

XVITH INTERNATIONAL CONGRESS OF PENAL LAW (Budapest, 5-11 September 1999)¹⁷

Topic: The Criminal Justice System Facing the Challenge of Organized Crime

1. Criminal Law. General Part.
2. Criminal Law. Special Part.
3. Procedural Law.
4. International Criminal Law.

Introduction to the Resolutions adopted by the XVIth International Congress of Penal Law

From 5 to 11 September 1999, in Budapest, Hungary, the XVIth International Congress of Penal Law was held with the theme "The Criminal Justice System Facing the Challenge of Organized Crime". The Congress was attended by over 500 participants - professors of criminal law and procedure, judges, government officials in charge of penal matters - from about forty countries.

The theme of the XVIth Congress was addressed during four Preparatory Colloquia held in Naples, Italy, Alexandria, Egypt, Guadalajara, Mexico and Utrecht, The Netherlands, between 1997 and 1998. The Colloquia were attended by over one hundred national experts. National reports submitted to the Preparatory Colloquia were published in four consecutive volumes (1997-1999) of the *Revue Internationale de Droit pénal / International Review of Penal Law*, totaling over 2,200 pages.

Background documents submitted to and resolutions approved by the XVIth Congress, along with the reports submitted to the Preparatory Colloquia, represent the largest comparative legal study ever compiled on organized crime and a most relevant contribution with respect to the juridical and criminal policy approach to such a phenomenon by international and regional institutions, as well as national legal systems.

The organization of the XVIth International Congress of Penal Law was assigned to the Hungarian National Group of the International Association of Penal Law.

The International Association of Penal Law, which was established in 1924 in Paris to continue the work of the International Union of Penal Law (Vienna, 1889), is an academic, non-governmental organization with consultative status with the United Nations and observer

¹⁷ RIDP, vol. 70 3-4, 1999, pp. 869-887 (French); p. 861-913 (English); pp.915-939 (Spanish).

status at the Council of Europe, and it enjoys a special cooperative agreement with the Organization of American States. Membership of the Association includes those who are active in the field of criminal justice, both at the theoretical and practical level.¹⁸ Its approximately 3,000 members and participants, individually or as national groups, who are active in more than one hundred countries around the world, make it not only the oldest academic organization but also the most relevant in the field of criminal justice. Membership of the Association comprises many distinguished experts widely known for their academic or professional contribution. The Association has excellent professional and friendly relationships with the three other Associations that, each one within its own perspective, are active in the framework of penal and criminological sciences: the International Society of Criminology, the International Society of Social Defense and the International Penal and Penitentiary Foundation.

The International Association of Penal Law devotes particular efforts to criminal policy and penal law codification, comparative criminal justice, international criminal law and human rights in the administration of criminal justice. The work of the Association has also been important in the establishment of the International Criminal Court, which was started within the Society of Nations by distinguished members of the Association, in particular by Vespasiano V. Pella, and culminated with the 1998 Rome Conference, and to which the Association devoted many of its activities, publications and Congresses. Particularly important has been in this framework the activism of our President, M. Cherif Bassiouni, who presided over the work of the Drafting Committee that produced the final text of the Rome Statute.

The International Association of Penal Law celebrates its world Congress every five years. Every Congress is preceded by four Preparatory Colloquia where the representatives of the national groups present their respective reports on the issue at hand, with a view to elaborating resolutions and recommendations based upon the indications that the scientific community proposes to legislators and policy-makers on different criminal justice issues. The four sections of the Congress examine and discuss the draft resolutions, submitting to the Congress's plenary the final proposals for its approval.

The four perspectives of the XVIth International Congress of Penal Law "*The Criminal Justice System Facing the Challenge of Organized Crime*" were:

- Criminal Law, General Part: general principles of criminal law, theory of the crime, theory of punishment and juridical consequences;
- Criminal Law, Special Part: crimes;

¹⁸ For the history and activities of the International Association of Penal Law, see the contribution of its President, M. Cherif Bassiouni ("IAPL: International Association of Penal Law: Over a Century of Dedication to Criminal Justice and Human Rights"), in *Recueil de l'Association internationale de droit pénal / Compendium of the International Association of Penal Law*, Nouvelles Etudes Pénales, n°18, Eds. Érès, Ramonville St. Agne, 1999, pp.65-95.

- Criminal Procedure: procedural mechanisms developed to fight against organized crime;
- International Criminal Law: international developments related to the establishment of common institutions and definition of criminal offences, establishment of adequate means for international cooperation and prosecution.

Following the approval of the Congress' general commentary¹⁹ by the Scientific Commission of the Association – coordinated by the Vice President Reynald Ottenhof, each perspective was the subject of a specific Preparatory Colloquium, where panelists appointed by the national groups of the Association dealt with the issue at hand on the basis of their national criminal law experience and perspective. Each Colloquium relied upon the work of a *General Reporter*, who studied the issue and submitted a thorough report that took into account the most relevant reports submitted by the National Reporters.

- The General Part was the subject of the Preparatory Colloquium held in Naples (18-21 September 1997), organized by the Italian National Group and chaired by Professor Alfonso Stile. *General Reporter* of the Colloquium was Professor Thomas Weigend, University of Colonia (Germany). The reports submitted to the First Colloquium, as well as the draft resolution it approved, were published in the *Revue Internationale de Droit Pénal / International Review of Penal Law*, vol. 68, 3-4, 1997 (500 pp.).

- The Special Part was tackled by the Preparatory Colloquium of Alexandria (8-12 November 1997), organized by the Egyptian National Group and chaired by Professor Abdel Azim Wazir. The *General Reporter* was Professor Christopher Blakesley, Louisiana State University (USA). The reports submitted to the Second Colloquium and the draft resolution adopted for consideration by the Budapest Congress were published in the *Revue Internationale de Droit Pénal / International Review of Penal Law*, vol. 69 1-2, 1998 (614 pp.).

- The Guadalajara Preparatory Colloquium (14-17 October 1997), organized by the Mexican National Group and chaired by Professor Raul Zaffaroni, National University of Buenos Aires (Argentina), dealt with criminal procedure issues. Professor Jean Pradel, University of Poitiers (France) acted as the *General Reporter* and the relevant national reports were published in the *Revue Internationale de Droit Pénal / International Review of Penal Law*, vol. 69 3-4, 1998 (400 pp.).

- The last Preparatory Colloquium was devoted to International Criminal Law and was organized by the Dutch National Group in Utrecht, The Netherlands (13-17 May 1998). The Colloquium was chaired by Professor Bert Swart, University of Amsterdam (The Netherlands), and Professor Christine Van den Wyngaert, University of Antwerp (Belgium), acted as the *General Reporter*. Its acts were published in the *Revue Internationale de Droit Pénal / International Review of Penal Law*, vol. 70 1-2, 1999 (726 pp.).

¹⁹ Published in *Revue Internationale de Droit Pénal / International Review of Penal Law*, vol. 67 3-4, 1996 (769 pp.).

Along with the Preparatory Colloquia, a Colloquium for Young Penalists was organized in September 1997 by the International Institute of Higher Studies in Criminal Sciences in Syracuse (Italy), which dealt with the very same theme of the Congress.

The four sections of the XVIth Congress discussed and elaborated the draft resolutions submitted by the Preparatory Colloquia and the Colloquium for Young Penalists²⁰, with a view to their adoption by the General Assembly of the International Association of Penal Law, which held its quinquennial session in Budapest, on Saturday, 11 September 1999.

The XVIth Congress also approved a motion to the Secretary-General of the United Nations. With this motion, considering that organized crime in all its forms and manifestations, constitutes a complex phenomenon and a priority for the United Nations and that the General Assembly, by its resolution 53/111 of 9 December 1998, decided to establish an intergovernmental *ad hoc* Committee charged with the elaboration of an international convention against transnational organized crime, the International Association of Penal Law - deplored the absence of the Secretariat, in particular the Centre for International Crime Prevention,

- requested the Secretary-General to instruct the Executive-Director of the Office for Drug Control and Crime Prevention to cooperate with the scientific community involved in the fight against organized crime, in particular with the International Association of Penal Law,
- reiterated the availability of the International Association of Penal Law to cooperate with the United Nations in the fight against organized crime.

Following is the text of the resolutions approved by the XVIth International Congress of Penal Law on "The Criminal Justice System Facing the Challenge of Organized Crime", which should have as wide a diffusion as possible, since it represents the elaboration of ideas shared by a large majority of those who are active in the theoretical and practical development of an effective, fair and humane criminal justice. The International Association of Penal Law also wishes that its proposals are considered by international organizations and States as a balanced contribution to the orientation and development of the important efforts that the international community makes in its daily reality. Budapest, 12 September 1999.

²⁰ The text of all draft resolutions in English, French and Spanish, along with a Message of the President, the Congress's Program and other relevant information, may be found in ASSOCIATION INTERNATIONALE DE DROIT PÉNAL / INTERNATIONAL ASSOCIATION OF PENAL LAW / ASOCIACIÓN INTERNACIONAL DE DERECHO PENAL, *Lettre d'information / Newsletter / Carta informativa*, 1999/1.

Section I

I

1. Organized crime typically seeks to obtain power and/or profits by making use of a highly structured organization. Organized crime often has special features which can frustrate the application of traditional concepts and means of criminal justice. Such features can be, e.g.,

- division of labor and dilution of individual responsibility within the organization,
- interchangeability of individuals,
- secrecy
- mixture of legitimate and illegal activities,
- capacity to neutralize law enforcement (e.g., by intimidation, corruption)
- special capacity to transfer profits.

It is therefore necessary to develop further the criminal law so that it can adequately respond to the challenge of organized crime.

2. Whenever a legislature decides to impose or to increase sanctions for involvement in organized crime or to authorize special procedures with regard to organized crime, the law must clearly define what is meant by "organized crime", "criminal group", etc.

3. In devising new legal institutions and in reshaping existing ones to meet the challenge of organized crime, it is necessary to respect human rights and to adhere to basic principles of criminal law, e.g. the requirement of socially dangerous conduct as a prerequisite of punishability, the principle "*nulla poena sine culpa*", the principle of proportionality between crime and punishment, and the principle "*in dubio pro reo*". Law reformers should be aware of the risk that new instruments specifically devised for combating organized crime, e.g. new forms of complicity, may be used in other contexts and may have unforeseen consequences there. Substantive criminal law should not be turned into an instrument of proactive suppression of possible threats to society.

4. When considering changes in the law, one should keep in mind the fact that organized crime often transcends national borders; laws should therefore be internationally compatible to make effective international cooperation possible.

II

1. Because it is often difficult to prove that leaders and members of organized criminal groups have actually participated in the perpetration of particular offences, traditional forms of perpetration and accessorial liability can be insufficient to make these individuals accountable. To the extent the traditional law of perpetratorship and complicity is deemed insufficient, one should consider a cautious modernization based on the principle of organizational responsibility. In hierarchically structured organizations, persons with decision and control

power can be made responsible for acts of other members under their control if they have ordered these acts to be committed or have consciously omitted to prevent their commission.

2. Recognition of the concept of *conspiracy* may help to extend criminal liability to individuals not directly involved in the commission of particular offences. Criminalization of *conspiracy* should, however, be limited to serious crime and should require an overt act in furtherance of the agreement.

3. Negligence is not sufficient for accessorial liability.

III

1. When devising an efficient response to organized crime, consideration should be given to civil and administrative measures, which may be equally efficient alternatives to criminal sanctions. Non-criminal sanctions should, however, not be employed in order to circumvent the guarantees of substantive and procedural criminal law.

2. Preventive controls should be installed in order to prevent organized crime groups from taking over legitimate business and from infiltrating public administration.

3. In cases in which legal entities have been involved in organized criminal activities, dissolution of such entities, confiscation of their assets and/or other measures directed at them can be efficient tools in combating organized crime.

4. Criminal sanctions must be proportionate to the seriousness of the offence and to the offender's personal responsibility.

5. When it is regarded as necessary to make concessions to individuals who have participated in criminal organizations but have abandoned them and cooperate with law enforcement, full impunity should be limited to the offense of membership in a criminal association and should require that the offender has voluntarily abandoned the criminal association before he was aware of an actual or impending criminal investigation. In other cases, possible mitigation of sentence should be regulated by law. Under no circumstances should there be *de facto* impunity. Sentencing concessions offered to leaders should not be disproportionate to those available to ordinary members.

6. In sanctioning organized crime, confiscation of assets, including derivative profits, is a useful instrument for retrieving illicit gains and for reducing the operational basis of criminal associations. Confiscation should be treated as a criminal sanction, not as a "preventive measure" or in any other way not requiring the full guarantees of the criminal process.

To the extent that confiscation exceeds the offender's net gains from his crime, confiscation should be regarded as part of the criminal penalty for purposes of determining the proportionality of the sanction to the offense.

7. Confiscation of a natural person's total assets should not be used as a criminal sanction.

8. Confiscation of profits in principle requires full proof that the possessor has obtained the

assets through an offense he culpably committed. However, if an entity has been found by a court to be a criminal association, assets related to its activities can be confiscated unless the possessor shows that he has acquired them by legitimate means. Assets of a legal entity can also be confiscated if the entity's representatives were aware, when acquiring the assets, that they stemmed from a criminal offense (or if the entity had acquired them without adequate payment).

9. In the area of organized crime, confiscation should also be possible, upon judicial order, when assets have been found which apparently stem from criminal activity but cannot be attributed to a particular offender. Upon proof of rightful ownership, the assets have to be returned.

10. Confiscation should not prevent or impede the recovery of damages by the victim. If necessary for providing recovery to victims, confiscated assets should be used for that purpose.

11. In the course of a criminal process, assets can be provisionally seized upon judicial order if there exists a high level of suspicion that they may be subject to confiscation and that they would be made unavailable to law enforcement if they were not seized immediately.

12. Research should be conducted to determine the effectiveness of confiscation as a tool in combating organized crime.

Section II

1. General

Traditional laws on perpetratorship and complicity might be found insufficient to provide an adequate and efficient answer to new forms of organized crime and to make persons connected with organized crime accountable. Therefore, legislatures may seek new ways especially to criminalize participation in associations with criminal purposes.

2. Scope

The criminalization of criminal associations and other forms of organized crime presented in the resolutions that follow must consist of the elements and characteristics mentioned in the Resolutions of Section I (The General Part).

3. Legitimacy of Specific Criminalization

To properly deal with organized crime by specific or particular legal measures, as mentioned in the following resolutions, legislators must research the extant objective knowledge relating to the volume, tendencies and the actual impact caused to national and international society by

this phenomenon. The legislator must determine by specific facts that an actual need for a specific incrimination exists, i.e., that a clear social harm exists.

4. Autonomous Crime: Membership in a Criminal Association

Incrimination of membership in a criminal association is a most important tool for fighting organized crime. Membership in a criminal association as a basis of criminal liability has to be defined in functional terms. This signifies, *inter alia*, creating, directing, financing, or adhering to the association. Membership does not require actual participation in specific offences but does require being part of the stable structure of the association. Membership in the association must be corroborated by a material fact (e.g., correspondence, or purchasing a disguise). According to classic criminal law, participants exterior to the association and who further the association's criminal goals may be prosecuted as accomplices.

In accordance with classic criminal law, persons who enter or remain in criminal associations by duress or compulsion retain their concomitant legal defense.

In relation to licit and proper conduct with the association, the mere knowledge of the illegal character of the association is insufficient to justify a prosecution (food services, medical or legal services).

5. Criminal Association as an Aggravating Circumstance

In the case that a crime has been committed, the national legislator must choose between three concurring approaches: autonomous incrimination of the membership in a criminal organization as penalty enhancement, cumulative punishment (for mere membership and for the crime actually committed by the offender for the benefit of the association), conviction of two offences but punishment for only one (*concoure réel d'infractions*).

6. Guarantees

National legislators who adopt the autonomous (*per se*) crime are confronted with serious substantive, constitutional, and human rights problems which require them to find an equilibrium or balance between the desired effectiveness and the protection of these legitimate social and individual interests. Otherwise such a criminalization would endanger:

- a) The principle of legality: Inherent vagueness of definition would violate the legality principle. This, in turn, would endanger the separation of powers and other constitutional structures and exigencies. Criminalization must be promulgated in strict terms and language.
- b) The principle requirement of social harm or social danger, which is a necessary part of the *actus reus* (*l'élément matériel*), and which, as a constituent element of the offense (i.e., that it cause actual social harm), will be lost. The prosecution must show that the party actually joined an association that has caused or is causing an actual social harm.

c) The culpability principle (i.e., personal responsibility), of which *mens rea* (*l'élément moral*) is a part. The *mens rea* for this offense requires convincing proof that the party intended to join the association for the purpose of supporting the association's criminal conduct. (i.e., that he did not join because he was compelled to do so in order to accomplish his legitimate profession or skill). This requires convincing proof that the party had sufficient knowledge of the association's past, present and continuing criminal activity and that he joined the group in support or sustenance of that activity.

d) The principle of proportionality. Due to the reality that great pressure to commit crimes may be brought to bear upon lesser members of organized crime groups to commit crimes, these individuals must be punished only in direct proportion to their role in the group. Moreover, the scope of and limits to incrimination must extend proportionately to the particular culpability of each individual.

7. Emergencies

Ad hoc or specific legislation which claims justification or legitimacy because it addresses "emergency situations", must be rigorously limited in nature, scope and in time.

8. International Cooperation

If the autonomous per se type of crime is adopted, minimal standards compatible with international human rights protection and constitutional principles must be followed. For these standards, see Sections III and IV.

9. Money Laundering

In the realm of organized crime, money laundering is extremely important for at least three reasons. First, it is the mechanism virtually necessary for the success of all organized crime. Second, money laundering is a very important type of organized crime, in and of itself.

Third, incrimination of money laundering is often the only means of thwarting organized crime. For these reasons, laws prohibiting money laundering should be used as a major tool to combat organized crime, and to enforce the mechanisms of confiscation of illicit gains.

Section III

1. Respect for the rule of law must be systematically assured, even in the case of the struggle against those forms of criminality which are included in the expression of organized crime. In most cases the basic rules of criminal procedure provide sufficient means to react firmly against the phenomenon of organized crime. Yet, in certain circumstances, it may be necessary to consider modifications of the provisions of criminal procedural law while retaining

respect for the requirements of fair trial taking the proceedings as a whole.

2. The presumption of innocence is part of the rule of law. The burden of proof rests with the prosecution, a judgment of guilt being based either on the judge's conscientious conviction or on the legal evidence. Presumptions of guilt which may not be rebutted are not permitted.

3. The objective of proactive investigations is to reveal the structure and the methods of a criminal organization in order to enable the initiation of criminal investigation against the members of the organization. Proactive investigations accompanied by measures which seriously affect fundamental rights are permissible under the following conditions only:

- No methods may be used except those recognized in positive law and which respect human rights (*legality principle*);
- They should not be used except in the absence of less restrictive legal means to accomplish the above objective (*the subsidiarity principle*);
- They may be used only in very serious cases (*gravity principle and proportionality principle*);
- They may not be carried out without the prior authorization of a judge or under his control (*principle of judicial control*).

4. Measures intruding into the privacy of persons, both in the course of proactive and ordinary investigations must be used only in the most restrictive manner. Notably these measures must be provided for by the legislation or other equivalent sources of legal authority. Measures implying grave intrusion into privacy must both be ordered and supervised by judicial authority.

5. Effective protection must be accorded to individuals and their families who voluntarily provide evidence or who agree to provide evidence or information which enable the disclosure of the activities of organized criminality.

6. Recourse to anonymous witnesses is not normally possible without violating the rights of the defense. If, however, certain countries find it necessary to use anonymous witnesses, this should only be permitted if the following conditions are envisaged and regulated by law:

- Testimony of anonymous witnesses can be justified only in cases of serious threats that must be clear and imminent;
- Conviction may not be based solely on anonymous testimony; - It must be the judge, whether before or during trial, who knowing the identity of the witness, decides whether the witness may testify while remaining anonymous. Also the credibility of the witness has to be assessed by a judge;
- The defense must have adequate means to put questions to anonymous witnesses and to participate in such hearings.

7. A witness or a victim who is subject to a serious threat may, with the authorization of a judge, conceal his age, home address and that of his employment.

8. The use of «*pentiti*» is not recommended because of the inherent difficulties regarding the legitimacy of the criminal justice system and the principle of equal treatment before law. However, individuals who are suspected of being members of a criminal organization and who decide to cooperate with the judicial authorities may benefit from a reduction of their sentence under the following conditions:

- The practice of «*pentiti*» must be based on a precisely defined text of law (*principle of legality*);
- In all cases approval of a judge is required (*principle of judicial control*);
- Conviction may not be based solely on testimony of «*pentiti*»;
- The allowance for «*pentiti*» can only be justified to establish proof of serious offenses (*principle of proportionality*)
- «*Pentiti*» may not benefit from anonymity.

9. The creation or development of specialized services in the struggle against organized crime, whether these services be law enforcement, judicial or administrative bodies is highly recommended.

10. To this end, all efforts of approximation between different procedural systems should be warmly welcomed.

Section IV

A. Defining new crimes and developing existing crimes in international co-operation conventions

1. International co-operation in the fight against organized crime should be improved by developing, implementing effectively, and reinforcing the existing conventions. New instruments to fight organized crime should only be developed to the extent really necessary. Depending on the nature and seriousness of the crimes involved, and the regional framework of which states are parties, co-operation should include the setting up of international application mechanisms (investigative, prosecutorial and/or judicial), or even application mechanisms having a supranational character; but should do so only to the extent necessary.

Attention should be directed to a multidisciplinary approach to the establishment and evolution of international enforcement and non-enforcement regimes against organized crime, especially on the interaction of international organization theory, on the one hand, and criminal and international law on the other hand.

2. In view of the fact that the Congress shares the concerns expressed by the first two AIDP

Sections on the vagueness of the definition of certain new and complex crimes (e.g., participation in a criminal organization, conspiracy), it recommends, that in the development of international conventions, particular care should be taken to focus on particularly serious crimes and to define the relevant criteria of criminal responsibility and its transnational prosecution as clear as possible.

3. The Congress nevertheless acknowledges the need for members of the international community to adopt adequate legislation covering certain crimes that are typical of organized crime and that may, at the present, be too narrowly defined to permit effective international cooperation (for example bribery of foreign and or international public officials). In addition, certain forms of trafficking in illegal goods (e.g. arms and explosives, toxic waste, national art treasures, protected animals, child pornography) and in human beings (e.g. in aliens, children, “black labor”, sex slaves) should receive more attention.

B. New rules on extraterritorial jurisdiction

1. The Congress does not recommend universal jurisdiction (including regional universal jurisdiction) for new and complex crimes or for any other crime. Insofar as states nonetheless assert such jurisdiction, it should be combined with a compulsory international *ne bis in idem* protection (see B 4).

2. Rules expanding jurisdiction (both territorial and extraterritorial) increase the potential for conflicts of jurisdiction. Co-ordination problems may arise as a result (see B 3). However, the Congress considers the problem of conflicts of jurisdiction to be primarily a human rights problem (see B 4).

3. Problems of concurrent jurisdiction should be resolved in a manner that takes into account not only the interests of the states concerned, but in particular the interests of the defendants and victims.

a) Where more than one state has jurisdiction to prosecute an offender for the same offence, the choice of the forum should be made by an international pre-trial chamber. This international pre-trial chamber should also have jurisdiction to decide in cases of transnational organized crime where two or more states have jurisdiction and the authorities of one of those states wish to settle the case by means of an out-of-court settlement (a transaction or a “deal”) (see also E 4 and E 6).

b) Whenever proceedings in two (or more) states offer an equal chance for efficient criminal law enforcement, the choice should be in favor of the forum that best accommodates the interests of suspects and victims (in the fair administration of justice). A particular forum should never be chosen for the sole reason that the accused will incur a more severe sanction in that forum.

4. The principle of *ne bis in idem* should be regarded as a human right that is also applicable on the international or transnational level.

Consideration should be given to incorporating this principle in the ICCPR and in regional human rights conventions. At the very least, a penalty which has been enforced abroad and which relates to the same conduct or the same offence that is the subject of the second prosecution must be taken into account in the sentencing whenever a new penalty is imposed (“deduction of sentence-principle”).

C. New rules on police co-operation

1. The Congress has identified important developments in the field of police co-operation; these include the use of new communication channels (liaison officers, mixed investigation teams, institutions such as Europol and OLAF which could grow into supranational police forces; of new investigative activities (proactive policing) and of new technological devices (e.g. cross border observations by satellite). In view of these developments, the Congress recommends the formalization of police cooperation through international conventions regulating these developments. As police co-operation becomes more and more operational, it should no longer operate in the grey zone of informal agreements. The Congress therefore welcomes recent codification efforts in the European Union.

2. Like domestic policing (cf. the recommendations of Section III), international proactive policing should abide by the principles of legality, proportionality and subsidiarity. Reference to these principles should also be made in the provisions of the future UN Convention against Transnational Organized Crime on the (international) use of special investigative techniques (see Article 15 of the draft UN Convention).

Appropriate monitoring of such policing activities by the authorities in charge of criminal investigations at the national level of the countries the police officers concerned belong to, is recommended. In case of coercive (or intrusive) methods, judicial order or review has to be provided for.

3. Unilateral actions on the territory of another state (i.e., investigative or operational by police officers without the authorization of the local authorities) should be prohibited. Evidence obtained in violation of the local rules and/or without the authorization of the locally competent authorities should be excluded, only if the *lex fori* would also require the exclusion of evidence obtained in this manner in a purely domestic situation.

4. When police officers operate or act in whatever capacity on foreign soil, this should take place only on the condition that the foreign officers will be under an obligation to testify in court should they be called on to give evidence. Police officers should have the same obligations and privileges in proceedings before the courts of the country in which they are acting as the police officers of that country. Adequate control of international police co-operation must be provided either on a national or an international level.

5. New structural forms of co-operation such as common automated systems (e.g., the Schengen information system) and joint investigation teams, require a clear determination of

the applicable law as well as the competent judicial authority.

6. In a number of countries financial intelligence units (F.I.U.s) have been created in the fight against money laundering. These F.I.U.s process information received from banks and other financial institutions.

Even though the role of those F.I.U.s varies substantially from state to state, an international exchange of information is taking place between F.I.U.s of different states. While this exchange of information should be supported in principle and further developed, it nevertheless should be formalized in publicly accessible international instruments. These instruments should permit the providing state (i.e., the state providing the information) to request the application of a specialty principle, according to which the information provided may not be used for purposes other than those stipulated by the providing F.I.U. (e.g., may not be used as evidence) without the permission of the providing state. If the information provided is to be used as evidence in a criminal proceeding, the prior authorization of the judicial authorities of the providing state should always be required.

D. New rules on judicial co-operation

1. Double criminality as a condition of extradition should be retained. It should be abandoned in cases of mutual assistance in criminal matters, provided such assistance does not require the taking of coercive measures or of measures that might lead to an infringement of human rights or to a restriction of fundamental freedoms.

Where double criminality is retained, it is important to resolve the problems that arise in connection with crimes (such as bribery, perjury, and fiscal offences) which are defined in terms that appear to refer to national officials or institutions. To this end, states should adopt the transformative interpretation method. Other lacunae should be resolved, not by abolishing double criminality but by harmonizing definitions of crimes which states seek to make extraditable.

2. In order to make judicial assistance effective, the collecting of evidence in the requested state should satisfy the requirements of the requesting state, as long as this is not incompatible with the fundamental principles recognized in the requested state and the basic rights of the defendants.

Direct contact between the judicial authorities of the requesting and of the requested state is recommended. To facilitate mutual assistance in criminal and related matters, the convention should require states that are parties to it to grant to one another, as well as to the tribunals and to the adjudicating parties the widest measures of legal assistance, within the conditions prescribed by the domestic legislation on legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the convention.

3. New technologies, such as the use of video-links to take evidence abroad, should be encouraged. Where appropriate, it should be possible for judges to transport themselves to

other states, not only in the pre-trial stage of the proceedings, but also at the stage of the trial on the merits. As far as the latter is concerned, the practice of “traveling national courts” should be encouraged.

4. When “deals with criminals” are made, arrangements should be in place so that witness protection programs operate internationally. The same should apply to out-of-court settlements such as “transactions”.

However, the international effect of immunity which has been granted to a criminal as part of a “transaction” should be limited to the facts covered by the “transaction”, so that the state having granted the immunity would not be allowed to invoke the immunity granted as a ground for refusing to extradite the criminal concerned or to grant mutual legal assistance in foreign proceedings against the criminal concerned for *other* facts than those the immunity was granted for.

However, in cases of transnational organized crime, deals with criminals and out-of-court settlements should not be entered into unilaterally by one of the states having jurisdiction. Procedures of the kind described above (see B 3) should be followed.

5. Rules for enforcement of judgments should be provided for or improved, in particular by entering into and ratifying relevant international conventions, e.g. those concerning the transfer of prisoners, the confiscation of proceeds etc.

6. In order to enable international co-operation in matters of identification, seizure and confiscation of proceeds of crime, all states should ratify and implement the Convention of Council of Europe on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (Strasbourg, 08.11.1990). Reservations should be limited as much as possible.

E. New rules concerning the legal position of individuals in international criminal proceedings

1. It is a collective responsibility for states bound by a common human rights convention and co-operating in criminal matters to ensure that the rights of the individuals (those of the defendants and/or victims) are properly guaranteed under international human rights conventions. This should be taken into account when new instruments, such as UN Convention Against Transnational Organized Crime, are prepared. This means that all the States concerned are accountable to international human rights supervisory bodies.

2. In extradition proceedings and in mutual assistance proceedings that involve coercive measures in the requested state, the individuals involved in such proceedings should have the following minimum rights:

- The right to be informed of the charges against them and of the measures that are requested, except where providing such information is likely to frustrate the requested measures;
- The right to be heard on the arguments they invoke against measures on international co-

operation;

- The right to be assisted by a lawyer and to have the free assistance of a lawyer if he does not have sufficient means to pay for his own lawyer as well as the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

- The right to expedited proceedings;

- In case of detention for the purpose of extradition, the individual subject to this procedure should have the same rights as any other person who is deprived of his liberty in a domestic criminal case.

Extradition should not be granted if the requested state has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or if that person's rights and interests may be prejudiced for any of these reasons.

3. The minimum rights of an individual involved in international criminal proceedings in the requesting state should include the right to obtain evidence abroad and the right to be informed about the exchange of evidence in his case.

4. The ability of individuals to have access to international courts should be enhanced. For example, in the case of concurrent jurisdiction on the part of more than one state, with the concomitant risk of multiple prosecutions, individuals who suffer prejudice from this situation should have recourse to an international judicial authority. Ideally, decisions of this kind should be made by an international pre-trial chamber (see B 3).

5. Conviction may not be based on evidence that has been obtained in violation of the human rights of the defendant.

6. The victim should have access to an international judicial authority (as in E.4.) in order to initiate the prosecution of an international organized crime, or to obtain review of the public prosecutor's decision on whether or not to prosecute.

F. Recommendation

The AIDP draws the attention of the ad hoc committee on the Draft United Nations Convention against Transnational Organized Crime to the contents of the present resolution and to the need to review the contents of the draft in this light.