

# MEASURES AND MECHANISMS TO STRENGTHEN INTERNATIONAL COOPERATION AMONG PROSECUTION SERVICES

by

Yvon Dandurand  
Senior Associate  
International Centre for Criminal Law Reform  
and Criminal Justice Policy

Dr. Gherardo Colombo  
Former Prosecutor and Currently Judge in  
the Supreme Court of Cassation  
Rome, Italy

Professor Nikos Passas  
Northeastern University  
Boston, USA

---

**International Centre for Criminal Law Reform  
and Criminal Justice Policy**

1822 East Mall, Vancouver  
British Columbia, Canada V6T 1Z1  
Tel: 1 (604) 822-9875  
Fax: 1 (604) 822-9317  
Email: [icclr@law.ubc.ca](mailto:icclr@law.ubc.ca)



## Measures and Mechanisms to Strengthen International Cooperation Among Prosecution Services

Yvon Dandurand  
Senior Associate  
International Centre for Criminal Law Reform  
and Criminal Justice Policy

Dr. Gherardo Colombo  
Former Prosecutor and Currently Judge in  
the Supreme Court of Cassation  
Rome, Italy

Professor Nikos Passas  
Northeastern University  
Boston, USA

This paper was Produced for the  
Second World Summit of Attorneys general,  
Prosecutors General and Chief Prosecutors

November 2005

***SECOND WORLD SUMMIT OF ATTORNEYS GENERAL,  
PROSECUTORS GENERAL AND CHIEF PROSECUTORS***

***DOHA, QATAR  
NOVEMBER 14-16, 2005***

---

***Working Paper IV***

**Measures and Mechanisms to Strengthen International  
Cooperation among Prosecution Services<sup>1</sup>**

---

<sup>1</sup> This working paper was commissioned by the Organizing Committee and written by Professor Yvon Dandurand (University College of the Fraser Valley, Abbotsford, British Columbia - Canada), Dr. Gherardo Colombo (former prosecutor and currently judge in the Supreme Court of Cassation, Rome - Italy) and Professor Nikos Passas (Northeastern University, Boston - USA).

## I. Introduction

1. The international community now recognizes international cooperation among prosecution services as an urgent necessity. Yet, as most criminal justice officials frequently deplore, cooperation mechanisms are not being implemented as fast as they should, certainly not always fast enough to keep pace with changes in patterns of transnational crime, including terrorism. One of the main objectives of the Summit is to further strengthen international cooperation in criminal matters.
2. The main mechanisms supporting international cooperation between investigators or prosecutors are mutual legal assistance, extradition, transfer of proceedings in criminal matters, freezing and confiscation of the proceeds of crime, as well as a number of less formal measures. These mechanisms are based on bilateral or multilateral agreements or arrangements or, in some instances, on national law. All of them are evolving rapidly to keep pace with new technologies and their evolution over the last decade or so reflects the new determination of Member States to work more closely with each other to face the growing threats of organized crime, corruption and terrorism.
3. Noticeably, some of the most innovative strategies are coming out of cooperation efforts between States that have either a crime problem or a geographical border in common. Some of the most significant lessons learned in recent years come from the experience of countries working at the bilateral, sub-regional or regional level to address practical issues on a regular basis. Regional cooperation is evolving rapidly in all parts of the globe.
4. A consensus is emerging around some of the most promising means of enhancing international cooperation in the investigation and prosecution of serious crimes. Some of them are now included in the international cooperation framework established by the United Nations Conventions against Transnational Organized Crime, against Corruption, against the Financing of Terrorism, and several other multilateral instruments at the global and regional levels, which provide a strong basis for legal cooperation. Having national legislation in place to fully implement these instruments is therefore of paramount importance<sup>2</sup>, as is the adoption of the administrative measures necessary to support the various modalities of international cooperation.
5. While some of the international cooperation mechanisms and strategies in the criminal justice arsenal have been in existence for some time, others are more recent and relatively untested. In many instances, the effectiveness of existing and emerging cooperation strategies and measures has not yet been systematically evaluated. The sharing of practical experience and lessons learned among professionals is therefore more important than ever in order to perfect these strategies and identify where, when, and under what conditions they are most useful. States are expanding their treaty network and are exploring various methods to

---

<sup>2</sup> See the legislative guides that have been made available by the UNODC to facilitate that process: UNODC (2005), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. UNODC (2005), *Guide for the Legislative Incorporation and Implementation of the Universal Instruments against Terrorism*.

cooperate more effectively. During this workshop, practitioners are invited to examine some recent developments in how they cooperate with each other in the investigation and prosecution of serious crimes, to share their knowledge of best or promising practices, and to reflect on further measures they may take collaboratively. The goal is to increase and deepen international cooperation.

6. This discussion paper reviews some key issues, trends, and innovative practices with respect to both formal and informal international cooperation in criminal matters. It considers some of the practical issues that have recently emerged during the implementation of these measures and strategies as well as some of the solutions that are being advanced. Topics and questions are suggested for discussion that may lead practitioners to recommend ways to enhance cooperation in law enforcement and, in particular, cooperation among prosecution services.

7. For the purpose of this paper, cooperation among prosecution services is defined broadly, reflecting the fact that the role of prosecutors varies considerably among legal systems. In particular, prosecutors may play a more or less active role in the actual investigation of crime, depending on national law, and as a result their respective relationship with the police may be different.<sup>3</sup> The expression “law enforcement cooperation” is often used to designate international cooperation efforts in relation to both the investigation and the prosecution of serious crimes<sup>4</sup>.

## II. Extradition

8. Clearly, the existing regime of international cooperation in criminal matters is still in need of major improvements to avoid legislative loopholes and eliminate safe havens. Multilateral Conventions have been developed within the framework of various regional and other international organizations, such as the African Malagasy Common Organization, the Benelux Countries, the Council of Europe, the Commonwealth, the European Union, the Nordic States, the Organization of American States, the Arab League and the Southern African States. Extradition provisions are also included in a number of international conventions dealing with specific types of crime, including the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the UN Convention against Corruption, the UN Convention against Transnational Organized Crime and the universal conventions against terrorism. Bilateral treaties on extradition are too numerous to keep track of. In spite of all this, there are

---

<sup>3</sup> See: Take, J.P. (2005). *The Relationship between Public Prosecutors and the Police in the Member States of the Council of Europe*. Conference of Prosecutors General of Europe – 6<sup>th</sup> Session, Council of Europe, Budapest, May 29-31, 2005. Also: Council of Europe (2005). *Replies to the Questionnaire – Relationship between Public Prosecutors and the Police*, Strasbourg, May 13, 2005. (<http://www/coe.int/prosecutors/>)

<sup>4</sup> The Council of Europe, for example, used the words “law enforcement agencies” and proposed the following functional definition: “irrespective of national definition, those public institutions and agencies that carry out under their legal terms of reference, investigations and/or prosecutions of criminal offences. See: Council of Europe (2001). *Guiding Principles in the Fight against Organized Crime. Recommendation Rec (2001) 11 of the Committee of Ministers to Member States Concerning Guiding Principles on the Fight Against Organised Crime*. Strasbourg, 19 September 2001, p.24.

still numerous situations where existing legal instruments are insufficient or do not cover the offence or the State concerned.

9. There remain numerous obstacles to quick and predictable extradition.<sup>5</sup> The often-cumbersome processes of extradition need to be streamlined. For that purpose, model treaties have been made available to States wishing to enter into new bilateral agreements.<sup>6</sup>

10. Furthermore, the UN Conventions against Transnational Organized Crime and against Corruption address some of the extradition issues that have arisen and recommend means to simplify evidentiary requirements and keep the burden of proof to a minimum in extradition proceedings. These conventions set basic minimum standards for extradition for offences they cover and also encourage the adoption of a variety of mechanisms designed to streamline the extradition process.

11. States need to continue to perfect their treaty network and modernize their extradition treaties. Nevertheless, it is the domestic law of the requested States which ultimately governs extradition works. According to the UNODC Informal Expert Working Group on Effective Extradition Casework Practice, “the sheer size and scope of the resulting domestic variations in substantive and procedural extradition law create the most serious ongoing obstacles to just, quick and predictable extradition”.<sup>7</sup> States tend to have widely differing preconditions for granting extradition and have in place a number of procedural requirements and practices that impede expeditious collaboration.

12. In many instances, changes to national extradition legislation are required as a procedural or enabling framework in support of the implementation of the relevant international treaties. In cases where a State can extradite in the absence of a treaty, a national legislation is often useful as a supplementary, comprehensive and self-standing framework for surrendering fugitives to requesting States. The UNODC has prepared a model law on extradition to assist interested Member States in drafting such legislation.<sup>8</sup> Recent trends in extradition treaties have focused on relaxing the strict application of certain grounds for refusal of extradition requests.

13. The principle of “mutual recognition” is increasingly perceived as a means of improving judicial cooperation between countries with different systems and replacing cumbersome procedures with swift procedures that recognize the integrity of other legal systems. For example, mutual recognition of arrest warrants, whereby an arrest warrant issued by a

---

<sup>5</sup> A fairly complete list of the main obstacles to quick and predictable extradition is provided in: United Nations Office on Drugs and Crime (2004). *Report of the Informal Expert Working Group on Effective Extradition Casework Practice*, Vienna, p. 6.

<sup>6</sup> See: the United Nations Model Treaty on Extradition (General Assembly resolution 45/116, subsequently amended by resolution 52/88). See also the manual on the Model treaty in the UNODC website: [http://www.unodc.org/unodc/en/legal\\_advisory\\_tools.html](http://www.unodc.org/unodc/en/legal_advisory_tools.html).

<sup>7</sup> United Nations Office on Drugs and Crime (2004). *Report of the Informal Expert Working Group on Effective Extradition Casework Practice*, Vienna.

<sup>8</sup> United Nations Office on Drugs and Crime (2004). *Model Law on Extradition*. [www.unodc.org/pdf/model\\_law\\_extradition.pdf](http://www.unodc.org/pdf/model_law_extradition.pdf)

competent authority in one State is recognized as valid and enforced by another State (a practice also referred to as the “backing of warrants”) expedites the extradition process. Bilateral arrangements exist between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland, between Singapore and Malaysia, and between Australia and New Zealand. Another example is provided by the European Arrest Warrant (EAW) which, since the beginning of 2004, effectively replaces extradition procedures by a system of surrender between judicial authorities.<sup>9 10</sup> Under this scheme, a national court may issue an arrest warrant, if the person whose return is sought is accused of an offence for which the penalty is at least over a year of prison or if he or she has been sentenced to a prison term of at least four months. The EAW allows requests for the arrest or surrender of a person to be executed with the minimum of formality for the purpose of conducting criminal prosecutions, executing custodial sentences, or executing detention orders.<sup>11</sup>

14. The EAW process introduces the following new features as compared to the previous extradition procedures:

- ❑ *Expeditious proceedings*: The final decision on the execution of the EAW should be taken within a maximum period of 90 days after the arrest of the requested person. If that person consents to the surrender, the decision shall be taken within 10 days after consent has been given (art. 17).
- ❑ *Abolition of double criminality requirement in prescribed cases*: Double criminality need not be verified for a list of 32 offences, which, according to art. 2 para. 2 of the Framework Decision, should be punishable in the issuing Member State for a maximum period of at least 3 years of imprisonment and defined by the law of this Member State. These offences include, inter alia, participation in a criminal organization, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud including that affecting the financial interests of the European Communities, laundering of the proceeds of crime, computer-related crime, environmental crime, facilitation of unauthorized entry and residence, murder and grievous bodily injury, rape, racism and xenophobia, trafficking in stolen vehicles, counterfeiting currency etc. For offences that are not included in the above mentioned list or do not fall within the 3 years threshold, the double criminality principle still applies (art. 2 para. 4).

---

<sup>9</sup> See: Blekxtoon, R. (2004). *Handbook of the European Arrest Warrant*. Cambridge: Cambridge University Press. Also: Plachta, M. (2003). “European Arrest Warrant: Revolution in Extradition”, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 11, No.2, pp. 178 ff.

<sup>10</sup> The European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) European Union, OJ L 190, 18.07.02.

<sup>11</sup> See Turone, G. (2005). *Considerations on the Concrete Ways to Address some of the Current Obstacles to Transnational Criminal Justice*, Report to the Committee of Experts on Transnational Criminal Justice, Strasbourg, Council of Europe, European Committee on Crime Problems, January 10, 2005.

- ❑ *Judicialization of the surrender procedure:* The new surrender procedure is outside the realm of the executive branch of government and is placed in the hands of the judiciary. Both the issuing and executing authorities are considered to be the judicial authorities which are competent to issue or execute a EAW by virtue of the law of the issuing or executing Member State (art. 6). Consequently, since the procedure for executing the warrant is primarily judicial, the administrative stage inherent in extradition proceedings, i.e. the competence of the executive authority to render the final decision on the surrender of the person sought to the requesting State is abolished.
- ❑ *Surrender of nationals:* The European Union Member States can no longer refuse to surrender their own nationals. The Framework Decision does not include nationality as either a mandatory or optional ground for non-execution. Furthermore, art. 5 para. 3 provides for the option of making execution conditional on a guarantee that, upon conviction, the individual is returned to his/her State of nationality to serve the sentence there.
- ❑ *Abolition of the political offence exception:* The political offence exception is not enumerated as mandatory or optional ground for non-execution of a warrant.
- ❑ *Additional deviation from the rule of speciality:* Art. 27 para. 1 of the Framework Decision enables Member States to notify the General Secretariat of the Council that, in their relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to carrying out of a custodial sentence or detention order for an offence committed prior to surrender, other than that for which the person concerned was surrendered.

#### A. *Best Practices*

14. The *Report of the Informal Expert Working Group on Effective Extradition Casework Practice*<sup>12</sup> offers a number of recommendations. They include:

- Enabling, wherever appropriate, lawful extraditions without a treaty.
- Enabling simplified surrender procedures by backing or recognizing arrest warrants.
- Making available an inventory of existing extradition laws and treaties.
- Reviewing these laws and renegotiating the treaties as necessary to ensure maximum flexibility in dealing with extradition requests.
- Reducing or eliminating authentication and certification requirements.

---

<sup>12</sup> United Nations Office on Drugs and Crime (2004). *Report of the Informal Expert Working Group on Effective Extradition Casework Practice*, Vienna, pp. 8-15.



- Enabling temporary surrender of persons sought by a requesting State (e.g. temporarily extraditing someone serving a prison sentence in the requested State).
- Providing a simplified process for the surrender of persons sought who voluntarily consent to stand trial or punishment in the requesting State.
- Reforming and simplifying the dual criminality requirements in domestic laws and bilateral treaties. Modern extradition legislation and treaty practice adopts a simple “punishability test” of both the foreign offence and equivalent domestic offence, regardless of their name or characterization in domestic legislation.
- Restricting offences qualifying as political offence exceptions to the essential minimum. Modern multilateral treaties addressing organized crime, corruption, terrorism or drug trafficking explicitly render certain offences ineligible for the political offence exclusion with respect to extradition.
- Relaxing existing prohibitions concerning extradition of nationals. The reluctance to extradite one’s own nationals appears to be lessening in many States. The UN Convention against Transnational Organized Crime incorporates a provision that reflects this development. Article 16(11) refers to the possibility of temporary surrender of the fugitive on the condition that this person will be returned to the requested State Party for the purpose of serving the sentence imposed<sup>13</sup>.
- Accepting a broad “extradite or submit to prosecution” duty.
- Ensuring that the authority exists in law to review and re-determine grants of citizenship and privileges or immunities that block extradition, if they were secured through the falsification or concealment of information.
- Using the services of criminal justice liaison personnel, including liaison magistrates or liaison prosecutors.
- Simplifying juridical review and appeals processes relating to extradition orders without prejudice to the fundamental right to review or appeal by the person sought. Simple, fair and expeditious appeal process can be provided.<sup>14</sup>

15. Measures to enforce the rule of law are also directly relevant to enhancing mutual assistance and international cooperation. For instance, a State is more likely to cooperate with another in an extradition matter, if it has assurances that the accused will have the right to a fair trial and to due process<sup>15 16</sup>.

<sup>13</sup> See also art. 44(12) of the United Nations Convention against Corruption; art. 8(2) of the International Convention for the Suppression of Terrorist Bombings; and, art. 10(2) of the International Convention for the Suppression of the Financing of Terrorism.

<sup>14</sup> For an example of a proposal to simplify hearing and appeal procedures (in a common law tradition country) see: United Kingdom, Home Office (2001). *Extradition: A Review*. (Chapter VIII: Hearings and Appeals), London: Home Office, March 2001, pp. 37-38. See also: United Kingdom, *Extradition Act, 2003*.

<sup>15</sup> The General Assembly, in its resolution 59/195 of 20 December 2004, emphasized the need to enhance effective international cooperation in combating terrorism in conformity with international law, including relevant State obligations under international human rights and international humanitarian law. See Council of Europe (2005). *Human Rights and the Fight against Terrorism – The Council of Europe*

16. Finally, there is now a greater understanding of how best practices for extradition casework can be promoted. Member States have an interest in exchanging that information with each other and making it broadly available to their own criminal justice personnel. For instance, the UNODC Informal Expert Working Group on Effective Extradition Casework Practice developed a list of suggestions.<sup>17</sup> Among them are suggestions relating to the training of law enforcement and other criminal justice personnel and the development of tools to facilitate the use of available national laws and international agreements.<sup>18</sup>

### III. Mutual Legal Assistance

15. Mutual legal assistance, as is the case with extradition, is generally based on bilateral and multilateral treaties, as well as on national legislation which either gives full effect to the relevant treaties or enables mutual assistance in absence of a treaty. Multilateral instruments such as the UN Convention against Transnational Organized Crime or the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances include detailed provisions concerning mutual assistance. Instruments on mutual legal assistance in criminal proceedings have also been adopted within the framework of the Commonwealth, the Council of Europe, the European Union, the Organization of American states, the Economic Community of West African States, and the Southern African Countries.

16. Further action is required to minimize obstacles to the provision of effective assistance. Many jurisdictions are taking legislative, judicial and administrative initiatives to enhance their ability to give, receive, and effectively use mutual legal assistance. A key component of such efforts consists of establishing, at the national level, an effective and comprehensive legal basis for mutual legal assistance and, at the international level, the necessary treaties to create binding obligations to cooperate with respect to a range of modalities. These treaties and laws should be reviewed periodically and amended if necessary to keep pace with rapidly evolving practices and challenges in international cooperation. They should provide maximum

---

*Guidelines*, Strasbourg, March 2005. United Nations General Assembly resolution 57/219 on the *Protection of Human Rights and Fundamental Freedom while Countering Terrorism*, 27 February 2003. Refer also to the work of the Sub-Commission on the Promotion and Protection of Human Rights, Human Rights Commission, to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism.

<sup>16</sup> See also Working Paper # 3 on *The Role of Prosecutors in Upholding and Strengthening the Rule of Law*.

<sup>17</sup> United Nations Office on Drugs and Crime (2004). “Chapter 3 – Best Practice Recommendations for Extradition Casework”, *Report of the Informal Expert Working Group on Effective Extradition Casework Practice*, Vienna, pp. 16-23. The report of the Informal Expert Working Group also includes a “Checklist for Outgoing Extradition Casework Planning” and a “Checklist for the Content of Extradition Requests, Required Supporting Documents and Information”.

<sup>18</sup> See, for example, the Codes of Practice developed by the Home Office in the United Kingdom to clarify the operation of police powers in extradition cases. United Kingdom, Home Office (2003). *Extradition Act – Codes of Practice*, London: Home Office, December 2003.

flexibility to enable broad and expeditious assistance. To facilitate these efforts, the UN has prepared a Model Treaty on Mutual Legal Assistance in Criminal Matters.<sup>19</sup>

17. The current trend in international cooperation mechanisms is to favour arrangements which: (1) allow direct transmission of requests for mutual assistance and expedite the sending and service of procedural documents; (2) require compliance with formalities and procedures indicated and deadlines set by the requesting Member State; (3) facilitate the cross-border use of technical equipment (for observation purposes) and the interception of communications; (4) authorize controlled deliveries and allow covert investigations to take place across borders; (5) encourage the establishment of joint investigation teams; (6) permit, under certain circumstances, the hearing of witnesses by video or telephone conferences; and, (8) permit the temporary transfer of persons held in custody for purposes of investigation.<sup>20</sup>

18. There is an increasing awareness of the need to limit the scope of any conditions or evidentiary requirements that may hinder the provision of effective legal assistance within the framework of human rights and other relevant international standards. The UN Conventions against Transnational Organized Crime and against Corruption include provisions on the freezing of assets, the use of video-conferences, and the “spontaneous transmission of information” without a request, which are finding their way into other bilateral and multilateral agreements.

19. The concept of “dual criminality” has been a procedural backbone of many, if not most, existing treaties on mutual legal assistance, but can also preclude more cooperative relationships in the investigation and prosecution of criminal matters. The use of the principle varies from one State to another, with some requiring dual criminality for all requests for assistance, some for compulsory measures only, some having discretion to refuse assistance on that basis, and some with neither a requirement or discretion to refuse. One of the innovations of the UN Convention against Corruption is to allow legal assistance in the absence of dual criminality, when such assistance does not involve coercive measures<sup>21</sup>. It also, requires that, whenever dual criminality is necessary for international cooperation, States parties must deem this requirement fulfilled, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties. The Convention makes it clear that the underlying conduct of the criminal offence neither needs to be defined in the same terms in both countries nor does it have to be placed within the same category of offence<sup>22</sup>.

20. Mutual assistance is often hindered by the fact that procedural laws of cooperating States can vary considerably. For instance, the requesting State may require special procedures that are not recognized under the law of the requested State, or the latter may provide evidence in a form or manner which is unacceptable under the procedural law of the requesting State.

---

<sup>19</sup> *General Assembly resolution 45/117, annex, and 53/112, annex 1.*

<sup>20</sup> See Vermeulen, G. (2000). “New Trends in International Co-operation in Criminal Matters in the European Union”, in C. M. Breur (Ed.), *New Trends in Criminal Investigation and Evidence. World Conference on New Trends in Criminal Investigation and Evidence*. Antwerpen: Intersentia.

<sup>21</sup> See Art. 46, *para. 8(b)*; see also Legislative Guide for the Implementation of the UN Convention against Corruption.

<sup>22</sup> Article 43, paragraph 2.

Member States should strive to ensure that their current framework for providing assistance does not create unnecessary impediments to cooperation.

21. At the operational level, designating a single<sup>23</sup> central authority for all incoming and outgoing legal assistance and extradition requests is crucial to international cooperation in criminal matters. In this way, a State can coordinate its own requests for assistance and stand ready to respond expeditiously to requests from other States. Increasingly, mutual legal assistance treaties require that States Parties designate a central authority (generally the ministry of justice) to which requests can be sent, thus providing an alternative to diplomatic channels. The UN Conventions against Transnational Organized Crime and against Corruption make it a mandatory requirement for States Parties. Nevertheless, the role of the central authorities need not necessarily be an exclusive one. Direct exchanges of information and cooperation, to the extent permitted by domestic law, should also be encouraged.

22. It can also be argued that there are some “corruption-specific” obstacles to international legal assistance.<sup>24</sup> For one thing, the offenders involved in a corruption case may well be part of or closely associated with the government officials whose cooperation is being sought. They may try to use their power and influence to hide, suppress or destroy relevant information or evidence or otherwise derail international cooperation attempts. They may have contacts or influence in the national financial institutions and be able to count on their complicity to cover their own wrongdoings. Finally, there may also be instances where “national interests” may be invoked against cooperation (e.g. to protect a national industry, employment, etc.). All this points at the need for strong relationships between law enforcement authorities based on a shared commitment to cooperate and to take all the measures necessary to stamp out corruption wherever it occurs.

23. A review of a major case, one could say a “mega-case”, involving a major corruption investigation carried out by the prosecutor’s office in Milan, Italy, illustrates some of these difficulties. The alleged offences involved more than five thousand suspects, including major political figures, magistrates, police officials and public and private entrepreneurs and businesses. During the investigations, prosecutors frequently had to rely on foreign assistance and were disheartened to realize that in many instances the cooperation was not forthcoming or not provided in a timely manner. Between 1992 and 1999, a total of 700 requests for information were sent to 29 countries both within and outside the European Union. Only 19 of the letters rogatory were rejected by the requested State, but in many of the other instances the delays experienced in obtaining a response nearly brought various aspects of the investigation to a halt. Some of the requests were succeeding previous ones, following up on new information that had been revealed through a response to previous requests for assistance.

---

<sup>23</sup> The UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (Vienna, December 2001) noted the wide and growing range of international treaties requiring States to establish a central authority for the purpose of mutual legal assistance in relation to the various offences covered by these instruments. The Group urged States to ensure that their central authorities under these conventions are a single entity in order to avoid duplications and inconsistencies.

<sup>24</sup> ADB-OECD Anti-Corruption Initiative for Asia-Pacific – Combating Corruption in the New Millennium (2003). *Effective Prosecution of Corruption. Ghaziabad, India, 11-13 February 2003, Asian Development Bank and Organisation for Economic Co-operation and Development.*

Others uncovered more suspects and more suspicious activities. The requests often involved information on financial activities taking place in offshore centres offering the protection of bank secrecy to their clients. The complex network of financial transactions involving shell companies, foreign financial institutions and multiple layers of deceit and secrecy created dead-ends in the investigation.

24. The following table summarizes the responses that 569 of these requests for assistance - sent over a period of several years - received in relation to that major corruption case in Italy. Looking at the reasons for the various delays and refusals, one found that political reasons, the fear of affecting their own economic interests, and the lack of commitment to fighting corruption were some of the main reasons for this relative failing of the international cooperation process. In some instances, officials involved in the handling of assistance requests, directly or indirectly, may have themselves been involved in corruption.

<b>Total Number of Requests for Assistance</b>	<b>569</b>	
Pending	235	41.30%
Partially answered	19	3.34%
Answered	315	55.36%
Refused or Declined	19	3.34%

25. This particular case, although not necessarily typical of the situations that arise daily in the world of international cooperation in criminal matters, may nevertheless suggest that special attention should be given to the many practical cooperation problems that are encountered in the investigation of major corruption cases. It could be worthwhile for States to create and share an inventory of case studies revealing some of the difficulties specific to this special type of investigation.

26. Corruption within the justice system is always a concern, but its implications for effective international cooperation are now more fully acknowledged. Corruption may not only affect the credibility and effectiveness of justice systems, in a general sense, but it can also compromise international cooperation in criminal matters, defeat coordination efforts, condemn international initiatives to failure, and place witnesses, victims and justice officials at risk. More proactive investigations, the creation of special anti-corruption units, and other specific measures<sup>25</sup> can offer some means of protecting the integrity of the justice process against corruption and strengthen the capacity and the willingness of national agencies to cooperate effectively, including joint operations and exchange of intelligence.

27. Cooperation in the prosecution of offences committed by legal persons is yet another area in which obstacles to international cooperation are encountered. There is still a great amount of variation in how national laws define and regulate the legal responsibilities of legal entities.

<sup>25</sup> Dempsey-Brench, J. (2003). Investigation and Prosecution of Police Corruption: Operation Othona”, in ADB-OECD Anti-Corruption Initiative for Asia-Pacific – Combating Corruption in the New Millennium (2003). *Effective Prosecution of Corruption. Ghaziabad, India, 11-13 February 2003, Asian Development Bank and Organisation for Economic Co-operation and Development. pp. 52-60.*

Corruption and various other forms of crime can be committed by a company or by criminal organizations acting under the cover of a legal entity. International instruments such as the UN Convention against Transnational Organized Crime, the UN Convention against Corruption, or the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions address the need for specific provisions in domestic law for corporate liability in relation to the offences they cover. Anti-Money Laundering regimes are also largely ineffectual unless accompanied by an ability to subject legal entities to a criminal, civil or administrative liability. It is therefore essential to establish the liability of legal persons for offences committed on their behalf. Domestic corporate laws should adequately reflect the need to regulate corporations to ensure that companies or agencies are not misused to facilitate corruption.<sup>26</sup> Investigators and prosecutors must also be able to exchange information on legal entities, their shareholders and officers, their business activities, as well as their financial transactions.

### ***A. Best Practices***

28. There are a number of practical measures that Member States can adopt. Some of the means suggested by the UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice<sup>27</sup> included:

- Minimizing the grounds upon which assistance may be refused (e.g. finding ways to minimize the consequences of the principle of *ne bis in idem* as a ground of refusal);
- Reducing limitations on the use of evidence in response to a request for mutual assistance and streamlining the grounds upon which and the process whereby limitations are imposed.
- Making efforts to ensure that requests are executed in compliance with procedures and formalities specified by the requesting State to ensure that the request achieves its purpose.<sup>28</sup>
- Improving the protection of confidential data and information.

---

<sup>26</sup> International Association of Prosecutors (1999). *Recommendations on Combating Corruption in Public Administration – IAP Best Practice Series No. 3*. The Hague: IAP

<sup>27</sup> United Nations Office for Drug Control and Crime Prevention (2001). *Report of the UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*, Vienna, December 3-7, 2001. See also the *EU Good Practice in Mutual Legal Assistance in Criminal Matters (Joint Action of 29 June 1998)*. See also the practical recommendations offered by judges, prosecutors and law enforcement personnel, in the context of the Visegrad Group, during the Regional Meeting to Develop Common Operational Strategies against Drug Trafficking and Money Laundering among Danube States along Southern Balkan Routes, UNDCP and ISM, June 6-9, 2001.

<sup>28</sup> The new European Convention on Mutual Legal Assistance, for example, contains one such innovation. It stipulates that the requested State must comply with the formalities and procedures indicated by the requesting State. The requested member State may refuse to do so only if compliance would be contrary to the fundamental principles of its own law.

- Ensuring the confidentiality of requests for assistance received when possible and, when not possible, advising the requesting State that its request may not be kept confidential.
- Making efforts to ensure that requests are executed within the deadlines specified by the requesting State.
- Coordinating multi-jurisdictional cases among the jurisdiction involved.
- Ensuring that their legal framework does not provide fortuitous opportunities for third parties to unduly delay cooperation and to completely block the execution of a request for assistance on technical grounds.<sup>29</sup>

### ***B- Timeliness of Responses to Requests for Assistance***

29. Prosecution services, more than anyone else, appreciate the vital importance of receiving a timely response to their request for assistance. When delays are inevitable, prosecutors need to be informed about the reasons. All recent treaties emphasize the need for promptness in responding to requests for assistance. However, it is unlikely that the most effective means of reducing delays are normative ones. One is led to look instead for practical and procedural means of addressing the problem. Some of the solutions reside in building the capacity within each State to respond and in dealing with some frequently occurring problems: improved communication channels; enhanced translation capacities; language training; use of standardized forms and guidebooks<sup>30</sup>; development and use of checklists of evidentiary requirements to be satisfied for a request to be accepted; secondment and exchanges between personnel in central authorities or between executing and requesting agencies; training material and courses; bi-lateral and regional seminars and information exchange sessions; and, the use of liaison officers and liaison magistrates to facilitate the preparation of the requests for assistance and any follow-up communications.

30. The use of standardized forms and procedures to request legal assistance and extradition is recommended. The UNODC has developed computer software for preparing such requests.

31. The UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (Vienna, December 2001) suggested that cooperation can also be expedited through the use of alternatives to formal mutual assistance requests, such as informal police channels and communication mechanisms, or when evidence is voluntarily given or publicly available,

---

<sup>29</sup> The UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (Vienna, December 2001) also noted that “(...) a modern trend in taking witness evidence in the requested State is to defer objections based on the law of the requesting State until after the testimony is transmitted to the requesting State so that it may decide on the validity of objection. This avoids the possibility of erroneous ruling in the requested State and allows the requesting State to competently decide matters pertaining to its own law.” (p. 13)

<sup>30</sup> The International Association of Prosecutors, for example, as developed a booklet for prosecutors on what international assistance may be available and how to seek it in order to enhance the investigation and prosecution of crime. International Association of Prosecutors (2004). *International Co-operation – Basic Guide to Prosecutors in Obtaining Mutual Legal Assistance in Criminal Matters*. The Hague: IAP

or the use of joint investigation teams with a capacity to directly transmit and satisfy informal requests for assistance.<sup>31</sup>

32. The UNDCP Informal Expert Working Group<sup>32</sup> also identified a number of best practices. They include:

- Ensuring awareness of national legal requirements amongst officials involved in the process (e.g., through the dissemination of information, guides, or procedural manuals to officials regarding mutual legal assistance law, practice, and procedures and on how to make requests to other States).
- Ensuring awareness of national legal requirements amongst foreign officials involved in international cooperation by developing guidelines, simple forms, checklists<sup>33</sup> and procedural guides on requirements.
- Increasing the training of personnel involved in mutual legal assistance, by the provision of technical assistance when required, seminars by central authorities, and exchanges of personnel between authorities.
- Encouraging direct personal contacts between officials.
- Encouraging the use of liaison magistrates, prosecutors and police officers.
- Interpreting the prerequisites to cooperation liberally in favour of cooperation and avoid rigid interpretations.
- Consulting before refusing, postponing or imposing conditions on a response to a request for assistance and determining whether the problem that has been identified can be overcome.
- Making use of modern technology to expedite transmission of requests.
- Optimizing the language capability within the central authorities.

---

<sup>31</sup> Similarly, the Council of Europe recommends the establishment of channels and methods of direct and swift international cooperation and information and intelligence exchange, the identification of contact points within the national structure to contact foreign operational agencies, and the appointment by States, subject to their legal systems, of judicial contact points, other than the central authority, are also recommended for a quicker identification of the requested judicial authority. Council of Europe (2001). *Guiding Principles on the Fight against Organised Crime, Recommendation Rec(2001) 11 of the Committee of Ministers to Member States Concerning Guiding Principles in the Fight against organised Crime*, 19 September 2001, par. 25.

<sup>32</sup> United Nations Office for Drug Control and Crime Prevention (2001). *Report of the UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*, Vienna, December 3-7, 2001.

<sup>33</sup> See the *Model Checklists and Forms for Good Practice in Requesting Mutual Legal Assistance*, developed by the UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (Vienna, UNDCP, December 3-7, 2001)



#### IV. Transfer of Proceedings in Criminal Matters

33. The possibility of transferring proceedings in criminal matters from one State to another is another interesting option upon which to build stronger international cooperation.<sup>34</sup> Such a transfer can be used to increase the likelihood of the success of a prosecution, when for example another State appears to be in a better position to conduct the proceedings. It can also be used to increase the efficiency and effectiveness of the prosecution in a State that is initiating proceedings in lieu of extradition. Finally, it can be a useful method of concentrating the prosecution in one jurisdiction and increasing its efficiency and the likelihood of its success in cases involving several jurisdictions.<sup>35</sup>

34. The UN Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Article 8) against Transnational Organized Crime (Article 21) and against Corruption (Article 47) contain provisions enabling States Parties to transfer proceedings where this is in the interest of the proper administration of justice. The UN has prepared a Model Treaty on the Transfer of Proceedings in Criminal Matters.<sup>36</sup>

#### V. Mutual Recognition of Decisions and Judgments in Criminal Matters

35. As mentioned previously, creating the possibility of recognizing the validity of decisions taken by a foreign authority or court and enforcing them as such can lead to more expeditious cooperation with respect to extradition. Member States may also explore other processes for the recognition of foreign court judgments or orders in order to facilitate criminal proceedings across borders. In some situations, such mutual recognition measures can be seen as precursors to the creation of sub-regional “judicial spaces” within which extended collaboration is taken for granted.

36. The Tampere European Summit in October 1999 endorsed the principle of mutual recognition and called for the preparation of a programme<sup>37</sup> to gradually make mutual recognition a working reality.<sup>38</sup> In addition to the measures they have already adopted in that

---

<sup>34</sup> See Gardocki, L (1992). “Transfer of proceedings and transfer of prisoners as new forms of international co-operation”, in Eser, A. and O. Lagodny (Eds.), *Principles and Procedures for a New Transnational Criminal Law*. Freiburg, Eigenverlag – Max Plank Institute, pp. 317 ff.

<sup>35</sup> The *European Convention on the Transfer of Proceedings in Criminal Matters* (Council of Europe) came into force in 1978. It requires double criminality in order to effect a transfer and it is based on the notion that, when a person is suspected of having committed an offence under the law of one State Party to the Convention, that State may require another State Party to take action on its behalf in accordance with the Convention. In practice, this can also lead the second State Party to initiate a prosecution in that case under its own law.

<sup>36</sup> G.A. resolution 45/118 of 14 December 1990.

<sup>37</sup> See: European Union, *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, OJ C 12, 15.1.2001.

<sup>38</sup> There are obviously several questions which must be addressed for such a scheme to be successfully implemented, including questions concerning the condition of double criminality and whether it should be maintained, the application of the principles of *ne bis in idem* to ensure that a final conviction handed down by one criminal court in one Member State is not challenged in another Member State, and the issue of whether the new system should allow refusals by a member State.

regard, European Union Member States are actively considering the potential for greater reciprocal recognition of decisions and judgements.

37. States can simplify their procedures for recognizing court orders relating to freezing, forfeiture and seizure of criminal assets. In the European Union, a Framework decision in 2003<sup>39</sup> established rules enabling a Member State to recognize and execute in its territory a freezing order issued by a judicial authority of another Member State in the context of criminal proceedings.

38. Another suggestion is to mutually recognize “evidence warrants”. A proposal is under consideration within the European Union to enable the mutual recognition of evidence warrants. The draft framework decision would introduce a European Evidence Warrant (EEW) by applying the principle of mutual recognition of court orders and judgements to the existing system of mutual legal assistance. The warrant is an order which would be issued by a judicial authority in one Member State and which would be directly recognized and enforced by a judicial authority in the executing State. This would likely bring greater certainty of execution of requests for evidence, reduce delays in the transfer of evidence, and support a more expeditious investigation and prosecution of serious crimes.

39. As in other instances of mutual recognition of judgments and court orders, the success of the proposed scheme will depend in part on whether adequate procedural safeguards can be provided in order to protect the legal and fundamental human rights of the persons involved. The EEW will not cover all mutual recognition issues at the pre-trial stages; other instruments will be required to cover orders relating to investigation measures such as questioning suspects, bank account surveillance, or telephone-tapping orders.<sup>40</sup>

40. Finally, as currently understood within the European Union, the effect of the mutual recognition principle is that, where there is a final judgment in one Member State, it must have a series of consequences in the others. In the context of the European Union’s programme of action to implement the principle of mutual recognition<sup>41</sup>, the development of a scheme of mutual recognition of final judgements has raised a number of practical issues, including: issues around the free circulation of information on convictions between Member States; the application of the *ne bis in idem* principle; the question of how prior convictions in another Member States are to be taken into account in criminal proceedings; the enforcement of criminal penalties in a State other than that in which it was pronounced; and, the mutual

---

<sup>39</sup> Framework Decision 2003/577/JHA of 22 of July 2003 on the Execution in the Union of Orders Freezing Property or Evidence. OJ L 196, 2.08.2003.

<sup>40</sup> European Union, Commission of the European Communities (2005). *Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust between Member States. Communication from the Commission to the Council and European Parliament*. Brussels, 19.5.2005, COM(2005) 195 final.

<sup>41</sup> See: European Union, *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, OJ C 12, 15.1.2001.

recognition of disqualifications (e.g. from working with children, driving, tendering for public contracts, etc.).<sup>42</sup>

## **VI. Cooperation in the Investigation of Bribery/Corruption, Economic and Financial Crime and Money- Laundering**

41. Given that organized criminal groups and terrorist organizations make use of illegal financial transactions to both transfer and fraudulently acquire funds, higher levels of international cooperation between States are required to prevent and punish financial crimes without disrupting legitimate commerce. Advances in technology and new opportunities for criminal activities present constant challenges for prosecutors and stretch the capacity of existing international cooperation mechanisms to their limit.

42. Both the UN Convention against Transnational Organized Crime (when the crime is perpetrated by organized criminal groups) and the UN Convention against Corruption (when the crime results from corrupt practices) contain provisions pertaining to financial and economic crimes and anti-money laundering measures. However, at present, no international instrument deals exclusively with the problem of economic and financial crime.

43. International cooperation has focused in part on controlling money laundering. The international regime against money laundering is the result of a framework and international standards adopted in the context of various regional and international organizations. Recent United Nations conventions against organized crime and against corruption also include provisions against money laundering.

44. Because adherence to a number of anti-money laundering provisions is not mandatory, there is renewed international pressure to develop a new global instrument on money laundering<sup>43</sup>. There is also growing international interest in exploring the viability of building a tighter international cooperation framework to combat financial and economic crimes in general. This is an area where Member States can explore ways to improve cooperation between governments and the private sectors to confront the problem.

45. International cooperation in confiscation continues to pose particular difficulties. The UN Convention against Transnational Organized Crime and, most importantly, the UN Convention against Corruption offer standards along which national laws and practices can be aligned. A ground-breaking innovation of the Convention against Corruption is the entire chapter devoted

<sup>42</sup> European Union, Commission of the European Communities (2005). *Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust between Member States. Communication from the Commission to the Council and European Parliament*. Brussels, 19.5.2005, COM(2005) 195 final, pp. 4-6. On the question of the implications of the principle of *ne bis in idem*, see also Laborde, J.-P. (2005). *État de droit et crime organisé*. Paris: Dalloz, pp. 43-45.

<sup>43</sup> The High-level Panel on Threats, Challenges and Change identified organized crime as a critical threat to the global community and recommended, among other things, that a comprehensive international convention on money-laundering be negotiated (A/59/565 and corr. 1, para. 174). See also the report on the 11<sup>th</sup> U.N. Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005. A/CONF.203/18, paras. 187-188.

to the return of assets, which addresses the cooperation between jurisdictions where assets are located and victims, including States and other parties.<sup>44</sup> The objective is to develop national legislative frameworks and practices that provide flexibility in providing international cooperation while protecting the legitimate interests of third parties. Efforts should also be made to enlist the cooperation of the banking and financial sectors and to ensure that relevant law enforcement authorities are familiar with the cooperation currently available from other countries and with the means to seek and obtain that cooperation.

46. The gathering and exchange of information by Member States to detect financial networks linked to organized crime groups and terrorist actors, including exchange of information between law enforcement and regulatory bodies, are necessary to a strategic approach to combating organized crime. Establishing financial intelligence units (FIUs) is essential for financial investigations and international cooperation<sup>45</sup>. It is also important to identify innovative and technologically advanced methods of direct cooperation between FIUs and between FIUs and prosecution services across national borders.

47. The successful investigation and prosecution of financial and economic crime and money laundering offences require the quick identification and communication of information from banks and other financial institutions. In many instances, changes to bilateral treaties or national legal frameworks are required to allow for the lawful and expeditious exchange of that information across borders. Treaties and international arrangements include provisions not only for prompt responses to requests for information on banking transactions of natural or legal persons, but also for the monitoring of financial transactions at the request of another State and for the spontaneous transmission of information on instrumentalities or proceeds of crime to another State. Spontaneous transmission of information, even in the absence of a request, should be encouraged when they may assist the receiving State in initiating or carrying out investigations or proceedings that might lead eventually to a formal request for cooperation. Article 56 of the UN Convention against Corruption requires States parties to endeavour to enable themselves to forward information on proceeds of corruption offences to another State Party without prior request, when such disclosure might assist the receiving State in investigations, prosecutions or judicial proceedings or might lead to a request by that State under this chapter of this Convention<sup>46</sup>.

48. The existence of offshore centres presents practical problems from the point of view of cooperation among prosecution services. Difficulties are frequently experienced in dealing with the differences in company laws and other regulatory norms. There are also issues with cyber-payments, “virtual banks” operating in under-regulated offshore jurisdictions, and shell companies operating outside of the territory of the offshore centre. Finally, control agencies

---

<sup>44</sup> See also European Union Framework Decision 2003/577/JHA of 22 of July 2003 on the Execution in the Union of Orders Freezing Property or Evidence. OJ L 196, 2.08.2003.

<sup>45</sup> See relevant provisions in the United Nations Conventions against Transnational Organized Crime and against Corruption

<sup>46</sup> See also Articles 16, 17, and 18 of *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*. Warsaw, 16.v.2005. See also Article 4 of the *Agreement on Mutual Assistance between the European Union and the United States of America*, E.U. OJ L 181/34, 19.7.2003.

have been trying to improve measures to curb money laundering in countries where participation in the “formal” financial system is low. Understanding these informal financial networks and how criminal actors can abuse them is a priority<sup>47</sup>.

## VII. Cooperation in the Confiscation of Crime-related Assets

49. Confiscation within a jurisdiction and internationally is made difficult by the complexities in the banking and financial sector and by technological advances.

50. The UN Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, against Transnational Organized Crime, against Corruption, and for the Suppression of the Financing of Terrorism contain provisions on the tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime. Other international efforts against money laundering and terrorist finance are based on the Forty + Nine Recommendations of the Financial Action Task Force on Money Laundering and the Basel Committee on Banking Regulations and Supervisory Practices.

51. Effective action against corruption must include measures to deprive perpetrators of the proceeds of corruption and targeting such proceeds by rigorous international cooperation to enable the freezing, seizing and recovery of assets diverted through corruption. The UN Convention against Corruption contains some innovative and far-reaching provisions on asset recovery, including provisions to facilitate the return of stolen government assets to their countries of origin.

52. The European Union also took decisive steps to improve cooperation for the confiscation of proceeds of crime. Framework decisions in 2001<sup>48</sup> and in 2003<sup>49</sup> eliminated the possibility of Member States making certain reservations and established rules enabling a Member State to recognize and execute in its territory a freezing order issued by a judicial authority of another Member State in the context of criminal proceedings. In May 2005, a comprehensive regional framework for international cooperation in such matters was also adopted in the Council of Europe Convention on Laundering, Search and Confiscation of the Proceeds of Crime and on the Financing of Terrorism.<sup>50</sup>

53. These international instruments are to ensure that each Party adopts such legislative and other measures as may be necessary to trace, identify, freeze, seize, confiscate criminal assets, manage these assets, and extend the widest possible cooperation to other States Parties in

---

<sup>47</sup> See Passas N. 2003. *Informal Value Transfer Systems, Money Laundering and Terrorism*, Report to the National Institute of Justice (NIJ) and Financial Crimes Enforcement Network (FINCEN), Washington D.C.: <http://www.ncjrs.org/pdffiles1/nij/grants/208301.pdf>

<sup>48</sup> European Union. Framework Decision 2001/500/JHA on Money Laundering, the Identification, Tracing, Freezing and Confiscation of Instrumentalities and Proceeds of Crime, OJ L 182, 5 July 2001.1

<sup>49</sup> Framework Decision 2003/577/JHA of 22 of July 2003 on the Execution in the Union of Orders Freezing Property or Evidence, OJ L 96, 2 August 2003.

<sup>50</sup> Council of Europe, *Council of Europe Convention on Laundering, Search and Confiscation of the Proceeds of Crime and on the Financing of Terrorism*. Warsaw, 16.5.2005.

relation to tracing, freezing, seizing or confiscating proceeds of crime. A similar ability must also exist among cooperating states with respect to assets of a licit or illicit origin, used or to be used for the financing of terrorism.

54. The implementation of effective measures against terrorism financing remains a priority for the international community. The International Convention for the Suppression of the Financing of Terrorism<sup>51</sup> requires States Parties to establish the offence of financing of terrorism and to enact certain requirements concerning the role of financial institutions in the detection and reporting of evidence of financing of terrorist acts. In addition, States Parties are required to engage in wide-ranging cooperation with other States Parties and to provide them with legal assistance in the matters covered by the Convention.

55. The G-8 Lyon Group has put forward a set of best practice principles on tracing, freezing and confiscation of crime related assets, including terrorism.<sup>52</sup> These principles emphasize the need for multi-disciplinary cooperation between legal, law-enforcement, and financial and accountancy experts within and across jurisdictions. They underline the necessary specialization of competent authorities to deal with complex cooperation issues.

56. The OSCE Expert Workshop on Enhancing Co-operation in Criminal Matters Relating to Terrorism suggested the adoption of a non-conviction based civil forfeiture regime as well as direct methods of execution of mutual legal assistance requests in restraining terrorist assets.<sup>53</sup>

#### ***A. Promising Practices***

57. A number of emerging practices in this area are worth considering. They include:

- The use of investigative strategies that target the assets of organized crime through inter-connected financial investigations.
- Development of arrangements and capacity to engage in active and continuous exchanges of relevant financial intelligence information and analyses.
- Enabling confiscation or forfeiture of assets proceedings that are independent from other criminal proceedings.
- Establishing a reversed onus of proof (or methods to mitigate the onus of proof) regarding the illicit origin of assets.<sup>54</sup>

---

<sup>51</sup> *International Convention for the Suppression of the Financing of Terrorism* (1999), G.A. res. 54/109. See also: International Monetary Fund (2003). *Suppressing the Financing of Terrorism – A Handbook for Legislative Drafting*. Washington (D.C.): IMF, Legal Department. The handbook contains some examples of model legislation.

<sup>52</sup> G8 – *Best Practice Principles on Tracing, Freezing and Confiscation of Assets*  
[http://www.usdoj.gov/ag/events/g82004/G8\\_Best\\_Practices\\_on\\_Tracing.pdf](http://www.usdoj.gov/ag/events/g82004/G8_Best_Practices_on_Tracing.pdf)

<sup>53</sup> OSCO (2005). *Overview of the OSCO Expert Workshop on Enhancing Legal Co-operation in Criminal Matters relating to Terrorism*, Vienna, April 2005.

<sup>54</sup> See also Council of Europe (2004). “Reversing the Burden of Proof in Confiscating Proceeds of Crime”, in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 43-76. Note that the study concluded that “(...) merely to pass laws that change

- Paying attention to tax and fiscal offences linked with organized crime
- Entering into bilateral or other agreements for assets sharing among countries involved in tracing, freezing and confiscation of assets originating from organized crime activities.

58. International cooperation can be substantially facilitated by the development of equitable arrangements for the sharing of forfeited assets and confiscated proceeds of crime. All recent UN conventions contain provisions in that regard. Earlier this year, an intergovernmental expert group met in Vienna to prepare a draft model bilateral agreement on disposal of confiscated proceeds of crime covered by the above-mentioned conventions<sup>55</sup>.

### VIII. Cooperation in the Protection of Witnesses and Victims

64. As many criminal and terrorist groups operate across borders, the threat they represent to witnesses and collaborators is not confined to national borders. Physical and psychological intimidation of witnesses and their relatives can take place in a variety of contexts. Furthermore, witnesses need at times to move from to another country during lengthy criminal proceedings. Victims of human trafficking, for example, may need to return to their country of origin while waiting for a hearing or a trial during which they are to provide evidence. Finally, there are cases where a State, because of its size, means or other circumstances, may not be able on its own to provide the required protection and safety to the witnesses.

65. For all these reasons, cooperation in the protection of witnesses and their relatives, including repatriated victims/witnesses of trafficking and their relatives, and collaborators of justice becomes a necessary component of cooperation between prosecution services. Furthermore, international cooperation may also be required at times in order to protect interpreters, the prosecutors themselves and other judicial and correctional personnel.

66. Effective protection of witnesses, victims, and collaborators of justice includes legislative and practical measures to ensure that witnesses testify freely and without intimidation: the criminalization of acts of intimidation, the use of alternative methods of providing evidence, physical protection, relocation programmes, permitting limitations on the disclosure of information concerning their identity or whereabouts, and in exceptional circumstances, protecting the anonymity of the person giving evidence.

67. The UN Conventions against Transnational Organized Crime and against Corruption require States Parties to take appropriate measures within their means to effectively protect witnesses in criminal proceedings who give testimony concerning offences covered by the

---

the burden of proof – whether post-conviction or as part of a separate civil process – will not *ipso facto* lead to a substantial increase in recoveries from offenders or third parties. The extra recovery can happen only if unspent assets can be found, and can be attributed to the possession or control of someone against whom an order can be made” (p. 46). Therefore, it is largely the amount of skills resources devoted to the financial investigations that will determine the success of the various initiatives.

<sup>55</sup> Text of the model bilateral agreement adopted by ECOSOC resolution 2005/14, can be found at: <http://daccessdds.un.org/doc/UNDOC/GEN/V05/812/39/PDF/V0581239.pdf?OpenElement>

Conventions. The cooperation of corporate information sources and protection of “whistle-blowers” are often crucial in the prosecution of corruption offences.

68. To ensure greater international cooperation in effective witness protection, bilateral and multilateral instruments can be adopted for the safe examination of witnesses at risk of intimidation or retaliation and to implement temporary or permanent relocation of witnesses<sup>56</sup>

69. Offering effective protection to collaborators of justice, including members or former members of criminal organizations, is also part of that equation<sup>57</sup>.

#### A. *Promising Practices*

70. The following measures support international collaboration in witness protection:

- Assistance in evaluating the threat against a witness or victim.
- Prompt communication of information concerning potential threats and risks.
- Assistance in relocating witnesses and ensuring their ongoing protection.<sup>58</sup>
- Protection of witnesses who are returning to a foreign country in order to testify and collaboration in the safe repatriation of these witnesses.
- Cooperation in the safe repatriation of victims of human smuggling and international kidnapping.
- Special protection measures for children witnesses.<sup>59</sup>
- Use of modern means of telecommunications to facilitate simultaneous examination of protected witnesses while safeguarding the rights of the defence.
- Establishing regular communication channels between witness protection program managers.
- Providing technical assistance and encouraging the exchange of trainers and training programs for victim protection officials.
- Developing cost-sharing agreements for joint victim protection initiatives.
- Exchange of witnesses who are prisoners.

---

<sup>56</sup> On the relevant requirements under recent UN Conventions, see Working Paper II paragraphs 60-64.

<sup>57</sup> See Working Paper II, paragraph 64.

<sup>58</sup> International cooperation in this area, as noted by a best practice survey conducted by the Council of Europe, “is highly important, since many Member States are too small to guarantee safety for witnesses at risk who are relocated within their borders” (p. 15). Council of Europe (2004). “Witness Protection”, in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 15-42.

<sup>59</sup> See, in particular, The *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* adopted in 2005 by the UN Commission of Crime Prevention and Criminal Justice (E/CN/15/2005/14/add.1). Also, International Association of Prosecutors (2001) *Model Guidelines for the Effective Prosecution of Crimes against Children*, IAP Best Practices Series #2.



## IX. Use of Special Investigative Techniques and International Cooperation

71. Obstacles to law-enforcement cooperation include the diversity of national policing structures<sup>60</sup> and big differences between the regulations governing special investigative methods.<sup>61</sup> Proactive law enforcement strategies and complex investigations frequently involve special investigative techniques. When a case requires international cooperation, differences in the law regulating the use of these techniques can become a source of difficulties. Major efforts have been made in the process of implementing the UN Convention against Transnational Organized Crime and other international initiatives to identify and remedy these difficulties. These efforts are also relevant to the prevention of terrorist acts, but their use by law enforcement and intelligence agencies in the course of their ongoing cooperation has drawn close attention.<sup>62</sup> <sup>63</sup> The role of prosecution services and the judiciary in the supervision of these methods is part of that discussion.

72. The effectiveness of techniques such as electronic surveillance, undercover operations and controlled deliveries cannot be overemphasized. These techniques are especially useful in dealing with sophisticated organized criminal groups because of the inherent difficulties and dangers involved in gaining access to information and gathering intelligence on their operations. Technological advances, such as cross-border surveillance using satellites or the interception of telephone conversations through satellite connections, make cross-border investigation possible without physical presence of a foreign investigating officer.<sup>64</sup> Domestic arrangements and legislation relating to these techniques must be reviewed to reflect technological developments, taking full account of any human rights implications, and to facilitate international cooperation.<sup>65</sup>

---

<sup>60</sup> Aden, H. (2001). "Convergence of Policing Policies and Transnational Policing in Europe", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 9/2, 99-112.

<sup>61</sup> Tak, P.J.P. (2000). "Bottlenecks in International Police and Judicial Cooperations in the EU", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8/4, pp. 343-360.

<sup>62</sup> The European Court of Human Rights has endorsed the use of such techniques in the fights against terrorism (*Klass and Others v. Germany*) and within the Council of Europe, a draft Recommendation of the Committee of Ministers to Member States that seeks to promote the use of special investigative techniques in relation to serious crime, including terrorism, is being drafted. See: De Koster, P. (2005). "Part 1 – Analytical Report", in Council of Europe, *Terrorism: Special Investigation Techniques*, Strasbourg, Council of Europe Publishing, April 2005, pp. 7-43, in particular, "Chapter 5: Special Investigation Techniques in the Framework of International Co-operation", pp. 35-38.

<sup>63</sup> A survey best practices as they relate to the interception of communications and intrusive surveillance led to the observation that "Although, in principle, the increasing co-operation between law-enforcement and national security services can be fruitful in the combating of criminal organizations, extra precautions should be taken to prevent the potential illegitimate gathering of evidence by security services", Council of Europe (2004). "Interception of Communication and Intrusive Surveillance", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 77-104, p. 102.

<sup>64</sup> Tak, P.J.P. (2000). "Bottlenecks in International Police and Judicial Cooperations in the EU", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8/4, 343-360, p. 346.

<sup>65</sup> See UNODC (2005). *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, Vienna, United Nations Publication, Sales No. E.05.V.2.).

73. As was noted in the best practice survey conducted by the Council of Europe, as part of its Octopus Programme, “(...) it is not primarily the technical, but foremost the ethical and legal (including constitutional) barriers to such activities that are the subject of very intensive discussion, controversy and sometimes strong objections, in many contemporary democratic societies”.<sup>66</sup>

74. In addition to the admissibility of evidence collected in other countries through methods that are not accepted in another country, there is also the question of whether violations of national laws by investigation officers from other countries affect the admissibility of the evidence. The answer to that question varies from State to State. The verification of the legitimacy of evidence obtained as a result of international police cooperation is replete with procedural and practical difficulties.

75. With a few regional exceptions, international cooperation in the field of covert investigations tends to take place in a juridical vacuum. Member States increasingly seek to provide a legal basis for judicial cooperation in criminal matters for officers acting under cover or false identify.<sup>67</sup>

76. The International Bar Association’s Task Force on International Terrorism has recognized the importance of law enforcement cooperation and recommended that States develop a multilateral convention on cooperation between law enforcement and intelligence agencies setting forth the means, methods, and limitations of such cooperation, including the protection of fundamental human rights.<sup>68</sup>

## **X. Strategic Approaches and the Coordination of Investigations and Prosecutions**

77. In cases where criminal activity occurs in several countries or transnational criminal groups are involved, States with jurisdiction usually find it important to coordinate their investigations, prosecutions and mutual assistance measures to effectively target these groups and their international activities<sup>69</sup>. Coordination of cross-border investigations and prosecutions is still rare and tends to require considerable preparation through formal channels. Some international structures are being developed to facilitate that process.<sup>70</sup>

---

<sup>66</sup> Council of Europe (2004). “Interception of Communication and Intrusive Surveillance”, in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 77-104.

<sup>67</sup> For instance, the matter is dealt with in the new European Union’s new convention on mutual legal assistance.

<sup>68</sup> International Bar Association (2003). *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association’s Task Force on International Terrorism. London: I.B.A., p. 140.

<sup>69</sup> See for example: Recommendation # 7 of the P8 Senior Expert Group 40 Recommendations to Combat Transnational Organized Crime, Paris, April 1996.

<sup>70</sup> The international legal framework for the governance of international policing activities is still relatively undeveloped. Hartmut Aden observes that the structures of transnational policing today are “a special mix of multi-level-government and governance as well as of multi-actor government and governance”.

78. Because of the dynamic nature of transnational crime and terrorism, Member States must constantly refine and perfect their strategies. The different modalities and tools of cooperation are meant to be complementary and, as cooperative relationships are being built, they should lead to integrated approaches to cooperation and to strategic approaches to the investigation and prosecution of crimes across international borders.

79. More proactive, intelligence-led approaches are needed to detect and disrupt organized crime, corruption and terrorism, dismantle criminal networks, and apprehend and punish criminals.<sup>71</sup> Inter-agency cooperation within a State is not only crucial to effective action against transnational organized crime in general, but also an important precondition for effective cross-border cooperation.<sup>72</sup> The use of specialised multi-disciplinary teams is often also a necessity. The use of specialised police, investigation and prosecutorial structures able to conduct financial investigations and analyze computerized information systems can be a prerequisite to successful complex investigations. Lawyers, investigators and prosecutors should form multi-disciplinary teams to more effectively to combat financial crimes, corruption<sup>73</sup> and other sophisticated forms of crime.

80. The success of strategic approaches, at the local, regional or global levels, is largely predicated on the capacity of strategic partners to cooperate effectively. For that purpose, technical assistance activities to help build the cooperation capacity of such partners are usually an integral part of efforts to combat organized crime, corruption and terrorism.

#### A. *Joint Enforcement Strategies*

81. The importance of operational cooperation across borders between law enforcement agencies investigating and prosecuting offences with a transnational dimension must be acknowledged, and it is now in a number of international instruments<sup>74</sup>. The development of these joint forms of operational activities offers one of the most promising new forms of international cooperation against organized crime, corruption and terrorism.

82. Nevertheless several outstanding issues remain in making this form of cooperation fully functional on a broad scale. Practical problems in the organization of joint investigations, including the lack of common standards and accepted practices, issues around the actual

---

Aden, H. (2001). Convergence of Policing Policies and Transnational Policing in Europe”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 9/2, 99-112.

<sup>71</sup> See, for example, Council of Europe (2004). “Crime Analysis”, in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 105-144.

<sup>72</sup> See: Council of Europe (2004). “Cross-border Cooperation”, in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 145-168.

<sup>73</sup> International Association of Prosecutors (1999). *Recommendations on Combating Corruption in Public Administration – IAP Best Practice Series No. 3*. The Hague: IAP

<sup>74</sup> Article 19, of the United Nations Convention against Transnational Organized Crime requires States Parties to consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. See also similar language in article 49 of the UN Convention against Corruption.

supervision of the investigation, and the absence of mechanisms for quickly solving these problems.<sup>75</sup> For joint investigative bodies to become an effective cooperation tool States must set in place the required legal framework, both at the national and international levels, although such a framework need not necessarily be very complicated.

83. For example, the Agreement on Mutual Assistance between the European Union and the United States of America<sup>76</sup> provides that the competent authorities in each State may communicate directly with each other for the purpose of setting up and operating such teams, except in some complex situations requiring central coordination. Members of the joint teams may also request their own competent authorities to take measures to facilitate the joint investigation, as if it was in support of a domestic investigation, without a formal request for assistance being required from the other State.

84. The development of bilateral and multilateral strategic planning and problem-solving mechanisms can also be important. Several States have seen the need to establish semi-operational mechanisms and task forces to address specific cross border issues (e.g. the Canada/USA Cross Border Crime Forum, with a number of specialized working groups). In some instances, such mechanisms are also used to flag emerging threats and law enforcement cooperation issues, exchange criminal intelligence of a general or analytical nature, and to engage in problem-solving discussions and activities. Such mechanisms can progressively lead to “project-based action” involving bilateral or multilateral priority setting, targeting, resourcing, and assessment of law enforcement operations drawing on the full strength of competent agencies.

### ***B. International Structures to Provide a Framework for Cooperation***

85. Several international structures exist which provide a framework for international cooperation in criminal matters at the regional, sub-regional, or international levels.

86. Both Interpol and Europol are non-operational. They provide a framework for cooperation between law enforcement authorities and provide mechanisms for effective exchanges of information. In the case of Interpol, for example, information is exchanged through national central bureaux in each State on persons wanted for serious crimes, missing persons, unidentified bodies, and about criminal modus operandi.

87. More intensive forms of law enforcement cooperation are included in the Schengen Agreement between 13 Member States of the European Union which have agreed to eliminate internal frontier controls. These forms of cooperation include the use of “controlled delivery”, the limited possibility of “hot pursuit” of fugitives crossing border into the territory of another State, the possibility of cross-border supervision (e.g. surveillance). The Schengen arrangements also include the Schengen Information System involving a database which can

---

<sup>75</sup> See Schalken, T. and M. Pronk (2002). “On Joint Investigation Teams, Europol and Supervision of their Joint Actions”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10/1, 70-82.

<sup>76</sup> Agreement on Mutual Assistance between the European Union and the United States of America, signed on 25 June 2003, O.J. L 181/34 of 19 July 2003. See: Article 5: Joint Investigative Teams.

be consulted directly by law enforcement officials in each of the participating states and to which they can all directly contribute information.

88. The Southern African Regional Police Chiefs' Cooperation Organization encompasses law enforcement agencies from 12 countries and aims to facilitate cooperation between these national agencies, the fostering of joint law enforcement strategies, the evaluation of crime trends and the exchange of information.

89. The European Judicial Network was established in 1998<sup>77</sup> to facilitate cross-border investigations and prosecutions of serious crimes. By putting judges and prosecutors in touch with counterparts in other participating States, the Network has greatly facilitated the gathering and communication of evidence by participating States. It was set up to promote direct contacts between prosecutors and it links up the central authorities for international cooperation in criminal matters and other authorities with specific responsibilities within the context of international cooperation. Tools have been developed such as a CD-Rom with the text of relevant international instruments and information on what can be requested from the different Member States, a compendium of authorities in the member States, and a secure computer link to send requests and follow up on them.

90. Eurojust is an empowered network of mutual legal assistance. Created in 2002<sup>78</sup>, it aims to improve cooperation between competent authorities in EU Member States, bring better coordination of cross-border investigations and prosecutions, exchange information and make recommendations to change laws to improve mutual legal assistance and extradition arrangements. It can request competent authorities to provide information, to investigate and prosecute specific acts, to accept that one country is better placed to prosecute than another, to set up joint investigation teams, to coordinate their activities with one another. It is built on a vision of an integrated approach between the police and the judiciary. There is some discussion, within the European Union, of establishing a European Union Public Prosecutor's Office from Eurojust in order to combat crimes affecting the financial interests of the Union.

91. In March 2005, a Memorandum of Understanding for the establishment of a Public Prosecutors Network in the Countries of the Western Balkans was signed in Skopje. Other regional and sub-regional initiatives are under consideration and should be encouraged.

92. Existing structures do not yet offer a comprehensive framework for cooperation. Consideration should be given, together with the International Association of Prosecutors and other groups, to develop a more comprehensive network, with or without a treaty base.

## **XI. Improved Liaison, Communication, and Information Exchange**

93. Once a relationship of confidence and trust exists between agencies, they can consider some ongoing exchanges of information and intelligence. Several agencies have entered into

---

<sup>77</sup> European Union, OJ L 191, 07.07.98.

<sup>78</sup> European Union, OJ L 63, 06.03.02.

formal agreements for the sharing of such information. Some do it within the framework of international structures such as Interpol or Europol, two non-operational organizations whose primary focus is to provide channels for information exchange among law enforcement agencies. Many of these arrangements remain superficial and have yet to produce appreciable results. Others are more promising. Providing real time access to databases is still rare and so is the connection between databases (despite the existence of encryption and other technologies allowing agencies to do so through securely). The data do not always circulate freely within a State, let alone across international borders, and there are issues concerning privacy and the confidentiality of information.

94. International cooperation between investigators and prosecutors can be enhanced through the development of more effective systems of information sharing at the regional and international levels on significant trends, criminal patterns, the activities and organization of criminal groups and their linkages. The development of regional or sub-regional databases could also be considered.

95. In many instances, international cooperation is hindered by the absence of clear channels of communication. In other instances, channels exist but their inefficiency prevents the timely exchange of both operational (data useful in responding to specific offences, offenders, or criminal groups) and general information (data on criminal networks, on trends and patterns of trafficking, extent of known criminal activity in a particular sector and typical *modus operandi*).<sup>79</sup>

96. The sharing of information and intelligence between security and law enforcement agencies is an important means to prevent terrorist acts and other major criminal offences. Efforts to increase these exchanges have produced some appreciable results, but they have also raised a number of issues.

97. In many States, immense progress has been achieved at the national level in terms of sharing criminal records and other data among law enforcement agencies in real time, securely and with human rights safeguards. The most significant obstacle to international exchange of law enforcement data is probably the lack of the necessary legislative framework, at both the national and international levels, to support lawful and effective exchanges of data. Some progress is made at the bilateral, sub-regional and regional levels to ensure that current exchange mechanisms meet the needs of judicial and law enforcement cooperation with the necessary safeguard for the protection of personal data and individual privacy rights.<sup>80</sup> For example, the Schengen information system, in Europe, allows participating national law enforcement agencies to share data on many key issues almost instantaneously with their colleagues in other countries. For most observers, the strength of the arrangements enabled by the Schengen conventions lies in the fact that they allow for highly practical law enforcement cooperation and information exchange, at a level that is unique in the world<sup>81</sup>. Europol also

---

<sup>79</sup> See Article 27 of the United Nations Convention against Transnational Organized Crime

<sup>80</sup> See for example, the Commission of the European Communities (2004). *Proposal for a Council Decision on the Exchange of Information from the Criminal Record*. Brussels, 13.10.2004- 2004/0238 (CNS).

<sup>81</sup> Joutsen, Matti (2001). *International Cooperation against Transnational Organized Crime: The Practical Experience of the European Union – 119<sup>th</sup> International Training Course – Tokyo: UNAFEI*, p. 398.

produces annual situation reports on organized crime based on data brought together from all member States. A long-term goal is the establishment of compatible criminal intelligence systems among Member States and the sharing of criminal intelligence data through secure computer networks with controlled access. This may include the setting up of a database of pending investigations, making it possible to avoid any overlap between investigations and to involve several competent authorities in the same investigation.

98. Mechanisms and processes that do not take advantages of advances in communication and data storage technologies often still govern the exchange mechanism for the sharing of criminal records and other criminal justice data between Member States.

#### **A. *Exchange of Information on Convictions***

99. The sharing of information on convictions is also a prerequisite to the establishment of a mutual recognition of convictions schemes by Member States. Member States are still confronted with difficulties in rapidly determining whether an individual has a criminal record in another jurisdiction, in identifying the Member States in which individuals have been convicted, and in understanding the information provided. Earlier this year, the Commission of the European Communities issued a white paper on exchanges of information on convictions<sup>82</sup> which outlines some practical obstacles to the development of agreements for the exchange of information on convictions, such as the heterogeneity of national systems for recording convictions, differences in the contents and coverage of these information systems, differences in the period of time for which information is included and kept in registries, and differences in the legislation regulating access to the information.

#### **B. *Exchange of DNA Information***

100. The use of DNA analyses is playing an important role in resolving complex criminal cases and in supporting the prosecution of serious offences. Not all jurisdictions have legislation allowing the use of this tool as part of criminal investigations. Some of them have the necessary legislation, but do not have the forensic analysis capacity to collect, analyze and make use of that kind of evidence. International cooperation, in many instances, is taking the form of sharing that analytical capacity. The exchange of expertise regarding scientific and technological developments such as advances in forensic sciences is to be encouraged.

101. Many Member States need to review their legislation to ensure that it provides for the gathering, analysis, storage and lawful sharing of DNA information on offenders involved in organized crime offences and in the activities of criminal and terrorist groups.<sup>83</sup> A lot of energy has been spent to standardize DNA analysis techniques globally. However, differences in national legislations, and sometimes the absence of DNA national legislation, still create significant obstacles to international cooperation in sharing DNA information.

---

<sup>82</sup> European Union, Commission of the European Communities (2005). *White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union*, Brussels, 25.1.2005.

<sup>83</sup> See the recent Canadian Legislation: *Act to Amend the Criminal Code, the DNA Identification Act and the National Defence Act*, S.C. 2005, Chapter 25.

102. In the absence of precise international cooperation arrangements, foreign requests to perform a search in a national DNA database are not always easy to accommodate. At the very least, they tend to trigger a tedious and time-consuming procedure that does not contribute to quick investigations.<sup>84</sup> Further bilateral and multilateral agreements to govern and facilitate these exchanges and offer the necessary legal safeguards for the protection of human rights are needed.

### ***C. Exchange of Information on Best Practices***

103. The identification of best practices in international cooperation is crucial to capacity-building initiatives in support of the fight against corruption, transnational organized crime and terrorism.

104. To encourage effective international cooperation in the fight against terrorism, for example, the Security Council adopted resolution 1377 (2001) in which it called on all States to take urgent steps to implement fully resolution 1373 (2001) and to assist each other in doing so by promoting best practice in the areas covered by the resolution. In response to this, various bodies have issued guidelines and prepared manuals and model laws. In 2004, UNODC issued the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*<sup>85</sup>. The Office also put together a compendium of legal instruments and useful technical assistance tools to prevent terrorism and other related forms of crime. It contains, inter alia, relevant legislative guides, model laws, manuals and implementation tools relating to terrorism and other related forms of crime, is available via internet and as a CD-ROM.

105. Member States have put in place several mechanisms for the sharing of information on best practices in the fight against serious crimes including terrorism<sup>86</sup>. More can be done to systematically identify and disseminate information on best practices and relate them to international standards, including observance of the rule of law, respect for human rights and fundamental freedoms.

### ***D. More Effective Liaison Function***

106. Law enforcement liaison officers provide direct contact with the law enforcement and government authorities of the host State. They can develop professional relationships, build confidence and trust, and generally facilitate the liaison between the law enforcement agencies in the States involved. When the legal systems of the States concerned are very different,

---

<sup>84</sup> See Janssen, H.J.T. (2000). "The DNA Database in the Netherlands", in C.M. Breur (ed.), *New Trends in Criminal Investigation and Evidence. World Conference on New Trends in Criminal Investigation and Evidence*. Antwerpen: Intersentia

<sup>85</sup> The UNODC has also contributed, together with the International Monetary Fund and the World Bank, to the formulation of model legislation against money laundering and the financing of terrorism.

<sup>86</sup> For example, the G8 Roma and Lyon Groups, the Council of Europe's surveys of best practices as part of the Octopus Programme, the United Nations Informal Expert Working Groups on Extradition, and on Mutual Legal Assistance, to name only a few. See: Council of Europe (2004). *Combating Organised Crime – Best Practices of the Council of Europe*. Strasbourg: Council of Europe – Octopus Programme.



liaison officers can also advise law enforcement and prosecutorial authorities, both in their own State and in the host State, on how to formulate a request for assistance. The role of such liaison officers can be enhanced by ensuring that they have access, in accordance with the law of the host country, to all agencies in that country with relevant responsibilities.

107. Reciprocal arrangements have been made by several States to facilitate the exchange of “liaison magistrates” or other criminal justice liaison personnel.<sup>87</sup> Some liaison officials represent their State, others represent more than one State<sup>88</sup>. These appointments aim to encourage cooperation between countries, particularly but not exclusively in international criminal law and mutual legal assistance in criminal matters<sup>89</sup>. They can alleviate the misunderstandings created by real and perceived differences between legal systems<sup>90</sup> and facilitate and expedite requests and other communications between the participating States.

## **XII. Technical Assistance and Capacity Development**

108. Integrated approaches are also important in the provision of technical assistance. Smaller States often experience difficulties implementing the numerous international conventions and bilateral treaties they are expected to comply with. They can benefit from integrated technical assistance activities that focus on building their overall investigation and prosecution capacity as well as their ability to cooperate effectively.

109. Law enforcement agencies can provide bilateral assistance and cooperation through various technical assistance and capacity-building projects in other States. Such assistance also helps establish future cooperation on solid grounds. Effective technical assistance activities are carried out through multilateral institutions such as the United Nations, the Commonwealth, the Association of South-East Asian Nations, or the World Bank.

With respect to international anti-terrorism initiatives, more capacity-building assistance is required in the context of the rule of law, the implementation of the universal instruments against terrorism and international cooperation.

## **XIII. Conclusions**

---

<sup>87</sup> Examples of such exchanges are provided by the French Liaison Magistrate Programme, the US Attache Programme, the Canadian Counsellor of International Criminal Operations Programme, the Iberoamerican Network of Judicial Assistance in Civil and Criminal Matters (IberRED), Eurojust, and the European Judicial Network.

<sup>88</sup> The common use of liaison officers posted abroad by law enforcement agencies of Member States of the European Union is now being encouraged and facilitated (Decision 2003/170/JHA, 27 February 2003). Also, the Nordic States collectively send liaison officers to host States.

<sup>89</sup> In 1996, the Council of the European Union agreed to a *Joint Action Providing a Framework for the Exchange of Liaison Magistrates with the Member States of the European Union* (OJ L 105, 27.04.96).

<sup>90</sup> See: Rabatel, B. (2003). “*Liaison Magistrates*”: *Their Role in International Judicial Cooperation and Comparative Law*. [http://www.ambafrance-uk.org/article.php3?id\\_article=343](http://www.ambafrance-uk.org/article.php3?id_article=343)

110. During the last decade or so, a new determination of Member States to improve international cooperation and fight various forms of transnational criminal activities has brought into focus a number of obstacles to cooperation and has led them to make significant improvements to the international cooperation regime in criminal matters.

111. Evaluation of progress in strengthening internal cooperation remains difficult. Different mechanisms can be considered, including expert reviews. Examples are provided by OECD's system of mutual evaluations of Member States on measures taken to prevent and control money laundering<sup>91</sup>, the OAS Inter-American Drug Abuse Commission's multilateral evaluation mechanism, or the Council of Europe Group of States against Corruption (GRECO)<sup>92</sup>. In 1998, the European Union decided to adopt a set of standards of good practice in mutual legal assistance and regularly reviews compliance with them. A mutual evaluation system has been established in which experts from different countries assess the practical conduct of international cooperation in the target country.

112. Practitioners are well aware of the many obstacles that still exist to international cooperation in criminal matters. They include sovereignty issues, the diversity of law enforcement structures, the absence of enabling legislation, the absence of channels of communication for the exchange of information, and divergences in approaches and priorities. These problems are often compounded by difficulties in dealing with the varied procedural requirements of each jurisdiction, the competitive attitude that often exists between the agencies involved, language, and human rights and privacy issues.

113. In spite of the considerable progress accomplished at the bilateral, regional, trans-regional, and international levels, international cooperation in the investigation and prosecution of serious crimes still needs considerable strengthening<sup>93</sup>. International cooperation among prosecution services can be strengthened by the ratification and implementation of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the Protocols thereto<sup>94</sup>, the United Nations Convention against Corruption, and the universal conventions against terrorism. Member States must review their extradition and mutual legal assistance arrangements, as well as their national legislation, to ensure compliance with these international instruments. In that process, the implications of a number of regional instruments, when relevant, should also be considered. Prosecutors who have first-hand experience of these matters can also play a significant role, at the national and international levels, in offering their input into this review process.

<sup>91</sup> Such reciprocal evaluation mechanisms, and the publication of their results, make a difference in strengthening collaboration against organized crime. (See: Laborde, J.-P. (2005). *État de droit et crime organisé*. Paris : Dalloz, p. 85).

<sup>92</sup> "According to its Statute, the aim of the GRECO is to improve its members' capacity to fight corruption by monitoring the compliance of States with their undertakings in this field. In this way, it will contribute to identifying deficiencies and insufficiencies of national mechanisms against corruption, and to prompting the necessary legislative, institutional and practical reforms in order to better prevent and combat corruption." <http://www.greco.coe.int/Default.htm>

<sup>93</sup> See: Laborde, J.-P. (2005). *État de droit et crime organisé*. Paris: Dalloz.

<sup>94</sup> See Legislative Guides for the Implementation of the Convention and the Protocols at: [http://www.unodc.org/unodc/en/organized\\_crime\\_convention\\_legislative\\_guides.html](http://www.unodc.org/unodc/en/organized_crime_convention_legislative_guides.html).

114. These various conventions call upon Member States to further develop their treaty network by entering into new bilateral and multilateral treaties to facilitate international cooperation in criminal matters. The proliferation of cooperation arrangements, however necessary as it is, is not an appropriate substitute for a more comprehensive, integrated international legal framework for international cooperation in criminal matters. Past experience of cooperation highlights the need for an integrated approach to international cooperation in criminal matters, one in which its separate modalities are used in a more effective and complementary manner.

115. As was argued by the International Bar Association's Task Force on International Terrorism, a comprehensive approach to international cooperation can minimize the weaknesses of each of the modalities of cooperation. The Task Force concluded that there are systemic causes behind the relative weaknesses of existing international cooperation mechanisms and that an integrated system is required whose goals should include: "political neutrality, the preservation of international standards of legality, human rights protections, and the enhancement of effective inter-state cooperation in penal matters"<sup>95</sup>.

116. A new international instrument on mutual legal assistance could build on some of the most innovative developments to date in terms of facilitating the transfer of criminal proceedings, mutual recognition of court orders and judgements, and the establishment of formal cooperation networks among prosecution services. It would enhance complementarities between the different modalities of cooperation and provide a framework for the harmonisation of national legislation. It could further enhance international cooperation by including a mutual or reciprocal feedback and evaluation mechanism, as well as a procedure<sup>96</sup> and guidelines for the friendly settlement of any difficulty or dispute that may arise out of the application of the mutual assistance mechanisms provided by the instrument<sup>97</sup>.

---

<sup>95</sup> International Bar Association (2003). *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association's Task Force on International Terrorism. London: I.B.A., p. 136-137.

<sup>96</sup> See Council of Europe, European Committee on Crime Problems (2002). *New Start- A Report of the Reflection Group on Development in International Co-operation in Criminal Matters and Approved by the European Committee on Crime Problems*. Strasbourg, September 18, 2002.

<sup>97</sup> The report of the I.B.A.'s Task Force noted that the current international cooperation agreements typically fail to provide a mechanism for the resolution of conflicts that arise between States. International Bar Association (2003). *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association's Task Force on International Terrorism. London: I.B.A., p. 138.