process. However, when the case become more complex because it touches upon the components of internationalized character or involves the matters of a state's jurisdiction, then the process generally applicable to the domestic criminal has justice may become impossible or even fail on its entirety. This may be perceived, for instance, when a crime has been committed in one country and the criminal has fled away to another country. How do we bring the offender back to stand trial and punishment? Of course, it would be impossible for the country of the crime scene to send its officers to arrest the fugitive directly in the territory of another state because it is against international law. Also, if the investigation or prosecution is carried out in one country but the essential evidence or witnesses exist in another country: How do we obtain such evidence or statements of such witnesses because then again the proceeding country could not send its authorities to conduct an investigation or to collect evidence within the jurisdiction of another country.

The situation illustrated here is not exhaustive. There still exists many aspects and problems the difficulty of which is beyond the capacity of a single state to deal with, especially under the current situation whereby many serious transnational organized crimes such as narcotics trafficking, money laundering, transportation of illicit firearms, sexuality exploitation of women and children, computer fraud, financial crime, terrorism, and so on, have been spread all over the world posing a great danger to every country. The tendency of today's crime is likely to continue and become even more severe in the next millennium. To halt the transnational criminality, states must concretely coordinate with each other in the prevention and suppression of it. Assistance and coordination between states to tackle the crime can take many forms and is collectively known as "international cooperation."

In broad sense, international cooperation encompasses every kind of activity regarding crime and justice, namely; mutual legal assistance, extradition, transfer of proceedings and prisoners, as well as technical cooperation. However, since this paper is intended to be used as the supporting document for the lecture to be given in the 114th UNAFEI International Senior Seminar, "International Cooperation to Combat Transnational Organized Crime - with Special Emphasis on Mutual Legal Assistance and Extradition", it will, therefore, discuss and concentrate

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substantially only on the issues of mutual legal assistance and extradition as emphasized. In this context, the experience of Thailand in dealing with the cases, laws, regulations, and practice will be taken as the model for comparative study.

## II. EXTRADITION IN GENERAL

Of all categories of international cooperation, extradition is the most concrete and direct means to take back the fugitive offender to stand trial and serve sentence in the jurisdiction of the state where he fled away. Extradition of today is still based on different norms and practices, which is reflected by diverse national legislation and treaties concluded between countries. The reasons behind this diversity may be as one scholar[1] point out that "*States still favor bilateral treaties and make extradition a consequence of their political relations. Thus, politically friendly countries reduce what government consider to be barriers to extradition, while the same countries increase these barriers in their relations with less friendly ones*". To take international cooperation among states, which has as its initial objective to cope with crime, as a means for acquiring political interests as such is, of course, against the spirit of crime prevention and suppression. Extradition should be regarded as a tool to prevent the fleeing away of transnational criminals who usually snatch the advantages from the limits of law enforcement, which often end at the border, as well as loopholes arising from the different laws and practices among nations to escape from justice. Difference in norms and practices is unarguably the crucial cause of hindrance and failure of effective extradition. Concern has, therefore, been expressed intensively at international forums as how to harmonize or compromise this kind of differences.

To harmonize diversity, attempts have been made on several occasions either at the global or regional level by international organizations, associations, and NGOs. This can be perceived, for instance, from the works of the United Nations, Association Internationale De Droit Penal, the Asia Crime Prevention Foundation or ACPF, and UNAFEI.

One predominant effort in this regard is the adoption of the United Nations Model Treaty on Extradition in 1990, which has been proposed revising later on by the Intergovernmental Expert Group Meeting on Extradition[2]. This Model treaty has as its main objective the suggestion of a uniform guideline to facilitate treaty conclusions between states. Recently, the issue of extradition has also been discussed comprehensively during the drafting of the International Convention against Transnational Organized Crime. According to the draft convention, significance of extradition in enhancing the effectiveness of criminal justice and law enforcement mechanisms under an international setting to combat transnational organized crime has been recognized, thus, one provision related to extradition will be specifically included.[3]

## III. EXTRADITION IN THAILAND

### A. Legal Basis

As a civil law country, Thailand promulgated the "Extradition Act B.E. 2472" in 1929. This act is the fundamental

[1] Cherif Bassiouni, Preface of International Review of Penal Law, Vol.62, Nos. 1-2, 1991, p.13

[2] Intergovernmental Group Meeting on Extradition was held at Siracusa, Italy, from 10-13 December 1996

[3] Draft United Nations Convention against Transnational Organized Crime, Article 10, UN documents A/AC. 254/4/Rev.2

legislation for all extradition proceedings so far as it is not inconsistent with the terms of any Treaty, Convention, or Agreement with a foreign state, or any Royal Proclamation issued in connection therewith[4]. Unlike those "Treaty prerequisite countries," Thailand may surrender to a foreign state the person accused or convicted of crimes committed in the jurisdiction of that state even if there exists no treaty, provided that by the laws of Thailand such crimes are punishable with imprisonment of not less than one year[5]. In practice, however, a declaration for the reciprocal assistance as well as certain requirements such as "double criminality", principle of "*ne bis in idem*", and so forth, must also be satisfied before the request for extradition is accorded.

The request for extradition from a foreign state, whether having concluded a treaty with Thailand or not, shall be sent through diplomatic channels, since an exclusive center for extradition like the Central Authority of Mutual assistance in Criminal Matters does not yet exist under Thai laws. Nevertheless, a need to have the Central Authority to expedite and facilitate enforcement of the rapid increasing requests for extradition has been addressed quite often among agencies concerned. So far, this idea has been reflected in new legislation, which is under draft. Presently, extradition is deemed to be commonly handled by various authorities, namely: the Ministry of Foreign Affairs; the Royal Police Organization, the Office of the Attorney General; the Court; and the Correctional Department.

Although there is still no clear-cut indication whether extradition is an administrative or judicial matter, the general consensus among the authorities concerned seems to be implied that it is a direct responsibility of the executive to supervise the extradition process and to look it proceeds on the right direction. Thus, unless the Government decided otherwise, the extradition request will be transmitted to the Ministry of Interior in order that the Public Prosecutor may bring the case before the Court[6].

By virtue of Article 11 of the Extradition Act, the preliminary investigation in the Court must be made in accordance with the Criminal Procedure Code. And this sometime causes problems, in particular with regard to the sufficiency of evidence, because Article 14 of the Act authorizes the Court to discharge the accused if it determines that the evidence is insufficient[7]. The State Attorney[8] who handles extradition proceedings in the Court has to be very careful about the admissibility and sufficiency of evidences adduced since the adequacy of evidence to institute "*prima facie*" for extradition in his opinion might be "inadequate" for some judges who might prefer higher assurance.

Being in use for more than seven decades, the Extradition Act B.E. 2472 is no longer able to cope with modern concepts and the progress of contemporary extradition. In particular, it is incapable to

[4] Article 3 of the Extradition Act B.E. 2472

[5] Article 4 of the Extradition Act B.E. 2472

[6] Article 8 of the Extradition Act B.E. 2472

[7] Article 14 of the Extradition Act B.E. 2472 provides that "*if the Court is of opinion that the evidence is insufficient it shall order the accused to be discharged at the end of forty-eight hours after such order has been read, unless within this period the Public Prosecutor notifies his intention to appeal. The appeal must be flied within fifteen days and the Court shall order the accused to be detained pending the hearing of such appeal*".

[8] The term "Public Prosecutor" has been replaced by the term "State Attorney" since the public Prosecution Department" has been changed to be the Office of the Attorney General in 1991.

answer several questions arising from the dissenting interpretation among authorities concerned. Accordingly, the Cabinet has on 1 April 1997, passed a resolution setting up a Special Committee to review and revise laws related to extradition including the Extradition Act B.E. 2472. This ad hoc committee is chaired by the Attorney General and consists of the representatives from various agencies concerned. It is expected that with the overhaul of extradition legislation, Thailand would be able to bring more advantageous and preferable system in this regard to combat transnational organized crime in this new era.

**B. Extraditable Offence**

If the term "extraditable Offences" is broadly interpreted as to cover all offences the extradition of which is not refused because of its nature, or excluded by the limit of the list of offences as prescribed in the treaties concluded between some states, then the extraditable offence should not include those offences which are against the principles of "double criminality", "*ne bis in idem*", "political offences", as well as any offences beyond the scope of the list.

In Thailand, the Extradition Act B.E. 2472 does not directly specify the definition of extraditable offences, while many treaties concluded between Thailand and foreign states do. Article 4 of the Extradition Act, which is applicable on the non-treaty basis, can be implied that the "extraditable offences" according to Thai laws are such offences punishable with imprisonment of not less than one year. Notwithstanding the provision of extradition laws, treaties between Thailand and some foreign states before 1983 were concluded upon the "list-of-offences" approach[9]. The tendency to shift from the "list-of-offences" approach was heralded for the first time in the treaty signed with the United States of America in 1983 where the minimum "one-year" imprisonment basis was clearly spelled out as the sole element to determine the extraditability of the offences. The "minimum penalty" principle as such has been used as the model for negotiation of later treaties between Thailand and foreign states on several occasions.[10] In draftng of the new Act on Extradition, currently under consideration of the Drafting Committee, a one-year minimum imprisonment is also adopted as the basis for determining of "extraditable Offences." It is quite clear, therefore that at present Thailand tends to follow the principle of "minimum penalty" rather than the "list of offences" approach. This perhaps because the latter is viewed as less flexible to cope with the dynamic emergence of modern and complex of nature crime of today.

Not only the range of penalty of the offence that has to be taken into account, but also the remaining period for its enforcement. Extradition will not be granted if the remaining period for serving penalty is less than six months even if other elements to fulfill extraditability of the requested offence have been met. This extended "minimum penalty" principle is upheld in the treaty between Thailand and the United States, and followed by the treaty between Thailand and the People's Republic of China. In addition, extraditable offences have been interpreted by the same treaty as to cover the preparing, attempting to commit, aiding or abetting, assisting,

[9] The 1911 Extradition Treaty between Thailand and the U.K., the 1937 Extradition Treaty between Thailand and Belgium, the 1976 Extradition Treaty between Thailand and Indonesia, the 1981 Extradition Treaty between Thailand and the Philippines.

[10] For example in the conclusion of treaty between Thailand and the People's Republic of China.

counseling or procuring the commission of, or being as accessory before or after the fact to, an offence which is punishable under the laws of both Contracting Parties by imprisonment or other forms of detention for a period more than one year or by any greater punishment.

Apart from the time clause, Thailand has also adopted, as the determining basis of the extraditable offences, the actual conduct of the alleged offender rather than the categorization or the naming of such conduct.[11]

### C. Reciprocity

The principle of reciprocity in extradition requires that the requested state would, vice versa, have the opportunity of calling for extradition for the same crime, wherein the requesting state would have to grant it.[12] Reciprocity is usually taken as a prerequisite claimed by the requested state before an extradition is accommodated in the case where no treaty with the requesting state existed. However, it is not considered as absolute essential even with the requested state adhering to the "treaty non-prerequisite" principle. This is perhaps, as one scholar pointed out, because "*This prerequisite (reciprocity) would be missing, if the crime underlying the request for extradition were unknown to the requested state or if it were not punishable according to its laws due to the criminal law defining this offence more narrowly*"[13]. It is definitely clear, therefore, that merely reciprocity alone could not institute a mandatory condition for the requested state to accommodate a request for extradition from the requesting state.

Generally speaking, reciprocity may be considered as the complementary part of the common perception among jurists in that extradition is a matter of choice of the state to grant to each other an accord of assistance rather than a mandatory obligation unless they have some treaties between them. The requested state chooses to extradite a fugitive to the requesting state, upon commitment of reciprocity, because it trusts in the standard of justice of the requesting state and, of course, expects to receive a similar trust from the requesting state in return. Therefore, reciprocity is a matter of reciprocal trust and commitment for that. In this sense, reciprocity may have some binding effect upon the requesting state after an accord for extradition has been granted because of reciprocity commitment. However, to create reciprocity is purely a matter of state's option. A requested state may refuse acceptance of reciprocity offered by a requesting state on whatever grounds including the difference between legal systems as occurred between the Common Law and the Civil Law countries.

Thailand has no difficulty in giving or receiving reciprocal trust in justice system of other countries. In addition, no treaty is required as a prerequisite for extradition even with the requesting state of different legal system. Article 4 of the Extradition Act B.E. 2472 specifies that "*The Royal Siamese (Thai) Government may at its discretion surrender to foreign States which no extradition treaties exist persons accused or convicted of crimes committed within the jurisdiction of such States, provided that by the laws of Siam (Thailand) such crimes are punishable with imprisonment not less than one year.*"

[11] Article 2 of theTreaty between Thailand and the United States.

[12] See "THE RULE OF SPECIALITY IN EXTRADITION LAW" by Theo VOGLER, International Review of Penal Law, Vol. 62, Nos. 1-2, 1991, p.234

[13] Cf. Schulz, Das schweiserische Auslieferungsrecht, 1953, p.313, as cited by Theo VOGLER, Id.

In practice, reciprocity is required in accompanied with other requisites such as "extraditability", "double criminality", and "non-political" nature of the offence. Requests for extradition from requesting states, which have no treaty with Thailand must clearly express a commitment to grant extradition of fugitives required by Thailand in similar manner when requested. So far Thailand has extradited to numerous countries the fugitive offenders, even no treaty concluded with Thailand.

**D. Representative Clause**

"Representative Clause" is understood to be the countervail against the refusal for extradition in order to narrow as much as possible the avenue for the fugitive offender to escape from justice and responsibility of his crime. The principle of *aut dedere aut judicare*[14] (either extradite or prosecute) which is stemmed from the old injunction *aut dedere aut punire*[15] (either extradite or punish) seems to be a decisive explanation for the "Representative Clause".

Although the representative clause is construed as a right kit to counter the refusal of extradition and should be encouraged in all likelihood, there are still some questions regarding the extent of its scope, manner, and appropriateness of various aspects concerned. Although the United Nations Model Treaty on Extradition seems to be silent in this matter, many endeavors at the international level have been made for many occasions.

One example in this context is the text of the "Representative Clause" proposed to be considered in the Asia Crime Prevention Foundation Group Meeting on "Extradition and Mutual Assistance in Criminal Matters" held in Kuala Lumpur, Malaysia, from 27-31 May 1997. The text reads:

> *"If the requested country refuses an extradition request from a requesting country because of lack of a treaty, the requested country shall establish jurisdiction over the case requested and refer to the authorized criminal justice agency (based on a request from the requesting country) subject to compliance with other requirements.*"

In some countries like Thailand, the refusal of extradition due to the lack of a treaty may not occur or is very rare, the suggestion to establish jurisdiction over the case underlying extradition request as well as to refer the case to the authorized criminal justice agency is somehow a problematic issue. Establishment of jurisdiction over the alleged conduct may be possible only if such a conduct contains in its some elements of international crime whereby every state is capable and willing to take action, otherwise it might be determined by the standard of "double criminality" principle. The lack of such characteristic will render the establishment of jurisdiction over the requested offence difficult if not entirely impossible.

Another example is the extradition clause in the Draft Convention against Transnational Organized Crime[16] recently proposed under the framework of the United Nations, which is currently under review of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The text

[14] This is the terms proposed by Cherif Bassiouni as cited by Edward M. Wise in "EXTRADITION: THE HYPOTHESIS OF A *CIVITAS MAXIMA* AND THE MAXIM AUT DEDERE AUT JUDICARE", International Review of Penal law, vol.62.Nos.1-2, 1991, p.119

[15] This is the terms used by H. Grotius as cited Id., p. 119

is partly read as follows:

> "*The State Party in the territory of which the offender or the alleged offender is found shall, in cases where this Convention applies, if it does not extradite that person [for the purpose of prosecution], be obliged, upon request of the State Party seeking extradition, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, [subject to the condition of double criminality,] through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State*"

The text proposed by the Draft Convention against Transnational Organized Crime has been developed a bit clearer than that of the former example since it expressly imposes the burden to prosecute upon the requested state if it refuses to extradite the offender.

In Thailand the principle of "*aut dedere aut judicare*" has not been included in the Act on Extradition B.E. 2472, nor any treaty. However, the issue has been discussed considerably during the drafting process of the new Extradition Act, which resulted in the acceptance of the Drafting Committee to include the principle of "*aut dedere aut judicare*" in the new Act.

### E. Political Offence

Political Offence as the exception for extradition is said having been built on a triple rationale, namely:

1. The political argument: which means that states should remain neutral toward political conflicts in other states, and, therefore, should not lose neutrality by surrendering a fugitive to his political opponents;
2. The moral argument: which is based on the presumption that resistance to oppression of political persecution is legitimate and therefore the political crime is justified;
3. The humanitarian argument: which means that a political offender should not be extradited to a state in which he risks an unfair trial.

The pragmatic problems usually occur due to the lack of neither universal definition of political offence nor the standard norm of application. Each country has to develop its own legal and political criteria on the subject, thus, very varied from the others. Furthermore, the complication seems to be on the increase when the exception related to political offence is enlarged to cover the ordinary crime allegedly committed by political motivation. However, the most disputable issue seems to fall within the question whether it is appropriate, and if so, how to narrow the scope of political and politically motivated offence in certain types of crime which cause massive injury to lives or safety of the innocent individual or the public, such as hijacking, hostage taking, terrorism, etc..

This question seems to be reflected clearly by the diverse concept between those who favor the political offence exception and those who do not; or as one expert[17] called it the split between the "prosecution" and the "defense."

For those who support the restriction of political offence exception, such conduct is viewed as the crime per se, and since it against public safety, no room should be accorded to allow the offenders escape from

[16] Article 10 clause 9(a), General Assembly document A/AC. 254/4/Rev.2

trial and being punished in the requesting state. In this regard, to list out certain acts and exclude them from the scope of political offence, which is known as "*per se* limitation" or the "negative definition", is extremely called for in international pattern to suppress crime.

In contrast, the argument raised by those who still firmly adhere to the tradition political offence is substantially relied on the humanitarian guarantee. For them, the extradition should be refused in all likelihood that a requested person will be subjected to a biased trial or imminent danger against his fundamental rights. Thus, to list out offences under the "*per se* limitation" approach seems to be too risky and unnecessary since the discretion whether to extradite a fugitive or not can be followed the normative limitations.

Position of Thailand in this regard seems to be on the compromise. While the Extradition Act B.E. 2472, as well as the treaties concluded between Thailand and the United Kingdom, and Thailand and Belgium keep silent on the "negative definition" of the political offence, the more recent treaties between Thailand and some countries such as the United States, Indonesia, the Philippines, and the People's Republic of China, explicitly excluded "a murder or willful crime against the life or physical integrity of a head of State or one of the Connecting Parties or of a member of that person family, including attempts to commit such offence" from the scope of political offence exception.

The adoption of the "negative definition" or "*per se* limitation" approach in Thailand through the conclusion of treaties as such is still very restricted and considered as an extraordinary exception under the current practice. This is enlightened, for instance, by the refusal to accept a very broad list of offences proposed by the delegation of India to be excluded from the course of political offence during the negotiation of Extradition Treaty between Thailand and India sometime ago. The reasons to refuse, according to the Thai delegation, were that: "most of the offences listed could be considered as normal offences, which fell under the general rule of extraditable offence and since there is still no universally accepted norm to determine such offences as political in nature or connected with politically motivated crime." In addition, another ground for Thailand to hesitate to adopt too wide range of the "negative definition" perhaps stemmed from the long implicit tradition to treat extradition as the administrative matter whereby the Government as the executive body has direct responsibility to supervise a policy towards a requesting foreign state, especially where the flexibility of Government's discretion might be lessened by the prior establishment of crime list.

However, since there is an international concern about the increasing refusal of extradition upon the excuse of political offence in some categories of criminality, in particular those transnational organized offences, which are very dangerous and capable of causing huge damage to lives and properties of innocent victims all over the world, the tendency to adopt "negative definition" of the political offence is becoming more and more recognized. To respond to the internationally accepted necessity in this regard, the Drafting Committee of the new Act on Extradition, therefore, unanimously agree to include in the new Act a provision recognizing certain conducts as the exception of political offence, namely:

[17] Steven LUBET, "THE POLITICAL OFFENCE EXCEPTION", International Review of Penal Law Vol.64Nos. 1-21911,p.108

(i) a murder or willful crime against the life or physical integrity of a Head of State or one of the Connecting parties or of a member of that person family;
(ii) offences under the treaty whereby Thailand is a party:
(iii) offences related to illicit trafficking of narcotics;
(iv) attempts, or coordinate with the offender to commit all said offences mentioned above

**F. Extradition of Nationals**

Reasons for states to refuse extradition of their nationals may be as one scholar pointed out long time ago that:[18]

(i) *the fugitive ought not be withdrawn from his national judges;*
(ii) *the state owes its subjects the protection of its laws;*
(iii) *it is impossible to have complete confidence in the justice meted out by a foreign state, especially with regard to a foreigner; and*
(iv) *it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses.*

To adhere too strictly to the non-extradition of nationals may impede the spirit of extradition with aimed at the attempt to narrow loopholes snatched by the fugitive offender to escape from justice, particularly if the refusal to extradite is not in line with the rule of "*aut dedere aut judicare.*" And even if the principle of "*aut dedere aut judicare*" is applied to counter the refusal of extradition, questions still arise especially with regard to the promptness and sufficiency of evidences of the crime scene as well as enthusiasm of the requested state to prosecute.

Lack of promptness and sufficiency of evidences may be compensated by the channel of Mutual Legal Assistance between the requesting and the requested state. Yet, lack of enthusiasm due to non-ostensive interests to deal with crime taking place in the jurisdiction of another sovereignty is somewhat could not be prevented to become the cause of worry of the requesting state, no matter how high degree the requesting state trusts in the system of the requested state. Nevertheless, even more worry in this regard may be the lack of jurisdiction of the requested states to try the alleged offender.

Although a suggestion has been made for the states that refuse to extradite their nationals to establish jurisdiction over the alleged cases, it is not easy to do so in every case. Most countries have already established their criminal jurisdiction according to their own ways of thinking, thus, might feel it extremely difficult to embrace a new alleged conduct that may not be a crime at all in their views.

In Thailand, the position towards the non-extradition of nationals seems to be not so obvious as that of some countries. The Extradition Act B.E. 2472 specifies no clear-cut rule on the issue. Article 16 of the Act provides that "*In all cases in which the Court is of opinion that the accused is a Siamese subject...reference must be made to the Ministry of Justice before making an order for the release of the accused.*" Some authorities have interpreted this provision that the "Thai nationality" is a mandatory factor to refuse extradition, and the Court, after having referred the case to the

[18] Lord Cockburn in R.v. Wilson, 3 Q.B.D.42, 44(1877) AS CITED BY Sharon A. WIIAMS in "NATIONALITY, DOUBLE JEOPARDY, PRESCRIPTION , AND THE DEATH SENTENCE AS BASES FOR REFUSING EXTRADITION", in International Review of Penal Law, Vol. 62, Nos. 1-2, 1911, p. 260-261

Ministry of Justice, shall release the accused. However, other authorities have a dissenting view that "Thai nationality" alone is not a mandatory factor to refuse extradition, thus, the Court has no power to release the person required on its own motion. This provision, according to the dissenting view, requires the Court to refer the case to the Ministry of Justice which is an executive agency because the actual authority to determine whether to extradite a Thai national or not is the executive not the judiciary. The provision is, therefore, considered as to forbid rather than allow the Court to automatically release the fugitive.

In the context of the treaty, apart from the 1973 Extradition Treaty between Thailand and Belgium where extradition of national of the requested state is explicitly forbidden, all other treaties between Thailand and foreign countries do not close the door for extradition of nationals of the Contracting Parties.

In 1995, Thailand extradited a Thai politician, who allegedly committed a crime of narcotics trafficking, to stand trial in the United States for the first time in history. This deal was made upon the 1983 Extradition Treaty between Thailand and the United States. Although Article 8 of the treaty provides that neither Contracting Party shall be bounded to extradite its own nationals, other paragraphs are widely open for each country to extradite its own nationals if it thinks appropriate to do so. In this case a strong opposition of the defendant upon the basis of nationality led to a hot controversy and debate among the authorities concerned as to whether it is possible and appropriate to extradite a Thai citizen to stand trial under the foreign laws and jurisdiction. However, since it was impossible for Thailand to establish a retroactive jurisdiction over the person requested for the crime allegedly committed long before the entering into force of specific legislation concerned, extradition was, therefore, considered as the best resolution to maintain the spirit of international cooperation and crime suppression.

The most recent tendency of Thailand in this regard may be perceived from the provision related to extradition of Thai nationals, proposed to be included in the new Extradition Act pending drafting. According to the proposed text, the request for extradition of a Thai national to foreign country will be refused unless (1) the treaty already concluded between Thailand and the requesting country provides otherwise, (2) the fugitive give his consent to be extradited, or (3) the Cabinet has a resolution approving extradition.

### G. Capital Punishment

The call for abolition of capital punishment or death penalty in various regions[19] is a contemporary phenomenon. Strong push to abolish such kind of conviction usually be correlated to the claiming of human rights protection, and in turn reflected by the refusal to extradite fugitive offenders to a requesting state where they might be punished by death. The requesting states that still apply capital punishment often face with refusal, or required by the requested states that

[19] The first binding international instrument against capital punishment is the "Sixth Additional Protocol to the European Convention on Human rights." Another convention on the abolition of death penalty was an additional protocol to the American Convention on Human rights. In 1988 the General Assembly of the United Nations adopted the text of a Second Optional Protocol to the International Covenant on Civil and Political Rights which aimed at the abolition of the death penalty. See "Extradition involving the possibility of the death penalty" by Matthias WENTZEL in International Review of Penal Laws, Vol. 62, Nos. 1-2, 1991, p.336

have already abolished such penalty to give an assurance not to impose death penalty upon the extradited person or at least not to carry it out.

Refusal of extradition request upon the citation of capital punishment or requirement of an assurance not to impose or carry out death penalty as such has been strongly protested by those countries that still retain capital punishment in their systems. For them, such practice not only hampers the smooth flow of extradition between states and thereby diminishes the spirit of international cooperation to suppress crime, but may also be considered as the effort to interfere with the judicial discretion of the requesting state and thereby equal to the stepping over the borderline of justice sovereignty of another state. According to the countries where capital punishment still exists, there is still no uniform rule on the issue of capital punishment; therefore, every country is free to establish national norm and standard conforming to particular historical background and tradition most suitable to the justice system of its own. No state should be allowed to encroach upon the border between nations.

Countries which strongly support the abolition of death penalty and usually refuse to extradite a fugitive to the requested states that still apply capital punishment, are mostly the European countries. According to them, the protection of fugitive offenders from facing justice in a requesting state for a crime related to death penalty by refusing to extradite is corresponding to human rights protection, which must be maintained and universally regarded as the absolute essential. However, this perception has been severely criticized by many other countries, as one scholar indicated that: "*From the contemporary European perspective, the choice may seem clear: the right of an individual to be extradited from Europe must satisfy the minimum standards of the European Human Rights Convention, an international instrument embodying international standards. However, Europe is not the globe, and a European consensus concerning the rights of an accused is not a global consensus.*"[20]

From the point of view of those countries which still retain capital punishment, it might be necessary to have such penalty to punish the most wicked criminal who has committed the most severe crime whereby other effort to correct or rehabilitate him is in despair. However, to establish death penalty and to carry it out are different matters. Let us take Thailand for example, according to the Thai Penal Code, the most severe penalty is death.[21] In practice, the law has given to the Court a very wide range of discretion to reduce penalty when the accused pledges guilty, or if he/she deserves penalty mitigation due to certain circumstances prescribed by the laws. Thus, the death penalty may be minimized to life imprisonment, or less severe conviction. If the offender is a juvenile, the Court has to automatically reduce penalty for him/her, and, therefore, will never be punished with death. In summary, it is possible to say that although Thailand still upholds the death penalty, the possibility to apply it is rather difficult.

With regard to the extradition request where the death penalty is concerned, it seems that Thailand is still reluctant to follow the standard suggested by those states which against the said penalty, although their requirement has begun to be increasingly accepted at some degree for the sake of compromise. Most treaties

[20] Daniel H. DERBY in "COMPARATIVE EXTRADITION STUDY SYSTEMS", International Review of Penal Law, Vol.62. Nos. 1-2, 1991, p. 59

[21] Article 18 of the Thai Penal Code.

concluded by Thailand do not explicitly forbid extradition in the case where capital punishment is concerned, and some treaties even implicitly allow it. For example, the Extradition Treaty between Thailand and Belgium clearly prescribes, in Section 2, the extraditable offences which include in sub-section (11) the offence of threat to cause bodily or property harm where such offence is inflicted with death penalty or imprisonment, while the treaty between Thailand and the Philippines, Article 2, defines the extraditable offence as the offences listed out in the treaty where such offences may be imposed by death, imprisonment, or deprivation of liberty at least one year.

A compromise to remove the stagnancy of extradition involving capital punishment has been firstly accepted by Thailand in 1983 in the provision of Extradition Treaty signed with the United States. According to Article 6 of the Treaty, when the offence for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the laws of the Requested State, the competent authority of the Requested State may refuse extradition unless:

(a) the offence is murder as defined under the laws of the Requested State; or
(b) the competent authority of the Requesting State provides assurance that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed.

To exempt murder from the ambit of refusal in this regard may be deemed as a new approach which could be applied also for the compromise between the countries which still uphold capital punishment and the countries which do not, in the sense that either side recognized the importance of conception regarding death penalty of the other and try to seek a tolerable solution mutually accepted. Likewise, the countries holding capital punishment could not insist the countries having no capital punishment to extradite a fugitive to face death penalty except in certain offences extremely crucial for the requesting states. On the other hand, the countries having no capital punishment have to retreat one step from the confrontation line by granting extradition only for such offences. The requesting and the requested states may consult each other what offences should be listed as extremely crucial.

To give assurance as to recommend to the pardoning authorities to commute death penalty is another approach to resolve problem. The assurance like this is somehow more lenient than the commitment not to impose death penalty or not to carry it out, because the only commitment binding the requesting states is to make a recommendation to the pardoning authorities not to guarantee the result of which. This kind of resolution seems to suit Thailand or those countries having similar administration because the pardoning authorities is the King, who is the most respectful person and sole authority to grant pardon at his own will, and nobody even the Government could interfere with His Majesty's discretion. In practice, the Minister of Interior will be the authority to make a recommendation to the King, but the final decision is rested with the King.

The most recent trend of Thailand is still unclear. Although, during the drafting of a new Act on extradition, a suggestion has been made as to include in the new Act a provision to automatically commute the death penalty imposed by the Court to life imprisonment in corresponding to the commitment of Thailand, as the requesting

state, not to carry out death penalty if so required by the requested states who do not impose death penalty on the underlying conduct requested by Thailand, this suggestion could not obtain unanimous agreement and still under hot debate.

### H. *Prima Facie* Requirement

Although the common view of states seems to emphasis on the speedy and convenient extradition as the ideal means of international cooperation to return the fugitive offenders back to face justice in their own land, it is regrettable that extradition still falls under some technical barriers. The "*prima facie*" requirement or whatever conditions requiring the requesting state to comply with before the extradition is accommodated, are undoubtedly construed as technical barriers.

In most of the common law countries, the "*prima facie*" requirement is usually interpreted relatively wide as to embody both the sufficiency and admissibility of the evidences in extradition proceeding. And this is somewhat astonishing to most civil law countries. According to civil law concept extradition wherever proceeded should not be confused with the actual case proceedings which requires the extreme strictness of proof. The sole purpose of extradition proceedings is whether or not the alleged fugitive should be surrendered to the requesting state, thus, very far from whether he is guilty or not. The requested state should limit its content to a warrant of arrest issued by the competent authorities of the requesting state, or an authenticated copy of the judgment of the court and other supporting document as enough to establish the committal for trial of the person needed and to extradite him/her.

In Thailand, the standard of requirement to establish suitability to extradite is more flexible than that of the common law countries. According to Article 7 of the Extradition Act B.E. 2472, the request for extradition must be accompanied by a duly authenticated copy of the judgment of the Court which tried him, or a warrant of arrest issued by the Competent Authorities of the requesting state, or a duly authenticated copy thereof, and by such evidence as would justify the commitment for trial of the accused, if the crime has been committed in Thailand.

In this regard, various treaties concluded between Thailand and foreign states contain similar provisions.[22]

### I. Simplified Procedure

Simplified procedure, the surrender of person requested with the least or without formal proceedings of extradition in the normal course, is a practice adopted in various regions.[23] This approach is also supported by the United Nations through the adoption of the United Nations Model Treaty on Extradition.[24] Generally speaking, rendition of a fugitive without meeting the stringent requirements of formalities under extradition can take many forms such as deportation, expulsion, exclusion, or even abduction. However,

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[22] For example, Article 9(3) of the 1983 Treaty between Thailand and the United States provides that "A request for extradition relating to a person who is sought for prosecution also shall be accompanied by:

(a) A copy of the warrant of arrest issued by a judge or other competent authorities of the Requesting State;

(b) Such evidence as, according to the laws of the Requested State, would justify that person's arrest and committal for trial, including evidence establishing that the person sought is the person to whom the warrant of arrest refers"

[23] For example, in Europe, U.S.A. , and Thailand.

[24] General Assembly's Resolution 45/116 of 14 December 1990.

such measures are considered as purely administrative and beyond the scope of extradition. The simplified procedure in this regard is emphasized on an extradition in some extra form. The main objective of simplified procedure is aimed at the shortening of process to expedite and grant as much as possible the convenience in the surrender of the required fugitive, thus, to cut down unnecessary formalities, as well as to waive or mitigate in some degree the test of eligibility of the case. The question may arise here as; To what formalities or requisites or tests should be waived or mitigated and to what extent? Since the simplified procedure, like the full process extradition itself, still relies on the different norms and practices of a particular countries or groups of countries without a uniform rules, the answer of the said question may be varied from jurisdiction to jurisdiction according to national value and philosophy. Treaties concluded between states as well as the United Nations Model Treaty on Extradition[25] explicitly indicates the consent of the person to be extradited as the key element for the "simplified procedure" but rarely mentions details of other conditions. This perhaps was because the simplified procedure was viewed as the practical matter requiring negotiation and mutual consent between the requesting and the requested states, thus, left out the details for sake of flexibility. For, instance, Article 15 of the Extradition Treaty between Thailand and the United States regarding "Simplified Procedure" provides that "*if the person sought irrevocably agrees in writing to extradition after personally being advised by the competent authority of his right to formal extradition proceedings and the protection afforded by them, the Requested State may grant extradition without formal extradition proceedings.*" This provision does not prescribe clearly as to what are those formalities which will be waived and what could not, but leaves it to the discretion and consultation between the concerned authorities of both Contracting Parties on case by case basis. In practice, the "formal proceedings" under this article has been interpreted as to cover all stages of criminal procedure including the judicial trial, if the extradition is proceeded on the full and formal basis. Thus, during the trial of the court, if the alleged accused agrees to be extradited, the State Attorney will apply for the cessation of the court proceeding, and refer the case back to the Ministry of Interior for the arrangement of rendition as soon as possible.

Simplified procedure for the informal extradition like this one certainly encourages the expedition and convenience of extradition between states and should be welcomed. Nevertheless, to achieve the true spirit of extradition through simplified procedure, and in order to save time, the requested state might be required to waive some scope of verification once used to be extremely essential procedure for extradition such as the consideration of the "rule of speciality," or the "extraditability" of the offence, as well as the protection of fugitive's fundamental rights through judicial review, etc.. In addition, technical requirement for the formality of the request for extradition and supporting documents should be made more lenient by the requested state. And this may be the problem deserves addressing and discussion to seek a common resolution for the more effective extradition.

[25] Article 6 of the United Nations Model Treaty on Extradition provides that "The Requested State may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

## IV. MUTUAL LEGAL ASSISTANCE IN THAILAND

### A. Background and Evolution

Unlike that of European countries, mutual legal assistance in Thailand does not stem from extradition treaty. Before the promulgation of the "*Act on Mutual Assistance in Criminal Matters B.E. 2535*", in 1992, although there were many extradition treaties concluded between Thailand and various foreign states such as the United Kingdom, Belgium, Malaysia, Indonesia, and the Philippines, non of them mentioned about "*other judicial assistance*," or "*mutual legal assistance*" as known today. In addition, there was also no direct legislation on this matter. The request of this kind, if any, was conducted in accordance with the "*General principle of international law*" as clearly spelled out in Ariticle34 of the Civil Procedure Code, which is also applicable in criminal case by virtue of Article 15 of Criminal Procedure Code. Article 34 of the Civil Procedure Code provides that:

"*Where any proceeding is to be carried out wholly or in part through the medium of or by request to the authorities in any foreign country, the Court shall, in the absence of any international agreement or provision of law governing the matter, comply with the general principle of International Law.*"

"*General principle of international law*" in this regard includes comity, reciprocity, and "rules of due process" as generally recognized between and among the sovereign states. When assistance regarding the whole trial or part of it was required, the request thereof shall be sent through diplomatic channel, which was a very time consuming process. First of all, the Court in Thailand had to submit its request to the Ministry of Justice; the Ministry of Justice would then refer such request to the Ministry of Foreign Affairs. The next step began by the Ministry of Foreign Affairs of Thailand sent the said request of Thai Court to the Ministry of Foreign Affairs of the requested states through the Thai Embassy attached to that country. Upon receipt of the request, the Ministry of Foreign Affairs of the requested state would refer the matter to the Court of that country. After the request was fulfilled or refused by the foreign Court, the matter would then sent back by the same process.

Since the process for request and receipt of legal assistance as such was too complicated and delay, other efforts for the more convenience and expedition were incessantly developed. In 1951,Thailand became the member of the "International Police Organization", or which is more often referred to as "INTERPOL", for the purpose of information exchange and cooperation with other members in the prevention and suppression of crime. In 1978, Thailand concluded an agreement on judicial cooperation in civil matter with Indonesia in order to establish a direct contact between the Courts of two countries. Similar agreement was concluded later on with France in 1983.

Nevertheless, cooperation under the scheme of INTERPOL is limited only among the polices with the rigid purpose only for information and technical exchange not law enforcement, while judicial cooperation agreement is limited only for civil matters. The actual mutual legal assistance according to the general sense of today, which encompasses all criminal matters, was begun after the coming into force of the *Act on Mutual Assistance in Criminal Matters B.E. 2535*, as well as the conclusion of many treaties regarding this matter.

**B. Legal Basis**

Upon the realization of necessity to cooperate with other countries to cope with the rising trend of transnational crime and criminal organizations, Thailand adopted the *Act on Mutual Assistance in Criminal Matters, B.E.2535*, in 1992. This Act is the main legislation to be applied to all processes of providing and seeking assistance upon the request from foreign states or Thai agencies, in so far as it is not inconsistent with the terms or provisions used by the treaties concluded between Thailand and such foreign countries. In the case of contradiction, the treaty will prevail. This may be perceived, for instance, from the provision of Section 9 (2) of the Act, which provides that:

> "*Section 9: The providing of assistance to a foreign state shall be subject to the following conditions:*
>
> (1) Assistance may be provided even there exists no mutual assistance treaty between Thailand and the Requesting State provided that such state commits to assist Thailand under the similar manner when requested
> (2) The Act which is the cause of a request must be an offence punishable *under Thai laws unless when Thailand and The Requesting State have a mutual assistance treaty between them and the treaty otherwise specifies....*"

Apart from the *Act on Mutual Assistance in Criminal Matters, B.E.2535*, the *Criminal Procedure Code* and the Constitution also play crucial role in the actual performance because various activities so requested such as the inquiry and producing of evidence, search and seizure of articles, as well as the initiating of proceedings must be carried out conforming to the *Criminal Procedure Code* and could not in one way or another contrary to the Constitution, which is the supreme law of the country to guarantee fundamental rights of the people.

Unlike that of treaty prerequisite states, assistance in Thailand may be granted even there exists no treaty between Thailand and the requesting state provided that such state commits to assist Thailand under the similar manner when requested. This principle is clearly specified in Section 9 of the Act, and known as the "reciprocal clause." In ordinary dealing, the request for assistance shall be submitted through diplomatic channel.[26] However, if the mutual assistance treaty between Thailand and the requesting state is in application, commitment for reciprocity and connection through diplomatic channel will be waived. The request for assistance in such a case as well as other communications shall be made directly to the Attorney General who is the Central Authority of mutual legal assistance as prescribed by the law.[27]

Normally, the process of requesting and granting of the assistance will follow the Act except where there is a treaty and the treaty provides otherwise, then the treaty will prevail. However, this does not mean that the treaty is automatically applied since the legislation in Thailand follows the "Dual System", which means no treaty or agreement concluded with foreign countries by the Government is self-executing but needed to be legitimized or adopted by the National Assembly before coming effective. To this extent, a supporting act for each particular extradition treaty or agreement must be enacted to support its legality. So far Thailand has already concluded mutual

[26] Section 10 of the Act on Mutual Assistance in Criminal Matters B.E. 2535.

[27] Section 6 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 provides that "*The Central Authority shall be the Attorney General or the person designated by him*"

legal assistance treaties with the United States, United Kingdom, Canada, Norway, and recently with France.

### C. Objective

Perhaps the most distinct indication of the objective for the establishment of mutual legal assistance in Thailand is perceived from the explanation of the necessity to promulgate the *Act on Mutual Assistance in Criminal Matters, B.E. 2535* during the introduction of its draft to the National Assembly in 1992. The text of such explanation reads: "*The reason to enact this Act (Act on Mutual Assistance in Criminal Matters B.E. 2535) is because the crime of today has been committed under the network of criminal organizations in many countries whereby criminal justice of each country alone could not efficiently prevent and suppress. Prevention and suppression of the said crime has to rely to international cooperation. To uphold such cooperation, it is necessary and appropriate to enact this Act.*" This explanation was further enlightened later on in the preface of "Laws Related to the Execution of Work under the *Act on Mutual Assistance in Criminal Matters, B.E.2535*"[28] to the effect that certain categories of criminality have been mentioned as transnational crime, namely: economic or white collar crime, computer crime, crime committed in the industrial world, environmental crime, as well as drug trafficking and narcotics crime.

The said indication might be somewhat arousing open-ended discussion, although it might be more or less similar to that of many countries, because the objective or reason to grant assistance to a foreign state is purely a state's option rather than obligation. Besides, the description of the objective of mutual legal assistance like this also seems to be rather abstract, thus, difficult to be given a definite demarcation.

Another way to indicate the objective of mutual legal assistance is by the practical viewpoint. In this regard, the more precise objective of the mutual legal assistance may be identified on one hand as to seek or request assistance from other countries, and on the other hand to grant or render it. This is the most explicit thing provided in all mutual legal assistance legislation and treaties as the main objective. Let us take Thailand for example. *The Act on Mutual Assistance in Criminal Matters, B.E. 2535* embraces in its content both the measures to grant assistance to foreign requesting states and to seek assistance from foreign states,[29] in particular Section 7 of the Act specifies very clear about this twofold function of the Central Authority.

### D. Forms of Assistance

Generally speaking, forms of assistance under the framework of mutual legal assistance legislation of various countries as well as those specified in treaties concluded between them are more or less similar, although the terms or wording used may be different. This is not too difficult to understand since the fundamental reason for requesting and rendering of assistance is to facilitate criminal proceedings in the requesting state. In broad sense, proceedings of criminal cases can be interpreted as to cover all steps of the deal such as tracing of clues and evidence, investigation, inquiry of witnesses, prosecution, taking testimony of the witness, etc. Criminal proceedings under any system are similarly relied to these processes. Assistance requested or rendered in order to facilitate criminal proceedings as such is, therefore,

[28] Handbook of the Office of the Attorney General, Thailand, "Rung Silp Printing Co. ,Ltd"., Bangkok, First Edition, September 1995.

[29] Section 9 to Section 14, and Section 36 to Section 41 of the Act.

based on the same set of activities or generally referred to as "forms of assistance."

In Thailand, forms of assistance are basically understood as to include certain forms of the processes of criminal cases handling, as well as other indefinite conducts under the scope of the stipulated open-ended description. According to Section 4 of the *Act on Mutual Assistance in Criminal Matters, B.E. 2535*, "assistance" means assistance regarding investigation, inquiry, prosecution, forfeiture of property, and *other proceedings* relating to criminal matters. Categorization of the forms of assistance is further enlightened by the provision of Section 12 of the same Act to cover the following:

(i) Taking statement of persons, providing documents, articles, and evidence out of Court, serving documents, searches, seizure of documents or articles, locating persons;
(ii) Taking the testimony of persons and witnesses, adducing document and evidence in the Court, forfeiture or seizure of properties;
(iii) Transferring persons in custody for testimonial purposes;
(iv) Initiating criminal proceedings.

It is quite clear from the above provision that the terms "*other proceedings*" stipulated in Section 4 is possible to be interpreted as to cover forfeiture or seizure of properties, transferring persons in custody for testimonial purposes, as well as initiating of criminal proceedings, however, such interpretation is not exhaustive. For some legal scholar, the said terms is intentionally made relatively flexible and open-ended, so it is capable to encompass other forms of assistance in the future.

## E. Authorities and Officials

### ♦ Central Authority

In the past, mutual legal assistance between countries was a time consuming matters and rather complicated. Seeking for and providing of assistance was conducted only through diplomatic channel or Letters Rogatory because there was no other means for a direct contact. To avoid delay and minimize unnecessary formalities, the concept of having "Central Authority" to be the center for sending and receiving requests as well as taking a direct responsibility of mutual legal assistance matter was, therefore, initially included in most of the treaties concluded by the United States. Advantages of having the "Central Authority" have become more and more recognized in the international level. This is testified, for example, from the United Nations Model Treaty on Mutual Assistance in Criminal Matters, article 3, whereby the designation of an authority or authorities through which requests for the purposes of mutual assistance should be made is suggested.

In Thailand, the "Central Authority," according to the *Act on Mutual Assistance in Criminal Matters, B.E. 2535*, as well as treaties concluded with various countries, is the Attorney General or, the person designated by him.[30]

The Central Authority is the official who take the most predominant role and responsibility in the process of granting and requesting assistance. Apart from general function as the coordinator to receive the request for assistance form the requesting state and transmit it to the Competent Authorities concerned, as well as to receive the request seeking assistance presented by the agency of Thai

[30] Section 6 of the Act on Mutual Assistance in Criminal Matters, B.E. 2535.

Government and deliver it to the Requested State, other equal or more significant task entrusted to the Central authority is to determine the legality and eligibility of all requests and processes. In this context he is also authorized to rule down regulations or announcement for the implementation of the whole process.[31]

Determination of the Central Authority in all manners regarding the granting and seeking assistance will be final except in two situations. First, if it is overruled by the Prime Minister, and second, if it is related to the issues of national sovereignty or security, crucial public interests, international relation, political offence, or military offence, and where the Advisory Board, set up under Section 8 of the *Act on Mutual Assistance in Criminal Matters, B.E.2535*, has a dissenting view and the Prime Minister agree with the dissenting view.

♦ **Competent Authorities**

The Competent Authorities are those officials who actually carry out functions conforming to the request for assistance as notified by the Central Authority. Thus, Competent Authorities in general sense are the officials of the requested state having authority and functions related to each particular form of assistance requested such as the investigation authorities, the detective units, the prosecution, etc.

In Thailand, the Competent Authorities are the following:

(1) The Police Commissioner General: to deal with the request for initiating of criminal proceedings and taking statement of persons, providing documents, articles, and evidence out of Court, serving documents, searches, seizures, and locating persons;
(2) The State Attorney Director General for Litigation: to deal with the request for initiating of criminal proceedings and taking the testimony of persons and witnesses, adducing document and evidence, as well as requesting for forfeiture or seizure of properties in the Court;
(3) The Director General of the Correctional Department: to deal with the request for transferring persons in custody for testimonial purpose.

♦ **Advisory Board**

To assist the Central Authority in dealing with some sensitive issues related to the national sovereignty or security, crucial public interests, international relation, political or military offence, an Advisory Board (the Board) comprising representatives from agencies concerned, namely; the Ministry of Defense; the Ministry of Foreign Affairs; the Ministry of Interior; the Ministry of Justice; the Office of the Attorney General; and other four distinguished peoples is established under Section 8 of the *Act on Mutual Assistance in Criminal Matters, B.E. 2535*.

In case of dissent between the Central Authority and the Board, the matter will be referred to the Prime Minister for his ruling.

**F. Double Criminality**

Requirement of "double criminality" in mutual legal assistance is one of the debatable issues. The principle of double criminality requires that the conduct underlying the assistance requested must also be a criminal offence punishable under the laws of the requested state, otherwise such request may be refused. Obstacle of this kind, which is also a crucial hindrance to extradition, normally stems from the

[31] Section 7 of the Act on Mutual Assistance in Criminal Matters, B.E. 2535.

divergent philosophy and conception under different legal system, which results eventually in the difference in substantive criminal law. States of different laws usually hesitate to render assistance for the conduct that does not institute a criminal offence in their jurisdiction for fear of unnecessary encroachment upon the fundamental rights and liberty of person, as well as the incapability to claim for the return reciprocity. Difficulty arising from this principle becomes even more severe nowadays when states have to include in their laws some innovative concept to cope with the modern crime. Even now, treaties on mutual assistance between some states, as well as the United Nations Model Treaty on Mutual Assistance in Criminal Matters still uphold the claiming of "double criminality" as justified for the refusal of assistance. However, since verifying of "double criminality" to institute eligibility of the request is a complicated and time consuming matter because each component of the crime and offence under the laws of the requested state must be identified out from the alleged conduct before the compliance with the request is permitted, but fighting against crime could not be waited for too long, alleviation or waiving of the strictness in application of "double criminality" approach has become increasingly called for at present. This is perceived from the recent conclusion of mutual assistance treaties between the United States and some countries including Thailand whereby the obligation to cooperate with the other Contracting Party prevails the requirement of double criminality. Even more striking example, is the motivation under the United Nations framework in the drafting of International Convention against Transnational Organized Crime where the refusal of granting assistance within the ambit of mutual legal assistance upon the assertion of "double criminality" will not be allowed, unless such grant will bring about some coercive measures.

Position of Thailand in this regard seems to be on the compromise between the concept of retaining innocent's rights and liberty on one hand, and spirit of cooperation between and among states to suppress and control crime on the other hand. While the *Act on Mutual Assistance in Criminal Matters, B.E.2535* places the principle of "double criminality" as a prerequisite for granting assistance, treaties concluded with the United States, Canada, United Kingdom do not require it. On the contrary, all said treaties impose obligation on each Contracting Party to provide assistance to the Other Contracting Party even the underlying conducts so requested does not constitute a crime or an offence in the requested state.

**G. Refusal of Request**

Generally speaking, states are competent to refuse granting assistance requested by other states on whatever reasons since there is no hard and fast rule under international law to force them to render it, unless they are bound by agreements or treaties. The requested state does not have to grant assistance, unless it so should because it thinks appropriate to do so for the reason of comity or reciprocity between countries. Refusal in this context may be made either upon the assertion of technical or non-technical grounds. Technical grounds for the refusal in this regard are those explicitly prescribed as "grounds for refusal" in national legislation, international instruments, or treaties on mutual legal assistance concluded between states. Non-technical grounds in this light are those beyond the scope of what specified by law or treaty, for example, refusal upon the political reasons.

As regards the non compliance with the request, the "Refusal of Assistance" clause as mentioned in the United Nations Model

Treaty on Mutual Legal Assistance, and "Limitations on Compliance" as used by some treaties, denote the same concept to preserve as State's absolute discretion not to grant assistance in some matters or occasions which are sensitive to them.

Apart from certain grounds such as the assistance requested is beyond the scope of treaty or agreement, or contrary to the elements of "double criminality", "*ne bis in idem*", and "conflict of jurisdiction", other grounds often asserted by sovereign states for refusal of giving cooperation are the preservation of national sovereignty, security or crucial public interests, and the avoidance of political offence or military offence.

In Thailand similar grounds for refusal are stipulated both in the *Act on Mutual Assistance in Criminal Matters, B.E. 2535* as well as various treaties concluded with foreign states.

Within the framework of the *Act on Mutual Assistance in Criminal Matters,B.E. 2535*, Section 9 provides that:

*"Section 9: The providing of assistance to a foreign state shall be subject to the following conditions:*

*(1) Assistance may be provided even there exists no mutual assistance treaty between Thailand and the Requesting State provided that such state commits to assist Thailand under the similar manner when requested;*
*(2) The act which is a cause of the request must be an offence punishable under Thai laws unless when Thailand and the Requesting State have a mutual assistance treaty between them and the treaty otherwise specifies provided, however, that the assistance must be conformed to the provision of this Act;*
*(3) A request may be refused if it shall affect national sovereignty or security, or other crucial public interests of Thailand, or relate to a political offence;*
*(4) The provision of assistance shall not be related to a military offence."*

As regards mutual legal assistance treaties, the clause related to the refusal of request usually prescribed similarly. For instance, Article 2 of the "Treaty Between Thailand And Canada on Mutual Assistance in Criminal Matters" concluded in 1994, partly provides that:

*"The Requested State may refuse to execute a request if it considers that:*
*(a) the request would prejudice the sovereignty, security or other essential public interest of the Requested State or the safety of any person; or*
*(b) the request relates to a political offence."*

## V. ADDITIONAL DATA

**APPENDIX I**

**A. Countries having Extradition Treaties with Thailand up to October 1999.**

| Number | Countries | Date of Signing |
|---|---|---|
| 1 | The United Kingdom | 4 March 1911 |
| 2 | The United States | 14 December 1983 |
| 3 | Belgium | 14 October 1937 |
| 4 | Indonesia | 29 June 1976 |
| 5 | The Philippines | 16 March 1981 |
| 6 | People's Republic of China | 26 August 1993 |
| 7 | Malaysia | Succession of Thai-United Kingdom Treaty. |
| 8 | Fiji | " |
| 9 | Canada | " |
| 10 | Australia | " |

**B. Countries having no Extradition Treaty but commit to follow Reciprocal Principle**

| Number | Countries |
|---|---|
| 1 | France |
| 2 | Italy |
| 3 | Norway |
| 4 | German |
| 5 | Austria |

**C. Countries having signed Extradition Treaties but has not yet ratified them.**

| Number | Countries |
|---|---|
| 1 | Cambodia |
| 2 | Bangladesh |
| 3 | Laos |
| 4 | Republic of Korea |

**Source: Ministry of Foreign Affairs.**

## APPENDIX II

### A. Countries having Mutual Legal Assistance Treaties With Thailand upto October 1999.

| Number | Countries | Date of Signing |
|---|---|---|
| 1 | The United States | 19 March 1986 |
| 2 | Canada | 3 October 1994 |
| 3 | The United Kingdom | 12 September 1994 |

### B. Country having singed Mutual Assistance Treaties but has not yet ratified it.

- France

### C. Country having negotiated Mutual Assistance Treaty. and pending the signing of it.

- Norway

## APPENDIX III

### A. States requesting Extradition from Thailand.

| Requesting States | Number of Cases During 1996-1997 | Number of Cases in 1988 Up to October | Total |
|---|---|---|---|
| Australia | 1 | 1 | 2 |
| Austria | 1 | - | 2 |
| Belgium | 1 | 1 | 2 |
| Canada | 1 | - | 2 |
| France | - | 3 | 3 |
| German | - | 1 | 1 |
| Malaysia | 2 | - | 2 |
| Norway | - | 1 | 1 |
| United Kingdom | 1 | 1 | 1 |
| United States | 14 | 4 | 15 |

**B. States requested by Thailand for Extradition.**

| Requested States | Number of Cases during 1997-1998 | Number of Cases in 1998 Upto October | Total |
|---|---|---|---|
| Australia | - | 1 | 1 |
| Canada | 1 | - | 1 |
| German | - | 1 | 1 |
| Malysia | 1 | - | 1 |
| Italy | - | 1 | 1 |
| People's Republic of China | 1 | - | 1 |
| United Kingdom | 1 | - | 1 |
| United States | - | 1 | 1 |

## APPENDIX IV

**A. Countries Requesting Assistance from Thailand during January 1996-October 1999.**

| Countries | Number of cases requested during 1996-1997 | Number of cases requested during January 1998-October 1998 | Total |
|---|---|---|---|
| Austria | 5 | 3 | 8 |
| Belgium | 10 | 3 | 13 |
| Canada | - | 1 | 1 |
| Denmark | 1 | 2 | 3 |
| France | 2 | 8 | 10 |
| Finland | - | 2 | 2 |
| German | 9 | 3 | 12 |
| India | 1 | 1 | 2 |
| Iceland | 1 | - | 1 |
| Japan | 2 | 1 | 1 |
| Laos | 1 | - | 1 |
| Lithuania | - | 1 | 1 |
| Poland | 2 | 6 | 8 |
| Russia | 1 | 1 | 2 |
| Sweden | 5 | - | 5 |
| Singapore | - | 1 | 1 |
| South Africa | 1 | 1 | 1 |
| Switzerland | - | 3 | 3 |
| Taiwan | - | 1 | 1 |
| United Kingdom | 5 | 5 | 10 |
| United States | 8 | 9 | 17 |

**B. <u>Foreign countries from which Thailand requested assistance. During January 1996-October 1998.</u>**

| Countries | Number of Cases requested During 1996-1997 | Number of Cases requested In 1998, up to October | Total |
|---|---|---|---|
| Austria | 2 | - | 2 |
| Australia | - | 4 | 4 |
| Canada | 1 | 1 | 2 |
| France | - | 2 | 2 |
| German | 1 | 1 | 2 |
| Greece | 1 | - | 1 |
| Japan | 1 | - | 1 |
| People's Republic of China | 1 | - | 1 |
| Pakistan | - | 1 | 1 |
| Singapore | - | 4 | 4 |
| Switzerland | 1 | - | 1 |
| United States | 3 | 1 | 4 |

# INTERNATIONAL COOPERATION IN FIGHTING TRANSNATIONAL ORGANIZED CRIME: SPECIAL EMPHASIS ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*John E. Harris* *

## I. INTRODUCTION

I should like to start my examination of the major features of international cooperation by sharing with you some information about my organization. The Office of International Affairs (OIA) in the Criminal Division of the United States Department of Justice was established twenty one years ago this week, and we specialize in processing requests to and from the United States for extradition and mutual legal assistance. We also participate with the State Department in the drafting of new extradition and mutual legal assistance treaties, the negotiation of international conventions, and engaging in general efforts to improve international law enforcement cooperation. The staff of OIA consists of nearly eighty men and women in our Washington, D.C. headquarters as well as attorneys and associated staff in six foreign countries. On any given day, we are in the process of handling about 6,000 requests to and from the U.S., for extradition and mutual assistance, and the number of cases grows every year, due in large part to the growth of transnational organized crime.

For purposes of our discussion today, I will use the phrase "transnational organized crime" to include offenses committed by organized bands or groups of criminal in which national borders are crossed in connection with the crime. Thus, it covers the most familiar operations of the traditional organized crime gang, or Mafias, including terrorist attacks, drug trafficking, money laundering, counterfeiting, financial fraud, alien smuggling, and trafficking in women and children. Offenses falling within this definition would include many of these crime are carried out daily by organized crime groups Russia, Asia, the Middle East, Mexico, Colombia, and Nigeria — and the United States. In addition, transnational organized crime includes crimes committed wholly within one country by an organized criminal group and the defendant flees to a foreign country to avoid prosecution or punishment. For example, in a recent case in Florida, the assassin for a drug trafficking ring, who committed several cold-blooded murders of several members of a rival drug ring. Although the killer committed all of his murders within the state of Florida, where his drug ring operated, he fled to England as soon as he was identified. After lengthy efforts, the man was finally extradited back to the U.S., pleaded guilty, and is serving a life sentence. This is an example of a local organized crime matter that acquired international connections and complications through the flight of the criminal.

We all know that the world is becoming smaller and more inter-related every day. Advances in telecommunications, transportation, and technology make it possible for people in every nation to feel more interconnected than at any time in history. The same breakthroughs in telecommunications (including the growth of the Internet and the development of

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advanced new systems of wireless and satellite-based communications) allow virtually every person on the planet to have access to anyone else. These advances that have so greatly facilitated trade, travel, and telecommunications have also benefited international criminal activity. In addition, the breakdown of the former Soviet Union has created a number of new nations that are still striving to develop truly effective law enforcement systems.

With this in mind, how significant is the problem of transnational organized crime? Let me offer some facts that illustrate the matter for you.

— All $48 billion worth of cocaine and heroin in the United States each year originates abroad, and is brought here by transnational organized crime groups.

— Two thirds of all counterfeit currency detected in the U.S. is actually created outside of the United States.

— About 200,000 of the automobiles stolen in the U.S. each year, worth over a billion dollars, are taken outside our borders for sale abroad.

— Theft of trade secrets from U.S. companies by their foreign business competitors resulted in losses to the U.S. economy estimated at $18 billion in 1997.

— The production and sale of counterfeit products and other forms of copyright, trademark, and patent infringement cost U.S. companies over $23 billion annually.

— Organized terrorist groups continue to maim and kill the innocent and unsuspecting. Americans seem to be a favorite target, and the recent, tragic bombing of our Embassies in Kenya and Tanzania, in which hundreds of innocent people lost their lives, show clearly that the work of these organized terrorist groups can be deadly.

In response to this growing threat from transnational organized crime, many nations have stepped up their efforts to confront and contain transnational organized crime. You have already heard from Mr. Nilsson about the response by the European Union and the Council of Europe to this problem, and Dr. Plachta will tell you more about the efforts of the United Nations to develop a global treaty in this area. The United States has supported all of these efforts.

I would like to take just a moment to mention the scope of the United States' internal response to the problem. President Clinton announced at the United Nations in 1995 that international organized crime groups pose not just a law enforcement problem, but a threat to our national security. He also issued Presidential Decision Directive 42, which directs government agencies to use all available legal means to attack international crime. The Directive also commands U.S. law enforcement, diplomatic, intelligence, and defense agencies to work together with other governments to identify and punish transnational criminnal, to eliminate sanctuaries for international criminals.

There have been a number of important changes within the U.S. Government, and even within my own agency, the Department of Justice, in recent years due to this heightened emphasis on strengthening our cooperative relationships with foreign law enforcement.

— Attorney General Janet Reno meets

foreign officials virtually every week to discuss ways to improve efforts to combat international crime. In just the last ten days, for instance, Attorney General Reno met with the Minister of Justice of Argentina and agreed to identify high-priority mutual legal assistance matters for expedited handling. She held similar meetings with the Minister of Justice of Indonesia and the Minister of Justice of Latvia, and, at her direction, other Justice Department officials met with high level officials from Mexico, Colombia, and other countries. She is deeply committed to this issue, and has made it a high priority within the Justice Department. Developing relationships with other countries traditionally was the job of the State Department, but in recent years the growth of transnational organized crime has made it essential that we in law enforcement work directly and cooperatively with foreign governments to build these relationships ourselves.

— The U.S. law enforcement agencies all have expanded their operations overseas. The FBI now has 32 overseas offices, and Justice Department law enforcement agencies have nearly 7,000 active investigations at their overseas offices.

— The Justice Department has increased the number of senior attorneys to U.S. embassies in order to provide advice on specific organized crime investigations and to assist in negotiating and implementing mutual legal assistance and extradition treaties and other international instruments. These attorneys, who report to me, work closely with both the U.S, law enforcement agency representatives at the embassy and with the lawyers in the Ministry of Justice or Attorney General's Office of the host country.

— The Justice Department's Criminal Division, which traditionally focused on crimes occurring inside the U.S., now spends a very significant portion of its time working on international criminal cases, such as international terrorism, drug trafficking, money laundering, export control, and computer crimes. OIA has rapidly become one of the largest components of the Criminal Division, and the negotiation and implementation of extradition and mutual legal assistance agreements has become our largest activity.

We know, however, that no single nation can successfully combat international organized crime alone. Therefore, in addition to negotiating bilateral treaties and agreements, Justice Department lawyers have been actively working with multilateral organizations to agree on procedures and instruments to combat transnational organized crime.

— We have been very active in the G8 (Canada, the United Kingdom, Italy, Japan, France, Germany, the United States, and Russia) which is chaired this year by Japan. The G8's Senior Expert Group on Transnational Organized Crime, also known as the Lyons Group, has developed 40 anti-crime recommendations, and is working to implement them globally. This group will meet in Tokyo next week, to continue its efforts.

— We have also been active in the Organization of American States (where we helped develop OAS

conventions against corruption and firearms trafficking), at the Organization for Economic Cooperation and Development (where we helped in negotiation of an OECD convention requiring states to punish the payment of bribes to foreign government officials in international business transactions), at the Council of Europe (where we are working on COE conventions on computer crime and on public corruption) and at the United Nations, where the UN Organized Crime Convention is being developed.

These negotiation initiatives are very important, and show us what the future may hold for transnational law enforcement. Let me mention, however, two or three recent cases that illustrate how the Justice Department's efforts involve practical measures in actual criminal investigations as well as global negotiations.

## II. BOMBINGS IN AFRICA

In 1998, truck bombs destroyed the U.S. Embassies in Nairobi, Kenya, Dar Es Salaam, Tanzania, and in the process dozens of Americans and hundreds of Kenyan and Tanzanian citizens were killed or injured. Within hours of the bombings, the first of nearly 300 FBI agents flew to Africa to begin intensive investigation, alongside their Kenyan and Tanzanian counterparts. Forensic examinations and interviews of suspects were conducted almost around the clock. Federal prosecutors from New York and Washington were on the ground within days to help direct the U.S. investigators in Nairobi and Dar Es Salaam. Today, hundreds of FBI agents continue to work on the investigation, both in the U.S. and abroad, and their efforts have been helped tremendously by leads from the intelligence community. Recently, formal criminal charges were filed in the U.S. courts against several members of the Usama bin Laden criminal organization responsible for the bombings, and one suspect is now in custody in the United Kingdom awaiting extradition to the U.S. Many of you know that investigators recently discovered links between the organization and efforts to commit additional acts of terror, this time on U.S. soil. In December, 1999, the FBI arrested a member of this organization who had smuggled explosives into the U.S. from Canada. U.S. and Canadian investigators, working closely together under our mutual legal assistance treaty with that country, uncovered additional information about the organization, and at our request Canada has arrested another suspect, who is being held for extradition.

## III. DRUG TRAFFICKING

In late 1999, U.S. Drug Enforcement Administration agents, working closely with police in Colombia and Mexico, completed an extensive investigation of cocaine and heroin trafficking cartels. As a result, the three Governments simultaneously arrested dozens of suspects in the U.S., Mexico, and Colombia, and seized drug proceeds and properties worth millions of dollars. As a result of this operation, about thirty of Colombia's most powerful drug traffickers are currently in jail awaiting extradition to the U.S. Using the applicable mutual legal assistance treaties and agreements, the three countries will share with each other the evidence needed to convict the offenders and to prove in court that the assets seized are subject to confiscation.

In these two cases, you can see both the current nature of the threat posed by international crime, and the corresponding globalization of the law enforcement

response. None of these investigations could have been successful had not the police and investigators in the affected countries worked together.

## IV. MECHANISM FOR INTERNATIONAL COOPERATION

I would now like to describe the key features of modern mechanisms for international law enforcement cooperation.

### A. Police to Police Assistance

Most international cooperation is conducted by direct liaison between police in the requesting and requested state. This is sometimes referred to as "cop to cop" cooperation, and is usually predicated not on a specific treaty or international agreement, but rather on the basis of good will, mutual respect, and shared interest in combating crime. A good example of successful "cop to cop" cooperation is the investigation of the Kenyan and Tanzanian embassy bombings that I mentioned earlier.

It is largely to facilitate this kind of cooperation that the United States has stationed law enforcement agents at its embassies in other countries, positioned to conduct ongoing and close liaison with their counterparts in those countries. The FBI has agents, called "legal attaches" or "legats," in 32 countries. The Drug Enforcement Administration and the Customs Service have their agents in an even larger number of countries. Similarly, a number of foreign countries have stationed their law enforcement agents in the United States for the same purpose. For example, the National Police Agency of Japan has agents posted in Washington who have been quite effective in advancing the interests of Japanese police in criminal investigations.

A major vehicle for advancing "cop to cop" cooperation is the International Criminal Police Organization, or INTERPOL. This organization is comprised of "National Central Bureaus" in each of its members state's police apparatus, and it serves as a conduit for the rapid and secure transmission of international criminal investigative information.

When it works, "cop to cop" cooperation can be fast, efficient, and refreshingly free of formalities. However, there are many instances in which a request for assistance that relies solely on the generosity and good will of the requested state's police simply goes unanswered.

### B. Letters Rogatory

While police to police liaison can be extremely useful, there are many instances in which the police of the requested state can do little without obtaining a court order or other compulsory process. In these instances, the police will need the assistance of a judge.

A letter rogatory is a request from a judge in one country to a judge in another in which the former asks the latter to use the requested state's judicial power to assist the requesting judge. While the letter rogatory process was developed to enable judges to aid judges, a judge in the requesting state may issue letters rogatory on behalf of the police or prosecutors in that country. Virtually every country has legislation for execution of letters rogatory, or permits its judges to execute them as a matter of comity. In the United States, the applicable legislation is Title 28, United States Code, Section 1782, a copy of which is attached to this paper.

Once the requesting state's judge signs the letter rogatory, it is transmitted via diplomatic channels, a process that can take many weeks or months. Upon arrival,

it first is reviewed by the requested state's Ministry of Foreign Affairs. This process which can add a degree of uncertainty to the process, because the diplomatic corps is generally considered free to refuse to act on a letter rogatory if it feels that the assistance sought would be inconsistent with the requested state's public policy. If the request is accepted by the Ministry of Foreign Affairs, it usually is then forwarded to the Ministry of Justice or Attorney General's chambers in the requested state, which transmits the request to a judge for execution. The judge generally is under no obligation to execute the request, and if he or she does execute the request it will be done in strict compliance with the law of the requested state. This can add another level of uncertainty to the process, because the law of the requested state may be very different from the law of the requesting state with respect to such matters as the authentication of evidence, the manner in which evidence is taken or preserved, the privileges that witnesses may raise to block execution of the request. In some instances, the law of the requested state may contain restrictions on cooperation that seriously impede efforts to execute the request. For example, some countries do not execute letters rogatory prior to the filing of formal criminal charges in the requesting state — a serious limitation, since sometimes the requesting state needs the evidence sought to determine whether charges should be filed. Another example: in some countries, the bank secrecy laws do not empower a judge to obtain bank records sought in a letter rogatory. Once the request has been executed (or the judge has decided not to execute it), the results are usually sent back to the requesting judge via diplomatic channels.

The letter rogatory process has occasionally produced spectacularly successful results for us. In some cases in which letters rogatory were issued, the requested judge successfully executed it immediately, and bank records or other evidence sought in the request were available in as little as one week. One successful example is the case many years ago of Roger FRY and Sicilia FALCONE, two men who operated a marijuana and cocaine smuggling ring so huge that it garnered $60 million in two years. Close cooperation between narcotics investigators in the U.S. and Mexico resulted in FALCONE'S arrest in Mexico and FRY's simultaneous arrest in Detroit, Michigan. Records seized during Falcone's arrest showed that he and FRY had several bank accounts in Switzerland, so U.S. sent a letter rogatory to Switzerland for records of the accounts. The Swiss provided the records, which proved the movement of hundreds of thousands of dollars in drug money and the Swiss to seize the money. FRY learned, on the morning that his trial was to start, that U.S. prosecutors had obtained copies of his Swiss bank records, and he immediately agreed to plead guilty to all charges.

More often, however, the letter process is not very successful, and the prosecutor or police officer who generates a letter rogatory may wait many frustrating months, or years, only to find that the requested evidence is not produced. We have many cases in which evidence sought by letters rogatory was not supplied until long after the trial has been completed.

There have been some recent efforts to make the letters rogatory system work more efficiently and effectively. The Council of Europe has negotiated a treaty that updates its 1957 convention on the mutual execution of letters rogatory. The European Union has begun discussions on establishing a "judicial network" which, it is hoped, will expedite execution of letters rogatory between European nations

covered by the network. We are monitoring these efforts closely, but it does not appear that these efforts have yet borne fruit.

**C. Mutual Legal Assistance Treaties**

An alternative to letters rogatory is provided by the development of mutual legal assistance treaties (MLATs). The United States has thirty-one (31) MLATs in force, with the following countries: Switzerland, Turkey, Italy, the Netherlands, Canada, Mexico, the Bahamas, the United Kingdom (regarding the Cayman Islands and other Caribbean dependent territories), Thailand, Morocco, Spain, Argentina, Jamaica, Uruguay, Panama, the Philippines, the United Kingdom, Hungary, Korea, Austria, Israel, Antigua, Lithuania, St. Vincent and the Grenadines, Grenada, Latvia, Poland, Australia, Trinidad, Belgium, and most recently, the Hong Kong Special Administrative Region. We have signed MLATs with another twenty-three (23) countries, and these treaties will enter into force in the next few months. These fifty-four treaties cover most European countries and many of the world's the major "bank secrecy" jurisdictions. Of course, many other countries have begun active campaigns to negotiate MLATs, too, notably the Philippines, Korea, Canada, Australia, and the United Kingdom. The rapidly expanding network of bilateral MLATs will soon rival the network of extradition treaties.

The United States has made the negotiation of MLATs in Asia a particular high priority, in part to maximize our ability to address transnational organized crime problems, such as the Chinese Triads. For that reason, we have MLATs in force with Thailand, the Philippines, the Republic of Korea, Australia, and the Hong Kong Special Administration Region. The United States is currently in the process of negotiating an MLAT with Japan — negotiations that were initiated in large part through the wisdom and hard work of UNAFEI Director Kitada.

Each MLAT places an unambiguous obligation on each party to provide assistance in criminal investigations in the other party. MLATs entitle the requesting state to assistance in:

(1) acquiring bank records and other financial information;
(2) questioning witnesses and taking statements or testimony;
(3) obtaining copies of government records, including police reports;
(4) serving documents; transferring persons in custody for purposes of cooperation;
(5) conducting searches and seizures; and
(6) freezing and repatriating stolen property or proceeds of crime.

Each MLAT also permits any other form of assistance not prohibited under the law of the requested state, and we successfully used the MLATs to handle more sophisticated and difficult requests. For example, we have made or received requests under MLATs to take the testimony of witnesses via real-time satellite videolink; to search for and seize information from computer hard drives, or Internet Service Providers; to conduct undercover operations, or conduct wiretaps, where permitted by law; to seize and repatriate stolen artwork or archeological treasures worth millions of dollars; or to place threatened persons in our witness protection programmes.

While some MLATs differ a bit from others, most of them have five key components that make the processing of MLAT requests easier and more predictable than other mechanisms for cooperation:

1. Scope - Each MLAT specifies the scope of the obligation to provide assistance. All require that cooperation must be provided at the earliest stage of the investigation, prior to the filing of formal charges, thus eliminating one problem with some letters rogatory.

2. Bases for Denial - Each MLAT specifies the grounds on which assistance can be denied. MLATs typically allow denial of requests that appear to involve a political offenses or a military offense not recognized under the ordinary criminal law, or if the request would violate the constitution of the requested state. All MLATs permit denial of requests that would violate the "essential interests" of the requested state interests such as national security or basic public policy. By specifying the grounds on which requests can be denied, the MLATs bring predictability to the international cooperation process.

It should be noted that some of our earliest MLATs (with Switzerland and the Netherlands) contained a list of the crimes for which assistance could be granted, and permitted denial of the request if the case involved a crime not on the list. We quickly learned that this list approach was not helpful, and impeded cooperation in major cases in which the laws of the two countries were different but there was no "essential interest" served by refusal to grant the aid. Therefore, subsequent MLATs permitted assistance to be granted for any crime for which there is "dual criminality," i.e., that it is an offense in both requesting and requested state. We soon concluded that even that is too restrictive a rule for mutual legal assistance, particular because in the early stages of an investigation it is difficult to predict what crime ultimately will be charged. Accordingly, the majority of our MLATs do not require dual criminality unless the request is for a search and seizure or for the confiscation of assets.

3. Use limitations - All of the MLATs contain a very clear obligation not to use information or evidence supplied under the MLAT for any case or investigation other than that for which the information or evidence was requested. This kind of provision is similar to the rule of specialty in extradition matters, and helps assure the requested state that the information provided will be used only for proper purposes.

4. Central Authority - One key innovation of the MLATs is that they oblige each party to name a "Central Authority" i.e., an agency or person designated to see to the prompt execution requests from the other party. In virtually every MLAT, the Central Authority is the Ministry of Justice or the Attorney General of each state.

A good Central Authority cannot be merely a "mailbox" through which requests are transmitted. On the contrary, the Central Authority is expected to take an active role in insuring the each request is executed. Our practical experience has been that a good Central Authority is a key part of to the success or failure of an MLAT.

5. Asset Forfeiture - The most successful MLATs all make provision for cooperation in cases in which unlawfully obtained assets are located

in the requested state. Many of these MLATs also provide for sharing the confiscated assets between the parties to the treaty. The United States has used the MLATs to recover well over $300 million in drug proceeds and other illegally acquired funds. I should point out that we do not keep all of this money. Instead, our practice is to share confiscated funds with our MLAT partners who assisted us in obtaining the evidence needed to prosecute the case.

All of our most recent MLATs contain these five ingredients, and these elements, among other, help make the MLAT process an especially effective mechanism for transnational cooperation. In the twenty years since our first MLAT, with Switzerland, entered into force, the United States had made and received several thousand requests under MLATs from various countries. We in OIA have made and executed these requests at the same time that we processed hundreds of requests for evidence by letters rogatory and other processes, so we have had a good opportunity to see and compare the operation of the various processes. There is no doubt in my mind that MLATs provide a more efficient and more reliable basis for international cooperation in evidence-gathering than many of the other mechanisms available. It is of course possible that the United Nations Transnational Organized Crime Convention currently being negotiated in Vienna will provide an even more efficient vehicle for managing international cooperation. Only time will tell us whether that is true or not.

## V. INTERNATIONAL EXTRADITION

I would like to say a word or two about the role of international extradition in the battle against transnational organized crime.

The applicable United States legislation on international extradition is found at Title 18, United States Code, Section 3181-3196. These statutes are attached to this article.

Our laws require that there be an extradition treaty in force before extradition can take place. We have extradition treaties with about one hundred and eleven (111) countries. In the past few years, we have signed new treaties with about forty (40) countries in Asia and elsewhere, including Australia, the Hong Kong Special Administrative Region, India, Korea, Malaysia, the Philippines, and Sri Lanka. We also have treaties in force with Japan, Thailand, and other important Asian nations.

There are three issues that typically arise regarding these extradition treaties:

1. Extraditable offenses: Our older extradition treaties each contain a list of the crimes for which extradition can be sought or granted. Newer treaties define extraditable offenses as any crime that is punishable in both states by more than one year's imprisonment. During treaty negotiation, we sought and received assurances that the new treaty will permit extradition for organized crime related crimes.

2. Evidence Needed: Common law countries, like the United Kingdom and Canada, traditionally refused to extradite unless the request was accompanied by "such evidence as would justify committal for trial in the requested state." The requesting state must show sufficient evidence to establish a "prima facie case" against the offender, i.e., enough evidence to persuade a judge in the requested state that the offender could have been convicted in that state. Civil law countries, such as France and Germany, usually did not deem

it necessary or proper to review the weight of the evidence against the offender, and are satisfied that a properly certified warrant for arrest is outstanding. Civil law states often had difficulty meeting the "prima facie case" standard, and criticized the common law states for this rule. Recently, some common law countries such as the U.K. have amended their law to eliminate the prima facie case rule and adopt the civil law approach, at least in dealings with European Union countries. The U.S., however, is one common law country that never followed the "prima facie case rule" in the first place. Our extradition jurisprudence requires only "probable cause," or just enough evidence to issue an arrest warrant. This is a very low standard, equivalent to what is needed to issue a search warrant. Most of our newest extradition treaties use this probable cause standard.

3. Extradition of nationals: One of the most troubling issues in modern extradition practice is the question of the extent to which states extradite their own citizens. Common law countries traditionally draw no distinction between their nationals and others for purposes of extradition. Many civil law countries, however, either bar themselves from extraditing their citizens altogether, or permit such extradition only in exceptional cases. Nations that refuse to extradite their citizens become safe havens for their citizens who commit crimes in other countries. Sometimes, nations that refuse to extradite their citizens offer to prosecute these offenders in lieu of extradition, but such prosecutions have proven to be extremely difficult as a practical matter, extremely expensive. These prosecutions also tend to impose heavy, unfair burdens on the victims of the crime, who are compelled to travel great distances at considerable expense and inconvenience in order to see justice done. The U.S. feels strongly that criminals should never escape punishment solely because of nationality, and that generally offenders should be tried in the community most affected by the crime.

We are gratified to see many civil law countries coming to the same conclusion. In 1996, Mexico extradited one its citizens to the U.S. for the first time in history, and in 1999, Colombia resumed extraditing its nationals to us after a hiatus of nearly a decade. Bolivia, Argentina, Uruguay all signed extradition treaties with the U.S. that require extradition of nationals to a greater or lesser degree. Mandatory extradition of nationals is provided for in most new U.S. extradition treaties, and we are currently negotiating several treaties with European countries that will contain such provisions.

## VI. CONCLUSION

In conclusion, please allow me to point out that the global battle to confront and destroy transnational organized crime is a contest that demands the best of all of us, as participants in the criminal justice system. The stakes are enormous. President Clinton has said that "[International criminals] jeopardize the global trend toward peace and freedom, undermine the fragile new democracies, sap the strength from developing countries, [and] threaten our efforts to build a safer, more prosperous world." For these reasons, it is important that we make the most of opportunities like this conference, to learn all we can about the tools available for international cooperation, and take these lessons with us to our homes for use in building the brighter future we and our families deserve.

**§1782. Assistance to foreign and international tribunals and to litigants before such tribunals**

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

(June 25, 1948, c. 646, 62 Stat. 949; May 24, 1949, c. 139, § 93, 68 Stat. 103; Oct. 3, 1964, Pub.L. 88-619, § 9(a), 78 Stat. 997; Feb. 10, 1996, Pub.L. 104-106, Div. A, Title XIII, § 1342(b), 110 Stat. 486.)

**§ 3181. Scope and limitation of chapter**

(a) The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

(b) The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that —

(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and

(2) the offenses charged are not of a political nature.

(c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(June 25, 1948, c. 645, 62 Stat. 822; Apr. 24, 1996, Pub.L. 104-132, Title IV, §443(a), 110 Stat. 1280.)

**§ 3182. Fugitives from State or Territory to State, District, or Territory**

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

(June 25, 1948, c. 645, 62 Stat. 822; Oct. 11, 1996, Pub.L. 104-294, Title VI, §601(f)(9), 110 Stat. 3500.)

**§ 3183. Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States**

Whenever the executive authority of any State, Territory, District, or possession of the United States or the Panama Canal Zone, demands any American citizen or national as a fugitive from justice who has fled to a country in which the United Stated exercises extraterritorial jurisdiction, and produces a copy of an indictment found or an affidavit made before a magistrate of the demanding jurisdiction, charging the fugitive so demanded with having committed treason, felony, or other offense, certified as authentic by the Governor or chief magistrate of such demanding jurisdiction, or other person authorized to act, the officer or representative of the United States vested with judicial authority to whom the demand has been made shall cause such fugitive to be arrested and secured, and notify the executive authorities making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

If no such agent shall appear within three months from the time of the arrest, the prisoner may be discharged.

The agent who receives the fugitive into his custody shall be empowered to transport him to the jurisdiction from which he has fled.

(June 25, 1948, c. 645, 62 Stat. 822.)

**§ 3184. Fugitives from foreign country to United States**

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the

United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

(June 25, 1948, c. 645, 62 Stat. 822; Oct. 17, 1968, Pub.L. 90-578, Title III, §301(a)(3), 82 Stat. 1115; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7087, 102 Stat. 4409; Nov. 29, 1990, Pub.L. 101-647, Title XVI, § 1605, 104 Stat. 4843; Apr. 24, 1996, Pub.L. 104-132, Title IV, § 443(b), 110 Stat. 1281.)

**§ 3185. Fugitives from country under control of United States into the United States**

Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who, having violated the criminal laws in force therein by the commission of any of the offenses enumerated below, departs or flees from justice therein to the United States, shall, when found therein, be liable to arrest and detection by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed.

(1) Murder d assault with intent to commit murder;

(2) Counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money;

(3) Counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same;

(4) Forgery or altering and uttering what is forged or altered;

(5) Embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries;

(6) Larceny or embezzlement of an amount not less than $100 in value;

(7) Robbery;

(8) Burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein;

(9) Breaking and entering the house or building of another, whether in the day or nighttime, with the intent to commit a felony therein;

(10) Entering, or breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein;

(11) Perjury or the subornation of perjury;

(12) A felony under chapter 109A of this title;

(13) Arson;

(14) Piracy by the law of nations;

(15) Murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government;

(16) Malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life.

This chapter, so far as applicable, shall govern proceedings authorized by this section. Such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

No return or surrender shall be made of any person charge with the commission of any offense of a political nature.

If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

(June 25, 1948, c. 645, 62 Stat. 823; May 24, 1949, C. 139, § 49, 63 Stat. 96; Nov. 10, 1986, Pub.L. 99-646, § 87(c)(6), 100 Stat. 3623; Nov. 14, 1986, Pub.L. 99-654, § 3(a)(6), 100 Stat. 3663.)

### § 3186. Secretary of State to surrender fugitive

The Secretary of state may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

(June 25, 1948, c. 645, 62 Stat. 824.)

### § 3187. Provisional arrest and detention within extraterritorial jurisdiction

The Provisional arrest and detention of a fugitive, under sections 3042 and 3183 of this title, in advance of the presentation of formal proofs, may be obtained by telegraph upon the request of the authority competent to request the surrender of such fugitive addressed to the authority competent to grant such surrender. Such request shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.

No person shall be held in custody under telegraphic request by virtue of this section for more than ninety days.

(June 25, 1948, c.645, 62 Stat. 824.)

### § 3188. Time of commitment pending extradition

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out, of the United States, any judge of the United States, or of any State, upon application made to him

by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

(June 25, 1948, C. 645, 62 Stat. 824)

**§ 3189. Place and character of hearing**

Hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public

(June 25, 1948, c. 645, 62 Stat. 824.)

**§ 3190. Evidence on hearing**

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

(June 25, 1948, c. 645, 62 Stat. 824.)

**§ 3191. Witnesses for indigent fugitives**

On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States.

(June 25, 1948, c. 645, 62 Stat. 825; Oct. 17, 1968,Pub.L. 90-578, Title III, § 301(a)(3), 82 Stat. 1115.)

**§ 3192. Protection of accused**

Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia there of, as may be necessary for the safe-keeping and protection of the accused.

(June 25, 1948, c. 645, 62 Stat. 825.)

**§ 3193. Receiving agent's authority over offenders**

A duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.

(June 25, 1948, c. 645, 62 Stat. 825.)

**§ 3194. Transportation of fugitive by receiving agent**

Any agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State or Territory from which he has fled.

(June 25, 1948, c. 645, 62 Stat 825.)

**§ 3195. Payment of fees and costs**

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate, shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

(June 25, 1948, c. 645, 62 Stat. 825; Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a)(3), 82 Stat. 1115.)

**§ 3196. Extradition of United States citizens**

If the applicable treaty or convention does not obligate the Unites States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

(Added Pub.L. 101-623, §11(a), Nov. 21, 1990, 104 Stat. 3356.)

# PARTICIPANTS' PAPERS

## INTERNATIONAL COOPERATION IN CRIMINAL MATTERS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN MALAYSIA

*Abdul Jalal Bin Mohd Yunus**

### I. INTRODUCTION

The world today has indisputedly opened up with an intensification of international relations in all areas. Crime previously confined to the territorial limits of states has now shed a harsh light on a new scene with accruing international fluxes which is becoming increasingly intense and complex.

With regard to the meaning of international crime, it is generally defined, as a crime which requires the cooperation of a foreign country in the process of enforcing criminal justice and the crime contains an international factor in terms of the perpetrator, victim, occurrence, whereabouts of the perpetrator or location of evidence.

The occurrence of international crime has brought great problems to investigators in their efforts to obtain evidence and to locate their witnesses, especially in foreign countries or to apprehend a fugitive abroad. In order to obtain evidence from a foreign country, mutual legal assistance is employed and the process in which a fugitive is surrendered from one country to another country is referred to as extradition. The objective of this paper is to focus on mutual legal assistance and extradition in Malaysia.

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### II. BASIS FOR EXTRADITION AND MUTUAL LEGAL ASSISTANCE

There are two bases for extradition: -

Firstly, International deterence and goodwill. An extradition request from one country to anther country between which there is no extradition treaty is based upon international comity. In Malaysia, if there is no such treaty with the requesting country, the law provides a discretion to the Minister of Home Affairs to allow the extradition, if he deems it fit to do so.

Secondly, An extradition made based on bilateral treaty or multilateral convention which obligates the member countries to abide by the terms. If the requesting country meets the requirements for extradition, the request must be honoured otherwise there could be a violation of its international obligations. Such a treaty is known as "Treaty Prerequisite Countries". Malaysia, Thailand, Indonesia and the United States have adopted this policy. Please refer to the relevant treaties at appendix "A, B and C".

As regard to mutual legal assistance, there are three bases for it, namely, an international treaty and international administrative agreements. The first two bases are the same as for those in extradition. The third basis is found in an international agreement with Interpol which is taken by police agencies of participating countries. In Malaysia, the role of the police in matters of mutual legal assistance is shouldered by the National Central Bureau/Interpol of Criminal Investigation Department. This division

will act as a coordinator in providing appropriate assistance to requesting countries.

## III. REQUIREMENTS OF EXTRADITION

### A. The Law

The extradition process in Malaysia is governed by the Extradition Act 1992. The Act applies to countries having treaties with Malaysia and in a case where there are no treaties between the parties, the law provides a discretion to the Minister of Home Affairs to allow the extradition if he deems it fit to do so. Apart from that, in order for the existing law to be enforced, two inherent conditions are required to satisfy the elements of extradition namely, (a) there must be a fugitive criminal and (b) the offence committed must be an extradition offence.

As regards fugitive criminals, this means a person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country. The offender must be a citizen of the country to which he is seeking a transfer and the conviction must be final. The case cannot be pending, in the sentencing stage or directly under appeal. This also includes appeals filed by an Attorney-General in a country which permits such appeals as well as appeals filed by the prisoners themselves or their lawyers.

### B. Categories of Offences Which Entitle Extradition

Under Malaysian Law, there are two categories of offences which entitle the respective authorities to request the return of fugitive criminals. The offences are as follows: -

1. Extradition Offence.

An extradition offence refers to any offence however described including a fiscal offence:-

a. which is punishable with imprisonment for not less than one year or with death under the laws of a country having extradition treaties with Malaysia or countries where the Minister had granted an extradition order; and
b. which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death.

Provided that, in the case of an extra-territorial offence, it is so punishable under the laws of Malaysia, if it took place in corresponding circumstances outside Malaysia.

2. Extra-Territorial Offences.

The offences given the status of extra-territorial offences are: -

a. Offences against the State (Chapter VI Penal Code);
b. Offences under the Official Secrets Act 1972 and the Sedition Act 1948;
c. Offences under the Prevention of Corruption Act 1961;
d. Offences which consist of attempts or conspiracies to commit, or abeting in the commission of, any offence described as above: Extradition Act 1992.

3. Offences Committed At Sea Or Air.

Where an offence in respect of which the return of a fugitive criminal is sought was committed on board any vessel on the high seas or any aircraft while in the air outside Malaysia which comes into any port or aerodrome in Malaysia, the Minister and any magistrate having jurisdiction in such

port or aerodrome may exercise the powers conferred by the Extradition Act 1992.

### C. Procedure of Extradition

The procedure of extradition must be strictly followed. The failure of the requesting countries to comply with it will result in their application being dishonoured. The law in Malaysia requires the following steps to be adopted: -

(i) The requesting country issues a warrant of arrest for the fugitive. The warrant shall be submitted through diplomatic channels to the Minister **(**Minister of Home Affairs**)**. If the Minister is satisfied that the warrant was issued by a person with lawful authority, he then authorises a magistrate to issue a warrant for the apprehension of the fugitive criminal. The Minister may refuse to authorise the magistrate to issue a warrant, if he thinks that the offence is political in character or which is not an extradition offence.

(ii) A magistrate may issue a provisional warrant based on information (for instance, from INTERPOL) where the Minister must then be notified. The Minister, if he thinks fit, may cancel such a provisional warrant.

(iii) The "fugitive criminal" shall be remanded before he is brought to the court for an inquiry into the case. The Session Court has jurisdiction to hear extradition cases. The court, after receiving enough evidence, shall decide whether a *prima facie case* has been established against the fugitive, and thus commit him and report to the Minister. If a *prima facie* case has not been established, the court will then discharge him.

(iv) Fifteen days after his committal to prison or if the fugitive challenges his detention by filing a writ of habeas corpus in the High Court, after the conclusion of the case, the Minister may order the fugitive to be handed over to the requesting country.

(v) The fugitive criminal may also waive the committal proceedings and hence be subjected to any orders.

(vi) Fugitive criminals who are serving sentences in Malaysia may also be returned to the requesting country for the purpose of trial against him. He will then be returned to Malaysia to complete his sentence and subsequently be returned to the requesting country.

(vii) With regard to Brunei Darussalam and the Republic of Singapore, special provisions are provided for in the Act, where a warrant issued by both countries can be executed in any part of Malaysia after it has been endorsed by a magistrate in Malaysia. This also known as Simplified Extradition.

## IV. RESTRICTIONS ON RETURN OF FUGITIVE CRIMINALS

### A. Mandatory Ground for Refusal

Section 8 of the Extradition Act 1992 provides that a fugitive criminal shall not be surrendered to a country seeking his return in a situation where:

- the offence in respect of which his return is sought is of a political character. However, the following offences shall not be held to be offences of a political character in relation to a country which has made corresponding provisions in its laws:

  a. murder or other wilful crime against the person of a Head of State or a member of the Head of State's immediate family;
  b. an act which under a multilateral treaty to which Malaysia and the country seeking the return of the fugitive criminal are parties, constitutes an offence for which a person will be extradited or prosecuted notwithstanding the political character or motivation of such act;
  c. any attempt, abetment or conspiracy to commit any of the foregoing offences;

- the request for his surrender although purporting to be made for an extradition offence, was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions;

- he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions;

- prosecution for 'the offence in respect of which his return is sought is, according to the law of that country, barred by time;

- the facts on which his surrender or return is based or any lesser offence proved by the facts on which that return was grounded unless the consent of the appropriate authority in the requested country has been obtained.

- a fugitive shall not be extradited to another country for trial or punishment for any offence that is alleged to have been committed unless the consent of the appropriate authority in the requested country has been obtained.

**B. Discretionary Ground for Refusal**

In addition to the mandatory grounds for refusal, most treaties also contain a number of discretionary or optional grounds. In Malaysia, the Act gives wide discretion to the Minister, who may refuse to allow an extradition if he thinks it would be unjust or inexpedient to do so for reasons such as the trivial nature of the offence or the application for extradition was not made in good faith or in the interest of justice or it was made for political reasons or for any other reason.

The Minister may, having regard to the circumstances of the case for which simultaneous countries made the requisition, return the fugitive criminal to such country as he thinks fit. The Minister may also refuse the surrender if the fugitive criminal is a citizen of Malaysia or for which the extradition offence is one over which the courts in Malaysia have jurisdiction. Where a country having no extradition treaty with Malaysia makes a request for the extradition of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give special direction in writing allowing such fugitive criminal to be extradited to the requested country after the provisions of the Act have been complied with.

## V. ESSENTIAL PRINCIPLES ADOPTED BY MALAYSIA REGARDING EXTRADITION

### A. Principle of Double Criminality.

For the rule to apply it must be an event that is defined as a crime in the territory of the requested country and also in the requesting one. The right to claim an individual from a state may not be acceptable if its legislation does not consider the event as punishable according to its own domestic law. This requirement must exist at the time the punishable act takes place and must continue until the handing over occurs. In Malaysia, the principle was established in the case of PP v Lin Chien Pang (1993 ) 2 MLJ34.

### B. Principle of Speciality

The rule of speciality means the requesting country is under a duty not to try or punish the offender other than that for which he has been extradited. The rule guarantees that all the requirements of the extradition process (such as double criminality, extraditable offences, reciprocity and, etc) are observed by the requesting state. The purpose of this rule is to prevent the requesting state from abusing the extradition process by way of using legal subterfuges to obtain extradition for on unavowed goal. In other words it will protect the right of an extraditee against any violation.

### C. Rule on Prime Facie Cases

In order to enable a fugitive criminal to be extradited to a requesting country, the court of the requested country shall decide whether a prima facie case has been proved against the fugitive. If a prima facie case has not been established, the court shall discharge the fugutive. However the statutory law in Malaysia does not define what is prima facie case is in the extradition process. Article No. 5 of the Model Treaty regards a prima facie case as "sufficient proof in a form acceptable under the law of the requested state, established according to the evidentiary standards of the state that a person is a party to that offence".

From the definition, it is clear that the prima facie case embodies a dual concept namely, sufficiency and admissibility of evidence under the law of the requested state. This requirement must be fulfilled by both requested and requesting country. The majority of common law jurisdictions including Malaysia still require and recognise this standard.

### D. Political Offences

The Malaysia Extradition Act 1992 states that a fugitive criminal shall not be surrendered to a country seeking his return on the basis of political character / offences. However, no clarification has been made by local courts pertaining to the definition on the offence of a political character. However in the United Kingdom, the political offence has been defined by the judiciary. In the case of "Regina v. Governor of Brixton Prison, Ex - parte Schtraks (1964) AC 566 at pg. 591 - 592 the court defined that, "offence of a political character" is that the fugitive is at odds with the state where he applies for his extradition on some issue connected with the political control or government of the country. The analogy of political in such phrases as "political refugee", "political asylum" or "political prisoner". In this regard, since Malaysia's courts practice the common law system, the definition in the abovementioned case is acceptable in deciding the nature of offences classified as political offences. Perhaps the scope of the definition may be wider depending on the situation which suits local conditions.

## VI. EXTRADITION AGREEMENTS

Presently, Malaysia has treaties with the Republic of Indonesia, the Kingdom of Thailand and the United States of America for the mutual surrender of fugitive criminals. As for the Republic of Singapore and Brunei Darussalam, special provisions are made in the Extradition Act 1992, for the similar purpose by way of warrants. The treaties made are as follows:

### A. Extradition (Republic of Indonesia) Order l975

This treaty was signed between Malaysia and Indonesia at Jakarta on 7 June 1974 and came into force on 11 August 1975. On signing this treaty, the Government of Malaysia and the Government of Indonesia undertakes to surrender fugitives to each other, subject to the provisions and conditions as laid down in the treaty.

Extraditable crimes are as listed in the treaty and they include abetments and attempts to commit such crimes. Restrictions on extradition are for the following reasons:

a. Crime regarded as political crime.
b. The right to refuse extradition of its nationals.
c. May refuse to extradite the offender if the offence is extra-territorial.
d. May refuse to extradite if the requested party is proceeding against the fugitive criminal in respect of crimes for which the extradition is requested.
e. Causes double jeopardy to the fugitive criminal (*Non is in idem*).
f. Rule of speciality to be adhered.

In cases of emergency, the competent authorities of the requesting party may request provisional arrest. Decisions in this matter will be made by the competent authorities of the requested party according to its laws. It can be made through the inspector General of Police in Malaysia or the National Central Bureau in Indonesia or through diplomatic channels or the INTERPOL.

So far as the law permits, the requested party shall seize and hand over property to the requesting party if such property, (a) is required as evidence, and (b) was acquired as a result of a crime and at the time of arrest he was found in possession or subsequently discovered. The property shall be handed over even if the extradition could not be carried out owing to the death or escape of the fugitive criminal. Any right in which the requested party or any other State may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested party as soon as possible after the trial. Expenses incurred in the territory of the requested party by reason of extradition shall be borne by that party.

### B. Anglo - Siamese Extradition Treaty 1911

This treaty which was enforceable was made between His Majesty the King of the United Kingdom of Great Britain and His Majesty the King of Siam in 1911. The provisions and procedures of the treaty are quite similar to the Extradition Act 1992.

In 1992 the Government of Thailand came up with a new draft treaty to update and repeal the 1911 treaty which had not yet been finalised. The new draft treaty is modified with the inclusion of the following provisions:

a. The obligation to extradite includes persons who have been proceeded against, have been charged with, have been found guilty or are wanted for the

enforcement of a judicially pronounced penalty for committing an extraditable offence by the judicial authority of the requested State;

b. Extraditable offence includes the principle of the double criminality rule where the offence is punishable under the laws of both contracting parties;
c. Restrictions to extradite with the following reasons.
   i. Offence is political or military in nature;
   ii. Dual jurisdictions;
   iii. Double jeopardy;
   iv. Capital punishment;
   v. Lapse of time;
   vi. Own nationals.

### C. Extradition (United States of America) Order 1985

By an exchange of notes on 17 November 1958 an arrangement was made between the Federation of Malaya and the United States of America for the mutual surrender of criminals in accordance with the treaty dated 22 December 1931 concluded between His Majesty the King of the United Kingdom and the President of the United States of America. With the powers conferred on the Yang Di Pertuan Agong, this Order was made in 1985.

This treaty allows the High Contracting Parties to deliver up to each other, under circumstances and conditions stated, those persons being accused or convicted of any crimes or offences which are extraditable and are committed within the jurisdiction and found within the territory of each other. Restrictions on extradition's are for the following reasons:

a. Double jeopardy;
b. Lapse of time;
c. Crime of political character;
d. A lesser crime other than the crime extradited.

Sufficient evidence to be given before the extradition should be produced within two months. If the fugitive criminal is claimed by other States extradition shall be granted to the State whose claim is the earliest in date unless the claim is waived. All articles seized in possession of the criminal fugitive at the time of his apprehension may be served as proof and shall be handed over when extradition takes place. Expenses connected with the extradition shall be borne by the party making the request.

## VII. MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Assistance in the investigation and prosecution of criminal activities in an international binding sense, is a far more recent development. Given the difference in legal systems both procedural and substantive, including rules as to the admissibility of evidence, it should come as no suprise that the difficulties in this area of international co-operation are even greater.

Considering the international features of many organized crime groups and criminals, it must be acknowledged that no country by itself can be effective in neutralising them. It is important for nations having problems with the same crime groups to share their information and experiences to curtail transborder criminal activities.

In the absence of formal legal treaties, experience has shown that regional meetings between law enforcement agencies play a big role in promoting cooperation and mutual understanding between states.

The Royal Malaysian Police (RMP) has always viewed regional cooperation as a practical means in pursuing a criminal matter outside its jurisdiction. The RMP has the following arrangements to foster

cooperation amongst the Police Forces in this region:

1. The Annual Conference of the Association of National Police Forces of Asean (ASEANAPOL)

   - a forum of Asean Chiefs of Police to discuss, exchange intelligence, mutual assistance, and others;

   - The Aseanapol Database System which was fully implemented at the end of 1996. Through this network, the NCBs of each country will be able to exchange criminal information by computer.

2. Malaysia/Singapore Liaison Meeting

   - Held every three months. The Narcotics Department of the RMP also maintains a special relationship with the Central Narcotics Bureau (CNB) of Singapore. Regular meetings and exchange of information/ intelligence have in the past resulted in the successful detection and apprehension of criminals in both countries.

3. Malaysia/Indonesia RAPAT Conference

   - This conference is held annually at alternative venues to discuss/ exchange intelligence on crime related matters. Both countries have a bilateral treaty that allows fugitive criminals to be arrested and extradited based on the principal of reciprocity.

4. Malaysia/Thailand Joint Committee

   - Police forces of both countries conduct an annual Joint Malaysia/ Thai Working Committee on Criminal Activities. It is held alternately in each country to discuss and exchange intelligence on criminal matters.

   - The Malaysian CID also conducts a special bilateral forum with the Royal Thai Police of the Southern Region to discuss crime related matters occurring along the common borders of Malaysia/ Thailand.

   - The Narcotics Department of the RMP also maintains a special relationship with the Office of the Narcotics Control Board, Thailand to discuss drug related matters.

5. Malaysia/United States of America

   - The RMP maintains good relations with the American law enforcement agencies, such as the DEA and the FBI, especially in the field of training and the exchange of information/intelligence to curb transitional crimes.

6. NCB/Interpol Networking

   - The Interpol network has given much assistance to the RMP in dealing with foreign offenders and in reciprocity the Malaysian NCB/ Interpol handles all requests and renders assistance to foreign countries for any enquiries or apprehension of fugitive criminals.

   - For countries which do not have any bilateral/special arrangement with Malaysia, a request can be made through the diplomatic channel of NCB/Interpol Branch for extradition purposes.

- International " Red Notice" for the purpose of provisional arrests can also be sent through NCB/Interpol office for the purpose of extradition.

7. Scope of Mutual Assistance in Criminal Matters

Malaysia has not ratified the UN Model Treaty and as such we do not have any legislation on mutual assistance to other foreign enforcement agencies. However the scope of assistance that can be given by the Royal Malaysia Police to our counter-parts are as follows:

a. To carry out investigations by interviewing witnesses after information received from requesting countries and inform the results of investigations to the requesting countries. This is normally done though INTERPOL.
b. Confirming the whereabouts of wanted persons of the requesting country.
c. If statements are required by the requesting country this can only be done through an affidavit before a competent authority. This can only be made through the witnesses voluntarily.
d. The requesting country may send their investigating officers to Malaysia for discussions regarding the case they are investigating. Interviews of witnesses or interrogation will be done by the Malaysia police and he may be in attendance.
e. Providing information for investigative use of the requesting country.

## VIII. CONCLUSION

Malaysia in its efforts to combat transnational criminal activities is ever willing to extradite a fugitive criminal as long as it satisfies all requirements as required by the law. In cases where there is no treaty, a fugitive criminal may be extradited upon the discretion of the Minister.

The extradition process is a slow process as it needs to fulfil all the necessary procedures before a fugitive criminal can be surrendered to a requesting country. This could take months as the fugitive criminal is allowed to seek redress by a writ of habeas corpus from the High Court of Malaysia. The alternative action that can be taken by the authorities is to expel the fugitive criminal from Malaysia through the process of deportation. In this instance only the immigration law of Malaysia is applied. However the Imigration Department requires reasonable justification to implement this process for a foreigner. Reasons could be given on the basis of expiration of travel documents or an invalid travel document, violations of Imigration Laws, etc.

We believe in close cooperation amongst the law enforcement officers of other States/Countries so that we can check the criminals in their endeavours to commit cross-border and global transnational crimes.

# TRANSNATIONAL ORGANIZED CRIME AND THE ROLE OF EXTRADITION & MUTUAL LEGAL ASSISTANCE TREATIES

*Sotonye Leroy Wakama**

## I. INTRODUCTION

Transnational organized crime will without a doubt be the yardstick by which the performance of governments and their law enforcement agencies will be judged in the 2l[st] century. It will also probably pose the most problematic, prolific and potentially devastating phenomenon ever encountered by these institutions in the normal course of their duties. However, despite the considerable attention that the media devotes in most countries to street and organized crime given its audacious, violent and inimical activities, policy makers and law enforcement agencies appear not to have understood the sheer magnitude of the potential dangers that these nefarious acts pose to national security, the economy and society in general. The issue is all the more worrisome in the developing world, which plays host to a number of these criminal organizations, but as yet has failed to fully perceive of its dangers.

## II. FORM, IMPACT & EFFECTS OF ORGANIZED CRIME

Transnational organized crime has expressed itself in many forms. The narcotics trade, money laundering, arms trafficking, in human beings, stolen vehicles and artifacts, terrorism, prostitution, international financial fraud, trade in environmentally dangerous and endangered species, counterfeiting, forged and stolen travel documents and other forms. Whichever organized crime or combination of crimes is adopted, they potentially have the same debilitating effects on the host and targeted communities. All too familiar is the destructive influence of narcotics, but trafficking in weapons and human beings, as well as financial fraud, have an equally adverse impact on the health and financial well being of the affected countries. Arms smuggling could initiate and exacerbate regional conflicts particularly on the African Continent and in Eastern Europe where several skirmishes are on going. International prostitution and pornography rings have health and social consequences. The illicit trade in endangered species may well have environmental repercussions. To cap it all, the laundering of monetary profits derived from these activities substantially undermines the financial systems and thus the economies of the affected nations.

The impact of organized crime may vary in differing societies but is likely to be more devastating in developing societies where it may supplant or exert considerable control over the state by filling the gaps in the provision of social amenities. This has to some extent also been reflected in instances where persons of "proven" criminal background have found their way into a nation's legislature. In such vulnerable environments as is depicted by fragile infant democracies, organized crime can secure the co-operation of influential government officials in the legislature, executive and judiciary to propagate its ends. It must be realised however, that there is no government completely immune to the activities of organized crime, or justice system that can guarantee control, and certainly no financial systems that would not want to benefit from its gains.

* Nigeria

Thus law enforcement agents of every hue must be open minded and prepared for the confrontation, which will manifest itself not only in different forms, but from different quarters. Nevertheless, for all its forms and potentials to destabilise governments, these acts are primarily criminal.

The reasons for the phenomenal "successes" of organized crime are not farfetched. Like any business enterprise where there is demand, opportunity, studied and appropriate investment, there are likely to be returns. Criminal enterprise is no exception. However, the extraordinary profits accurable to organized criminal enterprise have further been enhanced by technological advancements that have reduced the world to a global village. Communication, travel, information through computer links and thus knowledge is now available at moderate expense and the press of a button to any discerning organization or individual. With the resulting globalisation of the world economy organized crime has assumed new dimensions. Co-operative ventures between ethnically diverse criminal groups have resulted to hitherto unimaginable successes in criminal endeavours. One only needs to examine the Nigerian scam enterprise to understand this. Other examples abound. The spectacular profits derivable from transnational criminal enterprise are further used in the commission of a myriad of financial crimes, in a usually successful attempt to launder the illegitimate financial resources. The common denominator in transnational organized crimes therefore, is the involvement of financial institutions. It follows therefore that the management of these institutions has a crucial role to play in the resolution of this crisis. Non-bank financial institutions such as exchange houses, insurers, brokers, mortgagors, importers and exporters are also used to launder funds and thus should also be targeted for assistance in this fight. All these factors have affected tremendously the ability of these unwholesome fraternities to circumvent the various legal obstacles that may well have hitherto, hindered their growth.

## III. REMEDY

From the point of view of policy makers and law enforcement agents, a thorough and comprehensive understanding of organized crime - its characteristics and operational methods - is crucial. As long as emphasis is placed on its manifestation (usually at the street level), rather than its all-encompassing and pervasive influence on the entirety of society, then organized crime shall blissfully thrive for long. Unfortunately, law enforcement agencies in the developing world particularly, whose countries play host to a number of transnational criminal organizations, are least prepared to combat them. The existence of these organizations is only recently being acknowledged. Worst still however, is the fact that almost all law enforcement agents especially in the West African sub-region receive only community-based police training, and hardly any specialised training. Crime prevention strategies are almost exclusively directed to the street level, with little or no attention or realisation that more damaging activity exists beyond. The truth unfortunately, is that many countries that are havens for organized crime neither have the legal infrastructure or the law enforcement capabilities to combat these crimes.

Developing nations like Nigeria for instance, are further hampered by their abysmal failure in record keeping. Where statistics are kept, they can rarely be relied upon as all too often other considerations play a role in their compilation. Swings in the trend and volume of criminal activity

are recognised through the increase in complaints and the resulting volume of work, rather than the patient recording and analysis of statistical data. Where data is recorded and analysed, it is through the painstaking and often frustrating manual method of entry and retrieval. Furthermore, information on criminal activity is almost exclusively considered the preserve of traditional law enforcement agencies, without the comprehension that monetary data is also obtainable from the Central Bank or Treasury; and that trade statistics from legitimate corporations and industries also grant an indication of the cost and extent of organized criminal activity.

## IV. ORGANIZED CRIMINAL ACTIVITY IN NIGERIA

Nigeria has like most other countries had its fair share of organized criminal activity. Thankfully, what activity there is when compared to other regions in the world, is clearly in its infancy. However, as observed above, this has not given room for complacency as we fully realise our vulnerability and the potential dangers to our already struggling economy.

In the course of the last ten years, organized crime has manifested itself in Nigeria in the forms of stolen vehicles and artefacts, small-scale arms trafficking, in human beings and international prostitution, forged and stolen travel documents, and international financial frauds for which we are perhaps best known. The recorded cases of terrorism have since been discovered to be locally motivated and executed. The cases of stolen artefacts and vehicles, arms trafficking, international prostitution and financial crimes are presently the most bothersome. The methods employed in executing these crimes within Nigeria and the West African sub-region will now be briefly examined.

Vehicles are stolen off the streets of Nigeria in two principal ways. The first and less traumatic involves the theft of unattended cars using skeleton keys and "hot wiring" techniques. The second method deploys the use of violence and firearms and often results in injury, maiming and the loss of life. In both cases, the stolen vehicles, sometimes in convoy, are driven across borders to neighbouring countries where they are either cannibalised or sold holistically after few distortions.

The stealing of cultural artefacts which have great traditional and in some cases spiritual value has in recent times been on the increase. It is postulated that the end-users perhaps find a correlation between the age of the artefact and its aesthetic value. For the most part these artefacts appear to be stolen with the connivance of security guards and soon thereafter are smuggled out of the country in ingenious ways.

Instances of arms trafficking has generally been isolated and far between. However, with the recent conflicts along the West African coast an increased number of arms have found their way into the country through methods which suggest careful but unlawful planning and deliberation. Unfortunately, these weapons are subsequently used to commit felonious offences, which result in permanent impairments, mutilation and death.

In Nigeria, human trafficking and international prostitution are virtually synonymous. Italy appears to be the prime target of destination in Europe though other countries have had their fair share of the influx. This particular crime for the purpose of prostitution will be a bit more difficult to regulate principally because the "victims" are willing participants to the crime, who see the enhancement of their

future in a foreign land through this practise and the fact that no law against prostitution exits in Nigeria.

International financial crimes, the Advance Fee Fraud scam in particular, are what Nigerians are perhaps best known for. The frauds executed by Nigerians, usually on foreigners in the western world take on diverse forms. They include, but are not exclusive to, the transfer of funds from over-invoiced contracts, contract fraud on goods and services, real estate fraud, currency conversion scams, the sale of crude oil scams, etc.

## V. EXTRADITION & MUTUAL LEGAL ASSISTANCE TREATIES AS A SOLUTION

If the growth of transnational crimes is to be stemmed, it is obviously going to require the co-operation of all countries not only affected, but also concerned by its development. However, an understanding of the nature of the crime and its differing effects on various regions of the world, and divergent areas within a region must be appreciated. Attention will naturally focus on law enforcement but all sectors of society have a role to play. Law enforcement agents must be trained however to recognise organized crime, which means a departure from the more traditional and conservative approaches to crime resolution. Not only does organized crime require specialised study and training, it requires innovative thought, initiative and a disciplined will. Policy makers must also be ready to devote resources on a par with those of the criminals, and legislate appropriately if it is hoped to achieve any meaningful progress.

A direct response to the growth and menace of organized crime has been Extradition and Mutual Legal Assistance Treaties, the latter of which is a relatively recent development. They are primarily agreements between consenting nations to, on the one hand deliver to justice, persons within their territories who have reasonably and legally been shown to commit acts in defiance of the law, and on the other, grant assistance in the detection of a crime. The prime objective is to improve on the effectiveness of judicial assistance and facilitate its procedures.

Communication in respect of requests for extradition and legal assistance in Nigeria is usually between the Federal Attorney General and Minister of Justice and the Central Justice Department of the country involved. The treaties usually take on a similar form and include agreements regarding the summons of witnesses, taking down the testimony of witnesses, production of documents and records, locating and identifying persons or evidence, serving documents, executing requests for searches and seizures, collection of fines and other forms of assistance not prohibited by the laws of the participating states. Generally, the advantages of these treaties are only open to the prosecution (the State); the defence is required to obtain materials to facilitate its case under the laws of the host country. The wording and implementation of these treaties however may vary given the nations involved and the type of criminal activity targeted, or indeed the criminal who is the subject of investigation.

As stated above, Nigeria is in its infancy in respect to law enforcement and organized criminal activity. It has only in the last ten years entered Mutual Assistance Treaties with other nations, the ratified number of which is not immediately clear. This list is not however exhaustive. At the time of writing this report the statistics on requests to and by Nigeria in the last ten years was not immediately available. However, there is

a consensus, that very few requests have been received. It may be that a greater number of requests will now be received as Nigeria has democratised.

## VI. NIGERIA'S EXTRADITION POLICIES

Nigeria's Extradition policies have in principle remained the same since 1957, and include the following:

i. The offence for which a fugitive is requested must not be of a political, racial or religious nature;
ii. Request must be processed with reasonable evidence of culpability without which it may be refused.
iii. There must be an assurance that the subject will only be tried and punished if convicted for the offence stated in the application of the requesting state.
iv. Where the subject is already serving a jail term, he will not be extradited until the completion of the sentence.
v. The fugitive will only be extradited to the requesting country, which does not have the right to further "extradite" him to a third country.
vi. There must be reciprocity, otherwise Nigeria will not extradite its citizens to a country, which given the same facts would not have extradited their national to Nigeria.

### A. Request For Extradition By Nigeria: Procedure

Before Nigeria makes a request to any country, the police will conduct a thorough investigation and assemble applicable evidence. On satisfactory completion of the investigation, the case will be filed in a Magistrates Court, and if in the opinion of the presiding magistrate a *prima facie* case has been established, a warrant of arrest against the subject will be issued. The case file (in duplicate) will then be forwarded to the Ministry of Justice for vetting, and upon approval, the Minister will countersign the warrant of arrest and make formal representation to the country concerned.

### B. Request For Extradition Made to Nigeria: Procedure

In the case of a request being made to Nigeria for the surrender of a fugitive, the requesting nation, (if a treaty exists), will apply for the extradition of the fugitive to the Federal Attorney General and Minister of Justice, through the Ministry of Foreign Affairs. After examination of the request, the Minister of Justice may if he deems it fit, direct the Inspector General of Police to ensure the arrest and interrogation of the fugitive with respect only to the allegation contained in the request. The suspect will subsequently be arrested and brought before a Magistrate who will determine whether there is sufficient evidence to justify his being charged with the alleged offence. If the magistrate is so satisfied, the subject will be remanded in prison, and a report sent by the Magistrate to the Minister of Justice, awaiting a decision as to whether extradition can be fulfilled or not. The subject may appeal provided the appeal is lodged within 7 days. The subject (depending on the offence in question) may also be released on bail according to laid down procedures. If his appeal fails, he must be surrendered within 30 days.

## VII. NIGERIA'S POLICIES ON PROVIDING LEGAL ASSISTANCE

Nigeria has only in the last 15 years concluded agreements with various nations on Mutual Legal Assistance in criminal investigation. In most of these agreements, there is a common refrain in Nigeria's

policies, which include inter alia:

i. That there must be an agreement on legal assistance with the requesting state.
ii. The object of the request must be stated. Either the procuring of further evidence for a suspect already charged to court or an exploratory investigation to gather facts and evidence against an unidentified suspect. In the case of the latter, the criminal proceedings must be open to appeal.
iii. Precise data on the subject matter and subject will be provided. E.g. names, dates of birth, profession/ occupation, known addresses, description/likeness etc.
iv. Where the recording of testimony or the search and seizure of property is required, an elaborate questionnaire and description of evidence is necessary.
v. An assurance that will be given that all evidence and information obtained regarding the request will only be used against the suspect in the allegation stated in the request.
vi . The allegation so stated must not be of a political, racial or religious nature.
vii. Requests may be refused if it could jeopardise the sovereignty, security, public order or other essential interests of Nigeria.

**A. Types of Assistance Granted**

Subject to the terms of the individual agreements, the following types of assistance are usually given:

i. Recording of statements;
ii . Service of documents;
iii. Execution of searches and seizures;
iv. Surveillance physical and electronic;
v. Provision of documents or other records;
vi. Collection of fines;
vii. Location and identification of suspects;
viii. Other requests formally agreed upon.

**B. Reasons for Rejecting Requests**

In some instances, it is necessary to reject requests. These rejections, few or non-existent as they may be, are usually hinged on one of the following:

i. Lack of valid co-operation or agreement;
ii. The lack of an equivalent offence in Nigerian criminal laws;
iii. The offence being of a political, racial or religious nature;
iv. Insufficient evidence;
v. If the requesting nation does not permit the extradition of its nationals in similar circumstances;
vi . Existence of the death penalty.

## VIII. PROCEDURE FOR GRANTING LEGAL ASSISTANCE

All requests for assistance are communicated directly to the Central Authority (Federal Attorney General and Minister of Justice) through the Ministry of Foreign Affairs, where they are reviewed according to the policy guidelines above. If considered to be within the guidelines, the request is referred to the Inspector General of Police (Head Police Officer) for action. Assistance is granted only on the issues requested that are stated specifically. The Criminal Investigation Department is usually mandated to ensure assistance although other departments may assist. Where appropriate, court orders will be obtained for arrests, searches and Seizures. Finally, upon compilation of a case file, the filing of the case in a criminal court, and the issuance of warrant(s) (where applicable), the case diary is referred to the

central authority for final adjudication and request.

Where Nigeria wishes to request, appropriate evidence will be gathered and registered in a court of competent jurisdiction, which will if it sees fit, issue a warrant for the arrest of the subject. The file and warrant will then be processed to the Minister of Justice for further vetting, and upon approval a request will duly be made by the Minister.

## IX. THE STRUCTURE OF THE CENTRAL AUTHORITY

The Central Authority in Nigeria is the Attorney General and Minister of Justice. For the purpose of extradition and legal assistance requests in criminal matters, the department of International Law, headed by a director reviews all requests. In the department there are several lawyers who specialise in different aspects of international law, and are assigned "tables", which indicate the area or country of their specialisation. The requests are reviewed at this level and referred with report to the Minister for appropriate action. In practise, the action of the minister is not entirely unilateral as he refers his decision to the Presidency.

## X. CONCLUSION

The fight against organized crime should be a universal one with all hands on deck. It should be borne in mind that organized crime is not always violent, and quite often is clandestine in character. It is therefore difficult to analyse its effects and impact upon society as for instance would be the case in money laundering. Violent manifestations are easier to analyse, and the chance of the real threat avoiding attention is substantially reduced. Pro-active measures are necessary to contain this situation. As each region and indeed country probably has its unique characteristics, approaches may differ but the intent should remain the same. What is needed is a holistic approach to the problem, which should include the elimination of contributing factors, in addition to dealing with organized crime in a preventive and suppressive manner. In this regard therefore, the following suggestions are postulated:

i. Strengthening and transforming the capacity of the criminal justice system to deal with organized crime in terms of making it a more efficient and effective process;
ii. Initiating measures aimed at changing public values and attitudes towards crime, and involving communities in crime prevention;
iii. Improving control and management of international borders to prevent trade in illegal commodities etc..;
iv. Creating and training specialised units and border police to handle organized crime;
v. Legislating against organized crime and its proceeds more aggressively;
vi. Including organized crime prevention methods in the curriculum of Detective Training Academies;
vii. Encouraging various government Intelligence Units to focus on organized crime as it affects the security of the state;
viii. Increasing co-operation between security agencies and Non-Governmental Organizations and the business community;
ix. Strengthening the organizational, human and financial resources of law enforcement departments to respond to organized crime;
x. Reducing the bottlenecks in international co-operation;

xi. Entrenching a universal Code of Ethics/Conduct for law enforcement agents and civil servants.

The fight against trans-national organized crime is bound to be a difficult one but not an impossible one. Reliance should be on cooperation between security agencies within a country and between countries. Only when hands are joined in common intent, mutual determination and desire will the menace of trans-national crime be defeated.

# INTERNATIONAL COOPERATION TO COMBAT TRANSNATIONAL ORGANIZED CRIME - WITH SPECIAL EMPHASIS ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Ahmad Farooq**

## I. TRANSNATIONAL ORGANIZED CRIME

Presently there are various transnational crimes which are being committed by the people of the world generally and particularly under the influence of criminal organizations. Drug trafficking, money laundering, trafficking in women and children, illicit manufacturing of and trafficking in fire arms, acts of corruption, use of violence and extortion and illegal trafficking and transportation of migrants are the main transnational crimes with which the countries of the world are confronted. There is a rapid growth and geographical extension of organized crime in its various forms which has become a threat to the security of the international society, stability of sovereign states impairing the quality of life in addition to undermining the human rights and fundamental social values.

Recognizing the growing threat of organized crime with its destabilizing and corrupting influence on fundamental social, economic and political institutions which demands increased and more effective international cooperation, the United Nations General Assembly passed a Resolution No.49/159 on 23 December, 1994. The said Resolution emphasized the need for improved international cooperation at all levels for more effective mutual assistance between the states in their fight against organized transnational crime. The said Resolution urged states to implement the Political Declaration and the Global Action Plan against organized transnational crime adopted at Naples.

## II. EXTRADITION

The modern word extradition is perhaps derived from the practice which was called "extra-tradition" because it was against the traditional hospitality offered to an alien by a state who had allegedly committed an offence and sought refuge or asylum to save himself from prosecution or punishment. The term extradition has its origin in the Latin word "extradere" which means forceful return of a person to his sovereign. Mr. Cherif Bassioune defined extradition as a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought as an accused criminal or fugitive offender. Similarly, Dr. S. Bedi interpreted extradition as an act of international legal help and cooperation for the purpose of suppressing criminal activities consisting of handing over an individual, accused or convicted of a criminal offence by one state to another, which being competent, intends to prosecute or punish him in accordance with its laws.

## III. HISTORICAL BACKGROUND

The origin of international cooperation for the suppression of crimes go back to the very beginning of formal diplomacy. The surrender on demand of an accused or convict by a state to which he had fled for

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refuge in order to defeat prosecution or punishment by the state within whose jurisdiction the alleged crime was committed, is not a new phenomena in international relations. The practice originated in early non-western civilizations such as Egypt, China, the Chaldean and Assyro-Babylonian. In the early days of practice, the delivery of a requested person to the requesting sovereign was undertaken in solemn formulas and was performed with pomp. Delivery of individuals to the requesting sovereign was usually based on pacts or treaties but it also occurred on the basis of reciprocity and comity (as a matter of courtesy and goodwill between sovereigns). In fact, the whole history of extradition has been a reflection of the political relations between the states in question.

The first recorded extradition treaty in the world dates back to 1280 BC. In the second oldest document in diplomatic history, Ramases-II, Pharaoh of Egypt signed a peace treaty with the Hittites after he defeated their attempt to invade Egypt. This document was written in Hieroglyphics and carved on the Temple of Ammon at Karnak and is also preserved on clay tablet, in Akhodroin in the Hittite archives of Boghazkoi. The peace treaty provided expressly for the return of persons sought by each sovereign who had taken refuge on the others' territory. Since then, however, only the practice of Greece and Rome in extradition arrangements found its way into European texts of international law.

In fact, from antiquity until the late 18th century the persons sought by another state were generally political or religious opponents of the ruling families and they were not necessarily fugitives from justice charged with common crimes. Thus the stronger relationship between the sovereigns, the more interest and concern they had for each others welfare and the more intend they would be of surrendering those political offenders who had created the greatest dangers to their respective welfare. The common criminals were the least sought-after species of offenders since their harmful conduct affected only other individuals and not the sovereign or public order.

The history of extradition can be divided into four periods:

i) Ancient times to the 17th century - period revealing an almost exclusive concern for political and religious offenders;
ii) 18th century and first half of the 19th century - a period of treaty making which chiefly concerned military offenders characterizing the condition of Europe during that period;
iii) 1833 to 1948 - A period of collective concern for suppressing common criminality; and
iv) post 1948 development which ushered in a greater concern for protecting human rights of persons and revealed an awareness of the need to have international due processes of law to regulate international relations. The historical evolution of the practice of extradition expressly demonstrates that extradition in earlier times was used for preservation of political and religious interest of the states but gradually it evolved into an international cooperation for the preservation of the world's social interests and suppression of crimes. This common interest of states, in the suppression and prevention of crime, coupled with the increasing recognition of basic principles which gradually softened the

exaggerated feeling of national sovereignty unfettered by law and the emergence of humanitarian international law giving full protection to individual rights and interests, has paved the way for a true international law on extradition.

## IV. THE DUTY TO EXTRADITE

Hugo Grotios asserted that the state of refuge was obligated either to return the accused to the requesting state or punish him under its own laws. Similarly, De Vattel argued that international law imposed a definite legal duty on the state to extradite persons accused of serious crimes. Puffendorf represented a contrary view and argued that the duty to extradite was only an imperfect obligation which required an explicit agreement in order to become fully binding under international law and thus to secure the reciprocal rights and duties of the contracting states. Similarly, Billot took the position that there was no right to extradition save by contract or agreement between states. The duty to extradite only by virtue of a treaty, whether it be bilateral or multilateral has become the prevalent practice amongst states, though reciprocity and comity still exists as a legal basis relied upon by a number of states, usually through the support of national legislation.

Most of the conventions on international criminal law reflect the existence of the general principle either to extradite or punish. The signatory states to these conventions have incorporated this obligation into their domestic laws. However, it is unclear whether the duty to prosecute or extradite is disjunctive or co-existent. If the duty to extradite or prosecute is disjunctive or an alternative one, then there is a primary obligation to extradite, if relevant conditions are satisfied and a secondary obligation to prosecute under national laws, if extradition cannot be granted. If the duty to extradite or prosecute is co-existent rather than alternative or disjunctive, then the requested state can choose between extradition and prosecution at its discretion.

## V. RECIPROCITY

Reciprocity is one of the legal basis for extradition in the absence of a treaty which is a part of international principles of friendly cooperation amongst nations. Reciprocity, as a substantive requirement of extradition (whether based on a treaty or not) arises with respect to various specific aspects of the process. The essential question is whether it requires that the process of both the requesting and the requested state be alike or whether respective states will reciprocally recognize their respective processes. Reciprocity to a large extent means parallelism or symmetry between the two processes of the requested and the requesting state. However, the requested state may consider that the certain aspect of the requesting states criminal process is so alien to its system as to lack any basis of reciprocity.

## VI. DOUBLE CRIMINALITY

Double criminality refers to the characterization of the relator's criminal conduct in so far as it constitutes an offence under the laws of the two respective states. Hence, the general rule is that the offence in respect of which extradition is requested must be an extraditable offence not only under the law of the requesting state but also under the law of the requested state. Hence, no state is under any legal obligation to deliver up a fugitive offender to a foreign state on its demand if the person so demanded is charged with an offence, which is a crime under the law of the demanding state only but not

punishable under the legal system of the state of refuge. The principle of double criminality can also be termed as the identity rule. The role of double criminality gives rise to sometimes difficult promises mainly for the reason, firstly, because of variation of laws and institutions in the two countries and secondly because the act charged does not amount to a corresponding crime.

There are three approaches to determine whether the offence charged even though criminal in both states falls within the meaning of double criminality:

i) Whether the act is chargeable in both states as a criminal offence regardless of its prosecutability.
ii) Whether the act is chargeable and also prosecutable in both states and
iii) Whether the act is chargeable, prosecutable, and could also result in the conviction in both states.

Hence, there is a nexus between double criminality and extraditable offences.

## VII. EXTRADITABLE OFFENCES

Extraditable offences are offences that are punishable under the laws of both parties and either enumerated among the extraditable offences or found according to the formula for ascertaining extraditability in the applicable treaty. In the absence of a treaty, if extradition is based on reciprocity, the offence must be mutually recognized as extraditable. Where extradition is based on comity, it will depend exclusively on applicable national law. In addition to designating extraditable offences, the criminality of the relator's alleged conduct must satisfy the requirement of double criminality, i.e. the offence charged must constitute a crime in the two legal systems.

The substantive requirements to extradition are that a person accused of or found guilty of an offence in the requesting state be surrendered to that state, provided the following criteria are met:

i) If a treaty exists, the offence must be listed or designated.
ii) If no treaty exists, the respective states will reciprocate for the same type of offence.
iii) If no treaty or reciprocity exists, but the request is based on comity, the requested state will rely on its customary practice.
iv) Furthermore, in all three instances, the offence charged must also constitute the offence in the requested state i.e. double criminality.

A corollary to the requirements of extraditable offence and double criminality is the doctrine of speciality.

## VIII. THE DOCTRINE OF SPECIALTY

The doctrine of specialty embodies the theory in international law that compels the requesting state to prosecute the extradited individual upon only those offences for which the requested country granted extradition. This doctrine is premised on the assumption that whenever a state uses its formal processes to surrender a person to another state for a specific charge, the requesting state shall carry out its intended purpose of prosecuting or punishing the offender only for the offence for which the requested state conceded extradition. The doctrine of specialty developed to protect the requested country from abuse of its discretionary act of extradition. The violation of specialty occurs when after extradition, the requesting nation charges and prosecutes or seeks to prosecute the relator for a crime

not agreed to by the requested nation in the extradition proceedings. Implicitly, this doctrine provides the relator with assurances against unexpected prosecution.

## IX. U.N.O. RESOLUTIONS

The United Nations adopted the Model Treaty on Extradition (General Assembly Resolution No.45/116 of 14 December, 1990) and the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly Resolution No.45/117 of 14 December, 1990) which serves as an important basis for the national legislation of UN principal countries in their respective fields. No doubt the aforementioned Model Treaties are quite exhaustive but still difficulties are being faced by the various countries due to lack of international cooperation and refusal of extradition on various grounds. However, it is not conducive to the maintenance of international economic, political and social order that wrong doers escape from justice as a result of non-cooperation amongst the states and lack of mutual legal assistance and extradition. The principle of *aut dedere aut judicare* (extradite or punish) has to be employed wherever necessary and appropriate.

## X. OBJECTIVES OF SEMINAR

The main object of this seminar is to explore the ways and means of strengthening and improving international cooperation to combat transnational crime, particularly through effective implementation of the mechanism of mutual legal assistance and extradition.

## XI. EXTRADITION LAW OF PAKISTAN

In Pakistan, we have the Extradition Act, 1972 which is quite helpful for suppressing transnational organized crime through international cooperation. However, according to Section 5 (2) of the Extradition Act, 1972 of Pakistan, no fugitive offender shall be surrendered:

a) if the offence in respect of which his surrender is sought is of a political character or if it is shown to the satisfaction of the Federal Government or of the Magistrate or Court before whom he may be produced that the requisition for his surrender has, in fact, been made with a view to his being tried or punished for an offence of a political character;
b) if the offence in respect of which his surrender is sought is not punishable with death or with imprisonment for life or a term which is not less than twelve months;
c) if the prosecution for the offence in respect of which the surrender is sought is, according to the law of the State asking for the surrender barred by time;
d) if there is no provision in the law of, or in the extradition treaty with, the State asking for the surrender that the fugitive offender shall not, until he has been restored or has had an opportunity of returning to Pakistan, be detained or tried in that State for any offence committed prior to his surrender, other than the extradition offence proved by the facts on which the surrender is based;
e) if it appears to the Federal Government that he is accused or alleged to have been convicted of such on offence that if he were charged with that offence in Pakistan he would be entitled to be discharged under any law relating to a previous acquittal or conviction.

f) If he has been accused of some offence in Pakistan, not being the offence for which his surrender is sought, or is undergoing sentence under any conviction in Pakistan, until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise.

Sections 6 & 7 of the Extradition Act, 1972 deals with the procedure through which a foreign state can make a requisition to the Federal Government of Pakistan for the surrender of the fugitive offender and the conduct of a magisterial inquiry by the Federal Government of Pakistan. Pakistan has liberal provisions for receiving the evidence against the fugitive offender because it admits authenticated official certificates of facts and judicial documents stating facts against the fugitive offender as evidence. Similarly, in magisterial inquiry in Pakistan, the warrants, depositions or statements on oath which purport to have been issued, received or taken by any court of justice outside Pakistan or copies thereof or certificates of or judicial documents stating the fact of conviction before any such court are also admitted.

The magisterial inquiry in Pakistan is conducted only to find out a prima facie case and the same cannot be regarded as a regular trial by a court of law. The evidence before a magistrate would be relevant in determining the extraditability of an offender. The rule of specialty is also contained in Section 16 and Section 5(2)(d) of Pakistan's Extradition Act, 1972. Furthermore, the extradition law in Pakistan also provides for the surrender of everything found in the possession of a fugitive offender at the time of his arrest subject to the right of any third party.

In Pakistan, the following are extradition offences:

1. Culpable homicide
2. Maliciously or wilfully wounding causing grievous bodily harm.
3. Rape
4. Procuring or trafficking in women or young persons for immoral purposes.
5. Kidnapping, abduction or false imprisonment or dealing in slaves,
6. Bribery.
7. Perjury or subordination or perjury or conspiring to defeat the course of justice.
8. Arson
9. An offence concerning counterfeit currency.
10. An offence against the law relating to forgery.
11. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false presences receiving stolen property or any other offence in respect of property involving fraud.
12. Burglary, house - breaking or any similar offence.
13. Robbery
14. Blackmail or extortion by means of threats or by abuse of authority
15. An offence against bankruptcy law or company law.
16. Malicious or wilful / damage to property.
17. Acts done with the intention of endangering vehicles, vessels or aircraft.
18. An offence against the law relating to dangerous drugs or narcotics.
19. Piracy
20. Revolt against the authority of the master of a ship or the commander of an aircraft.

21. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals.
22. Aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the aforesaid offences.

Interestingly, the concept of extradition law was specifically upheld in Islamic history in the shape of the Al-Huddebiyah Treaty.

A new law has been promulgated in Pakistan known as the National Accountability Bureau Ordinance, 1999 which envisages international cooperation/ requests for mutual legal assistance.

Moreover, Pakistan has very stringent legal provisions for punishing offenders accused of drug trafficking. In this connection, Pakistan has a law embodied in the Act of the Parliament generally known as Control of Narcotic Substances Act, 1997 which contains a very broad/wide definition of narcotic drugs and describe maximum sentences. Even this Act of 1997 contains a full-fledged chapter on international cooperation. The Pakistan Government is legally bound to render mutual legal assistance to a foreign state to collect evidence, conduct investigation and even to freeze, confiscate and forfeit assets of an offender in Pakistan subject to legal process in Pakistan. Pakistan has also a law for sharing forfeited property with a foreign state on reciprocal basis by mutual treaties.

## XII. FIGHT AGAINST TRANSNATIONAL ORGANIZED CRIME THROUGH EFFECTIVE IMPLEMENTATION OF THE MECHANISM OF MUTUAL LEAGAL ASSISTANCE AND EXTRADITION

With the advent of modern technology in communication the world has grown to be pretty small. With the world growing yet smaller, crimes committed within one country are no longer confined to within its own borders but it so often happens that the looted and plundered money is laundered and filtered through various channels involving various countries. There are numerous instances where leaders of the third world have made wrongful and illegal gains in their respective countries and then stashed away their ill-gotten wealth either in the Swiss Banks or in the Carribean Islands, which have been safe havens for them. However, the world has not slept over their wrong doings. There has been a continuous effort to curb such activities and even countries which were safe havens till recent past, have legislated new laws aimed at mutually co-operating with each other to make the world a better and safer place.

The hand of mutual assistance was extended from one country to another primarily based on reciprocal promises. Laws on mutual assistance developed of late in the early 80s and various countries have enacted the same. The safe havens of Switzerland and to some extent the Carribean Islands are no longer safe with the advent of these laws. The Swiss Banks still have numbered accounts, but it has become mandatory on the operator of the account to disclose the name of the beneficiary in the Account Opening Form. This has been done in order to eradicate corruption and crime in one form or an other from the entire world. Swiss Banks no longer encourage or launder dirty money for others.

In my paper I try to highlight the role of Pakistan where laws of mutual assistance were sought and its laws invoked in the trial of its former Prime Minister. Pakistan invoked the jurisdiction of the Swiss Police in Berne under the Swiss Federal Act on International Mutual Assistance in Criminal Matters, This was an Act which was enacted on 20 March, 1981 and amended on the 4 October, 1996 by the Swiss Confederation.

It was under this Act that certain documents along with a complaint were presented by the Government of Pakistan to the Berne Police in Switzerland seeking its assistance in investigating some of the crimes committed by the Pakistan's former Prime Minister, Ms. Benazir Bhutto and her husband Asif Ali Zardari.

On the complaint being made, the Burne Police started investigating into the matter and thereafter referred the matter to an investigating Magistrate in Geneva. The Investigating Magistrate in turn summoned documents not only from the Swiss Banks but also took into possession documents from the companies that were involved in the commission of the offence. He also obtained documents from Zardari's agent, Jens Schlegelmilch and from Cotecna & SGS. Once these documents had been summoned by the Investigating Magistrate in Geneva he, on examination, found that not only some crime had been committed by Ms. Bhutto and Asif Ali Zardari in Pakistan on which mutual assistance had been sought, but these persons had conspired with Jens Schlegelmilch and the officials of Cotecna and SGS, who were Swiss nationals to commit acts which were offences under Swiss law as well. Apparently, money

laundering had taken place in Geneva. He, therefore, indicted all these persons. It was at this stage that the Judge in Geneva invoked the reciprocal promise of Pakistan, under the mutual assistance programme, to provide assistance in effecting service of the indictment orders on Mrs. Bhutto and Zardari in Paksitan.

Letters Rogatory were received from the Investigating Magistrate in Geneva through diplomatic channels in Pakistan for onward service on Mrs. Bhutto and Zardari. These Letters Rogatory also contained copies of original documents that had been collected by the Judge in Switzerland. It was after service had been effected in terms of the Letter Rogatory that these documents were used in the trial of Mrs. Bhutto and Zardari. The State of Pakistan obtained certified copies of these documents which accompanied the Letters Rogatory duly attested in the manner as prescribed under the law of evidence in Pakistan, and they were proved in court. During the course of the hearing a Commission was sent from the Lahore High Court, for authentication of certain documents from the Geneva Court. The Swiss authorities facilitated the task and the Commission was able to discharge its functions. These documents primarily brought home the guilt of the accused which resulted in their conviction, and the famous judgment of the Lahore High Court was delivered on the 14 April, 1999.

This is the first case in the history of the world where the former Prime Minister of a country has been convicted through the due process of law on charges of corruption and corrupt practices and Pakistan is the first country to have invoked the mutual assistance programme to achieve the desired results. The system worked.

Similar proceedings have also been initiated by Pakistan in London where mutual assistance has been sought on the charges of drug trafficking which have been brought against Mr. Zardari in Pakistan. The United Kingdom has a mutual assistance programme but it is restricted only to drug related offences. The mutual assistance programmes should be extended to other offences as well, like Switzerland which not only extends to drug related practices but also to money laundering as well. It would be very helpful for countries to gather evidence from other countries proving the commission of offences. In the English Courts evidence has so far been collected which definitely goes to show the wealth that had been amassed by Zardari but in the event of Pakistan not being able to prove its case against Mr. Zardari on drug trafficking charges, none of the evidence so collected would either be transmitted to Pakistan nor could be used. Mutual assistance programmes should be extended so as to cover all criminal acts and not be restricted to only one or two special instances.

Pakistan has also made another great headway when a Judicial Commission investigating allegations of fixing cricket matches proceeded to Australia and set up a Pakistani court in Melbourne. This could only be done under mutual assistance extended to each other by the two countries. A Victorian Supreme Court offered its court premises where the Judicial Commission assembled. The laws of Pakistan were made applicable. The process of service was provided by the Australians and it has been so reported in the Age of Melbourne of 9 January, 1999:

> "A Mont Albert tram was rattling and a seagull circled above as the judge made his entrance. The High Court of Lahore was in such session as it can never have been before. On one wall was the Victorian coat of arms. On the other hung a

> portrait of Muhammad Ali Jinnah, the founder of Pakistan, Judge Abdul Salam Khawar invoked the name of "Almighty Allah" as he began. On his desk sat a small Pakistan flag. Thus a few square metres of Australia became, for a moment, Pakistan."

These proceedings are an eye opener for the rest of the world. It clearly demonstrates that in the near future there is a possibility of courts of one country travelling to another using the paraphrenalia of the host country, including the law enforcing agencies in the host country for effecting service and summoning witnesses and documents, proving these documents in accordance with the law of ones own land by physically doing it in the host country and once the evidence is so collected and proven, to use it in your own country against the person charged with the offence. This could open new frontiers in the trial of cases. Video technology is already a new frontier but is still at its infancy stage. Statements of witnesses are already being recorded via video link and cross-examination is also done in the same manner but has limited practice at the moment. In the near future, I am sure this technology will be in everyday use.

The nations of the world must unite to make a solid commitment to enact the laws on mutual assistance. There should be no immunity to any one in respect of the crimes committed in any part of the world. In the recent past, in Rome, 120 states adopted a statute for a Permanent International Criminal Court with jurisdiction over war crimes and crimes against humanity - including those committed in peace times. The role of the International Court of Justice and Interpol (International Criminal Police Organisation) should be enhanced and the nations of the world should submit to its jurisdiction through treaties or under the umbrella of the United Nations.

UNO should also strive to prepare a common list of extraditable offences which should be accepted by all the nations of the world. The mandatory grounds for refusal to extradite an offender should be reduced to the minimum. The new investigating methods and technologies should be made admissible in evidence against the fugitive offenders in the requested states. New laws should be enacted for sharing the assets of an offender by the requesting and the requested states.

Before concluding this paper, I would like to propose that a International Authority for Extradition must be established under the control of U.N.O. and all the states should forward their requests for extradition of their fugitive offenders along with the necessary evidence to the said court which would decide the question of extradition after hearing the fugitive as well as representatives of the requested states. The creation of an independent and impartial International Authority for deciding extradition cases is essential because no state is under any legal obligation to surrender a fugitive offender in the absence of a specific treaty. There is no unanimity amongst the states on the point of extradition or legal assistance on the criminal 1aws of various countries which are sharply divided on many crimes as well as on the question of guilt of the fugitive. Moreover, there is a historical basis for non-extradition of nationals as it gives a sense of security and preference in favour of their own national jurisdiction. Hence, in order to achieve international co-operation for the suppression of transnational organized crime, states should accept the authority of an international body on extradition. This body/authority should also be empowered

to grant compensation/import fines on a state in case a request for extradition of a fugitive offender proves to be false, illegal and based on political considerations alone.

In the end, Pakistan for its part would be willing to cooperate with any international move which advances the cause of suppressing transnational organized crime.

# REPORTS OF THE SEMINAR

## *TOPIC 1*

## SPECIFIC PROBLEMS AND SOLUTIONS THAT ARISE IN CASES INVOLVING INTERNATIONAL MUTUAL LEGAL ASSISTANCE OR EXTRADITION

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|---|---|---|
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### I. INTRODUCTION

The topic assigned to our group for discussion and preparation of a report was; "specific problems and solutions that arise in cases involving international mutual legal assistance or extradition with respect to: assurance of reciprocity, dual criminality, and the scope of offences which can be the basis for mutual legal assistance, or the scope of extraditable offences".

In general, both "mutual legal assistance" and "extradition" are essentially a process of intergovernmental legal cooperation in the investigation, prosecution and punishment of criminal offenders. Accordingly, the basic concepts of mutual legal assistance and extradition are somewhat similar. Nevertheless, the main purpose of mutual legal assistance is different from extradition. Briefly, mutual legal assistance is the cooperation or assistance regarding investigation, prosecution and judicial proceedings in relation to crimes; for example, taking evidence or statements from persons, executing searches and seizures, providing information, evidentiary items, while extradition is a formal process by which a person is surrendered by one state to another. As Mr. Hans G. Nilsson (UNAFEI Visiting Expert) observed, the primary difference between mutual legal assistance and extradition is extradition involves the "body" of an offender and, consequently, extradition needs more serious consideration and urgent action since the fundamental human rights should be taken care of. As a result, there are some differences at the practical level between these two processes.

Nonetheless, in general, we could say that the objective of assurance of reciprocity, dual criminality and the scope of offences are not fundamentally different in these two forms of cooperation, and most countries use the same concepts in their domestic legislation for both purposes, for example, the rule of dual criminality in Japan (Law for International Assistance in Investigation, Article 2(2) and Law of Extradition, Article 2(5)), in Thailand (The Mutual Assistance in Criminal Matters Act, Section 9(2) and The Extradition Act, Section 12(2)), and in the Republic of Korea (Act on International Judicial Mutual Assistance in Criminal Matters, Article 6(4) and The Extradition Act, Article 6)

In addition, the group conducted a comparative survey on extradition and mutual legal assistance in criminal matters, based on national legal systems represented among the participants of the seminar. The results are included in the Appendix attached to this report.

## II. ASSURANCE OF RECIPROCITY

### A. General Concept

Reciprocity is one of the bases for mutual legal assistance and extradition treaties, whether it is a multilateral or bilateral agreement. Generally, "assurance of reciprocity" means the assurance that a requesting state will comply with the same type of cooperation or request from a requested state in the future.

Moreover, in practical terms, the essential question is whether this concept requires that the process of both the requesting and the requested states be alike or whether the respective states will reciprocally recognize their respective processes. This problem has implications in the area of the dual criminality requirement, extraditable offenses, criminal processes and others. To a large extent, reciprocity in this sense means parallelism or symmetry between the two processes in the requested and requesting states.

For example, some states rely on the nationality doctrine, while others do not. If the requested state can surrender its nationals, it implies in most cases that that state cannot prosecute its national for offences committed abroad. If such a state requires an extradition request from another state which prohibits surrender of its nationals, that state may, relying on reciprocity, deny the request. The requested state that can surrender its nationals may rely on reciprocity to deny the request on the understanding that since it could not prosecute on such a jurisdictional theory (nationality principle), it cannot grant extradition for prosecution in the requesting state which will be based on the said theory.[1]

### B. Issues Arising from the General Discussion and Individual Presentation Papers.

Admittedly, the principle of reciprocity creates some degree of uncertainty, especially in practice. Owing to this uncertainty, a better solution would be to ground the cooperation in a multilateral agreement, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 or Draft United Nations Convention against Transnational Organized Crime.

Reciprocity is explicit in a treaty where each party has agreed either to surrender fugitives to the other or to render requested assistance on the understanding that its requests will also be honored in the future. In *ad hoc* arrangements, designed to meet the situation where the fugitive is found in a country with which the requesting state does not have relationships based on a general extradition treaty, a special agreement may be reached whereby the requested state will extract an understanding that in similar circumstances its request for extradition, or legal assistance, for that matter, will be considered.

Although there are doubts as to whether the rule of reciprocity should constitute a legal requirement for extradition, reciprocity continues to play a significant

[1] M.Cherif Bassiouni, *International Extradition: United States Law and Practice*, 3rd. Edition, 384-385 (1996).

role in the practice of extradition. It renders extradition possible without excessive formalities in the absence of a treaty. It may also be relied upon to complement a treaty where the offence for which extradition is requested falls outside the scope of the treaty, but is nevertheless permitted by the domestic law of the requested state.

The difference of assurance of reciprocity between mutual legal assistance and extradition depends on the domestic legislature of each state. Consequently, some distinctions have to be drawn. The primary difference between mutual legal assistance and extradition is that extradition involves the "body" and consequently, extradition relates to the issue of human rights. Generally, the assurance of reciprocity in mutual legal assistance and extradition procedures depends on many factors, for example; the domestic legislature of both countries, dual criminality, previous practices, policies and politics. It seems that this requirement is more strictly observed in extradition, while the assurance of reciprocity in mutual legal assistance seems much more flexible. However, no commonly accepted standard of this assurance has developed in this respect. Sufficiency of assurance is examined and evaluated by the requested state according to its own standards on a case-by-case basis. With regard to the practice, the concept of "trust" or "mutual trust" may play the most important role for the cooperation of mutual legal assistance. There are some examples from states' practice that should be mentioned:

1. The United States may grant mutual legal assistance and cooperation to a requesting state, even though there is no treaty with this country. The requirement of assurance of reciprocity is also flexible, and can be based on the expectation of future cooperation by the requesting state. In addition to 31 mutual legal assistance treaties (MLATs) in force and 23 MLATs signed in recent years,[2] the United States has developed a modern mechanism for international law enforcement cooperation, a type of mutual legal assistance. Due to the fact that most international cooperation is conducted through direct contact between police in the countries involved, the "police to police assistance", or "cop to cop" cooperation has been used on the basis of good will, mutual respect, and shared interest in combating crime.[3] A good example is the investigation of the Kenyan and Tanzanian embassy bombings in 1998 when hundreds of FBI agents immediately flew to Africa to begin intensive investigation, alongside the Kenyan and Tanzanian counterparts.[4]

2. The Philippines, without any implementing laws for mutual legal assistance, has enforced MLAT to cooperate with many requesting states. For example, in 1998, Japan requested the Philippines for assistance in a criminal case relating to "Abandonment of Corpse and Violation of the Firearms and Swords Control Law" by confiscating the reward money for this criminal act that was transferred into a bank in the Philippines. In the end, the Philippines' prosecutor contacted the possessor of that money and turned

[2] John E. Harris, UNAFEI Visiting Expert, "International Cooperation in Fighting Transnational Organized Crime: Special Emphasis on Mutual Legal Assistance and Extradition," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 8.

[3] *Id.*, at 6.

[4] *Id.*, at 5.

over the money to the Japanese Embassy.[5]

3. The Republic of Uzbekistan, meanwhile, applies the provisions of the code of criminal procedure for extradition and mutual legal assistance, without any specific domestic laws. The only multilateral agreement is the 1993 Minsk Convention on the Legal Assistance and Legal Regulations in Civil, Family and Criminal Cases, dealing with the issues of extradition and mutual legal assistance.[6] Nonetheless, Uzbekistan has cooperated with requesting countries in matters of extradition and mutual legal assistance, based on the principle of reciprocity.

In addition, the Appendix shows that some participants' countries, as the treaty prerequisite countries, grant extradition and/or mutual legal assistance on the basis of reciprocity.

### C. Recommendations

1. A clear disadvantage of reciprocity is the geographical limitation of international cooperation. Moreover, reciprocity presumes a certain degree of similarity between the cooperating states. Therefore, a better solution seems to be a multilateral agreement.
2. Besides a multilateral agreement, bilateral treaties among states also should be promoted. In order to achieve smooth, efficient and effective cooperation, the United Nations Model Treaty on Mutual Assistance in Criminal Matters and United Nations Model Treaty on Extradition should be considered. Simultaneously, the United Nations may help the member states to modernize and harmonize their domestic laws by providing necessary information through sending written materials and organizing seminars and conferences.
3. In view of facilitating international cooperation, the treaty prerequisite countries may consider amending their domestic legislation in order to enable mutual legal assistance and extradition with treaty non-prerequisite countries. Moreover, in the fight against serious crime and transnational organized crime, it is essential to relax the interpretation of reciprocity to secure efficient and effective cooperation among states.

## III. DUAL CRIMINALITY

### A. General Concept

"Dual criminality" refers to the characterization of the offence, and requires that the set of facts on which the legal assistance or extradition request is based, constitute an offence under the laws of both states involved. In other words, dual criminality embodies a reciprocal characterization of those offenses deemed extraditable. Dual criminality is intended to ensure each state that it can rely on corresponding treatment, and that no state shall use its processes to surrender a person for conduct which the requested country does not characterize as criminal.

[5] Severino H. Gana, Jr., UNAFEI Visiting Expert, "Extradition and Legal Assistance: The Philippine Experience," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 15-16.

[6] Afzal A. Nurmatov, "Main Theme: International Cooperation to Combat Transnational Organized Crime — with Special Emphasis on Mutual Legal Assistance and Extradition," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 16-17.

There are two different concepts of dual criminality; one is *in concreto* approach in the context of application to extradition and the other is *in abstracto* approach in the context of application to mutual legal assistance, respectively.

### B. Issues Arising from the General Discussion and Individual Presentation Paper.

Both the "list of offense system" or "listing system" and "minimum imprisonment system" require dual criminality. As mentioned in Mr. Mikinao Kitada's paper, the dual criminality requirement comes from the view that it is not appropriate to surrender any fugitive for the offence which is not the crime in the requested country.[7] Also, in the context of mutual legal assistance, a requested country may not cooperate with the requesting country if that offence is not punishable in that country.

In the listing system, a schedule in which all extraditable offences are listed is usually attached to the treaty. Therefore, if an extradition request is based upon any of the listed offences, the request presumably meets the requirement of dual criminality. On the other hand, in the minimum imprisonment system, a requested country has to examine whether the act described in an extradition request may constitute any crimes under the requested country's criminal laws.

The differences in legal systems and interpretations of dual criminality give rise to many problems. To solve them within the context of extradition, the United Nations Model Treaty on Extradition, Article 2 Paragraph 2 proposes states to look at the totality of the conduct and to decide whether any combination of those acts and/or omissions would constitute an offence against a law in force in the requested state. Generally, most states have required *in concreto* approach. Particularly, the resolutions adopted by the 1969 Tenth International Congress of Penal Law recommended that the requested state set aside the requirement of dual criminality *in concreto*, unless special circumstances exist in the requesting state, such as the question of public order. In those cases, the requested state would examine *in abstracto* whether the conduct of the offender constitutes an offence under the state's law, or if it deems that type of conduct punishable.[8]

Nonetheless, in a case relating to a conspiracy offence in 1989, Tokyo High Court adopted a broad interpretation of the requirement of dual criminality. In this case, the United States requested Japan to extradite a person prosecuted for conspiracy to traffic drugs. The issue of dual criminality arose because Japan's criminal law had no offence of conspiracy. The Tokyo High Court ruled on the admissibility of extradition of the requested person on the ground of actual action, while holding that, "when we apply the Japanese laws to these facts, it is obvious that Person A is at least an accessory to the crime of heroin importation."[9] In other words, the decision mainly focused on the actual action behind the crime, and pointed out that the principle of dual criminality should

[7] Mikinao Kitada, Director of UNAFEI, "International Cooperation to Combat Transnational Organized Crime, Extradition and Mutual Legal Assistance," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 5.

[8] *See supra note 1,* 390.

[9] Makoto Tamura, "Two precedents regarding extradition in Japan," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 2-4.

be based on the behavior of the alleged offender.

On the other hand, for mutual legal assistance, the interpretation by related authorities seems much broader and relaxed. This may be due to the fact that the nature of this assistance is different from extradition as it may not necessarily infringe upon a person's liberty or freedom. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both states. Nevertheless, when it comes to mutual legal assistance, the trend and practice of many states is to relax this requirement. Some states are now rendering mutual legal assistance even without the requirement of dual criminality.[10] Furthermore, this principle has also been relaxed in some MLATs, for example;[11] the MLAT between the United States and Canada, specifying that assistance shall be provided without regard to whether the alleged conduct constitutes an offence in the requested country or not.[12]

The Draft United Nations Convention against Transnational Organized Crime indicates that the delegations proposed that the dual criminality requirement be abolished for mutual legal assistance except for the application of coercive measures.[13] Article 14, Paragraph 6 is an outcome of the compromise between the proponents and opponents of this requirement.[14] This disparity of views was also reflected among the members of Group 1. Some of them were of the opinion that the principle of dual criminality is still indispensable in the context of mutual legal assistance and merely a more flexible interpretation or lower standard test may be adequate in this area since this lower standard test could also cover all serious crimes, while the majority preferred the abolishment of the dual criminality requirement.

Furthermore, while interpreting the dual criminality principle, a due consideration should be given to the statute of limitation and lapse of time. The principle of dual criminality also relates to the principle of dual punishability. Therefore, the issue of lapse of time and statute of limitation will have to be taken into account while determining the fulfillment of the condition of dual criminality for extradition or mutual legal assistance.

[10] Group 2, Mutual Assistance in Criminal Matters, Annual Report for 1996 and Resource Material Series No. 51, 599 (1997).

[11] In addition, the Appendix shows that, among the participants' countries, the Philippines, Pakistan and Sri Lanka have abolished the dual criminality requirement for mutual legal assistance.

[12] Id.

[13] "Revised draft United Nations Convention against Transnational Organized Crime" has been prepared by the "Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime," United Nations, General Assembly, and was presented to the Fourth Session, Vienna, 6-17 December 1999. See Draft Article 14

"...

6. States Parties may not decline to render mutual legal assistance under this article on the ground of absence of dual criminality, unless the assistance required involves the application of coercive measures.

..."

[14] Information provided by Professor Michael Plachta, UNAFEI Visiting Expert at the 114th International Senior Seminar (Jan. 17 - Feb. 18, 2000). Mr. Plachta served as the leading expert of the Polish Government and a member of the official Polish delegation to the UN *Ad Hoc* Committee for the Elaboration of the Convention against Transnational Organized Crime.

Moreover, both the United Nations Model Treaty on Extradition (Article 3 paragraph (e)) and the European Convention on Extradition (Article 10) affirm that extradition shall not be granted when a person becomes immune from prosecution for lapse of time. However, domestic law varies in this respect. For instance, in most common law states, the system of lapse of time is not adopted.[15] In Japan, the lapse of time is interrupted as soon as the suspect flees the country. In Pakistan, once the case is legally registered, there will be no time limitation for prosecuting the defendant. The law in Thailand does not allow for an interruption of the running statute of limitation.

Another issue emerging from the general discussion is the following question: the statute of limitation of which country should be adopted as controlling the case? The Model Treaty of Extradition, Article 3(e), requires the law of either Party,[16] while the Convention relating to extradition between the Member States of the European Union, Article 8, seems to depend on the law of the requesting state,[17] unless the requested state also has jurisdiction under its own criminal law.

## C. Recommendations

1. In order to enhance international cooperation, in cases of extradition, it is recommended to interpret the principle of dual criminality in a flexible manner. In other words, the relevant authority in the requested state should be required to look at the totality of the conduct, focusing on the criminality of the conduct whatever its label. The requirement should be satisfied even if the offence is categorized differently in the two states or if some components of the conduct forming the extradition offence or mutual legal assistance are not entirely the same.

2. Countries should consider granting legal assistance without requiring that the alleged conduct constitute an offence in the requested country, unless the assistance requested involves the application of coercive measures, for instance search and seizure.

3. To solve practical problems created by the dual criminality requirement, the harmonization of domestic criminal law is recommended. This could be achieved through elaborating and ratifying an international instrument. An example can be found in the Draft United Nations Convention against Transnational Organized Crime whose Article 4 criminalises laundering offences. By ratifying this Convention, State Parties will adopt an identical definition of this offence and its constituent elements.

[15] Group 1, Mutual Assistance in Criminal Matters, Annual Report for 1996 and Resource Material Series No. 51, 573 (1997).

[16] Article 3(e) "If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty:"

[17] Article 8 Paragraph 1 "1. Extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State."

## IV. THE SCOPE OF OFFENCES WHICH CAN BE THE BASIS FOR MUTUAL LEGAL ASSISTANCE, OR THE SCOPE OF EXTRADITABLE OFFENCES

### A. General Concept

In general, the offence for which extradition is requested must be either enumerated among the list of extraditable offences or established according to the minimum imprisonment rule. In the absence of a treaty, the extradition may be based on the principle of reciprocity and the offence must be mutually recognized as extraditable. This requirement is in addition to that of the dual criminality requirement.

The listing system or enumerative system, by which the offences are named and defined, creates undue limitation to the scope of application of extradition, and makes this system inflexible. On the other hand, the minimum imprisonment system or eliminative system, which is indicative rather than limitative, specifies extraditable offences which under the laws of both states are punishable by an agreed degree of severity, usually a minimum of imprisonment.[18] This system, although more preferable, also has some disadvantages.

### B. Issues Arising from the General Discussion and Individual Presentation Paper[19]

The United Nations Model treaty on Extradition has adopted the minimum imprisonment approach in Article 2 paragraph 1, which reads as follows; "for the purpose of the present Treaty, extraditable offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least one/two year(s), or by a more severe penalty...." However, many countries use both approaches in their treaty practice.

The listing approach will offer the list of specific offences and also excludes the unnecessary offences. Therefore, the Parties could focus on the specific scope of offences as they agree, for example specific offences of transnational organized crime or other kinds of serious crimes. This listing approach also decreases some practical problems - for example, in some countries, the penalty for shoplifting may be imprisonment less than 6 months, while the maximum penalty for this offence in Thailand is a deprivation of liberty for 3 years. So, in this sense, the minimum imprisonment approach might also cause some problems. The main problem of the listing approach arises from the fact that the list can omit certain offences, and the subsequent inclusion by supplementary treaty may prove too cumbersome. With regard to some offences their definition may vary, for example, cheat or fraud. This may give rise to divergent interpretation in different countries. Another problem is that the list might not cover newly emerging and future crimes. To lessen the difficulties mentioned above, a proposed technique of defining extraditable offences in treaties presupposes listing non-extraditable offences and designating extraditable offences by type and category.

On the other hand, the minimum imprisonment approach will decrease the potential for a dispute relating to dual criminality. Also, this approach eliminates the problem of listing offences. Moreover, it could also cover any new crimes, for example computer crimes, white-collar

[18] *See supra note 1,* 396.

[19] The approach of each participant's country is shown in Appendix A.

crimes. The biggest disadvantage of this approach is the disparity in penalties among states and legal systems. The different cultural attitudes may also cause problems for minor crimes. For example, even within the European Community, there are different approaches to certain offences: "Simple examples are the permissive attitude towards cannabis use in the Netherlands, the greater tolerance to certain forms of pornography in Germany, the very tough stand taken by Greek courts against hooliganism".[20] Nonetheless, the minimum imprisonment approach is considered a modern concept. This formula has been adopted in the United Nations Model Treaty of Extradition, the European Convention on Extradition and many other treaties. Therefore, a consensus on the minimum imprisonment approach for extraditable offences is to be recommended. In addition, the United Nations Model Treaty on Extradition, Article 2 Paragraph 2, also has attempted to minimize the problem by providing some standards to determine the offence punishable under the laws of both Parties.

For mutual legal assistance, it is advisable and recommended that its scope be expanded as much as possible.[21] This idea has been reflected in Article 1 of the United Nations Model on mutual assistance in criminal matters: "The Parties shall, in accordance with the present Treaty, afford to each other the widest possible measures of mutual assistance in investigations or court proceedings." Similarly, the European Convention on Mutual Assistance in Criminal Matters, Article 1, states that the Contracting Parties undertake to afford each the widest measure of mutual assistance.

## C. Recommendations

1. For the purpose of extradition, the minimum imprisonment system should be adopted by all states to make the scope of extraditable offences broader and more dynamic.

2. It is recommended that the scope of offences for which mutual legal assistance can be granted be as wide as possible. However, a more restrictive approach should be adopted with regard to coercive measures.

[20] Geoff Gilbert, *Aspects of Extradition 9* (1991), in Jumpol Pinyosinwat, "The Extradition Act in Thailand and the New Draft Extradition Bill" Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 13.

[21] The Appendix shows that there is no limitation for the scope of offence under the domestic legislature of Japan and Korea, in the matter of mutual legal assistance.

## APPENDIX

### SURVEY ON MUTUAL ASSISTANCE AND EXTRADITION IN CRIMINAL MATTERS

| | | BANGLADESH | BRAZIL | CHINA | FIJI | INDIA | INDONESIA | JORDAN | LITHUANIA | MALAYSIA | NEPAL |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Law system | | Common | Civil | Original | Common | Common | Civil | Civil | Civil | Common | Mixed |
| Treaty Prerequiste | Extradition | Yes | No | No | Yes | No | Yes | Yes | Yes | Yes | Yes |
| | M.L.A. | — | No | No | Yes | No | Yes | Yes | Yes | Yes | Yes |
| Domestic Law | Extradition | Yes | Yes | No | Yes | Yes | Yes | Yes | No | Yes | Yes |
| | M.L.A. | — | No | No | Yes | Yes | No | No | No | Yes | Yes |
| Assurance of Reciprocity*1 | Extradition | Yes | Yes | Yes | No | Yes | Yes | Yes | Yes | Yes | Yes |
| | M.L.A. | — | Yes | Yes | No | Yes | Yes | No | Yes | Yes | Yes |
| Double Criminality Requirement | Extradition | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| | M.L.A. | — | Yes | Yes | Yes | Yes | Yes | No | Yes | Yes | Yes |
| Scope of offence | Extradition | Minimum | Minimum | Minimum*2 | Minimum | Listing | Listing | Minimum | Minimum*2 | Minimum | Minimum |
| | M.L.A. | — | | | Minimum | Listing | Listing*2 | Minimum*2 | Minimum*2 | Minimum | Minimum |

| | | NIGERIA | PAKISTAN | PERU | PHILIPPINES | REPUBLIC OF KOREA | SRI LANKA | THAILAND | UGANDA | UZBEKISTAN | JAPAN |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Law system | | Common | Common | Civil | Common | Civil | Common | Civil | Common | Civil | Mixed |
| Treaty Prerequiste | Extradition | Yes | Yes | Yes | Yes | No | Yes | No | Yes | No | No |
| | M.L.A. | Yes | No | Yes | No | No | No | No | Yes | No | No |
| Domestic Law | Extradition | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No | Yes |
| | M.L.A. | No | No | Yes | No | Yes | No | Yes | No | No | Yes |
| Assurance of Reciprocity*1 | Extradition | — | No | Yes | Yes | Yes | Yes | Yes | No | Yes | Yes |
| | M.L.A. | — | Yes | Yes | No | Yes | No | Yes | Yes | Yes | Yes |
| Double Criminality Requirement | Extradition | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| | M.L.A. | Yes | No | Yes | No | Yes | No | Yes | Yes | Yes | Yes |
| Scope of offence | Extradition | Listing | Both | Minimum | Both | Minimum | Listing | Both | Listing | Minimum*2 | Minimum |
| | M.L.A. | Minimum | Both*2 | Listing | Minimum*2 | All | | Minimum | — | Minimum*2 | All |

(Note) M.L.A: Mutual legal assistance
Minimum: Minimum imprisonment system
Listing: Listing system

*1 Question is “Does your country grant extradition or mutual legal assistance based on the assurance of reciprocity?”

*2 Be provided by the convention or treaty.

*TOPIC 2*

# REFUSAL OF MUTUAL LEGAL ASSISTANCE OR EXTRADITION

| | | |
|---|---|---|
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## I. INTRODUCTION

This group looked at the refusal of mutual legal assistance or extradition based upon the following grounds:

a) The principle of non-extradition for political crimes.
b) The principle of non-extradition of nationals.
c) Existence of the death penalty in the requesting state.
d) Insufficiency of case that is the basis for the request for mutual legal assistance or extradition.

Transnational crime is a global problem. Countries all over the world are concerned about the increase in the level and sophistication of transnational crime. To facilitate international concerted efforts to combat this problem, Mutual Legal Assistance and Extradition procedures have been emphasized.

According to the U.N. Model Treaty on Extradition and Mutual Legal Assistance in criminal matters Article 1, stipulates in specific terms the obligation to extradite. "Each party agrees to extradite to the other, upon request and subject to the provisions of the present treaty, any person who is wanted in the requesting state for prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offense." Therefore, the basis and focus of treaties on Mutual Legal Assistance and Extradition is the surrender of the persons to another state and not geared to creating impediments for the surrender of such persons.

However, in practice extradition or mutual legal assistance maybe refused by the requested state. The following are some of the grounds upon which extradition or mutual legal assistance maybe refused.

a) The principle of non-extradition for political crimes.
b) The principle of non-extradition of nationals.
c) Existence of the death penalty in the requesting state.
d) Insufficiency of cases that is the basis for the request for mutual legal assistance or extradition.

The rationale for refusal on the above grounds varies from State to State. However, reasons include; mistrust among states and the lack of confidence in one

another's justice system. Others are; political considerations, protection of human rights, sovereignty, tradition, notions of fundamental justice and fairness embodied in domestic legal system, and discrepancies between legal systems.

## II. REFUSAL OF EXTRADITION BASED UPON NON-EXTRADITION FOR POLITICAL CRIMES

Among the mandatory grounds for refusal of extradition in many states is the exception of non-extradition for political offenses. If the offense for which extradition is requested is regarded by the requested state as an offense of a political nature, then extradition is denied. This principle became prominent after the French Revolution. There was great resistance to oppression and tyranny thus embracing the fundamental rights and freedoms of citizens. The principle has been reinforced since the last century with the growing concern and expansion of the human rights concept. This exception also has been used extensively to cover freedoms of political and religious opinions and the expression of these opinions.

The U.N. Model Treaty on extradition Art. 3 sub-paragraph (a), stipulates that extradition shall not be granted "if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature." This principle has been incorporated in most of the bilateral and multilateral agreements signed between and among nations all over the world.

However, the application of this principle has evolved in the last 30 years as a result of the changing global political climate as well as the way the political offences are now perceived by society. Efforts have been made to suppress the use of violence by denying perpetrators the privilege of political cover to escape justice.

The implicit and explicit definition of what constitutes a political offense is complex and no consensus has been reached about its definition. In practice, offenses of a political nature have enlisted a broad range of definitions. These vary from the motive of the offense, effect of the offence, purpose of the offence, identity of the victim, democracy, human rights and the immediate circumstances of political conflicts in different countries. Through the use of a so called negative definition, the scope of political offences has been delineated by specifying conduct, or behavior that is not considered as constituting a political offence.

Various international conventions have been elaborated and signed to specify acts that shall not be regarded as offenses of a political character. These include:

i) 1963 - Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention).
ii) 1970 - Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention).
iii) 1971 - Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation (Montreal Convention).
iv) 1973 - Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.
v) 1979 - Convention on the Physical Protection of Nuclear Material.
vi) 1979 - International Convention Against the Taking of Hostages.
vii) 1988 - Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Extends and supplements the Montreal Convention on Air Safety).
viii) 1988 - Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation.
ix) 1988 - Protocol for the Suppression of

Unlawful Acts Against the Safely of Fixed Platforms Located on the Continental Shelf.

x) 1991 - Convention on the Marking of Plastic Explosives for the Purpose of Detection.

xi) 1997 - International Convention for the Suppression of Terrorist Bombings.

xii) 1999 - Convention for the Suppression of Terrorist Financing.

Therefore, some countries acting on the basis of the above conventions, have explicitly stated in their treaties what does not constitute a political offense.

In Thailand, "a murder or willful crime against the life of a head of state or one of the connecting parties of a member of that person's family, including attempts to commit such an offense" is excluded from the scope of political offense.

In Malaysia, Article 3(2) of the Extradition Treaty Act, 1972, stipulates that "the taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political crime for the purpose of this treaty."

The European Union Convention on Simplified Extradition, adopted in 1995 and ratified to date by the six (6) Member States, states as a general rule that the political offense exception shall not apply between the Member States. There maybe some reservations with respect to offenses which are covered by the Council of European Convention on the Suppression of Terrorism from 1977. These include not only offenses defined in a number of U.N. Conventions (on high-jacking), the safety of civil aviation and the taking of hostages mentioned above, but more generally serious offenses of violence affecting the life, physical integrity or health of persons.

## III. THE PRINCIPLE OF NON-EXTRADITION OF NATIONALS

The United Nations Model Treaty on Extradition, Article 4 (a), enables a requested state to refuse extradition of its nationals, but includes "prosecution in lieu" alternatives. This is an optional ground. However, the international treaty practice is that nationality of the requested person is a ground for optional refusal in some treaties but mandatory in others.

There is a firmly held belief that many countries do not want to extradite their nationals. This has been deeply entrenched in their constitutions.[1] Previously, this practice was mainly held by civil law countries. On the contrary, common law countries, such as the United States of America, do not have such a policy. Such opposing policies are said to derive from the different policies regarding how to establish criminal jurisdictions in criminal cases. The civil law countries tend to establish jurisdiction over both crimes committed in their territories and crimes committed by their nationals abroad while common law countries tend to establish only territorial jurisdiction. Therefore, since it is generally possible for civil law countries to try their own nationals who commit crimes on a foreign soil, they have a policy to decline such requests, and vice versa. It is also understood that the ground of the restriction stems from distrust in foreign criminal justice systems and the protection of its own nationals.

However, in practice, there is no sharp distinction between the two legal systems. Some common law countries especially in

[1] For an in-depth analysis of the problem of non-extradition of nationals, see Michael Plachta, *(Non-) Extradition of Nationals: A Neverending Story?*, 13 Emory International Law Review 77-159 (1999).

the European Union, can extradite their nationals only to requesting countries within the Union, while Scandinavian countries which are civil law countries also extradite their own nationals among themselves.

The exception of non-extradition for nationals jeopardises international efforts to fight transnational organized crime. However, several multi-national conventions, such as the U.N. Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, obligate member states to establish jurisdiction over cases when they do not extradite a fugitive who is alleged to have committed a crime defined in the conventions. In the European Union for example, the political will of the Member States is to make no distinctions, within the Union, and between citizens of the Union. This is a great stride towards erasing such an exception from their extradition laws and treaties. However, it is important to note the following.

(i) States should take giant strides towards enacting laws that allow their nationals to be extradited. Germany for example, has submitted a bill to the parliament seeking to amend article 16 of its constitution by allowing extradition of its nationals to other member States in the European Union and international criminal tribunals.
(ii) States can extradite their own nationals for trial abroad on condition that convicted fugitive offenders will serve their sentences in their respective countries.
(iii) Extradition of a national can be allowed with the consent of the offender.
(iv) Surrender of nationals can be considered as a new form of bringing fugitives to face justice. This has enabled many offenders who committed crimes in Yugoslavia and Rwanda to be tried before the Ad Hoc International Criminal Court for the former Yugoslavia and the Ad Hoc International Criminal Court for Rwanda, respectively. However, some countries still refuse to surrender their nationals to international tribunals because they consider surrender as amounting to extradition.
v) The principle of *aut dedere aut judicare* (extradite or prosecute) should be implemented to bring fugitive offenders to justice. If the possibility of an offender's impunity is recognised as the most serious danger caused by the practice of non-extradition of nationals, then from the point of criminal justice it should not matter in the territory of which State he/she is prosecuted and punished as long as justice is done.

However, this principle should be applied to serious international crimes that affect human society generally. The principle should not be used as a last resort when extradition is based on the grounds of nationality of the fugitive offender. Participants found it desirable to supplement the system based on the principle *aut dedere aut judicare* by the protection against double jeopardy (*nebris in iden*) to avoid the prosecution and conviction of the sentenced person in the requesting country, based on the same facts of the offence.

## IV. EXISTENCE OF THE DEATH PENALTY IN THE REQUESTING STATE

Article 4 sub- paragraph (d) of the UN Model Treaty, provides an optional ground for refusing extradition. This arises when the offense for which extradition is being

sought carries the death penalty, unless the requesting state undertakes not to impose the death penalty or not to carry it out if it is imposed.

While some countries have capital punishment, other countries have abolished capital punishment. It can generally be observed that the latter countries tend to refuse extradition of fugitive offenders to the former based on the ground that capital punishment may possibly be imposed. In reality, the exception becomes a mandatory one as most countries in Western Europe for example refuse to surrender a fugitive if he/she faces the risk of being sentenced to death. Some examples of this exception include:

i) In the recent past, Uganda made a request to the United Kingdom through the diplomatic channel for the extradition of two persons involved in a murder case. They faced the death penalty in Uganda if convicted. The request was not granted on the grounds that the United Kingdom had abolished the death penalty. The two fugitives are still believed to be at large in the United Kingdom.

ii) In a recent case where an Iranian fugitive was sought by both Japan and Iran from the Netherlands the latter's government granted extradition to Japan, because the offender faced a death penalty in his mother country while Japan gave an assurance that the prosecutor would not seek a death penalty and therefore it would not be imposed.

Therefore, many countries are amending their domestic laws to accommodate the requirement that in cases where capital punishment is likely to be imposed, the requesting state will not carry it out. One of such countries is India. In 1993, India amended its extradition law providing that in extradition cases, the original death sentence in the requesting State will be substituted with life imprisonment or a lesser sentence.

In the recent past, there is a call for the abolition of capital punishment especially emanating from human rights advocates. However, the death penalty exception to extradition is opposed by countries that still retain capital punishment in their legal systems. The arguments forwarded by those countries have been as follows;

i) Insisting on the death penalty exception hampers the smooth flow of extradition between states thereby diminishing the spirit of international cooperation to suppress crime.
ii) It interferes with the judicial discretion of the requesting state thereby encroaching upon the sovereignty of another state.
iii) Diplomatic treaties and the judicial system are two different and independent institutions. Whereas the requesting state may assure the requested state that capital punishment will not be imposed, the court may go ahead and impose it thereby straining the relationship and cooperation of the two countries.

However, these countries should,

i) Provide an adequate assurance that the death penalty, if imposed, would not be carried out.
ii) Involve making use of the executive authority to commute the sentence by taking advantage of the prerogative of mercy or pardon available in their legal system.
iii) Amend their domestic laws to accommodate the requirement of not imposing capital punishment in extradition matters. Such states

should adopt a provision that stipulates the surrender of an accused from the requested country. A trial court is bound by the conditions laid down by the requested state and agreed upon by the executive of the requesting state.

iv) Apply the principle of *aut dedere aut judicare* in cases where extradition is completely denied as a result of refusal to assure the requested state by the requesting state that capital punishment would not be imposed.

## V. INSUFFICIENCY OF EVIDENCE THAT IS THE BASIS FOR THE REQUEST FOR MUTUAL LEGAL ASSISTANCE OR EXTRADITION

Article 3, of the U.N. Model Treaty, stipulates mandatory grounds for refusal of an extradition request. However, countries are free to add to this article the following further mandatory ground for refusal " if there is insufficient proof, according to the evidential standards of the requested State, the person whose extradition is requested is a party to the offence." Inherently, this means that a requested country can refuse an extradition request on the ground that the evidence accompanying the request is insufficient.

In the past, common law countries required that extradition requests sent to them showed proof of apparent guilt while civil law countries only required a minimum amount of evidence. However, in contemporary extradition practices, there are no sharp distinctions between the two legal systems. The *prima facie* case requirement, developed by England and adopted by several common law countries is an old and outdated concept. Even England has partly abolished this requirement in extradition matters. Focus now is becoming increasingly placed on the amount of evidence required to grant an extradition request.

However, extradition procedures are different in different countries, therefore, it is difficult to determine how much evidence would be required in order to grant an extradition request. The U.N. Model Treaty does not specifically define how much evidence is required and who should decide on such an issue. Therefore, there is no universal standard on the amount of evidence required to grant an extradition request. Different countries set different standards.

It may be far fetched to envisage a situation where no evidence would be required to grant an extradition request by a requested State. Practical experience has tended to show that even countries that do not require any amount of evidence to grant an extradition request are reluctant to grant it. This may arise when during the process of extradition, an offender claims that he/she is being persecuted as there is no evidence to show that he/she committed the offence. This may result in an acquittal of the offender. It is therefore advisable that countries should keep track of the standard of evidence that is required by different countries. This helps in establishing the standard of evidence when making requests.

If the request concerns a fugitive that is sought for trial, it should only be required that evidence be adduced that he/she committed the offence. In order for this evidence to be taken as satisfactory, it has to be consistent with the extradition request. However, it is very difficult for a requesting country to provide all the required evidence in the early stages of the proceedings. This renders extradition or mutual legal assistance even more difficult to be obtained. Several countries have moved away from insisting on being furnished with all the evidence in order to grant an extradition request. This has helped to expedite extradition requests.

The following are some of the good practices.

i) The United Kingdom abolished the *prima facie* case requirement in 1989 in relation to non-commonwealth countries only.
ii) Australia has tried to make their extradition laws analogous to those of the civil law countries.
iii) In 1990, the Commonwealth scheme for the Rendition of Fugitive Offenders was amended to permit the Commonwealth countries to opt to abrogate the *prima facie* case requirements.
iv) The United States of America insists on evidence though not the whole evidence. The requirement is what is considered sufficient to warrant extradition but not establishing the apparent guilt of the offender.
v) Pakistan has liberal provisions for receiving evidence against a fugitive offender because it admits authenticated official certificates of facts and judicial documents stating the facts against fugitive offenders as evidence. Similarly, in magisterial inquiry in Pakistan, the warrants, depositions of Statements on oath which purport to have been issued, received or taken by any court of justice outside Pakistan of copies there of or certificates or judicial documents stating the fact of conviction before any such court are also admitted.

The above examples show that extradition jurisprudence requires just enough evidence to issue an arrest warrant and not to establish the totality of the evidence.

As far as mutual legal assistance is concerned, theoretically, there should be no requirement imposed on the requesting country to provide evidence at its request. It could be said that the opposite rule should apply to this form of international cooperation to that applicable to extradition. However, in practice, evidence may be required in certain requests such as seizure of assets, searches, and obtaining copies of bank records, which are secret. Various countries require some evidence before mutual legal assistance can be granted. The U.S.A. for example, in the bilateral treaties it has signed with different countries, requires that evidence be adduced if mutual legal assistance is to be granted in specific cases such as obtaining bank records in money laundering cases.

## VI. RECOMMENDATIONS

i) States should take giant strides towards enacting laws that allow their nationals to be extradited.
ii) States can extradite their own nationals for trial abroad on condition that convicted fugitive offenders will serve their sentences in their respective countries.
iii) Extradition of a national can be allowed with the consent of the offender.
iv) Surrender of nationals can be considered as a new form of bringing fugitives to face justice.
v) The principle of *aut dedere aut judicare* (extradite or prosecute) should be applied and implemented in cases where extradition is denied on two grounds: nationality of an accused and the death penalty.
vi) It is advisable that countries should keep track of the standard of evidence that is required by different countries. This helps in establishing the standard of evidence required by various countries when making requests.
vii) As far as mutual legal assistance is concerned, theoretically, there should be no requirement imposed on the requesting country to provide evidence

in its request. It could be said that the opposite rule should apply to this form of international cooperation to that applicable to extradition. However, in practice, evidence may be required in certain requests such as seizure of assets, searches, and obtaining copies of bank records.

viii) States that still retain the death penalty should take advantage of the prerogative of mercy or pardon available in their legal systems to commute the death sentence to life imprisonment or a lesser sentence.

ix) In Japan, the political offence exception is defined in terms of pure and relative terms. Pure political offence is whereby the political motive of the offender overrides the intention to commit an offence and vice versa. In future the feasibility of this definition may be considered by other countries to determine possible extradition of fugitive offenders.

*TOPIC 3*

# THE SCOPE OF ASSISTANCE TO BE RENDERED TO THE REQUESTING STATE WITHIN THE FRAMEWORK OF MUTUAL LEGAL ASSISTANCE

| | | |
|---|---|---|
| ***Chairperson*** | Mr. Abdul Jalal | (Malaysia) |
| ***Co-Chairperson*** | Mr. Rajnarayan Pathak | (Nepal) |
| | Mr. Yoshimatsu | (Japan) |
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## I. INTRODUCTION

In recent times, the rapid development of technology particularly in the fields of communication and transportation has successfully reduced the world to a "global village". These technological advances were intended to benefit the entire world by bringing different cultures together, and fostering a better understanding between the diverse religious, ethnic and cultural groupings the world over. Unfortunately, they have also been exploited by a criminally minded few, who have dedicated themselves to the usage of this equipment for the purpose of individual gain, and in the process circumventing and trampling upon all laws, ethics and regulations that stand in their way.

This unfortunate development is no better reflected than in the internationalisation of crimes, which by virtue of their cross-border characterisation have led to the coining of the term "trans-national crime". These crimes which are perpetrated by organized criminal gangs include, but are not limited to drug trafficking, illicit arms dealing, human trafficking, international fraud and terrorism to mention a few. In the process, these criminal fraternities accumulate stupendous wealth, which is used to further their nefarious ends and is intermingled with legitimate monies through the process of laundering and investments in legal enterprises.

The fight against organized trans-national crime has thus become the concern of law enforcement agencies in every part of the world. In consideration of the sovereignty of nations, it has become necessary to evolve new approaches to combat these crimes. As was said by the Attorney General of the United States of America, Janet Reno, "....we cannot continue to use 19th century methods to fight 21st century crimes". This statement is not limited to the technology required to successfully combat organized crime, but also, if not moreso refers to the ever-increasing need for co-operation between nations to successfully achieve this end. This 114th Crime Prevention Seminar examines two forums of co-operation between nations viz. Extradition and Mutual Legal Assistance Treaties (MLATs). It is with respect to these two types of treaties as a means of combating organized trans-national crime that problems were

highlighted, discussed and in some cases recommendations proffered. The subject matters and discussions under topic 3 are as reflected below in the following order:

- The structure and function of the Central Authority for the purpose of Mutual Legal Assistance.
- The confiscation of the proceeds of crime and the modalities for sharing.
- The feasibility of granting mutual legal assistance through new investigative methods and technologies.

## II. STRUCTURE AND FUNCTION OF THE CENTRAL AUTHORITY FOR THE PURPOSE OF MUTUAL LEGAL ASSISTANCE AND EXTRADITION

### A. Problem

Participants agreed that most central authorities presently appeared to cause delay in the response to, and execution of requests. It was with this in mind therefore, that discussion centred on the expectations of a central authority in terms of its function rather than its structure. Additionally, the question as to whether a different central authority was necessary to address requests on mutual legal assistance as opposed to extradition was raised as mutual legal assistance and extradition represented different intentions and to a certain extent different procedures.

### B. Response

1. The seminar observed that most countries present the Department of Justice or the Office of the Attorney General as the central authority. It noted however, that a few countries have more than one central authority, which varied dependant on the content of the request. The purpose and function of the central authority was reduced to three essential duties:

   i. It is to be accessible and visible as a contact point. This means it should have a clear unambiguous reference (name), which should also include an address(es), telephone and facsimile numbers, e-mail address(es) and any other information that will enable easy access by communication to the authority in normal or urgent times.
   ii. It is to oversee the administrative and executive processing of all requests referred to it. It is thus not to exist merely as a mail box, but is expected to actively follow up on all requests giving directives and information as is necessary.
   iii. It should thus be staffed with competent hands versed and experienced in this field, and with the requisite logistics to accomplish its duties with the minimum of inconvenience.

2. The seminar also sought to make a clear distinction between the “central authority” on the one hand, and the “competent authority” on the other. While the former refers to the individual or institution through which requests are made and received and directives given with respect to their execution, the latter refers to the agencies or departments assigned the legal authority to carryout, enforce and implement the execution.

3. On the question of the number of central authorities appropriate in a given state, the seminar felt it best to leave this to the discretion of the state as this was an issue of domestic policy upon which international consensus would be difficult to achieve. It was

rather advocated that treaties should concentrate on ensuring the availability as quickly as practicable of all information on the chosen central authority to facilitate expeditious communication. The seminar also stressed that in as much as the structure of a central authority could not be dictated that each state should nonetheless endeavour to ensure its functionality by staffing it with adequate personnel and equipment and ensuring the same for all competent authorities. The seminar thus concerned itself more with the functionality of the central authority, than with its number or structure.

## III. CONFISCATION OF THE PROCEEDS OF CRIME AND MODALITIES FOR SHARING

### A. Problem

The illegitimate proceeds of criminal activity in many states are subject to confiscation on the orders of a competent court after due process. However, many of these legal provisions are silent on the disposal of these confiscated assets, and thus do not consider the possibility of sharing the assets with another state. This unfortunate situation exists, despite the fact that in many cases involving transnational criminal activity, the confiscated assets in question were illegally acquired through criminal activity in one state, but necessitated the involvement through legal assistance of law enforcement agencies within another state. The issue becomes further complicated when these assets are invested in legitimate enterprises, as the tracing of these assets requires expert knowledge and experience. In addition, if an agreement on sharing is arrived at what yardstick, criteria or modality is to be adopted in respect thereto.

### B. Response

1. The seminar unanimously agreed that criminal proceeds should be subject to confiscation by order of court, and that in states where this legal provision did not exist (if any), the state or states concerned should be encouraged to so legislate.

2. The seminar also sought to make a clear distinction between confiscation and disposal, as confiscation referred to the legal process of permanently depriving a person of his assets in favour of the government; disposal refers to a decision on its subsequent use.

3. Participants were of the opinion that the sharing of assets between participatory states to an investigation particularly of organized transnational crime, recognised and acknowledged the co-operation necessary to fight-organized crime, and the efforts of other states and their respective law enforcement agencies. In this respect therefore, the seminar recommended that the most appropriate avenue for asset sharing are bilateral treaties, since this problem is insufficiently addressed in the domestic legislation of most states. These bilateral treaties would thus provide the legal basis for sharing the proceeds of crime between the participating states.

4. As opposed to bilateral treaties, the multilateral conventions are not well suited to regulate all the substantive and procedural problems associated with asset sharing. The most negotiators of these conventions are able to agree on is a clause that encourages the state parties to conclude bilateral agreements and arrangements to this effect.

5. Before the issue of the modalities for sharing was broached, the seminar cautioned that the legitimate third party interests in confiscated assets should be acknowledged, and that part of the confiscated assets excluded from sharing.

6. The actual modalities or criteria for the sharing would have to be agreed upon by the states on a case by case basis as the variables involved make the issue too complicated for the presentation of a single formula. Where illegitimately acquired assets have been inter mingled with legitimate investments, the proportion that can be traced and identified to the satisfaction of the courts should be subject to confiscation and disposal.

7. Finally, not all confiscated assets should be subjected to disposal without careful evaluation of the other states' interests as some may have a cultural, national or even a spiritual significance and cannot be subjected to evaluation. In these instances, it would be appropriate to return the asset in question in the greater interest of mutual co-operation and understanding.

## IV. FEASIBILITY OF GRANTING MUTUAL LEGAL ASSISTANCE THROUGH NEW INVESTIGATIVE METHODS AND TECHNOLOGIES

### A. Problem

The seminar recognised and acknowledged that with the passage of time, new methods, techniques and technology were being applied to the investigation and prosecution of cases. However, that though these techniques and methods had their advantages, in an era when it is necessary to obtain evidence in one state, and use it for prosecution in another certain problems become apparent. This is all the more so when the legal systems and procedures of the countries involved are different. The two principle problems were discussed under the headings of "legal" and "practical".

### B. Response

1. The seminar identified the following technologies that have been employed to some degree or other in modern law enforcement and criminal justice processes:

   i. Audio Tape Recordings
   ii. Video Tape Recordings
   iii. Telephone Conferencing
   iv. Still and Movie Photography
   v. Video Conferencing (Satellite Link)
   vi. Close Circuit Television
   vii. Electronic Surveillance
   viii. Satellite Surveillance
   ix. Electronic Bugging
   x. Fingerprint Analysis
   xi. DNA Analysis
   xii. Controlled Delivery

The list was considered not exhaustive however, each of these methods or techniques of investigation had at one time or other, particularly in developed countries, been applied in granting or obtaining mutual legal assistance in:

   i. Recording of evidence - oral and physical
   ii. Searches, seizures and confiscations
   iii. Examination of objects and sites
   iv. Provision of information
   v. Locating and identifying persons and objects, and
   vi. Other types of assistance.

2. Having acknowledged the problems, the advantages of these modern investigative techniques are as many

as the techniques are varied. Firstly, these techniques can (under certain conditions), and have been, successfully employed in investigations and court proceedings. Secondly, being purely scientific methods they are verifiable through other scientific methods of analysis and therefore the authenticity of the evidence is ascertainable. This means thirdly, that their utility is both effective and pro-active. In the case of court proceedings, and in certain instances investigations, some of these techniques have the capability to reduce the risk, time and expense associated with travel, and consequently limit the time and cost of the entire judicial process. They also and particularly where organized crime is concerned, can where necessary afford protection to witnesses who may be in danger when testifying. Finally, modern scientific technology supports and protects the rights of the individual by ensuring through indisputable means that right person is committed to prison, where older more over bearing methods of investigation left a margin of doubt. In this respect science furthers the interests of democracy.

3. The legal problems associated with these new techniques were best illustrated in the use of controlled delivery and video link technology. Controlled Delivery it was noted was one of the major outcomes of the 1978 United Nations Convention on Drug Trafficking held in Vienna, Austria. It is the process of allowing prohibited narcotic substances to be transported through various territories, under the covert surveillance and "supervision" of law enforcement agents. The objective is to identify trafficking routes, volume of traffic, the means employed and the traffickers themselves, with the ultimate aim of devising strategies to prevent further trafficking of these substances. This technique has over the years proven an extremely effective way of combating the drug trade, and as a result the technique has been applied to other crimes with equal success. However, the technique has not been without its birth pangs. Because of the differences hitherto mentioned in legal systems, policies and approaches to crime resolution reflected by nations the world over; controlled delivery has met with some "opposition". This perhaps principally extends from a legal notion that "...he who comes for justice must come with clean hands". The point often made is that since the law enforcement agents knew of the trafficking of drugs, but did nothing about it, they have by their omission committed a crime. Therefore perhaps, the value of their testimony and indeed the evidence (drugs) is questionable.

4. A further example of the legal problems that have to be resolved with new investigative techniques was illustrated by the increasing use of video link (via satellite) technology in obtaining testimony and information. The question here is one of admissibility in the courts as in most countries there exist no legislation in this respect, and the courts have not adopted it as part of their "Judicial Practice". Furthermore, most courts for the preservation of justice demand the physical appearance of witnesses and not matrix imagery no matter how impressive it may seem. In addition to the above, some of these techniques constitute an infringement of the rights of the individual particularly where electronic surveillance is deployed in investigations. As opposed to the four fundamental human rights recognised as non-dirigible (the right to life; the

prohibition on torture and other forms of cruel, inhuman and degrading treatment and punishment; the prohibition on slavery; and freedom from *ex post facto* or retroactive criminal laws), governments may impose some restrictions as necessary in a democratic society on other rights; such as the right to privacy.

5. One of the practical issues raised by the new investigative techniques bordered on the technical and financial problems. Some of these techniques involve infrastructure and equipment the cost of which cannot reasonably be expected to be met by some law enforcement agencies or their governments as resources are limited, and their priorities different. This of course could be over come if governments are willing to dedicate a percentage of confiscated criminal proceeds to the fight against crime.

6. Another practical problem discussed bordered on the training and technical competence of personnel to handle the sort of equipment used in these investigations. It is obvious that training would have to be provided in the spirit of international co-operation by countries whose understanding of these new methods factored its implementation. Again, the issue of cost would have to be addressed, but could be overcome if nations co-operate in the interest of a crime free world. This desire has been expressed in the draft Convention against Transnational Crime (TOC), which provides that States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in various areas. These areas include the collection of evidence, modern law enforcement equipment and techniques, methods used in combating transnational organized crimes committed through the use of computers, telecommunications networks or other forms of modern technology, detecting and monitoring of the methods used for the safe transfer, concealment or disguise of proceeds derived from such offences.

7. The feasibility of their use must therefore depend on the respective laws of the states involved, which if not compatible may necessitate provisions governing the acquisition of evidence by these means in the respective mutual legal assistance treaties. As a recommendation, consideration could be given to the organising of a forum or seminar, where technologists, judicial officers, law enforcement personnel and others could meet and discuss the problems associated with new technologies in investigation and prosecution, with a view to increasing the "comfort level" of the more conservative minded professions. Ultimately, the fight against organized crime will require sacrifices - academic and physical.

## V. ADVANTAGES AND DISADVANTAGES OF BILATERAL MUTUAL LEGAL ASSISTANCE TREATIES

### A. Problem

Because of the possibility of the number of countries that could become signatories to a multilateral treaty (there are 186 in the United Nations), it was considered an exercise in futility to examine the advantages and disadvantages of a multilateral treaty. There are simply too many variables involved in the equation. It is however, a lot simpler to examine the merits and demerits of these treaties from

a bilateral perspective, which is the approach adopted.

**B. Response**

1. One of the advantages of Mutual Legal Assistance Treaties (MLATs) lies in the fact that it places international co-operation on a firm footing by providing predictable areas of co-operation between countries.

2. MLATs acts as a vehicle of co-operation between consenting countries regardless of their individual legal systems.

3. Mutual legal assistance treaties assist individual states cope more effectively with criminal cases that have trans-national criminal characteristics.

4. Such treaties facilitate the receiving and rendering of assistance by way of "compulsory orders". This would mean that by signing and ratifying a treaty, the parties to it undertake an express obligation to render each other an assistance as defined in the treaty, unless the requested state invokes a ground for refusal.

5. They also provide a mechanism for evaluating the application of these treaties in relation to crime resolution.

6. These treaties also allow for methods and procedures, which ordinarily may not have been acceptable to the judicial systems involved. In addition, many of these treaties allow for direct contact, thus avoiding the formal diplomatic and cumbersome channels of communication. This speeds the process of criminal justice and the ultimate effectiveness of crime management.

7. Finally, in an era when almost each law enforcement agency (police, customs, immigrations, drug law enforcement agency etc.) has some form of agreement or other with a counterpart agency in another country, MLATs reduce the legal basis for co-operation to one document, which inevitably simplifies the process, and opens the requesting agency to the benefits and co-operation of all the other agencies. It must be stated however, that MLATs are not the only basis for co-operation in mutual legal assistance as domestic laws of some states, reciprocity and the notion of comity have served similar, though slightly more constrained roles in this respect.

8. On the other hand, it is noticed that there are some defaults with mutual legal assistance treaties. The first of these is that ratification can take years after the actual treaty has been signed, and for as long as the ratification is held in abeyance, so long shall the treaty be ineffectual. It must be mentioned however, that usually there exists some form of co-operation between countries prior to their entering into formal agreements, which reflect to a large degree the pre-existing levels of co-operation. Such formal agreements are usually accompanied with "Executive Agreements" on co-operation, which forms the basis of continued interaction before the treaties are formally ratified.

9. They can lead to an inequality in terms of benefits and obligations. One of the states is more likely to make more requests than the other, which means the requested state seemingly does more work. However, the more bilateral treaties entered and signed the greater the probable general benefit from their usage.

10. The opening of borders through these treaties itself can lead to security implications, which themselves may ultimately be more problematic than those of the criminals which lead to the treaty in the first place.

The question of the utility of mutual legal assistance and extradition treaties in relation to the problems discussed above are in the final analysis to be dealt with by individual states. It perhaps may be useful to mention that with the growth of organized transnational crime it has become imperative that government focus their attention in these areas.

# PART TWO

# RESOURCE MATERIAL SERIES
# No. 57

**Work Product of the 115th International Training Course**

**"CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES"**

**UNAFEI**

# VISITING EXPERTS' PAPERS

# CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES: OVERCROWDING OF PRISONS, THE MANAGEMENT OF WOMEN, FOREIGN PRISONERS AND THOSE CONVICTED OF DRUG RELATED OFFENCES. AN AUSTRALIAN PERSPECTIVE

*Luke Grant**

## LECTURE 1. OVERCROWDING

### I. INTRODUCTION

The rising number of people in prison around the world has been the subject of international interest particularly over the past two decades.

The number of people in custody *per capita* varies enormously over time and between jurisdictions and interpretation of these differences particularly between countries is difficult. What is clear however, is that the use of imprisonment as a form of punishment and incapacitation is increasing in most countries and that overcrowding (which I would define as a shortage of space and resources relative to the size of the population) in many places is becoming a significant problem.

It is also apparent that there is no one single factor that can be identified as being primarily responsible. There has been a lot of conjecture about the impact of the international drug problem and about rising crime rates, but researchers have consistently failed to show that this is the root cause.

Overcrowding itself is more than just a shortage of bed space, it has implications for the levels of programmes activity, hygiene, violence etc. It can be an obstacle to the realisation of many of the objectives of a modem correctional system.

The dilemma of prison overcrowding encourages a number of logical solutions. The approach that is taken in each country will be the outcome of a number of factors including the philosophy of punishment, the viability of alternatives to imprisonment, economics, political and populist ideology and the flexibility of the legislative framework. There are essentially three ways to solve the problem:

1. Reduce the number of prisoners
2. Increase the scale of available facilities and resources (build more gaols)
3. Rationalise the available resources and facilities e.g. to double up in accommodation areas and to reallocates funds for rehabilitation programms to meet more basic needs like food and clothing.

Unfortunately for prison administrators it is usually only the third of these options over which they have any direct influence.

In some countries the option of reducing prisoner numbers will not be considered because the number of people in custody may be regarded as a positive outcome of good law and order policies. In other countries the option of building more gaols may not be possible because of economic constraints. In many jurisdictions a combination of each of these approaches

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will prevail. This is certainly the case in Australia.

Whatever the approach, rigorous research is required to understand the causes of overcrowding and to ensure that whatever strategies are adopted do produce the desired outcome. A solid research base is also required to make accurate predictions about the prison population which can then be used to inform the planning process and decisions about the impact of new policies and legislation. In most jurisdictions including Australia, there are large gaps between theory, empirical research and practice.

In this paper I will explore some of the theories about prison population growth. I will then use the situation in New South Wales as a case study to identify factors contributing to the recent inmate population increase. I will then outline some of the strategies we have used and provide an overview of why these may not have been as effective as hoped. I am not proposing that the NSW experience is representative, but that the approach to analysing the problem has broad applicability in all jurisdictions.

**A note about comparing rates of imprisonment between countries**

The main indicator used for measuring the use of imprisonment is the number of persons in custody per 100,000 total population. The number of people imprisoned is either taken on a particular date (usually 30 June) or from the average daily population over a given year. While this definition may be standardised, the first problem that comes when making comparisons between countries is exactly who is included in the total population. Some countries for example Australia and Canada do not include offenders under the age of 18 in their counts. Other countries maintain separate statistics for sentenced and unsentenced components of the population or are only able to account for numbers imprisoned in federal or state facilities and not on local lock-ups. Forensic patients in secure psychiatric facilities may not always be included. Some countries include people detained for immigration violations who are awaiting deportation, others don't. The problem then with making comparisons is that differences in rate may simply be attributable to differences in the Counting method.

A second problem is that the number of prisoners per 100,000 population is static and obscures the relative impacts of the following dynamic determinants:

- The relative number of inmates on remand, the rate of admissions and the numbers bailed, the length of stay pre-trial
- the relative number of sentenced prisoners, the rate of sentenced admissions, the average length of detention
- the effect of parole and/or remissions

**Some theories on the rate of imprisonment**

It is useful to examine some of the theories put forward in the international literature to account for the recent increase in numbers in prisoners. My own experience indicates that those in government who make decisions about strategies for managing overcrowding seldom have a good understanding of this body of work and this had led to ill conceived policies.

Most of the international literature on prison numbers has come from the United States and United Kingdom that have both experienced unprecedented increases in the numbers of people in custody. In particular I would recommend as a classic

text on the subject a book called *The Scale of Imprisonment* by Franklin E Zimring and Gordon Hawkins which although published in 1991 is still provides a most compelling analysis of the American situation. For an international comparison of imprisonment rates read Young and Brown's *Cross-national Comparisons of Imprisonment*[1] I would also recommend a paper by Caplow and Simon published in 1999 and entitled "*Understanding Prison Policy and Population Trends*".

Theories about the determinants of the prison population have historically failed to give planners the capacity to accurately predict changes to the population. This may be because they have tended towards over-simplification. A well known flawed theory was put forward by Blumstein and Cohen in 1973 who after analysing the relatively stable American prison population prior to 1973 proposed that punishment was a self regulating system. They argued that:

> *if prison populations get too large. Police can choose not to arrest, prosecutors can choose not to press charges, judges can choose not to imprison... Similarly if the populations drop too far below the stable rate then pressure would develop to sanction certain kinds of behaviour that had previously been tolerated.*

Unfortunately for Blumstein and Cohen the population of prisoners started to climb exponentially the following year and this increase has not abated.

**The rate of crime and the rate of imprisonment**

There is a body of contradictory and confusing evidence that attempts to establish a causal relationship between the rate of crime and the rate of imprisonment. Contrary to popular and political opinion there is no clear relationship between the imprisonment rate and the crime rate, though it has been argued that such a relationship does exist for specific categories of crime e.g. serious violent crime and this category of offender. Zimring and Hawkins compared imprisonment rates in the USA with reported crime rates including the FBI index crime rates. They found:

> *the lack of a direct and simple relationship that would enable us to successfully explain most fluctuations in the rate of imprisonment by reference to changes in crime rates.*

Young and Brown (1993) carried out a comprehensive cross national comparison of imprisonment and concluded similarly that:

> *our conclusion would be that only a small measure of the differences in prison populations between one jurisdiction and another or the changes in prison populations within particular jurisdictions seem to be related to crime rates. Moreover to the extent that there is a relationship, we can not be certain that it is a causal one.*

If the rate of incarceration is not directly related to the rate of crime then what explains it?

The literature can be conveniently divided into two approaches. The first of these has been called 'the deterministic approach' which points to the importance

[1] Young, Warren and Mark Brown. 1993. *Cross National Comparisons of Imprisonment.* In Crime and Justice: A review of Research, Vol 17. University of Chicago Press

of factors outside the criminal justice system. The second approach emphasises the impact of policy choices and attitudes within the criminal justice system.

**Deterministic Approaches**

**Unemployment.** Possibly the earliest attempt to unravel the determinants of the prison population were Rusche and Kirchheimer who in 1939 published a book called *Punishment and Social Structure*. They argued that labour market forces shaped the penal system and determined the number of individuals in custody independent of the policies and theories of punishment. This notion is still currently pursued by some who have demonstrated a correlation between the levels of unemployment and the number incarcerated. Despite some consistent findings, high unemployment is not universally associated with increasing use of imprisonment. It has been argued that economic factors that influence employment also have an impact on societal attitudes that may influence imprisonment.

**Decline in the use of Psychiatric Hospitals.** There are a number of studies that have reported an inverse relationship between the sentenced prisoner population size and the psychiatric hospitalisation rate. In some countries including Australia there has been a marked tendency towards deinstitutionalisation of the mentally ill who it has been argued are better off in community care. Unfortunately when this has failed the patients end up in prison custody.

**Influence of capacity.** Advocates of prison reform have often argued that incremental increase of prison capacity results in a corresponding increase in the prison population. This has formed the basis of arguments against building new prisons when overcrowding occurs. An American National Institute of Justice study in 1980 claimed to show this and has been much cited in literature as evidence of such an effect. However in 1982 the data was re-analysed by Blumstein et al who found the conclusions to be incorrect. They also point out that in the USA:

> *there was considerable spare capacity in the 1960's, when crime was increasing but prison populations declined. We also believe that prison congestion or projected growth in prison population can stimulate increase in prison capacity to meet future needs.*

**Policy Choices and attitudes in the Criminal Justice System**

**'Law and Order' Policy Platforms** Many politicians respond to what they think the public want and advocate 'let's get tough on crime' policies. Influenced by the media, particularly popular television dramas, the public could be forgiven for thinking they were taking their lives in their hands as every time they walk down the street. The news is regularly filled with speculation about organized child sexual abuse and high level corruption in the government. Politicians, whether they are in government or waiting to be elected are more likely to introduce harsher penalties, increase the levels of policing and remove discretion from the judicial focus than the reverse. During election campaigns politicians seek to gain public confidence and mount campaigns where they effectively outbid their opponents in the law and order stakes. Once elected, governments then have a mandate to introduce new legislation that may result in increased sentences or even new offence categories.

**Levels and effectiveness of Policing.** The level of Policing has been shown to have an impact on arrest rates and rate of

convictions. This can be independent of the levels of criminal activity. A good example is the area of illicit drug use, which in countries like Australia, USA and UK is almost endemic in certain parts of the population. If the Police were to target certain locations then the arrest and conviction rate could be doubled. Outstanding warrants may not be pursued if they are a low priority, but if the number of Police is increased this could create more opportunity for arrests.

**Activity of courts.** The level of court activity can influence the number of people in custody in a number of ways. The number of unsentenced people in custody is largely an outcome of the time it takes to bring matters to trail and sentencing. Lengthy court backlogs will result in larger numbers of people in custody on remand. Increasing the activity of courts results in shorter remand periods, but may also increase the number of sentenced receptions, particularly those on Bail.

**Loss of faith in Rehabilitation.** There are few correctional issues that have attracted as much debate in the correctional literature as the possibility of rehabilitation. Although the 'nothing works" slogan attributed to Robert Martinson in the 1970's has been disregarded in favour of the view that some things work, the impact of this loss of faith in the rehabilitative process continues to have some impact in some jurisdictions particularly where it can be used to rationalise spending. Faith and lack of faith in rehabilitation can both result in increases in the prison population depending on policy implications. The use of remissions and flexible parole opportunities has been eroded in many countries in favour of 'truth in sentencing' legislation that ensures that those incarcerated serve a designated minimum term or even a mandatory term. Alternatively e.g. the belief that drug rehabilitation programmes in custody are effective will ensure that a person is incarcerated in favour of community based programmes. There are numerous examples of policies which directly emphasise or de-emphasise the role of imprisonment having a corresponding impact on the size of the inmate population. There are also examples in the literature of policies that have failed to have the desired impact. E.g. there are numerous examples of alternatives to custodial sanctions that have failed in that they have resulted in an increase rather than a decrease in the numbers in custody through the process of net widening.

**Moral Panic.** High profile crimes, particularly unusually violent offences involving women and children have been shown to have significant impacts on the prison population. The sense of moral outrage that follows these events coupled with the view that the very fabric of society is being threatened can have both direct and indirect consequences for the criminal justice system as a whole. In the United Kingdom following the murder of a young boy (Jamie Bulger) by other children, there was evidence of a shift away from leniency in sentencing. In Australia the murder of two young girls in a remote coastal area by two men one who was on Bail the other periodic Detention, resulted in the removal of the presumption in favour of Bail for certain offences and in the changes to the revocation processes for periodic detainees. Both of which I will demonstrate later contributed to the rise in the inmate population.

**Court Sentencing Practices.** While each of the factors that have been described above may influence the number of people in custody, it has been shown than it is not the number of admissions, but changes to the length of sentence that has the greatest

impact on the number of people in custody. More specifically it is an increase in the number of people serving longer sentences that will have the greatest effect. Increased Sentence lengths have become a reality in some countries through the introduction of mandatory sentencing, truth in sentencing, 'Three strikes and you are in", sentencing guidelines etc. These remove judicial discretion. Prescriptive sentencing rarely works to reduce sentence lengths.

It usually left to the courts to determine who will participate in alternatives to full time prison sentences. There has been mixed success with these strategies but a lot of criticism for net widening despite carefully constructed legislation

## II. NEW SOUTH WALES - A CASE STUDY

The New South Wales Department of Corrective Services is responsible for the management of approximately 7400 offenders in full-time custody, 1300 offenders on periodic detention and 17600 offenders subject to community supervision. New South Wales is one of six states and two territories, who manage their own criminal populations. There is no federal system and New South Wales, the state with the highest population accounts for close to one third of people imprisoned in Australia.

The operations and management of the Department have changed dramatically in the past 25 years. The introduction of specialised programmes for inmates, intensive training for staff, specific management plans for women and aboriginal inmates, and case management, combined with increased levels of inmate participation in education and work programmes, among other things, have altered the practice of corrections in this state.

The fundamental tenet that "A person is sent to prison *as* punishment and not *for* punishment"[2] is reflected in the Department's mission to provide safe and humane conditions for those incarcerated.

This Department plays a crucial role in the justice system but it does not determine the number of people sent to prison. Sentencing trends and the level of judicial use of alternatives to full-time imprisonment are issues best addressed by the judiciary.

## III. RECENT TRENDS IN THE NSW PRISON POPULATION

The graph on the following page shows the daily average number of inmates in NSW correctional centres (excluding periodic detainees) in the period from January 1988 to November 1999. Detailed data including the breakdown into males and females is given in Appendix 3. The graph and associated data show that:

- in the four years from January 1988 to January 1992, the prison population grew rapidly. The male inmate population rose from 3750 to 5679, a rise of 1929 (51.4%), and the female inmate population rose from 204 to 331, a rise of 127, (62,3%). These increases occurred mainly in the three years following the commencement of the *Sentencing Act 1989* in September 1989. The *Sentencing Act 1989* introduced the principle of 'truth in sentencing' which removed the capacity for remissions and increased the length of time served. It should also be noted that the strength of the NSW Police Service increased from 11,236 in 1987

[2] *Report of the Royal Commission into New South Wales Prisons,* NSW Government Printer, 1978, pages 49-51. See also recommendations 6 and 7 of the Nagle Report, on page 463.

to 12,857 in 1992, an increase of 1621 (14.4%)

- in the five years and six months from January 1992 to June 1997, the prison population continued to rise slowly, bearing in mind the time-span. During this period the male inmate population rose from 5679 to 6039, a rise of 360 (6.3%), while the female inmate population rose from 33lto 365, a rise of 34 (10.3%)
- in the next nine months, from June 1997 to March 1998, the male inmate population changed little, while the female inmate population fell substantially. In these nine months, the male inmate population fell from 6039 to 5959, a fall of 80 (1.3%), but the female inmate population fell from 365 to 294, a fall of 71 (19.5%). The reasons for this substantial fall in the female inmate population are not known
- in the two years from, from March 1998 to March 2000, the prison population grew rapidly. The male inmate population rose from 5959 to 7,000, a rise of 1,041 (17,5%), and the female inmate population rose from 294 to 452, a rise of 148 (50%). This high figure is partially explained, because the starting point, March 1998, recorded such a low female inmate population.

**Populatoin of inmates in full time custody**


**Comparisons with other Australian Jurisdictions**

The recent growth in the New South Wales prison population can be compared to trends in prison populations throughout Australia and the rest of the world subject to the qualifications I have already mentioned.

The rate of imprisonment in New South Wales increased from 133.1 to 152 per 100,000 adults, a rise of 14.2%, between the beginning of 1995 and the third quarter of 1999 (Australian Bureau of Statistics figures published in December 1999). The increase in the rate of imprisonment in New South Wales was exceeded by rises in other Australian jurisdictions during this period. The imprisonment rate in Queensland increased from 109.6 to 191.3 per 100,000 adults, a rise of 75%. The imprisonment rate in Western Australia

increased from 158.9 to 216.2 per 100,000 adults, a rise of 36%. The imprisonment rate in Victoria, which traditionally has had a comparatively low imprisonment rate, increased from 69.8 to 83.5 per 100,000 adults, a rise of 19.6%. South Australia reported the lowest increase in the rate of imprisonment of any Australian jurisdiction. In South Australia the rate rose from 118.6 to 120.6 per 100,000 adults, a rise of 1.7%.

The ratio of women inmates per 100,000 population in New South Wales was 13.5 in 1998, the rate had been 17.4 in 1992. In 1998 women were imprisoned in this State at a lower rate than in Queensland (20.5), Western Australia (23.4), Northern Territory (45.9), and South Australia (14). The Australian Capital Territory reported a female imprisonment rate of 5.1 per 100,000 population which was the lowest rate of any Australian jurisdiction The national average in 1998 was 14.4.

The United Kingdom (UK) reported an increase in its rate of imprisonment from 96 to 125 per 100,000 adults, a rise of 30%, between 1994 and 1998. During the period 1987 to 1997, the average female prison population in the UK rose by 51%. This rise was substantially higher than the 24% rise in the male population during the same period. The UK recorded an 18% rise in its average female prison population from 1996 to 1997 compared with a 10% rise in its male population.

The United States of America (US) reported an increase in its rate of imprisonment from 403 to 645 per 100,000 adults, a rise of 60%, between 1995 and 1998. The number of men and women in US state and federal prisons rose by 4.7% and 6.5% respectively in 1998. This was the third consecutive year in which the increase in the female prison population exceeded the increase in the male population. In the US, during the period 1990 to 1998, the number of female prisoners grew by 92% compared with a growth of 62% in the number of male prisoners.

The Netherlands, which in the past has had a relatively low imprisonment rate, has not been immune to the worldwide trend of increasing imprisonment rates. The Netherlands recorded an imprisonment rate of 51 per 100,000 population in 1993. The imprisonment rate rose to 75 per 100,000 in 1997 and to 85 per 100,000 in 1998.

## IV. DYNAMIC PROCESSES UNDERLYING THE RECENT RISE IN THE NSW PRISON POPULATION

As reported above, the dramatic increase of over 50% in the NSW inmate population between 1988 and 1992, can be attributed to the introduction of the *Sentencing Act 1989*. This legislation introduced the principle of 'truth in sentencing' which removed the capacity for remissions and increased the length of time served. The population stabilised in 1992 by which time it has been argued Judges compensated for the impact of the legislation in some cases imposing shorter sentences. Truth in sentencing legislation was adopted following a scandalous episode in the criminal justice history of NSW where a Government Minister, in collusion with others was found to be taking bribes to ensure the early release of criminals. The Minster himself ended up in custody.

The next period of rapid expansion which occurred in the period from 1997 to the present is not so easy to explain. In the next section of this paper I will work through the component changes in the inmate population with a view to determining what may have brought about this increase.

**Immediate causes of a rise in a prison population**

The actual number of people imprisoned at any point time depends on four factors:

1. The number of persons received on remand
2. The length of time they stay on remand
3. The number of persons starting a sentence of imprisonment
4. The length of time they serve.

Data from NSW for the period from 1997 to 1999 corresponding to each of these factors is presented below.

**Factor 1. The number received on remand**

Table 1 (below) shows *unsentenced receptions* for the past three financial years

**Table 1**
**Unsentenced Receptions**

| | 1996-97 | 1997-98 | 1998-99 |
|---|---|---|---|
| Male receptions | 7083 | 7252 | 8571 |
| Female receptions | 714 | 788 | 1080 |

This table shows that the number of unsentenced receptions grew somewhat between 1996-97 and 1997-98, but that the number jumped substantially between 1997-98 and 1998-99, especially the number of female receptions,

A high number of inmates on remand places intense demand on Departmental resources and staff. A high number of remandees means a high number of inmate movements[3], both to and from court and between correctional centres. It also means that there are more inmates on protection and more inmates who are unable to associate with other nominated inmates in the correctional systems. The higher the number of these inmates, the greater the challenges in terms of placing inmates in suitable accommodation.

Remandees are, generally speaking, much more unsettled than convicted inmates who largely accept their situation and try to adapt to prison life.

**Factor 2. Length of time spent on remand**

Tables 2 and 3 (below) show unsentenced male and female receptions over the past three financial years, divided into those who spent 30 days or fewer on remand and those who spent more than 30 days on remand[4]:

**Table 2**
**Unsentenced male receptions shown by time spent on remand**

| Time on remand | 1996-97 | 1997-98 | 1998-99 |
|---|---|---|---|
| 30 days or fewer | 4970 | 5066 | 5810 |
| More than 30 days | 2113 | 2186 | 2761 |
| Total | 7083 | 7252 | 8571 |

**Table 3**
**Unsentenced female receptions shown by time spent on remand**

| Time on remand | 1996-97 | 1997-98 | 1998-99 |
|---|---|---|---|
| 30 days or fewer | 553 | 618 | 829 |
| More than 30 days | 161 | 170 | 251 |
| Total | 714 | 788 | 1080 |

It can been seen from Table 2 that the number of unsentenced male receptions grew somewhat between 1996-97 and 1997-98, but that the number jumped substantially between 1997-98 and 1998-99, both for short-term and long-term

[3] In 1996-97 the Department made 100,462 inmates movements; in 1997-98 the figure was 111,636; and in 1998-99 the figure was 127,318 inmate movements. Source: NSW Department of Corrective Services, *1998/99Annual Report*, page12

[4] NSW Department of Corrective Services, Research & Statistics Unit

remandees. Table 3 shows that the number of unsentenced female receptions grew somewhat between 1996-97 and 1997-98, but that the number jumped substantially between 1997-98 and 1998-99, especially the number of female inmates spending fewer than 30 days on remand. One conclusion which can be reached from Tables1, 2 and 3 is that the length of time spent by inmates on remand has been a significant driving force behind the rise in the prison population.

**Factor 3. The number of Sentenced receptions**

Table 4 (below) shows the most serious offence category for male and female sentenced receptions for the past two financial years[5]:

It can be seen from Table 4 that the increase in the number of male receptions between 1997-98 and 1998-99 occurred

**Table 4**
**Male and female sentenced receptions during 1997-98 and 1998-99**

| | Male Receptions | | Female Receptions | |
|---|---|---|---|---|
| Most serious offence category | 1997-98 | 1998-99 | 1997-98 | 1998-99 |
| Homicide | 46 | 55 | 5 | 10 |
| Assaults | 1052 | 1166 | 77 | 73 |
| Sexual offences | 268 | 241 | 1 | 1 |
| Robbery | 386 | 473 | 27 | 45 |
| Fraud | 214 | 231 | 44 | 60 |
| Property | 1728 | 2059 | 217 | 229 |
| Dangerous driving | 78 | 98 | 6 | 10 |
| Driving under the influence | 212 | 231 | 9 | 5 |
| Driving without a license | 176 | 270 | 1 | 14 |
| Breach of parole | 388 | 542 | 39 | 47 |
| Cancelled periodic detention order | 354 | 466 | 29 | 35 |
| Breach of home detention order | 21 | 48 | 3 | 10 |
| Breach of Drug Court order | 0 | 13 | 0 | 4 |
| Breach of recognizance (bond) | 88 | 85 | 10 | 11 |
| Breach of community service order | 114 | 86 | 10 | 11 |
| Breach of apprehended violence order | 120 | 118 | 4 | 3 |
| Other offences against order | 126 | 122 | 11 | 17 |
| Use/possession of illegal drugs | 41 | 64 | 6 | 9 |
| Selling illegal drugs | 269 | 281 | 34 | 35 |
| Importing illegal drugs | 57 | 52 | 11 | 11 |
| Making/cultivating illegal drugs | 28 | 23 | 2 | 1 |
| Other offences | 90 | 77 | 8 | 5 |
| Total | 5856 | 6801 | 554 | 646 |

[5] NSW Department of Corrective Services, Research & Statistics Unit

mainly in the following categories: property offences (331); breach of parole (154); assaults (114); cancellation of periodic detention orders (112); driving without a licence (94); and robbery (87).

The increase in the number of female receptions between 1997-98 and 1998-99 occurred mainly in the following categories: robbery (18); fraud (16); driving without a licence (13); and property (12).

It should be emphasised that Table 4 shows the *flow* of male sentenced *receptions*. It is not a "snapshot" at a particular date. "Snapshots" of the number of male and female sentenced inmates in custody, as at 30 June 1998 and 30 June 1999 sorted on the basis of their most serious offence category, are shown in Table 5.

**Table 5**
**Male and female sentenced inmates as at 30 June 1998 and 30 June 1999**

| | Male Receptions | | Female Receptions | |
|---|---|---|---|---|
| Most serious offence category | 30 June 1998 | 30 June 1999 | 30 June 1998 | 30 June 1999 |
| Homicide | 440 | 460 | 26 | 29 |
| Assaults | 633 | 641 | 30 | 37 |
| Sexual offences | 640 | 619 | 3 | 3 |
| Robbery | 791 | 876 | 32 | 37 |
| Fraud | 165 | 174 | 34 | 37 |
| Property | 1087 | 1155 | 68 | 76 |
| Dangerous driving | 68 | 95 | 5 | 9 |
| Driving under the influence | 93 | 100 | - | 1 |
| Driving without a licence | 50 | 101 | - | 3 |
| Breach of parole | 259 | 352 | 23 | 29 |
| Cancelled periodic detention order | 136 | 228 | 10 | 15 |
| Breach of home detention order | 9 | 16 | 1 | 4 |
| Breach of Drug Court order | N/A | 1 | N/A | 1 |
| Breach of recognizance (bond) | 28 | 34 | 3 | 3 |
| Breach of community service order | 28 | 29 | 4 | 4 |
| Breach of apprehended violence order | 21 | 21 | - | 2 |
| Other offences against order | 59 | 59 | 7 | 7 |
| Use/possession of illegal drugs | 27 | 26 | 5 | 2 |
| Selling illegal drugs | 316 | 324 | 20 | 25 |
| Importing illegal drugs | 186 | 208 | 11 | 14 |
| Making/cultivating illegal drugs | 38 | 35 | 2 | - |
| Other offences | 61 | 56 | 1 | 2 |
| Total | 5135 | 5608 | 285 | 340 |

**Factor 4 Length of time served**

Table 6 (below) shows the length of time served/to be served by male sentenced inmate receptions for the past three financial years[6]:

Table 7 (below) shows the length of time served/to be served by female sentenced receptions for the past three financial years[7]:

**Table 6**
**Time served/to be served* by male sentenced receptions**

| Time served | 1996-97 | 1997-98 | 1998-99 | Increase between 96-97 and 98-99 |
|---|---|---|---|---|
| 0-3 months | 1962 | 2094 | 2565 | 603 |
| 3-6 months | 1317 | 1428 | 1708 | 391 |
| 6-12 months | 1224 | 1232 | 1317 | 93 |
| 1-2 years | 606 | 601 | 635 | 29 |
| 2+ years | 454 | 501 | 576 | 122 |
| Total | 5563 | 5856 | 6801 | 1238 |

* time served/to be served = sentenced reception date to end of fixed or minimum term

**Table 7**
**Time served/to be served* by female sentenced receptions**

| Time served | 1996-97 | 1997-98 | 1998-99 | Increase between 96-97 and 98-99 |
|---|---|---|---|---|
| 0-3 months | 236 | 293 | 333 | 97 |
| 3-6 months | 134 | 122 | 158 | 24 |
| 6-12 months | 71 | 79 | 87 | 16 |
| 1-2 years | 33 | 35 | 33 | 0 |
| 2+ years | 25 | 25 | 35 | 10 |
| Total | 499 | 554 | 646 | 147 |

* time served/to be served = sentenced reception date to end of fixed or minimum term

Many inmates are in prison for long periods of time, indicative of the seriousness of their crimes. As at 30 June 1999 there were 5594 male sentenced inmates. Of this number, 3208 (57.3%) were serving sentences of two years or more. As at June 1999 there were 340 female sentenced inmates. Of this number, 140 (41.2%) were serving sentences of two years or more[8].

**What is influencing these factors?**

Increases and decreases in the above factors may be the direct and indirect result of changes in:

5. Crime rate
6. Police activity
7. Court activity/outcomes

[6] NSW Department of Corrective Services, Research & Statistics Unit

[7] NSW Department of Corrective Services, Research & Statistics Unit

[8] NSW Department of Corrective Services, Research & Statistics Unit

8. Breach of orders.

**Crime Rate**

Overall the crime rate in NSW during the period from 1997 to 1999 did not increase. The NSW Bureau of Crime Statistics and Research in 1999 issued a media release stating:

> *For the first time in more than a decade NSW has no rising crime problem.*
>
> *...Between July 1997 and June 1999 there were falls in sexual assault (down 17per cent), indecent assault and related offences (down 20per cent), robbery with a firearm (down 29per cent), and motor vehicle theft (down 14per cent).*
>
> *Perhaps not surprisingly, measures of law enforcement activity are significantly higher now than they were two years ago.*[9]

During the same period however, the number of Murders increased by 7% (from 112 to 121), common assault increased by 6%, fraud increased by 8%.

**Police activity**

On 24 September 1999 the NSW Bureau of Crime Statistics and Research published the *New South Wales Criminal Courts Statistics 1998.* When doing so, the Bureau issued a media release stating:

> *There have been significant increases in the number of people brought before the Local Court on criminal charges, according to the annual court statistics report of the NSW Bureau of Crime Statistics and Research.*

The Local Court in New South Wales deals with the vast majority of criminal charges laid by police.

According to the report there have been increases in appearances for offences in the categories of: good order (+12.3%), environmental (+11.0%), against justice procedures (+9.8%), drug (+8.6%), driving (+5.7%), and theft (+4.7%).

> *There was a particularly large increase (+32.6%) in the number of appearances for "other offences against good order". This was mainly due to new provisions in the Summary Offences Act which prohibit the carrying of knives*[10].

The Police Service has reported that arrest figures increased in 1998-99 by the following percentages, compared with the previous year:

| | |
|---|---|
| Breaching bail conditions | +33% |
| Goods in custody | +15% |
| Drink driving offences | +22% |
| Driving while disqualified | +48% |
| Possession/use of cocaine | +48% |
| Possession/use of narcotics | +32% |
| Possession/use of cannabis | + 8%[11]. |

The Police Service also reported that the proportion of police in the front line had increased as follows since 1996:

| | |
|---|---|
| 1996 | 74% of police "in front line" |
| 1997 | 83% |
| 1998 | 85%[12]. |

[9] NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics: Quarterly Update June 1999 Media Release,* 6 August 1999

[10] NSW Bureau of Crime Statistics and Research, *Media Release: NSW Criminal Courts Statistics 1998,* 24 September 1999

[11] NSW Police Service, 1998-99*Annual Report,* page 13

[12] NSW Police Service, 1998-99*Annual Report,* page 4

**Court activity/outcomes**

Variations in the level of resources allocated to criminal matters by the courts, in any given year, are likely to have a direct impact on the inmate population. The Report *Key Trends in crime and Justice 1999*[13] shows that between 1995 and 1999 there was an increase in the number of cases brought before the Local Court and an increase of 24.3 % in the percentage of individuals refused bail by the local courts. In the District Court Bail refusals were up 10.6 % in the period from 1997-1999 but the number of new cases registered went down by 11.4%. On 12 December 1998 the Bail Amendment Act 1998 commenced. This Act increased the number of offences for which there is no presumption of bail.

In its media release of 24 September 1999, referred to previously, the Bureau of Crime Statistics and Research also commented:

> *The use of imprisonment ... appears to have increased in the Local Court.*
>
> *In 1997, 5,881 people (6.4per cent of those found guilty) were sentenced to a term of imprisonment by a Local Court. In 1998, the number of people given a sentence of imprisonment by a Local Court rose by 12. 4per cent, to 6, 612 people (or 7.0 per cent of those found guilty).*
>
> *The number of persons brought before the NSW Higher Criminal Courts did not increase between 1997 and 1998. However, the use of imprisonment did increase.*
>
> *In 1997, 1,588 people (61.9 per cent of those convicted) had a sentence of imprisonment imposed on them by the District or Supreme Court. In 1998, this figure rose by about 9 per cent, to 1,736 people (or 63.1 per cent of convicted offenders).*[14]

The Report *Key Trends in crime and Justice 1999*[15] shows that between 1997 and 1999 the number of persons sentenced to imprisonment for cases finalised in the Local Courts had increased by 19.8% (5,841-6,995), and that the average length of sentence imposed by the Local Court on women had increased by 13.9% during the same period. (There was no significant change in sentence length for men in the local court during this period.). In the District Court the number of new cases decreased by 11.4% from 1997-1999, but the number of women found guilty who received a prison sentence was up by 36.2%.

A recent publication by the Bureau of Crime Statistics and Research, which analysed the recent rapid rise in the female prison population in NSW, concluded:

> *In the Local Court:*
>
> - *There has been a substantial increase in the overall number of women convicted in the NSW Local Court.*
> - *In addition to the increased number of women found guilty, the proportion receiving prison terms has also increased. This is probably due to convictions for offences against the person and against justice procedures accounting for a greater proportion of offenders, as well as the increased popularity of prison as*

[13] NSW Bureau of Crime Statistics and Research, *Key Trends in Crime and Justice 1999,* June 1999

[14] NSW Bureau of Crime Statistics and Research, *Media Release: NSW Criminal Courts Statistics 1998,* 24 September 1999

*a penalty for some offences dealt with in Local Courts.*

- *Sentence length has also risen slightly.*

*In the Higher Courts:*

- *The overall number of women sent to prison from the Higher Courts has increased over the past five years, despite the number of convictions dropping by 31.5 per cent,*
- *The increase in women sent to prison may be due to the number of convictions for robbery (for which prison is a common penalty) nearly doubling over the past five years.*
- *In addition, the proportion of female offenders receiving prison terms for robbery property crimes, and drug offences has increased over the past five years.*

*Therefore, the increase in female imprisonment [from "early 1998"] is likely to be due to both harsher penalties handed down by the courts, and a shift in the types of offences being committed by women towards those more likely to receive prison penalties. The growth in the number of women appearing in court for offences such as robbery may be related to the general growth in heroin use among women.*[16]

A factor which may start to affect the rise in the inmate population is the handing down by the Court of Criminal Appeal of Guideline Judgments.

In 1999 the Court of Criminal Appeal handed down four Guideline Judgments.

In *R v Jurisic*, Spigelman CJ said:

> As in England, it appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving.[17]

In *R v Henry Barber Tran Silver Tsoukatos Kyroglou Jenkins*, Spigelman CJ said, after reviewing sentencing statistics relating to armed robbery:

> These statistics strongly suggest both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences. They justify the promulgation of a guideline judgment.[18]

On the other hand in *R v Wong & Leung* Spigelman CJ said, after reviewing sentencing patterns relating to heroin and cocaine offences:

> In such circumstances the considerations relating to inconsistency arid to systematic inadequacy of sentences to which reference is made in *Jurisic* and *Henry*...do not arise.[19]

[15] NSW Bureau of Crime Statistics and Research, *Key Trends in Crime and Justice 1999,* June 1999

[16] Fitzgerald, Jacqueline: *Women in Prison: the Criminal Court Perspective,* Crime and Justice Statistics Bureau Brief, Issue Paper No.4, NSW Bureau of Crime and Statistics Research, December 1999

[17] *R v Jurisic* (1999) 101 A Crim R 259 at 269

[18] *R v Henry Barber Tran Silver Shoukatos Kyroglou Jenkins* (currently unreported) [1999] NSWCCA 111, at paragraph 110

[19] *R v Wong & Leung* (currently unreported) [1999] NSWCCA 420 at paragraph 113

Similarly in *In the matter of the Attorney-General's Application (No.1)* Grove J said, after reviewing sentencing patterns relating to break, enter and steal:

> I am unpersuaded that the material to which the Court has been referred leads to a conclusion that there has been shown to be a general pattern of leniency...[20].

**Breach of orders**

If a periodic detainee, home detainee, or parolee breaches his/her order, the court or Parole Board (as the case may be) is likely to revoke the order and issue a warrant for the apprehension of the offender and his/her return to prison. If a person serving a community service order or a person under a bond breaches the conditions of the order or bond, the court may sentence the offender to imprisonment.

On 1 February 1999 amendments to the *Periodic Detention of Prisoners Act 1981* commenced. These amendments shifted from the courts to the Parole Board the function of cancelling periodic detention orders (if a periodic detainee fails to comply with the requirements of periodic detention, the detainee is liable to have his/her periodic detention order cancelled). Under the previous system, cancellation procedures were taking many months for listing and determination.

There was an increase in the number of cancellations of periodic detention orders in 1999. The Parole Board made initial determinations to cancel 1126 orders in the 12 months from 1 February 1999. The courts cancelled 424 orders in 1997-98. The Board later reviewed its decisions to cancel 588 of these orders, as required by law. Of the cases reviewed, the decision to cancel the order was rescinded on 125 occasions and cancellation was confirmed in the other 463 cases. Of the cases in which cancellation was confirmed, on 25 occasions the remainder of an offender's sentence was converted to an order for home detention.

In 1999, the Parole Board revoked the home detention orders of 86 offenders which was 17 more than in the previous year.

In 1999, the Parole Board revoked the parole of 1159 offenders which was 223 more than in the previous year.

**What does the NSW Case Study Show us?**

- The number of persons received on remand has increased significantly between 1997 and 1999. This may due to the combined impact of the increase in the number being refused Bail and the increase in Police activity, but it is not linked to an increase in criminal activity.
- the length of time spent on Remand has increased significantly
- the number of sentenced inmates received in custody increased during the same period. Major increases were seen in the numbers serving sentences for property offences, breach of Parole, assaults and cancellation of periodic detention orders. These categories of offences are unlikely to have attracted lengthy sentences.
- the number of people serving sentences greater than two years increased by 26% in the period from 1997-1999 and 30% for those sentenced to less than 3 months.
- the number of people who had their parole order, home detention order or periodic detention order revoked increased.

[20] *In the matter of the Attorney-General's Application (No. 1)* (currently unreported) [1999] NSWCCA 435 at paragraph 28

Each of the above factors has contributed to the increased inmate population. Given that there has been no demonstrated equivalent increase in criminal activity, the issues that are most likely to have influenced this include:

- increased levels of Policing
- removal of the presumption in favour of Bail
- reduced tolerance of Parole violations
- reduced tolerance of periodic detention order violations(net widening)
- increase in the length of additional term served by inmates

In a recent article on Australia's Rising prison Population[21], Arie Frieberg points to a more subtle force at work.

> *There is no one single factor... responsible for the steady but significant increase in Australian prison numbers. Although the level of crime differs between states as does the mix of offenses, there is no evidence of increases concomitant to the increases in the prison populations. ... rather the explanation is to be found in the courts' reaction to legislative signals and calls for "tougher" penalties and sentences.*

Frieberg includes among these signals

> *increased statutory maximum penalties; statutory changes in the aims of sentencing to favour incapacitative sentences; introducing indefinite sentences, mandatory and minimum sentences; requiring cumulative rather than concurrent sentences; and emphasising the rights and interests of victims of crime in the sentencing process.*

[21] Frieberg, Arie Understanding Rising Prison Populations In Australia, Overcrowded Times, October 1999.

## V. DEALING WITH OVERCROWDING

As I indicated at the outset, developing an understanding of the causes of the increasing prison population is a necessary precursor to developing strategies to deal with it. This includes developing models to predict future trends.

It is not required however for Capital Works solutions that include the construction of new facilities, the adaptive reuse of old building stock and the expansion of existing facilities are a logical solution, but may be beyond the means of the government or correctional authority. In NSW currently, construction and or planning is underway for three new correctional centres catering for men and women. This has become controversial and subject to a review by Parliament spurred on by groups who believe that building more gaols is an unacceptable solution.

I do not intend to explore the capital works solutions in this paper (as they are obvious) other than to mention that there is a body of literature about correctional centre design that promotes innovative building technologies. Among the more curious solutions to the shortage of accommodation is a Western Australia example where steel shipping containers have been converted to temporary inmate accommodation. In western NSW a remote rural town that had been abandoned by the railways has been purchased as a correctional centre and base for mobile prison camps that operate in national parks in the region.

### Reducing The Number of People in Full Time Custody

Reducing the number of people in custody is I believe is a better objective, though often harder to achieve. There are three groups of options for achieving this.

1. Reversing those processes that have been found to have a causal impact (from the NSW case study for example this could include for example reducing Police activity, restoring the presumption in favour of Bail and reducing court delays. Only the last of these would be an acceptable option.)
2. Developing alternatives to full time custody eg Home Detention
3. Adopting decarceration policies eg decriminalization

**Alternatives to imprisonment**

In NSW imprisonment is intended to be a last resort. The imposition of Section 80AB of the *Justices Act 1902* states that "a Justice or Justices shall not sentence a person to full-time imprisonment unless satisfied, having considered all possible alternatives, that no other course is appropriate". This was reinforced under Section 5 of *Crimes (Sentencing Procedure) Act 1999* which states that "a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate".

In New South Wales, the following are regarded alternatives to full-time imprisonment[22].

- fines
- probation in its various forms (order under section 556A of the *Crimes Act 1900*; order under section 558 of the *Crimes Act 1900*; order under section 432 of the *Crimes Act 1900*; order under section 554 of the *Crimes Act 1900*; common law bonds, including the "Griffiths bond")
- community service orders
- periodic detention orders
- home detention orders
- Drug Court orders
- Suspended Sentences

The Probation and Parole Service, which is part of the Department of Corrective Services, is responsible for managing offenders in the community. The caseload of the Probation and Parole Service has increased in recent times, in particular, there was a 14% increase in the number of supervised probation orders made by the courts in the period December 1997 to December 1998. The number of these orders increased by a further 5% between December 1998 and December 1999. The Probation and Parole Service also assists judges and magistrates to make sentencing decisions by providing them with pre-sentence reports.

**Pre-sentence reports**

Pre-sentence reports are not alternatives to imprisonment. It is appropriate, however, to mention them here as pre-sentence reports play an important role in assisting a court to decide whether to impose a custodial sentence or a non-custodial sentence.

Judges and magistrates frequently require information about an offender to assist them in determining an appropriate sentence. Offenders are remanded, either in custody or on bail while a probation and parole officer prepares a report. The report provides verified information regarding the offender's circumstances, an assessment of the offending behaviour, and any additional

[22] Except for Drug Court orders, the alternatives listed have been taken from the report of the New South Wales Law Reform Commission on sentencing (Report No. 79, December 1996). The Drug Court commenced in February 1999. The Drug Court is able to make an initial sentence to the effect that an offender go to a correctional centre for detoxification and then attend a community-based program. If the offender fails to comply with the terms of the initial sentence, the court may set aside its initial sentence and make a final sentence which may mean imprisonment.

information relevant to sentencing. The report also includes an assessment of an offender's suitability for periodic detention and a range of community-based sentencing options such as community service work, an attendance centre order, supervised probation, ability to comply with a monetary penalty, and any other specified programmes considered appropriate. A proportion of the offenders on whom a pre-sentence report is prepared inevitably will receive a full-time custodial sentence due to factors such as the seriousness of their crime and their criminal antecedents.

The Probation and Parole Service provided 17,931 pre-sentence reports to the courts in 1995-96. In 1996-97, 18,624 reports were provided and 20,167 were provided in 1997-98. In 1998-99, 22,832 pre-sentence reports were prepared which was 4,901 more than four years previously. An example of a pre-sentence report is provided in Appendix 16.

**Fines**

Courts have imposed fines as an alternative to imprisonment for hundreds of years. The *Fines Act 1996*, which commenced on 27 January 1998, introduced a fine enforcement system which is based on a hierarchy of civil and non-custodial sanctions for the non-payment of fines with imprisonment being a sanction of last resort. Under the system, a court will only issue a warrant of commitment if a fine defaulter fails to comply with the conditions of a community service order. The *Fines Act 1996* does not apply to fines/warrants issued by the Commonwealth or other States or Territories.

The *Fines Act 1996* has diverted all NSW fine defaulters from prison (there are usually about three interstate fine defaulters in the NSW correctional system at any one time). Prior to the commencement of this Act, a significant number of fine defaulters entered the correctional system. In 1995-96 and 1996-97, for example, 3,936 and 4,474 fine defaulters respectively entered the correctional system. It should be noted that eventually some persons will enter the correctional system because they have not completed community service orders made under the *Fines Act 1996*.

**Probation orders**

The various probation orders under the *Crimes Act 1900* have been with us for many decades; the notes to the *Crimes Act 1900*, contained at the end of the Act, state, for example, that section 556A was inserted into the Act in 1924. The "Griffiths bond", under which an offender may be released "to allow the court to assess their behaviour and capacity for rehabilitation before imposing an appropriate sentence"[23], derives from the case of *Griffiths v The Queen* (1977) 137 CLR 293.

An offender may be placed on probation supervision as a condition of entering into a recognizance (bond) to be of good behaviour. Probation is a sentence which combines sanctions for re-offending, or failing to comply with the conditions of the recognizance, with case management. The probationer is given assistance to develop goals and skills which are directed toward a law-abiding lifestyle through attendance at programmes organized by the Probation and Parole Service. The programmes are listed at Appendix 15.

In 1998-99, 8,394 offenders were placed on probation supervision which was 1,090 more than in the previous year. Eighty-seven percent (12,067) of the probation *and parole orders* completed in 1998-99 were

[23] NSW Law Reform Commission, *Sentencing*, Report No. 79, December 1996, page 83

completed successfully. In December 1999, 1,889 women were subject to probation supervision which was 8% more than in December 1997.

**Community service orders**

Community service was introduced in 1979 as an alternative to imprisonment. When the then Minister for Corrective Services, Bill Haigh, introduced the *Community Services Bill*, he said on two occasions during the second reading speech that "this sentencing measure should operate as an alternative to imprisonment"[24].

The NSW Law Reform Commission, in its discussion paper on sentencing, noted research carried out by the Judicial Commission which showed that it was doubtful that community service orders have always been used solely as an alternative to imprisonment[25]. The Department considers that the original purpose of community service - as an alternative to imprisonment - has, in many cases, disappeared. Nevertheless, community service orders are a valuable and often used sentencing option which enables offenders to develop work skills and make constructive use of their time.

A community service order can be imposed with an offender's consent. Judges and magistrates may sentence suitably assessed offenders to perform community work to a maximum of 500 hours. Under the scheme, offenders perform unpaid work at non-profit agencies. Community service orders are available across the state. As at 30 June 1999 there were 5,345 offenders supervised under community service orders which was 373 more than at the same time in the previous year. Eighty-two percent (7,901) of the community service orders completed in 1998-99 were completed successfully. The increase in both probation orders and community service orders indicates that sentencing authorities have not forsaken these options in favour of custodial sentences.

**Periodic detention orders**

Periodic detention was introduced in 1971 as an alternative to full-time imprisonment. When the then Minister for Justice, John Maddison, introduced the *Periodic Detention of Prisoners Bill*, he said:

> *Under the proposed legislation courts will...be able to sentence an offender to a term of imprisonment for not less than three months or more than twelve months in the ordinary way but may order that the sentence be served as a sentence of periodic detention*[26].

In 1998 the Judicial Commission of New South Wales published a monograph on periodic detention. The monograph discussed at some length whether the introduction of periodic detention had led to net-widening; that is, whether courts, had imposed periodic detention in cases where, but for the existence of periodic detention, the offender would have received a non-custodial sanction. The Commission concluded that net-widening had occurred, and stated:

[24] New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 29 November 1979, page 4258

[25] NSW Law Reform Commission, Sentencing, Discussion Paper No. 33, April 1996, pages 337-338, referring to Bray R & Chan, J, Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in New South Wales. Judicial Commission of NSW, Monograph Series No.3, April 1991

[26] New South Wales, Parliamentary Debates (Hansard), Legislative Assembly, 18 November 1970, page 8041

> *A root cause of net-widening appears to lie in the perception of the courts that periodic detention is a lenient disposition and not "equivalent" to full time imprisonment.... The legislature clearly envisages a link between full time custody and the imposition of a term of periodic detention.*

The amendments to the periodic detention legislation that commenced operation on 1 February 1999 strengthened the criteria against which those facing sentence are assessed for suitability for periodic detention. The amendments removed any doubt as to the requirement that a court must sentence a person to imprisonment before considering whether to make an order for periodic detention.

Periodic detention is available for offenders who live within a reasonable distance of a periodic detention centre. Courts are provided with pre-sentence reports by the Probation and Parole Service which contain relevant information about offenders in relation to matters such as: alcohol and other drugs; psychiatric or psychological conditions; criminal record, employment and other personal circumstances. When making a decision about periodic detention, the courts also take into consideration an offender's accommodation arrangements and access to suitable transport. As mentioned earlier in this paper, amendments to the *Periodic Detention of Prisoners Act 1981* have resulted in an increase in the number of cancellations of periodic detention orders. There are currently 1,302 offenders with current periodic detention orders.

**Home detention orders**

Home detention was introduced in 1997 as an alternative to full-time imprisonment. The object of the *Home Detention Act 1996*, as stated at the commencement of the Act, is:

> *An Act to provide for home detention as a means of serving a sentence of imprisonment in certain cases.*

In order to preserve home detention as an alternative to imprisonment, and thus avoid net-widening, section 11 of the *Home Detention Act 1996* requires that a court must first sentence an offender to imprisonment before calling for an assessment report from the Probation and Parole Service as to the offender's suitability for home detention. A review of the *Home Detention Act 1996* concluded that:

> *The HD Act was successful in limiting the potential for systematic net-widening within the criminal justice system by allowing access to a home detention assessment only after an offender had been convicted of criminal charges and sentenced* [27].

In 1998-99, 350 offenders were admitted to the home detention program. Of these, 83% were men and 17% were women. Seventy-eight percent (258) of home detention orders completed during 1998-99 were completed successfully. The *Weekly States* for 16 January 2000 shows that, as at that date, there were 141 offenders on home detention orders. As home detention is truly an alternative to imprisonment, on 16 January 2000 there were 141 offenders serving a sentence *outside* a correctional centre who, prior to the commencement of the home detention scheme in February 1997, would have been serving a sentence *inside* a correctional centre.

[27] Heggie, Kyleigh. Review of the NSW Home Detention Scheme, Research Publication No.41. NSW Department of Corrective Services, May 1999, pages vii-viii.

**Drug Court**

The Drug Court is a special court with the responsibility for handling offences committed by people who are dependent on prohibited drugs. The Drug Court helps a drug dependent offender to deal with his or her drug dependency by combining medical treatment services with comprehensive and intensive supervision by the Probation and Parole Service.

To be eligible to be referred to the Drug Court an offender must, among other things, be likely to be sentenced to imprisonment for the offence with which the offender has been charged. If the Drug Court decides that an offender is eligible for the program and the offender is willing to obey the conditions of the court, the court will ask the offender to enter a plea of guilty to the offence. The Drug Court will then convict the offender for the offence. The sentence will then be suspended while the offender satisfactorily participates in the program. The sentence is reviewed when the Drug Court program ends.

The Drug Court was opened in February 1999. As of 3 February 2000, the Drug Court had made 226 orders. Of these, 189 were in relation to men and 36 in relation to women. There were 121 active participants in the program as of this date. The Drug Court program is a trial program and is limited to 300 participants.

**Suspended sentences**

Suspended sentences have not been a sentencing option in NSW since 1974 when they were abolished. The *Crimes (Sentencing Procedure) Act 1999*, re-introduced suspended sentences. Under section 12 of the Act, a court that imposes a sentence of imprisonment on an offender for a term of not more than two years may make an order suspending execution of the sentence and directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.

Under section 99 of the Act, if a court revokes the bond for breach of the conditions, the order under section 12 suspending the sentence ceases to have effect and the offender must serve the whole of the original sentence in prison. The court may, however, make an order directing that the sentence of imprisonment to which the bond related (disregarding any part that may have already been served) be served by way of periodic detention or home detention.

It remains to be seen whether suspended sentences will truly divert offenders from prison, as has been the case with other sentencing options, if offenders persistently breach the conditions imposed. If the breach rate is high, suspended sentences may deliver offenders to *prison* rather than divert offenders *from prison*.

NSW has implemented a range of alternative programmes some of which have clearly diverted people from prison. The major risk with all "alternative sentencing options" is that sentencing authorities may impose those penalties on offenders who would not otherwise have been given a custodial sentence. While the same, or similar, number of offenders may be sentenced to prison, a wider circle of lesser offenders are brought within the "net" of the alternative penalties. When a proportion of those offenders breach the terms of their orders, they run the risk of full-time imprisonment. Despite measures taken to stop this from happening there is evidence of a significant net widening effect particularly for Community Service Orders and Periodic Detention

The other cautionary note is that alternative sentencing options are usually

applied to those who would otherwise have received a relatively short sentence. Logically, then large numbers of people in this category will have to be diverted to have a sustained impact on the prison population. ( E.g. If 24 people who would have been sentenced to 1 month in custody are diverted in a 12 month period this would result in a reduction in the prison population of only 2 people.)

**Decarceration options**

There are a variety of policies other than alternative sentencing options that seek to reduce the number of people in custody these include:

- Decriminalisation e.g. removal of criminal sanctions from Cannabis related drug offenses.
- Executive adjustments - pardoning and amnesties
- Sentencing Reform - e.g. Minnesota Sentencing Commission

**Rationalising Resources**

On a more pragmatic level overcrowding can be addressed through the rationalisation of resources. As I indicated in the introduction, overcrowding is usually more than just a problem of bed shortages. It is usually accompanied by a shortage of resources. The most costly resource in the provision of corrections is usually staffing. Rationalisation can not compromise the agreed standards of care or national correctional standards that are usually derived from international charters of prisoners rights and conditions.

In NSW some the strategies that have been adopted to some effect include

- reducing time out of cells (down to minimum of 8 hours in maximum security gaols)
- rolling lockdowns - which results in the scheduled and rotated lockdown of sections of a correctional centre.

Correctional Programmes that are often staff intensive and expensive also need to be rationalised. In NSW we have adopted a case management model and embraced the risk, needs and responsivity framework, which, when fully implemented will ensure that those who pose the highest risk of reoffending are targeted for the provision of programmes and services.

## VI. CONCLUSIONS

Overcrowding which is the outcome of the interaction between a number of dynamic factors can be managed with good research and commitment. The simplest way to do this, which is to create more accommodation and to secure additional resources may not be possible or desirable. Causal factors are difficult to identify and to influence however there are a number of remedial strategies that can be implemented to reduce numbers. To be effective, alternatives to imprisonment must be imposed on those who would otherwise be in full time custody. Legislation must be thoughtfully drafted to reduce the possibility of net-widening,

Strategies that result in shorter sentences will be more effective than reducing the number of short sentenced admissions.

# LECTURE 2 MANAGING WOMEN, FOREIGNERS AND DRUG USERS

## I. INTRODUCTION

In New South Wales, the Department of Corrective Services has common objectives for all inmates irrespective of their gender, race or offending profile. Two key result areas as expressed in the Corporate Plan are:

1. Managing Offenders - Safely and effectively manage offenders while enforcing the orders of the court and discharging the 'duty of care';

2. Reducing Offending Behaviour-provide opportunities and encouragement for offenders to acquire insights and skills to positively address deficits or addictions associated with offending behaviour.

The Department has adopted Case Management as the primary strategy for managing all inmates.

Case Management is defined as:

> *...a collaborative, multi-disciplinary process which assesses, plans, implements, co-ordinates, monitors and evaluates options and services to meet an individual's needs* (Inmate Case Management Policy 1999).

After initial information is collected about:
- the inmate's offence;
- needs in relation to AOD issues;
- mental health issues
- health, welfare and education needs
- work needs,

a case plan is developed by a multi disciplinary Case Management Team. This initial case plan will determine the inmate's security classification and placement and will make recommendations concerning the type of treatment, education and work interventions needed. When an inmate is transferred to a correctional centre of classification, the case plan is further developed by the Case Management Team and the inmate is assigned a case officer. It is the role of the case officer to monitor the inmate's progress on the case plan and to encourage the inmate to participate in programmes, work and counselling if appropriate. The case plan is reviewed every 6 months by the Case Management Team.

Case Management is the most significant correctional activity implemented by the Department in the last 10 years and is the process driving major correctional reform. Through Case Management barriers between custodial and non-custodial staff are gradually breaking down as custodial staff take up a more significant role in the management of offenders rather than only the secure containment of offenders. The Department has recently commenced down a new pathway for assigning programmes and interventions in the inmates case plans.

The new approach has been very much influenced by the Canadian approach as highlighted in the work of Andrews, Bonta and others[28].

The profile of male and female offenders in custody in NSW is different. Current research shows that in the overall inmate population:

- over 15% of inmates are Aboriginal or Torres Strait Islander
- 26% are from a non English speaking background (NESB)
- 28% are aged between 18-24
- 13% have an intellectual disability
- 75 % have an alcohol and other drug (AOD) problem
- 16% of males have been sexually abused before the age of 16
- 21 % have, attempted suicide
- 40% meet the diagnosis of Personality Disorder
- 60% not functionally literate or

[28] See as an example Andrews, D.A.., et al (1 990) *Does Correctional Treatment work?* a clinically-relevant *and psychologically informed meta-analysis.* Criminology, 28 369-404

numerate
- 44% were long term unemployed
- 60% did not complete year 10
- 64% have no stable family
- over 35% are Hepatitis B or C positive

In the female population:

- 25% are Aboriginal or Torres Strait Islander
- 39% previously attempted suicide
- 23% on psychiatric medication
- 73 % admitted to psychiatric or mental health units
- women have significantly higher levels of illicit drug use, Hepatitis C, depression and sexual abuse than men.

## II. MANAGING WOMEN

It is clear from the above data that women in custody are confronting different issues. While these issues may not be universal, cross-national comparisons show considerable overlap. Women in custody are more likely to be victims of physical and sexual abuse, have issues arising from their responsibilities to children, be addicted to drugs and to have mental health problems. Tables 4 and 5 also confirm that the offense profile for women in Australia is different to men, with women less likely to be convicted of sexual assault and armed robbery, but more likely to have been convicted of fraud.

Where women have been convicted for violent offenses they are twice as likely as men to have committed these offenders against someone close to them, often their spouse of partner who may have physically abused them.

Historically, the management and programming for women in custody has tended to mimic what is done for men who are in the majority. There are few jurisdictions where the number of women in custody exceeds 10% of the total population. However there are recent indications of a disproportionate increase in the number of women. This is certainly the case in Australia.

The research literature on 'what works' has tended to neglect the interventions provided for women, though it has been confirmed[29] that the principles of risk, need and responsivity are equally important for getting the best outcome for women.

Programmes that are devised specifically for women should take account of women's needs and responsivity. Their greatest needs are for treatment of substance abuse problems, trauma, basic education and vocational training and parenting skills.

Barbara Bloom[30] provides an excellent overview of guiding principles and practices for programming for women offenders. She suggests that program design must also provide an environment that supports recovery and is characterised by Safety ("free of physical, emotional and sexual harassment"), Connection ("exchanges among the treatment group facilitator and group members feels mutual rather than one way") and Empowerment. Programmes must also contain cognitive, affective and behavioural components.

A recent national survey in the USA[31], confirmed the profile of female offenders outlined above and noted that:

[29] Andrews, D.A., and Craig Dowden, *1999. A meta-analytic investigation into effective correctional intervention for female offenders. lnterventions. Canada*

[30] Bloom, Barbara; *1999, Gender-responsive programming for women offenders: guiding principles and practices;* Interventions, Canada, 1999

*The most commonly mentioned management problem, noted in 11 states was in the area of classification and screening... (which) did not provide needed information, were not adapted to women, and were not useful in matching women's needs for programming.*

**New South Wales a roach to managing women.**

In NSW the management of women offenders has been driven by a series of action plans. The *Women's Action Plan 2* will be the guiding force for the Department's *Women's Program* over the next three years. This plan exists within the broader context of the Department's *Corporate Plan*

The Department's *Strategic Plan* stipulates the priorities which must inform the further development of the *Women's Program* both in terms of capital works initiatives and service provision. In accordance with these overarching policies, the *Women's Action Plan 2* emphasises:

- the delivery of programmes and services reflecting a holistic approach to women's health and well-being;
- the provision of flexible programmes for women inmates in the areas of relationship and living skills, problem solving, alcohol and other drugs and health education, vocational training, offence-specific programmes and recreational activities;
- the planning and management of resources to ensure their equitable provision;

In June 1994, the Department of Corrective Services published its first *Women's Action Plan.* It outlined a series of capital works strategies and made recommendations concerning the provision of programmes and services relevant to the needs of women in the NSW correctional system.

Since 1995, placement options, programmes and services for female inmates have improved significantly:

- in addition to the main women's facility, the *Mulawa Correctional Centre*, which currently accommodates approximately 285 sentenced and unsentenced female inmates, the *Emu Plains Correctional Centre* was established as a minimum security facility for 138 women. A small 19 bed facility for women *(June Baker Unit)* is operating at the *Grafton Correctional Centre,* and a separate unit for up to 8 women at the *Broken Hill. Correctional Centre.* In 1996, the 21 bed *Parramatta Transitional Centre* for women and children was officially opened;
- a Women's Services Unit (WSU) was established with a mandate to provide policy advice and advocacy at senior management level of the Department concerning the needs of female inmates;
- a female-specific classification scheme was introduced which takes into account the circumstances of incarcerated women. The underlying principle of this is that women are low risk of violent offending but high need, they generally do not require confinement in a secure facility and the primary determinant of placement should be program provision.
- a *Mothers and Children's Program* was developed to ensure that young children of women serving a custodial sentence were able to maintain an ongoing relationship with their mother.
- The *Women's Action Plan 2* will build

[31] National Institute of Justice, 1998, *Women Offenders: programming Needs and Promising Approaches.* U.S. Department of Justice

on the success of the Department's *Women's Program* by consolidating the earlier capital works, policy and program initiatives.

The new strategies concerning the *Women's Program* have been derived from several important sources including consultation with inmates, Departmental staff and community organisations and following a systematic review of programmes services and facilities:

The *Mothers and Children's Program, the Transitional Centre Program, a Gender Specific Classification* and the *Jacaranda Cottages* at the *Emu Plains Correctional Centre* were initiated by the first *Women's Action Plan*. These are major initiatives in the management of female inmates and a critical assessment of the impact and effectiveness of these programmes is the logical next step to ensure the consolidation of those strategies recommended in the first *Women's Action Plan*. In evaluating these innovative policy and program initiatives, the Department has not found a body of existing relevant research.. The following evaluation framework is proposed:

- short-term outcome measures, e.g., program participation, rule violation and/or incidents, arrest for new criminal offence;
- long-term outcome measurements, e.g., return to custody for violation of probation or parole, relapse from alcohol and other drug recovery, observed significant behaviour change, employment status, type of new offence, seriousness of new offence.

The evaluations will use recidivism as an outcome measure of the effectiveness of the programmes but will combine quantitative and qualitative research methods.

**Mothers and Children's Program**

The recommendations of the Women's Action Plan in regard to mothers and children provided the impetus for the development of the Mothers and Children's Policy.

In developing the Mothers and Children's Program, the Department has put the best interests of the children of mothers who are serving a full-time prison sentence at the highest priority. The Department recognised that the continuity in the relationship between the primary carer and child is of great importance to the child's emotional, intellectual and social development. The Department also recognises that imprisonment in itself is neither evidence of a mother's lack of desire nor of her ability to perform her parental duties.

The contradiction between providing such as program for women and the commitment to developing policies which do not reinforce stereotypes is acknowledged. However, women's statistical dominance in the correctional system as primary care givers and the best interests of the children whose primary care giver is imprisoned make this contradiction a necessary one. Secondary benefits of the program include a likely reduction in re-offending behaviour of participants and alleviation of the distress and anxiety associated with the forced separation from children.

The Department provides a range of options to female inmates who wish to assume an active parenting role. Primary carers, irrespective of whether they are the biological mother, are eligible to participate in the program. Non-primary carers are eligible to participate in the occasional residence program with the written consent of the primary carer of the child or children.

The Mothers and Children's Program includes the following options:

- permitted absence pursuant to Section 29(2)(c) of the Correctional Centres Act.
- caring for child or children full time whilst in custody, up to school age. ie The Full Time Residence Program.
- occasional accommodation for children such as weekends and/or school holidays up to the age of 12 years. (The Occasional Care Program)

These options are administered with as much flexibility as possible in order to meet the needs of individual women and children. Decisions regarding Section 29(2)(c) absence and the Full Time Residence Program are made after a submission is placed before the Mothers and Children's Committee.

Once the applicant has satisfied the criteria for the program, the submissions are then placed before the Committee and discussed. The application is then recommended for approval or not recommended. The Co-ordinator then places the submission before the Assistant Commissioner Inmate Management and then to the Commissioner for final approval.

The guiding principles of the policy are:

- the best interests of the child is the paramount consideration;
- imprisonment in itself is neither evidence of a mother's lack of desire, nor of her ability to perform her parental duties;
- participation in the Full Time Residence Program is the option of last resort, to be utilised when there are no satisfactory alternatives for the placement of the child or children available;
- children residing in, or spending time at a correctional centre are the sole responsibility of their mother;
- participation in the Full Time Residence Program must never be used as a part of the hierarchy of privileges and sanctions;
- the Mothers and Children's Program is designed to meet the highest community standards of child protection.

Since December, 1996 until January, 2000 the Mothers and Children's Program has been responsible for assisting;

| | Women | Number of children |
|---|---|---|
| Section 29(2) (c) absence | 10 | 19 |
| Full time Residence Program | 21 | 23 |
| Occasional Care Program | 34 | 46 |

With the planned expansion of Emu Plains, it will be possible to also expand the Mothers and Children's program to provide more beds.

Employed at Emu Plains is a Family Support Worker who is involved daily in the operation of the Program. This person has developed and introduced to the Centre a network of community agencies that support the women and their children. The women are also assisted with a pre-release plan through Inmate Development staff who also run such groups as; Domestic Violence, Alternative to Violence Groups, Drug and Alcohol Counselling, Psychological Counselling, Welfare Assistance, Education.

## III. MANAGING THOSE CONVICTED OF DRUG RELATED OFFENSES

One outcome of the increased pattern of drug use in the community has been a disproportionate increase in the number of drug users in custody. As previously mentioned over 75 % of people in custody in New South Wales admit to having alcohol or other drug problems. Drug abuse itself is criminogenic in that it can lead to criminal behaviours. This can be through the disinhibiting and other effects of drugs on behaviour and through the activities people engage in to get money to support habits. Illicit drug use, supply, manufacturing and importation may all result in criminal sanctions including imprisonment for lengthy periods.

Part of the response to drug use in prisons, must include action to eliminate drug trafficing into prisons. Increasingly the use of technology, including surveillance, urinanalysis, ultrasound has been introduced to combat this problem in conjunction with more traditional techniqies of searching, use of sniffer dogs and intelligence. However, the use of drugs in prisons will be difficult if not impossible to eliminate because of the requirement to allow prisoners reasonable contact with family and friends and because of the possibility of staff corruption. As well as attempting to eliminate drugs, correctional authorities have an obligation to minimise the harmful effects of drugs and to provide opportunities to treat addiction and help break the drug/crime cycle.

### What works?

While many drug treatment programmes have been individually evaluated, there are few large scale reviews of effectiveness of treatment programmes. An excellent report that has recently been completed by Pearson and Lipton[32] who reported positive outcomes for, intensive 'therapeutic community' intervention, methadone maintenance and cognitive behavioural programmes. 'Boot Camps' and drug focussed group counselling programmes were not shown to be effective. This has been reported elsewhere.

### Alcohol and Other Drug Services in NSW

The Alcohol and Other Drug Health Promotion Unit (AOD/HHPU) provides services to inmates within the 'harm minimisation' framework. Its core business is to assist inmates reduce the harm (both individual and social) associated with substance use, as well as facilitate health promotion workshops and courses that educate inmates on safer practices relating to substance use, universal infection control issues and healthy lifestyles. These courses are run in each centre.

The harm minimisation framework is contentious, and those who favour abstinence often express the view that it is an admission of failure. It has been adopted in NSW because drug use is regarded as complex social and medical phenomenom rather than a criminal one and because failure to adopt has undesirable public health consequences particularly in the transmission of HIV and Hepatitis C.

Programmes and services are provided to male and female inmates that address issues of relapse, substance related recidivism and health promotion projects. Within this brief there are specific programmes targeting women, indigenous inmates, inmates with intellectual disabilities, inmates from NESB and young

[32] Pearson, F.S and Douglas Lipton, 1999; *A meta-Analytic Review of the Effectiveness of Corrections-based Treatments for Drug Abuse;* The Prison Journal, Vol 79 N04, December 1999

adult offenders. There are drug free wings in 3 centres, and a Therapeutic Unit will commence at Long Bay in July 2000. These programmes focus on pre release and transition and are part of the Department's commitment to through care and community involvement. A work in progress is the AOD Women's Transitional Centre for female offenders and their children. (See Appendix 1 for a comprehensive list of programmes)

AOD Workers provided services to inmates on 245,109 occasions and increase of 67,278 since 1997/98; attendance at AOD group sessions during 1998/99 increased to 22,008 from 18,240 in 1997/98.

**Intensive Alcohol and Other Drug Programmes**

The Alcohol and Other Drug Health Promotion Service has implemented various strategies to address the needs of those inmates who have identified as having a substance use problem. These strategies range from the Core AOD HHPU Programmes, Peer Support Programmes and the contributions of various community organisations to the more specialised and intense programmes that will address the issues of relapse and recidivism for inmates with high incidence of relapse.

A treatment pathway for these inmates has been developed, starting at entry to a "Drug Free Wing" and extending to a pre release/transition program for C2 and C3 category inmates. The Drug Free wings are in three Correctional Centres, Parramatta, Emu Plains and Cessnock. These wings operate within the normal gaol routine and the programmes and services attached to these areas have an extensive group work component and community involvement. Inmates who enter these wings are selected through an assessment criteria which includes remaining time to service of not less than 3 months and no more than 6 months. They are required to sign a contract in relation to participation in the program and are subject to random urinalysis testing. The urinalysis procedure will work under the umbrella of harm minimisation, that is, there will be a hierarchy of punishments and the use of relapse prevention tools as an education strategy.

For women, this Drug Free Wing will run along the same gaol routine as the males, however, it will focus more on living skills, parenting issues, job skills and conflict resolution in terms of their substance use. All of the programmes attached to these projects will have a strong CBT theoretical approach, with the long term aim of reducing offending behaviours.

The AOD Therapeutic Unit located at Long Bay will house 40 men and is a pre release program, with inmates being in the last 12 - 14 weeks of their sentence. The program content will be strongly linked to the community, and will facilitate social supports, networks with housing, TAFE and Centre Link, as well as non government agencies involved in the rehabilitation of these inmates. There will be a family component to this program and involvement with Probation and Parole. These intensive programmes have been well researched and whilst it is acknowledged that addiction is a complex issue with many variables, this whole of community approach to service provision looks promising in terms of successful outcomes. All programmes in this unit will be educational, therapeutic and cognitively based. The same local policy in relation to urinalysis at Parramatta Drug Free will apply to this unit.

The Lifestyles Units, (one for men in the MSPC and a work in progress for women at Mulawa) will address the issue of

healthy living in relation to HIV/AIDS and Hepatitis. These units have programmes that are holistic and give the residents factual information based on research into the use of alternative medicines.

Following the NSW Drug Summit, which was held in May 1999, funds were provided to expand the Department's alcohol and other drug services. Key features of the expansion include: the establishment of three detoxification units; the establishment of a transitional centre for women with AOD problems; the establishment of three healthy lifestyle zones (drug free wings); a proposed review of AOD programmes and services. All of these projects are in the development and/ or implementation stage.

**Assessment, Detoxification and Pharamacotherapies**

The provision of appropriate medical intervention is also a fundamental requirement. In NSW a Drug and Alcohol assessment is a routine component of the reception medical screening which is completed within hours of arriving in custody. Where an inmate self reports a history of recent drug use and displays clinical signs of withdrawl, a medical detoxificaiton regime commences. The protocol applied depends on the nature and intensity of drug use. It is most common however for prisoners to be poly-drug abusers, with the current drugs of choice including combinations of heroin, amphetamines, barbiturates, and alcohol. The protocol could require intensive supervision in a detoxification ward or under 24 hour camera surveillance. Medication is also provided to alleviate withdrawal symptoms that could include, nausea, vomiting cramping and convulsions.

NSW was one of the first jurisdictions to introduce methadone maintenance programmes and recent research continues to confirm the success of this particularly in reducing transmission of Hepatitis C. HIV is not a major problem in NSW gaols.

Clinical trials are now set to commence in prisons on the effectiveness of a number of new drugs including Naltrexone and Long Acting Methadone (LAM).

## IV. MANAGING FOREIGNERS

The issues surrounding the management of foreign born prisoners will be very different between countries.

New South Wales is one of the most culturally diverse societies in the world.

- 41 % of the NSW population was either born overseas or has at least one parent born overseas
- 25 % are from non-English speaking countries.

It is not surprising to find large numbers of people who come from non-English speaking backgrounds in prison as this is representative of the general population. There are a number of challenges however arising from this complex racial mix.

In 1996 the NSW parliament enshrined the principles of cultural diversity. These are

Principle 1: All individuals in NSW should have the greatest possible opportunity to contribute to all aspects of public life.

Principle2: All individuals and public institutions should respect and accommodate the culture, language and religion of others within an Australian legal and institutional framework where English is the primary language.

Principle 3: All individuals should have the greatest possible opportunity to make use of and participate in relative activities and programmes provided or administered by the New South Wales Government

Principle 4: All public institutions in NSW should recognise the linguistic and cultural assets in the population of NSW as a valuable resource and promote this resource to maximise the development of the State

As an instrument of government, the NSW department of Corrective Services under this charter has a number of obligations which focus on language, cultural and religious differences of the inmate population.

Inmates from non-English speaking backgrounds who are well represented in the inmate population include, Middle Eastern (mainly Lebanese), Polynesian and Pacific Islanders, and Vietnamese.

The Department's efforts are focussed n a number of areas.

1. Communication
   which involves the mandatory use of interpreters in range of interactions. Multi-lingual translations of key information documents
2. Recruiting and training
   actively recruiting staff from key language and cultural groups, provision of cultural awareness training
3. Programmes
   development of targeted programmes eg English as a second Language, AOD programmes for Vietnamese inmates etc
4. Religion and culture
   Facilitating religious and cultural activities for key groups
5. Diet
   Accommodating specific dietary requirements including Halal, Kosher &Vegetarian

To foster the appropriate attitudes and skills among staff, my division has recently completed an interactive training program on CD ROM that is designed to inform staff about the special needs of prisoners from non-English speaking backgrounds. I will be demonstrating this CD-ROM during my talk and providing a copy for course participants.

A concerted effort is still required because despite the best efforts of the Department, prejudice and discrimination within the inmate population and between inmates and staff remains a problem.

**Gangs**

A further issue that has recently arisen has been the increasing influence of gang affiliations in the inmate population. Gangs are not entirely racially based, however there has been recently been a number of disturbances where inmates have been divided on racial lines. The major race based Gangs are Vietnamese, Lebanese, Aboriginal and Pacific Islanders. Associations between these groups appear to be fluid. One of the dilemmas that arises in managing these groups is whether they should be permitted to aggregate in a single location or whether they should be dispersed. Clustering of ethnic groups has some benefits for the concentration of services but acts to reinforce the gang mentality.

**APPENDIX 1**

**INMATE PROGRAMMES**

| Program | What the program does |
|---|---|
| Relapse Prevention Program | Inmates learn techniques to assist them to maintain, during the remainder of their time in prison and after release, changes in relation to their drug and alcohol use |
| Harm Minimisation Drug Education Program | Inmates learn how to identify harms associated with their substance use and how to reduce those harms |
| Drink Driving Surviving Program | Inmates learn the risks associated with drink driving and how to put in place stop-behaviours upon return to the community |
| Quit Smoking Program | Inmates learn the health risks associated with smoking and receive a set of strategies to quit |
| Anger Management Program | Inmates learn more appropriate ways of handling their stress and their current responses to crisis |
| Alcohol and Violence Program | Inmates learn about violence in all its forms - in particular, the relationship between alcohol and violence - and learn techniques to stop or severely limit that violence |
| AOD [Acohol and Other Drugs] Awareness for Remand Inmates Program | Inmates on remand or with low literacy make the connection between their crimes and prison, and put in place strategies to reduce recidivism |
| Staying Alive Program | Intellectually disabled inmates take part in a program which facilitates learning in relation to their drug use |
| Methadone Lifestyles Program | Inmates learn about the effects of methadone, health and hygiene associated with methadone, social implications of methadone and coping skills |
| AOD Peer Education Program | Inmates gain skills to enable them to be a mentor to other inmates with a drug problem by initiating health promotion activities |
| One-day Peer Support Program | Inmates learn how to mentor other inmates in relation to risk behaviours, how to promote healthier living and how to use infection control procedures |
| Three-day Peer Support Program | Same as one-day program but at greater depth |
| Sweepers Program | Inmates learn about infection control procedures and cross-infection and how to use chemicals safely |
| Barber Shop Program | Inmates learn the duties of a barber, including infection control procedures, and how to clean barber shop equipment |

| Program | What the program does |
|---|---|
| Mens Health Program (joint program with | Inmates identify issues relating to testicular and prostate cancer, healthy heart and diet |
| Smoking Cessation Program (joint program with Corrections Health Service) | Inmates follow the Quit Smoking Program with continued awareness of emphasis on health risks to self and others |
| Mothers and Children Program | Inmates are granted leave of absence to care for their small children; children can live with their mothers or have all-day visits |
| Personal Ownership Identification and Self Esteem Program (POISE) | Female Inmates learn living skills and are linked with community agencies for follow-up upon release |
| Women's one-day health information package | Inmates identify the risks associated with drug use and put in place strategies to reduce the level of risk |
| Women's three-day health information package | Same as one-day package but at greater depth |
| Women's Health Program (joint program with Corrections Health Service) | Inmates identify health issues specific to women, such as breast cancer, diet and image |
| Stop-Doin'-Harm-to-Yourself Program | Indigenous inmates undertake a harm minimisation drug education program designed specifically for them |
| Say-No-to-Grog Program | Indigenous inmates learn that they are able to choose whether or not they will follow the example of peers who drink |
| Getting Respect Program | Indigenous inmates learn that violence is not the way to get true respect from their community |
| Alcohol and Violence Program | Indigenous inmates undertake an alcohol and violence program designed specifically for them, with an emphasis on family violence issues |
| Intro to Aboriginal AA [Alcoholics Anonymous] Program | Indigenous inmates obtain social support through a self-help network |
| Aboriginal one-day health information package | Indigenous inmates identify the risks associated with drug use and put in place strategies to reduce the level of risk |
| Aboriginal three-day health information package | Same as one-day package but at greater depth |
| Women's Cultural Drug Package Program | Female indigenous inmates identify the social implications of drug use and make choices rather than be influenced by peers and society |
| Pat gets a deadly new life | Indigenous inmates identify the risks associated with use of particular medication |

| | |
|---|---|
| AOD Peer Education Program for Vietnamese Inmates | Vietnamese inmates undertake the AOD Peer Support Program designed specifically for them |
| Vietnamese health information package | Vietnamese inmates learn how to assess their risk behaviours and replace those behaviours with more appropriate behaviours |
| Certificate of General Education for Adults<br>• Reading and Writing<br>• Numeracy<br>• Oral Communication<br>• Options<br>- Library and Research Skills<br>- Art<br>- English as a Second Language<br>- Horticulture<br>- Information Technology<br>- Workplace Communication<br>- Graphic Design<br>- Ceramics<br>- Stained Glass<br>- Screen Printing<br>- Painting and Decorating<br>- Sewing and Craft<br>- Music<br>- Health and Fitness<br>- Backhoe/Loader/Forklift<br>- Leather draft<br>- Chain-saw Operation<br>- Horsemanship<br>- Woodwork<br>- Textile Upholstery<br>- Aboriginal Studies<br>- Hospitality<br>- Video Production<br>- Calligraphy<br>- First Aid<br>- Legal Studies<br>- Maori Studies<br>- Drama<br>- Cooking<br>- Small Business Management | This Certificate may be undertaken at three levels. Level 1 is roughly equivalent to Year 10 secondary schooling. Level 3 may allow a person to gain university entry to particular sub jects.<br>Four subjects must be studied at level 1.<br>Three subjects must be studied at level 2.<br>Two subjects must be studied at level 3. |

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| External attendance courses<br>TAFE courses<br>- First Aid<br>- Ceramics<br>- Information Technology<br>- Community Services Welfare<br>- Engineering Production<br>- Clothing Production<br>- Carpentry<br>- Rural Welding<br>- Cleaning Operations<br>- Computing Skills<br>- Cooking/Hospitality<br>- Commercial Cookery<br>- Small Motor Service<br>- Kitchen Practice<br>- Horticulture Operations<br>- Upholstery<br>- Adult Foundation Education<br>- Bricklaying<br>- Painting/Decorating<br>- Cabinet-making<br>- Forest Products Operations<br>- Welding<br>- Farm Chemical User<br>- Small Business Management<br>- Forklift Operating<br>- Fitness Instruction | Selected inmates are granted leave of absence to attend courses held by educational institutions |

| | |
|---|---|
| Certificate of General Education for Adults<br>• Reading and Writing<br>• Numeracy<br>• Oral Communication<br>• Options (Mulawa)<br>- Pottery<br>- Music<br>- Legal Studies<br>- Creative Writing<br>- Paper-making<br>- Aerobics<br>- Food and Nutrition<br>- English as a Second Language<br>- Art<br>- Landscaping<br><br>• Options (Emu Plains)<br>- Ceramics<br>- Paper-making<br>- Music<br>- Art<br>- Koori Art<br>- Life Skills<br>- Horticulture<br>- Information Technology<br>- Screen-printing<br>The range of options available at Grafton and Broken Hill Correctional Centres are necessarily more limited. | This Certificate may be undertaken at three levels. Level 1 is roughly equivalent to Year 10 secondary schooling. Level 3 may allow a person to gain university entry to particular subjects.<br><br>Four subjects must be studied at level 1.<br><br>Three subjects must be studied at level 2.<br><br>Two subjects must be studied at level 3. |
| External attendance courses | Selected inmates are granted leave of absence to attend courses held by educational institutions |

| | |
|---|---|
| TAFE courses (Mulawa)<br>- Adult Foundation Education<br>- Focus on Skills<br>- Horticulture<br>- Aboriginal Mentor Training<br>- Forklift Operations<br>- Information Technology<br>- Occupational Health and Safety<br>- Painting and Decorating<br>- Building and Construction<br>- Creative Activities for Children<br>- Manufacturing Engineering<br><br>TAFE courses (Emu Plains)<br>- Children and Play<br>- Hospitality<br>- Information Technology<br>- First Aid<br>- Forklift Operations<br>- Tractor Operations<br>- Small Motor Service<br>- Painting and Decorating<br>- Office Practice | |

**Additional courses available for Aboriginal inmates**

Aboriginal inmates may attend any mainstream course. Courses designed specifically for Aboriginal inmates are:

- Aboriginal Native Gardens
- Aboriginal Arts and Cultural Practice
- Aboriginal Mentor Training
- Aboriginal Dance
- Aboriginal Art
- Aboriginal Carpentry and Joinery
- Aboriginal Vocational Preparation
- Aboriginal Mural
- Aboriginal Dance
- Aboriginal Industry

**Additional education courses available for ethnic inmates**

The only educational course specifically designed for ethnic inmates is English as a Second Language.

**APPENDIX 2**

**INTENSIVE RESIDENTIAL UNITS**

| Unit | Relevant inmates |
|---|---|
| Kevin Waller Unit<br>Malabar Special Programmes Centre | Inmates chronically at risk of suicide, with histories of self harm because of longstanding poor coping skills and severe personality disorder. |
| Acute Crisis Management Units<br>Bathurst Correctional Centre<br>Cessnock Correctional Centre<br>Malabar Special. Programmes Centre | Inmates in acute crisis and at risk of self harm or suicide. |
| Lifestyles Unit<br>Malabar Special Programmes Centre | Inmates who are diagnosed with HIV or Hepatitis C who wish to undertake an intensive health education program to assist them to come to terms with their illnesses |
| Violence Prevention Programmes<br>Alexander Maconochie Unit and Special Care Unit<br>Malabar Special Programmes Centre | Inmates who are convicted of violent offences and or exhibit violent behaviour in prison. |
| Healthy Lifestyles Zone (Drug-Free Wing)<br>Parramatta Correctional Centre<br>Emu Plains Correctional Centre | Inmates who have been drug-affected and are prepared to participate in a special program to assist them to remain drug free and prepare them for release |
| Intensive Case Management Unit<br>Goulburn Correctional Centre | Inmates who do not comply with normal prison discipline and are assessed as dangerous to others or as high risk of escape. |
| Long Bay Hospital | Inmates who are physically or psychiatrically ill |
| Mum Shirl Unit<br>Mulawa Correctional Cehtre | Female Inmates with chronic psychiatric illnesses, personality disorders or intellectual disability. |
| Additional Support Units<br>Special Purpose Centre, Long Bay<br>Goulburn Correctional Centre | Inmates who have an intellectual disability and are unable to manage in the mainstream environment. |
| Detoxification Units<br>Metropolitan Remand & Reception Centre<br>Mulawa Correctional Centre | Inmates undergoing detoxification after reception into the correctional system |
| Jacaranda Cottages<br>Emu Plains Correctional Centre | Female inmates and their children. The children live full time or at school holidays with the their mothers in the Units. |
| Transitional Centre, Parramatta | Female inmates approaching release |
| Sex Offenders Program<br>3 and 4 wing and CUBIT at the MSPC | Specialised sex offender management centres and an intensive residential unit. |
| Young Adult Offenders Program<br>Gurnang Life Challenge Program Oberon | Selected young inmates participate in a highly structured adventure based physical challenge and education program at Oberon Correctional Centre. |

## APPENDIX 3

### PROBATION AND PAROLE SERVICE PROGRAMMES AVAILABLE TO PAROLEES

| Program | What the program does |
|---|---|
| Parole group | Offenders participate in specifically tailored programmes which address issues such as community re-integration, goal identification, personal and social development |
| Drug and Alcohol Program | Offenders are presented with the physiological and social implications of substance abuse within a legal framework |
| Relapse Prevention Program | Offenders are taught skills to prevent their return to a substance-dependent lifestyle |
| Dependency and Lifestyle Program | Offenders are educated in the benefits of a lifestyle free from substance dependence |
| Alcohol and Cannabis Program | Offenders are presented with the physiological and social implications of substance abuse within a legal framework |
| Living Without Violence Program | Offenders learn personal skills to assist them to resolve problems and relationship issues without recourse to violence |
| Minor Drug Offenders Program | Offenders who have developed a pattern of involvement in minor drug offending are taught the ramifications of continuing these practices |
| Personal Development Program | Offenders deal with a variety of personal, social and legal issues to assist their personal development |
| Anger and Aggression Management | Offenders learn how to deal with their anger without recourse to anti-social behaviour |
| Drink Driving Program | Offenders are presented with the legal issues and ramifications of drink driving in a framework which addresses behaviour and attitude |

| Program | What the program does |
|---|---|
| Traffic Offenders Program | Offenders are presented with the legal issues of traffic offending in an environment which utilises the expertise of relevant community groups (eg Police, Vista [families of persons killed in vehicle accidents]) |
| Driver Education Program | Offenders are presented with the legal issues and ramifications of offending by way of driving matters in a framework which addresses behaviour and attitude |
| Life Management Skills Program | Offenders deal with a variety of personal and social issues, with an emphasis on skills acquisition to obtain employment. The program operates in collaboration with TAFE, and emphasises education opportunities |
| Living Skills Program | Offenders deal with a variety of personal and social issues, with an emphasis on self development to improve prospects of gaining employment |
| Social and Legal Issues Program | Offenders learn the social and practical implications of offending behaviour by focussing on relevant legal issues |
| Women's Issues | Offenders (female) address issues relevant to women in the context of a personal development framework |
| Responsible Living Education Program | Offenders deal with a variety of personal, social and legal issues in a model which addresses responsible societal behaviour |

# MANAGING PRISON POPULATION GROWTH, DELIVERING EFFECTIVE COMMUNITY-BASED CORRECTIONS AND TREATING DRUG-RELATED AND FEMALE OFFENDERS

*Laurence L. Motiuk**

## INTRODUCTION

Criminal justice policy makers and practitioners have the lead role in managing prison populations, delivering community-based corrections and treating offenders. Because of the enormous social and economic costs to society, crime control continues to present a serious challenge for many countries. Internationally, changes in legal definitions coupled with reduced public tolerance for crime and focused media attention have led to increases in sanctioning - both custodial and non-custodial - of offenders over the last decade.

Realizing that the public, in general, does not fully understand the inner workings of the criminal justice system (Roberts, 1993), service providers are being called upon to provide accurate information on the care, custody, control and safe reintegration of offenders. Knowing also that the media has stretched public acceptance to the limit for any correctional failure means that service providers need to learn everything there is to know about effectively and efficiently managing prison population growth, delivering community-based corrections and treating special offender groups such as drug-related and female offenders.

To summarize - public opinion, staff and offenders exert significant influence over the realization of correctional objectives. In particular, the task of safely reducing the size of the prison population and returning drug-related and female offenders to the community falls squarely of those working in correctional facilities and the community at large. Certainly, these people are being called upon to deliver more sophisticated services to a clientele constantly changing and for a public that is uncertain. Moreover, correctional staff and volunteers must do so in a safe, effective and cost efficient manner as possible. This, then, defines the problem statement for corrections - the care, custody, control and safe reintegration of offenders. The following paper provides background and a framework for this important work.

### A. Managing Prison Population Growth

As constant as growth in the use of prison has been over recent decades, it is a commonly held notion that it will likely continue well into this century. In North America, roughly one-fifth of those under correctional supervision (2000 — 2 million in the United States and 34,000 in Canada) are in prison (growing at a rate of nearly 3% per year in the United States and declining at a rate of 3% per year in Canada). Although international trends indicate that there will likely be larger prison caseloads to manage (Walmsley, 1999), it is notable that Canada has begun to experience a recent decline in their prison population.

In Canada, the ten provinces are responsible for accused persons remanded to prison before trial, young offenders (under 18), probation, adult offenders sentenced to under two years incarceration and parole supervision in three provinces.

* Canada

The federal government is responsible for adult offenders sentenced to two years or more prison and parole supervision. The National Parole Board decides conditional release for all federal offenders and provincial offenders in most provinces.

Between 1990-91 and 1992-93 the number of Provincial/Territorial prison admissions increased by 22.5%, from 207,946 to 245,746. Similarly, federal prison admissions increased 21.4% between 1990-91 and 1993-94 (peaking one year later than Provinces/Territories) from 4,646 to 5,642. The increase in admissions contributed in large measure to the rapid growth of the Canadian prison population in the 1990's. Moreover, the total actual-in prison population rose by 16% between 1990-91 and 1994-95 from 29,224 to 33,882. Because of this rapid growth in the prison population, the Federal/Provincial/ Territorial Ministers responsible for Justice in Canada asked Deputy Ministers and Heads of Corrections to identify options to deal effectively with the growing prison population (Motiuk & Serin, 2000). A paper entitled 'Corrections Population Growth' was subsequently developed and presented to the Ministers in May 1996 with a set of eleven recommendations. Additional recommendations were made in the 'First Report on Progress' (CPG 1997).

Eleven recommendations made to assist in addressing correctional population growth throughout Canada were:

1) endorsing a shared statement of principles for the criminal justice system;
2) making greater use of diversion programs and other alternative measures;
3) de-incarcerating low-risk offenders;
4) increasing the use of charge screening;
5) making wider use of risk prediction/ assessment techniques in Criminal Justice decision-making;
6) increasing the use of Restorative Justice and mediation approaches;
7) supporting Provincial conditional release recommendations to amend the Prisons and Reformatories Act for greater administrative flexibility;
8) better sharing information and technologies within the system;
9) better informing the public about criminal justice dynamics and issues;
10) testing innovative, traditional methods based on restoration and healing through Aboriginal justice and corrections pilot projects; and
11) working more co-operatively on programs and services through Federal/Provincial/Territorial pilot projects.

Additional recommendations included:

1) evaluating diversion programs to include a component on net-widening;
2) developing technology to assist with the integration of systems;
3) sharing research findings on program effectiveness; and
4) amending a principle contained in recommendation #1 - "*incarceration should be used primarily for the most serious offenders and offences where the sentencing objectives are public safety, security, deterrence or denunciation and alternatives to incarceration should be sought if safe and more effective community sanctions are appropriate and available*".

These recommendations inspired the formation of numerous working groups at all levels of government across Canada. These people were tasked with designing, developing and implementing creative options to deal more effectively and efficiently with prison population growth. Another important step towards this objective was to gain a better understanding of the most important factors influencing the size of the prison

population.

**Factors Influencing the Size of the Prison Population**

Throughout the 1990s, Canadian crime control practices resulted in changes in criminal code, reporting of crime, court processing, sentencing and conditional release policy and practice. Aside from public policy for crime control and causal factors linked to crime (such as child poverty, family breakdown, poor education and unemployment), six major factors are seen to account for the size of the prison population. They are: 1) crime rates, 2) sanctioning (incarceration rates), 3) sentence lengths, 4) release policy and practice, 5) offender population profile and 6) successful reintegration/recidivism. Another important factor is the offender profile (such as number and variety of previous youth or adult convictions, escape history, personal characteristics, etc.) of the prison population.

The crime rate, particularly the type of crime and the extent to which offenders are sentenced to a period of incarceration are the main determinants of prison admission rates (see CSC 2000). In contrast to earlier periods, since 1991 the overall trend in the number of offences in Canada has been downward. In fact, between 1991 and 1998 there has been a 15% decrease in the overall number of offences reported by police. More importantly, since 1993, most categories of violent crime (homicide, sexual assaults and robbery) have also decreased. Although comparisons of European and North American imprisonment rates in 1997 show Canada to be relatively high (129 per 100,000 population), it is significantly below the United States (645 per 100,000). While there had been a notable increase in annual Canadian prisons admissions in the early 1990s, sentenced offenders admitted to Federal/Provincial/Territorial prisons have been declining in recent years.

Sentence length and prison release policy/practice are two determinates of the average length of stay in prison. More specifically, sentence length determines not only how much time will be spent in a prison but also the earliest possible date for supervised release in the community. Corrections practitioners can impact on the average length of stay in prison by assisting in the selection and preparation of offenders for early release and contributing to their successful reintegration to the community with prescriptive intervention and appropriate supervision. Taken together, shortening the average length of stay of prisoners and reducing recidivism should result in a lowering of the size of the prison population.

**Prison Population Management - Offender Reintegration**

Offender reintegration can be defined as all activity and programming conducted to prepare an offender to return safely to the community as a law-abiding citizen (Thurber, 1998). Reintegration encompasses a broad range of decisions intended to: place offenders in the least restrictive setting possible, grant temporary absence or conditional release, and invoke suspension or revocation of conditional release when necessary (Motiuk & Serin, 1998). Correctional service providers can impact on the number of prison releases, the number of prisoners granted conditional releases, the number of offenders who remain incarcerated past their parole eligibility dates; and the number of cases who are not reviewed because they were not prepared in time. Therefore, safe, effective and efficient reintegration can yield fewer days spent in prison.

When there is a significant number of days less of incarceration for a prisoner this

has particular relevance for population management when accumulated over many cases. Sixteen reintegration levers are suggested considerable opportunity for impacting on the size of the prison population (Motiuk, 1998).

**Reintegration Levers**

**1. Classifying Initial Security Level**

*Initial security level placement has an impact on the probability and timing of discretionary release.*

**2. Profiling reintegration potentia**

*Accurate profiles of each offender's release potential and post-release adjustment serves as a means to predict good candidates for early release and can help to establish case preparation priorities.*

**3. Developing Correctional Plans**

*The correctional plan is the foundation upon which prison release is predicated and often the basis on which discretionary release is supported or denied and often understood or have the tendency to become "binding contracts", especially when the plan is associated with a statement of reintegration potential.*

**4. Improving Program Motivation**

*Offenders who are highly motivated to succeed in programs represent prime candidates for successful reintegration. Motivation is often a critical factor in parole officer support for program referral, participation, progress and early release. Accurately assessing offender motivation to target offenders for program participation and to establish release priority can make an important contribution to safe reintegration.*

**5. Increasing Program Participation**

*Institutional program participation often consumes a large proportion of case preparation time and often becomes a major cause of delays in release. Successful program participation has been demonstrated to improve the likelihood of post-release success. Indiscriminate assignment to programs, where the need is not identified or, the program is inappropriate, may offer no benefit or actually contribute to conditional release failure.*

**6. Ensuring Program Completion**

*Program participation is a critical foundation for the safe release of offenders. The full effects of programming are not always fully known, however, completing programs provides important information about post-release success; and program non-completers impose a cost both in terms of wasted resources and in depriving motivated offenders program opportunities.*

**7. Improving Program Performance**

*The assessment of program performance although critical in the decision to support early release, is often subjective and largely without guidelines. Assessing program outcome/gain or relating program performance to reintegration potential and post-release adjustment is important.*

**8. Referring for Preventative Detention**

*Increasing preventative detention referrals (to be held to the end of sentence) results in longer incarceration periods. Profiles of offenders who are returned to custody following detention can be established and provide the basis for improving detention referrals.*

**9. Moderating Segregation**

*Placement in segregation for disciplinary or administrative reasons is a major impediment to correctional progress and early release. Profiles of offenders identified as "at risk" to be segregated provide an opportunity to develop interventions designed to divert offenders from segregation and to ensure their quick discharge; effective implementation of*

*segregation policies can prevent the segregation of some offenders and ensure the speedy release of others.*

**10. Reclassifying Security Level**

*Reclassification and expeditious transfer of offenders to the "least restrictive measures of confinement" can improve the offender's chances for earlier, discretionary release.*

**11. Increasing Temporary Absence**

*Participation in either escorted or unescorted temporary absence programs are critical to establishing offender credibility for early release and re-establishing the temporary absence program can make a major contribution to safe reintegration.*

**12. Enhancing Case Preparation**

*Case preparation is the total of all activity designed to prepare appropriate offenders for early release and manage them throughout conditional release. Achieving modest efficiencies at any one of a number of critical stages along the case management continuum can result in significant reductions in "days of incarceration" and a corresponding increase in community supervision.*

**13. Encouraging Community Release**

*Participation in either work release or various types of early release programs (such as day parole, correctional halfway house placement, community correctional centres, attendance centres) are critical to establishing offender credibility for full release and re-establishing the view that this type of programming can make a major contribution to safe reintegration.*

**14. Enhancing Community Supervision**

*The effective use of minimum frequency of contact guidelines and special conditions can play an important role in determining whether offenders successfully complete their conditional release.*

**15. Reducing Suspensions**

*Reintegration success can also be achieved by maintaining conditionally released offenders in the community; predicting offenders who will be suspended is greatly improved by use of risk measurement techniques; and suspension practice is subject to broad interpretation, often reflecting local decision-making traditions and case management efficiencies that can impact on the reintegration progress.*

**16. Reducing Revocations**

*Technical revocations (those not based on a criminal conviction, charge or absconding from the parole jurisdiction) may provide a source for additional reintegration gain. There has been little study of decision-making processes and no technical revocation guidelines could be developed to support field staff; and a better understanding of the process and corporate guidelines, particularly that support alternatives to revocation submissions may offer additional reintegration gains.*

Clearly, the number of reintegration levers presented offer mechanisms for reductions in incarceration days. Within this context, the aforementioned levers can also contribute substantially to the integrity of custody, care, control and safe reintegration practices and the success of prison population management.

## Prison Population Management - Crime Reduction Through Effective Treatment

Research reviews on adult correctional treatment have found that correctional treatment is effective in reducing criminal recidivism. Recent studies on offender treatment have yielded overall average reductions of 10% in recidivism among treated offenders (Lozel, 1996). However, with appropriate interventions the results are more impressive - around 30%

reduction in recidivism (Gendreau & Goggin, 1996). Meta-analyses of adult and juvenile correctional interventions demonstrate that juvenile interventions are more effective than those designed for adults (Gaes, Flanigan, Motiuk & Stewart, 1999). While education, vocational training and prison labor programs were found to have modest effects on reducing criminal recidivism, they increased positive behavior in prison. Notwithstanding, studies on behavioral/cognitive treatments, on average, have produced larger effects of reducing recidivism than other treatments, Gendreau, Goggin, Cullen, and Andrews (2000) have noted that when it comes to reducing offender recidivism, the best approach is appropriate cognitive-behavioral treatments that embody known principles of effective intervention.

For reporting on crime reduction as a result of effective correctional treatment, the change and reduction in recidivism is calculated for program completers, participants and dropouts. The change and reduction (reported as the difference in recidivism rate over the comparison group - raises the overall magnitude of the effect) in recidivism is measured relative to either a matched comparison group, control group (sometimes waiting list controls) and or general base rate for a similarly situated correctional population. Accredited programs offered by the Correctional Service of Canada based on sound theory and research with therapeutic integrity report reductions in recidivism of 20% to 80% (CSC, 2000).

In sum, it is possible to manage prison population size through offender reintegration and crime reduction through effective treatment.

**B. Delivering Effective Community-Based Corrections**

Among the various factors that influence public safety, there is considerable evidence that incarceration alone shows no success as a method of rehabilitating offenders. Without other forms of intervention which directly address criminal behavior and attempt to instill new patterns of behavior, prison on its own lacks promise. A major review of accumulated findings (Andrews, Zinger, Hoge, Bonta, Gendreau, & Cullen, 1990) provides clear evidence of the impotency of criminal sanctions when unaccompanied by appropriate rehabilitative programming.

More recently, Gendreau et al. (2000) examined over 103 comparisons of offenders who were either sent to prison for brief periods or received a community-based sanction. Basically, they found no deterrent effect from prison, but actually an increase in recidivism. The results of another meta-analytic review by Losel (1996) reports rehabilitation programming that takes place in prison settings is less effective than programming which occurs in the community. Consequently, the evidence suggests that better correctional outcomes can be obtained in the community.

There is also solid evidence supporting the premise that the gradual and structured release of offenders is the safest and most effective strategy for the protection of society against new offences. Post-release recidivism studies (Waller, 1974; Harman & Hann, 1986) have found that the percentage of safe returns to the community is higher for supervised offenders than those released with no supervision. Therefore, offender reintegration is seen as working to better prepare offenders for release and providing them with greater support once they are in the community. Reintegration efforts should yield dividends in terms of higher rates of safe return to the community and lower rates of criminal recidivism.

The public is concerned with who and how offenders are managed in the community, particularly those who are violent or repeat, because those providing supervision services are seen as being responsible for their safety. The fact remains most incarcerated offenders eventually return to the community and the majority of sentenced offenders are given non-custodial sentences. In fact, nearly four-fifths of offenders being managed by North American correctional authorities are in the community.

The best way, then, to serve the public is to recognize the risk presented by an individual, and to then put to good use the tools, the training and a fundamental understanding of what it really means to manage offender risk.

**Risk Management Principles**

Effective risk management in corrections implies that decisions are made using the best procedures available, and are in keeping with the overall goals of the system. For correctional service providers, the application of risk management principles to reducing the chance of criminal recidivism is all that is required to develop an effective risk management program (or to improve on an already existing one). These risk management principles (Motiuk, 1995) include:

1) the assessment of risk;
2) the sharing of information (communication);
3) the monitoring of activities (evaluation); and
4) if deemed appropriate, an intervention (incapacitation, programming).

Public safety is improved whenever these risk management activities are integrated into every function and level of the correctional system providing care and control.

**Assessment Methods**

In practice, the analysis of offender risk serves to structure many of the decisions made with respect to supervision requirements and program placement. The key to risk assessment is to be able to make decisions after having considered all of the available information. However, the capacity to conduct formalized risk assessments is directly related to the amount of resources a correctional agency has at its disposal.

Andrews, Bonta, and Hoge (1990) have presented a number of principles to aid in the classification of offenders to promote effective rehabilitation. These include the "risk", "need", "responsivity" and "professional override" or discretion. The "risk" principle proposes that the more intensive correctional interventions are best applied with higher risk offenders (those who have a higher probability for negative correctional outcomes) while less intensive interventions should be reserved for lower risk offenders. The "need" principle proposes that when offender needs are targeted well and interventions applied to meet those needs, then we should expect a reduction in the amount of recidivism. The "responsivity" principle proposes that an offender's learning style should be matched with the appropriate method of service delivery. Finally, the "professional override" principle asserts that after having considered "risk", "need" and "responsivity", case workers exercise judgment in treating a particular offender.

Previous research by Motiuk and Porporino (1989) on the predictive value of community-based offender risk assessments found that:

1) criminal history factors are strongly related to community supervision outcome;
2) a consistent relationship exists between the type and number of needs

that offenders present (unemployment, substance abuse) and the likelihood of their re-offending and, most importantly,

3) the combined assessment of the level of both risk and needs significantly improves our ability to predict who is likely to re-offend and who will.

Static risk factors refer to criminal history background such number and variety of criminal convictions, breaches of trust (escape, breach of probation) and exposure/response to the criminal justice system (previous probation and/or incarceration, placement in disciplinary segregation). Dynamic risk factors refer to case needs or criminogenic needs that are capable of reflecting change in an individual (Andrews et al., 1990). This is a critical component of not only offender risk assessment, but also of risk management because this is where intervention takes place.

Little can be done about static factors (e.g., criminal record or criminal history). There is, however, considerable predictive power in those variables. While criminal history should not be ignored, you cannot do much to change those variables; this is where dynamic risk factors come in. These dynamic risk factors (or case needs) are considered to be a sub-set of overall risk. The goal is to effectively target these factors and apply appropriate interventions to have an impact on the likelihood of a criminal future.

Using this conceptual framework is very helpful for community corrections as it is allows one to vary frequency of contact, level of supervision or amount of service to be delivered if people do change. It is also helpful, as there is a mechanism to demonstrate that an offender has changed. This situation has resulted in a conceptual shift in community-based corrections towards a thorough examination of offender needs as a set of dynamic risk factors, thereby allowing some flexibility in service delivery.

As part of the standards for community supervision (Correctional Service of Canada/National Parole Board), parole officers are required to use a systematic approach to assess the needs of offenders, their risk of re-offending and any other factors which might affect successful reintegration to the community. In keeping with this standard, a 'Community Intervention Scale' (formerly called the Community Risk/Needs Management Scale) is used to capture case-specific information on 'criminal history' and a critical set of 'needs' for classification (employment, marital/family relations, associates/social interaction, substance abuse, community functioning, personal/ emotional orientation, and attitude) while on conditional release (Motiuk, 1997).

The Community Intervention Scale is systematically administered and re-administered to all offenders under community supervision by case managers across Canada. It provides an efficient system for recording criminal history risk and case needs, level of risk and need, required frequency of contact, and related background information on each offender (i.e., release status, warrant expiry). More importantly, the Community Intervention Scale assists community staff in managing sex offender risk. For example, the process of suspension of conditional release that may or may not lead to a revocation is one possible measure that can be used to assure that the level of risk is acceptable.

To sum, this dynamic assessment method serves to instruct community-based service providers with important information. More specifically, with whom they are dealing, what they are like, what

kinds of problems they faced out in the community before they became in conflict with the law, and what kind of problems they experience while under supervision. Such information can also help direct limited resources to particular segments of the population under community supervision to reduce risk.

**Supervision Standards**

Standards in community-based corrections usually affirm many traditional community supervision practices. They also transform correctional services into publicly acknowledged performance criteria. For example, community supervision standards might include the following: Agency Mission Statement and Services, Basic Policy Information, Information Sharing, Officer Selection, Training, and Workload, Case Planning, Case Conferencing and Documentation, Initial and Ongoing Contact with the Offender and Others in The Community, Violation and Suspension, Police Liaison, 24 Hour Availability, Agency Policies, Volunteers who provide supervision services, Offender Files, and Community Services and Resources (CSC, 1989).

For community-based corrections, the aforementioned standards introduce standardized methods of risk assessment and case planning, promote uniform decision-making, and clearly define areas of discretion. Luciani (1994) found that compliance with standards are vital to preserving the integrity of supervision and promoting a professional ethic.

Focused research on compliance with community supervision standards has found from audit exercises a number of keys to success (Luciani, 1994). First and foremost, those community offices with entrenched supervision practices that would survive an audit exercise (as opposed to achieving immediate compliance) fared much better than those who had not. Secondly, community offices managed by those who had established clear operational standards, routinely monitored work, and rejected substandard performance showed the most improvement. Finally, community offices whose field staff coordinated their efforts towards achieving standards performance received the highest ratings.

Correctional plans determine the how, what and why of community supervision. It is important to ensure that the plan is relevant to the individual's criminality, specific and understood by them, feasible, decent, humane, and legal. The release plan should focus upon: 1) reviewing dynamic risk factors and criminal patterns, 2) addressing concerns of the releasing authorities, 3) establishing short and long term goals and objectives of supervision, and 4) reviewing treatment programs, resources and supervision techniques.

Finally, a critical source of control and assistance resides in the quality of the interpersonal relationship between the offender and other involved workers in the community (Andrews, 1995). More specifically, the style and mode of communication is very important in the context of supervision, particularly in terms of interaction with different types of cases. For example, chronically depressed individuals may not respond well to highly confrontational exchanges. Other specific responsivity considerations encompass gender, age, intelligence and ethnicity.

When an offender's risk to the community is increased, the monitoring and assistance functions of supervision can be enhanced through disciplinary interviews and increased frequency of contact. Under certain conditions, when the increased risk level of the offender is no longer manageable, a suspension may

be in order (Motiuk & Brown, 1993). These situations include undue risk of a breach and/or re-offending; a breach of special or additional conditions (i.e., curfews, not to associate, abstain, etc.); and inability to assess risk because of failure to report.

In sum, careful attention to dynamic risk assessment or problem identification and monitoring are the keys to successful community-based supervision and intervention. A good community supervision plan will include elements aimed at avoiding high-risk situations (i.e., social patterns, locale, drug use) and building in added social support for compliance and active participation in the plan.

### C. Treating Drug-related and Female Offenders

Fueled by public concerns for community safety and demands for new measures to allay those concerns, the international corrections community is being challenged to respond with conceptual and methodological advances in treatment for special offender groups. Although jurisdictions may vary in the risk/need profiles of their offenders and the proportion of special groups in their respective correctional population, there may be sufficient range in these groups to suggest developing differentiated treatment strategies. The United Nations Asian and Far East Institute (2000) requested that this paper address issues related to treating drug-related and female offenders.

#### Drug-related Offenders

In North America, alcohol and drug abuse affects millions of people. Surveys on the prevalence of substance use disorders estimate that around 14% of adults have experienced Alcohol Dependence at some time in their lives, with approximately 7% having had Dependence in the last year. Due to the variety of drugs that could be included in large-scale surveys on Drug Dependence, reliable estimates of prevalence are difficult to obtain. However, it is believed that the prevalence of drug abuse is on the same scale as alcohol abuse.

Surveys of correctional populations find that significant proportions have substance abuse problems. Consistently, studies of prison samples show more than two-thirds evidence some degree of substance abuse problems. Recently, the Canadian Centre for Justice Statistics conducted a census of prisoners in all adult correctional facilities across Canada. Although substance abuse was the highest need area identified among Provincial/Territorial prisoners (less than 2 years), it was higher for federal inmates. In addition, substance abuse problems (such as intoxication, trafficking and importation) among the prison population was the most frequently identified security concern.

The high prevalence of drug abuse among criminal offenders indicates a strong association between substance abuse and various types of crime (Dowden & Brown, 1998). Alcohol is suspected of contributing to the loss of ability to control aggressive behavior. Some illicit drugs such as cocaine may elicit paranoid thoughts that lead to aggressive acts. Furthermore, obtaining the money to purchase drugs often involves criminal activity. Although the particular nature of the association is not clear, substance abuse has been found to be associated with violent acts among adults and young offenders.

Substance abuse has been especially implicated in murders. Moreover, substance abuse is a well-established predictor of recidivism among sexual offenders and mentally disordered offenders.

In relation to treatment, there is strong empirical support for the assertion that effective treatment of drug abuse reduces crime (Andrews & Bonta, 1998). Average reductions in recidivism of 30% have been reported in effectiveness studies of drug abuse and appropriate treatment. A recent outcome evaluation of Correctional Service of Canada's substance abuse programs in 1999 found a 31% reduction in new convictions for 2,432 federal offenders who completed the Offender Substance Abuse Pre-release Program.

Drug-related offender subgroups have different risk/need profiles and are mostly comprised of property, assaultive and robbery offenders in correctional systems. Antisocial associates, relationship to the offender and circumstance regarding their contact have been found to be very important dynamic risk factors to consider for drug-related offenders. For the most part, drug-related offenders present an elevated risk for re-offence.

However, there are a number of risk factors that are not unique to drug-related offenders but which are associated with re-offence: previous offenses, substance abuse, criminal associates, and antisocial attitudes. Risk factors unique to drug-related offenders include: early age of onset, family supervision/affection, scholastic/vocational maladjustment, and self-control.

**Drug Abuse Programs for Offenders**

Offenders with drug abuse problems differ in terms of: the etiology of the abuse, presentation of the problem, its specific relation to criminality, and their response to treatment (Lightfoot, 1995). Fundamental to effective intervention is the matching of offenders to the most appropriate intervention, although higher risk offenders with greater severity of abuse typically require more intensive intervention.

A recent review of the literature (Serin, 2000) would reveal that there are six essential components of an effective drug abuse program for offenders. These include the following: 1) assessment, 2) pre-treatment motivational analysis, 3) formal treatment, 4) relapse prevention, 5) maintenance and 6) evaluation.

*Assessment.* Identifying the range and severity of treatment needs, conducting client selection for a program; doing a functional analysis of use of alcohol and drugs and their relation to criminality; determining the role of alcohol and drugs in the offenders' use of violence, identifying treatment goals (abstinence or self-control/moderation); matching offender to program alternatives; conducting pre/post-treatment assessments of needs, knowledge and skills; and finally, doing follow-up re-assessments during maintenance phase.

*Pre-treatment motivational analysis.* Assessing prior treatment experience and performance (not just for drug abuse); developing a motivational strategy consistent with needs or stage of readiness; considering obstacles to successful program completion; establishing support system for maintaining treatment gains; and considering the role of therapeutic communities in facilitating treatment.

*Formal treatment.* Using accepted adult learning strategies, addressing treatment needs as identified in assessment phase; focusing on knowledge and skill acquisition using various procedures, incorporating teaching aids and presenting materials at the appropriate level; and considering group and individual sessions to enhance treatment performance.

Treatment targets for substance abuse

programs typically include most or all of the following: (from the Correctional Service Canada's Offender Substance Abuse Pre-release Program manual) orientation, alcohol and drug education, self-management training, social skills training, job skills, leisure and lifestyle, pre-release planning, and relapse prevention.

*Relapse prevention.* Identifying offense cycle and markers for relapse; considering resilience factors and skill acquisition regarding Relapse Prevention; practicing coping with high risk situations of increasing difficulty; and establishing a plan for maintaining treatment goals.

*Maintenance.* Identifying and developing support systems to maintain treatment gains; considering treatment boosters to maintain gain; establishing continuity of care in release planning; and determining the role of special conditions such as urinalysis and post-release intervention.

*Evaluation.* Establishing intermediate measures of treatment gain (reduced levels of substance use while incarcerated, fewer institutional misconducts related to drug abuse); calculating change scores for each offender on knowledge and skills relating to treatment targets; rating offenders' performance in the program; gathering satisfaction ratings (offenders, unit staff, nursing, correctional staff, parole officer, psychology); following up on drop-outs and refusals in evaluation of effectiveness; finding out the impact of other treatment program involvement; and comparing with a control group or cohort.

**Female Offenders**

Female offender subgroups also have different risk/need profiles with property, drug and sex trade offenders most common in correctional systems (Motiuk, 1999). The social context, relationship to female offender and circumstance regarding their contact are very important to consider. For the most part, female offenders present the lowest risk for re-offence.

There are a number of risk factors that are not unique to female offenders but which are associated with re-offence: previous offenses, substance abuse, family breakdown, marital problems, education/ employment difficulties, and criminal associates. Risk factors unique to female offenders include: histories of trauma, victimization, parenting responsibilities, physical and mental health problems, and poverty.

Clinical measures of capacity for relatedness and connection are important in determining treatment responsivity of a female offender (Bloom, 1999). In keeping with general principles of effective treatment it remains important to match risk/need profiles to intervention intensity levels (Andrews & Dowden, 1999). Offenses committed by females are not usually impulsive acts. Consequently, gender responsive programming for female offenders should be delivered in a woman-centered environment that is safe, trusting and supportive (Stableforth, 1999).

**Women-centered Programs**

Current assessment and classification paradigms are composites or reformulations of what is known about variables pertaining to female offender risk and need (Motiuk & Blanchette, 1998). Comprehensive evaluation strategies for female offenders are paramount for appropriate security placement, prescribing treatment, and risk management. There is growing evidence that the objective assessment instruments used in Canadian corrections are both reliable and valid for female offenders (Motiuk & Nafekh, 1999). While current assessment tools appear to be accurate in

identifying static and dynamic variables for female offenders, there is room for improvement.

Dowden and Blanchette (1999) found that drug abusing female offenders tend to: start their criminal careers at an earlier age; have previous adult court experience; possess histories of breaches of trust (escape, unlawfully at large) and placements in disciplinary segregation; be classified as high need; and experience difficulties in associates/social interaction, attitudes, employment, and marital/family relations. Their research also suggests that substance abuse problems are not uni-dimensional and interact with a number of criminogenic need areas. Clearly, reliable differences exist between female offender substance abusers and non-abusers in a variety of areas. Examples of women-centered programs offered by the Correctional Service of Canada include: Mother-child program (children (0 - 12) visitation or full- and part-time residency program); Anger and Emotions Management; Women's Substance Abuse Program (a substance abuse program that meets the needs of women); Empowerment Group for Women; Anti-fraud; Anti-criminal Thinking; Cognitive Skills Training (to think in non-criminal ways); Canine Program (introduces women to the basics of dog grooming and training); Native Sisterhood (provides support to Native and Non-Native women in Native culture, particularly in relation to Native craft and livelihood skills); Parenting Skills Program (a short general education program); Survivors of Abuse and Trauma Programming (education/ awareness; intensive group therapy, post-program support); Peer Support (intensive training women inmates to provide emotional support to their peers); and Dialectical Behavior Therapy (a cognitive behavioral treatment program for borderline personality disorder).

## CONCLUSION

Corrections has always been about people, not just numbers. State-of-the-art offender assessment tools, treatment programs, and practice guidelines or standards are helpful. But unless an organization's people, at all levels, are committed to both effective and efficient correctional service delivery (custody, care, control and safe reintegration), and supportive of various initiatives, within their respective jurisdictions, corrections will be unable to move forward into the future.

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# CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES: TRANSFER OF SENTENCED PERSONS

*Candido Cunha**

**Sovereignty limits the space of those who fight crime**

Both the theory and the practice of State sovereignty have always prevented the arms of the judge, as those of the policeman[1], from stretching any farther than the border of other countries.

Indeed, States are all the more eager to assert their privilege of sovereignty in respect of criminal matters that the right to punish is a right that States jealously keeps to themselves alone. Moreover, criminal law expresses certainly the requirements of a given society, not necessarily universal concerns.

There is in principle no question for State A to allow State B to exercise, within the territory of State A, the right of State B to punish. Otherwise the sovereignty of State A might be questioned. Adding to that there is the assumption that the values with reference to which State B would exercise its right to punish may differ from the values pursued under the criminal law of State A.

**Nothing limits the space of criminals**

Crime however knows no borders, in that borders do not confine crime, not even do they deter crime. Quite on the contrary, borders attract crime to the extent that they hinder the action of all those whose task it is to control crime. Borders also produce crime in the sense that whatever it is that they seek to separate often is matched with a demand to bring together. Often, the action of bringing together again amounts to crime or is easier done, or done in a more profitable way, by resorting to crime.

Human relations have crossed the walls of the family home to go beyond the bushes of the village, the limits of the county and the borders of the state: we are in this global village all in contact with each other. Most of us all now share the net, Coca-Cola and Champagne, drive Toyotas, fly Boeings, work for a multinational company or organisation. In particular, the global economy has brought men and women from all over the world to be in contact each other, often to visit each other. It was different with our grand-parents.

Therefore, the chances are high that crime committed today has an international dimension; the chances are even higher that crime committed tomorrow will have an international dimension.

**How to deal with transborder crime**

Because national judges and policemen cannot act beyond their respective borders, States have since early civilisations[2] agreed on methods of inter-state co-operation in criminal matters, designed to overcome that difficulty.

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1 References in the masculine gender are intended to include both genders.

2 Cherif Bassiouni (cf. International Extradition: United States Law and Practice, Oceana, New York 1999) mentions the Egyptian, Chinese, Chaldean and Assyro-Babylonian civilisations)

The simplest and most common method is that of mutual legal assistance. The underlying philosophy of mutual assistance is that, to the extent that State A may not carry out action in State B, State B carries out action on behalf and at the request of State A, for purposes relating to proceedings pending in State A. State B acts in lieu of State A. Mutual assistance may also consist in State B authorising State A to carry out action on its territory.

Because there is virtually no limit to what may be requested under the banner of mutual assistance, all other methods of inter-state co-operation should be considered. Traditionally however many methods of co-operation are autonomously identifiable and indeed separately regulated both in domestic and international law.

The oldest method is extradition. It is the surrender of a person by State A to State B, at the request of State B, where the person is being proceeded against in State B or is wanted by State B for the carrying out of a sentence. Extradition applies when the person wanted is in one state while the person's criminal file is in another State.

The classical approach to extradition is the following. Firstly States accept to extradite a person for the sake of reciprocity. Where reciprocity is not guaranteed, extradition is not possible.

Secondly, extradition is only granted to the extent that the person concerned is not a person protected by the State to which extradition is requested. Thus nationals of that State are usually not extraditable. Nor are persons otherwise protected, such as refugees.

Thirdly, extradition is not granted when the interests at stake, beyond the criminal nature of the case, are closely linked to the sovereignty of the State requesting extradition. Thus, tax matters, military matters and political offences are usually not extraditable.

Lastly, where the consequences of extradition might shock fundamental values of the State to which extradition is requested, it is usually refused. The circumstance that death penalty may be applied is for many countries one such example.

A simplified method of extradition has developed these last years. It applies to cases in which the person concerned consents to his extradition.

When the person wanted is in one state and the person's criminal file is in another State, instead of transferring the person by way of extradition, it may be possible to transfer the file. Where the file takes the shape of proceedings, that is called transfer of proceedings in criminal matters. It applies in particular where extradition is not an option. It also applies, regardless of whether extradition is or is not an option, where the interests of justice so require, for example where evidence or important evidence is to be found in the country where the person is, not in the country where the file is.

An extension of the concept of transfer of proceedings allows a state not only to transfer the proceedings but also to transfer the person concerned along with the proceedings. One is no longer in a situation where the file is in one country and the person in another. The situation is one where both the file and the person are in the same country although there are reasons to transfer both to another country. Such reasons may have to do with the availability of evidence or with the circumstance that different persons are

being prosecuted for the same acts in different countries and justice would better be served by trying them together in the same courtroom.

Where the file is transferred in the shape of a final sentence, that is called international validity (or recognition) of criminal judgments. Such a method allows State A to recognise and enforce a criminal judgment passed by a court of State B. It applies in particular where the sentenced person is in one state and the sentence was passed in another state. However it may also apply in a situation where the person is in the same state where the sentence was passed although there are reasons to transfer both to another country. Such reasons may have to do with better chances for the rehabilitation of the person concerned, for example, where the person is a national of the other state.

An extension of that latter form of international validity of criminal judgments may allow a state to transfer both the person and the sentence under a simplified procedure. That is called transfer of sentenced persons. I am going to concentrate on that method of international co-operation in criminal matters.

**Transfer of sentenced persons**
**Foreign detainees**

In many countries - certainly in most European countries - the number of foreign inmates is disproportionately high when compared with the total number of inmates. That is not because human beings have some special propensity for offending when they move beyond the borders of their native community, as if social control dropped when people are amidst foreigners. In the fringes there may be a little of that. For the main bulk of the offences, the reasons are elsewhere.

I mentioned above that the chances are high that crime committed today has an international dimension. Adding to this there is the fact that offences of trafficking, especially drug trafficking, are amongst the most intensively investigated and heavily punished. Indeed they account for a high number of foreign detainees. And of course there is the circumstance that non nationals are less likely than nationals to benefit from such measures as bail and conditional release, because of the suspicion that they might easily take refuge in their native country, i.e. abroad.

Foreign prisoners frequently encounter particular difficulties on account of such factors as different language, culture, customs and religion. If they do not understand the language of the country of detention they may not be able to communicate with staff and other inmates and may not have access to information and reading material, and thus risk being excluded from participating in the prison's activities and facilities. Imprisonment in a foreign environment poses additional problems, especially if customs and food are unfamiliar or incompatible with the prisoner's religious precepts. All this produces alienation and isolation which is increased by the fact that foreign prisoners will have difficulty in maintaining contact with family, friends and others in their country of origin; visits are rare or non-existent. In addition, lack of a common language will impair communication with those persons and agencies responsible for assisting the prisoner in his resocialisation. As a result, the foreign prisoner's chances of social resettlement are greatly reduced.

At the same time, the problems of communication with foreign prisoners and the necessity to take account of their special needs and problems place an additional burden on prison administrations: they must seek to provide

interpretation and translation, to make special arrangements for prison visits and other contacts with the outside world, to adjust educational and professional training facilities, to observe special dietary requirements - to mention but a few of the problems posed by the detention of foreigners.

Under such circumstances the purposes of imprisonment are partially impaired. The nationality of the offender has no incidence on objectives such as to keep the offender away from society, to prevent him from offending again, to defend the society against him, to show that society reacts to crime, or to ensure that serious crime does not remain unpunished. However, the objective of resocialising or resettling or rehabilitating the offender, is highly impaired by the circumstance that the offender is not a member of that community, in particular where he is an alien.

It follows that, all else being equal, the same sanction is harsher when imposed on a foreign prisoner than it would otherwise be if applied to a national. There is an element of justice that requires being taken into consideration when the prisoner is not a national.

And it also follows that the burden put on the prison administration is heavier with respect to foreign prisoners that nationals. A heavier burden means extra expenses which, in an environment where resources are limited, usually will be compensated by bringing down the level of expenditure elsewhere in the system with obvious disadvantages to the system as a whole.

The need therefore is there, on different accounts, to reduce the number of foreign prisoners. One way of achieving that result is to transfer.

## THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

### Historical background

The Convention of the Transfer of Sentenced Persons, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature on 21 March 1983.

At their 11th Conference (Copenhagen, 21 and 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of a Resolution (No. 1), by which the Committee of Ministers of the Council of Europe was invited to ask the European Committee on Crime Problems (CDPC), inter alia, “to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member states or by member states in their relations with non-member states”.

Following that initiative, a Select Committee of Experts on Foreign Nationals in Prison was set up in June 1979.

The committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, at its own request, the Select Committee was authorised to prepare a multilateral convention rather than a model agreement, provided it would not conflict with the provisions of existing European conventions.

The Select Committee was composed of experts from fifteen Council of Europe member states (Austria, Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers.

The Convention on the Transfer of Sentenced Persons of 21 March 1983 is an example of European legal co-operation which has been extended well beyond Europe. 45 States are a Party to the Convention, 37 of them European and 8 non-European. Its purpose is to provide a procedure under which a person serving a prison sentence in a country of which he is not a national may be transferred to the country of his nationality in order to serve there the remainder of the sentence.

The draft was finalised in May 1982 and forwarded to the Committee of Ministers that approved it in September 1982 and decided to open it for signature on 21 March 1983.

**General considerations**

The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious. In that respect it is intended to complement the European Convention on the International Validity of Criminal Judgments of 28 May 1970 which, although allowing for the transfer of prisoners, presents two major shortcomings: it has, so far, been ratified by only a small number of States, and the procedure it provides is not conducive to being applied in such a way as to ensure the rapid transfer of foreign prisoners.

With a view to overcoming the last-mentioned difficulty, due to the inevitable administrative complexities of an instrument as comprehensive and detailed as the European Convention on the International Validity of Criminal Judgments, the Convention on the Transfer of Sentenced Persons seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners.

In facilitating the transfer of foreign prisoners, the convention takes account of modern trends in crime and crime policy. In Europe, improved means of transport and communication have led to a greater mobility of persons and, in consequence, to increased internationalisation of crime. As penal policy has come to lay greater emphasis upon the social rehabilitation of offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interests of the prisoners as well as of the governments concerned.

Unlike the other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftsmen's opinion that the instrument should be open also to democratic States outside Europe. Two such states — Canada and the United States of America — were, in fact, represented on the Select Committee by

observers and actively associated with the elaboration of the text.

Presently, the Convention is in force with respect to 45 States, 8 of which are non-member States.

The convention distinguishes itself in four respects:

With a view to facilitating the rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.

A transfer may be requested not only by the State in which the sentence was imposed ("sentencing state"), but also by the state of which the sentenced person is a national ("administering state"), thus enabling the latter to seek the repatriation of its own nationals.

The transfer is subject to the sentenced person's consent. Thus, for all practical purposes, the Convention operates on the basis of a threefold consent, namely, the sentencing State, the administering State and the person concerned.

The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested state to give reasons for its refusal to agree to a requested transfer.

Its objectives according to the preamble are (a) further the ends of justice and (b) contribute to the social rehabilitation of sentenced persons.

The question has been raised of how to establish priorities between the two objectives stated in the Preamble if and when such objectives enter into conflict with one another.

In this respect it has been recognised that the ends of justice, including the enforcement of the sentence, are a major aim of the Convention. The latter therefore does not authorise action designed to obviate or by-pass the execution of the sentence. Indeed, upon agreeing to a transfer, administering States undertake to execute the sentence, either by way of continuing enforcement, or by way of conversion.

Difficulties may arise where there is great discrepancy between the actual length of the prison term that the transferee, should he not be transferred, would have to serve in the sentencing State and the actual length of the prison term that the transferee, should he be transferred, would have to serve in the administering State.

Where there is great discrepancy, some States tend to consider that, should the person be transferred under such conditions, the ends of justice are not served.

It has also been recognised that the social rehabilitation of sentenced persons is equally a major aim of the Convention. This aim can better be served by allowing sentenced foreign persons to serve their sentence within their own society, i.e. by transferring them.

The two aforementioned aims of the Convention are placed on the same footing in the Preamble. In technical terms, there is no gradation of importance or priority between them. It follows that both

objectives must be pursued compatibly with one another.

However, whilst the ends of justice may be achieved regardless of the Convention, rehabilitation of foreign detainees can better be achieved through the Convention. The objective of rehabilitation is the "raison d'être" of the Convention.

Furthermore, the Convention has a humanitarian dimension. Indeed, bringing foreign detainees back home amounts to reducing their hardship to the same level as that of national detainees, by way of giving them the same chance that the latter already have, i.e. "to serve their sentences within their own society".

In principle, the objective of rehabilitation is served in all cases of transfer; the objective relating to the aims of justice might, in the view of some States, not be entirely served in all cases. Hence, the situation where States may have to ponder between either (a) serving rehabilitation while not entirely fulfilling the ends of justice, or (b) not serving rehabilitation while ensuring the fulfilment of the ends of justice.

Whilst recognising that the balance between the two terms is not even, one must accept that there is no straightforward answer to the dilemma. Only on a case by case basis, depending on the particular circumstances of each case, will it be possible to decide one way or the other.

**Scope**

The definition of "sentence" makes clear that the convention applies only to a punishment or measure imposed by a court of law, which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

Article 9.4 provides that any State which cannot avail itself of one of the procedures referred to in that Article to enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

That Article implicitly extends the scope of the Convention to persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence.

Due however to the variety of procedural ways of dealing with such persons, it remains to be confirmed whether all the Parties to the Convention are in a position both to transfer out and transfer in mentally disturbed offenders.

Ways and means ought to be found to transfer such persons to their countries of origin. Indeed, it makes no sense to keep them in a country where little can be made to take proper care of them. Their transfer, however, should take place under formal arrangements that take due care of:

- the interests of the person concerned, who probably cannot give his or her consent;
- the need to ensure that the society into which the person is being transferred is properly protected against him or her;
- the need to ensure that the person does not move on, uncontrolled, to another country, including the country from which he or she was transferred out.

**General principle**

The application of the convention is

governed by the general principle that states shall afford each other "the widest measure of co-operation in respect of the transfer of sentenced persons". This is intended to emphasise the convention's underlying philosophy: that it is desirable to enforce sentences in the home country of the person concerned.

Although Parties are in no way under an obligation to proceed to any requested transfer, they must examine in all good faith, with respect to each such request, whether transfer is not an option.

**The right of initiative**

Transfers may be requested by either the sentencing state or the administering state. Thus the Convention acknowledges the interest which the prisoner's home country may have in his repatriation.

Although the sentenced person may not formally apply for his transfer, he may express his interest in being transferred under the Convention, and he may do so by addressing himself either to the sentencing state or the administering state.

**Seven conditions for transfer**

**(1) Nationality**

The first condition is that the person to be transferred is a national of the administering state.

In an effort to render the application of the convention as easy as possible, the reference to the sentenced person's nationality was preferred to including in the convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms "ordinarily resident in the other state" and "the state of origin"

Contracting States may, however, define, by means of a declaration, the term "national". And indeed many have defined that term in such a way as to include persons having their permanent residence in their territory.

It should be pointed out that any State may define the term national for the purposes of this Convention only as far as it is concerned (Article 3.4). That means that each State may describe which persons it wishes to come under the category of its own nationals. Such a definition is relevant where the state concerned is the administering state, not the sentencing state. No state is authorised to define the category of nationals of any other given state. It is important to note this because an analysis of the declarations entered by some states shows that they have interpreted the provisions of Article 3.4 in a different way.

One consequence of this is that dual nationality should not prevent a person from being transferred from the country of one of its nationalities to the country of the other nationality.

The question may be raised of re-transfer to a third State, as follows. A person that has two nationalities, after having been transferred to one of the countries of his nationality, may request to be re-transferred to the other country of his nationality. The question is whether a person transferred under the Convention may be re-transferred to a third State and, if so, under which conditions.

In this respect the following observations are relevant. The Convention must not be used as if it were a travel agency. However, it is the primary purpose of the Convention to facilitate the rehabilitation of the sentenced person and, thus, re-transfer must not be ruled out. Re-transfer should require the agreement of (1) the person concerned, (2) the sentencing State, (3) the first (or intermediate) administering State

and (4) the second (or final) administering State. The question of who may take the initiative is irrelevant in practical terms.

**(2) Final and enforceable judgment**

The second condition is that the judgment must be final and enforceable. This means that all available remedies must have been exhausted or the time-limit for lodging a remedy must have expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.

**(3) Length of sentence**

The third condition concerns the length of the sentence still to be served. For the convention to be applicable, the sentence must be of a duration of at least six months at the time of receipt of the request for transfer, or be indeterminate.

**(4) Consent of person concerned**

The fourth condition is that the transfer must be consented to by the person concerned.

This requirement constitutes one of the basic elements of the transfer mechanism set up by the convention. It was noted above that the simplified procedure provided by this Convention is possible only because the person concerned consents to it.

Where in view of the age or physical or mental condition of the person concerned, one of the two states considers it necessary, the consent of the sentenced person's legal representative is required in lieu of the sentenced person's consent.

While the requirement for consent is laid down in Article 3.1.d, the rules applicable to consent are laid down in Article 7.

The sentencing State must ensure that the person required to consent to the transfer - either the sentenced person or his representative, as appropriate - does so voluntarily and with full knowledge of the legal consequences which the transfer would entail for the sentenced person.

The procedure for giving consent is governed by the law of the sentencing state.

The sentencing State shall afford an opportunity to the administering State to verify through a consul or other official agreed upon with that state, that the consent is given in accordance with the conditions set out in the Convention.

A document certifying the consent of the person concerned must be forwarded by the sentencing state to the administering state.

The circumstance that consent is required led the drafters to consider it not necessary to lay down a rule of speciality. It results that any person transferred under the convention may be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. That information must of course be included in the information on the substance of the convention which is to be given to sentenced persons.

**(5) Dual criminality**

The fifth condition is intended to ensure compliance with the principle of dual criminal liability.

The condition is fulfilled if the act which gave rise to the judgment in the sentencing state would have been punishable if committed in the administering state and if the person who performed the act could, under the law[3] of the administering state, have had a sanction imposed on him.

The basic idea is that the essential constituent elements of the offence should be punishable in the administering State.

An interesting question has been raised in Norway. A Norwegian citizen applied to be transferred to Norway to serve a sentence imposed on him in another state. He claimed that he had been provoked by the police into performing the illegal act for which he was sentenced. Such provocative methods by the police are accepted and legal in the sentencing state; however, they may not substantiate a conviction in Norway. Thus, the Director of Public Prosecution concluded that, had the act been committed in Norway, no punishment could have been imposed. The Norwegian authorities thus rejected the application for transfer. However, internal Norwegian procedures under the Public Administration Act allow for an appeal. On appeal, it was found that the conditions in Article 3(1)(e) had been met and, therefore, transfer was finally granted.

In reaching conclusions in the appeal, emphasis was put on the aims of the Convention, as stated in the Preamble and in Article 2.

Once transferred, the person claimed that he was illegally detained in Norway because the act for which the sentence was imposed, does not constitute a criminal offence in Norway.

The first question here is whether the expression <<double criminality>> should be interpreted as double criminality *in concreto* or double criminality *in abstracto*.

Most experts are in favour of dual criminality being assessed in concreto. Dual criminality should mean : (a) looking at the law of both countries, as it applies, or as it would apply, to the concrete circumstances of the case, and (b) assessing whether there is sufficient overlap in view of the effect sought. In fact, once the person concerned - not a hypothetical person in a hypothetical case - is transferred, there must not be any legal impediment, in particular of a constitutional nature, that would prevent the administering state from executing the sentence passed by the other state. In most states individuals are protected against deprivation of liberty by strict rules of a constitutional nature that cannot be overruled, for example, by the provisions of this Convention. It follows that the Convention would be prevented from operating should double criminality in concreto not apply.

One must however be careful in establishing the limits of such a concept. Indeed it cannot be interpreted to mean that in both states concerned the law provides likewise in respect of the circumstances of the case. Sufficient overlap was used above to mean the following. The facts for which the person was sentenced, under the circumstances in which they occurred, including the circumstances relating to the persons involved, should they have come under the law of the administering state, would have carried a criminal sanction.

In the case under review, it should be recalled that Article 7.1 requires that the person requested to give consent to the transfer does so voluntarily and with full knowledge of the legal consequences thereof. Such a consent must therefore be seen to carry with it the acceptance of the effects of transfer in the administering state.

One must have in mind that the Convention operates in particular on the

[3] Unless where it results otherwise from the context, the word "law" is always used to mean both enacted law and common and customary law.

basis of respect for a legitimate interest of the sentencing state in that the sentence be served. Such an interest cannot be frustrated by allowing for the sentence to be challenged in the administering state. The possibility must therefore not be considered of giving transferred persons the right to challenge the effects of transfer in the administering State.

Moreover, it would be circumventing the provisions of Article 13 (i.e.: "The sentencing State alone shall have the right to decide on any application for review of the judgment.") to give transferred persons the right to apply to the administering state for a direct or indirect review of the judgment.

Because the world in not perfect, it can always happen that it is not before the actual transfer of the person that it becomes apparent, or that it is found, that the dual criminality requirement was no met. In such circumstances, the remedy could not be to free the person, but rather to annul the transfer and return the person.

**(6)Agreement of the sentencing state**

The sixth condition is the agreement of the sentencing state.

**(7)Agreement of the administering state**

The seventh condition is the agreement of the administering state.

In the view of certain experts, the Convention is too rigid and in that way inadequate to cope with present-day needs. It is not flexible in the sense that requests are either to be totally granted or totally rejected. It does not provide a mechanism for ad hoc arrangements that may take care of the particularities of each case. Because the Convention does not preclude ad hoc arrangements, more should be done in order to facilitate such arrangements.

Others however think that the Convention should not be used as an instrument under which ad hoc arrangements may be agreed upon, according to which the States involved would follow a course of action opposite to that which is foreseen under the Convention. They question whether ad hoc arrangements are consistent with the spirit of the Convention. Is it not one of the purposes of any Convention to close negotiations as to how to deal with a given category of situations? Should it now become routine practice to discuss from scratch the terms under which sentenced persons are transferred, then the Convention would become purposeless.

**Obligation to furnish information**

The Convention provides for an obligation to furnish information at four different levels. Firstly, the sentencing state must inform the sentenced person on the substance of the convention, provided of course that the sentenced person may be eligible for transfer under the convention (Article 4.1). In order to facilitate that information, the Council of Europe has prepared a standard text with all the information deemed to be necessary at that level. The Secretariat of the Council of Europe invites all states that become a Party to the Convention to translate that text into their own language or languages, adding if appropriate any other relevant information. The translated version is then distributed to all the other states. It becomes then possible to any state to provide to any person eligible to transfer under the convention relevant information in that person's language.

Secondly, once the sentenced person has expressed an interest in being transferred, information between the two states concerned is required. (Article 4, paragraphs 2, 3 and 4)

Thirdly, the sentenced person shall be informed, in writing, of any action taken by one state or the other, as well as of any decision taken by either state on a request for transfer.

Fourthly, Article 15 of the Convention provides for the administering state to inform the sentencing state on the state of enforcement:

a. when it considers enforcement of the sentence to have been completed;
b. if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
c. if the sentencing State requests a special report.

**Requests and replies**

Requests, replies and supporting documents are dealt with under Articles 5 and 6 of the convention. They must be in writing and should follow channels of communication determined beforehand.

Article 6.2.(a) of the Convention provides that the sentencing state must provide the administering state i.e. with a certified copy of the judgment. However, in some cases the full facts on which the sentence is based are not apparent from the text of judgement. That is the case for example with judgements on appeal. A comprehensive statement of the facts is in any case necessary for the administering State to ascertain double criminality. And indeed Article 4.3.(c) requires the sentencing State to forward to the administering State a statement of the facts upon which the sentence was based.

In order to increase efficiency and save time, states should, when providing copies of judgements that do not contain a full description of the facts, also forward a separate statement to that effect.

Where a translation of the judgment is required by the administering state, and the original sentence is long and/or complicated, as a general rule translation of select extracts of the judgment, or a summary thereof, should suffice. Where and when the administering state deems necessary to have more information than that contained in the translated extracts of the judgment, it may of course so request from the sentencing state.

All the information that is necessary in order to carry on speedily with the procedures should promptly be made available in order to avoid unnecessary delays. In particular, the "penal" situation of the person concerned (duration of remand in custody, how long he has served the sentence, any credit of time due to some special reason, etc) must be clearly spelt out in the documents.

**Effects of transfer for sentencing state**

Article 8 provides that transfer shall have the effect of suspending the enforcement of the sentence in the sentencing state. As from the point in time in which the administering State considers enforcement of the sentence to have been completed, the sentencing state may no longer enforce the sentence.

It results from the wording of this Article that the Convention does not prevent the sentencing State to resume enforcement of the sentence after transfer in so far as enforcement will not have been completed. Such would be the case, for example, where the transferred person escapes from the administering state and ends up being recaptured in the sentencing state.

This Article aims at preventing transfer from leading to the same person being punished twice for the same facts (*ne bis in idem*).

**Effect of transfer for administering state**

According to Article 9, the administering state may choose between two ways of enforcing the sentence. It may either:

- continue the enforcement immediately or through a court or administrative order; in that case, the administering state continues to enforce the sanction imposed in the sentencing state, possibly adapted;

- or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing state; the sanction is converted into a sanction of the administering state, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing state.

The alternatives are respectively called "continued enforcement" and "conversion of sentence".

It must be underlined that, under Article 3.3, States may enter a formal declaration excluding one or the other of these methods in their relations with other Parties. Such declarations have as a result, not only that the state having made the declaration chooses once and for all the alternative that it will follow, but also that that state will not transfer any person to any state that follows the barred alternative.

In fact only two states, namely France and Italy, have entered declarations that can be interpreted to mean that. Other States have invoked Article 3.3 to make declarations to the effect of announcing beforehand the alternative of their choice where they act in the capacity of administering states.

**Rule common to both alternatives**

In both cases, the enforcement is governed by the law of the administering state.

**Continued enforcement**

Where the administering state opts for the "continued enforcement" procedure, it continues to enforce the sentence imposed in the sentencing State, as if it had been imposed in the administering state. In particular, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing state.

The "legal nature" of the sentence refers to the kind of sanction imposed, as it is defined under the law of the sentencing state.

The administering State is nevertheless allowed to "adapt" the original sentence. In practice that will prove necessary in most cases. Indeed, the "legal nature" of sanctions available is often not exactly the same in any two countries. For example, in most countries imprisonment breaks down into a diversity of sanctions involving deprivation of liberty, known by different names that cannot be translated. Thus "adaptation" is often necessary on such grounds in order to reach the nearest equivalent available in order to make the sentence enforceable.

Adaptation of the original sentence may also be necessary in order to ensure that it does not exceed the maximum prescribed by the law of the administering state.

Moreover, the administering state is usually faced with the need to prescribe some kind of legal procedure leading to a decision that fixes the amount of time — duration of sentence — that remains to be served, taking into account the time served and any remission earned in the sentencing state up to the date of transfer. Indeed,

any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence to be continued in the administering state.

The administering state thus continues to enforce the sentence imposed in the sentencing state, but it does so in accordance with the requirements of its own penal system.

**Conversion of sentence**

The conversion of the sentence to be enforced is the judicial or administrative procedure by which the sanction imposed in the sentencing state is replaced by a sanction prescribed by the law of the administering state.

Procedures of this kind, for example in civil matters, are often called exequatur procedures. The name should probably be avoided in this case because of the fundamental difference between procedures under this Convention which are based on the consent of the person concerned and any legal procedure allowing for the coercive enforcement of a foreign judgment.

The conversion of the sentence is governed by the law of the administering state. However, four conditions are to be observed by the administering state.

Firstly, the administering state is bound by the findings as to the facts insofar as they appear - explicitly or implicitly - from the judgment pronounced in the sentencing state.

This requirement may lend itself to difficulties. For example, sentences imposed are often aggravated because the court takes into consideration the circumstance that the person is a recidivist. Once the person is transferred, the question might be raised of whether the circumstance that the person was found to be a recidivist in the sentencing state is, or is not, a binding "fact" in the meaning of Article 11.1.a of the Convention. In other terms, the question is whether or not the court entrusted with converting the sentence in the administering state is bound by the circumstance that the person was a recidivist in the sentencing state.

It might be said on this count that the court in the administering state is bound by the findings of the court in the sentencing state, including its findings with respect to the criminal record of the sentenced person. It may not, for example, based on the fact that the person has a clean criminal record in the administering state, find that the person is not a recidivist and thus disregard the findings in this respect of the court in the sentencing state. However, it does not follow that the court in the administering state is bound to draw any legal consequences from the finding that the person is a recidivist.

Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction.

Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering state.

Fourthly, the penal position of the sentenced person must not be aggravated.

This latter condition must be interpreted with care because there is usually a great variety of factors that contribute to defining the penal position of the person concerned, such as the duration of the sentence, requirements for remission, prison regime, etc. It is often delicate to establish a fair balance between such factors in order to reach an overall assessment.

**Pardon, amnesty, commutation**

The administering state alone is responsible for the enforcement of the sentence, including any decisions related to it, such as any decision to suspend the sentence. However, according to Article 12, pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering state, in accordance with their respective laws.

**Review of judgment**

The condition that the judgment must be final and enforceable does not preclude the possibility of a later review of the judgment in the light of fresh evidence. In such cases, the sentencing state alone has the right to take decisions on applications for review of the judgment.

This raises a difficulty because both the interests of justice and the interests of the person concerned require the personal appearance of the person concerned before the court that reviews his judgment. That court, according to Article 13, sits in the sentencing state while the person sits in a prison in the administering state.

The Convention makes no provision for the transfer-back of the person. At the time of preparation of the Additional Protocol to the Convention, the question was discussed of whether it should not be proper to include provisions designed to cover such a situation. However, the conclusion was that the solution should be found within the framework of arrangements on mutual assistance between the states concerned.

In fact, with respect to states that are a Party to the European Convention on Mutual Assistance in Criminal Matters, the issue is being solved by including in a Protocol to that Convention, presently being prepared, provisions on the personal appearance of transferred sentenced persons

Such provisions will render applicable to such persons the provisions of Articles 11 and 12 of that Convention, on the personal appearance of persons in custody for purposes of being heard.

**Termination of enforcement**

Article 14 concerns the termination of enforcement by the administering state in cases where the sentence ceases to be enforceable as a result of any decision or measure taken by the sentencing state (e.g. the decisions referred to in Articles 12 and 13). In such cases, the administering state must terminate enforcement as soon as it is informed by the sentencing state of any such decision or measure.

**Transit**

Article 16 imposes an obligation on Contracting states to grant requests for transit, in accordance with their national law, where the transfer in question has been agreed upon by two other Contracting States.

**Languages**

The Convention privileges the languages of the countries involved, as well as the official languages of the Council of Europe which are French and English. However, the rules applicable change with circumstances.

In this respect, the Convention provides for the communication of information and/or documents on three different sets of circumstances, namely:

(a) at a preliminary stage where the person has expressed an interest in being transferred (Article 4, paragraphs 2 to 4);
(b) requests for transfer, replies and supporting documents (Article 5 and Article 6, paragraphs 1 and 2);
(c) information and documents asked by

either state before any request for transfer is made (Article 6.3).

Article 17 deals with the question of languages to be used. It distinguishes between the situations described above under (a) and (b) and makes provision for languages to be used in one case as in the other.

In the cases described under (a) information must be furnished in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

In the cases described under (b) the rule is that no translation shall be required. However, any State may, by way of a declaration, require that requests for transfer and supporting documents be accompanied by a translation. The requesting State has a choice between translating into the other state's own language or into one of the official languages of the Council of Europe or into such one of these languages that the other state will have indicated in its declaration.

However, Article 17 remains mute with regard to the situation described under (c).

No other article of the Convention makes provision for languages to be used in the situation described under (c).

Hence the question: which languages may be used for the purposes of applying Article 6.3 of the Convention, i.e. when a State provides information and/or documents asked for by another State before any of them having requested the transfer of a sentenced person.

Firstly it should be recalled that several articles of the Convention clearly indicate that the latter applies even before a request for transfer is made. Thus the reply to the question above should be found within the Convention.

There appears to be no reason for considering that declarations made under Article 17.3 - which in fact have the purpose of derogating from the rule laid down in Article 17.2-should apply to any information and/or documents other than "requests for transfer and supporting documents".

Which leaves us with the rule under Article 17.1 and the rule under Article 17.2. The first applies to information under Article 4, paragraphs 2 to 4; the second applies to requests for transfer and supporting documents. None apply to "information and/or documents asked by either State before any request for transfer was made".

One is thus led to investigate, for the purposes of the Convention and bearing in mind its operation, which of the two situations (i.e. (a) above and (b) above) is closest to "information and/or documents asked by either State before any request for transfer was made".

Article 4 bears the title "obligation to furnish information". That has to do with an obligation imposed on both States to seek and furnish such information as may be required so that each and all the three actors are in a position where they may decide either to agree or not with the transfer.

The context of Article 4 leads to the conclusion that it was drafted having in mind information and/or documents asked by either State before any request for transfer was made.

Conversely, no clear argument appears that would allow to bring closer together "information and/or documents asked by

either State before any request for transfer is made" and "requests for transfer, replies and supporting documents".

The conclusion therefore is that information and/or documents asked, under the provisions of Article 6, paragraph 3 of the Convention, by either State, before any request for transfer is made, should be transmitted in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

**Costs**

The main rule on costs is given in Article 17.5 that reads that <<any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.>>.

This Article has been interpreted in the following way.

Where the person is being delivered at a common border, the sending State bears all the costs incurred with transporting the person to the border; and the receiving State bears all the costs incurred as from that point onwards.

Where the person is carried by air, the sending State bears all the costs incurred with transporting the person to the airport of departure; and the receiving State bears all the costs incurred as from that point onwards, including the price of the air fare and escort.

This means that - in principle - it would be (examples) for the Australian authorities to bear the costs incurred with taking a prisoner from Tasmania to Sydney and for the French authorities to take care of the air fare from Sydney to Paris, both for the prisoner and his escort.

However, practice may be different since States are often ready to go beyond their commitments in order to speed up the procedures or to overcome some technical or other difficulty.

It may indeed be the case that - in some States - the issue of costs plays a role in the decision of whether to agree or not with a given transfer.

It is therefore advisable to remain open in terms of internal regulations in these matters.

The question may be raised of whether the costs of transfer that the Convention allots to the administering State (the receiving end) may be, or ever are in practice, devolved to the person concerned. Thus, the following concerns only the administering State.

Different countries have different practices in this respect.

- one country may require persons who wish to be transferred to sign a "promissory note" with respect to costs, then the government bears the costs and then the government endeavours to execute the promissory in order to recover the costs. Thus the question of the actual transfer of the person is separated from the question of the financial implications of the transfer;
- in other countries, the person concerned is not required to pay the costs of transfer. However it is known that, should the person wish to pay, the pace of the procedure will significantly speed up;
- the costs of transfer are as a general rule borne by the State in a number of countries;
- it may happen that the costs of transfer are either borne by the State or devolved to the person concerned, depending on a case by case appraisal.

It should be noted that where transfer is made subject to the person paying the costs, that will prevent many persons from being transferred and thus constitutes an obstacle to the application of the Convention. Moreover it is a discriminatory practice.

In fact, it is often in the financial interest of the sentencing state to bear the costs of transfer. The provisions of Article 17 of the Convention do not prevent States from making arrangements to that effect in between them.

**Choice between extradition and transfer**

Where a national of State A was sentenced and serves a sentence in State B; and proceedings are pending in State A against the same person for an offence other than the offence for which he was sentenced in State B; and State A seeks the presence of the person on its territory for investigation and trial; one might raise the question of whether State A has an option between requesting the extradition of the person and seeking that person's transfer under the Convention.

Under the above-mentioned circumstances, State A does not have an option between extradition and transfer since the only legally appropriate procedure in order to achieve its aim is extradition; to obtain the transfer of the person under the Convention in order to obtain a result that cannot be subsumed under the aims of the Convention would amount to abusing the transfer procedure and to achieve a disguised extradition.

It is a general principle of international law that treaties must be executed in good faith. It follows that the application of a treaty for purposes other than the purposes recognised by the treaty itself is contrary to international law. And it may be challenged unless all the parties concerned explicitly or implicitly consent. Thus, the transfer procedure can only be legitimately used in order to try the person if all the interested parties are well aware of what is going on and consent to it. This also applies to the person concerned because his consent is a conventional requirement for the operation of the Convention.

The same conclusion can be drawn from another ground. Indeed, the Convention requires that, in giving his consent to his transfer, the person must have "full knowledge of the legal consequences thereof". It follows that, should the administering State abstain from revealing to the person certain legal consequences, the person's consent will not have been fully knowledgeable.

Some, however, might follow a different, more pragmatic, approach according to which:

- transfer procedures, because they are quicker and less burdensome than extradition procedures, may be used instead of the latter;
- it is legitimate to do so because the person concerned is necessarily aware of its past behaviour in the administering State and, when he consents to transfer, he implicitly consents to proceedings and trial for past behaviour, regardless of whether proceedings have already been initiated or will be initiated in the future;
- the requirement in Article 7 of the Convention concerns "legal" consequences only, present and future, meaning consequences resulting from the law, abstract as it is, not concrete consequences.

**The Additional Protocol to the Convention on the Transfer of Sentenced Persons**

An Additional Protocol to the Convention on the Transfer of Sentenced Persons was

opened for signature on 18 December 1997. On 1 June 2000, it will enter into force in respect of three States only (Estonia, Poland and Macedonia). However fifteen other States have signed it.

The purpose of the Additional Protocol is to provide rules applicable to the transfer of the execution of sentences in two different cases, namely:

(a) where a sentenced person has fled the sentencing State to go to the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed; and
(b) where the sentenced person is subject to expulsion or deportation as a consequence of the sentence.

As with the mother Convention, the Protocol imposes no obligation on the sentencing State or the administering State to agree to transfer. It sets the framework within which States involved may co-operate, if they so wish, and provides a procedure for this purpose.

**Persons having fled from the sentencing State**

In this respect, the Protocol envisages a situation where a national of State A is sentenced in State B and subsequently leaves State B before or while serving the sentence and voluntarily enters State A. It would apply most commonly to cases where the sentenced person escapes from legal custody in the territory of the sentencing State and flees to the territory of the State of his or her nationality, seeking thereby to avoid the execution, or full execution, of the sentence.

The mother Convention is of no use in such situation because the sentenced person is not present in the sentencing State and is thus unavailable for transfer. Nor can the problem in practice be dealt with under existing forms of international co-operation. For example, the normal method of returning a fugitive from justice - extradition - is generally not available because most countries do not extradite their own nationals. Apart from this, the only other option which may be available at present is for the person to be prosecuted and sentenced afresh in State A for the same facts - a process which is both expensive and cumbersome. If neither option is available, the consequence is that the person goes unpunished and thus the ends of justice are frustrated.

It was recognised that the Convention is to a great extent founded on humanitarian principles and that, for this reason, the consent of the person is an integral element in it. But it was thought that where the person has deliberately sought to frustrate the judicial process by fleeing from justice, he or she has thereby taken himself or herself outside the ambit of the Convention. Consequently, it was considered that under such circumstances the need for his consent was no longer appropriate.

Article 2 of the Additional Protocol provides that, upon a request from the sentencing State, the administering State may, pending the arrival of documents supporting the request, arrest the person concerned on a provisional basis. The maximum length of time for the provisional arrest of the person concerned is however not mentioned.

In normal circumstances, there should be no great danger that the person might abscond, because in any other third State the person is no longer protected against extradition.

There is a sense of urgency in such situations, which is inherent to any situation where a person is arrested on a

provisional basis. However, under the circumstances described above, one might rightly suggest that the person cannot benefit from a presumption of innocence, but rather, on the contrary, that there is a presumption - based upon the declaration of a competent authority of the sentencing State - that the person concerned is a sentenced person whose sentence has not yet been entirely served.

It follows that the sense of urgency inherent to any situation where a person is arrested on a provisional basis is less pressing in the instant case that in other cases. In particular, it is less pressing that in a situation where extradition is requested.

One might therefore conclude that where a limit is established for provisional arrest under Article 2 of the Additional Protocol, that limit may go beyond the limit of 40 days provided in Article 16 of the European Convention on Extradition.

**Sentenced persons subject to an expulsion or deportation order**

It does not serve the objective of rehabilitation of the sentenced person to keep such a person in the sentencing State when it is likely that, once he or she has completed the sentence to be served, he or she will no longer be permitted to remain in that State.

The situation here is one where the person is subject to deportation or expulsion as a consequence of the sentence.

Acknowledging that the Convention operates on the basis of a three-fold consent, i.e. the sentencing State, the administering State and the sentenced person, provision was nevertheless made for the Convention to operate on the basis of a two-fold consent, namely the consent of both the sentencing State and the administering State, where the person concerned as a consequence of the sentence passed is subject to deportation or expulsion from the sentencing State.

Because transfer under the provisions of this Article neither requires nor assumes the sentenced person's consent, the rights and interests of the person should be otherwise protected. Hence the provisions extending to such persons the benefit of the principle of speciality, as well as the requirement for the person's opinion to be examined and taken into account prior to any decision being taken.

**INFORMATION DOCUMENTS AVAILABLE**

PC-OC / INF 1 *A Chart showing the state of signatures and ratifications of the Council of Europe Conventions in the penal field;

PC-OC / INF 2 *The full text of the Reservations and Declarations entered by States Party to those Conventions

*This information is available on the Council of Europe Internet site(http://conventions.coe.int).

PC-OC / INF 3 A compendium of Recommendations adopted by the Committee of Ministers of the Council of Europe on the practical application of those Conventions;

PC-OC / INF 5 A guide to procedures on the transfer of sentenced persons in States Party to ETS 112;

PC-OC / INF 6 The list of officials responsible for the practical application of Conventions ETS 24 (Extradition), ETS 30 (Mutual Assistance) and ETS 112 (Transfer of Sentenced Persons); [*classified document*]

PC-OC / INF 7 A chart showing requirements of States with respect to languages used in requests received under Conventions ETS 24 (Extradition), ETS 30 (Mutual Assistance), ETS 112 (Transfer of Sentenced Persons), ETS 141 (Laundering)

PC-OC / INF 8 A list of bilateral treaties on criminal matters involving member States

PC-OC / INF 12 A standard text providing information about Convention ETS 112 (Transfer of Sentenced Persons), translated into the national languages of the Parties to the Convention

PC-OC / INF 14 FINLAND : International Co-operation in the Enforcement of Certain Penal Sanctions Act (16 January 1987/21) [Engl. only]

PC-OC / INF 18 The Swedish system for international mutual legal assistance
Le système suédois d'entraide judiciaire internationale

PC-OC / INF 19 Legal co-operation in criminal matters and the rights of the defence - Case-law of the European Commission and Court of Human Rights

PC-OC / INF 20 SLOVAK REPUBLIC : Selected legal provisions applicable to international legal co-operation in criminal matters [Engl. only]

PC-OC / INF 23 ICELAND : Extradition of Criminals and Other Assistance in Criminal Proceedings Act N° 13 of 17 April 1984 [Engl. only]

PC-OC / INF 26 HUNGARY: Act on International Legal Assistance in Criminal Matters [Engl. only]

PC-OC / INF 30 ISRAEL: Law on Transfer of Prisoners [Engl. only]

PC-OC / INF 32 USA: State Laws relating to international prisoner transfer [Engl. only]

PC-OC / INF 33 COSTA RICA: Rules for the application of the Convention on the transfer of sentenced persons

PC-OC / INF 35 ITALY: Case-law [Engl. only]

# NOTES ON CRIME AND PUNISHMENT IN SWEDEN AND SCANDINAVIA

*Hanns von Hofer**

## I. CRIME AND PUNISHMENT IN SCANDINAVIA: AN OVERVIEW

Geographically, the Scandinavian countries (here meaning Denmark, Finland, Norway and Sweden) lie on the margins of Europe, and with the exception of Denmark are rather sparsely populated, with a total population of around 24 million. All the countries bar Finland are constitutional monarchies, and all are both protestant and very homogeneous in terms of culture. It wasn't until a few decades ago that the Nordic countries began to feel the impact of immigration, this level being highest in Sweden and lowest in Finland. The standard of living in the Nordic countries is among the highest in the world and the region's modern political history has been shaped on the whole by the principles of social democracy.

Comparative research into levels of welfare has shown that there is a rather clear-cut pattern of national clusters in the EU-member states of similarity in the welfare mix, as well as the general distributive outcome in material living standards. The European Union appears to be divided in three homogeneous clusters (Vogel, 1997):

- **a northern European cluster** (including Denmark, Finland, Norway [not a member of the EU]) and Sweden exhibiting high levels of social expenditure and labour market participation and weak family ties. In terms of income distribution this cluster is characterised by relatively low levels of income and class inequality, and low poverty rates, but a high level inequality between the younger and the older generations;

- **a southern European cluster** (including Greece, Italy, Portugal and Spain) characterised by much lower levels of welfare state provision and lower rates of employment, but by strong traditional families. Here we find higher levels of income and class inequality and of poverty, but low levels of inter-generation inequality;

- **a central European** cluster with an intermediate position (including Austria, Belgium France, Germany, Ireland, Luxembourg, the Netherlands and the UK). The UK borders on the southern cluster in terms of its high levels of income inequality, poverty and class inequality.

Against this sketchy backdrop reasonably simplistic descriptions of traditional crime in the Nordic countries, and these countries' responses to crime, are presented in the following.

### 1. International Crime Victims Surveys (ICVS)

Because of variations in the rules governing the collection and production of statistics in different countries, it is generally accepted by experts that comparisons based on crime statistics do not in principal allow for the possibility of making cross-national *level* comparisons of crime (CoE, 1999b:13). For this reason,

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when cross-national comparisons of crime levels are considered desirable, the international crime victims surveys (Mayhew & Killias, 1990; Mayhew & van Dijk, 1997) are a great help despite the obvious methodological difficulties which face even these data sets. The data are collected by means of telephone interviews (using standardised questions) based on random samples of between 1,000 and 2,000 persons from each country. A total of nineteen countries have participated in the three surveys (1989, 1992 and 1996), whilst of the Nordic countries, Norway took part only in 1989, Sweden in 1992 and 1996 and Finland in all three. Denmark has not participated at all and must therefore be excluded from the following presentation. The offence types covered in the survey are: car theft, motorcycle theft, bicycle theft, burglary and attempted burglary, robbery, theft from the person, sex offences and assault/threatening behaviour.

Results from all the surveys between 1989 and 1996, irrespective of how many times the individual countries participated, have been summarised and are presented in the table below.

Generally speaking, the level of criminal victimisation is reported to be lower in Finland and Norway than in Sweden (however, the Norwegian data refer to 1989 only). For the most part, Sweden lies fairly close to the European average. Similar differences between the Nordic countries were also found during the 1980s when comparisons were carried out on results from national victims surveys produced in these countries. At that point the results from Denmark were similar in many respects to those in Sweden (RSÅ, 1990:146 ff). Sweden distinguishes herself (along with the Netherlands) with respect to the level of bicycle thefts, whilst the Nordic countries on the whole present relatively low levels of car vandalism, burglary and robbery. However, the Nordic countries score higher on sex offences and high on assaults/threatening behaviour. There has been speculation that these differences might in part be explained by higher levels

**Table 1**
**Victimisation over the last year (percentage victim once or more), 1989, 1992 and 1996 according to the ICVS project.**
***Source*: Mayhew & van Dijk (1997, Appendix 4, Table 1).**

| | DK | FI | NO | SE | EUR9 |
|---|---|---|---|---|---|
| Car theft | n.a. | 0.5 | 1.1 | **1.5** | 1.2 |
| Theft from car | n.a. | 2.8 | 2.8 | 4.4 | **5.4** |
| Car vandalism | n.a. | 4.6 | 4.6 | 4.6 | 7.5 |
| Motorcycle theft | n.a. | 0.3 | 0.3 | 0.6 | **0.8** |
| Bicycle theft | n.a. | 4.4 | 2.8 | **7.9** | 3.5 |
| Burglary | n.a. | 0.6 | 0.8 | 1.4 | **1.9** |
| Attempted burglary | n.a. | 0.6 | 0.4 | 1.0 | **1.9** |
| Robbery | n.a. | 0.7 | 0.5 | 0.4 | **1.1** |
| Thefts of personal property | n.a. | 3.6 | 3.2 | **4.4** | **4.4** |
| Sexual incidents | n.a. | **2.3** | 2.2 | 1.9 | **2.3** |
| Assaults & threats | n.a. | **3.8** | 3.0 | 3.6 | 2.7 |
| All eleven offence types | n.a. | 18.7 | 16.4 | 22.8 | **23.3** |
| Number of completed interviews | n.a. | 6544 | 1009 | 2707 | 29903 |

n.a. = not available
FI (Finland): 1989,1992,1996; NO (Norway): 1989 only; SE (Sweden): 1992, 1996.
EUR9: Austria, Belgium, France, England & Wales, (West)Germany, Italy, Netherlands, Spain and Switzerland.

of awareness and lower levels of tolerance among Scandinavian women when it comes to setting limits for the forms of inter-gender encounters that are considered socially acceptable (HEUNI, 1998:132 f, 163, 349, 432).

Additional data from cause of death statistics regarding the mid-1990s indicate (CoE, 1999:43) that levels of homicide in Denmark, Norway and Sweden are on a par with those reported in central Europe (around 1.2 per 100,000 of population), whilst Finland still presents considerably higher frequencies (around 3.0 per 100,000 of population), which had already been noted in the criminological literature of the 1930s (NCS, 1997:13).

According to various estimates (EMCDDA,1997: Table 5 & 1998: Table 4; Reuband, 1998:332), national prevalence rates of problem drug use appear to be near average in Denmark and below average in Norway, Finland and Sweden as compared to central and southern Europe. An account of the Nordic drug scene in the 1990s is given by Olsson et al. (1997).

The ICVS project surveys not only the extent of criminal victimisation but also other related phenomena such as levels of fear, crime-preventive measures, and attitudes towards and experiences of the police. Asked whether they felt they were at risk of being burgled in the course of the following year, respondents from Finland and Sweden were ranked low (Mayhew & van Dijk, 1997:50). Asked how safe they felt outside in their own neighbourhood after dark, feelings of insecurity were lowest among respondents from Finland and Sweden together with Switzerland (Mayhew & van Dijk, 1997:51). In response to the question of whether they had installed various kinds of anti break-in devices (such as burglar alarms, special locks, or bars on windows or doors) Finland and Sweden also came out below the average (Mayhew & van Dijk, 1997:54).

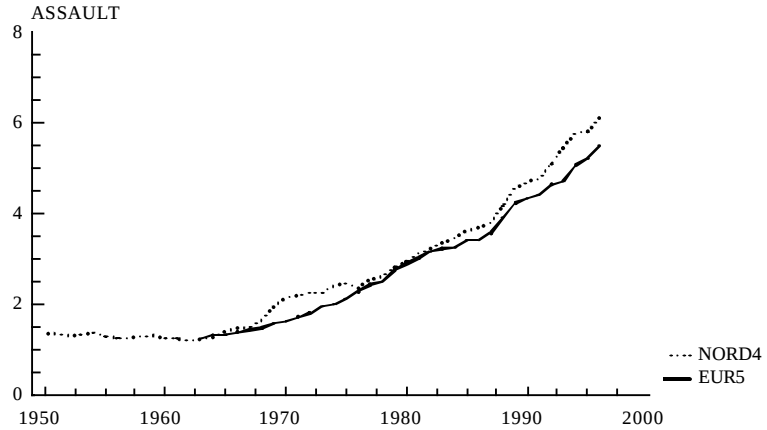
## 2. Trends

Since there are no victims surveys (at either the national or European level) covering the post-war period, descriptions of crime trends have to be based on records of crimes reported to the police. Despite the well known shortcomings of official crime statistics, the use of such statistics to compare crime *trends* is an accepted method (CoE, 1999b:13).

The number of crimes reported to the police has risen in all the Nordic countries at least since the beginning of the 1960s. The smallest increase is found in the number of reported incidents of homicide (the number of such reports has doubled, except in Finland where they seem to have remained at more or less the same level). The largest increase (between seven and twelve times) is to be found in the number of reported robberies, this being partly due to the fact that at the end of the 1950s robbery was more or less unheard of in these countries, a total of only 1,200 robberies being registered in these four Nordic countries in 1960 (NCS, 1997:72). The increase is probably linked in part to the upward trend in juvenile crime and in part to the emergence of a group of socially marginalised males (NCS, 1997:31). It is nonetheless worth noting that according to the ICVS, robbery levels in Finland, Norway and Sweden still remain low in an international perspective (see Table 1 supra). The reporting of other offence types (assault, rape and theft) has increased between two and six times over the same period. When the countries are ranked on the basis of increases in five offence categories (homicide, assault, rape, robbery and theft), Sweden presents increases of the greatest magnitude, whilst the increases are least marked in Finland.

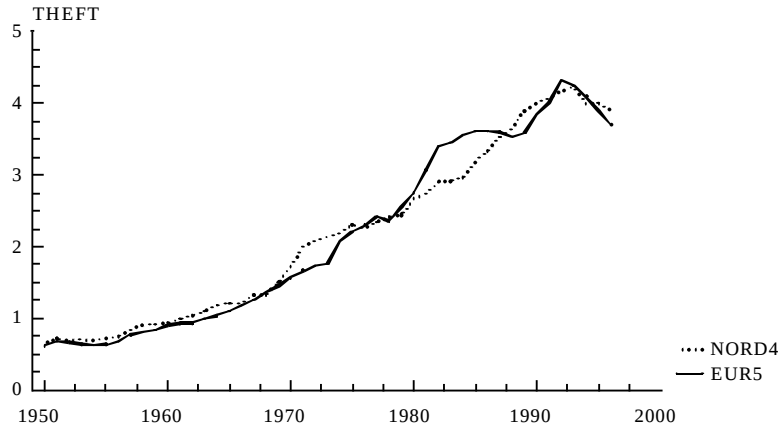
Crime trends in the Nordic countries are on the whole much the same as those found in other central European countries. Westfelt (1998) recently compared crime trends in Scandinavia with those in Austria, England & Wales, France, (West) Germany and the Netherlands. He found that all countries reported increases in crime, even though there were periodical local differences. Figure 1 clearly shows the striking similarity between the trend in registered assault and theft offences in the Nordic countries and that in the countries of central Europe. The similarities in crime trends have previously been noted by writers such as Heidensohn & Farrel (1991), Eisner (1994), Killias (1995), Joutsen (1996), and Marshall (1996).

**Figure 1a**
**Assault offence trends in the Nordic and some European countries, 1950(63)-1996. Scaled series, per 100,000 of population.**
***Source*: Westfelt (1998; updated).**




EUR5 = Austria, England & Wales, France, (West) Germany and the Netherlands

**Figure 1b**
**Theft offence trends in the Nordic and some European countries, 1950-1996. Scaled series, per 100,000 of population.**
***Source*: Westfelt (1998; updated).**




EUR5 = Austria, England & Wales, France, (West) Germany and the Netherlands

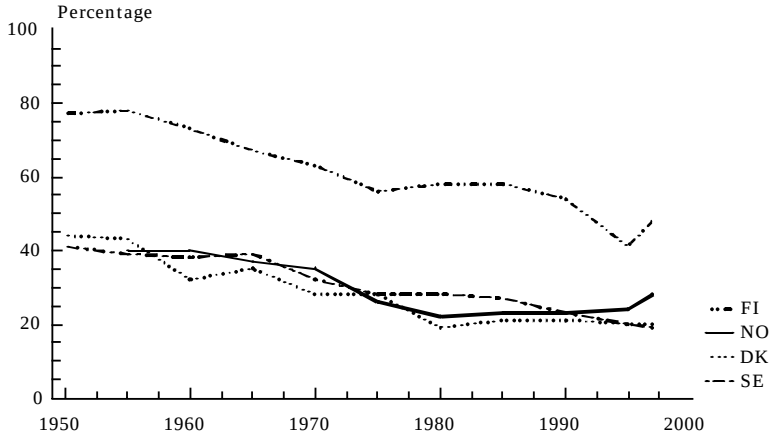
It has been suggested that theft trends in the 1990s may be in the process of changing direction. Up to now, the observations on which such statements are based remain too few for us to be able to speak with any degree of certainty - particularly in light of the fact that we do not have good theories available which would be able to explain such a break in crime trends (cf. Steffensmeier & Harer, 1999).

The trend in juvenile crime constitutes a special case. The issue has recently been studied by Pfeiffer (1998) and Estrada (1998). According to Estrada, levels of juvenile crime (i.e. mostly against property) increased in all ten of the European countries studied (Denmark, Finland, Norway, Sweden as well as Austria, England, (West) Germany, the Netherlands, Scotland, and Switzerland) without exception in the decades following the Second World War. In many of these countries this upward trend was broken however, probably at some point between the mid-1970s and the early 1980s. Available statistics suggest that there followed something of a levelling off. In three countries, however, England, Finland and Germany no such break is visible in juvenile crime trends, and the increases have simply continued. The trends in levels of violent offences committed by juveniles differ somewhat from the general crime trend. Here virtually all the countries present increases during the last ten - fifteen years (with the possible exception of *Finland* and Scotland).

### 3. The Response to Crime and the System of Sanctions

The number of police per 100,000 of population is lower in the Nordic countries than in either southern or central Europe (data for Germany are unavailable). In the mid-1990s the Nordic countries reported a total of 183 police per 100,000 of population, whilst central Europe reported 291 (although the Netherlands were on a par with the Nordic countries) and southern Europe 395 (CoE, 1999b:78). As is the case in other European countries, however, the clear up rate has dropped considerably over the years (see Figure 2). Exactly how this drop ought to be interpreted is not altogether clear: purely as a fall in police efficiency, for example, or as a result of increases in the number of offences which were always unlikely to be cleared, or as a combination of such factors (cf. Balvig, 1985:12).

**Figure 2**
**Clear up rates (all offences covered by respective penal codes) in Denmark, Finland, Norway and Sweden, 1950-1997 (every fifth year).**
***Source*: NCS (1997, Table 9; updated).**



The ICVS show that the level of public satisfaction with the police is mixed in Finland and Sweden (data are unavailable for Denmark and Norway). Sweden tops the list as regards the extent to which members of the public report crimes to the police (Mayhew & van Dijk, 1997:40). Concerning the way persons reporting crime feel the police have acted at the time the crime was reported, Finland and Sweden present a higher than average level of satisfaction in comparison with the other countries (Mayhew & van Dijk, 1997:44). However, in the matter of how satisfied the respondents were with the police in general, confidence seems to be average in Sweden and below average in Finland (Mayhew & van Dijk, 1997: 47).

The ICVS have also assessed attitudes to the kind of sentences dealt out in respect of criminal offences. The respondents were asked to choose which of a variety of sanctions they felt to be most suitable for a 21 year old male having committed his second burglary, stealing a colour television set in the process. Given the choice between fines, a prison sentence or community service, just under 50 percent of the Swedish respondents chose community service, 24 percent prison, and fourteen percent fines (Mayhew & van Dijk, 1997:56). The corresponding figures for Finnish respondents were 47, 16 and 16 percent, and for the Norwegians 47, 14 and 23 percent. The view in the Nordic countries does not seem to deviate too much from the European average, with the exception of the English speaking nations, where prison sentences are advocated to a greater extent.

Shinkai & Zvekic (1999:120) claim that public attitudes to punishment generally conform to the actual sentencing options available. This seems to hold true for the Nordic countries, where fines and other forms of sanction are most common and where prison sentences are employed less frequently. This is of course due primarily to the fact that the large majority of offences which lead to convictions are of a less or moderately serious nature and the demand for proportionality between crime and punishment means that prison sentences should be reserved for more serious offences.

The following brief description of choices of sanction concerns those imposed for all offences against the penal code taken together (NCS, 1997:78 ff). A more detailed description looking at different offence categories would not have been feasible given the brevity of this overview. Since the majority of offences committed against the penal code are property offences of one kind or another, the sanctions described here are in practise primarily those imposed for theft offences and the like. The figures refer to 1995. In the case of Norway, the data had in part to be estimated since "misdemeanours" are not included in their entirety in the Norwegian statistics (NOS, 1997: Table 40).

Finland convicts far more people than the other Nordic countries (1,238 per 100,000, as compared with 927 in Denmark, 731 in Sweden and 544 in Norway). Finland's unique position may be partially explained by the legalistic approach characteristic of Finnish judicial practise, with its rather strict observance of mandatory prosecution (Joutsen, [1999]) and also, as has been intimated by Finnish experts, by the fact that clear up rates have been consistently higher in Finland than in the rest of Scandinavia.

In contrast to the other countries, however, 81 percent of those convicted in Finland receive fines (the corresponding proportions in Denmark, Norway and Sweden being 59, 53 and 43 percent respectively). "Other sanctions" (excluding

prison sentences) are used most often in Sweden (42 percent as against 23 in Denmark and Norway and eleven percent in Finland). This very rough outline nonetheless captures a number of the essential characteristics of the sanctioning culture of the Nordic countries: Sweden still appears as the country where the philosophy of individual prevention, based on a wide variety of sanctions, is most pronounced, whilst Finland most clearly follows the classical tradition of imposing fines and prison sentences as the most common forms of sanction. Irrespective of these differences, fines are used extensively throughout the Nordic countries.

When it comes to the use of prison sentences, these are imposed more often in Denmark and Norway - both in relative and in absolute terms - than in Sweden and Finland. On the other hand, prison sentences are longer in Sweden and Finland. This somewhat complicated picture serves as a good indication of the difficulties faced when trying to measure and compare the relative "punitiveness" of the sanction systems of different countries (cf. Pease, 1994).

In addition, we could note that Sweden more or less abandoned the use of prison terms as a means of sanctioning non-payment of fines at the beginning of the 1980s (Sveri, 1998) and that since the mid-1990s electronic tagging has been used as an alternative for certain categories of offender sentenced to up to three months imprisonment (Bishop, 1995; BRÅ, 1999). In 1998 almost 4,000 individuals served their sentence in this way, of whom less than 200 dropped out of the programme (KOS, 1998:45).

## 4. The Prisons

Despite the above differences in the frequency and length of the prison sentences imposed in the Nordic countries, their judicial systems result in prison populations of a similar size. The Council of Europe (CoE, 1999a:13) reports that the inmate population in the Nordic countries (measured on 1 September 1997) is low in a European perspective (58 prison inmates per 100,000 of population; the level being lowest in Norway at 53 per 100,000 and highest in Denmark at 62 per 100,000). The corresponding figure for central Europe was 89 per 100,000, and for southern Europe 100 (with Greece included although she deviates quite drastically from this figure with a low inmate population of 54 per 100,000). The perception that prison sentences are harmful and should thus be avoided as much as possible still has a great deal of currency in the Nordic countries (Bondeson, 1998:94).

Unlike in many other European countries, there is no general problem of prison overcrowding in Scandinavia (although such problems can arise in special types of institutions, CoE, 1999c:115 ff). As a rule, prisons in the Nordic countries are small (between 60 and 100 inmates), modern and characterised by high staffing levels (CoE, 1999a:51 ff). Open prisons, where security arrangements aimed at preventing escape are kept to a minimum, account for between twenty percent (Sweden) and forty percent of prison places (Denmark). For this reason the Nordic countries, with the exception of Finland, report high levels of escapees in comparison with those of other countries (CoE, 1999a:41).

There are very few persons under the age of eighteen in Nordic prisons (such individuals account for way below one percent of the prison population, CoE, 1999a:16). The proportion of female prisoners lies - as in many other countries - between five and six percent, whilst the proportion of foreign citizens among prison

inmates varies quite considerably - being lowest in Finland at 4 percent, and highest in Sweden at 26 percent (CoE, 1999a:18).

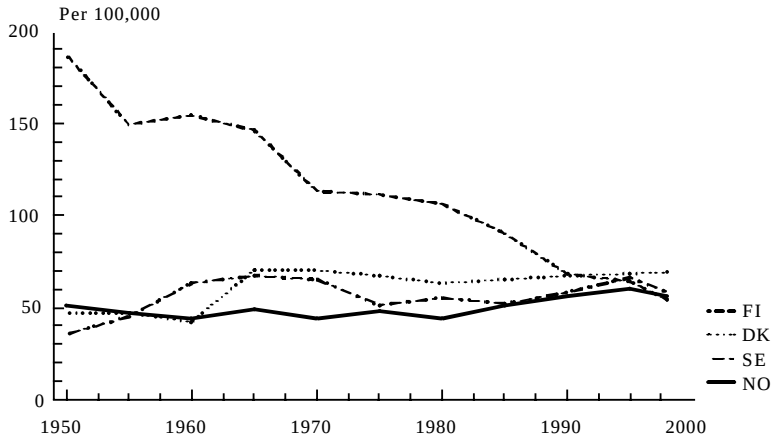
The average length of stay in prison can be estimated (cf. NCS, 1997:82 f) to be shortest in Norway (2.9 months in 1995) and longest in Sweden (5.2 months). As regards the number of individuals serving life sentences, on a certain day in 1998 there were twelve such 'lifers' in Denmark, 59 in Finland and 78 in Sweden (KOS, 1999:102). The life sentence has been abolished in Norway.

Over the last 50 years, prison populations have been fairly stable in the Denmark, Norway and Sweden (see *Figure 3*). The increases of the last ten years are not that large when seen in a European perspective (CoE, 1999c:17). Finland constitutes a remarkable exception to the trend towards rising inmate numbers. There the prison population has shrunk quite considerably since the mid-1970s (1976: 118 inmates per 100,000 of population) and is today on a par with that of her Nordic neighbours. The roots of the past high Finnish population may be traced back to the civil war (1918) and its aftermath (Christie, 1968:171). The political mechanisms underlying the recent decrease have been described by Törnudd (1993) and Lappi-Seppäla (1998), who - among other things - concludes that the decrease of the prison population has not changed the Finnish crime picture in an unfavourable way as compared to other Nordic countries (p. 27).

## 5. Summary

This short overview of the state of the crime levels and penal systems of the Nordic countries, as portrayed by available statistical sources, indicates that the crime level in Scandinavia (as regards traditional offences) is on a par with or lower than that of other European countries. Drug abuse too appears to be less widespread in the Nordic countries. Increases in crime rates during the post-war period have been very substantial in the Nordic countries just as they have been elsewhere in Europe - indicating that the recorded increases of traditional crime in Europe may have common roots out of reach for varying national welfare and criminal policies. The 1990s may have witnessed a stabilisation

**Figure 3**
**Prison populations in Denmark, Finland, Norway and Sweden, 1950-1998 (every fifth year). Per 100,000 of population.**
***Source*: NCS (1997; updated)**



in theft rates, albeit at a high level. Increasing equality between the sexes has probably contributed to an increase in the reporting of violent and sexual offences against women (and children), making these offences more visible. The system of formal control in the Nordic countries is characterised by relatively low police density, a falling clear up rate, the imposition of fines in a high proportion of criminal cases and low prison populations.

The international crime victims surveys (no data being available for Denmark and Norway) indicate that fear of crime is comparatively low in Finland and Sweden; and that (for this reason) people do not feel the need to take special precautions against the possibility of crime to any great extent. Respondents appear to be fairly satisfied with the performance of the police and also support limits on the use of prison sentences.

It should be remembered that debates on crime policy in the mass media or among politicians at the national level are rarely based on a comparative cross-national perspective. Conclusions such as those drawn in HEUNI's "Profiles of Criminal Justice Systems" (1998), for example,

on Denmark: "In general, therefore, the data (which is admittedly limited) suggest a relatively low crime problem in Denmark" (p. 134)

or on Sweden: "All in all, therefore, the image one receives from the data on crime and criminal justice is that, at least in the international comparison, Sweden has been relatively successful in its crime prevention and criminal justice policy" (p. 434)

would be rejected by many editorials and politicians as artefacts. Instead, the scenarios painted are not uncommonly quite clear in their inclination towards law and order and the need for tougher anti-crime measures.

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*Summary crime and correctional statistics regarding the Nordic countries are found in CoE (1999a, 1999b) and NCS (1997). Summary profiles of criminal justice systems are presented by HEUNI (1999) and in the World Factbook of Criminal Justice System (www.ojp.usdoj.gov/bjs/abstracts/wfcj.htm). EUROSTAT (1997) provides valuable demographic and social data for the period 1986-1996.*

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## II. THE SWEDISH PRISON SYSTEM

### 1. Incarceration in Sweden

Since the end of the 1980s, the Swedish penal system has been officially based on a model of just deserts (cf. Lundquist, 1990; Tham, 1995). This means that the perceived gravity of the offence, or the 'penal value', is the most important factor in the decision of an appropriate sanction for the crime. This does, however, not

imply that there is a heavy reliance on the use of imprisonment as a sanction for crimes. Quite the contrary: the modern official view is "that, preferably, people ought not to be locked up. To deal with offenders by keeping them in the community is considered to be the best way of getting them to lead crime-free lives" (Basic Facts, 1997: 1). Thus, probation, community service, civil commitment (contract treatment), suspended sentences and fines are the preferred methods of punishment. This is further emphasized by a special provision in the Criminal Code which prescribes that in all cases the court "is required to give notice to any circumstance or circumstances suggesting the imposition of a sentence milder than imprisonment".

In 1998, about 125,000 people (or 1,400 per 100,000 population) were found guilty for a variety of criminal acts. The breakdown of sanctions imposed was as follows: 77,000 fines; 15,000 prison sentences (of which 4,000 were converted into 'electronic monitoring', see below); 10,000 probation orders (including supervision of young offenders); 8,000 penal warnings (suspended sentence), and less than 400 committals to psychiatric care. In addition, the public prosecutor waved prosecution for 14,000 people.[1]

All prison sentences are for a fixed term or for life, depending on the gravity of the offence. The minimum prison sentence is 14 days. Most often the actual prison sentence is for a relatively short period. During 1998, a total of 9,497 persons were admitted to prison, of whom 30 percent received a sentence of two months or less and 33 percent between two and six months. The average prison population amounted to 5,156 prisoners (of whom 1,071 were remand prisoners) or to a total of 58 prisoners per 100,000 population. Prisoners released in 1998 had served an average of 154 days in prison.

## 2. The Prison System: An Overview

The Ministry of Justice is responsible for establishing prison policy, but has no authority to interfere in the daily work of the prisons and probation service centrally or regionally. This is, instead, the resposibility of The Swedish Prison and Probation Service (SPPS), which is headed by a government appointed board that consists of trusted citizens (members of parliament, charitable organizations, labour unions, and so forth). The government also appoints the Director-General.

All prisons and gaols (remand prisons) in Sweden are state controlled and there are no county jails. Privatization of prisons is a non-issue in Sweden, despite Parliament's decision, in 1998, that authorized private security firms may be used, under special circumstances, to carry out functions such as transporting prisoners or guarding hospitalized prisoners.

The penal administration of the country is divided into five regional units. The regional offices are responsible for the administration of gaols and prisons, aftercare and non-custodial sentences (supervision). In October 1998, the SPPS employed approximately 7,800 persons, 42 percent of whom were female; 4,487 of staff were employed in prisons and 1,553 in gaols. In 1997, the staff/inmate ratio amounted to 0.9: 1 in the prisons and to 1.4: 1 in the goals. The total budget, including expenditure for requirements such as non-institutional care, for the 1998

[1] If not otherwise stated, all statistical data are taken from the following official sources: Crime and Criminal Justice Statistics 1998 and Correctional Statistics 1998. The Swedish population amounted to 8.85 million people in 1998.

fiscal year was 4,150 million Swedish Kronor (SEK) (about 460 million US Dollars). The daily cost per inmate, depending on the prison category (see below), has been calculated at between 200 US Dollars in open prisons and 300 US Dollars in maximum-security prisons.

The management style in Swedish prisons is 'organic', rather than militaristic. Armed guards do not exist. In very serious unrest situations, the local police department is contacted and authorized to deal with the situation. However, riots and other forms of unrest are extremely rare events in Swedish prisons. In 1994 a major incident occurred at the maximum security Tidaholm prison, when inmates set fire to parts of the prison.

Presently an increasing number of prison officers are required to maintain contact with a specified number of inmates on a daily basis. The purpose of this contact responsibility is to assist inmates with treatment, education and activity planning, as well as to assist in the granting of routine parole. The minimum requirements for a position as correctional officer is at least two years of senior high school education or the applicant must be at least 26 years of age with at least four years of work experience. In addition to the general educational requirements, prospective correctional officers are required to have at least two years of senior high school training in the English language, Swedish and in the social sciences. Hiring is based on personal job interviews with prospective officers.

### 2.1 Prison Classification

In Sweden there are four different security categories for prisons. Prison categories I to III are known as 'closed prisons' and category IV prisons are considered 'open prisons'. This system was introduced in the first half of the 1990s. Before that, a distinction was made between national and local, or 'neighbourhood' prisons. National and local prisons could be open or closed prisons. National prisons were usually maximum-security prisons but could vary from maximum to minimum prisons. Neighbourhood prisons were usually minimum or medium security prisons.

Category I prisons are similar to maximum-security prisons in other countries. They are designed with the highest level of security possible, given the current state of technology and security methodology, in order to prevent escapes and release attempts. The only difference between category II and category I prisons is that category II prisons do not have security measures preventing release attempts. Category III prisons are basically designed to thwart 'impulse escape' attempts. These prisons only provide minimum security measures against escapes. Finally, category IV prisons, known as 'open prisons', have no physical barriers or technology aimed at preventing escape. The only barriers to escape are the (unarmed) prison officers themselves. Persons convicted of drunken driving and less serious offences are often sent to category IV prisons. Prisoners serving time in these prisons may be allowed to pursue employment or education during the day outside of the prison.

In 1998, the average number of available prison beds (including gaols) was approximately 5,600 with the national average being at about 87 percent of occupancy. On average, six percent of the prisoners were placed in category I prisons; 18 percent in category II prisons; 30 percent in category III prisons; 21 percent in category IV prisons; and 26 percent were remand prisoners.

From an international perspective,

Swedish prisons are modern, expensive, and small. The largest prison, Kumla, which is a maximum-security prison, has about 260 (nominal) beds and only 177 were in use during 1998. The typical Swedish prison has far fewer than 100 beds. Single celling at night is the rule and over-crowding does not occur.

In 1998, no escapes were reported from category I and II prisons, 36 escapes from category III prisons, 155 escapes from category IV prisons and no escapes from gaols. Over and above these numbers, another 178 abscondings (in connection with furloughs, during transport, etc.) were reported. By official Swedish standards, this level of security is considered high.

## 3 The Swedish Prison Philosophy

Even if sentencing in Sweden is now based on a just deserts model, treatment, presently called special 'programmes activities' is still an explicit goal of correction. According to the current Prison Treatment Act of 1974 (PTA), the primary goal of the prison sentence is to promote the inmate's adjustment to the community as well as to counteract the detrimental effects of imprisonment. Already in the Prison Treatment Act of 1945, the view was expressed that the deprivation of freedom itself should be regarded as the penal element of a prison sentence and not the actual prison experience itself. Thus, the PTA of 1974 states explicitly that an inmate shall be treated with respect for his or her human dignity.

The PTA of 1974 is based on four principles:

(i) imprisonment as last resort, that is, the usual punishment should be a fine or a community sentence, since imprisonment normally has detrimental effects;
(ii) normalization, that is, the same rules concerning social and medical care and other forms of public service should apply to prisoners just as they apply to ordinary citizens;
(iii) vicinity, that is, the prisoner should be placed in prison as close as possible to his or her home town; and
(iv) co-operation, meaning that all parts of the correctional system (probation service, gaols and prisons) should work closely together in individual cases as well as in general.

Due to a general shift in Swedish criminal policy towards a pro-active and more repressive model, increasing emphasis has been placed on security during the late 1980s and the 1990s with the result that the vicinity principle is now obsolete. Recently, the aim of the prison system has been officially described as follows: "The correctional system's operations shall be characterized by a humane attitude, good care of and active influence upon the prisoner, observing a high degree of security as well as by due deference to the prisoner's integrity and to due process. Operations shall be directed towards measures, which influence the prisoner not to commit further crimes. The objective should be to promote and maintain the humane treatment of offenders without jeopardizing security" (author's translation). Or in the words of the SPPS itself : "The Prison and Probation Service has two main goals. To contribute to the reduction of criminality, and to work to increase safety in society. To achieve these goals we work with sentenced persons in order to improve their possibilities of living a life without committing new crimes."

## 4 Specific Aspects of the Correctional System

### 4.1 Medical Treatment of Prisoners

All newly received inmates are questioned about their state of health by the admitting prison official. In the event

of any health complaints, the prison official sends them to a prison nurse. In 1998, a total of 163 nurses were employed by the Prison Service. Typically, all new inmates are examined by a prison nurse within 24 hours of arrival. Any prisoner who is identified as possibly having a serious medical problem is then referred to a physician for a closer examination and, if necessary, any further referrals are made. In the event that an inmate requires specialized treatment, the treatment is obtained from outside medical services. Inmates that require hospitalization are transferred to an outside hospital for as long as necessary.

Inmates are offered the opportunity to have an HIV test performed upon entry into the facility. Prisoners who are seropositive or who have the Aids virus may request separation from other prisoners. On April 1, 1998, 25 inmates were classified as HIV-positive.

In 1998, three prisoners and seven remand prisoners were reported to have committed suicide. In 1994 the European Council's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) criticized Sweden for keeping remand prisoners under excessive restrictions and in isolation.[2] Recently, Parliament decided to ease restrictions and that, as a rule, remand prisoners must be given the opportunity to stay with other remand prisoners.

### 4.2 Prison Labour

All inmates must participate in programmes activities in one form or another. The programmes include 'conventional work', education, specialized rehabilitation or treatment programmes, day releases for the pursuit of study or work outside the prison during normal business hours, internal service, that is, kitchen duties, building and general maintenance, and finally, training in everyday social skills, like how to do laundry, maintain a clean living space, cooking, and planning a personal budget. In 1998, work programmes comprised about 47 percent of all programmes activities, education formed 20 percent, service and maintenance programmes comprised 15 percent, specialized rehabilitation and treatment programmes, six percent, and other activities 12 percent.

The industrial prison work is administrated by a special unit known as KrimProd. This unit is responsible for manufacturing operations within the prison system and also functions as a supplier to civilian companies or sells various prison products directly to retailers and wholesalers. KrimProd employs modern managerial work ethic principles. The employment fields traditionally available to inmates are industry, agriculture, horticulture, forestry, construction and various service occupations. Those inmates who are employed in the conventional employment sector receive a wage of about 1.20 US Dollars per hour. Prisoners participating in educational programmes are paid a specific allowance of about 1 US Dollars per hour.

### 4.3 Disciplinary and Security Measures

Unlike other countries, solitary confinement, as a formal disciplinary punishment, is not used in the Swedish prison system. However, solitary confinement can be resorted to under those special circumstances (disturbing the general order, being under the influence of

[2] The Swedish Government had requested the publication of this report and it is available from the CPT's website (*www.cpt.coe.fr/cpt/swe.htm*). - The CPT paid a new visit to Sweden in February 1998.

intoxicating substances, attempts to escape, investigations of breach of discipline). In 1998, a total of 2,100 cases of solitary confinement were reported.

According to the law, amended on January 1, 1999, there are two official sanctions that prison officials may impose upon a prisoner for violating prison rules, although, serious violations which constitute a criminal offence, can be brought before a court. The principal sanction available for use by the prison officials is a decision that up to 15 days of release can be postponed. The second sanction is a formal warning to the prisoner. In 1998, 3,700 warnings and 1,600 cases of postponed release were filed. The average number of days additionally spent in prison amounted to 3.6 days.

Another informal, but documented disciplinary measure is the use of a prison transfer. If a prisoner seriously misbehaves, the prison officials may transfer the unruly inmate to another prison. In 1998, the number of transfers amounted to 330 cases. Despite the availability of these sanctions, informal discussions with the fractious prisoner are the usual method of dealing with infractions unless the infraction is of an especially serious nature (Bishop, 1991).

The illegal use of drugs in prison or whilst on furlough and escapes or attempted escapes are the most common reasons for imposing disciplinary measures on an inmate (Bishop, 1991). It should be noted that escapes from prison or attempted escapes are not viewed as a criminal offence in Sweden. Therefore, no further sanctions can be imposed on an escapee other than the official disciplinary sanctions. However, disciplinary problems are not a priority issue in debates about Swedish prisons. Nor is violence between prisoners and prison employees, between prisoners amongst themselves or prison rapes a major issue. In 1998, a total of 241 employees, including staff of gaols and after-care services, reported that they had been subjected to threats or violence perpetrated by inmates or clients. Approximately 45 percent of the reports referred to intentional violence, while 55 percent were reports of different forms of threats. However, since 1993, at least four prisoners were killed by other prisoners. No prison killings had ever been reported prior to 1993. All killings occurred in maximum-security prisons.

### 4.4 Complaints procedures

The complaints procedures are laid down in the Prison Treatment Act (PTA) and the Prison Treatment Ordinance. In general, the role of the courts is down played in the Swedish system. Only decisions of individual cases, decided by the central prison administration (kriminalvårdsstyrelsen), can be sent on appeal to the administrative court. Statistical data on the number and nature of prisoners' complaints and the outcome of complaints are not available.

Like every other citizen, prisoners also have the option to appeal to the ombudsman. During the period 1 July 1997 to 30 June 1998, the ombudsman concluded a total of 410 complaints in the field of corrections, of which 32 cases led to admonitions or criticism by the ombudsman.

Inmates in Swedish prisons have the right, guaranteed by law, to meet and discuss issues of mutual interest and to present their views to the warden of the prison. Prisoners can hold regular meetings, unattended by the prison staff to discuss the pertinent issues. Proposals emanating from such inmate 'community' meetings are discussed with the warden by a specially elected council of inmates. The

inmate council is elected by the other inmates and represents them.

Swedish prisoners are entitled to vote in the general elections.

### 4.5 Visits and Other Contacts with the Outside World

From an international perspective, the Swedish prison policies regarding visits and furloughs are quite liberal. Regular contact with the outside world is officially viewed as an important component in the treatment of the offender. Inmates are granted furloughs, or short-term leave, outside of the prison, on a regular basis. The average length of a normal furlough is three days. Special furloughs are also given on a case by case basis. Before regular furloughs are granted, inmates must 'prove' themselves during various qualifying periods. In 1998, 18,500 normal and 33,000 special furloughs were granted.

In 1998, it was reported that about 1.3 percent of normal furloughs and 0.2 percent of special furloughs had been abused. 'Abused' means that the specific stipulations of the individual furlough were violated such as drug or alcohol abuse while on furlough or that the inmate did not report back to the prison at the end of the period of leave, thereby constituting an escape from prison.

Visits may take place unattended by a prison officer. However, the visitor may be searched prior to the visit as is the inmate after the visit is concluded, all in an effort to squelch the importation of drugs and other unauthorized materials into the prison environment. If necessary, prison officials and the police perform background checks on the visitors of inmates to assess the security threat. In cases where it is believed that the character of the visitor is doubtful, that is, he or she may attempt to smuggle in contraband for the inmate, visits are supervised by a prison officer. Facilities for regular conjugal visits are also made available for those prisoners who have a partner. Another form of visit is the regular visits paid by members of organizations like the Red Cross, Amnesty International, the Churches, and so on. Special visiting apartments, in close proximity to three of the prisons, are available to facilitate children's contact with their imprisoned parent.

### 4.6 Opening the Prisons

Due to the classification scheme of Swedish prisons, that is, security classifications I to IV, the only prisons that are considered completely open are the category IV facilities. Policies regarding frequency of furloughs are also more liberal in the open facilities than at the other levels. Provision for day-release are made for prisoners in open prisons in order to pursue outside employment, maintain their regular job, or pursue outside educational activities. In 1998, about 640 such day-release cases were granted. Furthermore, in about 17,000 cases, inmates were allowed to participate in various social activities outside the prison. Another 670 inmates were placed in treatment facilities for drug abusers or in foster homes.

### 4.7 Early Release

Inmates, who are serving a time-limited sentence of more than 1 month are conditionally released when 2/3 of the sentence has been served. The length of the test period, upon early release, is usually commensurate with the length of the original sentence, but of at least one year. During the test period, the conditionally released person can be placed under supervision. Prior to January 1, 1999, inmates with sentences of more than 2 years could be released after 1/2 of the sentence has been served. This possibility is now abolished and the 2/3-rule applies.

## 5 Special Categories of Prisoners

### 5.1 Prisoners in Maximum Security

Section 7(3) of the Prison Treatment Act states that any prisoner who is serving a sentence of at least four years or serving a sentence of at least two years for either an aggravated drug offence, any attempt at conspiracy or aggravated drug smuggling, must serve the sentence in a closed, maximum security national prison, if there is reasonable cause to believe that the prisoner will attempt to escape before the minimum sentence is served. This section of the PTA was promulgated on 1 July 1988 after the escape of a Swedish spy who had been sentenced to life imprisonment. Usually, one-third of those prisoners to whom s. 7(3) applies are in fact placed in a closed, maximum-security prison. On 1 October 1998 there were a total of 338 'Section 7(3) prisoners'. Half of them were convicted for drug offences.

Furthermore, s. 20 of the PTA provides for the separation of prisoners in maximum security. Section 20 states that a prisoner may be separated from the general prison population if: (a) the convicted person is an imminent threat to national security; (b) if the inmate seriously disrupts the normal order and general discipline within the prison; (c ) if the inmate continues to engage in criminal activity and there is reason to believe that the inmate will attempt to escape; and (d) if it is necessary to separate the inmate in order to prevent criminal activities while in the prison environment. This section of the PTA also states that, if the duration of the separation from the general prison populace is likely to be lengthy, the convict may be placed in a special maximum-security wing within the prison.

A prisoner in a maximum-security facility may be transferred to a minimum-security facility four months before the end of the sentence in order to facilitate preparation for release into the community. Inmates, who are serving time as s. 7(3) prisoners, are not afforded the same regular furloughs as other prisoners. Section 7(3) prisoners will only receive their first furlough after one-quarter of their sentence, or two years of their sentence, has been served, whichever comes first. Special leave may also be granted to s. 7(3) prisoners at the discretion of the prison authorities. Those prisoners who would normally not be given a furlough, that is, serious offenders and 'lifers', are allowed, what is known as a 'breathing space' leave. This type of leave is very restrictive relative to the normal three-day furlough. A prisoner, who receives special leave of this kind, is accompanied by two prison officers, who are dressed in casual civilian clothes, for the entire duration of the leave. The duration of this special leave is normally for four hours and can include various activities such as a visit to a shopping mall, a meal in a restaurant or a walk through a park. Prisoners in maximum security are of necessity more strictly controlled than those serving time in medium or open prisons, thereby inevitably reducing the amount of contact these prisoners have with the outside world.

Section 7(3) has been criticized as being unfair and was changed on 1 January 1999. Currently, individualized decisions are made for each case, spelling out exactly the special conditions and restrictions of the prison term.

### 5.2 Long-Term Prisoners

Prisoners who are serving a sentence of at least two years are considered long-term prisoners in Sweden. A sentence of life can be commuted, by a pardon, to a fixed term by the government. Once a life sentence is commuted to a fixed term, the normal provisions of conditional release apply to the prisoner once he or she is released. The average period of incarceration of

prisoners, who have been sentenced to life imprisonment, is now above 12 years and this period has increased during the last decade. A sentence of life imprisonment is imposed for murder and, in exceptional cases, for high treason. In the last two decades the number of life sentences has steadily increased (despite a low and stable homicide rate at about 1.2 killings per 100,000 population). Between 1988 and 1998, 77 'lifers' were admitted to Swedish prisons, of whom approximately one-third were foreign citizens. The total number of 'lifers' has increased from 24 on 1 October 1988 to 81 by 1 October 1998. The number of prisoners, with a sentence of four years or more, has also almost doubled. On 1 March 1989, there were 600 such prisoners and by 1 October 1998 this amount had risen to 1,038.

### 5.3 Women Prisoners

As in most other countries, women constitute a small percentage of the Swedish prison population; in 1998 they made up five percent. For a long time, the Hinseberg prison was the only all-female facility in the country. In 1989 and 1996, two additional all-female prison were opened, known as Färingsö (near Stockholm) and Ljustadalen in the north of the country. These prison were opened in response to the growing number of women prisoners, at the Hinseberg facility which is some distance from the Stockholm area, who were eligible to serve their sentences in neighbourhood prisons. In 1997, Hinseberg could accommodate 115 prisoners, Färingsö about 30 and Ljustadalen 20 prisoners. The remaining prisoners were divided between different neighbourhood facilities that accommodate both men and women.

From an international perspective, of a mixed-gender facility may seem odd and it is, in fact, contrary to international conventions. A study of women prisoners in Sweden revealed, however, that the majority of women prisoners preferred to serve time in a mixed facility; 56 percent of the respondents said they preferred mixed-sex prisons, whilst 16 percent of the respondents preferred women-only facilities (Somander, 1994). However, from 1 January 1999, the system of mixed-gender facilities was abolished. Currently, a woman prisoner may only in exceptional cases and only with her explicit consent be placed together with male prisoners in the same prison.

In 1998, the majority of female prisoners were between 30 and 44 years of age. The two most common crimes for which female inmates had been convicted were theft and drug offences.

Women prisoners are allowed to have their babies with them. In 1998, there were 13 such prisoners and the average time spent in prison was four months. All of the children were younger than two years of age.

Prison sentences are usually shorter for women than for men. In modern times, up until 1996, no women have been sentenced to life imprisonment. According to official recidivism statistics, there is no difference in the recidivism rates of men and women with a prior criminal record. Depending on the number of prior convictions, it is anticipated that between 45 and 90 percent of prisoners, male and female, will be reconvicted[3] within three years. Corresponding recidivism rates for persons who have been fined tend to vary between 20 and 80 percent. Seen from another perspective, more than half of the inmates has prior prison experience (56 percent in 1998).

[3] Note, that the reconviction can refer to a minor offence.

### 5.4 Juvenile Prisoners

In Sweden the age at which criminal responsibility begins is 15 years. According to law, juveniles below the age of 15 cannot be punished; they are taken care of by the social authorities. Between the ages of 15 and 21, the age of the offender is taken into special consideration for sentencing purposes. Section 7, Chapter 29 of the Criminal Code states that particular consideration shall be given to the youthfulness of the offender if an offence has been committed before the age of 21. It further states that no person under the age of 21 shall be given a sentence of life imprisonment. In general, the Swedish Welfare Service is the agency who is responsible for dealing with juvenile offenders and the guidelines for dealing with such persons are laid down by the Care of Young Persons Act of 1990 and the Social Welfare Act of 1980.

The most frequent criminal sanctions against juveniles are fines, waivers of prosecution and transfer to the social authorities. In 1998, only 21 persons, aged between 15 and 17 years, and 544 persons, aged between 18 and 20 years, were imprisoned. Of the 15 to 17 year old category, four boys were sentenced for violence and eight for robbery. Fourteen boys had a prison sentence of up to 6 months and three boys were sentenced to more than one year of imprisonment.

Special youth prisons were abolished in 1980. Instead, one entire prison and one wing in another prison is set aside for juvenile offenders.

On 1 January 1999, a new sanction called closed youth care became operative. This new sanction, which may be imposed for a period between 14 days and four years is intended to replace the relatively rare prison sentences for offenders who commit serious crimes prior to their 18th birthday. Such young offenders are now placed in a home administered by the social authorities.

### 5.5 Drug Addicts in Prison

In a European context, Sweden is known for its repressive drug policy (Lenke and Ohlson, 1998; Tham, 1998). The drug policy is one of the major explanations for the many changes of prison conditions and prison policies since the early 1980s. A growing number of people have been sentenced to imprisonment for drug offences, the lengths of sentences for drug offences have increased and various aspects of the prison regime have been 'toughened'.

In 1998, almost one third of the prison inmates were imprisoned for a drug offence. This percentage includes cases where the drug offence was not the principal offence. The number of prisoners who have been convicted of drug related offences is unknown. It was also reported that 47 percent of all prison inmates were classified as inmates with a history of drug addiction and that the likelihood of the frequency of drug addiction of the convicted person increases relative to the length of the sentence. For instance, 59 percent of the inmates sentenced to two months or more imprisonment were considered drug abusers. Two-thirds of that percentage are inmates who are 30 years of age or older.

One of the official policy goals is to have drug-free prisons. Drug use while in prison is relatively rare in the category I prisons but the incidence of drug use increases with each more lenient prison classification. Obviously, this is due to the tighter security in the category I prisons and the gradual relaxing of security measures in the other classes of prisons. Inmates are subjected to frequent urine tests as well as room searches. Even tracker dogs are used. In 1998, 81,000 urine tests and 66,000 cell

searches were reported. Positive urine tests usually indicate the use of cannabis and of amphetamines.

Other measures used in an effort to eliminate drug use within prison are the searching of personal mail and visitors. The prison service also collaborates with the welfare service to identify and make contact with the drug users in order to motivate drug users to seek treatment. The Standing Committee on Justice has recently agreed with the Government's view that seizures of narcotic drugs in the prisons and gaols are few in number and that the majority of prisons seldom or never have occasion to report the occurrence of drug abuse on their premises.

By law the prison system is not required to provide comprehensive drug treatment programmes. Rather, the prison system works with other agencies and private organizations to arrange and provide drug treatment programmes. On 1 October 1998 there were a total of 400 prison beds especially reserved for the treatment of drug abusers. In other prisons, there are less structured programmes. In all, 45 percent of all inmates who were considered to be drug abusers participated in some form of anti-drug programmes. About 130 prisoners were placed in drug treatment programmes outside the prisons.

Finally, special 'drug-free' sectors have been set up within various prisons throughout the country. These are special sectors within a prison that are officially designated as being completely drug-free. Inmates may request transfer to such sectors only after signing a contract which affirms their desire to give up drugs and to remain drug-free while in the sector. Special rehabilitation and coping programmes are set up within these special sectors in order for the inmate to realize the drug-free goal.

In some cases, where the offence is drug-related, the court may hand down a sentence of contract treatment, which is a form of civil commitment, in lieu of a prison term. This sentence is a probation order with a specific order to enroll in a drug treatment and rehabilitation programmes. In most cases, if this contract is broken, the court will order the remainder of the sentence to be served in prison. In 1998, 959 contract treatment sentences were ordered by the courts, of which the vast majority (69 percent) were handed down to offenders between 30 and 59 years of age. The high percentage of older offenders is due to the fact, that, in Sweden, drug addiction is not an unduly prevalent phenomenon among younger people.

### 5.6 Foreign Nationals in Prison

In 1998, a total of 2,135 foreign nationals, including non-residents, were admitted to prison which translates into 22 percent of the total number of people admitted to prison in 1998. In relation to their total percentage of the general population in Sweden, foreign nationals are over-represented in the prison system as well as in judicial statistics (von Hofer et al., 1997; Martens, 1997).

Foreign prisoners are placed among Swedish prisoners. Special prisons or wings, exclusively dedicated to foreign prisoners do not exist. Approximately 15 percent of the foreign prisoners are usually deported from Sweden after having served their prison sentence. For obvious reasons, foreign prisoners who are not permanent residents in Sweden, are not granted furloughs to the same extent as Swedish prisoners are. International agreements between Sweden and a number of countries allow the execution of the prison sentence in the home country of the sentenced person.

## 6 Conclusions

According to the description given above, one could conclude that the Swedish prison system is a system in balance. This is also borne out by the fact that, during the 1990s, Swedish mass media has not focussed on the prisons, but on the police and other sectors of the criminal justice system. In contrast with a number of other European countries, the prison population in Sweden, as well as in other Scandinavian countries, has remained rather stable during last 30 years. In Sweden this was partly accomplished by the introduction of alternatives to imprisonment like civil commitment (1988), community service (1990) and electronic monitoring (1994). Especially electronic monitoring, which can replace a prison sentence of up to three months, is considered to have saved prison space (between 350 and 400 beds per year, *see Part III* below). During the 1970s and 1980s efforts were also made to shorten the time spent in prisons (for example, shorter sentences, deduction of time spent in gaol, conditional release after one-half of the imposed prison sentence). In the 1990s, however, this process has come to a standstill. Periods of imprisonment appear to be on the increase since prisoners with very short sentences, such as drunk drivers, are granted alternative sanctions and prisoners, sentenced for serious crimes, are receiving longer sentences. This process of "bi-furcation" [Bottoms] has been observed in many countries in recent years.

From a historical perspective, the Swedish prison system is, as are its European counterparts, a rather young institution. Its rise to prominence can be dated to the first half of the nineteenth century. At that time, imprisonment was substituted for the death penalty and corporal punishment. Originally the prisons, with their roots in the early modern workhouses, functioned as an assembly point for the poor, jobless and marginalized populace. This function is still very much alive today. According to a recent level-of-living survey among prisoners, only one-third of the interviewed prisoners had been employed during the 12 months prior to their admission and only half had had some work during the same period. Almost all prisoners were in debt. Twenty-nine percent had no accommodation of their own and 15 percent of these were totally homeless. About half of the prisoners were living alone. Nineteen percent reported alcohol problems and 47 percent regular drug use. Forty-nine percent reported psychological problems and 38 percent suffered from physical ailments.

From a structural perspective, the development of (officially registered) criminality and the use of imprisonment (measured as daily prison population) are seemingly two independent processes in Sweden. Even if the data, shown in Figure 1a & 1b, is partially based on estimates, it becomes clear that the Swedish prison population has not been determined by the course of (known) criminality. Neither is it possible to apply the widely discussed idea of the 'stability of punishment' to the Swedish system (Blumstein, 1995).

Whether the fluctuating use of imprisonment has influenced the course of crime, is more difficult to answer. Obviously, prior to World War I there is no relationship at all. The prison trend was decreasing, whilst the offence rates remained stable. After World War I, the picture changed drastically with more or less stable prison trends, but soaring offence rates. In the case of theft, which determines the shape of the offence curve after World War I, a comprehensive analysis of the data's secular trends and interruption in trends has shown that the Swedish theft data lends very little support to the deterrence hypothesis in a

**Figure 1a**
**Sweden: Number of prisoners (at year-end), 1841-1999.**
**Remand prisoners excluded. Rate per 100,000 of the population.**

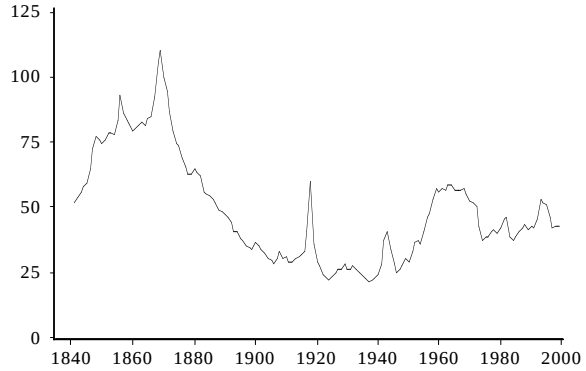
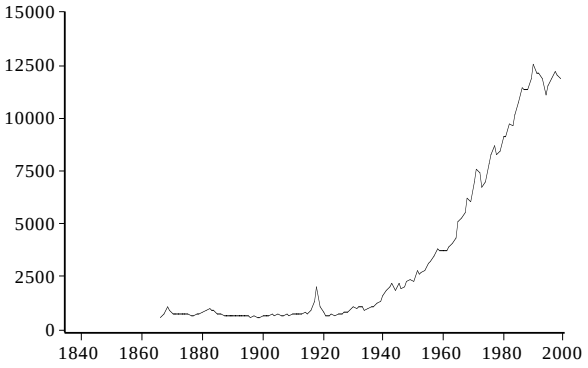



**Figure 1b**
**Sweden: Number of registered offences against the Criminal Code, 1866-1999.**
**Estimated figures 1866-1949. Rate per 100,000 of the population.**




longitudinal perspective (von Hofer and Tham, 1989); a result which reminds us of the trivial fact that statistical co-variation does not necessarily imply causality.

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## III. ELECTRONIC MONITORING OF OFFENDERS IN SWEDEN

Since 1994, Swedish authorities have had the power to use electronic monitoring of sentenced offenders. On a trial basis, electronic monitoring was first introduced in six court districts and the experiment was subsequently extended (1997) to cover the entire country. Since January 1st, 1999 it has been a standard tool under the Swedish penal system.

### 1 Background

The political initiative to introduce electronic monitoring was instigated in 1993 by the then Conservative Minister of Justice. Although this introduction had long been debated among experts and under the previous Social Democrat government, it had ultimately been rejected. However the impetus behind the trial's extension in 1997 and the final establishment of the policy came from the Social Democrat government.

In Sweden there is no political dissent over the issue of electronic monitoring. Political parties to both right and left, as well as the Swedish Green party, view electronic monitoring positively. The same is true of the press. Hearings were held, as is normal in Sweden, prior to the initial trial introduction in 1993, and only the Swedish Data Inspection Board voiced objections in principle, in part because electronic monitoring was held to be a previously unknown intrusion into the private domestic sphere. The fact that arguments based on the integrity of the person carry somewhat less political weight in Sweden than in other European countries may in part be due to historical circumstances specific to Sweden. The country has never been occupied by external forces in modern times, and it has not played an active part in wars since the beginning of the 19th century. Sweden is not prone to violent political upheavals and there is no tradition of radical citizens insisting upon civil rights. State abuse of power has little direct relevance as a political argument in Sweden.

During the advance work on the first law, the Justice Ministry in charge made express reference to positive experiences from the United States. There was no evidence to the contrary from a European perspective. The introduction of electronic monitoring was justified with the following principle arguments. There was a general consensus that periods in prison tend to have damaging consequences for convicted offenders, and therefore that the use of imprisonment ought to be restricted. Electronic monitoring was felt to allow a restriction of the offender's freedom of movement that closely approximates to imprisonment, thus presenting a suitable alternative to (short) prison sentences. Another point in favour of electronic monitoring was the cost-saving element. It was not believed that electronic monitoring harmed the integrity of the person any more than a full prison sentence.

The Swedish parliament's legal committee put forward no objections and the law was passed unanimously in principle. The same applied to the later amendments. The only point of contention was whether a prison sentence of two, three or six months should be the upper limit qualifying for the use of electronic monitoring.

### 2 Legal Rulings

*(Lag (1994:451) om intensivövervakning med elektronisk kontroll* [Law on intensive supervision by means of electronic monitoring])

It is central to the way that electronic monitoring is framed in Swedish law that it does not stand as a sentence in its own right, but is formulated as a special implementation of prison sentencing. This construction is to be understood in terms of the Swedish tradition since the penal code came into force in 1946, whereby the punitive element of sentencing was restricted solely to the withdrawal of personal freedom of movement, in place of other forms of punishment. Approached from this perspective, electronic monitoring can be understood as withdrawal of freedom of movement - provided that it is implemented in such a way as to approximate to a term in an open prison.

Under the law currently in force, prison sentences of up to three months can be served at home under electronic monitoring instead of in a penal institution. It is not the court of law but the regional correctional authorities that make this decision, in response to an application from the convicted offender. If this application is refused, offenders can appeal to the administrative court for a review of the decision.

The duration of electronic monitoring corresponds exactly to the length of the prison sentence imposed by the court. The core of the ruling is § 3 of the law. Permission to serve the sentence outside a prison is conditional upon a ban on leaving one's home except at specifically stated times and for specifically stated purposes such as paid work, training, medical treatment, shopping for essentials etc. Adherence to these regulations is monitored using electronic equipment. The person being monitored must refrain from consuming alcohol and other drugs including banned stimulants (§ 4). Furthermore, assuming the person has an income during the sentence, a daily fee of up to 50 Swedish crowns (SEK) is levied, up to a maximum of 3,000 SEK (approximately 350 USD). The fee is payable in advance and is directed to the state crime victims' fund (§ 5).

In practice, electronic monitoring is organized as follows: The local state probation service (part of the Swedish Prison and Probation Service) conducts an investigation of the personal and social circumstances of the convicted person. The person must live in appropriate accommodation with a telephone connection. They must also have a place of employment or training, although even voluntary work for an organisation or church group is sufficient. It is a central prerequisite for the monitored person to have some form of employment since the Swedish legislature is expressly against turning electronic monitoring into a form of house arrest. The agreement of other adults living in the person's household must also be secured. The person being monitored makes a commitment to adhere to the monitoring schedule drawn up and the conditions imposed therein. All participants in the monitoring programme must normally take part in what is known as a "motivation course" operated by the probation service to address the consequences of the crime committed, and discuss ethical issues, alcohol and drug use and conflict management.

Besides the electronic monitoring the person is also subject to repeated unannounced personal visits (which may also take place in the evenings or at weekends). Supervision also includes tests for alcohol using automatic breath testing kits, which transmit results directly down the telephone line. Urine tests and other direct drug tests are also administered. Electronic monitoring takes place according to the "active system" (for details, see Haverkamp, 1998) whereby the person being monitored wears a transmitter on the

leg and the signals it constantly emits are transmitted to the computer in the monitoring centre.

## 3 Empirical Data

During the trial period, electronic monitoring has been systematically evaluated (most recently in BRÅ [1999] with English summary). There follows a brief summary of key empirical findings.

In 1998 a total of 3,930 persons were subject to electronic monitoring, of whom (in line with expectations) six percent were women. The majority of them were convicted for drink driving (53 percent). Assault was the principle offence in 21 percent of cases, and property offences, the third highest category, accounted for eight percent. In seven out of ten cases, the term of imprisonment was one month or less. In barely ten percent of cases it exceeded two months (in which case - as for normal prison sentences - release on parole is likely after two months). One quarter of those who might legally have been considered for electronic monitoring did not in fact apply for it. Some 15 percent of applications were refused, and around 4,000 people were finally monitored. The average age of those monitored was in the range 31-40 years. Two thirds of them had previous convictions and somewhat fewer than half had previously served terms of imprisonment. In 1998 there were just 200 cases where monitoring had to be terminated prematurely. The principal cause was - typically for Sweden - violation of the ban on alcohol consumption. The reoffending rate was studied in the years 1994-95. This revealed that the electronically monitored offenders were no more or less likely to reoffend than the control group. After three years, 26 percent of the monitored persons were known to have reoffended; in the control group the corresponding rate was 28 percent.

Around two thirds of those monitored were living with a partner in a joint household. Twenty percent had children under the age of eighteen. More than 90 percent of those monitored and over 80 percent of their partners stated that they would prefer electronic monitoring to a prison term if faced with the same choice again in future. Even the quarter of those surveyed who said that they often or nearly always found it “unpleasant” to wear the electronic “foot shackle” gave this same response. The majority of those monitored viewed electronic monitoring as a less severe punishment than a prison term, as did their partners.

The probation officers interviewed were generally very positive about electronic monitoring but wished for improvements to the technology and better workplace supervision of those being monitored.

The cost savings for the year 1997 - depending on the method of calculation - were put at between 70 and 140 million SEK (approximately 8 and 16 million USD). In that year around 3,800 offenders had been monitored which corresponds to some 390 prison places in the year as a whole. Furthermore, certain economic benefits accrue since the person undergoing electronic monitoring continues in paid employment. In general it should be noted that the cost of a prison place in Sweden (and Scandinavia) is high in comparison to other countries (Council of Europe, 1999). For example, the cost per day of a place in an open prison was put at 150-185 USD for the years 1997/98.

The evaluation also revealed that only about half of those being monitored had paid the daily fee of 50 SEK. In total the victims' fund benefited to the tune of some 350,000 USD in 1997.

On its current scale (approximately

4,000 persons), electronic monitoring contributes to an annual reduction of the Swedish prison population by between 350 and 400 places.

Two points of criticism were particularly highlighted in the evaluation mentioned above (BRÅ, 1999). Firstly, supervision in the workplace was inadequate - partly for technical reasons (the electronic monitoring is inoperative during working hours), partly for other reasons: the contact persons in the workplace do not necessarily report every infringement of the rules to the penal authorities. The evaluation study was critical that the principle of equality had not been observed. The rules of electronic monitoring were deemed to have been applied differently from region to region. For example, the unannounced monitoring visits varied between the different districts from 1.8 to 4.4 visits a week.

The judiciary criticised the fact that the final decision on whether to impose electronic monitoring fell to the correctional authorities and not to the court. Electronic monitoring was not, in their view, a special form of executing a prison sentence but a standard punishment. In its statement, the Justice Ministry stood by the current solution - above all out of practical considerations - but left the door open for an amendment to the law.

## 4 Further Extensions

As indicated in the introduction, electronic monitoring is not a politically disputed issue in Sweden. Hence it is no surprise that a range of ideas and proposals have been put forward for extending electronic monitoring - in some cases beyond the confines of criminal law. The following proposals are under discussion in Sweden.

*Extension to early release*

According to the American model, applications of electronic monitoring can be categorised by the "front door" and "back door" principle. Electronic monitoring serves on the one hand to curb entries into prison (the principle currently adhered to in Sweden) and/or to increase releases from prison. The "back door" principle thus entails that part of the prison term is served as a remainder period outside the prison, under electronic monitoring.

*Electronic monitoring of prison leave*

The Swedish penal system has long made use of a broadly drawn prison leave system. On condition that a positive cost-benefit analysis is produced, many are in favour of electronic monitoring but their motives are diverse. On the one hand, the leave granted to date can be better supervised; on the other hand, certain categories of prisoner who were previously unable to benefit from leave, or could do so only under great restrictions, can be given the opportunity to interrupt their sentences.

*As an alternative to imprisonment on remand*

Electronic monitoring is also recommended as an alternative to imprisonment on remand so long as there is no danger of concealment, and there is felt to be little risk of the offender's absconding.

*As a measure against persons (i.e. men) who breach the terms of an injunction*

In Sweden it has been permissible since 1988 for the prosecution service to prohibit a person for a limited period of time from visiting certain other persons, making contact with them or following them, insofar as it is likely that this person will commit crimes against the other person or harass them in any way. In the Swedish Justice Ministry, the legal and organisational basis is currently being

examined for the commencement of electronic monitoring of those who have repeatedly violated injunctions. According to investigations by the Swedish Crime Prevention Council this would be technically possible.

## 5 The Past and the Future

I would like to conclude this summary of Swedish experiences of electronic monitoring with a few speculative thoughts. In many ways the introduction of electronic monitoring in Sweden is reminiscent of the introduction of imprisonment during the first half of the 19th century. Both periods can be understood as times of radical societal change. At that time the industrial age was dawning; today it is the electronic age. The prison as a "spatial" form of control over convicts was something fundamentally new, just as electronic monitoring is today. Both are the expression of previously unknown technical innovations. Prison then and electronic monitoring now have not been issues surrounded by political dissent (unlike specific implementations such as the Auburn and Philadelphia systems). What prison has in common with electronic monitoring is that they incorporate both a progressive and a repressive potential. The prisons were welcomed and promoted by philanthropists as a humane alternative to corporal punishment, among other things. Long sentences and harsh penal measures (including isolation and beatings) were used to appease doubting hard liners. Electronic monitoring is prized today as a superior alternative to short prison sentences but can equally be used to step up repression. The introduction of prisons came at a time when new forms of formal social control were being developed. In the first half of the 19th century organized police forces came into being, institutional reforms were undertaken and state education was extended, to name but a few aspects. Modern developments in recent decades have been characterised by rapid progress of compulsory pre-trial measures, and Sweden is not alone in this. In parallel, a general breakthrough has been noted in non-penal areas with strategies for monitoring and recording general segments of the population - in private and in public - for instance, via camera and television monitoring, (electronic) records, user profiles, GPS systems and DNA techniques (see Wright, 1998).

Modern technology has brought about the possibility of comprehensive supervision of the individual citizen. In drastic terms, the electronic tagging of livestock is already a reality, and similar registration of citizens now only remains a question of political desirability. How long the introductory phase will last, and how all-embracing the ultimate result will be are questions that cannot yet be answered. However, electronic monitoring - in one form or another - will be a ubiquitous phenomenon in a few generations' time, exactly as prisons once became and still remain; this, to me, seems a near certainty.

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# CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES

*Somboon Prasopnetr**

## I. PRISON OVERCROWDING

Prison overcrowding is one of the major issues currently faced by many countries in Asia and Pacific region. In Thailand, for example, nearly 200,000 inmates are in prisons with a total capacity of only 80,000 persons. A sharp rise in the inmate population occurred between 1996 and 1999 when numbers doubled from 100,000 to 200,000. Among today's inmates, 25 percent or 51,039 inmates are involved in court processes or petitioning appeals. Another 11 percent are detained during the course of police investigations. Among the convicted inmates, 30 percent committed light offenses and have sentences of not more than two years. Other countries in Asia also have the same prison overcrowding problem, but may be different on the degree of seriousness. In some countries in the Caribbean Sea, the number of prisoners rose over 200 percent while the number of those in Western Europe is over 120 percent in recent years.

Problems as a result of prison overcrowding have been numerous. Prison overcrowding not only causes lack of space and facilities to accommodate prisoners, but also a host of other problems for prison administration. It causes strain on staff and effective administration. It impedes the vocational training and other correctional programmes. In some places, inmates have to wait upwards for three months on a waiting list to be admitted into educational or vocational programs because the number of inmates is too great. In many prisons, many inmates are unemployed and have nothing to do.

Proper classification and separation cannot be practicable in an overcrowding prison. If classification is to work properly, there must be some spare capacity in a prison so that inmates may be allocated according to their security rating and their treatment needs. Thus, under the overcrowding conditions it is impossible to implement any effective ways of rehabilitation of inmates. The job of just keeping large number of inmates in prison is in itself occupies all the prison officers' time and energy. Furthermore, the wide spread of contagious diseases in such circumstance is inevitable and the U.N. Standard Minimum Rules cannot be applied. These lead to the violation of human rights and dignities.

Prison overcrowding also causes tension and stress among inmates. There are many research studies supporting this notion. Mccain et.al[1], for example, indicated that high degrees of sustained crowding have a wide variety of negative psychological and physiological effects, including increased illness complaint rates, higher death and suicide rates and higher disciplinary infraction rates. Nacci et.al[2] also revealed that high density is associated with high rates of assaultiveness with the relationship being strongest in institutions housing young adults.

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[1] Q. Mccain, V.C. Cox and P Panlus, Effect of Prison Crowding on Inmate Behavior, University of Texas, 1980.

The causes of prison overcrowding is complicated and varies from nation to nation. The fact is that more people have been sentenced to imprisonment but there are not enough places in prison. This has resulted in prison overcrowding. The enormous number of people admitted to prison may be the result of an increase in crime, war on drugs, effective police and prosecution operation, and tougher sentencing. In some countries there is an unjustifiably large number of crime categories, such as drugs, in the criminal law for which long term imprisonment is a form of punishment. Thus, 60 percept of the inmates population may be sentenced for drugs related offenses. Moreover, the insufficient use of alternative forms of punishment which could be applied instead of imprisonment is another factor. In some countries, if such measures have been implemented, most judges still look toward punitive forms of punishment by using imprisonment.

In the United Kingdom and the United States of America, many non - custodial measures or alternatives to imprisonment have been widely used, the details of which are as follows:

1. Absolute and Conditional Discharge. This measure will be used for those who do not deserve to be punished or to be put under probation. For conditional discharge, the offender must not violate the conditions fixed by the court for not more than 3 years.

2. Binding Over. Instead of punishment the court may order the offenders to make a contract with a fixed amount of money which will be forfeited in case they do not come to court on the appointment.

3. Fines. This is another measure of punishment which the court can use instead of imprisonment when it is deemed fit.

4. Probation. Under this measure, the offenders will be released but they, have to follow the conditions fixed by the court and must be under the supervision of probation officers for not less than 1 year and not more than 3 years.

5. Suspended Sentences of Imprisonment. In case the court will imprison the offenders for not more than 2 years, suspended sentences of imprisonment may be used from 1 - 3 years.

6. Commital to the Care of a Fit Person, In case the offender is less than 17 years, the court may commit him to the care of a person who is deemed fit until he is 18 years old in order to avoid the bad environment which he is confronting.

7. Remission and Release on Licence or Parole. For those who are imprisoned for more than 1 month (except those who serve life sentences) they will be eligible for release after 2/3 years of their sentences have been served. Parole may also be granted by the Parole Board to those who have already served 1/3 of their sentences. But for those who serve life sentences, the Minister of Home Office is empowered to grant parole after discussing with the Lord Chief Justice, the judge who considers the case and the Parole Board.[3]

8. Community Service. This measure generally involves public service for nonprofit organisations. It usually involves the performance of unpaid

[2] P. Nacci, H. Teitelbeaum and J. Prather, Violence in Federal Prisons: The Effect of Population Density on Misconduct, National Institute of Justice, 1977

labor by the offender in an attempt to pay a debt to society, with assignments ranging from cleaning litter from roadsides and performing lawn maintenance on government facilities, to janitorial work in churches or schools, to building parks and playgrounds, reparing public housing and serving as a volunteer in a hospital or rehab center. The communities undoubtedly benefit from the thousands of hours of free labor, and the city government saves money by not having to jail some offenders.

9. House Arrest, Home Confinement or Home Detention. This measure requires the offender to remain within the confines of the home during specified times and to adhere to a strict curfew. Additional conditions, such as restrictions on visitors and the prohibition of drugs or alcohol use may also be stipulated. The offender is normally allowed to leave only for work and reasons such as grocery shopping, community service assignment and doctor appointments. However, the success of house arrest programs has been bolstered by the use of electronic monitoring devices which will enhance the level of supervision directed toward each offender. Electronic monitoring uses telemetry devices to keep track of an offender's whereabouts.

10. Day Reporting Centers. These are non-residential locations at which offenders must appear, daily to participate in programed activities and to work out a schedule detailing their activities outside the center. Offenders are also required to maintain frequent phone communications with center staff and to submit to random drug and alcohol testing.

11. Residential Community Corrections. These include halfway houses, pre-release centers, work furlough and community work centers, community treatment centers and restitution centers. Residents may live either part-time or full-time at such centers, depending on other conditions set forth by the court. These types of centers may be used as an alternative to sending an offender to jail or prison or may be a transitional stop for offenders just released from incarceration, to determine if they are ready to return to society.[4]

Apart from the lack of front-end options such as probation suspensions of prosecution and other forms of alternatives to incarceration, the lack of back-end options such as parole, pardon or sentence remission is also another factor for prison overcrowding. The insufficiency or the lack of back-end option to release inmates from prisons may be due to limited opportunity for early release or release on bail, or substituting imprisonment for a more lenient punishment. In Thailand, for example, there are many restrictions for parole application especially for those who are drug traffickers. Royal Pardon cannot be implemented as frequently as it used to be. Part of the factors for this restriction is the hardening attitude of the public including criminal justice personnel

[3] Home Office The Sentence of the Court: A Handbook of Courts on the Treatment of Offenders, (Her Majesty's Stationery Office, London, 1978) p.p. 9-26 and p.p. 38-54

[4] Norman A. Carlson, Karen M. Hess and Christine M. H. Orthman Corrections in the 21st Century: A Practical Approach, (An International Thompson Publishing Company, U.S.A., 1999) p.p. 157-163

towards crimes and offenders which is reflected in the demands for the use of more harsh punishment.

The most easy solution to prison overcrowding is obviously to build more prisons, but it is very expensive and is not the right way to solve the problem. However, many countries use this method by building more prisons year by year. Some countries may use similar methods by converting unused facilities or expanding current prisons in order to have more capacity. It is not surprising that more and more prisons have been built in Asia and the Pacific for the past decade. This solution presupposes the notion that the institutional treatment of inmates is the only effective measure to solve the crime problem. But it has been long proved that this is not true. The more we built new prisons, the more imprisonment will be used. In order to alleviate the problem, more alternatives to incarceration must be used, especially for those who are first time offenders or commit minor offences. Moreover, bail should be granted more for unconvicted offenders and imprisonment must be used as the last resort and for those who are habitual or professional criminals only.

At the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Vienna on April 2000, the Penal Reform International Organisation introduced a 10 point plan to reduce imprisonment. These points were as follows:

**1. Inform public opinion**

Increasing use of imprisonment is often blamed on public demand for punishment. Yet the public are often misinformed about how the system operates and will support effective non-custodial measures.

**2. Improve access to, and co - ordination within, the criminal justice system**

Increasing public access to the police, courts and prisons engenders public confidence and transparency. Co-ordinating and streamlining the work of the criminal justice agencies assists both efficiency and compliance with international human rights standards.

**3. Invest in crime prevention and crime reduction**

Problem solving partnerships between the police, other public agencies, businesses and communities can produce effective plans to reduce the risk factors which lie behind much crime drug misuse, family difficulties, school failure, unemployment.

**4. Divert minor cases from the criminal justice system**

Many cases can be effectively dealt with outside the formal criminal justice system.

**5. Reduce pre-trial detention**

In some countries as many as 75% of the prison population may be awaiting trial. Alternatives such as bail and regular reviews of cases can reduce pre - trial detention.

**6. Develop constructive alternatives to custodial sentences**

Courts need sentencing options that are effective and not just a *'soft option'*: without alternatives, imprisonment as a punishment of *'last resort'* becomes commonplace.

**7. Reduce sentence lengths and ensure consistent sentencing practice**

Sentencers need guidance to deter inconsistent sentencing practices.

**8. Develop, special arrangements for youth offenders that keep them out of prison**

Children in conflict with the law (under 18) should be diverted from the criminal justice process. A term of imprisonment should be strictly a measure of resort and for the shortest appropriate period of time.

**9. Treat rather than punish drug addicts and mentally disordered offenders**

Courts should be able to order treatment for those whose crimes are often committed to feed their addiction. Prison is not a suitable institution for mentally ill people.

**10. Ensure the system is fair to all**

Imprisonment impacts disproportionately on the poor, the dispossessed and minorities who face discrimination outside. Monitoring should take place at every stage of the criminal justice system to ensure that discrimination does not take place and that the efforts to reduce imprisonment suggested in this plan are made in respect of all members of the community.

In my opinion, the first recommendation on informing public opinion is very important. The public's demand for harsh punishment leads to longer sentences imposed by the courts and opposition to any kind of leniency in punishment. Thus, imforming the public about the advantages of non-custodial measures is necessary. However, recommendations concerning co-operation from, the courts to reduce pre-trial detention and to use more alternatives to prisons may long be expected in some developing countries. On the other hand, a law is needed to provide sentencing options for non-custodial measures and to require judges to use such alternatives unless there is an exception according to the law. Short term sentences should not be allowed to be imposed on inmates, rather probation or other measures of community - based corrections should be implemented.

In sum, the problem of prison overcrowding can only be alleviated by using more alternative measures to incarceration especially for those who are not habitual or professional criminals. Building more prisons is not an answer to the problem. In this connection, the amendment of the law to require judges to use such alternatives in case there is no exception is necessary especially in some countries where judges are prone to use only imprisonment as a main measure of punishment. Furthermore, making the courts responsible for speedy trial and expanding various forms of alternatives to imprisonment is also recommended. Lastly, the public should be well informed of the disadvantages of short-term sentence which will have bad effects on the offender rather than good ones. He has to lose his job, social status and family. Morever, he may have the tendency to commit more crimes in the future as a result of having an opportunity to learn the criminal career from his friends during incarceration. In this connection, the public should be informed of the advantages of community-based correction which have lower costs than incarceration while the offender's work, social status and family are not contaminated. This will reduce the public attitude of using only imprisonment in some countries.

## II. IMPROVEMENT OF PRISON CONDITIONS

It is recognized that inmates are human beings and they deserve to be treated with dignity and respect so that they can be resocialized to become more responsible people. In this respect, the improvement of prison conditions is very important for the rehabilitation process of the inmates. Overcrowding, lack of hygiene, un-sanitary

conditions, HIV and other infectious diseases, should not prevail in the prison. Inmates should be ensured the adequacy of medical and other services should be the same as outside including living condition. Furthermore, they should be provided with individual assistance and opportunities to develop their own potential with a view to reintegrate as normal citizens. Therefore, contacts with the outside world are an essential part of their reintegration into society.

Many countries in Asia and Pacific Region are now confronted with the issue of prison conditions. Prisons in these countries have been built for many years and usually are overcrowded. Thus, prison conditions in many countries in this region continue, to fall short of the United Nations and other acceptable standards. These problems are the main obstacles of the fulfillment of the Standards.

The United Nations Standard Minimum Rules for the Treatment of Prisoners constitute a landmark in the process of prison condition reform. They have had a significant impact on the law and practices of many countries in the regions. However, there are some problems related to the implementation of the U. N. Rules.

The major problem is overcrowding. Prisons in Asia, in general are overcrowded. This issue directly affects the prison condition and the implementation of the U.N. Rules. When more people are being sentenced to imprisonment accompanied by a decrease in the number of places in prison, the result is prison overcrowding and a deterioration in living conditions in prisons. Overcrowding may contribute to higher levels of violence and increase spread of illness such as AIDS, Tuberculosis and other infectious diseases. Classification of prisoners cannot be carried on because there are no places to segregate them. This problem also affects both institutional management and official satisfaction. Thus, under these circumstances any standards cannot be applied.

The social context is also important. For example, prison officials are generally affected by the public, social and political attitude. Particularly in the developing countries where aggressive feeling still prevails in the community, the group of old and unprogressive prison staff are mostly affected. It is impossible to pension them off and to recruit young progressive ones. The idea of arranging training courses for the old guards to assume new roles in progressive prison administration is found uneffective. Therefore, the aim to promote progressive treatment following the Standard Minimum Rules will need a rather long time to achieve. The administrators of prisons have to accept means of gradually helping old staff to pension off sooner and to replace them with new young progressive recruits.

Related to the problem of overcrowding is the lack of financial resources of many countries to upgrade the prison conditions. The lack of financial resources to build a new and modern prison to replace the old one. There is also a lack of funds to facilitate the implementation of modern correctional programs.

The fourth problem is the implementation of the U.N. Rules which may be too expensive. In many countries, not all of the Rules are applicable in all places and at all times because of the great variety of legal, cultural, geographical conditions and wealth. It seems to me that, if the Rules are too expensive, it is difficult for the poor countries to implement. In these countries the U.N. Rules may be overlooked owing to the shortage of budget to improve the living standards of inmates

and also to build standard prisons. Under this circumstance, the implementation of any standard rules cannot be expected. Prison is only the place to detain criminals while deteriorated living conditions are neglected.

The most important problem for the U.N. Rules implementation is the lack of mechanisms to encourage and enforce country members to follow. It has only paper - based reporting mechanisms which are not effective. Thus, every country should be encouraged to have supervisory mechanisms and regular inspection at national and local levels. Such mechanisms should be used by both governmental and non - governmental organizations.

From my conclusions, prison conditions are very important for prisoners' rehabilitation and human rights. They should be treated as normal persons, so their living conditions must not be different from those outside. To achieve the objective, many problems have to be eradicated.

1. The problem of prison overcrowding must be solved by using more non - custodial measures or alternatives to imprisonment or community - based corrections especially for those who are not habitual or professional criminals.

2. The U.N. Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations and other Standards should be trained to all prison staff including the administrators and the new recruits in order to gain cooperation for the implementation as much as possible.

3. The improvement of prison conditions should be regarded by the Government of each country as a major problem of development, In this connection, financial support should be granted to the concerned organisations for such matters. In most developing countries, prison or correctional work has been neglected or regarded by the Government as least important. This will surely impede the improvement of prison conditions since the budget will not be allocated.

4. Since the U.N. or other standards may not be suitable for all countries according to the difference in legal, cultural, geographical conditions and wealth as having been stated above, all countries should have their own suitable standards by using the U.N. and other standards as the framework. In fact, we cannot deny that there is no unique standards which can be used by all countries in the world.

5. In order to ensure the implementation of such standards or the improvement of prison conditions, all countries should be encouraged to have supervisory mechanisms and regular inspection by both governmental and non-governmental organisations at national and local level. The inspection organisations should be independent and can inspect at all times without informing beforehand. After the inspection, a report should be submitted to the related organisations for their remedies. Opening prisons to inspection and outside scrutiny promotes transparency and accountability and so better ensures that prison rules are put into practice and that prisons are safer places for all concerned.

## III. FOREIGN PRISONERS AND PRISONER TRANSFER TREATIES

Foreign prisoners incarcerated in other countries, is now becoming one of the most crucial issues facing correctional administrators all over the world. The increasing tourism industry, migrating for job opportunities, and the changing economic and political regime have increased the number of people travelling and working abroad. As a result, the numbers of people involved in crime related to drugs, illegal entry, credit card fraud etc., have increased sharply. These offenders are arrested and incarcerated abroad and have to face cultural differences as well as unfamiliar food and living conditions in foreign prisons. Moreover, they frequently face the difficulties in communication with prison officers and other prisoners as well as lack of qualified lawyers and inadequate medical care. Foreign prisoners, on the other hand, cause economic and administrative burdens for prison administrations in many countries.

One of the most effective methods to solve the problem of foreign prisoners is the prisoner transfer treaty. Although the treaty itself does very little in solving the problem of prisoners while they are in foreign countries, it does allow these prisoners to return home to serve the rest to their sentences. At present, there are many countries engaged in these treaties, both by multilateral and bilateral treaties.

### A. Multilateral Treaties

For multilateral treaties, a group of countries join together to make an agreement on transfer of prisoners. They agree to follow the same conditions and procedures. There are many groups of countries participating in multilateral treaties on transfer of prisoners. The Council of Europe Prisoner Transfer Treaty is an example. It has many countries, not exclusively for members of European states, that participate. The Organization of American States (OAS) Prisoner Transfer Treaty is another example that involves all countries in the North and South American continent. This treaty is different from other treaties in that the initial request for transfer can be started by either the sentencing state, or by the administering state.

The oldest cooperation in the enforcement of foreign penal judgement was among Arab countries. However, prisoner transfer treaties among them entered into force in 1985.

The Arab prisoner transfer treaty does not require the consent of the sentenced person for this transfer. The transfer is allowed if the following conditions are met;

a) the sanction imposed involves deprivation of liberty, the minimum term of which, to be served is no less than six months;
b) the penalty has been imposed for an offence for which extradition may not be granted;
c) the offence is punishable in the prisoner's home country with imprisonment of no less than six months;
d) both the sentencing and enforcing states agree to the transfer[5]

Perhaps the biggest number of countries involved in prisoner transfer treaties is the prisoner transfer treaty of the British Commonwealth countries. This treaty links upwards of 35 countries in all parts of the world. The prisoner transfer treaty among African countries involves 15 countries. Although the treaty provides for the extradition of both accused and

[5] Richard D. Atkins (ed) Prisoner Transfer Treaties: A Practical Guide, International Legal Defense Counsel, Philadelphia, Pennsylvania U.S.A. 1995

convicted offenders, it is also applied to the transfer of prisoners.

**B. Bilateral Treaties**

In case there is no available multilateral treaty, individual countries have to approach other countries for negotiating bilateral treaties. Thus, conditions and procedures for transferring prisoners of each country may differ from another treaty depending on the negotiation of the parties. Thailand, for example, has negotiated separate treaties with many countries. Each treaty is unique. The first treaty of prisoner transfer between Thailand and the U.S.A., was signed on October 29, 1982 and became effective afterwards. Today, Thailand has already signed treaties with many countries. The treaties that have been ratified and come into effect are the treaties with these respective countries:

| | |
|---|---|
| France | ; effective in 1985. |
| Spain | ; effective in 1987. |
| Canada | ; effective in 1988. |
| United States of America | ; effective in 1988. |
| Italy | ; effective in 1990. |
| Sweden | ; effective in 1990. |
| Great Britain | ; effective in 1991. |
| Finland | ; effective in 1992. |
| Portugal | ; effective in 1994. |
| Austria | ; effective in 1994. |
| Germany | ; effective in 1996, |
| Poland | ; effective in 1999. |
| Denmark | ; effective in 2000. |

To date, 230 foreign prisoners incarcerated in Thai prisons were transferred to their home land, and 5 Thai prisoners were transferred back to carry out their sentences in Thailand.

According to the Thai Legislation of Procedure for Cooperation between States in the Execution on Penal Sentences. B.E. 2527 (1984), the general principle of prisoner transfer is based on:

1. A person sentenced in the territory of one party may be transferred to the territory of another party.
2. A transfer of prisoners should be effected in cases where the offense giving rise to conviction is punishable by deprivation of liberty by the judicial authorities of both the transferring state and receiving state.
3. The offender is not sentenced in respect of an offense under the law of Thailand:
   - 3.1 against the internal or external security of the state;
   - 3.2 against the monarch, his consort or his sons or daughters; or
   - 3.3 against legislation protecting national art treasures.
4. The sentence imposed on the offender is one of imprisonment, confinement or any other form of deprivation of liberty in any institution.
   - 4.1 for life;
   - 4.2 for an indeterminate period on account of mental incapacity, or;
   - 4.3 for a fixed period of which at least one year remains to be served at the time of the request for transfer.
5. The offender has served in the transferring state any minimum period of imprisonment, confinement or deprivation of liberty stipulated by the law of the transferring state; (For life sentences, he has to serve 8 years and for other sentences, he has to serve 4 years)
6. The judgment is final and no further legal proceeding relating to the offense or any offense is pending in the transferring state;
7. The transferring and receiving states and the offender all agree to the transfer. In transfering the prisoner, all expenses will be met by the receiving state.

### C. Problem of Prisoner Transfer Treaties

There are many advantages of prisoner transfer treaties. First, they facilitate the social reintegration of the prisoner by permitting persons convicted of a crime in one country to return to complete their sentence in their familiar living and cultural conditions. Prisoner transfer treaties also remove an economic and administrative burden for prisons in many countries. Taking care of foreign prisoners causes a lot of prison administration problems in term of communication with prisoners and provision of food and medical care. Prisoner transfer treaties, however, have some difficulties in implementing. This is due to the difference between the law and penal sanctions of the participated countries. Some sentencing states, for example, may have severe punishment for drug offences while the administering state has less severe punishments. In such cases, prisoners may be transferred to administering countries just simply to be released earlier because the receiving state is empowered to enforce the rest of the sentence according to its law. For example, a prisoner in the U.S.A. will be eligible for parole after 1/3 of his sentence has been served while in Thailand he has to serve 2/3 of his sentence. In another case, prisoners were transferred to convert the sentence term in court of the administering countries. The Council of Europe suggests that if the sentence imposed was longer than or different in nature from the sentence which could be imposed for the same offence in the home country, it would be adapted to the nearest equivalent sentence which was available under the law in the home country without being longer or more severe than the original sentence. Two potential difficulties can be seen with this approach. Firstly, the foreign prisoner will not know the length of his sentence until transfer and therefore may find it difficult to decide whether or not to apply. Secondly, it is probable that in some cases the period already served in the foreign country will be equal to or greater than the converted sentence in the home country with the result that the transferred prisoner would be immediately released. This is likely to undermine confidence in the integrity of the transfer scheme and may even be seen as interfering with, or criticising, the criminal justice system of another country.[6] While there are some difficulties related to the implementation of the treaties, prisoner transfer treaties bring about international cooperation and understanding and should be promoted to expand to countries worldwide.

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# PARTICIPANTS' PAPERS

## CRIME PREVENTION: CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES

*Muhoro Peterson Kamunyu**

### I. INTRODUCTION

In the recent past, the correctional services in Kenya have been in the print and electronic media spotlights. They have received critical appraisal that sometimes has been outright negative. They have been as it were stripped and laid out for very close scrutiny:

> "Naked inmates shock judges in prison visit" screamed the East African Standard of 4.11.99 front page. "Woman jailed for seven years for stealing husbands cow" - Daily Nation - 4.11.99

The editorial leadership of the print media has also argued against the excess and the rot that is currently to be found in correctional institutions. The concern shown leaves one wondering whether all these shortcomings have been there all along with nobody noticing or it is the old fashion of bashing public institutions with correctional institutions providing an easy target. The following discussion is therefore an attempt to add to the debate by objectively looking at the critical issues in this drama. I have therefore examined the following areas: -

i) Difficulties in developing effective rehabilitation programmes in prisons.
ii) The current and cumulative logistical problems faced by correctional administrators.
iii) Suggested remedial strategies and their limitations.

Ideally a man is born free and the sojourn in life is a social drama in pursuit of enjoyment of that freedom. The social norms from onset reinforce this being "free" status. This is so until the long arm of the law of the land catches up with transgressors and the law breakers and for once the freedom is taken away. The punishment as often is the case - is automatic exclusion and separation from the rest of society and being placed under charge of a correctional institution. Within the institutions are well rehearsed and regimented roles, rules and regulations. The offender of necessity has to adjust to the new status and fit into a new life - life inside the prison walls. This process of fitting into a new life is gradual, thorough and ends up abolishing the individualism and privacy - values that one has long been socialised into.

Prisons by design are places where offenders are sent down as punishment. They are meant to epitomize both the retributive and deterrence principles of sentencing. The architecture and social aloofness further reinforces this feeling of punishment. Also prisons are places where hardships are inevitably occasioned whether by design, deliberate or otherwise. The deprivation of personal liberties, the denials of the basic choices in life, the withholding and withdrawal of basic privileges. All the basic issues that find expression in ordinary life are controlled and sparingly provided.

Prisoners soon learn the art of conforming to the expectations of custody. Prison stay only makes sense depending on ones ability to quickly adjust and

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assimilate the social life in prison. In so conforming, the offender is able to cope with the pains of imprisonment.

Adjustment by offenders translates itself into various social relationships. Decision making on the most basic chores and routines is regimented. Orders are issued out and obedience extracted. Soon enough an offender is institutionalised into a mechanical actor to programmed commands. The more an offender assimilates into the social life in prison, the more he/she becomes dependent on the favours conferred by correctional services.

The institutionalisation bonding on the offender creates dependence complex that negates any long-term rehabilitation efforts. Prisons therefore looked at from the theoretical framework have in built such heavy odds that deny offenders an opportunity or a chance with reasonable probability for rehabilitation. As is often quoted, it is not possible to rehabilitate offenders in situations of captivity.

## II. CURRENT ISSUES IN PRISONS

The issues that have brought prisons into close focus relate to:

- Over-crowding in prisons
- Old and dilapidated prisons

### A. Overcrowding in Prisons

There are 78 prison establishments in Kenya. Their capacity is indeterminable and they are stretched to accommodate anybody convicted to serve a prison term. It is however generally agreed that with between 33,000 to 40,000 daily average prison population; the prisons in Kenya are in some cases 100% - 150% overcrowded.

The prisoners are:

8,000 - 10,000 - in custody
- awaiting trial
- awaiting sentence or
- awaiting repatriation

25,000 - 30,000 - convicted and sentenced prisoners.

The growth of prison population has been rapid and the trend has been upward with no peak in sight. This could partly be accounted for by the actual population growth which reflects that up to 46% of Kenyans are aged 24 years and below.

It is also true that by tradition and due to absence of effective and extensive non-custodial sanctions, imprisonment as a custodial sentence has been extensively utilised by the courts. Unlike any other sentence, custody has a high public profile relative to other sentences. With a relatively young population, it is predictable that potential for more people being sentenced to prison in future is high - very high indeed given the population living below poverty line.

The rapid population growth; a relatively large proportion of youthful population, a poorly performing economy; and the courts preference for custody sentence and we have an ideal recipe for prisons overcrowding. Prisons over-crowding means the facilities meant for few are increasingly stretched to cater for more and more prisoners. It is a common saying that prisons never fill up. What is a fact is that physical utilities in prisons are over-used, over utilised, over-stretched and the consequent wear and tear is fast and evident. Prisoners are therefore left to share minimum of everything - food, clothing, sleeping space, exercise space, and welfare is limited to the bare minimum. Overcrowding generally prevents realisation of any planned utilisation of prisons resources, facilities and leads to otherwise uncalled for restrictions. This is the unending cycle of

overcrowding leading to decrease resources leading to overcrowding in prisons.

**B. Old and Dilapidated Prisons**

Majority of the prisons institutions in use today were built in 1920's, 1930's and 1940's. They were built during the hey days of colonial authority in Kenya. Today, the same prisons are found in many districts - same architecture, sagging walls and a perimeter barbed wire fences.

Such physical facilities incur heavy maintenance costs, are problematic to maintain in hygienic conditions as demanded by public health act and in most cases are a public eye sore. They are degrading settlements to live in both for the prisoner and prison officer. The obvious solution to these old prison institutions is to embark on building new modern prisons. This however is an expensive venture and does not attract goodwill in times of scarce resources allocation.

Overcrowding in our prisons coupled with old dilapidated prison buildings leads to: -

i) Unhygienic living conditions which often lead to outbreak of communicable diseases. The incidence of skin diseases, water and air borne diseases is symptomatic of this problem.
ii) Underfed, malnourished and weakened prisoners who are likely to succumb to illnesses.
iii) Poorly clothed prisoners.
iv) High incidences of aggressive tendencies of prisoner to prisoner or prison officer to prisoner.

Given such heavy odds, it is a difficult task for correctional administrators to mount effective rehabilitation programmes. This however does not mean that efforts are not made. Indeed the picture is not as gloomy as it has been printed so far.

## III. CURRENT PRISONS PROGRAMMES

**A. Prisons Farming Activities**

Kenya is basically an agricultural country. The majority of the population derive their livelihood from agriculture and agricultural related activities. Land as a resource is therefore central to majority of Kenyans social-economic engagements. The prisons service controls a sizeable land estates - some of it in prime agricultural areas. Farming in prisons is therefore potentially a major activity for the prisoners. A lot of efforts are made to produce basic foodstuffs viz; maize, beans, rice, bananas, fruits, vegetables. Livestock farming is also encouraged especially in low rainfall places. A combination of unpaid labour, rent free farmlands and trained prison officers should ideally produce enough to create a surplus for the market place. The results in appropriation in aid realised however reflect dismal returns.

In spite of this, prisons farms have a potential to feed the prisoners and realise surplus for sale. Such proceeds could in turn be ploughed back into welfare activities that could lessen the negatives on prisoners' lives and brighten the dull correctional lifestyle.

**B. Prisons Training Activities**

Our prisons are reknown for producing top class products. The carpentry workshops, weaving tailoring, masonry, blacksmith, printing are some of the skills taught to prisoners. Indeed some of the products from prison industries compete favourably in the market place. In 1999, prisons stand in Nairobi Agricultural show was awarded first position against stiff competition. From the major prisons, medium and small workshops keep the

prisoners busy. With unpaid convict labour, qualified instructors and a controlled environment, prisons produce goods whose value would offset any cost, however, prison industries do not generate any sizeable revenue - why is this?

A reasonable guess is: -

- demotivated prisoners
- lack of marketing skills by prison authorities for their products
- wastage occasioned by training

Majority of the prisoners have left custody with improved skills on various trades. It is however doubtful whether they engage in the same trades once out of prison. One reason is that majority of prisoners learn these trades and perfect their skills through force of circumstances and not through their voluntary individual choice. The interest is therefore sustained as long as they are in prison.

**C. Prisons Spiritual Guidance and Counseling**

The Kenya Prisons spiritual guidance and counseling services are now recognised as having positive inputs. Based on the religious crusade of reclaiming lost souls of the sinners/offenders, all the major religious denominations have set up base in prisons and do provide religious teaching, guidance and counseling services to prisoners. In some instances the prisoners do have character change from criminality at least as they confess while in prison. Whether they maintain the same positive characters after their sentences are over is another issue.

It is true, one dimension of any person's culture is the religious believes and values attached to it. Without even compounding rehabilitation, it is possible to appeal to the prisoner's soft spot and if systematically reinforced genuine character change is possible. Such spiritual appeal to be effective has to be launched, managed and run by existing community religious groups rather than being tied to the regimented, correctional programme.

**D. Prisons Welfare Service**

The Prisons welfare services were established to create a linkage between the prisoner and the outside world. The welfare officers are meant to keep bridges between the prisoners and their families or any other relations. Hence the welfare services is staged and run by civilian staff. The scope, effectiveness and efficiency of welfare units in prisons are doubtful. Often times, the greatest problem is lack of funds to sustain welfare activities that are meaningful and of benefit to the prisoners.

There is also the old issue of welfare officers who are advocates of generic social work practice, principles and ethics of social work being relegated to work within the limits of prison walls. Whatever the good intentions there remains conflict of interests. For example the principle of confidentiality is difficult to keep. What information is one duty bound to disclose to prison authorities?

It would be better perhaps for the welfare units to operate from outside the confines of prison walls i.e. creating rapport of the community so that the eventual prisoners resettlement is easy and smooth.

These and many other issues continue to hamper the welfare services in prisons.

## IV. OTHER SENTENCING OPTIONS

Any discussion of the merits or demerits of custodial sentences, the pros and cons of imprisonment and advantages or disadvantages end up looking at the available alternatives.

These alternatives are;

- Diversion strategies during the pre-trial stage.
- Non-custodial sentencing options during the pre-sentence stage.

**A. Diversion**

Criminal justice process starts from arrest of suspect, through arraignment in court, trial conviction or otherwise, sentencing and punishment. Diversion refers to deliberate intervention mechanisms put in place to offload suspected offenders from reaching the final stage of conviction and sentence. The diversion could be facilitated by the police-arresting arm of the Government, the prosecutors or the trial court. At any stage during the process, the preferred charge can be terminated and the suspect let off with a warning, caution or an order to keep peace over a given time. The objective of any diversion is to stem off categories of petty persistent offenders, youthful offenders, misdemeanour range of offenders and other nuisance offenders from clogging the criminal justice administration. All these categories when aggregated amounts to quite a sizeable number who would otherwise be tried with a possibility of conviction and most likely imprisonment.

Diversion is therefore a useful strategy if properly implemented. So far however, the statistics available reflect a negligible practice. It is therefore not uncommon for juvenile offenders to be overcrowded in approved schools, borstal institutions and other remand centres. This would not be the case if diversion was used to a significant level.

**B. Non-Custodial Options**

Non-custodial sentences range from fines and other monetary penalties, conditional and unconditional suspended sentences, probation orders, community service orders; each of which is outlined hereunder:

i) Fines:

The use of monetary penalties is now recognised as expedient and processes a large proportion of offenders in any given court. The monetary penalty as a penal sanction assumes among other things that:

"an offender is penalised proportional to his/her earning capacity"

Often however, the fines are dispensed by magistrates and are dependent on subjective discretionary considerations. There are not set guidelines to standardise levels of the fines awarded and therefore avoid excesses. As mentioned earlier, majority of the population are living below the poverty line. Add another lot who are in economically precautious position and the proportion who cannot afford to pay fines increases. To compound the fine as a viable option is the fact that is given as an alternative to imprisonment thus:

"So much to be paid or in default so many days/months/years to be served in prisons"

Majority of such offenders are unable to redeem themselves and end up in prison. Fines as a sentence remains the most misapplied and inconsistent in penal intention. A common offence of stealing for example attracts a fine whose range and variation is so wide that it is unjust. It is however the case that fines account for the largest proportion of courts sentences - over 70% in some cases in any given year. Assuming an effective and efficient fines collection and management, more offenders could be cleared using this option than is presently the case.

ii) Conditional and Unconditional Discharges

The courts even after declaring a guilty verdict have the option of awarding conditional or unconditional discharge depending on each case. The courts have wide discretionary powers in deciding conditional or unconditional options. This is an opportunity the courts could use to discharge all those found guilty but who have proof of ill health or terminal illnesses. Rather than load prisons with sickly prisoners; the courts could use their discretionary powers to allow such people to be taken care of by their relatives and suspend all such cases with other orders as each merits. More importantly, the courts could demystify conditional and unconditional discharges by offering reasons behind such decisions in an open court to stem off speculative concerns by the public.

As it is the case, unconditional and conditional orders of the courts are sparingly utilised and the overall impact is not significant. The contention here is that these orders can meaningfully be used especially if for all such cases there is an accompanying pre-sentence social report.

iii) Probation Orders

Probation orders are empowered under the Probation of Offenders Act, Chapter 64 - Laws of Kenya. This act was passed on 12th December 1943 and probation services were formally in use from 1946. Since then, the courts have utilised probation orders as an alternative to custodial sentencing. Overtime the proportion of probation orders relative to custody has stayed as a ratio of "one probation order for every four to five prison sentences".

The structure put in place to implement this non-custodial court order covers the whole range of offence spectrum and is established in the whole country with a probation office existing alongside a court establishment. This arrangement ensures that the court orders requiring information are expediently attended to.

The Probation services has been providing this information as reflected in the following statistics: -

| Year | Enquiries Conducted | Order Made | Percentage |
|---|---|---|---|
| 1995 | 10,507 | 7,624 | 75.6 |
| 1996 | 10,497 | 7,804 | 74.3 |
| 1997 | 9,652 | 7,204 | 74.6 |
| 1998 | 9,903 | 7,274 | 73.5 |

Provision of information to courts is a core function and a major pre-occupation of probation officers. Expenditure incurred gathering information accounts for up to one third of the time and other resources available to the Department.

For any social report submitted to court, it is entirely left to the discretion of the court to make a probation order or any other sentence. To release or not to release is once more the discretion of the courts. The concurrence level between the recommendations made in reports and eventual sentence given is 60% - 75%. This is an indication that the social reports do have a bearing on sentencing.

The cases awarded probation orders undergo compulsory, mandatory supervision period of six months to three years depending on the circumstances of each offender. This supervision period confers necessary contact between the probation officer and the probationer. Coupled with the conditions listed in the order, probation officer is able to use subtle social work skills to extract conformity and correct behaviour.

The contact period is therefore the basis of social work arrangements that are

deemed useful and beneficial to the probationer. Probation orders as practised have the following advantages going for them:

- Probationers remain based in the community during the duration of the order.
- Probationers stand to benefit from any rehabilitation efforts designed to help overcome wrong behaviour.
- Average cost of supervising probationers in the community per client is very low compared with custody.
- Probationers are prevented from contamination with criminals and the stigma associated with imprisonment.
- Probation orders are made in respect of any offender regardless of sex, age or religion.
- Presently, the Department is handling a total workload of:

| Men | Boys | Women | Girls | Total |
|---|---|---|---|---|
| 7,931 | 2,097 | 2,016 | 400 | 12,444 |

With a workforce of 300 probation officers, this translates into a ration of 40-70 probationers per probation officer. Comparatively therefore probation orders are easier to manage, relatively cheaper in terms of cost-effect and gain social acceptance readily when the community is properly sensitised.

The following tables ably demonstrate the above conclusion:

a) Costs:

| Staff Strength | No. in Establishment | Percentage |
|---|---|---|
| Ministry | 22,451 | 100% |
| Prisons | 15,283 | 68.1% |
| Probation | 760 | 3.4% |
| Others | 6,403 | 28.5% |

b) Holding Capacity:

Daily average - Prisoners - 30,000-40,000

Daily average - Probationers - 12,500-15,000

Ratio:

One probation officer for 40-70 probationers

One prison officer for 3-7 prisoners

c) Daily average costs:

About Kshs. 130/ per prisoner per day

About Kshs. 35/ per probationer per day

d) Budget allocation per annum:

Prisons - 65%-68%

Probation - 4.5%-5.5%

iv) Community Service Orders

The Community Service Order Act No. 10 of 1998 became law on December 31, 1998. The Minister proclaimed it operational on July 23, 1999 and it was formally inaugurated on December 29, 1999.

The basic features of the new act are that:

- It is a non-custodial sentence of the court.
- It will normally attract the less serious offences that lead to offenders being imprisoned.
- Offenders will submit to provide unpaid labour in the community.
- The supervising officer will be a volunteer member of the community.
- The sentence will be judicial driven.
- The probation officer will be the linkman between the courts, the offenders, and the volunteer.

This programme is new and its impact

as an alternative to custody is potentially promising as the initial statistics indicate. Today over 4,000 offenders have gone through this programme and presently there are 1,500 CSO on supervision and performing unpaid work.

v) Aftercare Services

The aftercare work with offenders is technically difficult. It involves trying to resettle offenders who have already been in prison. These ex-prisoners are released earlier by quasi-judicial recommendations made by various discharge boards.

The aftercare categories are:

1. Borstal inmates discharged for one or two years supervision.
2. Psychiatric criminal offenders released but subject to supervision.
3. Long term prisoners released but subject to supervision.

These three categories account for 600-1,000 daily average per annum. Probation Service therefore constitutes a key role in non-custody management. The data available shows that the workload stands at:

1. Probation orders on supervision 12,444
2. Community service orders on supervision 1,500
3. Aftercare supervises 800

Total on supervision (average) 14,744

Ratio of officer per supervisee is greater than 50

The capacity to hold more supervisees is already stretched to the limits and any more added workload would entail injection of more personnel and more resources especially reliable transport and office accommodation.

## V. SUGGESTED WAY FORWARD

The administrative structure for an effective and efficient administration of justice already exists. The process is well laid out and has been rehearsed often enough to provide confidence in the public and trusted working arrangement. It is however the case that the justice that is supposed to reassure the victim and the villain ends up being suspect and cause for public dissatisfaction. This has led to unwarranted over use of prisons and the consequent overcrowding.

The following suggestions could remedy the situation if applied with utmost good faith by all stakeholders: -

a) There is need for more use of non-custodial combination orders so as to reverse the monopoly currently enjoyed by custody orders.
b) There is need to devise a proportional and pre-determined fines tariff with consideration for ability to pay.
c) There is need to separate the run on the mill petty persistent offenders who engage most of the resources. This will redirect efforts to combating serious crime.
d) There is need to use more diversion strategies for the untried suspects and other low rated offences. Attention and resources to be given to combating crimes such as pollution of environment, drugs offences, frauds, white-collar crimes and other felonies.
e) There is need to use more community strategies in crime prevention and treatment of offenders. Probation orders, community service orders, combination orders, fines would be

effectively utilised in this direction.

f) The courts to be sensitised to use more pre-trial and pre-sentence social reports as provided by probation officers and others. The reports serve to inform the courts on any given offender appearing before the magistrate.

g) There is need for accelerate use of early release programmes and hence cut back on the overall length of sentence served in prison.

Non-custodial options have elsewhere been demonstrated to work given the right approach by stakeholders. There is need therefore to have the priorities right in the area of criminal justice administration.

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# CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES

*Zulkifli Bin Omar**

## I. INTRODUCTION

It is the general consensus that the fundamental objective of corrections is rehabilitation, whether such institutions are prisons, juvenile centers and other types of correctional institutions. Like many other countries, Malaysia has been strongly influenced by the so-called treatment and rehabilitation concepts, and strongly believe in the possibility of being able to treat and rehabilitate offenders. The treatment process within the prisons is clearly directed towards the preparation for an eventual return to the community as law abiding and socially productive citizens. Their treatment should spell out principles of legality and humanity, and this conforms in almost every aspect to the United Nations Standard Minimum Rules (Treatment of Offenders) 1954 and the Prison Rules.

A reasonably high economic growth sustained by our country for the last several years has furnished and coloured the prisons population. Drastic social and economic changes has created a great impact on the annual admission of correctional institutions. The steady flow of foreign workers besides providing and fulfilling our manpower needs for the country's growth and also contributed significantly and has been a continued upward pressure in the prison population. This issue of over crowding has always been the priority agenda in our prison reformation. The sudden influx of HIV/ AIDS infected prisoners have pressured the management to accommodate some changes in policies of prisoner daily management.

Some major contemporary issues resulting from these social, economic and environmental changes facing correctional administrators include the changing trend in prison population, overcrowding in correctional facilities, improvement of prison conditions, increase of drug-related offenders, shortage of effective treatment programmes and the small issues that can easily be resolved by prison management.

## II. RELATIONSHIPS BETWEEN THE CRIMINAL JUSTICE AGENCIES IN MALAYSIA

The administration of criminal justice in Malaysia is enforced and administrated by three different agencies, that is the Police (Investigation & Prosecution), the Judiciary (Criminal Justice Process) and the Prisons (Correctional Center for Offenders). These agencies are separated in the sense of administration and jurisdiction, but they are related in their functions. This relationship can be seen whenever there are reported crimes; it becomes the responsibility of the police. When the police make an arrest, a decision is made on whether or not to seek formal charges against the arrest suspects. The police may release a suspect without charges if they consider their evidence insufficient or admissible; or if the suspect has established an alibi; if the suspect agreed to be an informant; if the victim or key witnesses show reluctance to follow through on prosecution; or for other reasons. When the police do seek formal charges, the prosecutor must decide

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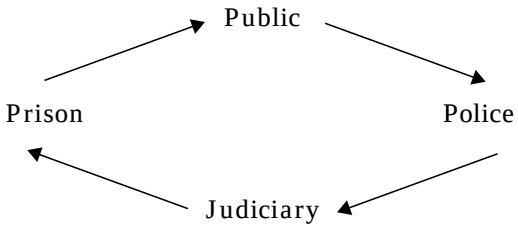
whether to issue an information or seek a bill of inducement from a grand jury. When a case is prosecuted, the guilt or innocence of the defendant must be determined. A preliminary hearing of some sorts is usually held first, where the probable cause supporting the charges is reviewed and defense motions concerning the admissibility of the prosecution evidence are considered.

When a person is sentenced, additional decisions determine whether that sentence will be served in prison or a rehabilitation center. Decisions are also made about what kinds of treatments the convicted person should undergo. In the case of a person sentenced to prison important initial decision concerns the kind of institution to which he will be sent. The principal distinction is among minimum, medium and maximum-security prisons. Generally, the higher degree of security, the less comfortable the accommodation and the more limited the freedom enjoyed by inmates. The prison administration within the framework of its penal legislation classifies the prisoners and determines the treatment programm for them. Therefore, we can summarize that the enforcement and the administration of the criminal justice system in essence are to arrest, sentence and rehabilitate the same offender. The objectives of the Criminal Justice System in Malaysia in relation to law-breakers are that it removes dangerous persons from the community, it prevents others from criminal behavior, and it offers the society an opportunity to attempt to transform law-breakers into law-abiding citizens. As said earlier, these objectives are achieved by a close working relationship between the Police, the Judiciary, and the Prisons.

## III. THE ROTATION OF THE CRIMINAL JUSTICE PROCESS




### A. The Malaysian Judiciary

The Malaysian Constitution provides for the exercise of power by the legislature, the executive and the judiciary. The judiciary plays an important role in this balance of power. It has the power to hear and determine civil and criminal matters, and to pronounce on the Legislative and Executive Act. To enable it to perform its judicial functions, impartially, the judiciary is relatively independent.

The judicial power of the country is vested in the Federal Court, the High Courts and the Subordinate Courts. The Head of Judiciary is the Lord President of the Federal Court. He has direct supervision over all courts, which are headed by an administrative head, that is the Chief Registrar.

### B. The Malaysian Police Force

The Malaysian Police Force headed by the Inspector General of Police is charged with the responsibility of not only preventing crimes but also performing a variety of general duties for the protection of the general welfare of the people. They are also responsible for investigating crimes, detecting and identifying offenders and prosecuting criminals in courts. Besides all those, the police also have to perform other duties including patrolling coastal water and rivers, jungle operation, tracking down undesirable elements, investigating the smuggling of drugs, arms and other protected items through the

borders ensuring the safety of passengers traveling in the nations railway and airline system.

### C. The Malaysian Prison Service on the Treatment and Rehabilitation of Offenders and Juvenile Delinquents

#### a. Background

In Malaysia before the Second World War, the penal establishments in various Malay States, Straits Settlement (Penang, Singapore and Malacca) and Sabah and Sarawak were directly under the responsibility of the respective states and settlements. Each of which had its own prison regulations. The policy in all prisons was basically punitive in nature, i.e., making the life of the prisoner hard and unpleasant. It was hoped that such conditions would operate as a deterrent to crime. In 1949, a centralized administration was set up and a Commissioner of Prisons appointed to exercise control over the administration of all prisons. From the year 1950 onwards, in keeping with modern trends of penal development the deterrent theory of punishments was replaced by the reformative theory and this had an important impact on the department. In 1953, there was a repeal of the seven separate and different prison enactment's which were replaced by prison ordinance and prison rules, which were based on the modern concept of human treatment of prisoners and juvenile delinquents. The replacement by the new legislation does not cover the states of Sabah and Sarawak. These two states still practiced their own ordinance and rules until the year 1995, when the Prison Ordinance 1952 was replaced with the new legislation called the Prison Act 1995. This new piece of legislation is a landmark in the development of the penal system in the country. For the first time, it became possible to apply uniform penal methods throughout the country and to ensure consistency of administration in all the penal establishments in all the states.

The Prison Department is responsible for the administration and management of 39 penal establishments in Malaysia including the Prisons Rehabilitations' Centers, Drug Rehabilitation Centers and Advanced Approved Schools for juvenile delinquents. The Minister of Home Affairs is the central and final authority for policy making and administration relating to the treatment of offenders in Malaysia.

| INSTITUTION | TOTAL |
|---|---|
| Headquarters | 3 |
| Prisons | 25 |
| Rehabilitation Centers | 3 |
| Detention Centers | 1 |
| Advance Approved Schools | 5 |
| Prison Colleges | 2 |
| Total | 39 |

The Director General of Prison is responsible to the ministry for the direction, supervision and overall control of all penal establishments in Malaysia. At the Prison Headquarters in Kajang, Selangor, the Director General is assisted by a Deputy Director General and various head divisions at the regional level, each penal institution is headed by a Director or Senior Superintendent of Prison depending on the size and inmates population of that particular prison. They are responsible to the Director General of Prison with regard to the administration, security of institution as well as the rehabilitation programmes of the inmates.

#### b. Roles and Functions of Malaysian Prison

The purpose and objectives of this paper are to enlighten the role of Malaysian Prison as a main correctional body in the Criminal Justice System. Generally the objective and functions of the Malaysian

Prison Department are:

i) To protect the public by segregating the offenders from the community as ordered by the courts.
ii) To effectuate judicial decisions by holding prisoners in custody until their actual times of release.
iii) To provide a secure, orderly and humane treatment environment for offenders in department custody, and
iv) To rehabilitate offenders so that they may regain their self-respect and self-identity and thus eventually return to their community as law-abiding and socially productive citizens.

In order to ensure these objectives and functions being successfully achieved, various steps have been taken by the institution. In other word, this is where the Prison Department plays their role.

The main principles in treatment of the prisoners are as follows:

i) Discipline and order shall be maintained with fairness but firmness, and with no more restriction than is required for safe custody and to ensure a well ordered community life.
ii) In the control of prisoners, prison officers should seek to influence them, through their own example and leadership so as to enlist their willing co-operation; and
iii) At all times the treatment of convicted prisoners shall be such as to encourage their self-respect and a sense of personal responsibility; so as to rebuild their morale, to inculcate in them habits of good citizenship and hard work, to encourage them to lead good and useful life on discharge and to fit them to do so.

In Malaysia, particular attention is paid to the treatment of prisoners with the objective that persons deprived of liberty should be treated humanely, and enjoy basic rights and as far as possible, conditions of living in accordance with the dignity of a free man outside the prison wall. To prove this, upon admission to prison, a great deal of trouble is taken over each individual prisoner whereby each of them is documented and a dossier is opened for him.

Information about him, like social background, antecedents, physical appearance, offense, sentence, etc. is recorded in the dossier, admission registry and other books. After being medically examined, the Reception Board headed by the Officer-in-Charge or his Deputy interviews the inmates, ascertains their interests, classifies them and assigns them an appropriate form of treatment which is deemed best suited to them.

**c. Vocational Training**

Rule 74, Prison Rules 1953 stated that, "Every prisoner shall be required to engage in useful work, all of which so far as practicable, shall be spent in associated or their work outside the cells, and no prisoner shall be employed on any work unless he has been certified as fit for that type of work by the medical officer."

In the Correctional System of Malaysia, prison industry forms an integrated part of the programm of rehabilitation of offenders as well as an important instrument for providing employment for inmates. The objectives of this trade are:

i) To provide the offender vocational training with a level of training and skills appropriate to his aptitude and capacity that would enable him to compete for related and satisfying employment after release.
ii) To give the offender confidence,

satisfaction and self-respect so that he may adjust easily to normal society after release.
iii) To cultivate good working habits among offenders.

Carpentry, tailoring, metal work, laundry, handicraft, rattan-work, printing, engine-repairs are some trades taught in prison. Besides practicing this trade, in 1981, Malaysian Prison Department moved to a new concept of vocational training called "Joint-Venture Scheme." Under this scheme, the Prison Department supplies a selected number of inmates and workmanship premises (within the prison) and the private companies involved provide machinery, raw materials, trade instructors, expertise and are also responsible for the marketing and sale of the products.

The participating firms are also required to pay for the rental of the prison workshops, water and electricity bills, insurance coverage for inmates and regular salaries to inmates who participate in the scheme.

The objectives of this new approach are:

i) Reduce government expenditure and increase revenue.
ii) Provide inmates the opportunity to be trained in the use of modern machinery and acquire the technical know-how.
iii) Reduce technical training instructors and administrative work.
iv) Non-involvement in marketing.
v) Increase the earning of inmates.
vi) Provide more vocational training facilities for the increasing prison population.

Industries pursued under the Joint-Venture Scheme are wood-cane, furniture, and knitting of sweaters for export, electronic gadgets, carpet inlays and others. Since its introduction, the Joint Venture approached has proved to be a success and inmates have benefited tremendously from it. For this reason, the Prison Department is planning to expand this scheme to all prisons.

## IV. TRENDS IN PRISON POPULATION

### A. Prison Capacity

There should be a balance between the number of prisoners and the facilities to accommodate them. Any imbalance will create severe impacts on the total rehabilitation programm. Currently we have 34 penal institutions with a comfortable capacity of 23,884 prisoners. However the prisoner population as per 2 March 2000 was 25,029 (9.54%) that is above the comfortable capacity.

**Total Number of Prisoners as per 2 March 2000**

| Institutions | Total No. of Prisoners | Comfortable Capacity |
|---|---|---|
| Prison | 22,176 | 20,755 |
| Rehabilitation Center | 1,884 | 2,030 |
| Detention Center | 29 | 369 |
| Advance Approved School | 940 | 730 |
| Total | 25,029 | 23,884 |

Excess number of prisoners certainly creates some problems for the administrator on the mundane tasks of transportation, feeding and bedding. And more importantly it undermines internal social control, creates high potential for conflict and can negatively influence the relationships between staff and inmates.

The central problem in prison management here is its lack of control over the increasing number of inmates. Its workload is entirely at the mercy of magistrates and judges who have no structural involvement in the management of the prison system and no responsibility for allocating resources thereto.

### B. Prisoners Awaiting-Trial

**Remand Prisoners as per 2 March 2000**

| Type | Total of Remand Prisoners |
|---|---|
| High Court | 392 |
| Session Court | 873 |
| Lower Court | 5,161 |
| Foreigners | 924 |
| Others | 4 |
| Total | 7,353 |

Another factor adding to the prison capacity is the high incidence of prisoners awaiting-trial or remand prisoners in prison. As the above chart clearly shows, over 29.38% of all prisoners held on March 2, 2000 were awaiting trial. This is largely due to a considerable proportion of mainly 'lower socio-economy' class of accused being unpresented in court or unable to meet bail or bail requirements. We strongly feel that the high percentage can be reduced in the following ways.

a) The introduction of an easier and more accessible legal aid system. Apart from representing an accused in court, this would entail a system whereby lawyers are 'on call' so that they may consult with a defendant as soon as possible after arrest. It is timely to introduce a 'duty solicitor' whose service is paid by Judiciary Department under their legal aid scheme.
b) Shortening the period between admission and judgement or sentence.
c) Introducing a holistic approach in sentencing. The prison system should be seen as, and should operate as an integral part of an administration of justice. The courts should be confronted with the reality that their decisions have resources consequences and impact on the prison regime. The court should be informed that resources do not permit more than a pre-determined number of persons in prison - meaning that either fewer offenders be incarcerated or some be released. Allocation of scarce resources (i.e. places in prison) would be only for the most deserving cases.

### C. Foreign Prisoners

**Foreign Prisoners as per 2 March 2000**

| Institution | Total of Remand Prisoners |
|---|---|
| Prison | 5,036 |
| Rehabilitation Center | 15 |
| Detention Center | 2 |
| Advanced Approved Schools | 15 |
| Total | 5,068 |

Besides the increasing number of prisoners awaiting trial, the influx of foreign prisoners has also changed the prison population trend. Currently almost

20.29% (5,068 as per March 2, 2000) of the prisoners in all our penal institutions are foreigners. Although they do not create a physical threat towards discipline or security, however their sudden and ever increasing number will generate negative responses in terms of prison regime. It has caused ineffective communication between staff and prisoners (language barrier) and also a rise in various contagious diseases (i.e. conjunctivitis, scabies, and diarrhea).

Furthermore, exceeding capacity will ultimately cause a serious degraded ability to manage education and recreation spaces which are turned into sleeping quarters, leading to a lack of services and activities which quickly translates into boredom, restlessness and tension among prisoners and between the prisoners and staff. Prisoners gain more control as morale among the staff is depreciated and there begins 'a vicious circle of diminished control'. This causes a substantial number of prisoners to leave the prison more embittered and hostile to society than when they arrived. They leave prison therefore in a state of mind where they are more likely to reoffend.

The number of inmates held in a prison should be determined NOT by the number of beds that can be crammed in but by the facilities available to contain people decently and provide them with out of cell activity.

## D. Overcrowding

Prison overcrowding is a pressing problem of the Criminal Justice Administration. The Prison Department of Malaysia is perplexed to a certain degree by the explosion of the population.

### a. Causes of Overcrowding

i) The increasing number of social problems faced by the country due to changes in social economical and political conditions. The abrupt migration process and the flow of foreign nationals to meet the demand of manpower.

ii) Excessively dependent on imprisonment. The criminal justice system imposes a great deal of importance to imprisonment as a major means of deterring crime and defending society. It is also seen as a primary method of punishment. Therefore more offenders are imprisoned than is necessary due to the lack of alternatives.

iii) An increase of drug-related offenses and long-termers. The number of drugs-related offenses has doubled in the last ten years. This category of prisoner serves a longer term of sentence. Furthermore, serious drug-related cases (39B - Dangerous Drug Act 1985) spend an average of 2-3 years in Remand Centers before actually being sentenced or acquitted.

iv) Prison facilities unable to keep pace with the prison population influx.

### b. Implication of Overcrowding in Prison

i) Intolerable strain on staff, budgets and the running of programmes. The alarming ratio between staff and prisoners results in a high degree of stress among officers. They are unable to carry out their duties effectively and efficiently which indirectly effects their morale. The lack of space facilities, resources and technical equipment have hindered the prison department to provide prisoners with a full range of training, work and educational opportunities when they have too many prisoners to cater for properly.

ii) Prison overcrowding impedes our department to effectively implement international standards in particular. The United Nations Standard

Minimum Rules (Treatment of Offenders). The poor living conditions thereby causes tension and stress for both inmates and officers.

iii) Due to this acute problem we are unable to categorize prisoners specifically to undergo a designed programm. Prisoners from various categories mix and this creates various stressful situations.

**c. Present Strategy to Overcome Overcrowding**

The trickling down effects of this overcrowding problem is perceived by our department very seriously. Short-term solutions are as below:

i) Mobilizing Prisoners
Prisoners from an over populated institution are moved to another which are able to accommodate them. Multiple variables are considered prior to allocation of these prisoners. The process of mobilizing prisoners causes severe strains on escorting / security personnel and financial control. Prisoners being placed hundreds of miles away from their homes, with adverse effects upon their ability to maintain contact with their families and plan for their future. Critics claim that this strategy hinders society for playing a vital role in molding the deviant behavior of the prisoners and preparing them to become an integral part of society. This strategy enables every inmate to have a comfortable living space and to ensure the rehabilitation programm is run effectively.

ii) Cell Expansion Programmes
Several out-dated buildings were identified and reconstructed to accommodate the increase of prisoners. Besides living quarters, expansion of other facilities was also done simultaneously.

iii) Building New Blocks in the Existing Prison
New additional accommodation has been built in several prisons such as in Penor Prison, Pengkalan Chepa Prison and Kemunting Camp. Building a new block with facilities will help to overcome overcrowded prisons.

iv) Co-operation with Other Agencies
Our department holds an average of 4,500 to 6,000 of foreign prisoners (18-25% of total population) at any one time. Besides space and language obstacles, a huge mount of financial resources is spent annually for their upkeep, about RM30.00 a day. Periodic meetings are held with the immigration and members of consulate offices to expedite repatriation and deportation.

**d. Long-Term Strategy to Overcome Overcrowding**

i) Building New Prison
The most direct solution to prison overcrowding is constructing more prison facilities. For example: The Pudu Prison which was built in the so-called suburbs in 1895 to cater for 600 prisoners, currently situated near the K.L's golden triangle. Therefore it has been relocated at Sungai Buluh with the capacity of 2,500 prisoners. In the seventh Malaysia Plan our department has proposed several new prisons to be built and operationalized. After several rounds of negotiations an agreement was reached between the central government and the department that some colonial and pre-war prisons shall be replaced

with high-tech and modern facilities to meet the projected demand into the next century.

Extremely high costs in building these institutions has forced all concerned parties to seek alternatives. In principle the Economies Planning Unit has agreed and awarded several projects to private companies. The involvement of the private sector has sparked new ideas in design and construction with cost-efficiency in mind.

A proposal of a new prison has been made to build an additional prison in several places such as in Pokok Sena, Central Prison of Kuching, Temerloh, Perlis, Raub, Gombak, Kuala Kangsar, Seberang Prai, Jeli and Bintulu.

ii) Alternatives to Imprisonment
Courts usually impose custodial sentences (i.e. imprisonment) when it is thought to meet one or more of the perceived aims of sentencing viz., retribution, deterrence, protection of the public and rehabilitation. One major factor which influences a court to impose a prison sentence is the lack of suitable alternatives such as non-custodial sentences including fines, whipping, binding certain offenders over, discharges (absolute and conditional), probation, police supervision and some fairly little utilized provisions for compensation.

Research has shown that first-time offenders that are imprisoned for offenses are more likely to later embrace criminality than offenders given alternative sanctions. Therefore the Prison Department with the assistance and blessing of the Ministry of Home Affairs has made recommendations to the Judiciary for new avenues in sentencing i.e. introduction of a parole system and community service orders. It is timely that the Compulsory Attendance Act 1954 be revised and utilized extensively.

## V. THE PROVISION OF FOOD AND HEALTH SERVICES IN PRISONS

A number of issues relating to prison health services have been discussed in the previous conference and it is not proposed the same discussion be repeated here. Hence, the emphasis on this occasion will be particularly on the following: -

1. Food Services
2. Health Services

### a. Provision of Food in Prisons

i) There is great dissatisfaction with the times for serving prison meals, particularly when the evening meal is served very early to precede the nightly lock-up. The Director-General of Prisons, Malaysia has recently issued a Standing Order to all prison institutions to serve evening meals to all categories of prisoners after 6 p.m.

ii) To ensure that all prisoners receive reasonable levels of nourishment while they are in custody.

Prisons Rule 61 states, "The food of a prisoner shall be in accordance with the diet scales set out in the First Schedule hereto, or such other diet scales as may from time to time be approved by the Minister of Home Affairs on the recommendation of the Minister of Health."

Prisons Rule 62 states, "Debtors,

prisoners awaiting trial, prisoners on remand, and all others committed for safe custody who do not elect to provide their own food shall be supplied with the same diet scales as prisoners undergoing sentence."

Prisons Rule 64 states, "No prisoner shall receive or have in his possession any food other than that authorised by the diet scales, except; (a) with the authority of the Officer-in-Charge in special circumstances, or (b) with the authority of the medical officer if a variation of diet is desirable on medical grounds for an individual prisoner."

Prisons Rule 66 states, "Care shall be taken that all provisions supplied to prisoners be of proper quality and weight, and in all cases food shall be given to prisoners before the day's work begins. Scales and standard weights and measures shall be provided for weighing the food supplied to them."

iii) To ensure that the health standards of prisoners are maintained.

Prisons Rule 7 states, "In every prison, an infirmary or proper place for the reception of sick prisoners shall be provided."

Prisons Rule 18 states, (1) "Every prisoner shall as soon as possible after this admission be separately examined by the medical officer, who shall enter on the prisoner's record particulars of the state of health of the prisoner; whether or not he has been vaccinated, or had smallpox; whether he has been on opium."

Consumer, and to what degree; and any other information which it may seem desirable to record; (2) "No prisoner shall be put to labour until the medical officer has certified that he is fit for such labour, and the medical officer shall certify whether a prisoner may be employed to do hard labour or light labour"; (3) "Every prisoner shall be examined by the medical officer before being discharged or removed to another prison and no prisoner shall be removed to another prison unless the medical officer certifies that the prisoner is fit for removal."; (4) "A prisoner due for discharge who is suffering from any acute or dangerous illness shall be transferred to a government hospital."

Prisons Rule 19 states, "A prisoner may be vaccinated or re-vaccinated at the direction of the medical officer."

Prisons Rule 20 states, "If a prisoner shall be found to be suffering from any infectious or contagious disease, or to be in a verminous condition, steps shall at once be taken to treat the condition and to prevent it from spreading to other prisoners."

Prisons Rule 58 states, "Every prisoner shall be supplied with bedding adequate for warmth and health in accordance with a scale approved by the Director-General. Additional bedding may be supplied in special circumstances on the recommendation of the medical officer."

Prisons Rule 59 states, "The clothes of a prisoner shall be changed and washed weekly, and bedclothes shall be aired and washed as often as the officer-in-charge may direct. The prison clothing discarded by a prisoner on discharge shall be

thoroughly washed, dried and disinfected before being returned to store or re-issued."

Prisons Rule 69 states, "Arrangements shall be made so far as practicable for every prisoner, unless excused by the medical officer on medical grounds, to take exercise and physical recreation daily."

Prisons Rule 75 states, "A prisoner certified not to be fit for hard labour by the medical officer may be employed in one or more of the following forms of light labour: - sewing, gardening, laundry work, cleaning and white-washing the prison, conservancy, and any such similar services as the officer-in-charge may from time to time direct."

Prisons Rule 184 states, "A prisoner on remand or awaiting trial shall, if necessary for the purposes of his defence, be allowed to see a registered medical practitioner appointed by himself or by his relatives or friends or legal adviser on any week day at a reasonable hour, in the sight, but not in the hearing, of the officer-in-charge or an officer detailed by him."

Prisons Rule 185 states, "When an unconvicted prisoner wears his own clothing in prison the medical officer, may, for the purpose of preventing the introduction or spread of infectious disease, order that the clothing be disinfected, and during the process of disinfection the prisoner shall be allowed to wear prison clothing."

**b. Dietary Restrictions**

The United Nations' Standard Minimum Rules for the Treatment of Prisoners does not prohibit the use of dietary punishments but requires medical supervision. Many nations have prohibited the use of dietary restrictions as a form of punishment and control. However, the Prisons Department of Malaysia still mobilises "Half Rations" / "Bread and Water" as management strategy for recalcitrant or troublesome prisoners and prisoners who committed serious offenses, such as assaulting staff or repeated attempts to escape. "Punishment by close confinement or reduction diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it." Rule 32 (1) U.N.S.M.R.

Prisons Rule 122 states, "An Officer-in-Charge, if a Chief Officer or Principal Officer Grade 1, may punish any prisoner, found after due enquiry to be guilty of a minor offence, by ordering him to undergo 'confinement in a punishment cell for a period not exceeding three days on the punishment diet prescribed in the First Schedule hereto'."

Prisons Rule 124 states, "An officer-in-charge, if of or above the rank of superintendent, may punish a prisoner found, after due enquiry, to be guilty of a minor offence, by ordering him to undergo 'confinement in a punishment cell for a team not exceeding seven days on the punishment diet prescribed in the First Schedule hereto'."

Prisons Rule 125 states, "An officer-in-charge, if of or above the rank of superintendent may punish a prisoner found, after due enquiry, to be guilty of an aggravated prison offence by ordering him to undergo (a) corporal punishment not exceeding twelve strokes with a rattan, (b) confinement in a punishment cell for a term not exceeding seven days on the punishment diet prescribed in the First Schedule hereto."

Prisons Rule 126 (3) states, "The Visiting Justice shall, upon receipt of the report where a prisoner is accused of an aggravated prison offence, attend at the prison without undue delay and investigate the charge, and may punish a prisoner whom after due enquiry upon oath he or they may find guilty of such offence with (a) confinement in a punishment cell for a term not exceeding thirty days upon the punishment diet prescribed in the First Schedule hereto; (b) corporal punishment not exceeding 24 strokes with a rattan."

Prisons Rule 127 states, "Every prisoner sentenced to dietary or corporal punishment shall be sent to the medical officer for examination, and a certificate that its infliction is not likely to produce any serious or permanent injury shall be obtained by the officer-in-charge before it is carried out."

Prisons Rule 128 states, "A prisoner undergoing punishment shall be supplied with such clothing and bedding as may be certified as essential by the medical officer."

Prisons Rule 129 states, "Whenever a prisoner is sentenced to undergo close confinement in a punishment cell for a period exceeding three days on a punishment diet, he shall be given full diet on every fourth day."

Prisons Rule 130 states, "Confinement in the punishment cells shall not exceed an aggregate of ninety days in a year for any one prisoner, and the execution of any two consecutive sentences shall be separated by a period not shorter than the longer of such sentence."

Prisons Rule 131 states, "A prisoner sentenced to confinement in the punishment cells shall see no one other than prison officers in the execution of their duty, a Minister of Religion and the Medical Officer, and shall have only such out-door exercise as the latter certifies is absolutely necessary for health. Every prisoner confined in a punishment cell or subjected to restricted diet shall be visited at least once a day by the Officer-in-Charge and the Medical Officer, and if he is confined in a punishment cell he shall be visited by the appointed prison officer at intervals of not more than three hours during the day and night."

**c. Provision of Food and Water**

i) "Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served," Rule 20 (1) U.N.S.M.R.

ii) "Drinking water shall be available to every prisoner whenever he needs it," Rule 20 (2) U.N.S.M.R.

iii) Food services to meet the needs of minority groups.

(a) Members of particular religious groups in prison may have very specific dietary requirements and prohibitions which they regard as essential to their well being.

(b) Other minorities with particular dietary needs:
- foreigners
- women who are pregnant
- prisoners who are unwell

(c) Special needs or privileges for unconvicted or remand prisoners, even though in some nations they comprise the majority of all prisoners. Historically, in some systems, remands have been allowed to have their meals sent in rather than being required to eat the prison food.

(d) Provision of professional advice and supervision by dietitians to ensure that the nutritional value and scheduled variety of prison

food is maintained.

(e) Privatization of all food services to a prison or even prison system. The cost-effectiveness of this venture of entering into contracts with private business organizations for the supply of all food services.

## VI. PROVISION OF HEALTH SERVICES

The objectives of health services are to provide proper medical services to prisoners to provide first aid services to the needy and to handle emergency cases that need immediate medical attention.

Doctors, medical assistants and nurses are the employees directly employed or transferred from other government departments of the Malaysian prison system. At present, the prison medical unit consists of (1) medical officer, (19) medical assistants and (1) staff nurse. They are all full time employees of the Prisoner Department operating 27 prison clinics throughout the country. There are (17) institutions with sick-bags that can each accommodate (15) beds at any one time. Prison clinics and sick-bags cater only for minor cases. All the serious and major cases are referred immediately to the District Hospital outside.

The challenge received by the health service in prison began when four prisoners were identified as HIV carriers in 1989 through blood screening done by the Ministry of Health group. The number of HIV positive inmates kept on increasing every year. Steps should be taken to overcome this problem if not this situation will effect the credibility of the prison health service. To prevent HIV cases from spreading in prisons the management take further steps and a have close rapport with the Ministry of Health.

Guidelines given by the Ministry of Health regarding precautions and managing the spread of HIV will be followed strictly. Prison staff that will be involved in controlling HIV prisoners have to attend seminars, courses, lectures which gives them knowledge about HIV and AIDS.

The Malaysian Prison Department has to maintain the health of all prisoners and also to prevent HIV from spreading within the prison wall, so in order to make sure this is done, screening by the team from hospitals and prison counselor have to be done with new prisoners. From these results, all the HIV positive inmates will be placed in one building. Even though they stay in HIV blocks they are still involved in every activity that other prisoners have, such as playing games, working in workshops together and being involved in other rehabilitation programmes. To make sure that these HIV prisoners get proper treatment, they will be placed in certain prisons that have enough medical facilities and every year more allocations will be given to that prison to buy more medicine and give better treatment.

The Prison Department also has counselors dealing with HIV/AIDS, as we know that since 1991 it has spread widely around the world including Malaysia. At present, we have quite a number of prisoners involved in drugs. Among them, those who have been affected by HIV/AIDS could have practiced risky behavior and lifestyles such as individuals with multiple sexual partners, drug abusers who share needles, prostitution etc.

### A. Objectives of HIV/AIDS Counseling

HIV/AIDS counseling is done to achieve various objectives. Among them are: -

a. Prevention of infection through promotion of healthy life styles, behavior, moral and spiritual values.
b. Prevention of transmission through modification of risky lifestyles and behaviors.
c. Provision of psychosocial support to those infected and / or affected by HIV/AIDS to achieve optimum levels of functioning and a satisfactory quality of life.
d. To complement health education and correct misconceptios or myths about HIV/AIDS.

For the prisoner that cannot accept that he is HIV positive the prison counselor will play their role until this prisoner can accept the reality. To maintain the health of the HIV prisoners the prison officer will make sure the medicine given to them will follow the schedule and the follow up at hospital will be arranged depending on the due date in the treatment card.

When HIV prisoners are released, letters to the nearest hospital will be sent and a copy to the prisoners to ensure that further treatment will be had by him. Prison counselors also take this opportunity to give advice to them to follow the hospital precautions to prevent the spread of HIV outside.

The question on the provision of health services by a private organization needs serious consideration at this moment due to the difficulties in employing medical professionals and the high cost maintenance.

## VII. INCREASE OF DRUG RELATED OFFENDERS

The increase of drug-related offenders was also an important issue that shall be considered by the prison management. The increase of these prisoners will make us think how to treat them within the prison walls. It is not that easy to make them change their lifestyle to be a normal person.

In the year 1981, the Malaysian Prison Department first introduced a rehabilitation programm where it started with an integrated approach, which also involves other rehabilitation agencies in and outside of prison. Counselors were trained in skills and techniques of counseling. Now we have 150 posts for the counseling officer and we have filled 125 of them and when we compare the ratio with the prisoners the difference is still very high. The ratio that has been suggested by the Public Service Department is 1:30 but the ratio in the Malaysia Prison Department is 1:90.

The duty of the counseling officer is not meant to be for drug-related prisoners only but they have to cover other types of prisoners also. In short term strategy, our department tries to fill in the post that we have and in long term strategy, the post will be restructured and should have at least 400 posts comprised of the ranks of superintendent, deputy superintendent and assistant superintendent.

The integrated approach programm will include

1. Vocational Training
2. Religious Education / Morale
3. Academic
4. Marching
5. Spots / Recreation
6. Activities in Libraries, Music, TV and etc.

On February 1992, the prison based Therapeutic Community (TC) programm was introduced where basic training in therapeutic community was given to the counselors as well as the inmates.

**A. Prison-Based TC Programmes**

On 2 September 1992, one pilot project of the TC rehabilitation programm was implemented in the Drug Rehabilitation Center, Kajang Prison. From that programm we achieve success and this TC programm has been introduced and expanded to other prisons such as:

1. 1 December 1994 - Henry Gurney School, Telok Mas, Melaka
2. 27 July 1996 - Drug Rehabilitation Institution, Jelebu, Negeri, Sembilan
3. 1 August 1999 - Womens Prison, Kajang
4. 1 October 1999 - Marang Prison, Terengganu
5. 7 July 1999 - Henry Gurney School Kota Kinabalu
6. 1 October 1999 - Seremban Prison, Negeri Sembilan
7. 1 November 1999 - Sibu Prison, Sarawak

The expansion of this TC programm is still going on and will be implemented to other prisons.

**a. Objective of the TC Programmes**

i) To provide long term residential treatment programmes for drug-free and productive lifestyles and become good Malaysian citizens.
ii) To utilize concepts / peer support and review progress in conjunction with professionally structured therapy programmes.
iii) To say no to drugs and abstain from drug abuse.

**b. Strength of the TC Programmes**

The Therapeutic Community (TC) Program has its owned modality aim unlike other drug rehabilitation programmess. This concentrates on:

i) More than 90% on physical rehabilitation
ii) Love and caring attitudes
iii) Family oriented

**B. Religious Activities**

Religion is a main subject in a human life no matter what race he/she comes from because every religion carries good teaching and good faith. It provides a guide to be an honest citizen, decent and honest living. Malaysia is a multi-racial society and prisoners of different races and religion are committed to custody. Freedom of religious worship is allowed for all prisoners. Religious instructors and teachers from various faiths provide religious guidance in all penal institutions. By doing so, it is hoped that each prisoner realizes his mistakes and sins of the past and try to change into a good well-matured human being. Religion alone can be a strong medicine for rehabilitating a prisoner, which carries a very strong impact upon their release.

Besides visits from family members, visits by religious groups and volunteer agencies will help prisoners connect with some religious beliefs and have a better understanding of the outside world and perhaps their future. These visits will, in one way or another, encourage prisoners to have a better out-look on life. This religious influence may entice this category of prisoners to spend some of their time praying or reading religious scripts.

The rehabilitation programm that has been introduced and exposed to the offenders in prison as an institutional treatment is hoping to be a starting point for them to change their future undertakings. Without public participation the process of changes wills stop half way. What we hope is that, the prisoners or offenders that are ready to change or repent will play their role after release. After

release, these offenders will go back to society and become part of society. With the changes made by these ex-offenders this will at least prevent them from being involved in drugs outside and follow religious activities.

### C. Reformation Programmes - Message from Prison

One of the new rehabilitation programs that is useful for prisoners involved in drug or drug-related offences is the reformation programmes - message from prison. This program is a teamwork program between the Prison Department of Malaysia and the Education Department of Malaysia. This program was launched on 1 April 1999 as an alternative to fight against social illness or problems among teenagers, mainly students. With this cooperation, the Prison Department has taken steps in choosing inmates, trained them, made them involved, exposed them to the community and let them share their experience and background up until their involvement in criminal offences and the results of being sentenced to prison. Their backgrounds, the hardship faced by inmates and repenting following the prison rehabilitation program will be shared among their inmates, students and also parents.

From this program the inmate will feel that they are also important and can give their support to the government and realize that the community can also appreciate them. The program will also encourage them to change their life and have a sense of personal responsibility. Also this program will rebuild their morale and formulate habits of good citizenship and hard work, to lead a good and useful life.

## VIII. INTERNATIONAL TRANSFER OF PRISONERS

International cooperation is generally defined as mutual assistance between countries; where all parties gain mutual benefits. Beneficial in terms of the exchange of information, ideas, materials and resources. It is undeniable that with the vast technological innovations in the world today people are more mobile and travel time is short. However such speed and freedom cannot be applied to prisoners serving in nations other then their homeland as treaties for the transfer of prisoners from one country to another have yet to be established in most nations.

International transfer treaties are beneficial if established as the positively contribute to the rehabilitation process of the prisoner in terms of being in a suitable environment where family relations and friends may provide moral support.

Familiar atmospheres additionally assist in elevating mental stress experienced by prisoners serving terms in a country foreign to them.

As of 2 March 2000 there were a total of 5,068 foreign prisoners in Malaysian prisons. The number accounts for 20.29% of the total number of prisoners. Therefore if transfers of prisoners are made possible, the congestion of Malaysian prisons may be alleviated by 22.95%. This will not only lesson the congestion but also avoid problems such as hunger strikes which are often sparked by the wish to return to their homeland, linguistic differences, remand costs, etc.

However, although the international transfer programs carry benefits complications arise due to the differences in form and length of sentences, prison administration and legal system

incompatibilities.

The difference in sentences above mentioned is primarily for countries which carry out corporal punishment, hanging and death by firing squads whereas judicial differences in terms of the penalty for drug trafficking can sometimes be a mandatory death sentence but in other countries traffickers receive a lesser sentence.

Administrative differences may involve instances where a prisoner loses the benefit of pardons in countries which practice parole or pardons due to national celebration days.

In Malaysia, the international transfer of prisoners is not a norm as there are as yet no treaties with other countries and furthermore, in Malaysia decisions for such policies are addressed to and tabled by the Ministry of Home Affairs. All applications or requests for the transfer of prisoners must be directly forwarded to the Ministry of Home Affairs. The Prison Department supplies all relevant information pertaining to the cases requested and act upon receiving instructions from the ministry.

## IX. SPECIAL ISSUES RELATING TO THE MANAGEMENT OF FEMALE OFFENDERS

As of 2 March 2000 there were 1,365 female prisoners held in prisons throughout Malaysia. Of this number, 881 were at Kajang Female Prison (largest female prison) while the rest were in the female sections of several regional prisons throughout the country.

Female inmates in prisons come from different races and backgrounds and the crimes they are convicted of are also of various types. For every crime committed, the imprisonment sentence is no different to that of the male inmates.

In Malaysia, female inmates are segregated from the male inmates. In respect of accommodation, the Prison Rules 1953 provides for the following:

> "Male and female prisoners shall be kept absolutely separate from each other and shall be confined in different buildings. The wards, cell and yards where women prisoners are confined shall if possible, be secured by locks different from those securing the wards, cell and yards allotted to male prisoners. Women prisoners shall in all cases be attended by women prison officers. A male prison officer shall not enter a prison or part of a prison appropriate to women prisoners except on duty or unless accompanied by a women officer."

Although the number of female inmates is small, the rehabilitation programs that are being run by the female prisons are similar to those at the male prisons. The programs are geared towards the preparation of inmates for their eventual return to the community as law-abiding citizens and socially productive persons.

The rehabilitation program encompasses the following:

a) Vocational training
b) Spiritual welfare
c) Recreation
d) Counseling

### a) Vocational Training

Convicted female inmates are provided with opportunities to equip themselves with a form of skill or trade. The following trades are normally available:

i) Tailoring

ii) Handicraft
iii) Hairdressing
iv) Laundry
v) Domestic Science
vi) Vegetable Gardening

**b) Spiritual Welfare**

It is recognised that religion can function as an important agent in rehabilitation. With this in view, religious teachers of various faiths visit the prison to impart religious instruction to the inmates.

**c) Recreation**

Recreational and extra mural activities not only contribute towards physical and mental well being but also provide constructive means of spending leisure time and assist to relieve tensions, anxieties and monotony. In female prisons, several recreational facilities are made available and singing and cultural activities are also encouraged.

**d) Counseling**

In all female prisons, counseling is always made available to them. They are more susceptible to feelings of pressures, anxieties and worries - very often worries about their parents, husbands and children who are in the outside world. For this reason, counseling occupies an important place in the prison rehabilitation program.

Woman can become infected by HIV in exactly the same way as men. It is often useful for an HIV positive individual to receive specialised counseling and support during their sentence. In this way the prisoner has the chance to learn about her situation, ask questions and express emotion and learn to cope more effectively and responsibly with their condition.

Female inmates that conceived during their imprisonment period will be given a special diet based on the recommendation of the doctor. During their early stage of pregnancy, they will be frequently checked by the doctor in the prison. However, during the latter stage they will be sent to the hospital for weekly check ups. They are always encouraged to give birth at the hospital in order to ensure the good health of both the mother and the child. Under the Prison Rules 1953, female inmates are permitted to keep their children who are under 3 years of age with them while they are in prison.

The Prison Department of Malaysia maintains good relations with the public. Non-Government Organizations (NGO) have contributed much to the inmate rehabilitation program. It is very important that prisoners have some contact with outside agencies before release, so that problems such as accommodation, counseling and job placement can be worked out in advance.

With respect to aftercare assistance and job placement, organizations such as Selangor Discharged Prisoners Aid Society (DPAS), Malaysian Care. PENGASIH, PINK Triangle and Narcotics Anonymous have rendered meaningful assistance. All the organizations can offer support and advice to the prisoners. In this way the problems of losing contact with the prisoners can be minimized.

## X. CONCLUSION

In respect of implementing prison sentences and the treatment of offenders, the Prison Department of Malaysia subscribes to the concept of human treatment that stresses a fair and firm approach when dealing with prisoners. It also conforms in almost nearly every aspect with those of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

There are so many issues which arise in the Malaysia Prison Department but only the big and vital issues as above have been highlighted and the countermeasures taken by the management of the prisons.

In this era of rapid change and development, the Malaysia Prisons Department realises the fact that it cannot remain complacent with its present achievements but continuously seeks to be on the move seeking new innovations such as the progress of computerisation that will bring a greater efficiency in penal administrations as well as keep it abreast of modern trends in penology.

# CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES

*Gunaratne Kuruppu**

The Department of Prisons in Sri Lanka which comes under the Ministry of Justice, Constitutional Affairs, Ethnic Affairs and National Integration has for many years been committed to a correctional policy, where the ultimate objective is to rehabilitate and reform convicted offenders and reintegrate them to society mobilising community support. Many progressive measures have been adopted to achieve this objective.

In Sri Lanka we have 3 Closed Prisons, 2 Open Prison Camps, 6 Work Camps, 2 Correctional Centres for Youthful Offenders, 14 Remand Prisons and 28 Prison Lock-Ups. All our closed prisons for convicted offenders have been built over 100 years ago by the British at a time where the country's population was about 3 million. The story is almost the same about remand prisons. Imprisonment is done at both ends of the criminal justice process. Persons suspected of committing crime are imprisoned soon after arrest as remand prisoners, at one end and persons found guilty are imprisoned at the other end.

The following statistics show that large numbers are kept in remand custody. Hence, it will be seen that no proper rehabilitation programmes could be implemented to this type of persons, and the problems faced by the prison administration. The problem is not only keeping them, feeding them, looking after their health but also producing thousands of them in courts daily travelling hundreds of miles.

See Table I (Annexed)
Admissions of Unconvicted 1991-1995
See Table II (Annexed)
Admissions of Convicted 1991-1995

A peculiar situation with Sri Lankan prisons is that the number of unconvicted prisoners far exceeds that of the convicted.

Many factors have contributed to the increase in crime and the overcrowding of prisons. It is also a fact that there is very little that the Department of Prisons can do to ease the situation. The overcrowding of the population in urban areas and the scarcity of employment creates a tendency to resort to evil ways of living. The commonest among such acts are petty thefts, pick pocketing, selling of narcotic drugs and prostitution amongst females. Other factors too have their contribution to the overcrowding of prisons. The school dropouts who have had little or no vocational training have become more or less a burden to their parents, who are of the lower middle income groups, frustration and unrest among the youth tends to create in them a tendency to form into gangs and commit violent crimes. Hence it is seen that the causes attributed to the increasing rate of crime and the overcrowding of prisons are mainly due to socio-economic conditions and environmental factors prevailing in Sri Lanka. The effects of overcrowding are felt not only in the area of space but discipline and control, hygiene and effective treatment programmes.

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**Institutional Treatment**

The Department of Prisons provides institutional treatment, preliminarily, for convicted prisoners classified and categorised under first offenders, re-convicted and recidivist reconvicted prisoners.

**Closed Prisons**

These prisons are meant to be for convicted prisoners, but due to severe overcrowding of unconvicted prisoners in remand prisons, unconvicted prisoners are often located in closed prisons too. These prisons can be classified as low, medium security institutions.

**Work Camps**

These camps are open institutions with no boundary walls. First offenders sentenced to terms of imprisonment up to two years and below are transferred to these work camps, the concept being that a large number of first offenders with comparatively short prison terms will be kept away from contamination with hard-core criminals who remain in closed prisons. The prisoners located in the camp work under minimum-security conditions and these conditions are very much similar to any other collective farms in the community.

**Open Prison Camps**

The first camp was established in 1951 in the Central Province of Sri Lanka. Prisoners located in this camp are selected prisoners with good conduct, who would have served one-fourth of their sentence and with at least two years more to serve. Here the emphasis is to accustom the inmate to conditions and circumstances available in the community to which he would return. Hence, he is given enhanced freedom and responsibilities, and the principle guiding custody is trust. Unlike visits to prisoners in a prison, families are encouraged to meet inmates often and such visits are not supervised by prison officers. Inmates are encouraged to build good relationships with those in the free community, and at the same time encouraging them to participate in community projects on an entirely voluntary basis.

**Work Release Centre**

This centre consists of short-term prisoners living and working by themselves on a Coconut Estate in "Open" conditions. The inmates are supervised by a residential retired prison officer.

**Correctional Centre for Youth Offenders**

This centre consists of youth offenders. Offenders with pending cases and long terms of imprisonment are located in a walled section of the centre and others in an "open" section.

**Training School for Youthful Offenders [Borstal]**

Boys between the ages of 16 and 22 who are found eligible by courts are sent to this centre for maximum terms of 3 years. Unlike prisoners, these boys are not entitled to remission of sentences, but are eligible for release on licence after one year. There is only one training school in the whole of Sri Lanka.

**Remand Prisons**

Persons awaiting trial or unconvicted prisoners are located in these prisons and convicted prisoners with short terms are also located in these prisons, and convicted prisoners with short terms to attend to jail services including work in the preparation of food.

**Prisoners Involved in Organized Crime**

Prisoners who are admitted to prisons are also classified as organized crime offenders or hard core on the basis of reports forwarded by the police. On

admission to prison, the police furnish a report on the previous history, *modus operandi* and the nature of crime committed by the offender. If there are more than two prisoners in the same case, they are not located in one prison but are located in different prisons to prevent close contacts with each other. They are segregated from normal prisoners and their custody is under close supervision and special security. As there are no maximum-security prisons in Sri Lanka to locate these types of prisoners, special sections have been constructed within some of the large closed prisons for their location. The location therefore of this category of prisoners is under maximum-security conditions.

**Prisoners Admitted to Prisons from Foreign Countries**

The offences committed by these foreign nationals are mainly drug related. Communicating with these offenders have posed a serious problem to prison staff as many of them are unable to speak, read and write English. With difference in religion, customs, culture, climate conditions and food, these offenders languish in prison custody in virtually self-imposed isolation. These prisoners do not have, understandably, regular visits. Visits generally are from the respective Embassies or Consular Offices.

**Vocational Training in Prisons of Sri Lanka**

Every convicted prisoner sentenced to rigorous imprisonment is required to work for approximately eight hours a day. This requirement is met both in the form of vocational training in industries as well as on job training in prison workshops. The dual objective is to train the offenders in order to enable them to find suitable employment upon release from prison custody as well as to utilise their services for the benefit of the State. The whole range of trades that are available in the free community are made available within prisons, viz. carpentry, tailoring, laundry, motor mechanism, printing, bread making, weaving, knitting, masonry, soap making, mat making, brush making, polishing, tat making and the manufacture of coir goods. The prisoners are paid wages according to a grading scheme depending on their skill and training.

**Agriculture and Animal Husbandry**

In the prison work camps for short-term and medium-term offenders and in the open prison camp for long-term offenders, training is largely in the fields of agriculture and animal husbandry.

**Education, Recreation and Religious Activities**

The Department of Education conducts adult education classes for the benefit of prisoners. In some of the institutions, volunteers too help the department in these educational programmes. Facilities are also provided for the prisoners to sit public examinations.

Prisoners are also encouraged to take part in both indoor and outdoor recreational activities. Facilities are provided for scouting, wrestling and boxing.

After ceasing labour, facilities are provided for offenders to follow religious activities in keeping with their faiths. All prisons, work camps, open prison camps and training schools have places of worship such as shrine rooms, chapels, and mosques within the premises and prisoners are allowed unrestricted access to these places. On important religious occasions, prisoners in open prisons and work camps are permitted to participate at functions organized by the members of the community. Prisoners are allowed to sit religious examinations, if they so desire,

after following classes held in the institutions.

**Female Prisoners**

Female prisoners constitute a very small population of the total number of prisoners. In each closed prison there is a separate section to locate convicted and unconvicted females. The largest number of female prisoners are convicted for prostitution, excise offences, trafficking drugs and petty thefts. The majority of the women in prison are between 22 to 40 years old, and their educational level is low. Although women who are imprisoned are permitted to bring their infants to prison with them, the bigger children face the threat of being neglected and left uncared for and forgotten. Hence some of the females bring children up to five years. The Department of Prisons in collaboration with the Prisoners' Welfare Association have started a pre-school in the female section of Welikada Prison, Colombo where a teacher is employed by the Education Department.

The convicted female prisoners are given training in various vocations such as tailoring, knitting, weaving and cookery.

**Convicted Drug Offenders**

Sri Lanka is one of the developing countries afflicted with the plague of drug abuse. Severe health, social, and economic problems are emerging associated with the abuse of drugs. Statistics have revealed that heroin dependence is commonest amongst the youth. It is also turning law abiding young people into criminals. Property crimes have increased in recent years as a result of drug addicts committing theft and burglaries, in order to find money to purchase drugs to satisfy a craving need which surpass all other needs.

From the statistics shown below it is seen, that there has been a steady rise annually in the number of prisoners who are admitted to penal institutions for drug related offences. The percentage being over 40% of the total number of admissions of convicted prisoners.

See Table III [Annexed]

Table 1 shows the direct admission of convicted prisoners according to the highest number of offences.

A remarkable indication is that narcotic drug offences have moved to the top of the table of offences. With the influx of this large number of drug offenders, the Department of Prisons is now confronted with a host of new problems hitherto not experienced in our penal institutions.

The following are some of the problems.

i) It is necessary to keep the drug abusers separated from the other category of offenders for the abusers' own welfare and that of the others. However, due to the inevitable overcrowding the prisons have to face with the admission of drug abusers in large numbers, it is not possible to keep them separated in overcrowded institutions, thus there is a great possibility of their mixing with others and promoting the habit of drugs amongst others.
ii) A number of prison officers have been subjected to harassment, threats and bodily harm for detecting drug traffickers and users inside the prisons.
iii) By locating drug offenders and other inmates including the hard core in the same prison, the possibility of planning organized crimes and drug offenders getting involved in these crimes has been observed.
iv) Instances of officers supplying drugs into prisons have been detected and

this has caused a lot of fresh administrative problems.

v) Also cases have been detected where the prisoners are involved in the sale of drugs inside the prisons, and sometimes it is also observed that due to severe competition amongst themselves, gang warfare and various violent incidents take place.

The Department of Prisons which has experienced a very large intake of convicted drug offenders in recent years has organized rehabilitation, therapeutic and educational programmes in various penal institutions. These programmes are spearheaded by prison officers trained in the rehabilitation of drug offenders. With the kind assistance of the National Dangerous Drugs Control Board, 1451 officers of all grades were trained. Twenty-three officers with special aptitudes were given intensive training in counseling by the University of Colombo.

They actively participate in all programmes in their respective institutions and prevent drugs and unauthorised substances coming into the institutions.

In implementing these programmes the greatest obstacle the Department is facing is the severe overcrowding in penal institutions. Prison overcrowding prevents the effective implementation of the United Nations Standard Minimum Rules for the treatment of prisoners which require the separation of prisoners taking into account such factors as sex, age, criminal record, legal reason for detention and treatment needs. Overcrowding also prevents the classification and segregation of certain offenders from others, the young with the old, unconvicted with the convicted, the hardened criminals with the not so hardened, thus the not so hardened leave prison as hard-core criminals.

Anyhow considering the importance of the programme the department has taken meaningful steps in setting up two treatments centres at Navodawa, Pallekelle and Taldena. The World Health Organization through the National Dangerous Drugs Control Board has donated a sum of Rs.760,000 for the implementation of the programme.

Those convicted for using drugs such as heroin, opium, hashish and other types of dangerous drugs are admitted to the centres, after the detoxification period is completed.

They are also produced before the medical officer regularly to undergo medical observation for drug withdrawal symptoms and treatment. On admission they participate in the admission orientation programme conducted by Prison Welfare Officers where an intensive briefing is given to the inmates of the objectives of the centre, the evils of drug abuse, code of discipline that they should observe and the facilities available to them. They are encouraged to discuss their problem in a group or individually. They are also subjected to intensive counseling and encouraged to participate in religious activities including meditation. They are permitted to have visits and correspond with relatives.

A letter is sent to the member of their families by the Commissioner General of Prisons explaining the programme and their responsibility towards the rehabilitation of the addict. Where the need arises family reconciliation is done and family relationships strengthened keeping in mind that the family is the most important factor in the reintegration of a drug offender into society.

Literary programmes are conducted at the centres and inmates encouraged to

make use of the library and inculcate reading habits and write articles to our "Sannivedana" paper.

Inmates are detailed to work on agricultural projects and some are selected for vocational training according to their needs. The programmes are organized in consultation with the vocational training authority so that inmates could receive a certificate of competence on completion of the course. They are motivated to physically exercise, lift weights and participate in sports activities.

In addition the following programmes are initiated:

i) Counseling.
ii) Regular film and video shows.
iii) Lectures in the fields of religion, health, education, sports, community development, crime prevention and drug rehabilitation.
iv) Dramas.
v) Literary association meetings of inmates.
vi) Family awareness meetings and crisis intervention programmes.

Action is also taken to prepare social reports by Prison Welfare Officers to enable them to be sent on home leave, normal release and premature release under conditions [Licence Scheme or Parole].

Inmates are assisted to return to society to lead a normal and productive life harnessing the support of volunteers, members of the Prisoners' Welfare Association, Social Workers, Prison Welfare Officers and organisations like the Sarvodaya, Lions, Leos and Rotarians who do follow up work.

**Effective Countermeasures**

The Government of Sri Lanka, being conscious of the illicit drug problem especially in relation to heroin and cannabis and its far reaching and destructive socio-economic implications, is determined to combat the problem by developing effective strategies based on:

a. Enforcement

(i) Building - up intelligence on trafficking, effectuating interdiction at all points of entry and strengthening operational capabilities of all enforcement agencies and personnel.
(ii) Extend scope of existing legislation to deal effectively not only with carriers but more importantly with traffickers and financiers with maximum penalties and deprivation of proceeds of their crimes.
(iii) Taking necessary steps to (a) expedite the hearing of drug cases, (b) establish standard procedures for the safe handling and destruction of court productions of drugs.
(iv) Stressing alternatives to imprisonment such as treatment and rehabilitation programmes for dependents wherever appropriate.
(v) Supporting international efforts to curb the production, transiting and trafficking of drugs.
(vi) Entering into treaties with other countries to cover exchange of prisoners, mutual legal assistance, extradition and controlled delivery.

b. Preventive Education and Public Awareness

Sri Lanka is taking effective steps in the implementation of the 1988 UN Convention. Action is taken to forfeit vehicles and other methods of transport of dangerous drugs.

In 1997, a training programme was organized in Sri Lanka on controlled

delivery by the United Kingdom Customs and excise officials, several foreign participants in the Asian countries participated.

**Alternatives to Imprisonment and Effective Countermeasures Taken to Reduce the Prison Population**

The following are some of the techniques used.

a. Probation

Probation as a method of treatment was first introduced in Sri Lanka with the promulgation of the Probation Offenders Ordinance No. 42 of 1944.

The Probation Service which was a branch of the Prison Department until 1956 was established as a new department called the Department of Probation and Child Care Services, under the Ministry of Social Services.

This department now consists of the field services manned by 130 trained probation officers. Increasing use of probation officers has been made every year and the service is making a definite contribution in the rehabilitation of offenders. The percentage of success in rehabilitation has been in the neighbourhood of 82 percent. The majority of offenders who have been placed on probation would have otherwise been sent to prison and this ensures the rehabilitation of the offender in his environment and in the community. Furthermore, probation saves money for the State and also prevents congestion in the prisons.

b. Suspended Sentence of Imprisonment

Suspended sentences of imprisonment were introduced into the Law of Sri Lanka in 1972. These are generally imposed where a court decides that an offence is serious enough to justify a short term of imprisonment. They may be imposed on an offender on whom a sentence of imprisonment not exceeding two years may be imposed, the periods of suspension being not less than five years. If a subsequent offence is committed during the operational period of suspension, the offender is liable to serve the suspended sentence. Where no offence is committed during the operational period the suspended sentence is deemed never to have been imposed.

c. Community Service Orders

The provisions relating to Community Service Orders are contained in the Code of Criminal Procedure [Act No. 15 of 1979 amended by Act No. 49 of 1985].

Community Service Orders enable a court to direct an offender to perform community service in lieu of sentencing him to imprisonment and was first introduced to the Laws of Sri Lanka in 1974. In 1985 the provisions relating to community service were amended for wider utilisation and further amended as Community Based Correctional Act No. 46 of 1999.

This act was certified on 10 December 1999 by the Parliament of the Democratic Socialist Republic of Sri Lanka. A pre-sentence report is furnished to the court including the following:

i) The age of the offender;
ii) The social history and background of the offender [including the names and ages of the persons who are dependant on the offender];
iii) The medical and psychiatric history of the offender;
iv) The educational background of the offender;
v) The employment history of the offender;
vi) Any other offences of which the offender has been found guilty or for which he or she is charged or

indicted;

vii) The extent to which the offender has complied with any earlier sentence or is complying with any sentence currently in respect of him or her;

viii) The financial circumstances of the offender;

ix) Any special needs of the offender;

x) The employment history of the offender's spouse and the income earned by him or her;

xi) The courses, programmes, treatment or other assistance that could be made available to the offender and from which he or she may benefit;

xii) The facilities available for the performance of unpaid community work.

No Community Based Correction Order shall be entered into respect of an offender, unless the offender consents in writing, in the prescribed form to the entering of such an order.

In terms of the present law the court specifies the place in which the community service is to be performed and the number of hours and the period within which it is to be performed. Such orders may be varied to suit altered circumstances or revoked for non compliance in which case an offender will be liable to another penalty.

d. Release of Prisoners on Licence [Parole]

A scheme for release on licence was introduced in 1970 for the benefit of long term prisoners. Due to the low rate of violations this scheme has been reviewed on two occasions and at present extended to all prisoners sentenced to four years or more who have completed half their sentence, and all prisoners who have served six years of their sentence [whatever the aggregate term], and all prisoners who have served five years of their sentence [whatever the aggregate term] provided they have served at least one year in an open prison camp becomes eligible for release on licence.

A social report comprised of the antecedents of the offender, some details of the offence, vocational and other training he had in prisons, information regarding his prospects for employment and a plan for his rehabilitation in the community is prepared by prison welfare officers and submitted to the licence board. At every licence board hearing, the offender is present and if for any reason he is not granted release on licence he is informed of the facts so that he could adjust himself and look forward to being present at another hearing.

Up to date 17,943 prisoners have been released on licence in Sri Lanka since the inception of this scheme. Of this number, 701 have successfully completed the period of their supervision. Only 36 prisoners have violated their conditions of release and have had their licence revoked.

e. Other Re-Integration Programmes

Home Leave

The privilege of home leave for long term prisoners up to a period of 7 days at a time was introduced in Sri Lanka in 1974. The purpose is to help the offender to maintain his relationships with the members of his family and that of the community, also it will facilitate him to re-establish his contacts in the area to which he will return. The prisoner will also be afforded the opportunity to interview prospective employers and assist him to be re-introduced back to the community to which he will return.

I have given you an account of what we try to achieve in our attempts to rehabilitate the criminal offender. We, in

Sri Lanka, can be proud that all the known techniques that are in use throughout the world are being tried out successfully in our penal institutions.

**[ANNEXURE I]**

## TABLE 1

## DIRECT ADMISSIONS OF UNCONVICTED PRISONERS BY INSTITUTION, 1991-1995

| Institution | 1991 | | | 1992 | | | 1993 | | | 1994 | | | 1995 | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | F | T | M | F | T | M | F | T | M | F | T | M | F | T |
| Welikada | 14,509 | 2,044 | 16,553 | 14,039 | 2,263 | 16,302 | 14,157 | 2,231 | 16,388 | 14,326 | 1,867 | 16,193 | 11,509 | 2,575 | 14,084 |
| Colombo Remand Prison | 9,896 | - | 9,896 | 10,191 | - | 10,191 | 10,419 | - | 10,419 | 9,126 | - | 9,126 | 10,919 | - | 10,919 |
| New Magzie Prison | 664 | - | 664 | 976 | - | 976 | 370 | - | 370 | 193 | - | 193 | 82 | - | 82 |
| Mahara Prison | 5,965 | - | 5,965 | 6,069 | - | 6,069 | 6,900 | - | 6,900 | 6,769 | - | 6,769 | 6,862 | - | 6,862 |
| Bahgambara Prison | 2,842 | - | 2,842 | 3,997 | - | 3,997 | 3,176 | - | 3,176 | 243 | - | 243 | 1,730 | - | 1,730 |
| Kandy Remand Prison | 5,128 | 691 | 5,819 | 4,134 | 687 | 4,821 | 3,767 | 604 | 4,371 | 6,959 | 570 | 7,529 | 6,335 | 868 | 7,203 |
| Jaffna Prison | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 |
| Anuradhapura Prison | 3,100 | 90 | 3,190 | 3,303 | 97 | 3,400 | 3,138 | 127 | 3,265 | 3,562 | 104 | 3,666 | 4,518 | 291 | 4,809 |
| Badulla Prison | 4,138 | 210 | 4,348 | 4,929 | 260 | 5,189 | 4,030 | 294 | 4,324 | 3,204 | 142 | 3,346 | 3,289 | 152 | 3,441 |
| Battcaloa Prison | - | - | 0 | - | - | 0 | - | - | 0 | 999 | 81 | 1,080 | 1,096 | 70 | 1,166 |
| Galle Prison | 3,094 | 317 | 3,411 | 3,128 | 280 | 3,408 | 3,600 | 342 | 3,942 | 3,474 | 329 | 3,803 | 4,103 | 396 | 4,499 |
| Matara Prison | 1,120 | - | 1,120 | 1,394 | - | 1,394 | 1,963 | - | 1,963 | 2,187 | - | 2,187 | 2,212 | - | 2,212 |
| Tangalle Remand Prison | 1,588 | 70 | 1,658 | 1,888 | 99 | 1,987 | 2,145 | 105 | 2,250 | 1,906 | 72 | 1,978 | 2,347 | 95 | 2,442 |
| Negombo Prison | 5,153 | 416 | 5,569 | 5,203 | 578 | 5,781 | 4,532 | 540 | 5,072 | 4,385 | 341 | 4,726 | 4,940 | 393 | 5,333 |
| Watupitiwala T.S.Y.O. | - | - | 0 | - | 0 | 0 | 0 | - | 0 | - | - | 0 | - | - | 0 |
| Trincoamlee Remand Prison | 411 | 32 | 443 | 630 | 47 | 677 | 665 | 52 | 717 | 598 | 51 | 649 | 777 | 78 | 855 |
| Kegalle Remand Prison | 1,687 | - | 1,687 | 2,133 | - | 2,133 | 1,999 | - | 1,999 | 1,529 | - | 1,529 | 1,824 | - | 1,824 |
| Kalutara Remand Prison | - | - | 0 | 131 | - | 131 | 190 | - | 190 | 276 | - | 276 | 3,658 | - | 3,658 |
| Total | 59,295 | 3,870 | 63,165 | 62,145 | 4,311 | 66,456 | 61,051 | 4,295 | 65,346 | 59,736 | 3,557 | 63,293 | 66,201 | 4,918 | 71,119 |

M-Male F-Female T-Total

See original report because these numbers do not match the original one.

**[ANNEXURE II]**

## TABLE II

## DIRECT ADMISSION OF CONVICTED PRISONERS BY INSTITUTION, 1991-1995

| | M | F | T | M | F | T | M | F | T | M | F | T | M | F | T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Welikada | 11,468 | 543 | 12,011 | 9,791 | 376 | 10,167 | 11,182 | 410 | 11,592 | 8,771 | 395 | 9,166 | 8,164 | 228 | 8,392 |
| Colombo Remand Prison | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 |
| New Magzie Prison | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 |
| Mahara Prison | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 |
| Bahgambara Prison | 2,219 | - | 2,219 | 2,608 | - | 2,608 | 2,221 | - | 2,221 | 2,324 | - | 2,324 | 2,326 | - | 2,326 |
| Kandy Remand Prison | - | 162 | 162 | - | 149 | 149 | - | 104 | 104 | - | 79 | 79 | - | 108 | 108 |
| Jaffna Prison | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 | - | - | 0 |
| Anuradhapura Prison | 541 | 5 | 546 | 1,060 | 36 | 1,096 | 945 | 42 | 987 | 907 | 28 | 935 | 1,267 | 54 | 1,321 |
| Badulla Prison | 748 | 19 | 767 | 982 | 22 | 1,004 | 839 | 29 | 868 | 637 | 22 | 659 | 442 | 8 | 450 |
| Battcaloa Prison | - | - | 0 | - | - | 0 | - | - | 0 | 132 | 10 | 142 | 138 | 6 | 144 |
| Galle Prison | 650 | 60 | 710 | 598 | 32 | 630 | 766 | 52 | 818 | 710 | 42 | 752 | 608 | 27 | 635 |
| Matara Prison | 195 | - | 195 | 258 | - | 258 | 367 | - | 367 | 334 | - | 334 | 328 | - | 328 |
| Tangalle Remand Prison | 295 | 20 | 315 | 235 | 4 | 239 | 219 | 6 | 225 | 462 | 2 | 464 | 361 | 9 | 370 |
| Negombo Prison | 1,086 | 192 | 1,278 | 1,065 | 173 | 1,238 | 585 | 117 | 702 | 694 | 117 | 811 | 514 | 61 | 575 |
| Watupitiwala T.S.Y.O. | 27 | - | 27 | 39 | - | 39 | 71 | - | 71 | 83 | - | 83 | 46 | - | 46 |
| Trincoamlee Remand Prison | 57 | 10 | 67 | 171 | 13 | 184 | 286 | 19 | 305 | 248 | 18 | 266 | 257 | 22 | 279 |
| Kegalle Remand Prison | 722 | - | 722 | 639 | - | 639 | 384 | - | 384 | 220 | - | 220 | 309 | - | 309 |
| Kalutara Remand Prison | - | - | 0 | - | - | 0 | - | - | 0 | 6 | - | 6 | 610 | - | 610 |
| Total | 18,008 | 1,011 | 19,019 | 17,446 | 805 | 18,251 | 17,865 | 779 | 18,644 | 15,528 | 713 | 16,241 | 15,370 | 523 | 15,893 |

M-Male F-Female T-Total

**[ANNEXURE III]**

**TABLE III**

**TOTAL NUMBER OF CONVICTED PRISONERS FOR DRUG RELATED OFFENCES, 1989-1998**

| | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|---|---|---|---|---|
| Narcotic Drug Offences | 3,091 | 6,654 | 7,642 | 5,915 | 6,656 | 5,660 | 5,181 | 7,349 | 7,139 | 8,199 |
| Excise Offences | 1,275 | 2,248 | 5,723 | 4,928 | 4,873 | 4,002 | 4,162 | 4,652 | 4,806 | 4,932 |
| Theft | 853 | 1,080 | 1,140 | 1,645 | 1,466 | 1,384 | 1,376 | 1,008 | 758 | 1,127 |
| Appearing in Public Places Drunk | 244 | 331 | 164 | 457 | 435 | 340 | 355 | 334 | 360 | 440 |
| Looting | 176 | 309 | 259 | 267 | 358 | 308 | 342 | 351 | 256 | 380 |
| Viewing Blue Films | 136 | - | 75 | 74 | 74 | 10 | 30 | 1 | 3 | 14 |
| Simple Assult | 178 | 244 | 165 | 253 | 253 | 262 | 255 | 223 | 243 | 372 |
| Cheating | 117 | 163 | 125 | 140 | 159 | 154 | 139 | 155 | 124 | 143 |
| Acceptance or Retention of Stolen Property | 116 | 161 | 295 | 492 | 421 | 387 | 379 | 529 | 463 | 643 |
| Maintenance | 103 | 166 | 204 | 163 | 262 | 272 | 338 | 361 | 472 | 415 |
| Other Offences | 1,725 | 2,772 | 3,227 | 3,917 | 3,687 | 3,462 | 3,336 | 2,806 | 3,519 | 4,135 |
| Total | 8,014 | 14,128 | 19,019 | 18,251 | 18,644 | 16,241 | 15,893 | 17,769 | 18,143 | 20,800 |

# CRIME PREVENTION: CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES

*Sivakorn Kuratanavej**

## I. INTRODUCTION

When making the comparative study on correction activity, one always firstly looks at the imprisonment rate of each country to overview the general situation. Looking into the statistics of Thailand, one might be astonished of the very high rate of imprisonment, which is 1:270. In 1999, there were 133 prisons and correctional institutions all over the country, with totally 10,909 correctional officials. The prison population was 205,340 while the standard capacity was only for 84,223 inmates. Overcrowding has become a problem for the Thai correctional system during this last decade, and the situation continues aggressively. The effect of overcrowding is not only on the inmate's daily living but also the official's difficulty in operating of custodial measurement as well as treatment programs for offenders.

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## II. ACTUAL SITUATION OF OVERCROWDING

### A. Prison Population

During this last decade, prison population in Thailand has been increasing dramatically. In certain years, there was a collective royal pardon related to an important occasion of the country; some convicted inmates were released. In 1994, the number of inmates reached 103,329, which was considered as very high. Five years later, the number has doubled and reached 203,702 inmates. Even though there was a collective royal pardon at the end of 1999, the prison population as of March 2000 was 200,310 inmates. Table 1 shows prison population during these last ten years.

### B. Main Causes of Prison Overcrowding

i) The Increase of Drug Offenders: There are various factors that lead to higher number of drug offenders

**TABLE 1**

**Prison Population in Thailand**

| Year | Male | Female | Total |
|---|---|---|---|
| 1991 | 81,980 | 6,071 | 88,051 |
| 1992 | 68,097 | 5,212 | 73,309* |
| 1993 | 83,523 | 6,784 | 90,307 |
| 1994 | 94,776 | 8,553 | 103,329 |
| 1995 | 101,130 | 9,898 | 111,028 |
| 1996 | 92,353 | 10,849 | 103,202* |
| 1997 | 109,885 | 16,070 | 125,955 |
| 1998 | 141,131 | 23,320 | 164,451 |
| 1999 | 172,620 | 32,720 | 205,340 |
| 2000 | 165,485 | 34,825 | 200,310* |

* In fiscal years 1992, 1996 and 2000, there were collective royal pardons.

in Thai prisons.

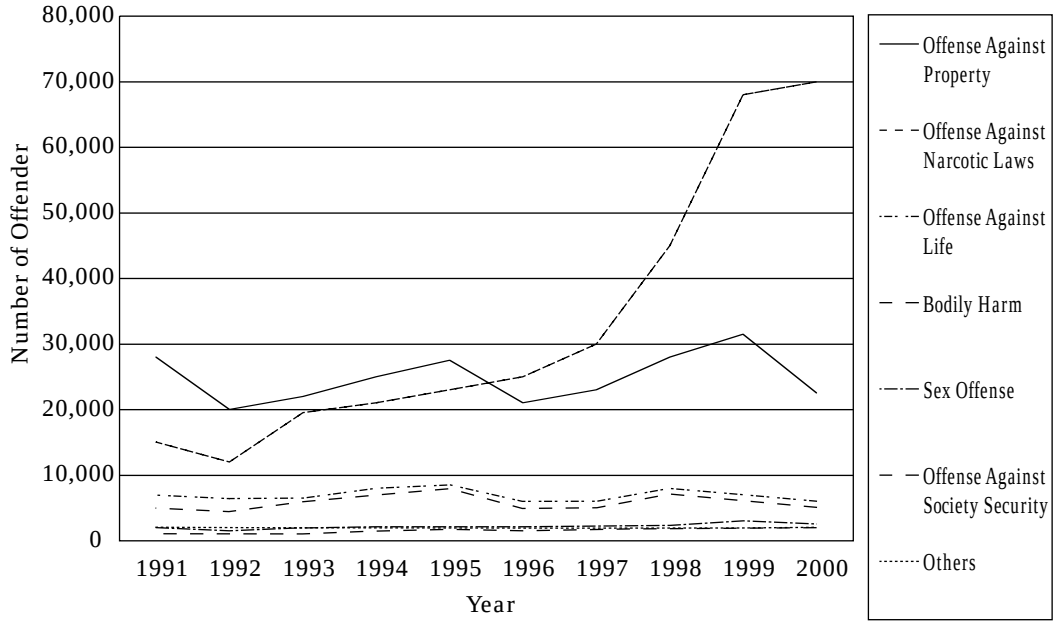
- The government's policy on drug suppression: The suppression strategy is done by the demolishing of drug production sources and by arresting drug users and drug dealers. The main sentence imposed on drug offenders is imprisonment. The more drugs are suppressed, the higher the number of drug offenders. In the past, offense against property was the most common offence in prisons, but since 1996, drug offenses have topped other offense in Thai prisons and have climbed up remarkably fast as shown in Table 2.

- The Public Health Drug Definition: In 1996, the Ministry of Public Health has stipulated that amphetamines (previously considered as a legal stimulant drug) were illegal drugs on the same level as heroin. Punishment for a possessor or seller of amphetamine shall be as severe as that for heroin. The situation has become catastrophic. Amphetamines are easy to find and have widely spread among various groups of people including students and laborers. Suppression has led to more arrests and more drug offenders in prisons.

- The Prime Minister's Order on Treatment of Drug Offenders: In 1998, the Office of the Prime Minister has issued the order concerning the treatment of drug offenders. It indicated that drug

**TABLE 2**

**Type of Offenders in Thai Prisons**




* See original report. This is not the as same as the original due to lack of the number of offenders.

users should receive treatment program while drug dealers should receive severe punishment and should not receive any lenient treatment or commutative pardon. The order has had a direct effect on drug dealers in prisons who shall have to spend longer time in prison than other offenders. Long-term imprisonment is certainly one main cause of overcrowding.

ii) The Incarceration of Unsentenced Inmates: Among the total prison population, 38.72 percent are inmates awaiting investigation and inmates awaiting trial. Generally, remandees or unsentenced inmates are incarcerated in Remand Prison. As for Provincial Prison, there must be a separate section for remandees which had previously been expected as 10 percent of the total capacity. However, at present the number of remandees represents almost half of the total prison population. Most prisons are overcrowded. Some prisons have to incarcerate unsentenced inmates together with convicted prisoners due to the lack of facilities.

iii) The Frequent Use of Imprisonment in Thai Criminal Justice System: In Thailand, patterns of punishment vary from fines, forfeitures of property, imprisonment to capital punishment. Practically, the main punishment is imprisonment. Those who cannot afford to pay a fine shall also have to be imprisoned. Imprisonment could be replaced by probation in case of first-time offense. Compared with probation, imprisonment rate is still very high and is imposed to every type of offenses including petty offense, gambling, offense against traffic laws, etc. The frequent use of imprisonment has simply made an overcrowding situation in prisons.

iv) The Strict Regulation of Pre-Release Programs of the Department of Corrections: In Thailand, after the imprisonment term is imposed, the Department of Corrections has a responsibility to keep the offenders in custody until the termination of their sentence term. During incarceration, if the inmates show better attitude, good conduct, and their readiness to return to society, the Department of Corrections is empowered to release them prior to their sentence term. Pre-release programs include Good Conduct Allowance, Public Work Allowance, and Parole. Practically, to comply with these three programs, especially parole, the conditions are very strict and quite difficult to obtain. The Department of Corrections has

**TABLE 3**

**Number of Conditional Released Prisoners during the Last 5 Years**

| Year | Good Conduct | | Public Work | | Parole | | TotalConvict | |
|---|---|---|---|---|---|---|---|---|
| | No. | % | No. | % | No. | % | No. | % |
| 1995 | 14,003 | 20.57 | 8,287 | 12.18 | 2,088 | 3.07 | 68,058 | 100 |
| 1996 | 17,460 | 23.62 | 7,935 | 10.73 | 2,109 | 2.85 | 73,920 | 100 |
| 1997 | 17,543 | 26.85 | 4,608 | 7.05 | 802 | 1.23 | 65,336 | 100 |
| 1998 | 18,670 | 24.79 | 5,868 | 7.79 | 1,114 | 1.48 | 75,320 | 100 |
| 1999 | 17,671 | 18.21 | 6,093 | 6.28 | 1,016 | 1.05 | 97,027 | 100 |

realized that pre-release programs are one good way to solve the overcrowding problem and has tried to promote program implementation, but the number of conditional releases are still relatively low due to the strict conditions. The number of inmates receiving conditional release during these last five years is shown in Table 3.

### C. Countermeasures for Alleviating Long Term Detention of Unsentenced Inmates

As for Thailand, it might be difficult to alleviate the long-term detention of unsentenced inmates since there are no facilities for custody apart from prisons. Generally, at every police station, there is a custody cell for unsentenced offenders or detainees. However, most police cells are small, limited in number, and lack of good hygiene. It is necessary to send unsentenced offenders and detainees to be incarcerated in the overcrowded but yet cleaner prisons and correctional institutions.

The basic measurement that would alleviate the long-term detention of unsentenced offenders is bail granting. However, this measurement is practically for those who can afford with their property and may not be affordable for the poorer. The solving of this problem might be done by the change of bail guarantor, which could be honorable persons, working status, or some possible alternatives.

Actually, the most important countermeasures to alleviate the long-term detention of unsentenced inmates are speedy trial, which needs good cooperation from every agency in the criminal justice system. Due to the circumstances in Thailand where there are a lot of arrests as part of crime suppression, the trial cases are too numerous and beyond the capacity of public prosecutors, judges, or other officials in the system. Consequently, speedy trials are too difficult in practice.

### D. Effective Use of Alternative Measures to Imprisonment

i) The Expansion of Probation Supervising: In order to alleviate imprisonment, it is important that probation be imposed to some certain crimes; so that the offenders can be treated and supervised in their own community. The number on probation in Thailand is relatively low compared to imprisonment. The expansion of probation is considered as one important measure in this issue.

ii) The Establishment of Alternative Punishment Schemes to Imprisonment: For some petty offenses, there should be appropriate types of punishment rather than imprisonment such as home detention, community redemption work, weekend detention, etc.

iii) The Establishment of Alternative Punishment Schemes for Drug Addicts: Upon the arrest of a drug offender, the offender should be scrutinized and diagnosed whether he/she should receive the compulsory drug treatment program or imprisonment. Compulsory drug treatment programs may be operated in either a drug treatment center or a boot camp system.

iv) The Expansion of Community-Based and Aftercare Schemes: It has been recognized that community-based and aftercare programs are important activities in terms of rehabilitation and alleviation of imprisonment. The Department of Corrections should consider changing the regulations that has limited the number of conditional releases. Furthermore, projects on pre-

released in the community should be encouraged, so that pre-released prisoners should be able to stay in facilities situated in the community where they can find jobs and adapt themselves to their society before the termination of their sentence term.

## III. ACTUAL SITUATION AND PROBLEMS OF PRISON CONDITIONS

### A. Implementation of the Rules in Thailand

a. Food

In Thailand, the budget that the Department of Corrections receives for food of each prisoner per day is 27 Baht (US$ 00.73). According to Thai Penitentiary Act, food shall be provided to a prisoner at least twice a day. Practically, prisons and correctional institutions serve three meals to prisoners. In case of religious restriction about food like Muslim, proper food shall be prepared for the prisoners.

As for the received budget, the 27 Baht is spent on rice, side dishes and cooking gas. It is very low and does not deem to produce sufficient quality and quantity of food. The Department of Corrections has raised this problem to the government and was approved for the new rate of 32 Baht (US$ 00.86) per person per day. Unfortunately, due to the economic crisis of the country, the new rate has not yet been equipped.

Practically, every prison and correctional institution has ameliorated the problem of food for prisoners by allowing relatives to bring some food for the prisoners occasionally. However, the bringing of food could be a channel of drug smuggling into prisons. The problem is partly solved by the establishment of store in front of a prison to cook and sell food to relatives in fair price. Food selling is convenient for both the relatives and prison staff.

b. Clothing

In Thailand, clothing necessity that should be provided to each prisoner consists of:

- Prison Clothes
  2 sets/person/year
- Loincloth (Traditional All-purpose Cloth)
  1 piece/person/year
- Underwear
  2 pieces/person/year
- Towel
  1 piece/person/2 years

The above necessity seems to be very limited and might not be sufficient for one's personal use. Nonetheless, the Department of Corrections is not yet able to provide such necessity to every inmate due to the lack of budget allocation. In some prisons where there is garment factory inside, prison clothes may be produced and provided to every inmate on a self-help basis. But this is only an exception. The Department cannot provide sufficient clothing to prisoners. Problem is solved by letting the inmates using their personal clothes. Prison clothes is used only when bringing the inmates outside the prison e.g. during transportation to and from the court and while performing public work in the community.

c. Housing

Housing or facility is one of the main problems that the Department of Corrections has encountered. The unexpected rapid increase of prisoners has brought the overcrowding circumstance, especially during nighttime when the inmates have to sleep tightly in dormitory cell.

The standard capacity of prison in Thailand is set by the calculation of

minimum sleeping floor space in the dormitory cell. Standard capacity for one inmate is 1 meter in width and 2.25 meter in length, totally 2.25 square meter.

The standard capacity varies when there is a construction of more facilities or the expansion of dormitory cells. In 1998, total floor space was 156,687.00 square meter. The capacity was 69,638 inmate. The prison population was 164,451 inmates and the number beyond the standard capacity was 94,813 inmates. Later on in 1999, there were more facilities and the total floor space was 189,208.42 square meter. The capacity was 84,223 inmates. The prison population was 205,340 inmates and the number beyond the standard capacity was 121,117 inmates. Housing construction seems to be very slow and can never catch up with the rapid increasing number inmates.

So as to solve the problem and to plan for the future, the Department of Corrections has proposed to the government various construction projects, some of which were accepted while some were not. Samples of construction projects are:

- Improvement of Prison Facilities Project: The Department had proposed four projects, two of which have been approved while the other two do not receive budget for operation.
- Construction of Regional Maximum Security Prison Project: The Department had proposed five projects, two of which have been approved while the other three do not receive budget for operation.
- Construction of a Prison to Substitute the Old Prison in Urban Area Project: The Department had proposed 31 projects, 8 of which have been approved while the other 23 do not receive budget for operation.

**B. Factors Impeding Satisfaction of the Rules and Their Effective Countermeasures**

In the administration of correctional activity, the Department of Corrections has basically followed the Standard Minimum Rules for the Treatment of Prisoners. Correctional officers at every level shall receive knowledge on the rules through training program. In some aspects, Thai prisons and correctional institutions have treated the offenders better than the stipulated rules, even though in some other aspects it is not able to do so. Considering the preliminary observations of the rules indicating that "In the view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all time. They should, however, serve to stimulate a constant endeavor to overcome practical difficulties in the way of their application", the Department of Corrections is confident in its application responding satisfactorily to the rules. The treatment of prisoners is basically based on the rules and on the suitable circumstances of Thai culture. There is no such thing like the breach of human right or inhumane treatment of the system.

The applicable of the rules in Thai correctional system is impeded in some aspects as follows:

***Separation of Categories***: The rules indicate that "Untried prisoners shall be kept separate from convicted prisoners." As previously mentioned, prisons responsible for taking in custody of untried prisoners are Remand Prisons or Remand Sections in Provincial Prisons. Due to the rapid increase of prisoners and overcrowding problem, it becomes difficult to separate the untried prisoners, especially during

daytime. During nighttime, separation is likely to be applicable. In some limited facilities such as female section in provincial prison, it is not possible at all to separate untried prisoners from convict ones because of a small scale of the section. The solving of problem is done by transferring convicted prisoners to regional female correctional institutions. The transfer of prisoners can cause trouble because they may be too far from the relatives to pay visits to them.

***Accommodation***: The rules indicate that minimum floor space should be provided to prisoners. The Department of Corrections has basically stipulated minimum floor space for one prisoner, but due to the overcrowding problem in most prisons, the minimum floor space can not be met.

***Medical Services***: It is indicated that "At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry." In this regard, one thing that every government agency in Thailand shares in common is the lack of medical doctors. The cause of this problem is because the production of medical doctors is very limited and a lot of doctors prefer working in private sector to public one. Consequently, the Department of corrections cannot provide medical doctors in every facility. Medical service is available in very few prisons that are equipped with necessary medical facilities.

If the prisoners are sick, either by general disease or mental sickness, they shall be transferred to nearby public hospitals. Sick inmates requiring long-term treatment shall be transferred to Central Correctional Hospital, which is the only hospital of the Department of Corrections.

### C. Actual Situation of Health Control for Inmates and Measures for Improvement

There are 133 prisons and correctional institutions throughout the whole country while there is only one hospital with its capacity of 300 beds. In every prison, there is a clinic where basic medical assistance is available. Sick prisoners requiring medical treatment are to be transferred to nearby public hospital and those who need long-term treatment shall be transferred to the Central Correctional Hospital situated in Bangkok. Health control for inmates is conducted by the Medical Services Division and by the Central Correctional Hospital. Two main problematic situations are AIDS and TB.

a. AIDS Situation

Comparing to general population of the country, inmate population has much higher infection of AIDS. A random blood testing was conducted to 400 general inmates in Klong Prem Central Prison in October 1998, it was found that 10 percent of the inmates were infected with AIDS. The number could have been much higher if conducting to drug addicted inmates. The inmates infected to AIDS who are seriously sick shall have to be transferred to the only Central Correctional Hospital, which has its capacity of 300 in-patient beds. This has led to two main problems: overcrowding the hospital and an extremely high death rate.

b. TB Situation

In connection to AIDS situation, one serious disease that follows is Tuberculosis. The death rate from TB has increased. In 1998, 24 percent of sick inmates in the hospital died of TB, having spread the disease to many other inmates beforehand due to overcrowding circumstances. It is found that the statistic of TB infection of the inmate population is ten times higher than the general population. The

treatment of TB needs at least 6-9 months and should be closely supervised by medical technicians so as not to spread the disease to others. As a matter of fact, keeping the TB infected inmates in custody is considered as an advantage in terms of medical treatment and prevention of disease spreading to people in the community. The problem of Department of Corrections is un-sufficient medical services and inpatient beds to serve the high number of sick inmates.

## IV. CURRENT TREND OF PRISONERS AND THEIR PROBLEM

### A. Foreign Prisoners and Issues of Their Transfer

a. Foreign Prisoners

At present, the advance of transportation and communication makes the world smaller. The international crime becomes numerous. Looking back 30 years earlier, there was no foreign prisoner in Thai prisons. As of December 1999, there were totally 5,034 foreign prisoners consisting of 4,454 males and 580 females in prisons and correctional institutions all over the country. Among this number, 81.96 percent were Asian, 12.24 percent were from Africa, and the rest of 05.80 percent were from Europe, America and Oceania.

As for type of offense, the most frequent offense is offense against narcotic drug (52.52 percent). The other offenses committed by foreign prisoners are offense against property, against life, false document, others respectively.

In regard to treatment program, foreign prisoners basically receive the same treatment program as Thai prisoners. However, considering that foreign prisoners are serving their time in a place too far from their home, with different language and culture, certain leniency is given as far as the prison would consider appropriate.

b. Transfer of Prisoners

Transfer of prisoner recalls the resolution 13 adopted by the 6th United Nation Congress on the Prevention of Crime and Treatment of Offenders held in Caracas, Venezuela in 1980. In Thailand, transfer of prisoner is operated in two categories: the transfer of prisoner to serve the remaining sentence term in his/her country of nationality and the transfer of prisoner as mutual assistance in criminal matters.

i) Repatriation Transfer of Prisoner: In 1984, Thailand has issued "The Legislation on Procedure for Cooperation between States in the Execution of Penal Sentence B.E. 2527." With stipulated provisions, Thai prisoners in foreign countries can be transferred to serve their sentence in the Kingdom, and foreign prisoners in the Kingdom shall be able to continue to serve the rest of their sentence term in their respective countries.

The idea of prisoner transfer had been initiated in 1978 between Thailand and the USA. However, the negotiation and administrative process took periods of time. The first treaty of prisoner transfer between Thailand and the USA was signed in 1982. At present, the operation of transfer treaty is as follows:

- Transfer treaties have been signed and become effective with 13 countries that are: the USA, Canada, France, Spain, Portugal, Poland, Germany, Sweden, Austria, Italy, United Kingdom and Northern Ireland, Finland and Denmark.

- Transfer treaties awaiting ratification with two countries that are: Switzerland and Israel.
- Transfer treaties pending negotiation with seven countries that are: Czech Republic, Peru, The Philippines, Swaziland, Nepal, Estonia and Hong Kong.

ii) Transfer of Prisoner as Mutual Assistance on Criminal Matter: The problems of crimes affect the public security and the economic stability of the country. With the technological development, various crimes start to move across the boundaries of two or more countries. The growth and expansion of transnational crimes stimulate many authorities to improve and implement the measures at international level with the main purpose of punishing the alleged offenders in order to strengthen and lubricate the criminal justice system. Extradition and bilateral agreements on mutual legal assistance in criminal matters are considered valuable tools in the fight against transnational crimes.

In Thailand, apart from "The Extradition Act B.E. 2472", "The Mutual Legal Assistance in Criminal Matters Act B.E. 2535" is another important legislation. It provides assistance in criminal matters to foreign states i.e. taking the testimony and statement of persons, providing documents, records and evidence for the prosecution of the alleged offenders to the requesting state. The new concept on mutual legal assistance brings about a great success for the effective international cooperation.

According to this mutual assistance transfer scheme, some prisoners, both Thai and foreign nationalities, have been transferred to another states to be present in the prosecution of some criminal cases. The transfer has shown the attempt of cooperation in criminal justice system at the international level.

**B. Drug Related Prisoners**

In Thailand, narcotic drug is a problem that has occurred for very long time. The addiction, possession, producing, selling or trafficking of drugs are illegal, and the punishments shall be imprisonment, life imprisonment or capital punishment. Notwithstanding the attempt of the Thai government in prevention and suppression of narcotic drug, the problem has never been diminished from the Thai society.

Thailand may be the only country that provides specific facility to incarcerate drug offenders called "Correctional Institution for Drug Addicts". The six correctional institutions for drug addicted are situated in different regions of the country. The institution is responsible for the incarceration of drug offenders, both drug addicts and drug dealers. The offenders of other offenses, even though they have history of drug using or drug relating, they shall not be incarcerated in the correctional institution for drug addict. Apart from taking the inmates in custody which is the main responsibility of the Department of Corrections, the institution for drug addicts shall have to provide drug treatment programs for the addicts. As for drug dealers, after conviction, they shall be transferred to other prisons since they are considered as criminals, not drug addicts.

Now that the number of drug offenders in high, the six correctional institutions for drug addicts are not able to intake the whole number. It is necessary to incarcerate drug offenders in various prisons throughout the whole country. At

present, more than half of prisoners in most prisons and correctional institutions are drug offenders.

Drug treatment has become one important mission of the Department of Corrections. Practically, it is well recognized that after a period of detention, a person can automatically stop using drug. But it is only a physical stop. When the prisoner gets release and return to his own society, he would deem to use drug again, which would cause recidivism. The Department of Corrections has altered the means of treatment program from physical treatment to mental treatment. It has been seven years that Therapeutic Community or TC program has been applied as treatment of drug addicts in prisons.

In order to study TC theoretically and practically, the Department has cooperated with various agencies both in private and public sectors. Correctional officers and concerned staff are trained to handle TC program in prisons. At present, only 6 correctional institutions for drug addicts have handled the TC program, but 70 prisons throughout the country have also handled the TC program to their inmates.

Nowadays, the Thai government has put high emphasis on drug treatment. The target of treatment is not only at drug offenders, but also at offenders committing other type of crime that have drug-using history. The Department of Corrections has the project of construction of "Drug Treatment Center". The center, which shall be opened in late 2000, will serve as a minimum-security prison that provides TC program and agricultural training program to drug offenders and drug related offenders.

**C. Female Prisoners**

During this last decade, number of female prisoners has been increasing. In 1992, there were 4,030 female prisoners in prisons and correctional institutions of the whole country, while in 1999, there were 19,235 female prisoners. Comparing to male prisoners, the increase of female prisoners is much higher. In 1999, the ratio between male and female prisoners is 6 to 1. The tendency shows that if the increasing of female prisoners continues in this rate, the number of female prisoners will be equal to male prisoners within the next ten years.

The number of female prisoners might have represented the equality of men and women in Thai society. The actual situation indicates that crime involved not only men but also women, especially drug offense. According to the statistic, it is found that, in 1999, among the total number of convicted female prisoners, 13,314 or 69.22 percent has committed

**TABLE 4**

**Type of Offense of Female Prisoners (as of 1999)**

| Type of Offense | No. | % |
|---|---|---|
| Offense Against Property | 4,604 | 23.93 |
| Offense Against Drug and Inhalant Laws | 13,314 | 69.22 |
| Offense Against Life | 308 | 1.60 |
| Bodily Harm | 120 | 0.62 |
| Sex Offense | 77 | 0.40 |
| Offense Against Social Security | 10 | 0.05 |
| Others | 802 | 4.17 |
| Total | 19,235 | 100 |

crime against drug laws; as shown in Table 4.

Looking backward into the last ten years, it is found that the number of female prisoners who have committed drug offense has been doubled. In 1990, there were 1,815 female drug offenders, which represented 39.39% of the total number. While in 1999, the number of female drug offenders has reached 13,314 prisoners or 69.33% of the total. The details are shown in Table 5.

**TABLE 5**

**Number of Female Prisoners During the Last Ten Years**

| Year | Female Prisoners | Drug Offenders | % |
|---|---|---|---|
| 1990 | 4,609 | 1,815 | 39.39 |
| 1991 | 4,929 | 1,960 | 39.76 |
| 1992 | 4,030 | 2,130 | 52.85 |
| 1993 | 4,593 | 2,765 | 60.20 |
| 1994 | 5,409 | 3,230 | 59.71 |
| 1995 | 6,519 | 4,167 | 63.92 |
| 1996 | 6,401 | 4,629 | 72.32 |
| 1997 | 8,855 | 6,857 | 77.44 |
| 1998 | 12,808 | 10,046 | 78.43 |
| 1999 | 19,235 | 13,314 | 69.22 |
| 2000 | 32,662 | 17,346 | 53.11 |

It can be said that Thai women have committed more crime, especially crime against drug and against property. As for serious crime such as offense against life and bodily harm, the number remains unchanged. This has represented participating roles of women in Thai society, which have led to chances to commit crime concerning property, financial activities and illegal drugs.

## V. CONCLUSION

As people commonly say, "If one wants to know what the country is like, one should look at the country's prison". The administration of corrections in Thailand has definitely reflected the country's social and economic problem. People have a fear of crime and wish that every wrongdoer be kept away and expect that prisons should rehabilitate every single criminal before releasing him back into the society. All criminal justice agencies are effected by this public attitude and are trying their best to encounter the situation. Corrections, which is the last agency in criminal justice system, has to be responsible for the increasing number of offenders. Overcrowding, prison conditions and rehabilitative treatment programs have become heavy burdens for correctional officers. The solving of these problems can not be done by the Department of Corrections alone. Governmental bodies including criminal justice agencies shall have to reconsider and cooperate in ameliorating the problem.

# REPORTS OF THE COURSE

## *GROUP 1*

## PRACTICAL MEASURES TO ALLEVIATE THE PROBLEM OF OVERCROWDING

| | | |
|---|---|---|
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### I. INTRODUCTION

The group was assigned to review, analyze and discuss the problem of overcrowding in correctional institutions and to come up with suggestions on considered remedial measures. We analyzed the concept of 'overcrowding' and explored issues related to it. Briefly the group outlined these issues as:

- the official correction capacities authorized by each country,
- the available single cells verses dormitories accommodation,
- the periodical peaks and lows experienced by correctional institutions over a given period,
- and the variations between one prison and another caused by the application of allocation and classification criteria.

Members of the group generally agreed that overcrowding exists in correctional institutions in many countries. They were also of the view that overcrowding in correctional institutions brings with it management problems that make it difficult to implement effective treatment programs.

The group therefore adopted a three-tier approach to deal with this topic thus;

- To review the actual overcrowding situation in each participant's country.
- To critically examine the possible causes, and
- To offer possible countermeasures

In discussing this topic, the members agreed to extensively make use of :

- Individual Presentation Papers already submitted during the plenaries.
- Review existing materials and literature relevant to this topic. Consult the experience and opinion of the advisers that have been attached to the group.
- Lectures by the visiting experts and faculty members.

Right from the start the group agreed to adopt a working definition of overcrowding as a situation where the correctional institution holds or accommodates prisoners or offenders over and above the statutory capacity or the conventionally accepted space per prisoner. Overcrowding

may also be viewed from the perspective of the limitations it causes to effective implementation of treatment programs.

The formula applied to calculate levels of overcrowding is :

Average Daily Population in Prison proportional to the available capacity per hundred percent (ADP/CAPACITY (100 %)).

## II. ACTUAL SITUATION OF OVERCROWDING

### A. Introduction

The participants in this group reported varying levels of overcrowding in correctional institutions in their respective countries.

In brief, the level of overcrowding is as here outlined. Japan has a population of 126 million. It is also recorded as having the lowest number of prisoners per 100,000 population. The prison population is currently (-17.1%) below the available capacity i.e. prisoners versus the available space stands at 82.9%. On the other hand in this group is a representative from Kenya where there is 150.4% overcrowding, followed by Pakistan at 127.5%, Philippines by 56.4%, Costa Rica at 20.4%, and Malaysia 4.8 %. The last two are noticeable for the low levels recorded.

The following Tables reflect the overcrowding situation and the proportion of convicted and unconvicted prisoners.

**TABLE ONE**

**Comparative Levels of Overcrowding in Prisons**

| Country | Population In Millions | Prison Capacity | Number of Prisoners | No. of Prisoners/ 1000,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|---|
| Costa Rica | 3.6 | 4,296 | 5,173 | 143.7 | 20.4% |
| Japan | 126.0 | 63.625 | 52.715 | 41.8 | (-17.1%) |
| Kenya | 28.5 | 14,000 | 35,058 | 123.0 | 150.4% |
| Malaysia | 23.0 | 23,884 | 25,029 | 108.8 | 4.8% |
| Pakistan | 126.81 | 34,700 | 78,938 | 62.2 | 127.5% |
| Philippines | 68.6 | 45,000 | 70,383 | 87.2 | 56.4% |

Table two attempts to find out the status of the prisoners held in custody in correctional institutions i.e. convicted or unconvicted. In all the countries, convicted prisoners account for more than 70% of the total prison population. For example Costa Rica has 80%, Japan has 82%, Kenya has 74%, Malaysia has 71% and the Philippines has 62%. The general trend therefore is one where the overcrowding situation is as a result of holding more convicted offenders relative to the available space. It is only in Pakistan which has 22.4% of convicted offenders.

**TABLE TWO**

**Comparative Levels of Convicted and Unconvicted Prisoners Relative to Overcrowding**

| Country | No.of Prisoners | Convicted Prisoners | Unconvicted Prisoners | Percentage of Overcrowding |
|---|---|---|---|---|
| Costa Rica | 5,173 | 4,906 (80%) | 1,245 (20%) | 20.4% |
| Japan | 52,715 | 43,464 (82%) | 9,251 (18%) | (-17.1%) |
| Kenya | 35,058 | 25,974 (74%) | 9,084 (26%) | 150.4% |
| Malaysia | 25,029 | 17,676 (71%) | 7,353 (29%) | 4.8% |
| Pakistan | 78,938 | 17,697 (22.4%) | 61,241 (77.6%) | 127.5% |
| Philippines | 70,383 | 43,486 (62%) | 26,897 (38%) | 56.4% |

**B. Actual Situation of Participants' Countries**

**1. Costa Rica**

(i) During the last few years, Costa Rica has shown a growth in the penal population and this phenomenon has caused a problem of overcrowding. It has however been fairly alleviated because several new prisons were constructed a few years back. In 1999, the average rate of overcrowding was 20%, but in some institutions the percentage reached 80%.

(ii) Causes

Overcrowding in Costa Rica is caused by the tendency of long term sentences, delays in trials, and the inappropriate use of non-custodial measures.

a. Tendency of long term sentences

The average length of a sentence of imprisonment has been increasing yearly. In 1999, the percentage of convicted prisoners who have been sentenced for

| Year | Popula-tion In Millions | Penal Population | Number of Prisoners | Number of Convicted Prisoners | Number of Unconvicted Prisoners | Prison Capacity | No. of Penal Population/ 100,000 Population | No. of Capacity/ 100,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|---|---|---|---|---|
| 1997 | 3.4327 | 5,747 | 4,922 | 4,420 (70%) | 1,327 (30%) | 3,029 | 167.4 | 88.24 | 62.5 % |
| 1998 | 3.4964 | 6,187 | 5,026 | 4,929 (74%) | 1,258 (26%) | 3,899 | 177.0 | 111.51 | 28.90% |
| 1999 | 3.5587 | 6,202 | 5,173 | 4,957 (75%) | 1,245 (25%) | 4,296 | 174.3 | 120.72 | 20.40% |

Ref.: Statistic Department, Minister of Justice

more than 16 years went up by 12%. During the same year, imprisonment was used in more than 90% of the cases. This was probably because of the public and pressure for more and more punishment. The legal reform of 1998, maximum statutory length of penalty was extended from 25 to 50 years and this has contributed to increasing the average length of sentence.

b. Delay in Trial
Currently the average period of trial from prosecution until sentencing is about seventeen months. This is due to the shortage of public prosecutors and judges.

c. Inappropriate Use of Open Penal Centers and Conditional Release.
In the last three years, the percentage of prisoners in closed centers is more than 85%. This figure seems to indicate that there is excessive utilization of closed imprisonment by the penitentiary system.

**2. Japan**

(i) In 1999, there were 67 prisons and 7 detention houses (excluding the juvenile classification homes and the juvenile training schools.). The percentage of accommodation rate in 1998 was 82.9 percent. Correctional institutions as a whole in Japan are not overcrowded.

The acknowledged number of offences has increased consistently for the last ten years. The accommodation rate of penal institutions has been rising every year and some penal institutions like female prisons or prisons for those convicts who do not have advanced criminal tendency have been experiencing problems of overcrowding. This is a trend that raises some concern to the administration of penal institutions and is to be watched in future.

| Year | Population In Millions | Number of Offences | Number of Prisoners | Number of Convicted Prisoners | Number of Unconvicted Prisoners |
|---|---|---|---|---|---|
| 1996 | 125.86 | 1,812,119 | 49,414 | 40,515 (81.99%) | 8,899 (18.01%) |
| 1997 | 126.17 | 1,899,564 | 50,897 | 41,868 (82.26%) | 9,029 (17.74%) |
| 1998 | 126.49 | 2,033,546 | 52,715 | 43,464 (82.45%) | 9,251 (17.55%) |

| Year | Prison Capacity | No. of Prisoners/ 100,000 Population | No. of Capacity/ 100,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|
| 1996 | 64,770 | 39.3 | 51.5 | -23.7% |
| 1997 | 64,404 | 40.3 | 51.0 | -21.0% |
| 1998 | 63,625 | 41.7 | 50.3 | -17.1% |

Ref: White Paper on Crime 1997 - 1999

(ii) Reasons for No Overcrowding in Japan

Generally, overcrowding may be caused by delay in investigations, inadequate use of non-custodial measures and others, but Japan does not have these problems.

a. Strict Observation of Law

The Code of Criminal Procedure requires police and public prosecutors to handle one case within the confinement period of 23 days or less at the investigation stage. This restriction of period is observed strictly by them. Also at the trial period, cases requiring long trial periods have been limited to only brutal or complicated cases. The ratio of cases whose trial periods were within three months exceeded 70 % in the courts of first instance in 1998. The ratio of cases that took more than one year in the trial period was only 1.7 %. These figures have not changed much in recent years.

b. Adequate Use of Bail

Japan has a bail system after the initiation of prosecution. The number of defendants who were released on bail in the courts of first instance was about 16 % in 1998. Though at first sight this figure seems to be low, this is because the number of bail requests was not so high. Realistically more than half the number of the requests for bail were accepted by the judge before the first trial date.

c. Effective Use of Non-custodial measures

As for the non-custodial measures, there are such measures as disposition of petty offences at the police stage, suspension of prosecution at public prosecutors stage, and suspension of execution of sentence at trial stage. These systems are being utilized accordingly. For instance, the rate of suspension of prosecution of criminal code offence was 34.9 % in 1998. The rate of suspension of execution of sentence was 63% for imprisonment with labor and 95.8 percent for imprisonment without labor. The ratio of the number of newly admitted prisoners per the total number of offenders (penal code offenders and special law offenders) received by public prosecutors offices was only 2.06% in 1998. These figures show that many cases are diverted at each stage.

d. Effective Use of Parole

Moreover, at the stage of the execution of punishment, release on parole is effectively used. The rate of release on parole was 58.2 percent in 1998.

(iii) As mentioned above, the number of crimes and the accommodation rate has been increasing in the last few years. We can analyze that one of the reasons for the recent increase of the accommodation rate in Japan is the increase in the number of crimes/ prisoners. And the reasons of the recent overcrowding situation in the female or non-advanced criminal tendency prisoners' prison results from the lack of facilities which can accommodate them, while the number of such kinds of prisoners keeps on increasing and the classification is strictly done.

## 3. Kenya

(i) Overcrowding in prison penal institutions in Kenya has consistently been a problem. The magnitude of this problem however

varies from one penal institution to another. Example: the medium sentence prisons are relatively more overcrowded than others while prisons based in major towns experience more overcrowding relative to those in district rural areas.

As at the week of 18 February 2000, the average daily prison population was as shown in the following table. Compared with late 1970's and early 1980's the prison population has rapidly risen from 24,239 to 35,058. The overcrowding has been very rapid and steep more than doubling up (from 73% to 150.4%) between 1979 and 1999.

| Year | Population In Millions | Number of Prisoners | Number of Convicted Prisoners | Number of Unconvicted Prisoners | Prison Capacity | No. of Prisoners/ 100,000 Population | No. of Capacity/ 100,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|---|---|---|---|
| 1999 | 28.50 | 35,058 | 25,974 (74.09%) | 9,084 (25.91%) | 14,000 | 123.0 | 49.1 | 150.4% |

Ref: Prison Annual Report

(ii) Causes of Overcrowding in Kenya

The main causes of prison overcrowding in Kenya are the following:

a. Inadequate Finances

Prisons like all other government public institutions are funded from public finances. Like all other public institutions they have to make a strong case to justify their demand for funds and in this they compete with others for the available national funds. This is in spite of the fact that their function and roles are mandatory. With a declining national economy, funds made available to prisons have proportionally been declining at a time when the prison population has actually been increasing. The inadequate finances lead to cut backs on most prison activities. At best, most of the prison programs operate at half or less of their capacity performance levels. This has lead to correctional staff focusing more on secure custody at the expense of corrections and rehabilitation and thus placing constraints on the essential early release measures of remission and good conduct sentence reduction measures. As a result, the length of prison sentence served by inmates is in most cases as per the courts originating orders.

b. Lack of Early Release Measures

The "end line" early release measures that have been effectively utilized elsewhere are lacking or under utilized. The parole program especially is competently capable of down loading prison population by a third or more. It is however unavailable and therefore there is no opportunity to utilize this early release program. This means that the length of sentences served in Kenya is relatively greater.

Prisoners end up staying longer in correctional institutions for periods unrelated to training needs. As mentioned earlier remissions, general pardon and

other early release measures are applied ad-hoc and therefore only marginally impact on prisons overcrowding.

c. Inadequate Use of Alternatives
The magistrates/courts which have the first jurisdiction and process over 80 % of the criminal proceedings annually sparingly apply non-custodial countermeasures. Ordinarily, the proportion of imprisonment compared with probation orders, community service orders and other supervisory orders are low. The mindset in sentencing is to consider imprisonment as the sentence of first choice. This inevitably creates a very fast build up of prison population. This has been the trend in the last ten years. The occasional mass state pardons do not seem to have had a lasting impact because barely six months after, the same levels are reached. As such there is presently no cut-off on prison overcrowding in Kenya.

## 4. Malaysia

(i). The actual situation of overcrowding in Malaysia fluctuates and the trend shows that the prison population declined from 29,150 in 1998 to 25,019 in 1999. The percentage of prison overcrowding decreased from 32 % to 4.75 %. The main reason for this decline is that in 1998 many foreign prisoners were deported to their own countries and the practice will continue in future.
As of 2 March 2000 there was a marginal increase of the penal population from 25,019 to 25,029 and the percentage of overcrowding rose from 4.75% to 4.8%.

| Year | Population In Millions | Penal Population | Number of Prisoners | Number of Convicted Prisoners | Number of Unconvicted Prisoners | Prison Capacity | No. of Prisoners/ 100,000 Population | No. of Capacity/ 100,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|---|---|---|---|---|
| 31-Dec -98 | 22.20 | 29,150 | 25,427 | 22,666 (89.14) | 6,484 (10.86) | 22,085 | 131.3 | 99.48 | 32.0% |
| 31-Dec -99 | 22.80 | 25,019 | 21,966 | 19,649 (89.45) | 5,370 (10.55) | 23,884 | 109.7 | 104.75 | 4.75% |
| 2-Mar -00 | 23.00 | 25,029 | 22,176 | 17,676 (79.71) | 7,353 (20.29) | 23,884 | 108.8 | 103.84 | 4.79% |

Ref: Malaysia Prison Department

(ii) Causes

a. Lack of Alternative Measures
The main reason of overcrowding in Malaysia is the lack of alternative measures to imprisonment. This is because the public has a very strong influence in favor of imprisonment particularly for heinous crimes.

b. Increase in Number of Crimes
The increase in the number of crimes committed especially under the Dangerous Drug Act and the Immigration Act aggravate the overcrowding rate. Malaysia is the place of transit for drug smugglers. The steady flow of foreign workers also contributes to the prison population. The foreign prisoners charged under the Immigration Act in 1998 were 5,051 prisoners and as of 2 March 2000 the number of foreign prisoners was

5,068.

c. Slow and Inefficient Administration in the Criminal Justice System

The shortage of judges and magistrates and also the increasing workload causes delay in trials and makes the period of remands longer. The increase of awaiting trial prisoners in Malaysia also creates overcrowding.

**5. Pakistan**

(i) There are vastly diverse ways to measure overcrowding. Here the simplest method is used and involves comparing the state set capacity of prisons and the actual number of prison inmates on a given day. If the latter exceeds the former (more than 100%), one could conclude that the prison system is generally overcrowded. Pakistan with a population of 120 million has 76 prisons with a capacity of 34,700 inmates. Against this capacity 81,904, 73,884 and 78,938 prisoners were housed during 1997, 1998 and 1999 showing an overcrowding of 136%, 112%, and 127% respectively whereas the imprisonment rate per 100,000 population was 68.2, 61.5 and 65.7 in the same order during the above period. The table below presents occupancy rates for the last three years ie 1997, 1998 and 1999. The highest rate of overcrowding has been in the year 1997, which shows 136% overcrowding.

The careful perusal of the table indicates a fluctuating prison population during these three years hence, no special trend setting inference can be drawn. During the 70s the position was not grave, but with rapid changing socio-economic conditions, process of globalization exposure of youngsters to world media and increases in population has resulted in the growth of the prison population. In addition to the above there are a number of other causes of over crowding, which are discussed hereinafter.

| Year | Population In Millions | Number of Prisoners | Number of Convicted Prisoners | Number of Unconvicted Prisoners | Prison Capacity | No. of Prisoners/ 100,000 Population | No. of Capacity/ 100,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|---|---|---|---|
| 1997 | 120.00 | 81,904 | 50,318 (61.44%) | 31,586 (38.56%) | 34,700 | 68.3 | 28.9 | 136.0% |
| 1998 | 123.36 | 73,884 | 15,777 (21.35%) | 58,107 (78.65%) | 34,700 | 59.9 | 28.1 | 112.9% |
| 1999 | 126.81 | 78,938 | 17,697 (22.42%) | 61,241 (77.58%) | 34,700 | 62.2 | 27.4 | 127.5% |

Ref: Home Department Government of Punjab, NWFP, Sindh, Baluchistan,

(ii) Causes of Overcrowding in Pakistan

a. Delay in Judicial Disposition of cases

Overcrowding of unconvicted prisoners is a common problem in many countries, however in the present group, Pakistan is the only country where this problem is more pronounced. The number of unconvicted prisoners have shown a sharp upward trend during the last three years which not only reflects a very low conviction

percentage, but also indicates slow judicial disposition of cases. The reasons are shortages of judges, magistrates, police, prosecuting officers and above all insufficient court officials who are over worked. The other reasons are postponement of cases, witnesses not available due to all sorts of reasons, lawyers engaged in other courts, incomplete investigations, police officers (due to other multifarious duties) are either not available or not well prepared to face the court and counsel for the accused. The influence of corruption and insufficiency are also considered contributing factors in this regard. Although unconvicted prisoners are eligible to obtain release on bail, inadequate use of bail provisions result in increases in remand population.

b. Lack or Limited Use of Alternative Measures to Imprisonment
This is one of the major contributory factors towards an increase in the prison population. Although we have fines and suspension of sentence as alternative measures to imprisonment, these are not very frequently used particularly in heinous crimes. In fact public perception about the punishment is tilted more towards imprisonment than alternative measures. That is one of the reasons that the courts have sparingly used alternatives. Cases have also come to the notice where a number of fine defaulters are serving prison sentences because of inability to pay.

c. Lack or Limited Use of Early Release Measures and After Care Services
Although we have sufficient early release measures like remission, pardons, parole, treatment program within prisons and after care services, they are far below optimum level. As a result the rate of recidivism is increasing. In fact prisons are considered as nurseries for the training of first timer offenders to turn them into hardened criminals. On the other hand, one school of thought is of the view that the lack or non availability of facilities within prisons or bad prison conditions act as deterrents and results in a reduction of recidivism. But in fact it is the other way round and a very negligible proportion of the prison population fall under this category.

d. Lack of Resources
Financial constraints lead to deficient space and facilities for the prisoners ultimately leading to overcrowding. In Punjab, which is one of the biggest provinces of Pakistan only 10 new jails have been constructed after independence, where as the population has increased tenfold. Hence, due to the non-availability of space for the penal population the overcrowding is not only increasing rather it has already reached an alarming stage.

## 6. The Philippines

(i) Generally, the correctional institutions in the Philippines operating under three distinct and separate departments (the Department of Justice, the Department of Interior and Local Government and the Department of

Social Welfare and Development) are experiencing overcrowding problems in their respective correctional facilities. It is pointed out that the capacity of its facilities is not enough to accommodate the increasing number of offenders.

The estimated population of the Philippines in 1999 was 80.7 million. It recorded an average increase of 6% per year. In 1999, the recorded number of the penal population was 70,383 or its equivalent to 87.2 prisoners per 100,000 population. It has an average yearly increase of 9.6%. In 1997, the ratio between the adult and youth population was 86.5% and 13.5% respectively; in 1998, it increased to 91% and 9%; and in 1999 registered a slight decrease to 86.5% and 13.5%. In three years time, the average ratio between the adult and juvenile offenders was 88% and 12% respectively.

The measurement of capacity in the correctional facilities varies from the kind of treatment and accommodation afforded to them by the three distinct departments. For DSWD, the quarters of youth offenders are of dormitory type wherein each offender is provided with two square meters bed space and another two square meters open space for easy mobility. In 1999, the overcrowding situation in the facilities for youth offenders went up to 21.8%. On the other hand, the Bureau of Corrections under the Department of Justice providing custodial care to convicted national prisoners (3 years above sentence) reported that the average living space for each offender is 1.82 square meters. The overcrowding is however compensated by wide-open spaces for

| Year | Population In Millions | No. of Prisoners | Prison Capacity | No. of Prisoners/ 100,000 Population | No. of Capacity/ 100,000 Population | Percentage of Overcrowding |
|---|---|---|---|---|---|---|
| 1997 | 72.60 | 58,552 | 43,000 | 80.7 | 59.2 | 36.2% |
| 1998 | 76.60 | 64,668 | 45,000 | 84.4 | 58.7 | 43.7% |
| 1999 | 80.70 | 70,383 | 45,000 | 87.2 | 55.8 | 56.4% |

| Year | Type of Offenders | Penal Population | No. of Convicted Prisoners | No. of Unconvicted Prisoners | Prison Capacity | Percentage of Overcrowding |
|---|---|---|---|---|---|---|
| 1997 | Adults | 50,558 | 25,795 (51.02%) | 24,873 (48.98%) | 36,000 | 40.4% |
| | Juveniles | 7,994 | 0 | 7,994 (100%) | 7,000 | 14.2% |
| 1998 | Adults | 58,893 | 37,482 (63.64%) | 21,411 (36.36%) | 38,000 | 55.0% |
| | Juveniles | 5,775 | 0 | 5,775 (100%) | 7,000 | -17.5% |
| 1999 | Adults | 61,857 | 43,486 (70.30%) | 18,371 (29.70%) | 38,000 | 62.8% |
| | Juveniles | 8,526 | 0 | 8,526 (100%) | 7,000 | 21.8% |

Ref: Bureau of Corrections, DSWD Annual Report

playgrounds inside the prison compounds. The state of overcrowding is even more serious in district, municipal, city and provincial jails managed by the Department of Interior and Local Government.

(ii) Causes of Overcrowding in the Philippines

a. Slow Administration in the Criminal Justice Process

The table attached herewith shows that the average percentage between the unconvicted and convicted prisoners is 45.3% and 54.7%. The slow administration in the criminal justice process is pointed out as one of the leading causes of the overcrowding problem prevailing in most correctional facilities. The trial procedures are delayed such that the detention of the offender sometimes exceeds the maximum period of penalty for the offense charged.

b. The Economic Crisis

The economic turmoil experienced by the country is one important aspect that contributes to the increase in criminality. The unemployment and the underemployment rate of the country as of January 2000 were 30.5% as against the entire working population. This may explain why crimes against property was so high in the country for many years now (50.6% in adult population and 49.4% in youth population). This number further accounts for the considerable number of detainees who cannot afford to post bail and therefore stay longer in detention cells. The budgetary constraints faced by the government also hindered the construction of correctional facilities.

## III. INFLUENCE OF OVERCROWDING

### A. Introduction

As we have seen above, many countries are facing the problem of overcrowding. This is the root cause of many problems experienced in correctional institutions such as deterioration of the living and working conditions of both inmates and correction staff.

### B. Influence of Overcrowding on the Prison Administration.

1. Staff

In overcrowded prisons, staff are over worked, their works become more risky, the quality of work goes down and their effectiveness to implement programs designed to rehabilitate offenders is reduced. Furthermore, it causes health problems to staff because they are exposed to unhealthy surroundings. They are also affected psychologically and emotionally.

2. Staff - Staff Relations

In overcrowded situations, staff-staff relationships are also strained, and staff efficiency goes down because the senior officers are over loaded with work while sorting out staff disputes instead of concentrating on correctional training assignments and responsibilities.

3. Staff - Inmate Relations

In overcrowded prisons, security risks increase because the breach of prison rules and regulations is high, gangs are organized and the possibility of prison riots increases. The unfair distribution of favors and corruption creeps in. The chances of

contracting diseases are more in such situations.

### C. Slows Down the Correctional Programs.

Classification/segregation of cases according to behavior, age, etc. will be difficult. Every prisoner may not get the opportunity to avail the correctional programs i.e. waiting list increases. As a result, the recidivism rate climbs because not all are put through the correctional system.

On the other hand, management are most likely to experience difficulties in planning, coordinating, implementing, monitoring and evaluating activities of the inmates. Classification will be difficult.

### D. May Lead to Violation of Human Rights and Dignities.

The United Nations Minimum Standard Rules describes a model system of penal institutions. To practice human rights and dignities in the penal institutions, it is important to apply the standard of these rules as much as possible. When overcrowding occurs in penal institutions, the application of these rules, especially concerning clothing and bedding, food, hygiene, medical services becomes very difficult to implement.

### E. Causes Stress and Tension among Inmates.

Stress and tensions among inmates create an increase in the number of disciplinary cases and will develop disruptive behaviors, which may cause psychological and physiological effects.

## IV. CAUSES OF OVERCROWDING

### A. Introduction

It is often stated that prison overcrowding is a problem in many countries. This leads to a deterioration of the living and working conditions of both inmates and correction officers. There are several explanations of overcrowding. Although imprisonment is a minor element of the conventional punishment system, the correctional authorities cannot control the flow into prisons.

Furthermore increase in population, changing economic conditions all over the world, globalization factors and exposure of particularly the young generation to electronic media has also resulted in an increase in the number of crimes and criminality which has ultimately resulted in overcrowding of the penal population.

On the other hand, police and prosecutors in some jurisdictions are often given great discretion in the number of cases to be processed. Thus, the agencies administrating punishment, be it imprisonment or otherwise may suffer from heavy overcrowding and increasing work load over which they have no control.

In the following paragraphs the causes which are more critical and are applicable to almost all the countries in general are being discussed in relation to these organs of the criminal justice system.

### B. Causes of Overcrowding at the Police/Prosecutor Stage

#### 1. Delay in Investigation and Submission of Indictment

Delay in investigation of cases in which the accused is detained will result in overcrowding of detention houses and prisons. In many countries either the provisions for investigation without detention are limited or are not used effectively and efficiently, thus resulting in more unconvicted prisoners. Similarly the delay in submission of indictment will slow down the process of criminal justice and is likely to result in an increase in the number of unconvicted/under trial prisoners.

**2. Non Availability of Provision in the Law for:**

(i) Disposal of Cases by the Police
(ii) Suspension of Prosecution

In many countries provisions do not exist where cases of petty theft, petty fraud, etc can be disposed of by the police. In fact non disposal of petty cases at the initial stages not only results in overloading the criminal justice system with unnecessary work but also results in increasing the number of unconvicted prisoners.

Similarly on the prosecution side many countries have provisions in the law for the prosecutor to suspend or close the investigation when certain criteria are fulfilled and in some cases purely on discretion, but these provisions are not being applied efficiently. This may result in increases in the number of unconvicted prisoners or detainees.

## C. Causes of Overcrowding at the Judiciary Stage

1. Slow and Inefficient Administration in the Criminal Justice Process.

   It is clear that delay in the criminal justice process will increase the number of remand prisoners and cause overcrowding. Slow and inefficient administration in the criminal justice process is a major cause to overcrowding at the judiciary stage.

   In every country, judges/courts are trying to realize speedy trials. Realistically, however they cannot accomplish this goal because of increasing numbers of cases, inadequate cooperation of parties involved or witnesses. Incomplete investigation, neglect of preparation for trial, difficulties in designating continuous trial date and shortage of judges, public prosecutors, lawyers, court clerks and interpreters also impede on speedy trial.

   Additionally, though the authority of investigation belongs to the police and prosecutors, it is one of the duties of a judge/magistrate to observe that the investigation is carried out. In some countries, observation of investigation by judges (magistrates) is imperfect and causes the extension of detention period.

2. Inadequate Use or Lack of Alternative Measures.

   Lack of alternative measures to imprisonment is considered a major factor in causing prison overcrowding situations in many countries. The tendency in these countries is one where imprisonment is utilized by the courts as first option before considering other non-custodial measures. It was observed that in these countries, many alternative measures do indeed exist. It was however noted that their use or application was minimal and they therefore do not affect the levels of numbers sentenced to imprisonment. The preference for the over use of imprisonment was discussed and it came out that generally it is influenced by the already established sentencing practice, prevailing feeling and attitude of people at a given time on issues of crime and in some instances the judicial tradition and precedents that have been set and followed in the past. It is however the case that lack of alternative measures and inadequate use of the available countermeasures have a great influence on levels of prison overcrowding. Any effort to relieve this problem must therefore be directed to this cause of overcrowding.

   In some countries the average term of sentence is comparatively long. This can also be one reason of overcrowding.

3. Inadequate Use of Bail.
All the countries discussed have a bail system. In many of them, there are many defendants waiting for trial, even though their offences may be bailable. It is no doubt that this situation deteriorates to overcrowding. This is because defendants cannot pay bailbond due to their poor financial situation or they are not offered the opportunity.

**D. Causes of Overcrowding at the Correction/Rehabilitation Stage**

1. Inadequate Use and Lack of Early Release Measures
Prolonged incarceration has been used as a traditional way of punishment. Studies however show that prolonged incarceration has brought about negative effects on the well being of offenders. Henceforth, early release measures have been put in place as alternative measures to imprisonment like probation, parole, remission, week-end detention and others. These are made available to attain the objectives of correction/ rehabilitation and to solve management problems brought about by congestion in penal institutions.
As a result of group discussions, it was found out that although early release measures have been made available in all participant countries, they are not fully maximized and utilized. Some do not have other early release measures as have been practiced by other countries. For example, Malaysia and Kenya do not have the parole system to provide an opportunity to the qualified offender to continue serving his sentence in the community which is less costly on the part of the government and provides ample opportunity to an offender to start a new life.
Early release measures have the advantage of lessening the length that the prisoners spend in correctional institutions. Where early release are also granted but subject to good conduct they operate as subtle inducements for behavior in correctional set-ups which is a necessary pre-requisite to effective training, care and control. The overall effect however is to reduce the number of prisoners and thus reduce prison population levels.

2. Capacity
It is observed that penal capacity in many countries has remained the same without taking into consideration the numbers of those sentenced to prison terms every year. This capacity in most cases is often below the prison's population level. It is felt that if capacity was utilized as an indicator of ideal prison levels at any given time, overcrowding would be avoided as resources required could be made available to accommodate the increased numbers. Low capacity means that the distribution of prisoners to appropriate correctional institutions is not properly done according to the risk and needs assessment criteria. It also means that space and resources are constrained. Transportation of convicted prisoners from one prison to another or unconvicted prisoners from remand homes to the courts are a major occupation for correctional staff. It is considered that prison capacities could be regularly adjusted commensurate with the country's population.

3. Lack of Effective Treatment Programs and After Care Services
It has been observed that the treatment programs at the correction/

rehabilitation stage are not systematic, complete or suitable to fulfill the individual needs of prisoners. The lack of effective treatment may be due to inadequate classification of the prisoners, mismatched allocation of prisoners into the appropriate prisons and distribution of inmates into the wrong training schedules. This problem is made worse where the correctional staff do not have up to date knowledge, skills and motivation to carry out their duties. This trend has a tendency of releasing prisoners back into the community who are not properly rehabilitated. The community's tendency is predictably to harbor and harden negative feelings of ex-prisoners. It is considered that the creation of appropriate community awareness on treatment programs will be useful to create positive public attitudes to corrections. It is in this connection that after care services are recommended in early release countermeasure.

## V. COUNTERMEASURES FOR OVERCROWDING

### A. Introduction

Arising from group discussions, it is evident that many countries are experiencing overcrowding in prisons. This has been brought out through the descriptions and graphic data submitted in this paper. It has also come out that the causes of overcrowding are clear when analyzed against the background of criminal justice practiced by each respective country.

It is, however, difficult to prescribe possible countermeasures due to the following:

- The penal philosophy, ideology and policy guiding correctional practice vary from one country to another. There is no uniformity in the application of aims of sentencing, that is, whether it is outright retribution/ incapacitation, deterrence, or correction/rehabilitation.

The correctional policy is therefore found to be influenced by :

- Social/cultural experience of the people, economic development level of the country, and the expectation of the people on what constitutes fair justice.

The impact of countermeasures will also be influenced by the public perception of public security, law and order, and how it is executed by the various agencies of criminal justice. An informed public opinion would appreciate efforts aimed at decongesting prisons. Public opinion is likely to influence the extent to which non-custodial measures are viewed and, by extension, accepted by the community.

### B. Countermeasures at Police/ Prosecutor Stage

Because the stage of police and prosecutors is aimed at investigation and prosecution, countermeasures towards overcrowding are comparatively limited. As a whole, for prisoners to get alternatives to imprisonment, investigation and prosecution must be done as quickly as possible.

These countermeasures are as here under:

1. Minimum Detention

   Using the investigation with minimum detention of suspects by reducing unnecessary delays. For example, a suspect involved in minor offences may not be arrested/ detained. The countries that do not have this provision may consider this option as it works successfully. Furthermore where the suspect is involved in a crime which is cognisable and bailable, the option of releasing him on affordable surety

bond may be considered, after giving due weight to circumstances of the case.

2. Disposal of Cases at the Police and Prosecutors Stage

Disposal of cases at the police and prosecutors stage shall be improved to reduce prison population. This can be discussed under the following headings:

- Disposition of Petty Offences
- Suspension of Prosecution

(i) Disposition of Petty Offences at the Police Stage.

In some countries the suspects/ offenders involved in minor offences like traffic violations, petty theft, petty fraud and petty gambling could be subjected to a simplified procedure of terminating their cases. This can work as a countermeasure at the initial stage of the criminal justice system.

(ii) Suspension of Prosecution

This is being practiced very successfully in many countries. In this process the prosecutor is empowered by the law to suspend prosecution before trial and in a few countries like Pakistan and India etc after commencement of trial. We feel that in countries where this provision does not exist, they may consider such provisions in their law.

To achieve benefits from the above two provisions, the confidence of people in the prosecution and police is a prerequisite. Furthermore the process is required to be transparent and officials are required to be accountable for their deeds.

**C. Countermeasures at the Judicial Stage**

1. Speedy and Efficient Criminal Procedure

(i) Observation of Investigation

When a judge/magistrate views a warrant request, they have to consider whether it is necessary to arrest/detain the suspect or not by considering the merits of the case or the circumstance of the suspect. A judge/magistrate also has to observe strictly the time limitation imposed on investigating agencies. Proper observance of time limitations will reduce the number of unconvicted prisoners.

(ii) Introduction of Arraignment Procedure, and Summary Order Procedure.

In order to reduce the number of trials, some countries have introduced criminal procedures through which cases are disposed of without opening trials. These procedures contribute to reduce the detention period of unconvicted prisoners.

a) Arraignment Procedure is a faster process. For example in Costa Rica, Malaysia, Kenya, Philippines, the defendant and the public prosecutor could get into a mutually acceptable arrangement: the defendant accepts the penal responsibility and the public prosecutor often offers him/ her a discount in the penalty. Then the court approves the agreement and does not open trial.

b) Summary Procedure is also useful for speedy criminal procedure. This is the special procedure that imposes a

certain amount of fine on the defendant without the normal trial. The request of prosecutors and the agreement of the suspect are required before applying this procedure. This procedure is utilized to deal with minor cases well and about 90 percent or more of all cases indicted are disposed of through this procedure in Japan every year.

(iii) Limitation of Detention Period at Trial Stage

Some countries do not have specific time limits of detention periods after prosecution. There were some defendants who had stayed in jail waiting for trial for longer periods than the length of final punishment. For this countermeasure, the law should order a specific time limit for the detention period at the trial stage as well as at the investigation stage. For example in the case of Costa Rica, this measure is applied and has a limit of time 12 months. If the sentence is in appeal, the measure is extended by six months more. If this period expires and the individual does not have the definite sentence, the detention is discontinued.

(iv) Speedy Trial

The judicial goal is to achieve speedy trial. To realize this, judges should hold pre-trial conferences with public prosecutors and defense counsels to identify the main issues of the case. Judges should also determine the length of trial and make arrangements with both parties about the schedule of trial. To designate plural trial dates will contribute to speedy trial.

Needless to say, speedy trials cannot be realized without the cooperation of public prosecutors and defense counsels.

2. <u>Effective Use of Alternative Measures to Custodial Sentences</u>

(i) Fines

Fines are utilized in all countries of our group and contribute to reduce the number of convicted prisoners. In some developing countries where the economic conditions are poor, there are many prisoners who are sent to jail because they cannot afford to pay the fines. To prevent this, a day fine system or paying the fine by installment is recommended as a solution.

(ii) Suspension of Sentence/ Suspension of Execution of Sentence

Suspension of sentence/ suspension of execution of sentence frees the defendant from punishment. Many countries have this kind of system. These systems are mainly utilized for first time offenders who commit minor offences. In some countries suspension is sometimes accompanied by a probation order. As mentioned before, in Japan execution of sentence is suspended in more than 60 percent of all trial cases and it contributes to reduce the number of convicted prisoners.

(iii) A Drug Court

The rapid increase of drug addicts causes overcrowding too. Drug Court is a new alternative measure incorporated in

countries like Australia and the United States. In Australia they have a program for the offences granted to drug addicts, as alternative to imprisonment and the judge refers to a specific program of treatment and supervision. If the individual fulfills this measure, he/she does not have to go to jail (the sentence is suspended).

(iv) Others

There are some other non-custodial measures as follows:

- House Arrest: the offender must remain within the confines of the home during specified times and adhere to a strict curfew.
- Binding Over: the court orders the offender to make a contract with a fixed amount of money which will be forfeited on him/her in case he/she does not appear for the court appointment.
- Community Service Order: the court orders the offender to perform unpaid labor like cleaning public parks, schools, and hospitals for a specified number of hours in a determined time period.
- Weekend Detentions: the court orders the offender to stay in jail only on weekends.
- Recognizance: this is an alternative measure for the detention of youth offenders in the Philippines. Offenders on trial can be released back into the community with the protection and guidance of qualified parents, relatives or responsible persons in the community on condition of good conduct but under the supervision of a social worker.

3. Reduce Sentence Length

In some countries, reduction of the sentence length is one way to alleviate overcrowding. But the sentencing practice has taken roots in the judicial system of many countries and therefore it is very difficult to change the average length of sentence. So, to change the sentencing practice, it is necessary to win the understanding of the public. Costa Rica has a unique system where the judges have the powers to release juvenile convicts before expiry of their sentence (which can be called as one of the early release measures) after obtaining reports from concerned agencies on behavior and other factors of the convict.

4. Appropriate Use of Bail

After considering the contents of offences, the possibility of destroying evidence or threatening witnesses, judges/court could grant bail if the offence is bailable.

In some countries, there are many defendants who cannot be released on bail, because the amounts of bail bond are so high, even though their offences may be bailable. But the purpose of bail bonds is to make the defendant attend trial. In this sense, the amount of bail bonds should be affordable to each defendant and sufficient to ensure his/her presence for trial.

As mentioned before, lack of information for defendants causes insufficient use of bail. It is necessary to enhance the defense activities in the pre-trial process.

## D. Countermeasures at the Correction/Rehabilitation Stage

1. Early Release Measures

(i) Parole

Parole is a conditional release of

prisoners after serving certain periods of the determined sentence. Eligibility is however conditional on other factors e.g. whether one is a first time offender, a recidivist offender or a risky offender. Modalities for consideration of parole as practiced in Japan is as follows:

- Pre-parole investigation reports prepared by parole/ probation officer are submitted to the Parole Board.
- Prisons Superintendent sends application of all suitable prisoners to the Parole Board.
- Contact interviews with a prisoner by the Parole Board.
- Decision to grant parole or not is decided by the Parole Board.
- If the decision is positive the prisoner is granted parole for the remaining period of the prison sentence subject to supervision in the community by a probation/ parole officer.

This countermeasure can be extensively utilized. For example, in Japan the number of paroles were given to 12,948 prisoners (58.2%) in 1998. Revocation cases amounted to 992 or 7.6% for the same period.

- The advantage for this countermeasure is that the Parole Board does not change the length of original sentence given by the court.
- The parolee gets guidance and assistance/support after release from prison and some get residence and daily living allowances from half-way houses run and managed by the non-profit private organization.
- The parolee is expected to observe some laid down conditions as part of his contract to keep within the law.

Parole is a demanding program and creates a lot of overload while processing applications and deciding on each case. It therefore requires personnel, finances and a lot of time to make it work. It is however, a good program because it is accountable and encourages prisoners to live normally in the community.

(ii) Remission

Remission is the reduction of the period to be served by a prisoner. This period is pre-determined e.g. in Malaysia 1/3; Philippines 1/3, Kenya 1/3 and Pakistan 1/3 remission period is provided for by the law. The period of remission may vary from one country to another but generally is a program practiced in many countries. Remission is provided for in the law except in capital punishment or where otherwise stated. Remission can be forfeited in cases of gross misconduct by the prisoner as laid out in the prison rules. Remission is administered by the prison authorities and therefore is not expensive to manage.

It has been found that remission reduces prison custody by up to a third of the length of the sentence. It is a useful program in reducing overcrowding because it is less costly, easy to administer and decision-making is done by the prison administration. It encourages good discipline in the prison setup. In the short term, remission is an effective countermeasure to overcrowding. In the long run, it may create recidivism because there is no follow up or any

supervision.

(iii) Pardons

These are ad hoc decisions to relieve prison pressure by releasing prisoners before their sentence is completed. Such cases are released during national day celebrations or on any other such like occasions. They are effective in reducing prison populations for a time but they are not sustainable. The released prisoners are not subject to supervision and therefore they raise concern for the public. More often, the impact of these general pardons is temporary to the prisons' overcrowding situation. It was noted that pardons are practiced in the Philippines, Malaysia, Kenya, Pakistan, Costa Rica, Japan and many other countries. They do serve a purpose however short lived.

The above countermeasures are considered significant because of their ability to deal with the sizeable number of prisoners if properly managed. These programs are practical and easy to manage and funding requirements are comparatively low. Finally, it is possible to monitor and evaluate the impact of these programs to prison overcrowding situation on an on going basis.

2. Enhanced Resource Allocation

The local and national government should increase the operational budget of correctional institutions so that effective treatment programs can be implemented. Construction, expansion and renovation of facilities are needed to accommodate the increasing rate of penal populations and keep pace with the changing situations such as the proper classification and allocation of offenders (young and adult, convicted and unconvicted).

3. Improve Effective Treatment Programs and After Care Services

Improve staff competency levels that implement treatment programs utilizing case management strategy. This is a collaborative and multi-disciplinary process that includes assessment, planning, implementation, coordination, monitoring and evaluation of options and services needs by the offenders. This may include the assessment of the offenders' risk, the recognition of needs, the monitoring of their activities and if deemed appropriate, a correctional intervention. Further, counseling integrated with cognitive skills training which touch on topics relative to control of misbehavior is also proven as an effective measure. Open penal systems that utilize the concept of conditional release like parole, probation, suspension of sentence, week-end detention etc. is a good strategy to give pre-release prisoners a chance to prove his worth again to be reintegrated back to society. This minimizes the stigma attached to an offender as prisoner, enhances role performance and regains self-esteem. This system is effective, easy to manage and reduces overcrowding situations in correctional facilities.

The enhancement of after care services should be given full attention by the government as one important measure to reduce the recidivism rate. Networking with non-government organizations, civic bodies and religious groups is also needed to augment the limited budget of the government and to strengthen the after care services in the community.

**E. Other Countermeasures**

It was felt that in addition to the above countermeasures there is a need to ensure effective coordination amongst the organs of the criminal justice system coupled with decriminalization of behaviors that do not pose a threat or risk to public security. It is also realized that agencies of the criminal justice system need to be made more efficient and compatible with the changing times by providing them with sufficient staff, adequate funds and computerization of records. An efficient criminal justice system can reduce the number of prisoners substantially thus relieving the pressure on prisons.

## VI. CONCLUSION

In conclusion, it was felt that weak economies, high unemployment rates, low literacy percentage, high population growth, unfair application of laws, globalization factor and exposure of particularly young generations to electronic media has resulted in an increase in the number of crimes and criminality which has ultimately resulted in an increase in the number of unconvicted and convicted prisoners. This phenomenon has posed very serious problems for the criminal justice system and especially the correction administration. The countries that had never experienced the problem of overcrowding are also threatened because of this phenomenon.

In addition to the actual situation and causes of overcrowding in each participant's country, the causes and countermeasures at each stage of the criminal justice system, that is, police, prosecution, judiciary and correction were also discussed in detail. It was felt that to alleviate the problems of overcrowding in the penal institutions there is a need to have an efficient criminal justice system to ensure speedy trials, wider use of non-custodial measures and abundant use of early release measures. However it was observed that before introducing new countermeasures it would be appropriate to properly evaluate the same to ensure its success and effectiveness.

It was also felt that governments do not assign appropriate priority to the prison administration at the time of allocation of funds for creating more capacity and to improve/update correctional facilities.

Last, but not the least it was realized that the option of imprisonment as a punishment is being used more often than not in most of the countries, which is one of the major causes of overcrowding. However it was felt that in spite of the above, it is possible to formulate countermeasures that are viable, implementable and practicable which can solve the problems of overcrowding substantially.

## *GROUP 2*

# PRACTICAL MEASURES TO IMPROVE PRISON CONDITIONS

| | | |
|---|---|---|
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## I. INTRODUCTION

Reviewing current issues in correctional treatment in the world, one of the problems is the improvement of prison conditions. The issue of prison conditions is very important because it relates to the human rights of prisoners in correctional institutions.

On this point, the Standard Minimum Rules for the Treatment of Prisoners (herein after referred to as "SMRs") adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, defines the standard of institutional treatment (including prison conditions) in detail and has served as the basic guidelines that must be satisfied by each country. However, many countries are confronted with problems which hinder the fulfillment of this standard.

Given these circumstances, Group 2 first takes a general review of the international instruments regarding prison conditions, and how domestic legislation is described based on the SMRs and what the actual situation of prison conditions is in the participating countries of our group, particularly on accommodation, hygiene and medical services, clothing and bedding, and food.

Then, Group 2 also analyzes the main causes which impede the implementation of the SMRs and its influences on prisoners. Finally, some measures to improve prison conditions are examined from both a legislative and practical point of view.

## II. STANDARDS AND NORMS REGARDING PRISON CONDITIONS

The SMRs is well-known as the international standard regarding the treatment of prisoners including prison conditions. In this section, our group firsts takes a general view of human rights in prison and then describes the historical background and legal nature of the SMRs and discusses the interpretation of "Standard Minimum" in the SMRs and its adaptation to practice.

### A. Human Rights in Prison

Human rights are the basic rights of human beings and no person should be deprived of such rights. The protection of human rights is guaranteed by some important international instruments and should not regress. This fundamental principle is also applied to prisoners in custody in correctional facilities and should be respected fully as long as it does not harm the purposes of their incarceration. Making an effort to attain this goal is

expected to lead to the improvement of prison conditions.

In this connection, some basic principles regarding the treatment of prisoners including prison conditions are mentioned in the international instruments. For example, the important provisions relating to prison conditions can be found in the International Covenant on Civil and Political Rights as follows:

*Article 7*

Article 7 prescribes the prohibition of torture or cruel, inhuman or degrading treatment or punishment, stating " No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no men shall be subjected without his free consent to medical or scientific experimentation."

*Article10, Paragraph 1*

Article10, Paragraph 1 prescribes the treatment of all persons deprived of their liberty, stating "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

## B. Standard Minimum Rules for the Treatment of Prisoners

### 1. Historical Background

The SMRs was adopted at the first United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Geneva in 1955. On 31 July, 1957, the Economic and Social Council of the United Nations adopted these rules.

### 2. Legal Nature

The SMRs is not a treaty and is not legally binding. Taking account of legal, social, economic and geographical conditions, the SMRs has the meaning of the international standard that each government should give favorable consideration to adopting and applying it in the administration of their penal institutions.

### 3. Interpretation of "Standard Minimum" of the SMRs and its Adaptation to Practice

It is quite a basic question as to at which level "Standard Minimum" of the SMRs should be located. On this point, The SMRs does not describe it explicitly, with Rule 2 only stating that ".....the minimum conditions which are accepted as suitable by the United Nations" and it seems to depend on the interpretation of the provision. In connection with an aspect that the public is very sensitive to at which level prison conditions are, this issue is considered worth discussion. Thus, Group 2 discussed the interpretation of "Standard Minimum" of the SMRs and its Adaptation to the Practice in Respective Countries.

In terms of the interpretation of "Standard Minimum" of the SMRs, there are two opinions presented in our Group; (i) it is considered "the level of minimum" to the letter to be observed by each country in consideration of the International Covenant on Civil and Political Rights, and (ii) it is deemed to signify the living standards of the outside people in respective countries. However, in the latter perspective, it is quite difficult to satisfy such a "Standard Minimum" in most countries, especially taking into consideration the different level of economic situation or other. Therefore, our Group considers the "Standard Minimum" as a relative standard, while indicating the minimum conditions to be observed by respective countries so that inmates may be treated as human beings, and is the guidance for realizing the betterment of prison conditions in its adaptation, according to the circumstances in respective countries.

## III. DOMESTIC LEGISLATION REGARDING PRISON CONDITIONS AND ACTUAL SITUATION OF PRISON CONDITIONS IN THE PARTICIPATING COUNTRIES

Group 2 focused on the four areas; 1) accommodation, 2) hygiene and medical services, 3) clothing and bedding and 4) food, which are considered important factors of prison conditions. Here, the legal provisions and the actual situation regarding the above mentioned areas in our respective countries are discussed.

### A. Accommodation

#### 1. Significance

Accommodation is a basic factor for inmates to spend their prison lives and its equipments should satisfy the conditions necessary for maintaining their health in prisons. Proper equipments are also expected to contribute to the betterment of hygiene. The SMRs stipulate the accommodation of prisons in Rules 9 to 14 in the following items:

(a) Types and conditions of accommodation;
(b) Standard of sleeping arrangements;
(c) Lighting and ventilation;
(d) Sanitary facilities;
(e) Bathing and shower installations; and
(f) Maintenance.

In addition to Rules 9 to 14, Rule 8 also stipulates the separation of different categorized inmates, which is indirectly related to accommodation.

#### 2. Domestic Legislation and Actual Situation

a) Fiji

In Fiji, there are two types of accommodation; cell type and dormitory type. In case of cell type regulations, a prisoner shall not be housed in a cell with less than 60 square feet of floor space and only one prisoner shall be accommodated in one cell. But at times when there is a situation of overcrowding, three prisoners can be accommodated in one cell.

On the other hand, in case of dormitory type regulations, each prisoner confined in a dormitory shall be allocated at least 40 square feet of floor space. Usually 22 to 24 prisoners are accommodated in a dormitory. Both cells and dormitories are sufficiently provided with lightning and ventilation. In case of dormitories, bathing and toilet areas are located within the buildings. Sanitation allocated within accommodation buildings is well cleaned and maintained. However, most prisons that were built during the colonial era are not provided with sufficient sanitation and are still using sanitary buckets.

b) India

In India, accommodation in a prison consists of cellular and association wards. A cell is intended for a single prisoner and an association ward for more than one prisoner. Rule 701 of the Assam Prison Manual lays down that every prisoner in an association ward shall be allowed not less than 36 square feet of ground space and 540 cubic feet breathing space, that the height of the walls of a ward shall not be less than 13 feet and that in calculating the allowance of cubic feet per person no account shall be taken of any air space above 13 feet.

Near the door of every ward shall be recorded the number of cubic and superficial feet which it contains and the number of prisoners which it is capable of accommodating. On the basis of the manual, the lock up register shall show the maximum accommodation of every ward, so that the Superintendent may be able to judge at a glance whether any ward is over crowded or not. Also he/she shall pay special attention to the ventilation of the

sleeping wards. In all cases, care shall be taken that there is sufficient lateral, as well as roof ventilation. The interior of worksheds, sleeping wards and cells shall ordinarily be white washed twice a year, and in hospitals once in every three months.

c) Indonesia

In Indonesia, there are two types of accommodation; single cell and dormitory. The latter is designed to accommodate 3, 5, 7, or 9 prisoners.

Both types of accommodation are provided with facilities like: mattresses, pillows, toilets and bathing, ventilation and light. Both single cells and dormitories are available for prisoners and detainees as well and almost 80 percent of the prisoners or detainees are accommodated in dormitories. The placement of prisoners is determined according to the classification of prisoners and security, such as - maximum security, medium security and minimum security.

d) Japan

In Japan, there are two types of accommodation; single cell and dormitory. Both types of accommodation are sufficiently provided with a window, an electric light, and a flush toilet. Unconvicted inmates are put into single cells in principle. Each correctional institution accommodates inmates separately according to sex, age and the number of previous offenses.

e) Nepal

In Nepal, as most of the prisons were built long ago, they are lacking the basic facilities. The prisons were also considered as punitive centres and not as correctional centres at the time of their construction. Therefore, the functional structure and equipment in most of the prisons is very poor. No new prisons have been constructed so far, but the government is planning to construct new prison buildings. Although the prisons in Nepal are divided into four categories, they are not classified according to the type of detention or level of security but capacity alone. There are no separate facilities for detainees and sentenced offenders, although the Prisons Act stipulates keeping detainees and sentenced offenders separately as far as possible. Similarly, there are no special women's prisons (female inmates are accommodated in separated wings of the same buildings of the male inmates). In Nepal dormitories are provided for prisoners. No size of the prison is mentioned in law. The size differs from prison to prison and there is no uniformity. A case of one prisoner accommodated in a single cell is often the exception rather than a general rule and the standard of one prisoner per a single cell is utilized in the case of solitary confinement.

f) Findings of Discussion

In Fiji, India and Nepal, on the basis of the domestic laws, civil prisoners are kept separately from prisoners. However, in India and Nepal, due to overcrowding and the lack of space, all prisoners are actually kept together in many prisons, except that female prisoners are kept in separate blocks. In Japan and Indonesia, there is no concept of civil prisoners and otherwise the domestic law and practice comply with the other provisions of Rule 8 of the SMRs.

Nevertheless the domestic legislation regarding accommodation in the participating countries is a bit different, the substantial matters mentioned in Rules 9 to 14 of the SMRs are almost stipulated by them, except that Japan and Indonesia have no domestic legislation in compliance with Rule 14. In general, the actual situation concerning the requirement of the separation of convicted and unconvicted prisoners is not satisfied and it is recognized in some participating countries.

**B. Hygiene and Medical Services**

**1. Significance**

Maintaining hygiene and providing necessary medical services are of vital importance on the ground that correctional institutions accommodates a large number of inmates and manages them. Bad hygiene risks spreading diseases rapidly among inmates, and insufficient medical care damages their health conditions and sometimes may lead to their deaths. Thus, good hygiene and medical care are the fundamental prerequisite to be addressed by prison authorities in order that inmates send their sound lives in prisons. In this connection, the SMRs have provisions regarding personal hygiene as follows:

*Rule 15*

*Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.*

*Rule 16*

*In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.*

Here, our group also discussed the matter of medical services stipulated by Rules 22 to 26 on the ground that hygiene and medical care are very closely related to each other.

**2. Domestic Legislation and Actual Situation**

a) Fiji

In Fiji, the visiting medical officers (VMO) to prison are provided by the government and they visit the prisons once a week to make medical checks of newly admitted prisoners, pre-release prisoners and prisoners complaining about sickness and those necessary to be diagnosed on the request of prison officers. Prisoners with serious and complicated disease are sent to hospital for diagnosis. The VMO is also to visit a prison at least once a month to inspect every part of the prison and shall pay special attention to its sanitary state, the health of the prisoners, and the adequacy and of the diet.

Recently, due to the threat of incurable diseases like HIV/AIDS, thorough medical examinations are conducted for all newly admitted prisoners and their specimens are sent to hospital for further assessment and conformation of results. Prisoners are encouraged to keep themselves clean and decent and are provided with basic necessities like bathing soap, towels, tooth paste and brushes, toilet tissues and shaving gear for daily use. All convicted prisoners are to shave daily and cut their hair short. Civil and unconvicted prisoners are not compelled to shave and have their hair cut short unless the VMO certifies it to be necessary.

b) India

In India, the Superintendent, medical officer and all other subordinate officers are responsible for any hygiene matters. Rule 707 of the Assam Prison Manual lays down that attention shall be paid not only to the more important subject of the disposal of night soil and refuse but also to every detail connected with the cleanliness and neatness of the prison and its surroundings. The jail area shall be cleaned daily and be kept free from all jungle matter and weeds, accumulation of broken manufacturing refuse etc. No cooking room refuse shall be permitted to be thrown on the ground, nor shall rubbish of any kind be allowed to accumulate near the jail.

The drainage of the ground round about the jail shall be carefully attended to and where necessary drainage cuts shall be

made with a view to preventing the accumulation of water. The Superintendent and medical officer are responsible that an ample supply of water of good quality is always available for drinking, bathing and other purposes. The sources from which drinking water is derived shall be carefully selected and protected from pollution. Samples of water should be sent to the laboratory for chemical examination twice a year and also when in the event of an outbreak of epidemic disease, there is a reason for a belief that it might be due to contamination of the water supply. Every possible precaution shall be taken to prevent pollution of the water supply either at the source or at the storage. Every officer of the prison shall exercise utmost vigilance in maintaining hygiene and sanitation.

Section 37 of the Prison Act of 1894 requires that the name of sick prisoners shall be reported without delay to the jailer or medical officer. Under section 39 of the Prison Act a hospital shall be provided in every prison. Rule 650 of the Assam Prison Manual lays down that every prisoner complaining of illness be sent for immediate medical examination by a doctor. A lady doctor may be called in to attend female prisoners when necessary. Every prisoner suffering from any active disease shall be brought under medical treatment and his name shall be recorded in the appropriate register. The medical officer shall daily inspect the out patient register and order the admission to hospital of any out patient if necessary. At least once a week, the medical officer shall examine all out patients. The medical officer shall also visit daily all prisoners in hospital and under observation and decide whether any prisoner shall be admitted into or discharged from hospital.

c) Indonesia

In Indonesia, prisoners are required to maintain a short haircut and be shaved cleanly at all times in order to maintain a good state of personal hygiene. Items such as nail cutters, mirrors for shaving are provided by the prison authority and are available on a communal basis. Inmates are also provided with soap every two weeks from the prison.

In terms of medical care, medical treatment is provided inside a prison or detention house. However, as facilities are not adequate, an inmate may be sent to a hospital outside the prison under escort by prison officers. Doctors from local government and the Red Cross institutions examine inmates for HIV/AIDS once a year.

d) Japan

In Japan, an inmate can take a bath and shave twice a week (three times in the summer). The bathing time is 15 minutes on average (20 minutes on average for women). There is no restriction on hair-styles of unconvicted inmates. However, convicted inmates are required to have a given hair-style in view of keeping better hygiene or safety.

Doctors and other medical staff shall be assigned in every correctional institution. The ratio of doctor against inmates is about 1 to 150, which seems to be higher than that of the general Japanese population. There are the medical prisons and if necessary, sick inmates may be transferred to them. Also if a special medical care or operation is needed, inmates may be transferred to a hospital outside the institution at national expense. Medical checkups are firstly conducted at the time of admission and done regularly once per 6 months afterwards.

e) Nepal

In Nepal, there is legislation regarding the hygiene and medical services to be provided to prisoners. In general, all prisoners are urged to keep their personal and living environment clean. Medical treatment of ill prisoners is to be done by the government doctors serving in prisons. Depending upon the number of prisoners, there is the regular doctor's service only in some prisons. Otherwise, the visit of the doctors is made as per the necessity or on the request of the prison. If an inmate is seriously ill and a government doctor diagnoses that he/she should be admitted to a hospital for better treatment, he/she should be hospitalized and treated in a hospital. In terms of the matters regarding the personal hygiene of inmates, prison officers shall be responsible for maintaining its good state in compliance with the law.

f) Findings of Discussion

The matters relating to personal hygiene are well stipulated in the legislation of the respective participating countries, but in a different way. In the legislation such as in Indonesia, it is just mentioned to provide prisoners with soap, while in Nepal the legislation is silent as to what kind of articles should be provided to prisoners but simply states that the conditions of personal hygiene among prisoners should be kept properly as the duty of prison staff.

As far as medical services are concerned, not all of the matters as stipulated in the SMRs are covered by the legislation of the participating countries. Also the different degree of the provisions is recognized. For example, the services of a qualified dental officer as stipulated in sub-rule (3) of Rule 22 of the SMRs is not mentioned in any legislation of the participating countries except Japan. Similarly, the matter stipulated in Rule 26 of the SMRs is not mentioned in details in any domestic legislation of the participating countries but India. It is the actual situation that medical services provided to inmates do not always satisfy the provisions of the legislation.

## C. Clothing and Bedding

### 1. Significance

Clothing and bedding are necessary requirements for daily life. Providing clean and sufficient clothing and bedding to inmates is essential for maintaining humanitarian prison conditions and also ensures good hygiene by preventing the spread of contagious diseases in a prison. The SMRs prescribe the matter of clothing and bedding in Rule 17 through to19. These Rules include the following items:

(a) Adequate clothing;
(b) Cleanliness of clothing;
(c) Clothing in exceptional circumstances;
(d) Cleanliness of their allowed own clothing; and
(e) Separate bed and sufficient bedding.

### 2. Domestic Legislation and Actual Situation

a) Fiji

In Fiji, on the basis of the regulations, prisoners are provided with three pairs of uniform and may be allowed to wear personal clothing on occasions, such as attending court, being transferred by public transport, attending outside church services and burial for close family members. They are also supplied with bedding, such as beds, mattresses, pillows, mosquito nets and two blankets.

b) India

In India, the existing scale of clothing and bedding for all the convicted prisoners is prescribed in the Assam Prison Manual rule 393 in detail. The prison clothes supplied to an inmate under trial shall be withdrawn and taken back at the time of his discharge or release on bail. The above-

mentioned scale of clothing and bedding shall also be admissible to non-criminal mentally disordered people who are not provided with sufficient clothing and bedding from a private source.

c) Indonesia

In Indonesia, according to the regulations, the basic necessities are provided by the prison authority. Prisoners are provided with two sets of blue uniforms and are allowed to receive shirt and pants from their family. All prisoners are also allowed to wear their own clothing for all authorized purposes, such as visiting prison mosques, churches, attending the funerals of family members, attending medical treatment in public hospitals, family visiting program. If they are not able to afford to have personal clothing, they are supplied with civil type clothing by the prison authority.

d) Japan

In Japan, on the basis of the Prison Law, clothing and bedding are provided for convicted prisoners by correctional institutions. Those for unconvicted detainees are self-supplied in principle. However, those who are unable to afford them may be supplied with such items by the institutions. Different types of clothing are supplied according to the seasonal changes of climate. If any circumstances (e.g., in case of sick, aged and foreign inmates) require special consideration, additional supplies, such as clothing for cold weather or other materials are available.

e) Nepal

In Nepal, all convicted prisoners are provided with dresses two times a year. Mats, blankets, bed sheets and pillows are provided to both convicted and unconvicted prisoners upon their admission. Unconvicted prisoners are allowed to receive approved items of clothing from their relatives or friends, or to purchase them at their own expense. In cases where unconvicted prisoners stay in prison for more than one year they are also entitled to get dresses.

f) Findings of Discussion

There is domestic legislation in each of the participating countries corresponding to the provisions of Rules 17 to 19 of the SMRs. Especially, the legislation in India as well as in Indonesia is fully compliant with the provisions stipulated in those Rules. In Japan, all the things required by the SMRs are not stipulated in the domestic regulation. In Fiji, except sub-rule (2) of Rule 17 and the matter relating to climate, all requirements are stipulated in the domestic legislation. In Nepal, except for the matters of Rule 19, all requirements are mentioned in the domestic legislation. In general, as far as clothing and bedding, the domestic legislation in each participating country is well provided and put into practice in conformity with its provisions.

## D. Food

### 1. Significance

Providing food of nutritional value adequate for maintaining inmates' health and physical strength is of vital importance in correctional institutions. Keeping well-balanced calories in food is also required to prevent adult diseases such as diabetes. In this connection, the SMRs have the following provision regarding food as follows:

*Rule 20*

*(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.*

*(2) Drinking water shall be available to every prisoner whenever he needs it.*

**2. Domestic Legislation and Actual Situation**

a) Fiji

In Fiji, on the basis of the regulation, there are three dietary scales provided to the prisoners, which are prescribed in the First Schedule commonly known as dietary scale of A, B and C. Prisoners may select any of these dietary scales on admission. On the other hand, there is no any legislation regarding the amount of calories which is required. However, there is the provision regulating that the food supplied shall be wholesome in quality and with all the ingredients prescribed in the First Schedule.

b) India

In India, Rule 368 of the Assam Prison Manual lays down that it is the responsibility of the Superintendent to see that the prisoners entrusted to his custody are fed properly so that their health is not impaired and their weight is maintained. The food should contain an adequate quantity of each of the essential elements for maintaining proper nutritional status of the individual. The degree of physical activity is the most important factor that determines the calories of food required.

Calorie value required: An average man who is engaged in any hand manual labor will require 2000 to 2400 calories. A person who is to do heavy work would require not less than 2800 calories. An average woman would require about 2400 calories. A pregnant woman or a nursing mother should have additional calories. Every prisoner shall be entitled to receive diets at the prescribe scale for the class to which he belongs. The diet scales are categorized into A, B and C division of prisoners.

Special diets shall be given to each prisoner on the occasion of Republic Day, Independence Day, Gandhi jayanti and Magh bihu, in addition to the diet ordinarily admissible.

c) Indonesia

In Indonesia, on the basis of the regulation, food is served three times a day, and food calories for inmates are uniformly determined at 2,250. Foreign prisoners who cannot eat Indonesian food due to some reasons (religious or cultural reason) are given special meals. Even in such a case, both quality and quantity are the same as the food for national prisoners. Special diets are available for sick prisoners subject to the recommendation or approval of medical officers (doctors). During the religious month, including hari raya and Christmas day, prisoners are allowed to receive food from their home or religious organizations to celebrate these occasions.

d) Japan

In Japan, according to the regulation, food is supplied for inmates three times per day. Food is required to maintain enough calories with reference to their constitutions, health conditions, age, and kinds of work assigned. The nutritional values of food vary from 2300 kcal (kilo-calorie) to 3000 kcal per day. Special diets are available for foreign prisoners whose customs and religious restrictions are different from those of the Japanese, in addition to sick inmates due to medical reasons.

e) Nepal

In Nepal, the legislation clearly stipulates that food be provided to the prisoners. Prisoners are divided into two categories; “Category A” and “B”. Daily necessary commodities are supplied based on the Category of prisoners or detainees placed. Those placed in “Category A” are entitled to obtain a quantum of 700 grams of rice and 20 rupees a day, while those in “Category B” obtain 700 grams of rice and 15 rupees a day. In case when a female

inmate gives birth to a baby in a prison, some additional commodities are provided to her.

f) Findings of Discussion

The domestic legislation regarding food in each of the participating countries is in compliance with Rule 20 of the SMRs, although they are stated in a different way slightly. That is to say, the legislation has provisions regarding the quantity of the commodities in detail, whereas other legislation includes clear clauses of the nutritional value adequate for health and strength. For example, in India, the food is subject to different categories of prisoners and this is mentioned in a form of clarifying the calories per the kinds of items in detail. In Japan the legislation clearly states how many times the food is supplied and calories according to the work assigned to the prisoners, which seems to be more detailed than Rule 20 of the SMRs. In general, as far as food is concerned, the domestic legislation in each of the participating countries is well provided and put into practice in conformity with the provision.

Through the discussions, our group is of the same opinion that enjoying sufficient living space, clothing and bedding, hygiene and medical care, and food is the fundamental necessity for human beings. Such a principle is applied to even inmates in custody in correctional facilities and should be respected fully as long as it does not harm the original purpose of their incarceration.

## IV. MAIN CAUSES FOR IMPEDING IMPROVEMENT OF PRISON CONDITIONS, AND ITS INFLUENCE ON PRISONERS

Our group first reviewed both the Standards and Norms regarding prison conditions and then, especially on the basis of the provisions of the SMRs examined how the domestic legislation is stipulated in each of the participating countries and what the actual situation was in practice in prisons. As a result, it is found that the actual practice does not always comply with the standards stipulated in the SMRs. Therefore, it is necessary to find out the existing problems in prisons and to examine the main causes for impeding the improvement of prison conditions and its influence on prisoners. This group first discussed the causes for impeding the improvement of prison conditions and tried to relate each problem with the respective causes. The main causes for impeding the improvement of prison conditions are found as follows:

### 1. Insufficient Budget

Our group reaches the consensus that the insufficient budget is the main cause for impeding the improvement of prison conditions. This cause may differ from country to country and may exist even in the developed countries. But this is considered as the main cause in most of the developing countries. The government has other priority sectors such as poverty alleviation, health, education, drinking water and so on. As the budget is very limited and many sectors need to be improved, there is no sufficient budget allocated for the improvement of the prison conditions. The national budget of many developing countries depends not only on internal resources but also on foreign resources. Therefore, the priority sectors are sometimes determined by the external factors as well. Similarly, the priority sector, in most of the developing countries, is determined, depending on the returns to the government by the particular sector concerned and as the prison sector does not make any substantial returns to the government, the government does not allocate sufficient budget to it. In many countries the prison buildings were built

many years back and lack minimum facilities, but constructing new prison buildings costs a lot and most developing countries can not afford this because of the insufficient financial resources.

On the other hand, the budget allocated to the prisons is not properly distributed among the prison institutions and thereby the conditions of the prisons such as accommodation, clothing and bedding, food, and personal hygiene etc. differ from prison to prison. Due to insufficient budgets there is the lack of equipment, lack of medical care and insufficient implementation of rehabilitation programs. If the above mentioned problems are in a prison, there is a bad influence on the inmates housed in such prisons and it causes the dissatisfaction of the prisoners which leads to disobedient attitudes of the inmates and sometimes it even leads to hunger strike and to riots in prisons.

**2. Lack of Understanding by Government**

This is also considered as a cause for impeding the improvement of prison conditions. It is one cause which differs from country to country depending upon the political system of a particular country. If the political system is democratic, then the government is more likely to listen to the voices of the human right activists and give due priority to the improvement of prison conditions. Especially, in a democratic system of government if the government does not have proper understanding about the prison conditions and people are not made to understand about the human rights situation in a prison as well as prison standards, then the people may pressure for the development of sectors other than the prison, which ultimately hinders the improvement of prison conditions. In some countries depending upon the election system, the politicians are interested in only securing their votes and therefore they pay more attention to own constituencies. Then, prison is not a priority for such politicians. This can also be taken for the lack of understanding by the government as the same politicians are there in the government.

Regardless of the political system, there are cases where the government officials working in prison do not recognize the minimum standard of prisons which should be maintained and they do not report to the higher authority accordingly and the higher authorities do not have sufficient knowledge about prison conditions and these institutions are neglected, similarly due to the lack of understanding by the government about the prison conditions, low priority is given to the prison institutions within the ministry concerned and thereby the prison conditions are not improved. As a result, there are different levels of prison conditions, lack of equipment, lack of medical care and so on, when such problems are in a prison there is a negative influence on the prisoners and they gradually show their dissatisfaction and it leads to disobedient attitude and finally may lead to hunger strike and riots. In such a situation there is no expectation of proper rehabilitation and making a good citizen in a prison.

**3. Overcrowding**

Overcrowding is one of the main obstacles and causes of the impediment for the improvement of prison conditions. It hinders the realization of the goals of the prison administration. The annual budget for a particular prison is fixed at the beginning of the fiscal year bearing in mind the actual number of the prisoners or the maximum capacity of that prison and the manpower is determined beforehand. But the overcrowding starts somewhere anytime of the year but after the budget

has been fixed. Due to the limitation of manpower, material resources and technical equipment, prison administrations have to be emerged in coping with daily affairs and correctional programs cannot be effectively carried out.

Overcrowding also impedes the proper implementation of the classification of prisoners. Increasing prison population and limited prison facilities cause different categories of prisoners to be kept mixed. For that reason, in some countries convicted and unconvicted prisoners are also kept together, as a result different kinds of offenders share their crime experiences with each other and cause contamination, overcrowding weakens prison security. Consequently, it makes some inmates' temper worse and some inmates may behave abnormally and even provoke dispute. These matters may escalate violence among the prisoners. Because of overcrowding, there is a possibility of spreading diseases, such as HIV/AIDS, tuberculosis, hepatitis and other epidemics which may take place and ultimately may cause the death of inmates.

**4. Insufficient Disclosure of Information to the Public**

In a democratic society, public opinion plays a vital role. The general public are the source of power, therefore, nothing can be done against the people's will. The government is formed by the people and the policies formulated should reflect the public will otherwise the policies cannot be successfully implemented. The participants reach consensus in general that one of the causes of impediment in the improvement of prison conditions is the lack of disclosure of information to the public. Firstly, some prison officers themselves are reluctant to provide information about the actual situation of the prison to the mass media and to the public. Secondly, the mass media does not publish the real situation of prisons and distorted information is reaching the public. Therefore, the media makes unnecessary exaggeration of the fact, especially the negative incidents in prisons are highlighted and the public cannot have real information about the prison conditions and they think that they have nothing to do with prison.

One of the important facts is that the public in general should be made aware that prisoners are also human beings and they need to be treated as human beings. This is lacked even in the developed countries and the public is often critical of correctional institutions and say that too many facilities are provided for prisoners. However, the reality is different because no countries have provided too many facilities for prisoners. It depends on the level of overall development of a particular country. When the public in general are not informed correctly and they are critical of the management of prison, it definitely impedes the improvement of prison conditions.

**5. Lack of Cooperation from Outside**

Our group, in discussing this point, basically observed two views: first - cooperation from the private sector, non-governmental organizations (NGOs) and other volunteer organizations and second - from outside the prisons but within the government institutions. The private sector is reluctant to invest in the operation of factories in prisons which makes it difficult to provide jobs to the inmates who are willing to work and such situations contribute to the impediment of the improvement of prison conditions. In most developing countries, the NGOs and volunteer organizations are not working properly in order to improve prison conditions.

Similarly, the government agencies which are supposed to support the prison administration ( for example- medical officers and other medical facilities from the health department etc.) are also not so eager to provide such facilities to the prisons. In some countries, medical doctors deployed in prisons are not willing to work there. Such cases impede the improvement of prison conditions. Such matters definitely have a negative impact on prisoners. Depression, health deterioration and many other negative consequences arise.

### 6. Some Prison Officers' Lack of Recognition of Inmates' Rights

The right of inmates stipulated in each country's legislation that governs the treatment of prisoners must be fully observed by prison officers when carrying out their duties. It must be realized by all prison administrators and staff that the prisoners should be treated as human beings.

Our group has identified that some officers lack the commitment to their work or have a mere ignorance or negligence in performing their work. For instance, prison officers pay inadequate attention to complaints, requests and grievances made by prisoners regarding prison conditions. Also, there are some cases where they provide or demonstrate unfair treatment for prisoners by distributing clothing or food unequally. Those situations increase the dissatisfaction of prisoners with negative attitudes towards the prison authority and discourage their self-motivation of rehabilitation.

Considering the background of prison officers' poor recognition towards prison conditions, two reasons can be imagined; the one is the low level of salary and the lack of chances of promotion for personnel, and the other is an insufficient training system.

### 7. Lack of Inmates' Positive Attitudes towards Prison Conditions

It is important that inmates themselves pay more attention to prison conditions to be kept in a good state. Actually, most inmates do not have enough positive attitudes towards prison conditions. Furthermore, some of them even ignore the breakdowns of prison equipment. Such a lack of inmates' positive attitudes can be one of the causes impeding the improvement of prison conditions. Also, in order to cultivate inmates positive attitudes, prison officers themselves should have and show inmates their positive attitude regarding prison conditions.

The causes for impeding the improvement of prison conditions mentioned before are taken from the experiences of the participating countries. There may be other causes which hinder the improvement of prison conditions. Nonetheless, the most important cause impeding the improvement of prison conditions is considered to be the constraint of resources. Similarly, the socio-economic as well as cultural development of a country may also influence the improvement of prison conditions.

## V. SOME MEASURES TO IMPROVE PRISON CONDITIONS

Our group first discussed the actual situation of prison conditions and the major impediments to the improvement of prison conditions. Now that these impediments have been explored, it is necessary to suggest some countermeasures to elevate these prison conditions to the desired standard.

### 1. Measures for Insufficient Budget

Regarding insufficient budget, although it is very difficult to increase the budget overnight where a country is facing economic problems, systems including a

proper mechanism for analysis, assessment and submitting reports should be developed. It is not possible to solve all the problems concurrently, therefore, priority should be given to the minimum requirements and this should be non-negotiable and the available budget must be utilized properly. If there is a possibility of reducing any costs, such as use of electricity, telephone calls or any other stationary goods, this should be reduced so that the surplus budget can be used to improve prison conditions. Such strategies have been successful in Fiji which can be used as an example for other countries.

Similarly, some mechanical or electrical devices can also be used and prison staff can be reduced which would be cost effective in the long run. On the other hand, as part of the measures to make up for the insufficiency of the government budget, establishing a mechanism to generate profits inside corrections is recommended. As one possible way to build such a mechanism, activating the business of prison work inside correctional institutions is conceivable.

In addition to these strategies, the actual need of each prison should also be assessed in detail before the allotment of budget so that the budget can be distributed properly among prison institutions.

In countries where the prison buildings were constructed many years back and are located in urban areas, there is an option to sell the land or to utilize such land for other purposes. New prison buildings can then be constructed in a place where the land is cheaper, and thereby the prison conditions could be improved. For this purpose, model site plans for prisons should be devised as a priority to maintain uniformity in terms of architectural design to be based on SMRs. Privatization of some of the prison management aspects, such as food, clothing, hygiene and so on could also be one of the countermeasures to reduce expenditures. Privatization of prisons has been introduced in Australia and is found to be cost effective. But our group does not propose complete privatization which may have pitfalls including security problems and low quality which have been experienced in some countries.

**2. Measures for Lack of Understanding by Government**

In order to give the government a clear understanding about prison conditions, prisons should be well managed and sound professional competence of the prison officers should be developed. Prison administrators should take the initiative for making periodical reports to the prison department and Ministry concerned. Another initiative is to invite politicians including ministers and members of Parliament to visit the prison and make them appreciate the urgency of improvement of prison conditions. Similarly, other officials involved in the criminal justice system may be invited from time to time to visit prisons to make them aware of the actual situation in prisons, therefore, the improvement of prison conditions may become a priority of government. To that end, the prison authorities should be very honest and provide adequate information to the mass media as well as to the government.

**3. Measures for Overcrowding**

Obviously overcrowding causes inadequate prison conditions which have already been mentioned in this paper. General countermeasures to cope with overcrowding are supposed to be discussed in detail by group 1, therefore, our group has dealt with some of the measures to be taken inside the prisons assuming that there is overcrowding in the prisons, particularly those that have a negative impact on prison conditions.

When there is overcrowding in prisons the first problem to overcome is the shortage of space. To overcome this problem, underutilized and obsolete facilities can be adapted into new cell blocks. Other initiatives might include using the space in a cell room more effectively, for example, by making shelves and putting possessions in order. Similarly, use of accommodation of open camps and open prisons could be helpful to overcome this problem. In doing so, a system of proper security risk assessment is required in order to send low risk inmates to such prisons or open camps. Open camp systems in Indonesia and open prison systems in India have been successful. Prison authorities should be encouraged to explore innovative strategies for providing additional accommodation. For example, some devices for increasing beds such as using container type beds, mobile camps and demountable buildings have been used successfully in some countries. Use of bunk type beds (2-3 stories) may also contribute to increasing bed numbers and providing better conditions.

To overcome the shortage of goods for the daily use of the inmates, it would be desirable to insist that inmates themselves purchase some such goods at their own expense and from outside (such as religious groups). Prisons can also be encouraged to become self-sufficient in the production of food stuffs, for example through growing fruits and vegetables on prison property.

To overcome the shortage of resources for rehabilitation programs, proper screening process in rehabilitation of inmates should be carried out. So that budget for programs can be targeted and prioritized. Similarly, the shortage of prison staff due to overcrowding can be overcome by encouraging volunteer activities or through the use of temporary staff system.

**4. Measures for Insufficient Disclosure of Information to the Public**

In order to make accurate information about prison conditions available to the mass media, a designated prison officer or public relation section in each prison should be given such responsibility. Depending upon the situation of each prison, meetings with the mass media on a regular basis could be held. The officer in charge of providing such information should follow the news publications and if the news was distorted, the immediate concern should be brought to the attention of the publisher. Corrections to the news should be published with a guarantee of not distorting the information in the future.

Real transparency should be a feature of prison administrations particularly with regard to prison conditions. If there are some reasons why the government cannot allocate more budget, sufficient explanation should also be given to the public. Therefore, they may come up with some solutions and it even helps make indirect pressure on government to draw attention for cooperation from the outside.

Depending upon the size of prison and the existing work load, setting up a separate public relations section is also desirable. Such a section will regularly deal with the public in providing them information about the prison and obtaining public opinion which may help for the better management of prison. Use of internet, where possible, would also be a good method for circulating information to the public and getting public opinion.

**5. Measures for Lack of Cooperation from Outside**

In order to attract private sector investment inside the prisons, the government should develop infrastructure and try to attract the private sector. Joint

investment by government and private enterprise would be an appropriate method to attract the private sectors. Potential NGOs and religious groups should be selected which are really interested in the work and the government can work together with such NGOs and religious groups for the betterment of prison conditions. Similarly, volunteers should be encouraged to work in this field. So far as the cooperation with the government institutions is concerned, the initiative should be taken by prison authorities to get such adequate cooperation from those institutions. In order to facilitate this goal, the Prison Department should get in touch regularly with the institutions concerned and make them understand the seriousness of the situation. In order to pursue educational programs, the Prison Department should correspond to open universities and other educational institutions and get cooperation from them.

### 6. Measures for the Lack of Some Prison Officers' Recognition of Inmates' Rights

Today, human rights of prisoners have taken on a new significance and perspective. Therefore, the prison staff in general and the prison officer in particular should be quite aware of the fact of how human rights of prisoners are to be upheld in prisons. To this end, training about the importance of human rights should be given to all staff from the highest level to the lowest level involved in the prison administration and prison management. To update the knowledge of the prison officers and other staff and to make them able to implement correctional policies in a proper spirit, refresher training and on the job training should be provided in addition to the basic training. Such training will help to update their knowledge and make them able to implement correctional policies in a proper spirit. To ensure that staff are constantly reminded of their obligations towards prisoners, the appropriate authority should publish information, including procedures and legislation that enshrine basic human rights and disseminate this to staff. This could include the production of handbooks, posters and where possible use of the intranet and internet.

Similarly, prison authorities should be able to afford job satisfaction to its personnel. An officer or staff not satisfied with his/her job may not provide an effective and efficient service and ultimately it leads to the lack of recognition of inmates' rights. In this connection, the attention to the equal opportunities of prison staff who actually deal with the human rights of prisoners should be recognized first and then the principle of reward and punishment should be applied strictly on the basis of performance.

It is important that all prison officers should also have positive attitudes towards the prison conditions. For example minor repairs which can be easily done should be fixed by the prison officers themselves and be an example for the inmates. It contributes to improve prison conditions without involving any extra cost. This will help to improve prison conditions.

### 7. Measures for the Lack of Inmates' Positive Attitudes towards Prison Conditions

The prisoners themselves should play a vital role in improving the prison conditions. Prisoners from different backgrounds need some basic training after their admission to prison, they should be provided with an inmate handbook in order to make them clear about the human rights, expectations and obligations. Forming different committees such as a cleaning committee, maintenance committee, self-management committee, etc. among prisoners can be another way

for cultivating their positive attitudes towards prison conditions. If programs are conducted with the introduction of competition systems, highly evaluated committees are rewarded, and their attitudes can be stimulated and enhanced by those incentives. Good relations between the prison staff and the prisoners can also be expected in the course of such activities to achieve these goals. An environment for self-motivation among prisoners should be created in the prison so that they may develop positive attitudes towards the efforts to improve prison conditions.

## VI. METHODS AND PROCEDURES TO SECURE THE EFFECTIVENESS OF LEGISLATION REGARDING PRISON CONDITIONS

Establishing systems such as inspection and reporting systems are considered a key to a success for securing the effectiveness of the legislation regarding prison conditions. In this connection, Rule 55 of the SMRs stipulates as follows:

*Rule 55*

*There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be, in particular, to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.*

Therefore, our group discussed the inspection and reporting system in each of the participating countries which is as follows:

### 1. Fiji

The officers in charge of prisons are required to visit all wards, cells, yards, workshop, kitchen and latrines and other parts of the prison two times a day. Such officers are also required to see all inmates daily, if possible. He shall submit his report to the Supervisor of Prisons for perusal. The Supervisor of Prisons has to inspect all prisons under his control as frequently as possible and as per the direction of the Commissioner of Prisons. A report of his inspection is to be forwarded to the Commissioner of Prisons. The Commissioner of Prisons shall thoroughly and systematically inspect all prisons at least twice a year and submit his report to the Minister of Justice. Similarly, the Visiting Justice shall visit and inspect a prison at least once a week at any time and may inspect all books, papers and records relating to the management and discipline of the prison. He will also report to the Commissioner of Prisons of any matter of interest made through his inspection or visit. There is also a Visiting Committee in Fiji which consists of four or five people nominated by the Minister of Justice. Such Committee shall visit and inspect prisons at least once every three months and make a report to the Commissioner of Prisons and to the Minister of Justice. Other visits like Official Visitors, Ombudsman and Government Officials, Provincial Officials and NGOs are allowed after gaining the Commissioner of Prisons approval.

### 2. India

In India, the Inspector General of prisons shall inspect all departments of every jail at district headquarters at least once a year and every jail at Sub-Division headquarters at least once in two years. During inspections he shall personally see every prisoner and give reasonable opportunity of making any application or complaint and shall investigate and dispose of such as relate to jail discipline. He shall inspect the yards, wards, cells, worksheds and other enclosures, conservancy arrangements, and the medical administration, shall see the food

and ascertain that it is of proper quality and quantity and generally satisfy himself that the building and premises are in proper order. He shall satisfy himself that the orders of government regarding the arrangement and periodical destruction of record are observed. Immediately after the inspection the I.G. shall furnish the Superintendent with a memorandum embodying his opinion of the manner in which the jail is administrated the extent to which the officers appear familiar with their duties, together with any suggestions or orders for the guidance of the Superintendent.

The Inspector General shall exercise full control over all expenditure in jails submitting annually to government, through a comptroller, a budget of the funds necessary for their maintenance in such a manner and at such time as may be required. All monthly and other bills for jail expenses of every description shall be submitted to and audited by the Accountant General's Office.

**3. Indonesia**

In Indonesia, the Superintendent of prisons inspects blocks, cells, kitchens, food rooms, etc, every day, except Saturday and Sunday. If the Superintendent of prisons finds any complaint by the inmates, he will discuss such matters with his staff to solve the problem, but if the problem is found to be serious, the Superintendent of prison will form a Committee to investigate the case. The result of investigation should be reported to the head of the branch office of the Department of Law and Legislation and to the Director General of Correction. There are three types of inspection for prison conditions in government, the inspection by Inspector of Department of Law and Legislation, inspection by Director General of Correction and Staff and inspection by Auditor of Development and Finance Agency (every year, at the end of the fiscal year). Similarly, the members of the House Representatives, the International Committee of Red Cross, Indonesia Branch and other religious groups also visit the prisons. The Red Cross and religious groups often provide food and clothing to the inmates.

**4. Japan**

In Japan, the prison warden must observe the administration in prisons at any time, and in case of complaints made by inmates, he is ultimately responsible for examining the contents of those complaints and taking any action for the improvement of prison conditions if necessary.

On the other hand, regional correction headquarters and inspecting officers who are designated by the Minister of Justice, alternately visit each prison to inspect and ensure proper administration every year.

In Japan, there are two types of inspection in government. Administration Inspection Bureau as a subordinate department in Administration Affairs in the Prime Minister's Office and Board of Audit, as a kind of independent administrative committee, are supposed to make inspections. Administration Inspection Bureau inspects and ensures the proper administration by each department of government, and the results of inspections are reported to the Cabinet to a regular target.

On the other hand, the Board of Audit inspects and ensures the proper execution of budget in each department of government, and also is obliged to submit the reports to the Diet through Cabinet. Thus, it can be inspected whether or not prison conditions are managed properly from the point of execution of budget.

In Japan, there is no organization out of government which is designed to aim at

only watching correctional institutions. However, many NGOs, such as the Japan Federation of Bar Associations and Amnesty International Japan, function as general human rights observer groups. These groups propose the government progress reformation with perspectives different from government, and submit the reports to the United Nations. These activities take part in the inspection of the management of correctional institutions in Japan.

**5. Nepal**

There is no regular reporting system as such in Nepal about prison conditions. But the prison officer is required to submit a monthly report to the Chief District Officer. The Chief District Officer should visit the prison on a regular basis and be aware of the prison conditions. Prison officers are also required to submit an annual report about the activities of the whole year at the end of each fiscal year. Non-Governmental Organizations involved in the field of human rights, on their request, are also permitted to visit prisons.

So far as the proper utilization of the budget allocated to the prison is concerned, an internal audit is made by the Comptroller General and final audit is made by the Auditor General. This final report is required to be submitted to parliament. Thus the system of checking balances on the budget is transparent and accountable.

The reporting system in most of the participants' countries is not found to be working properly, therefore, an independent, transparent, impartial and fair body should be set up and the power to visit and inspect every prison should be given to this body which shall report on prison conditions to the Minister concerned. A copy of the report should be sent to the parliament. If the reporting system functions properly, the prison conditions will be improved.

## VII. CONCLUSION

This report was compiled following extensive group discussions, where all members participated, expressing their ideas and bringing useful and relevant perspectives from their own countries. The discussion was augmented by the immense contribution of our two faculty advisors and also Mr. Grant, the visiting expert from Australia.

The paper itself explains measures to improve prison conditions and may not satisfy all readers perceptions or thinking. However, it may help others especially from developing countries to identify the problems of impediment for improving prison conditions that we have outlined in this report and we hope that there will be opportunities to implement some of the solutions or countermeasures that we have outlined.

It is therefore necessary for all correction administrators to work towards one common goal and that is to provide humane treatment to offenders taking into consideration the human rights concept thus helping them successfully to reintegrate back into society.

In this regard well structured, improved prison conditions contribute a lot to the personal development (attitude, behavior, knowledge, skills) to successful integration.

## *GROUP 3*

# CURRENT TRENDS AND PROBLEMS OF PRISONERS, AND MEASURES FOR EFFECTIVE TREATMENT

| | | |
|---|---|---|
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## II. GENERAL INTRODUCTION

The discussion of Group 3 highlighted trends, conditions, and treatment of three groups of prisoners: foreign, drug-related, and female prisoners. These are groups of prisoners who definitely have special needs. Mention must be made to other special groups that are as important but were unable to be highlighted such as young, elderly, hard-core, AIDS/HIV infected, mentally ill and indigenous/ minority prisoners. In view of the worldwide trend of change, we attempted to draw out the problems concerning the treatment programs for these three groups of prisoners and to highlight the effective countermeasures.

Participants related to foreign, drug-related, and female prisoners were proportionally allocated to the group, giving rise to three sub-groups that were adequately able to address the sub-topics. The participants of each sub-group have utilized their expertise in discussions and have provided a rich outcome in this

document. Each sub-group has smoothly facilitated the plenary meetings related to their sub-topics.

## III. FOREIGN PRISONERS

### A. Introduction

According to the worldwide trend, the phenomenon of globalization has effected every sphere of life including the capacity to move from one place to another. People get more access to travel across borders bringing their diversified cultures and languages. When such persons violate the laws of other countries, they have to receive the results that may come in the form of detention or incarceration. One of the problems that correctional systems in various countries have encountered is the increasing number of foreign prisoners.

As paragraph 6 of the Standard Minimum Rules For The Treatment of Foreign Prisoners (hereinafter referred to as "SMRs") stated, "The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." As for the treatment of foreign prisoners these rules should be respected. Due respect should also be given to the "Recommendations on the treatment of foreign prisoners" approved by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985.

### B. Definition

#### 1. Differences in Definition of Foreign Prisoner

The term "foreign prisoner" has many shades of meaning. Generally speaking, it means a prisoner who has a foreign nationality, but sometimes it includes "foreign-born prisoner" or "foreign detainee". It was found during the discussion that each country has a different definition of foreign prisoners. Some countries like Peru, Sri Lanka, and Belize define foreign prisoners as persons of different citizenship or nationality, while in Thailand, foreign prisoners cover a number of hill tribes or minority groups who have no nationality but reside in the country. Japan defines foreign prisoners as those with foreign nationalities, but designates those offenders who need different treatment from local prisoners as F-class prisoners.

#### 2. Definition Resulting from Discussion

On the ground that each country has its own definition, the group has broadly discussed and has unified an appropriate definition of foreign prisoners. It is agreed that citizenship or nationality is the first important component. The other supporting component that should be taken into account are the prisoners' needs for different treatment and the fact that they shall be deported to their respective country after the end of their detention.

Resulting from the discussion, our group has come out with the definition of foreign prisoners as those persons having citizenship and/or nationality of another country, who are in custody. Such persons have special needs related to their treatment and welfare, and are normally deported after completion of sentence or detention.

### C. Trends (See Annex 1)

Although some countries lack statistics corroborating this upward trend, in many countries the number of foreign prisoners seems to be on the increase. As for the type of crimes committed by these prisoners, most countries reported that drug-related crimes are shooting up.

The characteristics of crime classified by nationality, in Japan, larceny is the most

prevalent offenses committed by foreigners. In Belize reports, illegal entry and prostitution account for most foreign prisoners. In Sri Lanka, there are many foreigners committing child abuse. Peru reports that members of terrorist groups who come from neighboring countries are in custody.

As for Thailand, a lot of foreign prisoners have committed drug-related crimes, mostly drug trafficking. Since drug trafficking is considered as one of the most serious crimes, the offenders shall receive the most severe punishment, which consequently result in the long-term imprisonment of foreign prisoners. While for Japan, there is not a high number of long-term foreign prisoners. Other countries like Belize, Peru and Sri Lanka have reported relatively low rates of foreign prisoners. Annex 1 shows the rate of foreign prisoners in some countries discussed by the group.

**D. Problems**

**1. Difficulty in Communication**

Being in custody in a foreign land with different languages, one will certainly have a lot of difficulties in adapting himself/ herself. The stress, anxiety, and frustration are compounded by the fact that communication is minimal.

Foreign prisoners who can not speak the local language shall inevitably have difficulties in communication with local prisoners. Due to language barriers, they cannot express their feelings, their ways of thinking, and the differences in custom. Lack of communication aggravates misunderstanding and may cause serious conflicts with local prisoners.

Foreign prisoners also have disadvantages in communicating with prison officers. They cannot easily understand prison regulations and the instructions of officers. Gradually, some foreign prisoners come to feel estranged and reflect their problems by filing objections to various authorities expressing negative reports on prison administrations.

**2. Difference in Lifestyle (Culture, Food, and Religion)**

Foreign prisoners have different life styles, in terms of culture, food, and religion, which need to be taken care of. If the prison does not take good care of this problem, the prisoners may suffer from serious loss in their mental/physical health. For effective treatment of foreign prisoners, some specific facilities and activities have to be provided to satisfy the need of health care, religious practice and food restriction. However, this may not be practiced in some countries due to budgetary constraints.

**3. Difficulty in Obtaining Information Concerning the Prisoners**

It is difficult to obtain information concerning the prisoners from agencies, namely criminal justice agencies of the home country of the prisoners, because criminal justice agencies of different countries do not share information on a regular basis. In some countries, there is no system of identifying or classifying foreign offenders, which result in insufficient information. Lack of information may lead to an underestimation of risks, such as the possibility of escape. In this regard, the treatment of foreign prisoners can not be handled in an effective way.

**4. Lack of Assistance from Family/ Relatives**

Unlike local prisoners, foreign prisoners have less possibilities to receive assistance from their relatives or friends. They basically have to depend upon their diplomatic representatives. However they are not able to provide personal care which

should be provided by the family, relatives and friends. Without such assistance, foreign prisoners may have more difficulties in adapting themselves to life in prisons.

**5. Less Chance of Obtaining Privileges**

Due to administrative and/or legal reasons, foreign prisoners are sometimes not allowed to have access to early release scheme such as parole or conditional release. In some countries, an early release mechanism is performed with an unequal basis among local and foreign prisoners. While Japan grants parole to both local and foreign prisoners, Sri Lanka and Belize, on the contrary, apply parole to only local prisoners, but not to foreign prisoners. In the correctional services of Peru, remission days are accumulated upon the work of each prisoner. The prisoners, both local and foreign, who engage in the work remission scheme are applicable for early release. As for Thailand, the early release derived from good conduct allowance system is awarded only to local prisoners, but not to foreign nationals.

In the same vein, they sometimes have less chances of being allowed leave, work release, etc. Also, they may be more likely to put in a maximum-security institution (which itself could lead to longer imprisonment). Such disparity found in the treatment of foreign prisoners may invite criticism calling such practice a form of discrimination.

**E. Coutntermeasures**

**1. Careful Assessment**

Having a foreign prisoner in custody can be problematic if prison officers do not have sufficient information on that prisoner. Individual assessment is one of the activities that should be done upon the intake of each prisoner. In case of foreign prisoners, it is important for the prison officers to get sufficient information, so that proper custodial measurements and/or rehabilitative programs can be arranged. In this regard, careful assessment has to be conducted for each foreign prisoner.

**2. Provision of Materials to Facilitate Communication**

On entering an institution it is important that all relevant information is made available to the inmates. This is even more needed for foreign prisoners. The production of materials or publications can alleviate many basic problems that would normally arise and can facilitate better communication. Rules and regulations, prepared in the languages of the prisoners will be an assistance to better communication. In the case where the prisoners are illiterate, video productions can be used to give such relevant information. As paragraph 30 (3) of SMRs prescribes the arrangement for interpreters should be made in the disciplinary punishment procedures.

**3. Staffing and Training**

In order to communicate with foreign prisoners, it is necessary to have basic knowledge in foreign languages.

This problem can be solved by:

(i) Recruitment and training of staff and volunteers that are able to communicate in foreign languages, and providing them with necessary training
(ii) Providing of local language courses for foreign prisoners
(iii) Exchange of skilled staff should be encouraged as it relates to different institutions.

**4. The Cooperation with Volunteers and NGOs**

In order to deal with foreign prisoners, it is worthy to search for the assistance from volunteers and NGOs in the community. Appeals can be made to

volunteers to assist in language barrier problems that come with difference in languages such as letter writing and censoring. Volunteers and NGOs can also perform other rehabilitative activities with foreign prisoners within the prisons as well as aftercare programs. For example, an NGO named "Ansar Burni Advocate" in Pakistan provides some programs which assist foreign prisoners be deported.

**5. Promoting Cultural Awareness**

The need for cultural awareness is another countermeasure that can alleviate unnecessary stress caused by lack of understanding. Such events as cultural awareness weeks or months can be a very good means of sensitizing the foreign prisoners, local prisoners, and the staff. This will also result in more harmony in the diverse groups being held in custody. There should also be meetings between the parties involved in the life of foreign prisoners, so as to seek better treatment programs.

**6. Cooperation with Embassies**

Assistance extended by embassies is valuable because it comes from the prisoner's compatriots and it makes a linkage of the foreign prisoners with their respective countries. Paragraph 38 of SMRs guarantees the foreign prisoners the right to contact the diplomatic or consular representatives of their own countries. Prison officers should seek cooperation with embassies of foreign prisoners. The contact with embassies can also lead to smooth implementation of deportation or transfer of foreign prisoners.

**7. Provision of Special Resources Attending to the Needs of Prisoners**

Recognizing that foreign prisoners are those in need of special treatment, prison officers should provide special resources attending to their needs. In this regard, certain facilities and necessities should be provided such as books, newspapers, food, religious ornaments and specific room for prayers. As paragraph 41 of SMRs prescribes, specific consideration should be given to the religious needs of foreign prisoners.

**8. Legislative and/or Administrative Changes to Offer Equal Treatment to Foreign Prisoners**

Legal and administrative changes are required to overcome obstacles resulting in unequal practices such as unfair application of early release mechanisms to foreign prisoners. Relevant bodies, legislative and/or administrative, should recognize the fact that the problem exists and should pay efforts to minimize it.

**9. Reducing the Number of Foreign Prisoners**

The following are steps that can assist in alleviating the overpopulation of foreign prisoners:

(i) **Deportation:** Deportation can render the speedy return of inmates out of the correctional system instead of a long detention period. This would assist greatly as it relates to illegal-entry inmates. Prior to deportation, the mechanisms such as diversion, early release, and speedy trial should be encouraged.

(ii) **Transfer of Prisoners:** Treaties between states which allow sentences to be carried out in the country of the foreign offender. Thailand is an example where foreign inmates are transferred back to their home where the sentence is carried out. Such treaties are bilateral.

**F. Conclusion**

It is quite obvious that all countries need to review their policies and procedures as it relates to the treatment of foreign

offenders. In many cases, there is no clear and concise account of what the mission is, with respect to care, custody and control. When there are clear statements of principle that should be applied to the life of such inmates, there are measurable components that can be used to evaluate whether the mission is being accomplished. It is the hope that serious considerations and actions would be taken as it relates to the countermeasures suggested in this paper.

## IV. DRUG-RELATED PRISONERS

### A. Introduction

Substances such as heroin, cocaine, cannabis and amphetamines have a dependency nature. Therefore many people are hooked on drug abuse and face difficulty to dissociate themselves from the spell of drugs. In view of the globalization of production, trafficking and the consumption of these drugs, we discussed the problems and countermeasures of drug-related prisoners.

### B. Definition

This group has defined "drug-related prisoners" as prisoners who are in custody for drug offenses as well as those who are in custody for other offences and are dependent on drugs. In the prisons of some countries, even in those countries where drug abuse does not constitute criminal offence, there are many drug-dependent prisoners who are imprisoned for other crimes such as theft or robbery.

In addition we define "drug offenders in prison" as those who are in custody for drug offences.

### C. Situation & Trend (See Annex 2)

The ratio of drug-offenders in prison to the total prisoner population is relatively high in each country. In Thailand, it was 58.6% in 1999, the highest portion among the countries respected in our group. Next comes Sri Lanka with 39.4%. In four of five countries we surveyed drug offenders occupy more than a quarter of their prison population. The ratio of drug-related prisoners is expected to be much higher than this.

Furthermore, the number of drug offenders in prisons is on the increase in most of the countries firstly by more active law enforcement efforts and harsher sentencing usually accompanied by legal reforms asking for heavier punishment drug offenders, and secondly by the infusion of drug abuse into society. Consequently, the number of drug-related prisoners is also on the increase.

Other common trends found in many countries are as follows:

- There is an increasing number of female drug-related prisoners.
- In some countries, the recreational use of drugs among juveniles is becoming prevalent.
- Drug distributors and smugglers are found to be involved with gangsters.
- There is a relationship between poverty and drug trafficking.

However, the situations are not completely the same in each country. First there are differences in the legal system of each country. For instance in Peru, drug abuse is not a crime, while in other countries, it is a crime to which penal sanction is applied. Thus, in Peruvian and Thai Prisons, the number of drug traffickers is more than that of the number of abusers while in Belizian and Sri Lankan prisons, the number is almost the same. Japan is the only country where the number of abusers overwhelms the number of traffickers.

Also, there are differences in types of drugs socially causing problems. In

Central America, the most serious problem is cocaine. In South Asia and the South-eastern part of Asia, the heroin problem is historically serious and, in Eastern Asia and recently Southeastern Asia, some countries are affected by the wide spread of amphetamines. The globalization of drug trafficking is making the situation more complicated than ever.

**D. Problems**

**1. Access to Drugs in Prison**

In some countries, it has been the most serious problem that prisoners get access to drugs within the prison. Some inmates may receive drugs from visitors, from mail, or from other smuggling means. Thus, prisoners develop a drug-trafficking network within prison. Further, it was found that some prison officers intentionally overlooked the traffic of drugs in prisons, and sometimes, themselves traffic drugs. If drugs exist inside the prison, it is quite clear that the control of prisoners becomes more difficult, that drug dependants cannot get rid of their habit, and that treatment programs cannot be implemented properly.

**2. High Recidivism Rate of Drug-Dependents**

Drug-dependents have a high tendency of recidivism: upon their release from prisons, they have to go back to the same community where drugs are available. High recidivism rates can lead to concentration of drug dependents in prisons, which pushes up the prison population.

In contrast, it is found out that the recidivism of traffickers is not high, and that they benefit from treatment programs offered to general offenders such as vocational training. So the issue of re-offending of traffickers will not be discussed in this paper.

**3. Physical and Mental Health Problems**

Narcotic drugs basically do harm to the physical/mental conditions of the abusers. For example, heroin addicts are physically dependent on drugs and have to go through a physically tormenting period when they undergo detoxification. Also, long-term abuse of amphetamine/methamphetamine may cause a symptom called “flash back” that refers to a sudden and unintended re-experiencing of the situation which the abuser experienced when he/she abused the drug even when he/she is sober. In addition, it is known that the mental conditions of drug-dependants are usually volatile and unstable. The treatment of drug-related prisoners consequently needs to take into consideration the conditions of their physical and mental health.

**E. Countermeasures**

**1. The Control of Drugs in Prison**

Drug control efforts in prison are basically categorized into two parts. First, there are efforts to eradicate the access to drugs available in prison. For example, the check of incoming mail and the inspection of carried-in personal belongings, body/pat search of visitors, officers and new prisoners entering the institution, and the restriction of the sale of goods allowed to be brought into premises of institutions to authorized stores, are carried out.

Second, there are efforts to deter drug abuse by maximizing the probability of detection of drug abuse. These efforts include cell searches, urine testing and intelligence work (e.g. cooperation with police, use of informers, etc.). In addition, to coordinate these efforts, the establishment of an anti-drug committee within institutions are considered to be effective. If the incident is found, perpetrators should be sanctioned accordingly. For example, if an officer conspires in the drug trafficking, he/she

should get not only receive penal sanction, but also an administrative sanction such as discharge.

Of course the prison staff should be well trained so that they are experienced in the implementation of all the drug control efforts.

**2. Treatment Programs to Prevent Drug Recidivism**

Treatment programs for drug dependants should focus on the core problems of drug abuse: physical dependence and mental dependence.

To deal with first dependence, medication is available for some types of substances. For example, methadone, known as a substitute for heroin, is the most widely used and reliable medication. However, medication for cocaine dependents and amphetamine/ methamphetamine dependents are not yet developed and are still at the research stage.

Mental dependence should be dealt by psychological treatment. Although there are so many types of psychological treatment, a treatment method which has been found to be the most effective is cognitive-behavioral treatment. Cognitive-behavioral treatment has been used in Canada, the U.S., the U.K. and other countries and evaluated favorably. TC (Therapeutic Community: a program which allows prisoners to run a drug-free unit as a community) and similar self-help type groups have been found to be effective and now introduced to Asian countries such as Malaysia and Thailand. Some TC programs have religious backgrounds and this testifies to the success of spiritual/ religious programs such as conducted in Sri Lanka.

Support from family members as well as peers is also crucial. Schemes facilitating the interaction with family members such as Family Days (when an institution is open to family members) should be introduced and encouraged.

Supplementary programs including vocational, educational, PE (physical-educational) and recreational programs are also expected to contribute to the reduction of recidivism by stabilizing the drug dependent prisoners into the normal life.

Aftercare services such as halfway houses and continued community treatment are also essential because re-adaptation to social life is the key to the success of drug treatment. Lay/ professional volunteers, NGOs and other community service organizations will be beneficial in this respect.

Programs discussed in this section are mainly available to convicted prisoners, but the correctional authority has to pay every effort to put their inmates in contact with effective programs.

**3. Reduction of Contact with Drug-Related Prisoners**

Further, the influence of drug-related prisoners on non-abusers cannot be overlooked. Through interaction with drug-related prisoners, non-abusers may be introduced to and get interested in drug abuse.

Regulation of contact with/among drug-related prisoners is necessary to control drug abuse in prison, prevent the formation of drug offender networks, and nurture the prison environment conducive to the success of drug treatment programs.

To reduce contact, classification, categorization, and/or segregation must be utilized. This should be based upon the

introduction as to how offenders were related to each other before they enter the prison.

In addition, the control of movement of inmates, which do not allow the interaction of inmates belonging to different groups (e.g. groups set up according to workshop, wings, etc.), is effective to cut off the trafficking of goods within institutions. Also the control of conversation of inmates which is meant to reduce the exchange of information on occasions where supervision is minimal is effective to reduce communication related to drug abuse/ traffic within institutions.

**4. Medical and Psychological Care**

To provide special medical/psychological care, meeting the unique needs of drug abusers, correctional institutions need to carefully assess drug dependent prisoners. To meet their medical needs, correctional institutions need to recruit psychiatric doctors, nurses and other competent staff. These staff are required to monitor the conditions of the drug dependent prisoners who need special health care, to counsel and provide medication and to advise custodial staff. Wise and careful use of single cells should be made upon the recommendation of medical staff.

To take care of their psychological needs, interviewer schemes which enable prisoners to talk to officers/volunteers who are psychologically trained at any time should be developed.

**F. Conclusion**

Many countries in the world are afflicted with the plague of drug abuse. Severe health, social and economic problems are emerging associated with the abuse of drugs. It is also turning law abiding young people into criminals.

From the statistics shown in Annex 2, it is seen that more than a quarter of prisoners are drug offenders except in Belize. It is easily seen that drug-related offenders occupy a much higher percentage (conceivably, almost half) of the prisoner population.

With the influx of this large number of drug related offenders, many countries are now confronted with a host of new problems hitherto not experienced in the past.

First of all it is necessary to keep the drug abusers separated from other categories of offenders in their own interest and that of others. But it is not an easy task to keep them separated in overcrowded institutions, thus there is a great possibility of their mixing with others and promoting the habit of drugs amongst other offenders.

With these difficulties drug related offenders who are in the penal institutions must be assisted by correctional officials in order to return to society to lead a normal and productive life. These countermeasures and treatment programs which we highlighted here in this report in detail, should be applied effectively with their cost-effectiveness being monitored regularly.

## V. FEMALE PRISONERS

**A. Introduction**

Paragraph 6 of SMRs, which is cited, relating to the treatment of foreign offenders, states that there shall be no discrimination on the grounds of sex. However, the discrimination does exist and various reasons have been given for the lack of priority for treatment of female prisoners. One such is the fact that they make up such a small proportion of the correctional population, secondly the criminality is not serious. Also the

correctional system has failed to recognize the diversity among female prisoners by putting them into one category. However, in recent years, the number of female prisoners has been increasing in a lot of countries.

In view of this situation, the treatment system for female prisoners should take account of their specific needs which are different from that of male prisoners while attending to their individual variety.

Therefore, we discussed the effective treatment system for female prisoners, based on the actual circumstances in each country.

**B. Characters & Trends (See Annex 3)**

In recent years, the number of female prisoners has increased. There are different social backgrounds in female criminality. The penal system in each country differs too. In some countries, female prisoners are incarcerated in the same prisons with male prisoners, but are placed in separate wings of the prisons. In this case, female prisoners may not be able to get access to sufficient treatment of the prisons. Characteristics and trends of female prisoners found in the discussion are:

1. Female prisoners represent a minority scale compared to male prisoners (5 % - 15 %).
2. There is an increasing trend of population of female prisoners in many countries.
3. There is an increasing trend of female prisoners committing drug related crime and crime against property (theft/robbery).
4. Most female prisoners have low education backgrounds and are unemployed.
5. Most female prisoners are victims of abuse or are forced/introduced to crimes by male partners.

**C. Problems**

Since female prisoners make up only a small proportion of the total prison population, treatment services and programs are basically designed for male rather than for female prisoners. Upon the discussion, the group has found that most services and programs are male-centered, which have led to problems concerning the treatment of female prisoners as follows:

**1. Male-Centered Services**

(i) Male-Centered Allocation of Space

In some countries, there are correctional institutions for female prisoners, while in other countries, female prisoners are incarcerated in a section within the same campus of male prisoners. Relating to this point, paragraph 8 of SMRs recommends that different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex and specifically that men and women shall as far as possible be detained in separate institutions; in an institution which receives both sexes the whole of the premises allocated to women shall be entirely separate.

However, space and facilities provided for female prisoners are overlooked and are relatively small. It is found that female prisons or female sections become easily overcrowded due to the prison authority's delay in responding to the increase of female prisoners and in adjusting the space allocation between male and female prisoners. For example, it is recognized by Japan and Peru that sizes of female sections in male prisons and, in case of Japan, female prisons are small and do not share an equal space allocation to that of male prisoners Also, it should be pointed out that there is a tendency that female sections specially set up within male prisons suffer from worse conditions than female prisons do.

(ii) Male-Centered Attention to Daily Basic Needs

Women in general have specific needs for underwear, cosmetics, and some other feminine necessities. Although these are the basic needs of women, correctional systems often do not recognize them and do not allocate enough budget to satisfy these needs. This is another reflection of male-centeredness of correctional treatment. Basically, Thailand provided clothes for prisoners, but there is no difference between male and female; and the clothes are likely to be more useful to men. In Japan, even though some special necessities such as underwear are provided for female prisoners, there are still problems concerning the quality and variety of those necessities that do not serve the real needs of female prisoners.

(iii) Male-Centered Provision of Health Care (including Insufficient Child Care)

A lot of correctional institutions for females do not have sufficient health care services. Despite the fact that women need special medical services such as genealogical medical care, breast cancer and uterine cancer checks, most female institutions are poorly equipped and staffed in terms of medical services.

An extreme example can be seen in Thailand. The only correction hospital of the country lacked an in-patient ward for female prisoners for very long time. In case of operation, female prisoners would receive an operation and would be brought back to women's prison within the same day. In recent years a female ward has been established within the said hospital.

Apart from general needs of medical care, female prisoners sometimes need extra services concerning their pregnancy and child care. These needs require special food, clothes, and facilities, but they tend to be overlooked in prisons.

**2. Male-Centered Programming**

(i) Male-Centered Availability of Programs

Female prisoners have historically not been given the same range of opportunities as male prisoners. Their special needs have been overlooked when programs have been designed and resources allocated. Treatment facilities for education, vocational training, sports and recreation are always located in the main part of the prisons where only male prisoners can get access. This problem does not occur in some countries like Japan and Sri Lanka; but it is found quite seriously in correctional systems of Belize, Peru, and Thailand.

However, in cases where those programs are available to female prisoners, the varieties of the programs are more restricted than that arranged for male prisoners. The smaller number of female prisoners and the smaller size of female prisons have been used as an excuse for not providing female prisoners with equal opportunities to choose programs. This program management has generally put the female prisoners at a disadvantage.

(ii) Male-Centered Content of Programs

Most programs provided for prisoners have been historically introduced and practiced in prisons for a very long time, regardless of the change of market needs. Prisoners are given works or vocational training programs that are already available in prisons. In Peru, female prisoners will get access to works and vocational programs such as cooking, clothes making, hair dressing, and handicraft making. Actually, these types of work do not respond to the need of the labor market that needs more modern skills such as using computers. When new programs are introduced into prisons, they

are likely to be practiced in male sections first.

Female prisoners have needs for special programs. Because their job market is different from that of male prisoners, the content of vocational training should not be the same. Also, they have their specific taste for recreational activities that is different from male prisoners. However, these needs specific to women are not well taken into consideration, and, as a result, the content of programs available to female prisoners does not differ much from that available to male prisoners.

### D. Countermeasures

Considering the characteristics, trends, and problems of female prisoners, the group has found those necessary countermeasures to be operated so as to alleviate the problems of treatment of female prisoners and to increase effectiveness in the treatment programs.

#### 1. Fair Allocation of Resources

Fair allocation of resources, taking specific needs of female prisoners, is the most important countermeasure to be taken. Physical resources (e.g. space and facility), financial resources (e.g. budget for daily goods such as underwear) and human resources (e.g. the number and qualified staff) should be equally available to female prisoners. Further, it is recommended to establish separate institutions for female prisoners where treatment programs specially catering for the needs of female prisoners are provided by female staff. This recommendation is related to paragraph 53 of SMRs.

#### 2. Assessment and Classification

Assessment and classification regarding the specific needs of female prisoners should be conducted to attain the treatment programs responsive to their needs. The specific need areas include family, peer, anti-social associates, and anti-social cognition.

#### 3. Establishing Programs for Female Prisoners

(i) Educational Programs

Since it is found that female prisoners have low levels of education, which relates to unemployment, it is necessary to provide them with education programs; so that they can have sufficient backgrounds, which can lead to employment after their release.

(ii) Vocational Programs

Vocational training programs suitable for females are encouraged in regards to the unemployment problem. It was also found that female prisoners have been abused or forced/introduced to commit crime by male gangsters. It may be helpful if the female prisoners can afford some vocational skills that enable them to find work and avoid being abused by male gangsters.

(iii) Drug/Substance Abuse Prevention Program

Many female prisoners are drug/substance abusers. To change their drug/substance abusing behavior, correctional institutions should provide drug/substance abuse programs specially modified for women prisoners. Different from programs for men, programs for women need to emphasize the effect of drugs/substances on a reproductive system, on an effect of their association with male partners (on drugs/substance abuse), on a constructive use of leisure time, and on a building of support systems.

(iv) Victims of Abuse Program/ Relationships Program

Women prisoners have a history of being abused or forced/introduced to commit crime by male partners. To help them recover from trauma related to physical, mental and emotional abuse, and to help

them reconstruct their relationships with their male partners, special programs should be provided. These should help them recognize the destructive effects of their relationships with intimate partners and motivate them to change their way of building interpersonal relationships.

**4. Establishing Health and Child Care Services**

(i) Health Services

Recognizing that women have some specific needs concerning their physical health as is mentioned in Paragraph 23(1) of SMRs, it is necessary to provide them with sufficient medical care, especially genealogical care. Firstly, female prisoners, if pregnant, need to be taken care of according to their progress of pregnancy, even after the delivery of their children. Secondly, female prisoners, in general, should get access to regular physical checks (e.g. breast cancer checks, etc.).

(ii) Child Care Services

Most countries adopt the practice of allowing the female prisoners to raise their children in prison for a period of time, which may range from 1 year to 3 years. During this period, correctional institutions are required to guarantee the access to milk diet, and other items necessary to the development of children. Further, it is desirable to establish a nursery center for children within the prison compound or vicinity, as is recommended in SMRs paragraph 23(2). In cases where children become older than the specific age and are looked after outside the prisons, the prison authority is also expected to pay extra attention to facilitate the contact between imprisoned mothers and their children. For example, in the U.S., a center established within a correctional institution provides activities, mostly initiated by inmates, such as tape recording of mothers reading books; summer camps (for children housed with neighborhood host families); and overnight weekend visiting programs.

**E. Conclusion**

Female prisoners have been long disadvantaged in prisons. However, in accordance with the international society's emphasis on the improvement of situations of women in general, the situations of imprisoned women need to be focused on. Female prisoners should be recognized as having specific needs, and "equality" needs to be redefined as providing opportunities relevant to their needs, not as providing equal resources based the number of male and female inmates. Our discussion is an effort to step forward to this direction.

## VI. GENERAL CONCLUSION

It is quite obvious that "Foreign prisoners", "Drug-related prisoners" and "Female prisoners" all have specific needs and require special treatment. The correctional system of each country must consider what necessary action can be taken. In some countries, there may be limitation of resources; but this must not be an excuse for sitting back and doing nothing. It is the intention of the participants of this group to motivate the concerned systems to take actions that are appropriate and applicable to each country. With available human resources, there can be some effective and measurable changes. We cannot change the world, but we can change the part of the world where we are.

**ANNEX 1 (Foreign Prisoners)**

**Table 1**
**Trend of Belize**

| | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|
| Number of Prisoners | 1,544 | 1,389 | 1,193 | 1,313 |
| Number of Foreign Prisoners | 492 | 446 | 397 | 451 |
| Rate of Foreign Prisoners | 31.9% | 32.1% | 33.3% | 34.3% |

*Total number of admissions of each year

**Table 2**
**Trend of Japan**

| Year | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of Prisoners | 50,481 | 46,858 | 45,193 | 45,082 | 45,525 | 46,120 | 47,398 | 49,414 | 50,897 | 52,715 |
| Number of Foreign Prisoners | 1,505 | 1,380 | 1,342 | 1,369 | 1,424 | 1,568 | 1,801 | 2,038 | 2,153 | 2,359 |
| Rate of Foreign Prisoners | 3.0% | 2.9% | 3.0% | 3.0% | 3.1% | 3.4% | 3.8% | 4.1% | 4.2% | 4.5% |

*As of 31 December of each year

**Table 3**
**Trend of Sri Lanka**

| | 1993 | 1994 | 1995 |
|---|---|---|---|
| Number of Prisoners | 18,644 | 16,241 | 15,893 |
| Number of Foreign Prisoners | 2 | 9 | 26 |
| Rate of Foreign Prisoners | 0.0% | 0.1% | 0.2% |

* Total number of admissions of each year

**Table 4**
**Trend of Thailand**

| | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|
| Number of Prisoners | 125,955 | 164,451 | 205,340 | 200,310 |
| Number of Foreign Prisoners | 4,579 | 4,931 | 5,235 | 5,526 |
| Rate of Foreign Prisoners | 3.6% | 3.0% | 2.5% | 2.8% |

* As of 30 September of each year

**Figure 1:**
**Number of Prisoners and Foreign Prisoners (Belize)**

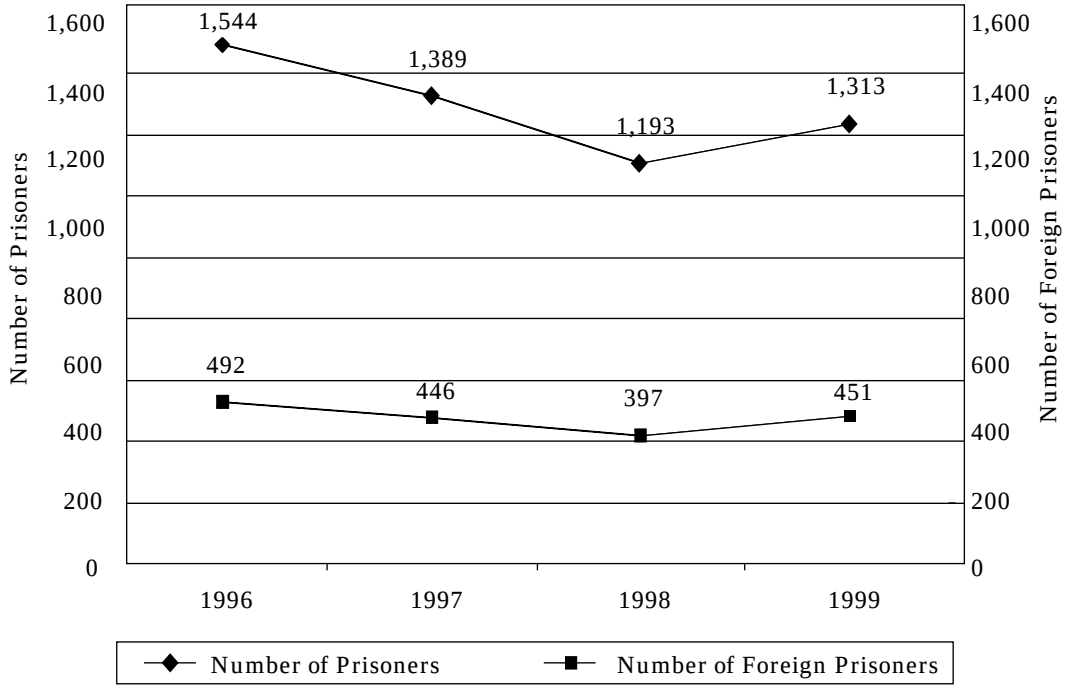



**Figure 2**
**Number of Prisoners and Foreign Prisoners (Japan)**

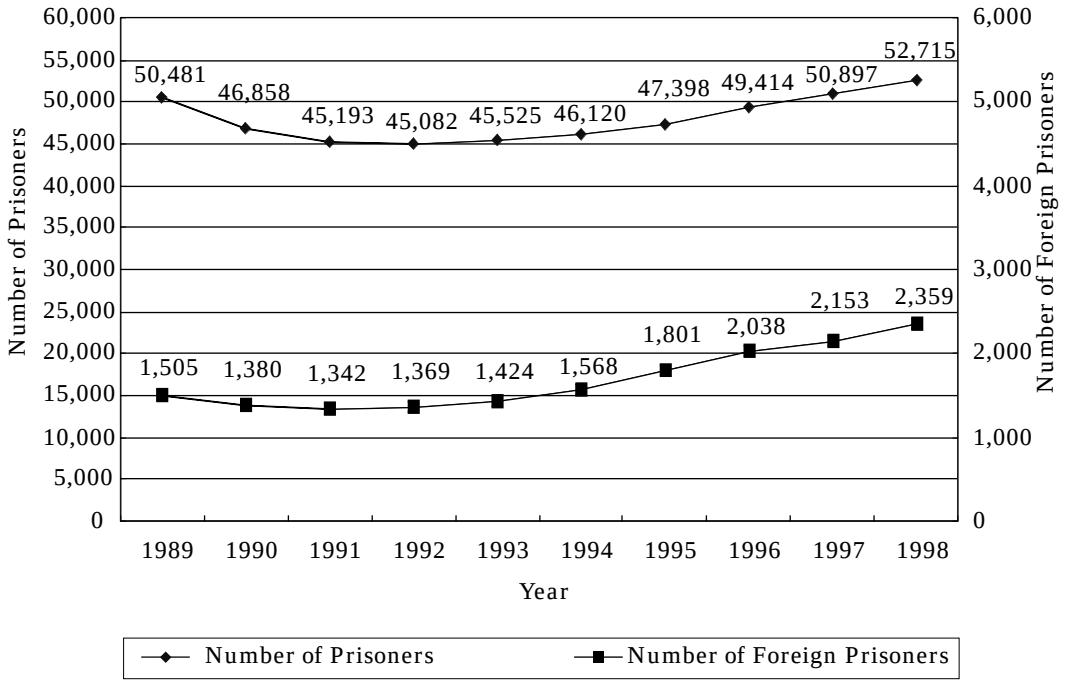


**Figure 3**
**Number of Prisoners and Foreign Prisoners (Sri Lanka)**

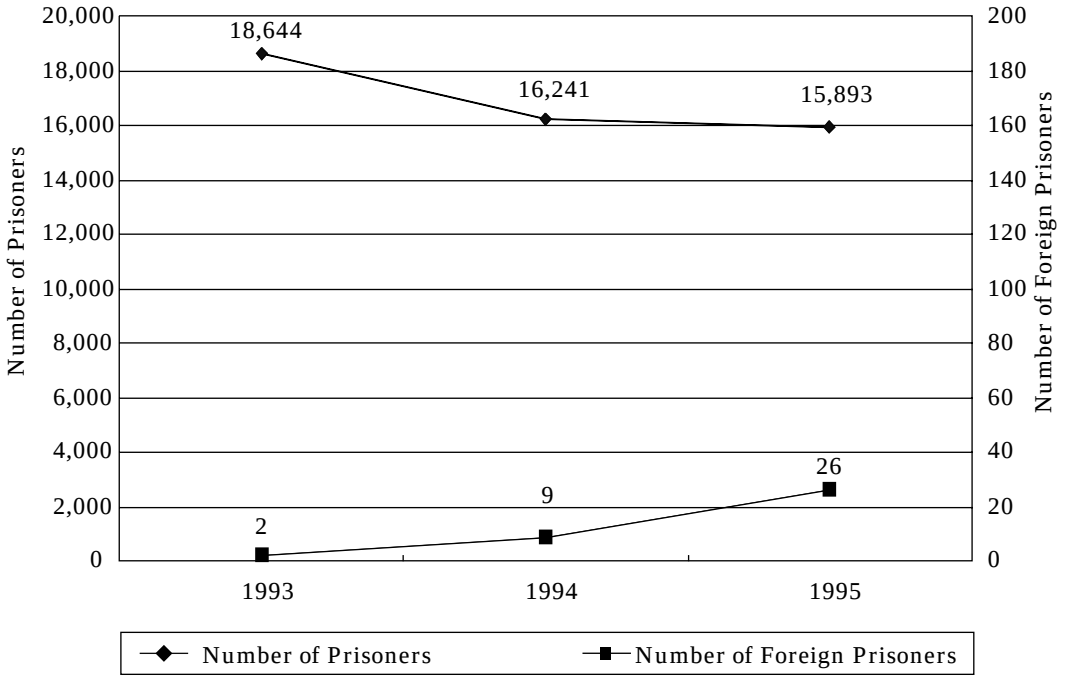
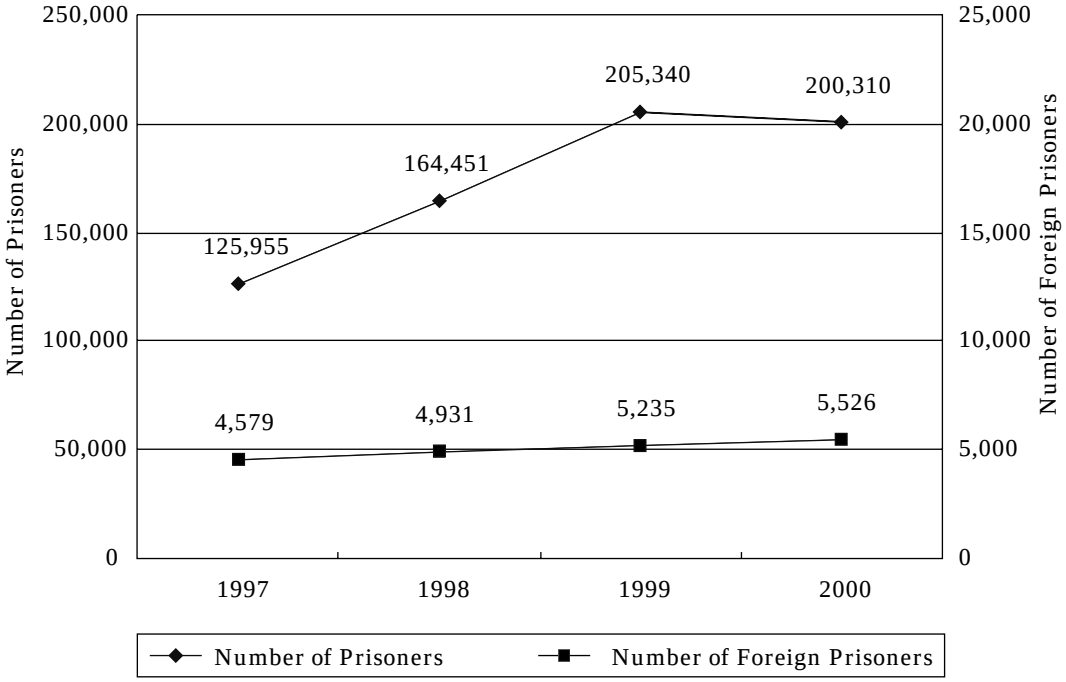



**Figure 4**
**Number of Prisoners and Foreign Prisoners (Thailand)**



**ANNEX 2 (Drug-related Prisoners)**

**Table 1**
**Number of Drug Offenders**

| Belize | Japan | Peru | Sri Lanka | Thailand |
|---|---|---|---|---|
| 127 | 12,605 | 7,004 | 8,199 | 67,473 |
| 12.5% | 29.1% | 25.6% | 39.4% | 58.6% |
| (1999) | (1998) | (1999) | (1998) | (1999) |

**Table 2**
**The Comparison of the Number of Drug Traffickers and Drug Abusers among the Prison Population**

| | Belize | Japan | Peru | Sri Lanka | Thailand |
|---|---|---|---|---|---|
| The number of Drug Traffickers are more than that of number of Abusers | | | X | | X |
| The number of Drug Traffickers are almost the same as that of number of Abusers | X | | | X | |
| The number of Drug Traffickers are less than that of number of Abusers | | X | | | |

- In Peru, drug abuse is not a crime.

**Table 3**
**Types of Prevalent Drugs**

| Belize | Japan | Peru | Sri Lanka | Thailand |
|---|---|---|---|---|
| Cannabis<br>Cocaine | Amphetamines | Cocaine | Heroin<br>Cannabis | Amphetamines<br>Heroin |

**Table 4**
**Trends of Drug offenders**

| Belize | | Japan | | Peru | | Sri Lanka | | Thailand | |
|---|---|---|---|---|---|---|---|---|---|
| Increase | | Increase | | Increase | | Increase | | Increase | |
| N.A. | 127<br>(1999) | 10,555<br>(1994) | 12,650<br>(1998) | 4,727<br>(1995) | 7,004<br>(1999) | 7,139<br>(1997) | 8,199<br>(1998) | 24,523<br>(1995) | 67,473<br>(1999) |

**ANNEX 3 (Female Prisoners)**

**Table 1: Number**

| Belize | Japan | Peru | Sri Lanka | Thailand |
|---|---|---|---|---|
| 88<br>9.2%<br>(1999) | 1,199<br>5.2%<br>(1998) | 2,353<br>8.6%<br>(1999) | 5,441<br>6.3%<br>(1995) | 32,720<br>15.9%<br>(1999) |

**Table 2**
**Trends**

| Belize | | Japan | | Peru | | Sri Lanka | | Thailand | |
|---|---|---|---|---|---|---|---|---|---|
| Increase | | Increase | | Increase | | Increase | | Increase | |
| N.A. | 88<br>(1999) | 1,071<br>(1996) | 1,199<br>(1998) | 1,836<br>(1996) | 2,353<br>(1999) | 4,270<br>(1994) | 5,441<br>(1995) | 6,401<br>(1996) | 19,235<br>(1999) |

For Thailand, the number of convicted prisoners is only available.

**Table 3**
**Institutions**

| Country / Institutions | Belize | Japan | Peru | Sri Lanka | Thailand |
|---|---|---|---|---|---|
| for female prisoners | 0 | 6 | 8 | 0 | 6 |
| Prisons with separate wing for female prisoners | 1 | 184 | 62 | 9 | 115 |

**Table 4**
**Type of Offense**

**4.1 Belize**
(1999)

| Type of Offense | Number | % |
|---|---|---|
| Drug related | 20 | 22.8 |
| Robbery /Theft | 14 | 16.0 |
| Assault | 9 | 10.2 |
| Illegal Entry | 37 | 42.0 |
| Others | 0 | 0.0 |
| Total | 88 | 100 |

**4.2 Japan (Convicted prisoners only)**
(1998)

| Type of Offense | Number | % |
|---|---|---|
| Drug related | 583 | 48.3 |
| Against property | 373 | 31.3 |
| Assault | 37 | 5.1 |
| Murder | 55 | 4.6 |
| Others | 151 | 10.7 |
| Total | 1,199 | 100 |

**4.3 Sri Lanka (Convicted prisoners only)**
(1995)

| Type of Offense | Number | % |
|---|---|---|
| Drug related | 47 | 9.0 |
| Excise Offense | 203 | 38.8 |
| Prostitution | 135 | 25.8 |
| Murder | 5 | 0.1 |
| Theft | 68 | 13.0 |
| Others | 65 | 12.3 |
| Total | 523 | 100 |

**4.4 Peru**
(1999)

| Type of Offense | Number | % |
|---|---|---|
| Drug related | 612 | 26.0 |
| Against property, Assault | 894 | 38.0 |
| Murder, against life | 259 | 11.0 |
| Others | 588 | 25.0 |
| Total | 2,353 | 100 |

**4.5 Thailand (Convicted prisoners only)**
(1999)

| Type of Offense | Number | % |
|---|---|---|
| Drug related | 4,604 | 23.9 |
| Against property | 13,314 | 69.2 |
| Assault | 120 | 0.6 |
| Murder | 308 | 1.6 |
| Others | 889 | 4.6 |
| Total | 19,235 | 100 |

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# APPENDIX

***COMMEMORATIVE PHOTOGRAPHS***

- ***114th International Senior Seminar***
- ***115th International Training Course***

# THE 114th International Training Seminar

**Left to Right:**
**Above:**
Mr. Sirisak (V.E.)

**4th Row:**
Mr.Takagi (Chef), Ms. Takeda (Staff), Ms. Matsushita (Staff), Mr. Hirata (Staff), Mr. Satou (Staff), Mr. Okeya (Staff), Mr. Gohda (Staff), Mr. Imai (Staff), Mr. Jimbo (Staff), Mr. Wang (China), Mr, Tezuka (Staff)

**3rd Row:**
Ms. Saitou (Staff), Ms. Kubo (Staff), Mr.Suzuki (Japan), Mr. Sanada (Japan), Mr. Afzal (Uzbekistan), Mr. Salahudin (Indonesia), Mr. Abdul Jalal (Malaysia), Mr.Jese (Fuji), Mr. EL Nabris (Palestine), Mr.Jumpol (Thailand), Mr.Kasingye (Uganda), Mr. Datinguinoo (Philippines), Ms.Kaneda (JICA)

**2nd Row:**
Mr. Wakama (Nigeria), Mr. Lim (R.O.K), Mr. Yadav (India), Mr. Razzaque (Bangladesh), Ms.Ibañez (Peru), Mr. Mutlaq (Jordan), Mr. Jayathilake (Sri Lanka), Mr. Pathak (Nepal), Mr. Ušinskas (Lithuania), Mr. Farooq (Pakistan), Ms. Mirânjela (Brazil), Mr. Yoshiura (Japan), Mr. Tamura (Japan), Mr. Nishiguchi (Japan), Mr. Yoshimatsu (Japan)

**1st Row:**
Ms. Findlay Debeck (L.A.), Mr. Itou (Staff), Prof. Watanabe, Prof. Nosaka, Prof. Aizawa, Dep. Director Tauchi, Mr. Plachta (Poland), Mr. Nilsson (E.U.), Director Kitada, Mr. Gaña (Philippines), Mrs. Gaña (Philippines), Mr. Harris (U.S.A), Prof. Iitsuka, Prof. Satou, Prof. Tsutomi, Prof. Imafuku, Mr. Chishima (Staff)

# THE 115th International Training Course

**Left to Right:**
**Above:**
Mr. Cunha (CoE.), Dr. von Hofer (Sweden), Mr. Grant (Australia)

**4rd Row:**
Mr. Takagi (Chef), Mr. Souma (Staff), Ms. Takeda (Staff), Ms. Matsushita (Staff), Ms. Saitou (Staff), Mr. Nozaki (Staff), Mr. Gohda (Staff), Mr. Nakagawa (Staff), Mr. Hirata (Staff), Ms. Kubo (Staff), Ms. Kuramochi (JICA), Ms. Kamitani (Staff), Mr. T.Kai (Staff), Mr. Kimura (Staff)

**3nd Row:**
Mr. Fujioka (Japan), Mr. Baba (Japan), Mr. Nakasato (Japan), Mr. Moody (Belize), Mr. Regmi (Nepal), Mr. Negi (India), Mr. Rao (Pakistan), Mr. Terasaki (Japan), Mr. Murillo (Costa Rica), Mr. Kuruppu (Sri Lanka), Mr. Yano (Japan)

**2th Row:**
Mr. Sakamoto (Japan), Mr. Kubo (Japan), Mr. Muhoro (Kenya), Mr. Omar (Malaysia), Ms. Ota (Japan), Ms. Kobayashi (Japan), Ms. Sivakorn (Thailand), Ms. Davila (Peru), Ms. Santamaria (Philippines), Mr. Yokoi (Japan), Mr. Tamani (Fiji), Mr. Adli (Indonesia)

**1st Row:**
Mr. Miyamoto (Staff), Prof. Tsutomi, Prof. Tachi, Prof. Watanabe, Dep. Director Aizawa, Mr. Somboon(Thailand), Director Kitada, Dr. Motiuk (Canada), Prof. Iitsuka, Prof. Kakihara, Prof. Satou, Prof. Nosaka, Mr. Chishima (Staff)