

**ASSOCIATION INTERNATIONALE DE DROIT PÉNAL  
INTERNATIONAL ASSOCIATION OF PENAL LAW  
ASOCIACIÓN INTERNACIONAL DE DERECHO PENAL**

**RESOLUTIONS OF THE CONGRESSES**

**OF THE**

**INTERNATIONAL ASSOCIATION OF PENAL LAW**

**(1926 – 2004)**

**Edited by**

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**PRESIDENT AIDP / IAPL**

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**GENERAL OUTLINE  
OF THE PROPOSALS AND RESOLUTIONS  
adopted by the Congresses of the International Association of Penal Law**

In Paris, in 1924, at the end of the First World War, an association of criminalists was created under the name of «International Association of Penal Law».

*Object.*

Its object is to establish a closer intercourse and collaboration between those who, in different countries, devote themselves to the study of Penal Law or participate in its application, to study criminality, its causes and remedies, and to encourage the theoretical and practical progress of international Penal Law.

*Means of action*

The International Association of Penal Law shows forth its scientific activity in several ways:

a) by publishing a quarterly review: *International Review of Penal Law*, which, in its leading articles, offers an abundant documentation to all of those who have any claim to be interested in questions of Penal Law, material of form, of criminology and penitentiary science.

b) by holding international congresses (four congresses have been held between the two world wars: Brussels 1926, Bucharest 1929, Palermo 1933 and Paris 1937; a fifth congress has been held at Geneva in July 1947; a sixth will be held in 1950: its place of meeting has not yet been settled, the managing board of the association having to choose between several invitations).

c) by editing a collection, in French language, of recent penal Codes offering fresh elements at the disposal of legislators and criminalists (for example, the translations of the Polish penal Code and the Danish penal Code have been published).

*General tendency of the Association*

The Association puts forth no political aim. It has not taken sides with any of the different schools of criminalists. It has no scientific creed. It tries, with the greatest liberty of thought, to find and establish a surer justice, more human, and more complete.

*Situation*

In 1939, at the outbreak of the Second World War, the Association numbered many national groups throughout the world. It has been called for to contribute with the League of Nations to resolve many questions of Penal Law and Criminology. It has held a prominent position in the movement of international juridical cooperation.

### *Resumed activity*

Hostile to undergoing the influence of the governments which had generated the Second World War, the Association has, of its own accord, interrupted its scientific activity during the war. It has resumed it in 1945, with a reorganized Board, in the same spirit of cooperation and with the same thought of scientific independence which made its strength and enabled it to radiate in all countries of the world.

The International Review of Penal Law is published again and among its contributors number eminent scientific personalities who represent, on penal matters, the great juridical systems in the world.

Aware of the extent of the task to be accomplished after the destruction, from a moral point of view, left by the second world war, and seeing that criminality increases in any country, even in those which have not taken part in the war, the International Association of Penal Law has addressed a pressing appeal to all jurists, professors of Law, magistrates, barristers, directors of penitentiaries, as well as to medical experts and psychiatrists, to help it in a work of reconstruction and social protection, the importance and urgency of which cannot be denied.

Besides, considering the high pacifying missions which will befall penal Law as a consequence of the notion of war criminality, the Association means to unite the criminalists in the different parts of the world, to defend with their science and experience, in these new spheres, the fundamental values towards which mankind must look, if it wishes its fine dream of peace to become fruitful and lasting.

### *Collaboration with U.N.O.*

In 1945, the Association intended to offer to the United Nations the fruits of a science and an experience acquired by its indefatigable activity in every branch concerning the international efforts for prevention and repression of the criminality.

It has the great satisfaction to verify to-day, that the most complete and efficient collaboration has been set up between itself and the United Nations.

In February 1947, invited by the U.N.O. it has participated in the Conference of International Organizations which has been held at Lake Success.

On the 3rd of March 1948 it was conferred by the United Nations the consultative status, as a non-governmental organization.

Finally, at the Conference of the consultative non-governmental organizations, which was held at Geneva from the 15 to the 21st of May 1948, the Association was elected a member of the managing Committee of the International Organizations commissioned to organize cooperation between U.N.O. and these organizations.

## **FIRST INTERNATIONAL CONGRESS OF PENAL LAW (Brussels, 26-29 July 1926)<sup>1</sup>**

*Topics:*

1. Security measures. Should they replace the penalty or be complementary to it?
2. Work “*in aperto*”. Should work «*in aperto*» be recommended for the prisoners; if the answer is in the affirmative, how should it be organized?
3. International criminal court. Is there need for instituting an international criminal jurisdiction? If the answer is in the affirmative, how should it be organized?

### **I.- Security measures. Should they replace the penalty or be complementary to it?**

The Congress, without prejudice to the question of the difference in form or substance between penalties and measures of security, declares that in the case of offenders mentally defective or of confirmed criminal tendencies or habits, as well as in the case of juvenile offenders, penal measures alone do not constitute an adequate protection against vermin.

It, therefore, expresses the desire that the Penal Code should make the necessary provisions also for security measures, to be determined according to the personality of the offender; and that the judges should have the power of awarding either the penal measure, or the security measure, or both, or both, in accordance with the circumstances of the case and the personality of the accused.

### **II. - Work “in aperto”. Should work «in aperto» be recommended for the prisoners; if the answer is in the affirmative, how should it be organized?**

The Congress, considering that when judiciously awarded and organized the work is a most effective means of re-education and social re-adaptation of the convicts, expresses the desire that it should be extended as much as the social and economic conditions of the various countries permit. It is being understood that the work «in aperto» should be established only for the benefit of selected convicts, who appear to be capable of improvement and moral betterment and whom this type of employment will bring progressively in touch with social life.

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<sup>1</sup> RIDP vol. 3, 4, 1926, pp. 461-464 (French); pp. 465-468 (English).

**III. - International criminal court. Is there need for instituting an international criminal jurisdiction? If the answer is in the affirmative, how should it be organized?**

*The Congress expressed the desire:*

1. - That cognizance in matters of repression should be vested in a Permanent Court of international justice.
- 2.- That this court should be consulted in matters relating to the settlement of disputes of cognizance, judicial or legislative, which may arise between the States, as well as on the review of irreconcilable sentences, pronounced on the same crime or offence by the tribunals of different states.
3. - That the said permanent Court should have knowledge of criminal liability of the States arising from an unjust aggression or any other violation of international law. It should have the power to pronounce against the guilty State both penal sanctions and measures of security.
4. - That the said permanent Court should have also the knowledge of the individual responsibilities, which may amount to aggression, or to similar crimes or offences, as well as of all violation of international law committed in time of peace, or in time of war, and especially of crimes of Common Law, which, by reason of the nationality of the victim or the presumed perpetrator, may be considered, by themselves or by other states, as international offences constituting a menace to the peace.
5. - That there should also be amenable to the said permanent Court any individual offender, who cannot be brought before the Court of the particular State, either because the place of his crime is unknown or because the sovereignty of this territory is contested.
6. - All offences which may be committed by States or individuals must be specified and approved. International conventions shall define offences within the cognizance of the Court and shall specify which penal and security measures may be employed.
7. - The number of judges in the Court shall be increased. The new members shall be chosen from among people reputed to have special knowledge of criminal law and its administration. The personnel of the Court shall be completed by the appointment of a body of magistrates. Public international action shall be exercised by the Council of the League of Nations. The instruction shall be entrusted to a special organization.
8. - The procedure shall be written and oral. It shall include conflicting debates in public. There shall be no other way of appeal than a revision of the terms in the present statute of the Court.
9. - The decisions of the Court shall be binding. The sentences pronounced against States shall be carried out by the Council of the League of Nations. The execution of those

concerning individuals shall be entrusted by the Council to a chosen country, which will be obliged to act under its supervision, according to its own legislation.

10. - The Council of the League of Nations will have the right to suspend and to commute penalties.

11. - A special commission of the Council of Management of the International Association of Penal Law shall be entrusted with framing the statute.

12. - Finally, the Council considers that the establishment of an international penal justice can only be realized progressively, by means of bilateral agreements between States which other states may later join.

***Vote in favor of the unification of penal Law***

Moreover, on the proposal of Mr. V. Pella, deputy and professor at the University of Jassy, the Congress adopted the following vote, in favor of the unification of penal law

*The Congress,*

having considered the reports on the present legislative position and considering it highly desirable to unify the fundamental principles of penal law as adopted by various States in accordance with the principles with the contemporary science of Penal Law has unanimously consecrated.

*Expresses the desire:*

that the commissions entrusted by the various governments with the task of preparing drafts of Penal Codes should meet in an international conference. This conference should discuss and unify the principles at the base of the plans evolved by the commissions, and to adopt as far as possible, a common basis for the exercise of repression.

To this end, the Congress entrusts the Bureau of the International Association of Penal Law to make known the present suggestion to all governments of the States in which new Penal Codes are now being evolved.

## SECOND INTERNATIONAL CONGRESS OF PENAL LAW (Bucharest, 6-12 October 1929)<sup>2</sup>

*Topics:*

1. Responsibility of societies.
- 2 The application by the judge of one state of foreign penal laws.
3. A single judge or a collegiate of the tribunal.
4. Penal pursuit by the Associations.

### I. - Responsibility of societies.

#### ***I. Internal Penal Law.***

*The second international Congress of Penal Law*

noting the continual increase and the importance of societies and recognizing that they represent social forces in modern life; considering that the legal order of any society may be gravely affected when the activity of any society constitutes a violation of the penal law,

*Expresses the desire:*

1. - That there should be introduced into the law of each country efficacious measures of defense against the infringements by the Societies perpetrated in pursuance of their aims or interests, or by means furnished by them and which involve their responsibility.
2. - That the enforcement of measures of social defense to the society should not exclude the possibility of an individual penal responsibility for the same infringement of persons who are responsible for the administration or direction of the given society, or who have committed the infringement by means furnished by the society.

This individual responsibility may be augmented or diminished according to the case.

#### ***II. International Penal Law.***

*The second international Congress of Penal Law*

considering that war has been outlawed by the Pact of Paris of August 1928; recognizing the necessity of assuring international order and harmony by application of effective sanctions to the states responsible for the violation of the said Pact,

*Expresses the desire:*

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<sup>2</sup> RIDP vol. 7, 1, 1930, pp.10-14 (French). RIDP vol.19 3-4, 1948, pp.415-418 (English). See also RIDP vol.19 3-4, 1948, pp.413-415.

That the organizations called upon to study the means of making more efficacious the principles of the Pact of Paris and of bringing them in line with the dispositions of the Pact of the League of Nations, take into consideration the proposals adopted in 1926 by the first International Congress of Penal Law on the subject of the establishment of an international criminal jurisdiction and of the cases of responsibility of the States and persons that should be within its competence.

## **II. - The application by the judge of one state of foreign penal laws.**

### *The Congress*

considering that while judges of each State are as a general rule empowered to apply only the particular law of that state (*Lex fori*), the respect for the individual rights, and the interest of good international relations may demand the application, in certain exceptional cases, of a foreign law,

### *Expresses the desire*

1. - a) That the repression of an offence against the Common Law committed in any given country, as well as abroad, should be subordinate to the condition that this offence be recognized as such and punished by the foreign territorial law (*Lex loci*);  
b) That the judge should take into consideration the dispositions of the foreign territorial law, when they are more favorable to the delinquent;  
c) That the demands of this law, relative to the necessity of a complaint, should be observed.
2. - That, with regard to offences, committed in any given country, as well as abroad, the judge may, among the elements on which his decision depends, take into consideration also the age at which the personal Law fixes the penal majority.
3. - That, in the case where the existence or the gravity of the offence depends on certain family relations of the accused with the victim or with a third party, these relations should be judged, except for a plea founded on public order, according to the law indicated by the rules of international private law.
4. - That the refusal of application and the false interpretation of foreign penal law should be sanctioned by the regulating court of each state.
5. - That there should be adopted, through an international agreement, a table of punishments and measures of security provided for by the laws of the relevant states.
6. - That every penal sentence legally pronounced by a competent judge, following the law normally applicable, be admitted to produce abroad, under the control of the local judicial authority, the effects necessitated by international cooperation, when they conform to the

public order of the country where they are to be carried out.

**Supplementary proposal.**

*The Congress*

considering that, for the application by a judge of foreign penal law, it is necessary that there should be placed at his disposal reliable information; considering, on the other hand, that only the League of Nations has the means necessary for collecting such an information, begs the Rumanian government to be good enough to intervene in the S.D.N. with a view of organizing an international office of legislative and jurisprudential documentation.

**III. - A single judge or a collegiate of the tribunal.**

*The Congress expresses the desire:*

1. - That the collegiate should be maintained absolute to judge crimes and in quality of appeal in the judgment of offences and contraventions.
2. - That the collegiate should also be maintained in principles, for the judgment of offences in court.
3. - That exceptions to these principles be admitted with extreme prudence, in a limited and progressive manner, without disorder, and chiefly by gradually extending the powers of the police judges to try crimes of lesser importance as well as offences against forestry and hunting laws.
4. - That other extensions of the power of the single judge be reversed, in every case, until the independence of the judiciary and the prestige to which it has a right are effectively assured, and until there should be assured a select recruitment by a remuneration in keeping with the high offices it occupied in the State.

**Supplementary resolution (Conti).**

Generally, the institution of a single judge like that of collegiate should both be maintained; the two forms complete each other in the development of corresponding systems of procedure.

The judge, having to be a lawyer, a psychologist and a sociologist, to have a knowledge of the offences as well as of delinquents, in particular of the danger they present to the community, the required specialization can be better attained in the case of individual judges than in that of the collegiate.

When a collegiate tribunal is to be called upon to perform duties which demand such specialization, a member of the tribunal should be delegated for this purpose.

In particular, it should be within the competence of single judges to judge faulty or involuntary

offences (culpa), and deliberate offences of lesser importance, while it should belong to the collegiate tribunal to judge deliberate offences of the greatest gravity.

Further, in dividing these offences into more or less serious ones, the collegiate could assign itself the former, according to the type of sheriffdom. The single judge should also be empowered to perform actions relating essentially to the procedure, and to the research and leaving to the collegiate tribunal actions which suppose deliberation.

*Functional power.* - To the single judge will belong in general the examination; he may also be delegated to acts of research by a collegiate charged with the examination. For the single judge will be reserved the procedure by penal decree. For instance, before a collegiate, there will belong to the president the accomplishments of acts which are proper to him, before, during or after the debate; and also there may belong to a delegated member of the collegiate the accomplishment of acts separated from and outside the court.

The judgment of petitions (appeals, annulments, etc.) will belong as a rule to the collegiate, as well as judgment on the difficulties of fulfillment.

To the single judge will belong the supervision of the enforcement of the penalty, and, as a rule, the administrative procedure referring to the measures of security in whichever way they complete the penalty.

#### **IV. - Penal pursuit by the Associations.**

*The Congress expresses the desire:*

1. - That there should be given to the members of associations of moral character the right to verify and prosecute the infringements of the penal law, which are within the sphere of their interest, under the responsibility of the association itself.
2. - That the attribution of this right to prosecute, as well as the determination of these infringements, be left to the determination of each legislator.
3. - That, in all cases, the right to prosecute be allowed specially to the associations which have as aim the prevention or the repression of crime.
4. - In the states where the subsidiary private accusation is not recognized, it would be necessary to confer on the said associations the right of constituting themselves civil parties.

## **THIRD INTERNATIONAL CONGRESS OF PENAL LAW (Palermo, 3-8 April 1933)<sup>3</sup>**

*Topics:*

1. For what offences is it proper to admit universal competency?
2. The jury of honor and the crime of slander.
3. Is it desirable to have, beside the penal code and the code of penal procedure, a code of the execution?
4. Should there be admitted in criminal matters the jury system or that of sheriffdom?
5. Is it proper to consider the accused as a witness at his own trial?
6. In what way could a better specialization of the judge be secured?

### **I. - For what offences is it proper to admit universal competency?**

Considering that there are offences which are harmful to the interests common to all states, such as piracy, slave-trade, trading in women and children, drug traffic, the circulation of and traffic in obscene publications, the breaking and deterioration of submarine cables and serious offences against the radio-electric communication, notably the transmission or circulation of false or deceitful distress signals or appeals, coinage offences, forgery of papers of value or of instruments of credit, acts of barbarism or vandalism capable of bringing about a common danger:

Considering that in the contemporary codifications of penal law, there can be discerned a tendency towards a universal repression of certain of these offences, considering that certain codes or drafts equally incriminate the other serious offences which endanger the common interests of the states in their international relations.

*The Congress expresses the desire that:*

- 1.- The existing international conventions be revised, or that new conventions be agreed upon, to ensure the universal repression of all offences which the states would agree to consider as harming their interests or as dangerous to international relations.
2. - The right to inflict punishment which is attributed to the tribunals of the country where the delinquent is arrested, or of the country to which belong the authorities which arrested the accused, be subordinated to the following:
  - the unification of the laws of contracting countries regarding the offences susceptible to international repression;

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<sup>3</sup> RIDP, vol. 10 1-2, 1933, pp.156-161 (French). RIDP vol.19 3-4, 1948, pp.418-421 (English).

- the establishment of rules of cooperation between the states designed to assure the exchange of evidence for and against.

*The Congress recognizes that:*

1. - In default of the above conditions, extradition is preferable;
2. - The attribution of competence to the tribunals of the country where the delinquent is arrested is highly desirable, even in cases of offences against the Common Law, and when the extradition of the accused has not been demanded either by the state, on whose territory the offence was committed, or whose interests it directly harms or by the state to which the accused belongs by nationality.

## **II. - The jury of honor and the crime of slander.**

*The Congress*

having heard the report and different opinions expressed in the third section; having established that this section, by several votes, has pronounced itself in favor of the maintenance of competence of ordinary tribunals in cases of offences against honor,

*adopts the conclusions of the third section.*

*The Congress*

considering the proposals of MM. Longhi, Perreau and Matter which aim at putting on the agenda of the next session of the Congress the study of this question: «Whether it is necessary to institute a special procedure in accordance with which the accused could ask the tribunal to pronounce its judgment on the question of honor alone, as distinct from penal offences»;

*adopts by the majority of votes the proposition in question.*

## **III. - Is it desirable to have, beside the penal code and the code of penal procedure, a code of the execution?**

*The Congress recognizes*

that in the larger sphere and in the complex finalities assigned to penal execution by the new doctrine and legislations, one must henceforth admit the existence of a penal law, that is to say of all the rules and regulations which determine the relations between the state and the accused from the moment when the verdict of the judge is to be executed.

Nevertheless, considering that this penal law is still in a formative stage, especially in what concerns the security measures, the Congress limits its desire in the sense that from now on, there is to be given a complete juridical form to the execution, of which it is question.

#### **IV. - Should there be admitted in criminal matters the jury system or that of sheriffdom?**

*The Congress esteems*

that in the countries where the jury system is in the national traditions, this may be usefully amended in its recruitment and its functioning according to the ideas of each legislation; that in the countries which judge it preferable to substitute for the regime of the Assize Court, founded on the separation of the act and the law, a different system, this must include the institution of a single collegiate, formed by one or several magistrates and jurymen. These latter, at least twice as numerous as the former, must be chosen from all the social classes and satisfy the necessary moral and intellectual conditions.

#### **V. - Is it proper to consider the accused as a witness at his own trial?**

*The Assembly recognizes that:*

1. - The legislative principle in accordance with which the accused could be allowed to bear witness under oath at his trial is not to be recommended in continental legislations.
2. - However, if a country were inclined to admit the testimony of the accused, under oath, it should do so only in the case of the offence prosecuted following a private complaint and should adhere to its own law, with, present or future procedure.
3. - In addition, if the testimony of the accused, under oath, be admitted in the above case, it should be done under the double guarantee that it should not be obligatory for the accused and that the absence of a demand on his part to give evidence should in no way unfavorably prejudice the court against him.

#### **VI. - In what way could a better specialization of the judge be secured?**

1. - It is necessary to direct the judiciary organization in each country towards a greater specialization of judges.

2.- This specialization should be attained through the university and post-university education, which will permit the future magistrates and advocates to acquire knowledge of the sciences indispensable to the fulfillment of their functions, and consistent with the new trends in criminal law.

3. - The specialization of the judge will be done progressively in accordance with the local contingencies in each country.

*The Congress has also adopted the following proposal:*

“Among the measures of application to be studied, it would be interesting to examine the possibility of including in the collegiate of magistrates at a criminal sitting a specialized expert judge”.

## **FOURTH INTERNATIONAL CONGRESS OF PENAL LAW (Paris, 26-31 July 1937)<sup>4</sup>**

*Topics:*

1. In what way can penal law of each country contribute to the protection of international peace?
2. International exchange of information concerning the criminal record of the accused.
3. Is it desirable that the judges should be able to retain and punish a deed which is not expressly within the scope of existing legal provisions? "Nullum delictum sine lege".
4. What guarantees should be given to the accused in the course of preliminary inquiries?
5. What should be the part of the justice in the execution of penalties and of measures of security?

### **I. - In what way can penal law of each country contribute to the protection of international peace?**

*The fourth Congress of Penal Law*

considering that war is a scourge which puts in peril not only the belligerent countries but the material and moral interests of the whole world; considering that the development of the international conscience can contribute efficaciously to the realization of the work of the peace organization; considering that the law of each country as it is addressed directly to individuals, can usefully contribute to the protection of property, from which results peace between the nations; seeing that penal legislations which become more and more numerous tend to protect international relations by the repression of deeds such as crimes against the safety of foreign states and all the other acts hostile to a foreign state and of a kind likely to create danger of war or to disturb international relations; considering that certain legislations even repress propaganda and pressure in favor of war, the outrages of a foreign nation as well as the diffusion of false news and documents which would endanger international relations,

*The Congress esteems*

That, in order to contribute to the maintenance of peace among the peoples, it is desirable that, in addition to the attacks on the laws and interests of the state, the criminal law of each country should deem it an offence to attack the fundamental laws and interests of foreign states and those of the international community.

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<sup>4</sup> RIDP, vol.15, 1, 1938, pp.54-58 (French). RIDP vol.19 3-4, 1948, pp.421- 424 (English).

## **II. - International exchange of information concerning the criminal record of the accused.**

1. - Providing facilities for an international exchange of information concerning the criminal record of the delinquent is an absolute and evident necessity.
2. - The criminal records should be exchange and, within the limits of possibility also the investigation-sheets of criminal biology concerning the delinquents.
3. - The exchange shall take place in cases defined by special conventions.
4. - To carry out this exchange, there should be constituted in each country a central national bureau of documentation which will unite the material concerning the former behavior.
5. - For the use of this material gathered in the central bureau and for the diffusion of this material to the interested states, it is desirable to create an international coordination centre.
6. - The Congress expresses the desire that the states should proceed to a progressive unification of systems of the identifications.
7. - The Congress believes it useful to conclude a unilateral number of states to define the above-mentioned methods of international exchange.

## **III. Is it desirable that the judges should be able to retain and punish a deed which is not expressly within the scope of existing legal provisions? “Nullum delictum sine lege”.**

1. - The principle of legality in judicial proceedings, a necessary guarantee of individual right, has as a consequence the exclusion of the analogous method, in the interpretation of penal law.
2. - It is desirable that the dispositions of the penal law which define offences be conceived in terms general enough to facilitate the adaptation of the jurisprudence to social needs.
3. - The exclusion of the analogous method concerns only the texts which include the recriminations, which determine the penalties or which provide for causes of aggravation.
4. - The principle of legality which forbids the analogous method relates to the security measures as well as to penalties.

#### **IV. - What guarantees should be given to the accused in the course of preliminary inquiries?**

To reply to the demands of a good justice, guaranteeing in fair measure the interests of social defense and individual liberty, the contradiction between the accusation and the defense must be assured as much before the examining magistrate as before the tribunals called upon to make decisions on the results of the examination.

This must be organized by each state in the frame of its national law.

It is desirable, however, that the accused should always be attended by his counsel when before the examining magistrate and that the counsel should receive with the shortest possible delay information on the action of the examination.

It is desirable also that the counsel may intervene (in a measure by which the examination cannot be impeded) in the investigations, examination of causes and surveys, and in every action not liable to be renewed before the judge.

It is desirable also that preventive detention should be ordered only in cases exactly determined by the law, and that all decisions affecting the liberty of the accused be liable to submission to a juridical control.

#### **V. - What should be the part of the justice in the execution of penalties and of measures of security?**

1. - The principle of legality which must be at the base of penal law as it is at the base of criminal law in general, in the same way as the guarantees of individual liberty, demand the intervention of the judicial authority in the execution of penalties and measures of security. The penal administration charged with this execution must be autonomous and independent.

2. - The intervention of the judiciary must include a mission of supervision and a certain power of decision.

3. - This supervision will be regulated by the national law; it may include the control of the exact application of the laws and rules in prisons, especially in view of the realization of the ends assigned to the penalties and measures of security in their application to each convict or prisoner. It may be exercised either by a commission of supervision established in each penitentiary and including magistrates and qualified persons interested in penitential questions and in the patronage of free men, or by a judge delegated for this purpose, with a permanent standing. The members of this commission should be chosen by the judicial authority; it should

be presided over by a magistrate, the highest in rank who belongs to it. It should exercise its control by a periodic and obligatory visit of its members; it should note the declarations made in reports addressed to the judicial authority which should transmit them to the superior penitential authority.

4. - The judicial authority should have the power to terminate penalties or to make essential changes in their execution. To it should equally belong the power of ruling the suspension, adjournment, the modification or substitution of measures of security, as well as the prolongation of imprisonment or the setting free of persons sentenced to an indeterminate sentence. The decision must be taken either by the judge selected by each national legislation, who, as far as possible, will be the same judge who pronounced the sentence, or by a mixed commission including a presiding judge and two or several persons chosen from among doctors, advocates or members of the societies of patronage. The members of this commission must be chosen by the judicial authority and nominated, in preference, from among members at the commissions of supervision. The law must indicate in a limited way the measures which should be ordered by the judge or by the mixed commission. It should determine the juridical guarantees which must accompany the decision and which it may vary with the gravity of the decision to be taken.

The law must foresee also cases in which the decision will be liable to appeal, and organize this appeal either before a superior judge, or before a central commission created according to the same fundamental principle as the local commissions.

5. - It is desirable that the magistrates be associated with the work of patronage of the social readaptation of the condemned or the prisoners after their liberation. In the countries where there exist official committees of patronage, it should be obligatory for certain number of magistrates to take part in them.

## **FIFTH INTERNATIONAL CONGRESS OF PENAL LAW (Geneva, 28-31 July 1947)<sup>5</sup>**

*Topics:*

1. How can a state, by its national law, contribute to the peace of another state?
2. Principle of opportunity and principle of legality in matter of penal proceedings

### **I. How can a state, by its national law, contribute to the peace of another state?**

A resolution might have been adopted although only by the majority of votes and though certain delegations, like the Belgian delegation, refrained from voting. This resolution is drawn up as follows:

The fifth international Congress of Penal Law expresses the desire that, in each state the repression of attacks on the safety of other states be efficaciously assured; that the equality of penal protection of the national and foreign currencies be assured; that the repression of war crimes be assured by extradition, with all guarantees resulting from the intervention of the judicial authorities, or that these crimes be judged on the territory of the proper state; that penal protection of the peace results as the national law, from thorough repression of the acts of propaganda for war of aggression and acts destined to favor the activity of the state declared aggressor by the competent international authority; that it results also from the institution of a permanent international jurisdiction, called to rule on positive and negative conflicts of competence, and to know especially of crimes against the peace, crimes of war, and crimes of treason against humanity.

### **II. - Principle of opportunity and principle of legality in matter of penal proceedings.**

Considering that the special reports and the general report as well as the discussions have stressed the special difficulty and, simultaneously the great interest of the question whether all offences *must* be prosecuted according to law or prosecution should only take place where it

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<sup>5</sup> RIDP, vol. 19 3-4, 1948, pp. 409-410 (French); p.424-425 (English). See also RIDP vol.19 3-4, 1948, pp.424-425.

seems necessary and desirable for public interest question which figures as second item on the programme.

Considering furthermore that in consequence of the aforesaid difficulty and interest, the motion has been passed, as a conclusion of the first debates, to form a special committee for the further study and reconsideration of the question.

*The Vth International Congress of Criminal Law*

requires the Board of Directors of the International Penal Law Association.

1) to form a special Committee for

a) the further collecting of useful information concerning legal systems adopted by the different countries.

b) the examination of this problem in connection with offences of which presents an international interest.

2) to submit the problem once more, as a leading question to the consideration of one of the next Conferences of the Association.

## **SIXTH INTERNATIONAL CONGRESS OF PENAL LAW (Rome, 27 September – 3 October 1953)<sup>6</sup>**

*Topics:*

1. Criminal protection of international conventions on humanitarian law.
2. Protection of personal freedoms during criminal proceedings.
3. Social-economic penal law.
4. Problem of unification of criminal punishment and criminal measures.

### **I Section: Criminal protection of international conventions on humanitarian law**

*The VI<sup>th</sup> Congress of International Penal law:*

1) Taking into account that the States who adhered to the Geneva Conventions of 12 August 1949 are obliged to promulgate appropriate measures in order to provide for the punishment of serious violations of the said Conventions;

Having regard to the fact that in the majority of the State Parties the respective measures in force are insufficient to achieve the above aim.

2) The Congress is of the opinion that national implementation legislation should be inspired by common principles and for this reason the State Parties who adhered to the Geneva Conventions of 12 August 1949 should propose a draft law envisaging possibly uniform criminal sanctions.

3) The above mentioned draft law should by all means establish definitions of serious violations of the said Conventions and indicate the degree of the seriousness of the violation. The draft law ought to apply to all offenders regardless of their nationality.

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<sup>6</sup> Association Internationale de Droit Pénal, *VI<sup>e</sup> Congrès International tenu à Rome du 27 septembre au 3 octobre 1953 sous les auspices du Gouvernement de la République Italienne. Comptes rendus des discussions*, Milano, Giuffrè, 1957, pp. 58 (sect. I), 179-182 (sect II), 218-220 (sect III), 309-310 (sect IV). Translation in English: K.Ligeti.

## **II Section: Protection of personal freedoms during criminal proceedings**

### *The VI<sup>th</sup> Congress of International Penal law:*

Having regard to the fact that within the rules of criminal procedure and their application a balance should be established between the interests of criminal prosecution and adjudication to fight crime for the benefit of the public and the right of personal freedom and human dignity of the offender, being regarded innocent unless proven guilty in a fair trial ;

Having regard also to the fact that criminal proceedings should be conducted in a way that both the material facts of the case are established and the personality of the offender are identified;

Taken into account both the written reports, the general report, the discussions and the proposals presented during the work of the second section;

Concerning the proposal of the Drafting Committee the following essential conclusions were adopted which adequately reconcile the interest of the justice system and the citizen subjected to criminal proceedings,

The issues submitted to the Congress concern the regulation and the functioning of:

- 1) the police,
- 2) the investigation,
- 3) the pre-trial detention being in line with the common principles of civilized nations and the rights of the accused as defined in the Universal Declaration of Human Rights.

### **I.**

#### *Concerning point 1 the Congress adopts the following principles:*

1) Police actions are indispensable to investigate the offence, to reveal its way of commission and secure material evidence.

The police must collect all facts connected to the offence.

These police actions must by all means be subjected to judicial scrutiny.

The police records must be submitted to a competent judge without delay.

2) The criminal police must conduct investigations according to the instructions and under the authority of the investigating judge.

Consequently, each State must appoint sufficient number of investigating judges enabling them to accomplish their judicial tasks.

- 3) Any crime scene investigation falls within the competence of the judiciary and not of the police, the latter being limited to conduct only preliminary investigative functions.
- 4) The police should be kept free of all extrajudicial influence.
- 5) Reminding the fact that everybody who is involved in criminal investigations regardless in whichever capacity, he/she is required to respect the rules of professional secret.
- 6) The recruitment and the formation of the police should provide during preliminary investigation for the highest level of guarantee for human rights. The recruitment of the police should be done with a high degree of precaution; the units of the criminal police should be seconded by personnel sufficient to carry out its functions properly.

The Congress is convinced that the abuse of authority by high ranking police officers should be prevented save for the exercise of disciplinary or penal measures.

## II.

*Concerning point 2 the Congress adopts the following:*

7) In the course of arrest and pre-trial detention ordered by the judge and during the first questioning relating to the identification of the accused, he/she must be warned by a judge prior to any declaration that he/she benefits from the right to refuse to answer unless a defense counsel is present. The accused being questioned at the crime scene also benefits from the right to be assisted by a defense counsel.

If an accused not having sufficient financial means asks for a defense counsel he/she should be provided accordingly.

8) Rules of procedure shall be regulated in a way to provide for the right of the accused and his/her defense counsel to submit proposals and to make reservation during each time the accused is questioned. The exercise of this right is of particular interest with a view to questions relating to the expert opinion and to the person of the accused.

Criminal investigation represents only the preparatory stage of the criminal process and the accused is entitled to the right of free defense in front of the tribunal.

9) Each State with a view to its system of criminal procedure should organize and conduct criminal investigation in a manner that provides for the widest application of the contradictory principle.

10) The accused may not be forced to respond to questions. The accused may change his/her attitude due to his/her interests and conveniences without prejudice to the right of defense.

11) No violation or pressure or disguised proceedings may be utilized in order to influence the accused's confession. Obtaining confession is not the goal of the investigation, confession is only one type of evidence;

Confession may be withdrawn at all stages of the procedure and the trial judge evaluates it in full independence with a view to all facts and other evidences of the case.

### III.

*Concerning point 3 the Congress recommends the following:*

12) The issue of pre-trial detention is of ultimate importance: the accused should be taken for innocent unless proven guilty by definitive judgment. Pre-trial detention should remain an exception and the detainee enjoys the right to be brought to a judge without delay.

13) Nobody may be taken into custody without legal warrant issued and reasoned by a competent judicial authority.

Pre-trial detention may be ordered only in cases and under conditions stipulated in the law. Pre-trial detention may not be prolonged if the legal reasons justifying it no longer prevail.

Arrest may be ordered by the police only exceptionally if prescribed by the law and the arrested person should immediately be brought to a judicial authority.

14) It is important that the pre-trial detainee has the right to appeal and the right – at all stages of the procedure - to make a proposal to be freed.

15) It is highly desirable that the legal regime on pre-trial detention should not be unnecessarily rigorous and that pre-trial detention –if possible– should be enforced in separate institutes of detention.

The pre-trial detainee should be transferred in a most considerate and rapid way.

16) The judge should not be personally liable save for exceptional and limited cases or if national law provides for such special terms and forms of liability.

17) In cases of manifest error, the accused who suffered from unjustified pre-trial detention should be provided indemnification by the state, if the circumstance of the pre-trial detention were of wrongful character.

18) Proposals of participants of the section which were not considered by the above resolution are attached to the Congress proceedings.

## **III Section: Social economic penal law**

*The VI<sup>th</sup> Congress of International Penal law:*

Having regards to the fact that the regulation of today's economic activities follow not only the system and epoch of the state and of its organs but also the groups of professionals, those regulations aim at a better and more just distribution of goods;

The Congress is of the opinion that on the one hand the legislators should do all reasonable endeavors to recognize the different systems and on the other hand international cooperation necessary in the field of economy should meet the requirements of complete and rapid comprehension of economic systems;

The Congress arrives at the following conclusions:

1 - a) The sanctioning provision of social economic law equal to the so called social economic criminal law and form part of the special part of criminal law similarly to fiscal penal law with particular characteristics.

b) Issues not foreseen by the law should be resolved by the application of the general principles of criminal law and of criminal procedural law with regard to the particularities of the subject matter.

2) The rigorous safeguards of the regulation are threatened by tempting lucrative operations which are forbidden due to their consequences; therefore, thoroughly efforts in the field of prevention should be required.

Those who belong to affected groups should be able to go on carrying out their profession and should be educated which is the best way to guide such activities in a good manner.

3 - a) The frequent amendments of the codes of conduct contained in regulation which protect the economic interests of the public need most precise edition and an efficient distribution even outside official publicity. These amendments impose extreme difficulties on the affected parties, therefore, retro-effective application of such norms should be precluded.

b) The fight against such crimes demands a certain extension of the notion of perpetrator and of accomplices and also the power to apply criminal sanctions against legal entities.

4 - a) Regarding adequate reaction to crime, besides and instead of imprisonment and financial penalties in order to avoid criminal proceedings out of court settlements should be preferred in the framework of which judicial prohibition to exercise certain professions, the publication of the judgment and special confiscation may be applied. Such special confiscation should extend to all goods to which the offence aimed at regardless whether they belong to the perpetrator but with due respect to the rights of third parties.

b) The application of securing measures in order to retain illegally gained profit, provided that is does not serve as a basis for the indemnification of the victim, should be appropriate and should contribute to hinder further carrying out of the offence.

c) The severity of the reaction serves to assure that imposing only one sanction makes the sentenced person to do what he/she failed to do until then or to stop the illegal activity he/she engaged in until then and that he/she fulfils the obligation foreseen as compensation. His/her

entrepreneurship should be sanctioned by, *inter alia*, the deprivation of illegal advantages gained with restraint to market competitors, the prohibition to access the market, the closure of the legal person for a definite period of time, or the appointment of judicial supervision for the legal person's assets, as well as by provisional measures or by deprivation of certain rights or entitlements, the withdrawals of certain permits and the prohibition of related advantages.

5 - a) Ordinary criminal jurisdiction should be established for such offences and for imposing social-economic sanctions by specialized magistrates.

b) The investigation of such offences is rich in detail of less importance making, *inter alia*, necessary the establishment of specialized investigation units with special skills and competences. For the purposes of criminal prosecution for social-economic offences the rules of criminal procedure should be taken more flexible.

c) The collaboration of the victim ought to be solicited by encouraging, if possible, his/her compensation and by facilitating collective action by the affected professional associations. The civil judge may contribute to prevent recidivism by pronouncing that certain precisely defined activities of the offender are inadmissible.

6 – Provided that market mechanism allow for and with a view to the nature of the interest at stake self-regulation initiative taken by a certain group of individuals may be permitted. The guarantees of such self-regulation remain in the disciplinary jurisdiction of that group.

7 – In the special case when administrative authorities are entitled to impose certain sanctions for certain offences the separation of powers of the executive and judiciary must be respected and such sanctioning should be made subject to appeal before independent judicial body.

8 – Within the framework of a coherent social-economic policy of the state, the administrative bodies and the public prosecutor should be unified in a coordinative organism and should follow the same line of common conduct.

Liaison officers have the duty to maintain contacts among the diverse authorities and should take care of information indispensable for the judge.

#### **IV Section: Problem of unification of criminal punishment and criminal measures**

##### *The VI<sup>th</sup> Congress of International Penal law:*

In view that the introduction of security measures besides punishments into criminal law constituted a progress which allowed for overcoming the debate between different criminal law schools and for achieving more efficient results in reducing criminality and preventing recidivism;

Considering that the legal system followed by certain legislations apply to the same behavior and to the same individuals successive punishment as well as security measures pose some inconveniences both from a theoretical and practical point of view.

Considering on the other hand that the unification of criminal punishment and security measures does not raise questions except for a particular category of offenders who need special treatment, such problem could, consequently, remain within the general theoretical debate on the nature of punishment, and in particular concerning normal offenders it allows for concrete solutions that encompass both who share the above opinion and those who follow a different opinion;

In favor of the offender for whose re-education physical punishment may prove inappropriate and insufficient, the future reform of criminal legislation should be as much inspired as possible by the principle according to which instead of cumulating punishment and a distinctive security measure and subjecting the offender to different successive treatments, one single treatment should be prescribed from the very beginning which extends to different categories of individuals.

The following issues should be approved in particular:

- a) For offender younger than 16 years of age, the application of all forms of physical punishment must be excluded;
- b) For offenders with limited mental capacity it is suggested not to impose criminal punishment. Should such an approach not be acceptable for the national legislations, such offenders should be subjected exclusively to treatments taking into account their physical state.

**SEVENTH INTERNATIONAL CONGRESS OF PENAL LAW  
(Athens, 26 September – 2 October 1957)<sup>7</sup>**

*Topics:*

1. The modern orientation of the notions of committing the crime and participation (complicity).
2. The control of judicial appreciation in the determination of punishments.
3. The legal, administrative and social consequences of condemning.
4. The offences committed onboard of aeronautical vehicles and their consequences.

**I. Section: The modern orientation of the notions of committing the crime  
and participation (complicity)**

*The Congress:*

*A. Establishes*

- 1<sup>o</sup>. The concepts referring to the participation vary according to the doctrinal inclination in connection with the fundamentals of criminal law;
- 2<sup>o</sup>. Nevertheless consent is possible in regard of certain number of directives considered as acceptable for the majority of penalists.

*B. – Estimates that in regard of intentional offences:*

- 1<sup>o</sup>. The regime of criminal complicity, inherent to each judicial system, shall take into account the differences deriving on the one hand from the act of participation of each individual in a common action, while on the other hand from the personal culpability and the personality as such;
- 2<sup>o</sup>. The participants cannot be held responsible and cannot be sanctioned, unless they have been aware of that one of the participants or different co-operating participants have performed an action qualifying as an offence or as an aggravated form thereof;
- 3<sup>o</sup>. The strictly personal circumstances which eliminate, diminish or aggravate the responsibility or the sanction shall not influence but the very participant in regard of whom such circumstances exist;
- 4<sup>o</sup>. Taking into consideration the effective differences between the perpetrator and the diverse participants following categories shall be accepted:

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<sup>7</sup> RIDP, vol.29, 1958 –12, pp. 228-229; 234; 236; 238; 241-242. Translation in English: K.Ligeti.

The person who by his action carries out the material and subjective elements of the offence shall be deemed as perpetrator. In case of offences committed by omission the person in regard of whom the obligation to act exists shall be deemed as perpetrator;

Co-perpetrators are those who carry out together the actions, with a common intention of committing the infraction;

Who mediates a person not to be held criminally responsible to commit an offence shall be deemed as the mediating perpetrator;

Instigator is the person who intentionally instigates the perpetrator to commit an offence. The commencing of the perpetration by the instigated perpetrator is necessary so as the instigator be punishable. Yet under each judicial system instigation not resulting in actual perpetration may be object of a sanction based on the dangerous character of the instigated offence;

Accomplice in a strict sense is the person, who intentionally assists the principal perpetrator to commit the offence. This assistance may be delivered previously, simultaneously, or in case preliminarily mutually consented, following the offence.

5°. Complicity following the perpetration of the offence and not being accorded previously, as the receiving of stolen goods shall be punished as special crime;

6°. The sanctions applicable to the participant can be provided for in the law with reference to committed or attempted offence but must be judicially determined so as to take into account the role and the personality of each of the perpetrators.

*C. – Reveals that*

In the domain of faultive offences, according to a first opinion, the responsibility must be established individually and the criminal participation can not be conceived, while according to another opinion certain forms of the faultive offences allow the application of the rules of participation.

*D. – Establishes:*

1°. Legal entities cannot be held responsible for offences unless provided for in the judicial systems. In such cases the ordinary sanction shall be financial penalty independently from security measures like judicial winding up, suspension of actions or appointment of a commissioner;

2°. According to a first opinion the rules of the participation do not apply to legal entities however according to a contrary opinion it is up to each juridical system to regulate this problem;

3°. Members responsible for the direction of legal entities can be punished for offences they committed personally.

## **II. Section: The control of judicial appreciation in the determination of punishments.**

*The second section concluded its work with the following resolutions:*

Considering that the legality of the incriminations constitute an essential guarantee of individual liberty, and that the principle of legality of sanctions being just as much fundamental does not prevent the judge to have a great power of appreciation necessary to realize the modern criminal policy of individualization.

*Establishes that:*

- 1º. The power of judicial appreciation may not be considered as an arbitrary power and it has to be exercised in a legal form, in conformity with the general principles of the law;
- 2º. To exercise correctly, the penal judge must receive specialized education, and appropriate criminological studies;
- 3º. It is necessary, at least in respect of certain categories of perpetrators, to be entitled to make use of the results of an examination of the personality, initiated by the judge and concluded by an expert appointed by him being different from the one appointed by the prosecution;
- 4º. This examination of the personality must, as all the elements required for the determination of the sanction, be the object of contradictory debates, while the judge keeps his entire liberty of appreciation;
- 5º. When exercising his power of appreciation, the judge shall conveniently be guided by precise legal directions, which can be used in particular matters;
- 6º. The judicial decision, flowing from a full contradictory debate and being based on a legal procedure which allows a thorough examination, must always be precisely reasoned and must be announced publicly after the public debates whenever provided for in the rules of penal procedure;
- 7º. Every determination or every essential amendment of the judicial decision shall be made object of judicial recourse either in the form of appeal, cassation or if necessary revision, as provided for in the general conditions of each national legislation.

## **III Section: The legal, administrative and social consequences of condemning**

*The section finally recommends the General Assembly to adopt the following resolutions:*

The extension and the complexity of the problem submitted to the third section do not allow it present conclusion in respect of the questions desiring discussions of merits. The section cannot state but the result of its work and express its wish that such works are going to be continued in the future.

The section commences with revealing that laws and regulations referring to penal condemnation depriving political or civil rights or having a judicially incapacitating character follow three different trajectories.

- a) Infamy (*Ehrenstrafe*)<sup>1</sup>, whereof the most typical examples are the legal prohibitions, the deprivation of civil rights, etc;
- b) prevention of crime, incapacitating the perpetrator from becoming a recidivist, in a most general layout (prohibition of exercising a profession, of hunting, of driving certain vehicles, etc.);
- c) the safeguarding of public interest, which ceases the access of the condemned offender to certain public functions, because of his judicial past.

These incapacitations or deprivations are often provided for in the law in an obligatory form, disregarding the particular circumstances. They are pronounced automatically either by the law or by an authority which might not be judicial.

*Taking into account these facts, the section establishes that:*

1<sup>o</sup>. The effort of criminal policy, which is engaged today in the social reintegration of the condemned offenders, is faced with the existence of these incapacitations and deprivations that the judge often ignores when determining the sentence. The reconsideration of the judicial consequences of a penal condemnation is unavoidably absent from present reform of the penitentiary system.

2<sup>o</sup>. Even if it is impossible to enter into the details of each national legislation, it shall be affirmed that all the legal consequences of a condemnation driven by the sole and unique goal of infamy have to be abolished, as well as legal prohibitions if not justified by the interest of either the condemned or the one to whom such prohibitions refers. Only those incapacitations can be sustained which justify the necessity to prevent the recidivist from perpetrating another crime in case such incapacitations are limited to the minimum;

3<sup>o</sup>. The danger of recidivism cannot be presumed by the law. As a consequence the deprivations and incapacitations must not be arranged for but in a decision taking the perpetrator's personality into consideration;

4<sup>o</sup>. For the purposes of the re-education of the condemned, measures shall be conveniently searched for in order to avoid that the administrative authority, with its decisions, does not take into account the program of social reintegration.

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<sup>1</sup> *Sic* in the original French text.

5°. Though because of the lack of time it is not possible to go into details of the problem of criminal records there is a unanimous consent as to the necessity of taking measures for appropriate procedures to put an end to all incapacitations and deprivations which do not justify the behavior of the condemned. Not only such procedures have to be adopted to solicit the rehabilitation of the condemned by a simple, rapid and discreet procedure taking also into consideration his financial possibilities, but the law must provide for a full rehabilitation of rights, if there has been no relapse during a certain time.

6°. The secondary effects of penal condemnation, independent from the actual punishment and modifications thereof, could be provided for in a separate code on enforcement of criminal sanctions.

7°. A penal condemnation shall not be an automatic cause of ceasing neither a civil contract, nor a labor contract.

8°. The right to work is an essential individual right and therefore shall not suffer any detriment caused by any penal condemnation of whatsoever kind.

9°. A duly authorized parole service in charge of post penal assistance and social re-adaptation (patronage) is the indispensable condition of the necessary revalorization of the condemned;

10°. With respect to the principle of publicity of court hearings, the section deems necessary to provide for the harmonization of the actual criminal and penitentiary policies. With a view to the difficulty of this problem the section suggests to sacrifice the subsequent congress to the latter. Further the section recommends to pay more attention to the human personality.

#### **IV Section: The offences committed onboard of aeronautical vehicles and their consequences**

##### *I. - The Congress esteems:*

1°. That an international convention should desirably be concluded in regard of the regulation of the different questions of offences committed on board of aeronautical vehicles would be desirable;

2°. That such a convention shall not apply to vehicles other than aeronautical ones;

3°. That the power of the commander of an aeronautical vehicle involves the authority to take the necessary measures comprising the right and obligation to establish the commission of an offence;

4°. That the police authorities of the state of the airport must proceed according to the measures taken by the commander of the aeronautical vehicle, also in case when the state of

the airport does not vindicate penal jurisdiction.

*II. The Congress establishes*

that none of the rules of international law contradicts to the admission of competence based on the nationality of the aeronautical vehicle by national legislation. This principle does not exclude the admission of other different principles of penal jurisdiction by national penal law:

*III. Considering that the opinions of the members of the section were different:*

1<sup>o</sup>. As to the necessity of concluding an international convention regulating the problems of criminal jurisdiction of the different states in regard of offences committed on board of aeronautical vehicles;

2<sup>o</sup>. As to question whether principle of territorial competence or that of nationality of the aeronautical vehicle should be preferred;

3<sup>o</sup>. As to the question whether the competence based on the principle of the nationality of the aeronautical vehicle shall extend to aeronautical vehicles resting on the ground or such competence shall be limited to aeronautical vehicles being in the sky;

4<sup>o</sup>. As to the question whether to confer a particular jurisdiction to the state where the first landing took place in regard of the petty offences to be defined;

*The Congress expresses its will,*

that ongoing studies keep on developing knowledge concerning the abovementioned questions with a view to arranging for the necessary elements to form an extended scientific basis for such studies.

*IV. The Congress also expresses its will,*

that the principle of universal penal jurisdiction shall be applied to offences most grievously endangering aero-navigation.

*V. The Congress*

Considering the significant importance of regulating problems of offences committed on board of, by means of or against aeronautical vehicles:

Recommends to the I.C.A.O. to give priority to drawing up a convention of said character and charges the secretary general of the Congress to hand over the collected documentation, the minutes, the reports, etc. to the I.C.A.O. as soon as possible.

*Professor BOUZAT proposes (recommends) the following:*

States desirably should take all reasonable endeavors to institute an international regulatory forum with competence to resolve on conflicts of penal jurisdiction.

## **EIGHTH INTERNATIONAL CONGRESS OF PENAL LAW (Lisbon, 21 – 27 September 1961)<sup>8</sup>**

*Topics:*

1. The problems posed by modern penal law via the development of non-intentional offences.
2. Methods and technical process employed in penal sentencing.
3. The problems caused by the publicity of criminal files and criminal procedures.
4. The application of foreign penal law by the national judge.

### **I Section: The problems posed by modern penal law via the development of non-intentional offences**

*The VIII<sup>th</sup> Congress of International Penal law:*

By interpreting the view expressed in the national reports and in the work of the section, the drafting committee did not find it impossible to establish a formula concerning the fundamental problem. Nevertheless, the Drafting Committee suggested to have as a point of departure for the scientific and practical evaluation of the problem a description of the real difficulties because such a formula tends to veil these difficulties.

These difficulties are as follows:

It is a generally accepted principle that incrimination presupposes reproach. Reproach is always understood as a material reproach, however, for the majority this material reproach is a moral one while for a minority it is rather a social one.

Concerning « non-intentional offences» and more specifically the cases of «negligence»<sup>2</sup> there is debate if such reproach can be made at all. Some scholars affirm the opinion according to which there is such reproach like in the German Penal Code. Others who deny the existence of such reproach are to be divided into two groups. One of these groups is of the opinion that such negligence<sup>3</sup> should not be assed within criminal law which is the case in principle in Anglo-American law. The other group accepts the incrimination of even negligence<sup>4</sup> indispensable and is of the opinion that punishable facts behave as elements of acts in a purely objective sense based on e.g. the disrespect of a legal provision.

Though there are further questions with exception of question no. 4, we are entirely bound to

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<sup>8</sup> RIDP vol. 23 2, 1962 2, pp.362-363; 366-368; 369-373; 378-380. Translation in English: K.Ligeti.

<sup>2</sup> « *Faute inconsciente* » in the original French text.

<sup>3</sup> « *Faute inconsciente* » in the original French text.

<sup>4</sup> « *Faute inconsciente* » in the original French text.

the principle question. This is why the section decided to employ the same approach in respect of these questions as in respect of the first one.

As far as question no. 4 is concerned, in cases where punishment entailing the deprivation of liberty are pronounced it is desirable to maintain a specialized correction regime designated to host persons condemned for a non-intentional offence and imprisoned for the first time.

The Section is of the view that the discussions of the Congress provoked substantial progress in the evaluation of the problem enabling an exact description of the real difficulties which is the pre-condition to find efficiently a solution.

## **II Section: Methods and technical processes employed in penal sentencing**

### *The VIII<sup>th</sup> Congress of International Penal law:*

I. - Within the legal provisions on the formal requirements of the penal sentence the law should stipulate general principles designated to guide the judge in elaborating the decision.

The penal sentence should be reasoned revealing the precise manner and the exact reasons of the decision.

The reasoning should reveal the deliberations of the judge and should respond to all evoked facts. The reasoning should avoid stereotype or ambiguous formulations with the exception when such formulations are indispensable, and should also avoid strictly legal formulations incomprehensible for the sentenced person; the interests should be explained as properly as possible by the judge in the judgment.

II. – Modern individualization places great margin of appreciation on the judge with a view both to the different elements of the process, the examination of evidences and guilt, and also the determination of the sanction. Nonetheless this great power should be exercised with due regard to the procedural legal framework designated to prevent arbitrary adjudication.

Though it is not desirable to return to a system of taxed evidence (\*) the production and admissibility of evidences should be exactly regulated by the law; it is forbidden to have recourse to any investigation in violation of either the rights of the defense or personal integrity and human dignity. With a view to the above imperatives it is also required that the rules on expert witness are revised with a particular view to their functions and to modern technologies as well as the role of the technician, the judge and the attorney.

In determining the appropriate sanction for the accused the judge should - in order to usefully exercise his sovereign power of appreciation -:

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\* "*Preuves légales*" in the original French text.

- dispose, in most cases, of a scale of individualized sanctions which he may apply based on a clear choice;
- find even in criminal law precise and clear directives susceptible to adopt in the particular case to be adjudicated;
- be entitled if made necessary by the special circumstances of the case, the particularities of the accused or the choice of the sanction to initiate the examination of the personality of the accused.

Such examination of the personality should be based - in most of the cases - on criminal law provisions, the judicial authorities should be entitled to dispose of the necessary tools in order to provide for the assessment of the person, the law should stipulate in advance the object of such assessment and the condition how to conduct such an assessment as well as the guarantees to prevent any breach of individual rights and any humiliation of the person concerned.

It is desirable that in the course of the criminal process the judge is empowered to decide on – if necessary in two separate decisions - the substantial facts, the responsibility of the accused and the sanction.

The judges have to clearly take full responsibility deriving from their social mission within an individualized criminal justice system. At the same time all reasonable efforts should be made in developing forensic techniques which contribute to solving debates on the elaboration of the sentence.

III. – The scientific methods of investigation should be promoted by the practical application of forensic techniques envisaged by the different penal jurisdiction within the same country and by the different criminal systems presently in force. The latter should reveal rational methods of elaborating the penal sentence and should give free way to forensic psychology.

The scientific training of penal judges should encompass all necessary knowledge of humanities to enable them to efficiently apply their power of individualization with the assistance of experts. The professional training should be promoted by all reasonable efforts comprising also practical experience.

Special attention has to be paid to the recruitment of criminal judges with a view to fundamental qualities indispensable for exercising the judicial profession; the spirit of human and social justice of modern criminal law should be promoted.

The essential dignity of criminal judges and of judicial functions should be promoted in the eyes of both the public, the legislator and even the magistrates themselves throughout the different jurisdictions; the procedural and organizational rules of the judiciary should in the given cases be modified in order to provide for at least of a certain specification of criminal judges based on the specific function of the judge.

### **III Section: The problems posed by the publicity of criminal files and proceedings**

#### *The VIII<sup>th</sup> Congress of International Penal law:*

##### *I. - Considers:*

the information of criminal facts and of the administration of the criminal justice system guarantees the public control of the latter within the limits imposed by the need of maintaining public order and safeguarding public morals, the respect for human persons, the safeguard of the dignity of justice and the utilization of such information for the sake of a humane criminal policy.

##### *II. - State:*

despite examples of fruitful collaboration between magistrates and the media, the misunderstanding of the needs are the source of numerous abuses; remedies to these abuses are to be provided by the adaptation of the legislation, the institutions and the morals.

##### *III. - Assumes:*

For the above reasons the following regulations should be applied:

1) The statement of facts should essentially be justified by thoroughly affirming the disrespected social values and in the will to level public opinion against threats deriving from the acts of certain social groups and individuals directed against the community. The represented of the media fearing that his report may qualify as an offence in particular in respect of influenceable personalities consequently:

- a) should refrain from making a false statement or delivering altered criminal facts;
- b) should abstain from providing a sensational character to the statement of facts, a proportional place should be reserved for the statement of facts with respect to all other information and neither the form in which they are presented, nor the way they are illustrated in writing or by photographs should be excessive or complacent;
- c) should refrain from depicting on the one hand violent scenes, cruelty or perversion in a way that entails the risk of being imitated, on the other hand the crime scene investigators' statement being also susceptible of imitation for possible criminals;
- d) should refuse to either idolize the crime or to paint a romantic or novelist image of the offender or the criminal milieu.

2) Except for the provisions on procedural secrets the media has the right to comment on or to criticize the result of the police investigation and the judicial proceedings, but the media should refrain from intervening with the administration of criminal justice and with the privacy of the person and his family.

*Consequently:*

- the media tries to follow on the police and the judicial investigation concerning the facts and perpetrators of the offence which may pose troubles and should, therefore, be prohibited or restricted;

- the media should do all reasonable efforts to avoid to reveal the identity of the suspect or the sentenced person or of the victim;

\* the principle of the presumption of innocence should at all stages of the criminal case scrupulously respected and no speculations susceptible to violate the dignity, the intimacy, and the privacy of the accused , his right to free defense and right to integrity of his family are allowed;

\* the media should remain unbiased regarding all persons of the criminal process;

\* the media should refrain from any commentary which may lead the witness or influence his testimony or result in changing the opinion having repercussion for the opinion of judges;

- the magistrates in charge of the prosecution may have recourse to media to disseminate announcements facilitating the detection of offenders, to calm the public, to protect the public from certain forms of criminality and from false alarm;

- the above principles applying to investigation must be interpreted strictly in order to guarantee the greatest freedom to the media.

3) The reportage of the trial audience should independently from the previous rules comply with the following:

- to adapt the freedom of information during the publicity of the debate to the needs of public order and to the evolution of penal justice in order to avoid bias to the accused;

- to prohibit the application of recording and disseminating equipment at judicial premises such as television, cinema cameras, photographic equipment and in general all sorts of information technology tools which may interfere with the dignity of justice or which influence the conduct of the accused, the witness and eventually the magistrates or the members of the jury;

- to avoid by all possible means to reveal the identity of the accused in the reportage and in judicial chronicles and simultaneously to enable the judiciary to order the publication of the sentence preserving the anonymity of the sentenced person;

- to pay attention that judicial chronicles and reportages do not hinder the offender's social reintegration, moreover do not reveal any results of the offender's psycho-medical or social examination which remains necessarily in secret so as to enable the justice system to attain the goals of penal sanctioning assigned by criminal policy.

4) The media has the double obligation to objectively expose on the one hand the goals of criminal process and the actual experiences of the offender's social reintegration and on the other hand never to reveal the identity of the sentenced person or the case of early or full

release. Information concerning penitentiary institution should be fully discreet with a view to persons.

*IV. - Proclaims:*

the above principles may not be invoked in a way so as to create a direct or indirect form of censure.

*V. - Wishes:*

that in every country scientific research on the effects of reportage concerning criminal cases and criminal procedures are to be contacted by groups of researchers involving the representatives of the press.

*VI. - Declares:*

confidence towards the consciousness of the representatives of the media that they shall provide for professional control as regards publication of criminal processes and facts. In order to facilitate the exercise of such professional control on the one hand journalists shall receive sufficient juridical and criminological training and on the other hand the rules of deontology and professional discipline shall be developed

*VII.- Invites:*

The governments to take all necessary measure that enables the information on criminal cases, penal proceedings and on the identity of the sentenced person, of the imprisoned person or the released one respect the rules established in the present resolution.

#### **IV Section: The application of foreign penal law by the national judge**

The fourth Section in light of the problems encountered by the application of foreign penal law by the national judge proposes to discuss the issue from a technical point of view. It is unnecessary to say that the discussion was not in vain. It is at the same time regrettable and joyful. Joyful because the work progressed but also regrettable because it demonstrates that there is little interest of the Congress members towards jurisdiction issues in criminal law.

#### ***Resolution***

The VIII<sup>th</sup> Congress of the International Association of Penal Law acknowledges the need of closer cooperation between the states on issues of penal jurisdiction for facilitating both the effective fight against crime and the respect of the offenders' individual rights: in principle states sharing common interests should allow for the national judge to apply foreign criminal law.

***I. – The domain of the application of foreign penal law***

1. Application of foreign penal law should in principle be precluded if the punishable act was committed on the territory of the forum state.

Nonetheless, in case the seriousness of the violation depends on certain family relations between the offender and the victim or a third party, such relations shall be examined unless excluded by the public order clause as defined by the rules on international private law (see third resolution of the Bucharest Congress of 1929).

2. The public order clause does not exclude the application of foreign penal law in respect of any category of crime.

However, for practical reasons the application of foreign penal law may be excluded in respect of political offences.

Other categories of offences, such as crimes against morals, may be exempted from the application of foreign penal law because of the fundamental differences between national legislation.

States should conclude conventions for the application of foreign penal provisions relating to certain categories of offences such as the draft European Convention on Traffic Offences.

3. Foreign penal law applies to punishable acts committed abroad regardless to the offender's nationality.

***II. – Modalities of the application of foreign penal law***

1. It should be provided for the application of foreign penal law in cases when the national penal law (*lex fori*) is not applicable either due to lack of incrimination or because the applicable rules exclude the application of national penal law.

2. Foreign penal law should be –for the reasons of justice- applicable even to offences committed abroad even in case the national law (*lex fori*) does not foresee any incrimination.

In such a case application of foreign penal law should be limited to offences where it is favorable to the offender.

3. The application of foreign penal law may be excluded by the public order clause of the forum state.

Therefore the term of public order shall be interpreted narrowly.

***III.- Solution for the practical difficulties deriving from the application of foreign penal law***

1. The congress having examined the practical problems deriving from the application of foreign penal law (namely those resulting from the choice of the forum, the interpretation of foreign penal law and the adaptation of the sanction) considers that these difficulties may be overcome as has been the case with regard to similar difficulties in private international law.

The case by case solution should remain in the jurisdiction of the national legislator.

2. Considering the practical difficulties of the national judge to be informed on the actual state of the foreign penal legislation, the Congress expresses its wish that international organizations encourage and facilitate the activity of national scientific institutions active in the field of comparative law.

3. If the application of foreign penal law provokes a conflict of competence, the Congress expresses its wish to authorize an international penal tribunal – frequently proclaimed by the AIDP - to resolve such conflicts.

## IX<sup>TH</sup> INTERNATIONAL CONGRESS OF PENAL LAW (The Hague, 23 – 30 August 1964)<sup>9</sup>

*Topics:*

- 1.- Aggravating circumstances, other than concurrent offences and recidivism.
- 2.- Offences against the family and sexual morality.
- 3.- The role of the prosecuting organs in criminal proceedings.
- 4.- International effects of penal judgments.

### **Section I: Aggravating circumstances, other than concurrent offences and recidivism.**

*Considering:*

That there exists a very wide variety of legislative techniques for the purpose of emphasizing the special gravity of an offence and of punishing it adequately;

That it is desirable for such techniques to safeguard the rights of the accused by observing the principle of legality and individualization of punishment, while being capable of adaptation to each particular case;

That, although it is sometimes very difficult to realize both these aims in full at the same time, one should seek to strike an equilibrium between the two;

That the legislations of the various countries present various systems for achieving this result, either through a choice between the minimum and maximum limits of a penalty provided by the law or by applying a penalty in excess of the normally provided maximum.

Notwithstanding this variety in legislation, whenever a system of aggravating circumstances is provided for, it appears desirable to the Congress:

1. That insofar as possible and with due regard to the requirements of criminal policy imposed by tradition and the particular nature of the various national legal systems, aggravating circumstances be dealt with in the general part of the Penal Code;
2. That consideration of aggravating circumstances take place with due regard for the general rules of subjective responsibility;
3. That application of aggravating circumstances be left to the discretion of the Courts;
4. That in cases where aggravating circumstances do not allow the legal maximum to be

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<sup>9</sup> RIDP, vol.35, 164 3-4, pp. 1124-1125; 1134-1136; 1138-1139; 1141-1146 (French).

exceeded, a non-restrictive listing of aggravating circumstances be furnished to the Courts by way of example, but that the Courts may, if necessary, consider others.

Such listing should have regard to the objective aggravating elements of the offence, and to the particularities of the offender's personality and the motives for his behavior in order to ensure the better resocialisation of the defendant and protection of society;

5. That active comparative studies be undertaken concerning the criminological aspects of the aggravating circumstances considered in the various legislations so as to permit a solution to be found for the essential practical problems in this field of criminal law.

## **Section II: Offences against the family and sexual morality**

### *The Second Section of the Congress,*

considering the importance of the questions which it has been dealing with, has tried to prepare moderate conclusions concerning certain problems. But in taking this position it remains aware that this constitutes only a first juridico-penal approach to a matter in which it is the desire of the Section that in years to come criminological studies be undertaken as regards sexual offences, so that a systematical juridico-penal elaboration be possible in the future.

#### ***Resolution I.***

1. Wherever fornication is a crime, it should be eliminated from the criminal law.
2. Adultery should not be made a criminal offence.

#### ***Resolution II.***

Where incest is punishable, the crime should be limited to sexual relations between ascendants and descendents and between brothers and sisters.

The proceeding, particularly in criminal cases of incest, should include studies of the defendant and his social and familial environment.

#### ***Resolution III.***

The distribution of birth control information and means of preventing conception should only be deemed infractions of the penal law if it violates legal prohibitions against pornography or obscenity, or is contrary to the necessities of protecting youth.

#### ***Resolution IV.***

In countries which prohibit abortion it is necessary to enlarge the possibility of obtaining legal abortions. In all cases in which the law authorizes a woman to interrupt her pregnancy, such interruption of pregnancy should be carefully regulated by law.

**Resolution V.**

The criminal law should not prohibit the practice of artificial insemination except in the single case where the insemination takes place without the consent of the woman and of her husband.

**Resolution VI.**

The criminal law should prohibit homosexual behavior under the following circumstances:

- a) where force or violence is used to compel homosexual behavior;
- b) where a minor is involved in homosexual behavior by an adult;
- c) where an individual in a position of trust and confidence abuses his position and involves his ward or the person entrusted to his care in homosexual behavior;
- d) where the homosexual behavior occurs openly or in such a way as to instigate others to perversion;
- e) where it instigates homosexual procuring.

Homosexual behavior either male or female, between consenting adults which does not violate any of the aforementioned elements should not be prohibited by the criminal law.

**Resolution VII.**

The problem of non-support of wives and children is a serious social problem, which has increased with the increasing mobility of modern society.

It is recommended that an international committee of the Association Internationale de Droit Pénal, of experts in family law, criminal law and international law, be created for the purpose of making a socio-legal investigation of the problem. The existing U.N. Convention of 1958 on this topic and the work of other associations like the Société Internationale de Défense Sociale and the Société Internationale de Criminologie should be studied in future efforts directed at finding effective remedies for dealing with the non-support of wives and children, which may be adopted on a worldwide basis.

### **Section III: The role of the prosecuting organs in criminal proceedings**

1. The Public Prosecutor's task, which is to protect the social and legal order disturbed by the commission of an offence, involves a heavy social responsibility. He must discharge his duties with objectivity and impartiality and with due and constant concern for safeguarding human rights. In discharging his functions, the Public Prosecutor must keep the offender's rehabilitation in view.

2. As regards the institution of prosecutions there are two opposing systems: the system of legality and that of discretionary power ("*opportunité*"). Either is admissible in principle,

provided that the manner of application ensures good administration of justice. Certain correctives to these principles are indispensable to check arbitrariness on the one hand, and legal inflexibility and formalism on the other. Such correctives must be inspired by considerations of humanity, fairness and social usefulness.

Nevertheless it is necessary to undertake a wider study of the value of the existing correctives to both systems, and perhaps also to improve them and consider criteria capable of leading to new correctives.

3. Many countries, considering prosecution an extension of the maintenance of order, feel that it is the responsibility of the Executive, to whose authority and orders the prosecutor must therefore be subject.

In other countries, however, the law has made the prosecutor independent of such authority, and in others again, legal and social developments have permitted him to achieve a large measure of independence.

The Congress has paid close attention to the considerations in favor of a wide autonomy of the prosecutor vis-à-vis the Government. It deems, however, that such autonomy should not exclude a posteriori supervision and possible sanctions, or the power of stimulating prosecutors when the vital interests of the nation are at stake.

4. The social importance of the Public Prosecutor's role requires that special attention be given to his professional training and high moral qualities. As for his professional training, thorough knowledge of criminology is necessary, *inter alia*, which should be perfected during his career.

## **Section IV: International effects of penal judgments**

### ***I. General observations.***

1. It is desirable in principle that penal decisions rendered in one State should be able to be recognized in another State. Such recognition is not incompatible with the idea of sovereignty. Actually the excessive nationalism which keeps nations divided has, in many cases and particularly in the field of criminal law, given way to a spirit of cooperation which conforms to international solidarity. Further, the practical difficulties involved in giving effect to foreign penal judgments can be overcome as a result of the recent contributions of comparative law.

2. The nature and extent of the effects of foreign penal judgments will depend on the degree of similarity of the political, cultural, social and legal backgrounds of the States concerned. It is essential to distinguish between effects which by their nature are mainly regional, and those which are mainly international. At present recognition of the possibility of enforcing foreign judgments in general and particularly the supervision of probationers and parolees of foreign jurisdictions, can be considered only within regionally defined groups of States which operate

under similar principles of public life. On the other hand, nothing stands in the way of prompt recognition of particular effects even between States having fundamentally different basic structures.

## **II. Preconditions for recognition.**

1. a) First, recognition of a foreign penal judgment presupposes that it has the status of *res judicata*.

As a rule, judgments entered in the absence of the offender should not be recognized. Such judgments may, however, be recognized if they involve minor offences, such as traffic offences, and if the offender had an opportunity to present his defense.

b) Further, as a general rule, recognition of a foreign judgment will actually mean a double penalty for the offence in question.

c) Finally, as a general rule, there will be no recognition in cases of political or connected offences, or of military or tax offences. However, special agreements in these matters are not to be excluded.

2. The procedure in the foreign court which resulted in the judgment whose recognition is sought must conform to the fundamental principles of criminal procedure under the rule of law, as set forth in various generally recognized international declarations and agreements.

3. Recognition of a foreign judgment is subject to the national "*ordre public*". The concept of "*ordre public*" as used here means the essential interests of the State.

## **III. The various effects.**

### **A. Negative effects.**

1. a) The negative effect of the *res judicata* quality of a penal judgment rendered abroad ("*ne bis in idem*") should be recognized by all States to the largest degree possible. This should particularly be applied in cases where the interested State (i.e. the State where recognition is sought) has only subsidiary jurisdiction.

b) But even in cases where the interested State has principal jurisdiction, recognition should be foreseen. In this context this is particularly true in cases of offences against legally protected personal rights (life, liberty, honor) and offences involving special interests (currency, prohibition of the release of nuclear energy, aviation safety).

c) Certainly the penalty served for an offence in one State should at least be capable of being taken into account in determining the penalty to be imposed in another State for the same offence.

d) In spite of the *res judicata* quality of a judgment rendered in one State, and without regard to the requirements of "*ordre public*", it might in exceptional cases be possible for the highest

judicial authority of another State (e.g. the Minister of Justice or the Attorney General) to institute fresh proceedings for overriding reasons of justice (wide divergences in the penal appraisal of the offence in the States concerned, the existence of telling reasons in favor of reopening proceedings ... ).

e) In the case of a penal judgment involving a conviction its *res judicata* quality can be recognized abroad only if the penalty has been served, rescinded or barred by limitation. This does not apply when a national State ensures enforcement of a sentence rendered in another country.

f) If a criminal prosecution is brought in one State for an offence committed in that State, the judicial authorities of other States should have the possibility of refraining from instituting a prosecution for the same offence ("*principe de l'opportunité*" - principle of discretionary power).

### **B. Positive effects.**

2. a) Even for States between whom unlimited enforcement of foreign penal judgments cannot presently be considered, the possibility of working out agreements on limited enforcement relating only to certain groups of offences (e.g. traffic offences), should be studied.

b) When it is possible either to extradite a convicted offender to the State having rendered the judgment, or to enforce the penalty in the State of residence, the convicted offender should at least be heard before a decision is made.

c) The State which entered the judgment should recognize an enforcement of the judgment in the State of residence.

3. Enforcement will not be effected:

- if limitation of the penalty has been obtained by virtue of the law of either the requesting or the requested State;

- or if the offender has obtained a pardon or amnesty in either the requesting or the requested State.

4. In enforcing a foreign judgment, the requested State will, if appropriate, substitute such penalty or other measures provided in its own legislation for an analogous offence, in place of the sanction imposed by the foreign judgment. Such substitution should never worsen the position of the convicted offender.

5. a) Consideration should be given to enabling a State to ensure, within its territory, the supervision of persons conditionally convicted or released in another State (parole, probation and analogous measures). Such a system of mutual assistance would be an excellent instrument of modern criminal policy not only between States with broadly similar legal systems, but also within a wider framework.

b) The basic decisions to be taken during such supervision may be made either by the sentencing State or by the State of residence, preferably by the latter for reasons of simplifying

procedure. It is important to know whether revocation of the conditional suspension of the penalty or the conditional release must ensue as a result of another offence or be ordered for other reasons.

c) Execution of the suspended or remaining prison sentence should as a rule be effected in the State of residence. However, one might consider a combination of supervision in the State of residence with execution in the sentencing State, notably when the State of residence cannot decide on ensuring execution.

6. a) Independently of whether execution will be granted in a State upon a foreign penal judgment, certain effects of the judgment, such as disqualifications and prohibitions (e.g. revocation of driving license, prohibition to engage in certain trades or professions) may in the interest of the legal order of the State be enforced in its territory to the extent that its law provides for such effects.

b) Secondary penalties and subsidiary measures under national law may likewise be attached to a foreign penal judgment through the institution of a subsequent proceeding.

7. Further, it is to be hoped that, as far as possible, a conviction rendered in one State will have special results with respect to a proceeding instituted in another State, when the previous judgment does not determine a legal sanction but determines a fact or a legal status.

a) A precondition for this is an exchange of judicial information, to be ensured in the widest possible measure by bilateral or multilateral conventions. When expunging entries from criminal records, foreign convictions should be treated in the same way as convictions by national courts.

b) As regards the fixing of the penalty, foreign convictions should to a very large degree be taken in consideration by national Courts. This applies to fixing the penalty in general, to the granting or revocation of suspension of the sentence or conditional release, to a later fixing of an aggregate penalty, to recidivism and to aggravation of the penalty for dangerous habitual offenders, insofar as this possibility is provided for by national legislation.

c) Also when special measures are to be undertaken previous foreign convictions should be taken into account in the same way as those rendered by national Courts.

d) Nor are there any objections to consideration of previous foreign convictions when decisions are to be made on the granting of rehabilitation, pardon or amnesty.

e) Moreover, foreign penal judgments may be given effect within the frameworks of civil, administrative and procedural law, whether occurring automatically or as a result of fresh proceedings.

8. The foregoing should not affect the international effects of civil law decisions made by a foreign criminal Court.

***IV. Recognition procedure.***

1. The question whether and to what extent enforcement proceedings are required for the recognition of a foreign penal judgment, or whether proof of the judgment will suffice, should depend on national law. As a rule enforcement proceedings will be necessary only in the case of enforcement of the foreign penal judgment or of supervision.

2. Insofar as recognition of a foreign judgment is based on an international convention, examination of such judgment should be confined to the procedural aspects of the case; consequently there should be no “review of the merits”. However, the requested State should reserve the power of adapting foreign sanctions to its own law. Insofar as recognition is effected only according to national law, the spirit of international solidarity would require reliance in principle on the propriety of the foreign system of justice.

***V. Final observation.***

It would be desirable that the settlement of litigation which may possibly result from application of the principles set forth herein, be submitted to an international jurisdiction.

## **Xth INTERNATIONAL CONGRESS OF PENAL LAW (Rome, 29 September -5 October 1969)<sup>10</sup>**

*Topics:*

1. Endangering offences.
2. The division of the penal process into two phases.
3. The role of the judge in the determination and application of punishment.
4. Actual problems of extradition.

### **I Section: Endangering offences**

*The Section states:*

that the number and importance of endangering offences is increasing in all penal legislations where the aim is to answer the actual claims of a social life transformed by technological progress and the internationalization of relationships;

that the risks generated by these transformations justify the legislator to develop the juridical structures to prevent all violations against human life and integrity or destroying material goods of public interests imposing on each of them the obligation to adapt their behavior;

that the feeling of solidarity among all the people developing everywhere, emphasizing a better recognition of equal value of each human being and the social aspirations created by the excessive individualism;

that this situation appears in the penal domain by the extension of legal regulations which tend to protect both individuals' existence and that of the collectives and by sanctioning the actions and omissions posing a general danger;

that the separate incrimination of endangering offences reinforces the guarantees which are already ensured by the former category of "choate offences of harm"<sup>5</sup>;

*Assumes:*

that legislation policy which incriminates endangering offences is not against the general principles of penal law, if this policy respects the principle of legality, i.e. avoiding the qualifications formulated in too generalized or too inexact terms;

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<sup>10</sup> RIDP, vol. 41, 1970 1-2, pp. 9-16. Translation in English: K.Ligeti.

<sup>5</sup> "Délits de lésion consommée" in the original French text.

that the incrimination of endangering offences is the final recourse to remedy the insufficiency of the non-penal methods of prevention;

that the system of "presumed danger" has to be attentively measured and accompanied by the possibility of offering a proof *a contrario* to turn the presumption except for cases which are definitely (expressly) foreseen by the legislators;

*Recommends:*

that the anticipated penal protection be reserved as individual or fundamental social values, as the human values endangered by crimes against peace and humanity or instigation to war or racial hate;

that the desire for strict legality be manifested in a precise qualification of the facts qualifying as an offence (endangering offences) in an exact definition of the seen dangers or in the legal identification of the persons submitted to these particular professional obligations;

that the sanction of endangering offences be accompanied beyond the punishment by security measures and social pedagogy interventions, in a way to permit the judge to select the most efficient sanction.

## **II Section: The division of the penal process into two stages**

### ***Preamble***

It seems impossible to recommend specific methods applicable to the numerous and different penal systems in force in the countries represented in the Congress. Consequently the following recommendations have to be considered as directives of general character.

The special adaptations to each penal system will be chosen in conformity with the entire "corpus iuris" and in the spirit of each individual legislation.

### ***Resolutions***

1. The judge ought to be authorized to limit, in case of at least serious offences, the examination of evidences and contestations to questions concerning the facts of the offences and culpability, i.e. the verification of the offence in their objective and subjective elements.

In this case the court at this stage ought not to examine the personality of the defendant in order to choose the appropriate sanction, only after having decided about the culpability with the exception of certain cases (when e.g. a mental disease gravely influences the culpability, it may be necessary to examine this case during the first stage).

2. The division of a proceeding into two stages can be done either by leaving the examination of the evidence and the contestations in one stage or by leaving the second stage to a future

date determined by the judge.

In case of reverting the duration ought to be the shortest possible. In a given system it ought to be desirable to obtain the consent of the suspect for the separate examination of the questions regarding the sanction.

3. If possible the information obtained to choose the sanction - which refer to the personnel and family circumstances of the suspect – must not be revealed, not even to the judge, prior to the first verification of the crime, neither must be known publicly, if this publicity can be harmful or detrimental to the suspect. The results of the investigation in regard of the personality of the accused must be secretly filed which later may be consulted only by the defense counsel and the prosecutor.

4. When the proceedings are divided into two separate stages, the second stage could take place either before the same judicial authority or before another judicial authority competent to choose the sanction. In case of the latter hypothesis the second stage ought to take place after experts of criminology having special competence to choose the sanction have examined the personality of the offender before a judicial authority

*(The great majority of the section favored the first alternative.)*

5. If new evidence emerges during the second stage, which raises the doubts in regard of the culpability of the suspect, the judgment will be reconsidered in the light of this evidence.

6. If the proceeding is divided into two stages, all the legal guarantees on the offender's side have to equally be respected during the second stage, and the choice of sanction will be contained in a reasoned judgment.

7. The two stage system does not involve appeal procedures.

### **III Section: The role of the judge in the determination and application of punishment.**

1. The facts that the judge has to take into consideration when determining the punishment and the security measures must be provided for in the law at least in general terms (in a general way).

2. With total respect to the presumption of innocence and the human person as well as the Charter of Human Rights, the judge must be aware of the input of human science and technology to certify the fact qualifying as an offence and to reveal the personality of the offender.

3. The methods of enforcing the punishment and the security measure must be regulated by the law. In case conclusions 1 and 2 in regard of information of the judge are legally determined, the judge by reasoned decision, selects one of them.

4. The judge when enforcing the punishment and the security measure prior has to consult the public prosecutor and the defense counsel.
5. The modifications of the enforcement modalities of the punishment and the security measures which influence the decision of the judge must be pronounced or revised by him or by another judicial authority that is in charge of supervising the enforcement of sanctions. The responsibilities of penal justice require that the judicial organization gives the judge a proper education enabling him to assume such responsibility.

#### **IV Section: Actual problems of extradition**

With a view to the fact that extradition is a worldwide institution to fight criminality;

Regarding that the development of the extradition law has to consider not only the technical evolution of the institution of extradition designated to facilitate this way of international judicial cooperation, but also the modifications of the general principles of international law, the innovations in international penal law, the new concepts of criminal policy as well as the recognition of human rights;

*The recommendations are the following:*

##### **I**

The principles regulating extradition must not be interpreted and applied at a purely national level.

##### **II**

States desirable have recourse to extradition even in lack of international conventions.

##### **III**

The condition of reciprocity is not ruled by the claims of justice, it is desirable not to maintain it as a rigid rule within the extradition law.

##### **IV**

1. In general the requirement of "double criminality" will be sustained as a condition to the obligation to extradite.
2. Meanwhile the requested state may avoid the above condition if the particular circumstances of the requesting State demand the repression and the public order of the requested State is not opposed to it.
3. At the same time it is to understand that the acts susceptible to extradition must be punishable *in concreto* in the requested state.

4. a) It could be satisfactory to announce that the incriminated facts underlying the request are punishable *in abstracto* according to the law of the requested state.

It is possible to refuse extradition if there are evident causes of justification or that of non-imputability, unless in the case of extradition for enforcement of security or educational measures are concerned.

b) It will be indifferent for extradition that the offence underlying the request is punishable only by denunciation under the law of the requested State.

c) Amnesty granted by the requested State and prescription according to the law of the requested state will have no importance from the point of view of extradition, unless the offence gives rise to another title of jurisdiction of the requesting state.

## V

1. It will be allowed to refuse extradition when under the law of the requested state the offence constitutes a political offence.

2. One cannot rely on this ground of refusal if the offence concerned constitutes a crime against humanity, a war crime or a serious violation of the Geneva Conventions of 1949.

3. The political offence exception will be regulated under the general rules which allow the requested state to refuse extradition, if there is undeniable facts justifying the fear that the procedure against the wanted individual does not offer the judicial guarantees of a penal procedure corresponding the minimum standards accepted at the international level, with a view to safeguarding human rights, or if the wanted individual will serve his penalty under inhuman conditions.

4. Extradition shall not be refused or excluded for prescription (limitation) of punishability in case of war crimes.

## VI

1. Fiscal, economic and military offences will not be left out of the domain of extradition.

2. It is desirable that extradition in case of these types of offences is particularly arranged among the states which belong to military pacts or among the states whose economic systems are apparent.

## VII

1. a) The requested state which wants to maintain the rule of non-extradition, ought to exercise its repressive power, or to enforce the judgment of the requesting state upon the request of the latter, i.e. it must adopt at an internal level the necessary legislative measures.

b) States should engage in criminal proceedings launched for the very crimes in respect of which extradition is excluded because of the lack of reciprocity.

2. It will be allowed for the requested state to agree to the extradition of its own national for

crimes mentioned in V.2.

3. The principle of non-extradition of its own nationals should be pressed back so that its own nationals be returned for adjudication in the state where the crime has been committed; however in such cases the enforcement of the sanction will be reserved to the state of nationality.

#### VIII

1. Request for extradition for the purpose of criminal proceedings shall be refused in case such request is based on a final decision of the requesting state resolving on the merits of the incriminated facts unless the revision of such proceedings is ordered.

2. Extradition shall be refused if the underlying offence has already been adjudicated in a final decision of either the requested state or a third state. In case of condemnation extradition will be refused only if the penal sanction has already been enforced, its enforcement is underway, its enforcement has been limited or annulled by either amnesty or grace.

#### IX

1. The suspect can consent to be reverted to the requesting state if this consent is voluntary and expressed before a judge in the presence of a freely chosen defense counsel.

2. Voluntary extradition shares the effects of coercive extradition from the point of view of the principle of specialty.

#### X

To facilitate the extradition the requested state has to verify the conditions of extradition on the basis of evidences delivered by the requesting state to sustain its request, it ought to restrain from examining in a particular trial procedure, if the charges are sufficient and the arrest is well founded under its own law. By all means the requested person must have the right to – without any limit – bring the evidence which permits the immediate statement of the wrongfulness of the alleged charge.

#### XI

1. In the extradition procedure the human rights must be respected, the requested person must be able to defend his rights against all the interested states.

2. The requested person must have the right –in the interested state– to turn to an independent court if he thinks that his human rights are not respected.

With a view to the guarantee of these rights it is desirable to envisage the establishment of an international court, which announces whether the human rights of the requested person were violated.

## XII

1. The return of the accused or sentenced person must be carried out strictly according to the rules of the extradition procedure. All recourse to the use of force or cunning in order to take the requested person to the requesting state must be avoided. The same way it is not allowed to avoid extradition by using the procedure or expulsion if it is susceptible that the latter will lead directly or indirectly the requested person to the state which is seeking him with the aim of punishment. This last rule does not concern the right of expulsion of the state on the territory of which the crime was committed.
2. The suspect must have recourse to a judge of the state where he stays or of the state proceeding against him, to file a claim against the expulsion or the refoulement to elude extradition.
3. The state of procedure shall be hindered in exercising its jurisdiction in case extradition is eluded by means of a claim against expulsion or refoulement or by means of force or elusion
4. The tendencies to avoid extradition procedures have to be reduced by its sensible simplification, e.g. by admitting the direct correspondence among the judicial authorities of the states concerned and by allowing the requested person to consent to the conditions as stipulated in Art. IX.1.

## XIII

1. When the forum state demands, in case the sentenced person stays on her territory, the enforcement of the judgment in the state of origin or the state of residence, this way of international cooperation should be subject to particular rules, susceptible even to derogate from rules of extradition.
2. If the sentenced person resides in a state different from the forum state, this latter state will demand the extradition in order to enforce the judgment if it esteems that this measure is appropriate for the given case.
3. In the opposite situation, one can demand the enforcement of the judgment by the state of residence.

## XIV

It would be convenient to increase - by conclusions of international conventions or by adopting the adequate measures in internal law - the possibilities of the state of residence to conduct penal proceedings in cases where the requested person will not be extradited, particularly when the nationality or domicile of the requested person or the minimal importance of the offence does not allow for extradition.

### ***Complementary resolutions.***

With a view to establish international penal legislation in the domain of extradition, which will be part of general international penal law, which would be highly desirable for humanity; the

followings are desirable:

- that the groups of states of likeminded ideological and legislative tendencies take all reasonable efforts to conclude multilateral conventions of extradition,
- that the differences concerning the application of these conventions be obligatory, or at least facultative, brought before an international penal court.

The conclusion of a universal convention of extradition would be ideal to achieve in the future, the application of which would be confined to a universal international criminal court.

**XIth INTERNATIONAL CONGRESS OF PENAL LAW  
(Budapest, 9 – 14 September 1974)<sup>11</sup>**

*Topics:*

1. Evolution of methods and means employed in penal law.
2. Drug abuse and its prevention.
3. Compensation of the victims of criminal acts.
4. The suppression of unlawful seizure of aircrafts.

**Section I: Evolution of methods and means employed in penal law**

**I**

The traditional system of repression and retribution is increasingly criticized and gradually replaced by one which grants priority to re-socialization and re-education among the social objectives of penal law. This new criminal policy should be developed and rationalized by precisely defining its methods and means.

This criminal policy has to satisfy three essential requirements first and foremost:

- 1) to achieve its aims by a minimum of repression and the maximum of efficiency and re-educational activity;
- 2) to be humanistic and maintain human dignity, and to ensure the fundamental rights of the individual;
- 3) to strengthen legality with all its consequences in procedures and jurisdiction.

At the same time it is essential that, in order to organize anticriminal reaction, research into the appropriate means and methods should go beyond the mere formal legal approach to the problems; we must solicit the cooperation of the experts of all the humanistic disciplines and not to neglect the consequences of the technical revolution, in the field of anti-criminalistic policy, either. We have to cherish or even intensify the relationships necessarily existing between penal policy and social policy.

**II**

When studying and defining the best suited means of anti-criminal reaction, due consideration should be taken of the fact that crime is a complex social phenomenon and cannot, therefore, be subject to a single solution; it requires, on the contrary, so differentiated legal means - differentiated sanctions or measures of a different nature, or in the given case, means or

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<sup>11</sup> RIDP, vol. 45 3-4, 1974, pp.670-690 (French); p. 671-691 (English).

measures not coming under the sphere of penal law - which may be modified according to the nature of crime and that of the criminal and from among which the criminal judge may have a free choice.

### III

The first problem to be studied is that of imprisonment; it was almost unanimously criticized, a considerable reduction of its scope was suggested. Although not indispensable, for the time being, it should be used against certain criminals until a coherent penal system is elaborated for its substitution.

To the degree as imprisonment is maintained as a penalty, the following questions must systematically be raised:

- what is the importance and what are the purposes of imprisonment at present / to what an extent can repression and re-education be accumulated or coordinated?
- what are the practical means to ensure that imprisonment should respect the principles of humanity and legality / the problems of the convicts' rights and of the minimum rules;
- what should be the exact position of imprisonment in the modern humanistic system of anti-criminal reaction / whether it should be the "*ultima ratio*" of the administration of justice in penal law when no other sanction is applicable ?

### IV

Greatest efforts should be concentrated on the search for measures to replace imprisonment, which can be found if:

- certain existing sanctions are used / deprivation or restriction of rights, financial or para-disciplinary sanctions, etc. ;
- new methods of anti-criminal reactions are introduced in the case of petty offences or against certain offender categories;
- supervision and/or patronage provisions are extensively applied:

\* individually as probation,

\* collective or social measures through certain protective organizations.

In this field the measures accepted by certain modern systems and, in particular, by those of the socialist countries, deserve special attention.

### V

The reform of criminal policy, as an organized anti-criminal reaction, calls for the strict and detailed examination of:

- 1) the cases when penalty / penal sanctions / should be foreseen: the problem of criminalization;
- 2) the cases when

\* either the penal sanction must be excluded / the problem of decriminalization /, with the criminal character abolished;

\* or the existing sanction must be modified and/or mitigated / the problem of depenalization.

In due consideration of the complex character and the difficulties of the problem, the Congress deems it necessary to continue or even intensify, the exchange of information on the development of the various systems of legislation, on the experiences collected, and on the results achieved.

## **Section II: Drug abuse and its prevention**

### ***Preamble***

1. Experience with the research behind this general report, and work with the national reporters at the colloquium and the work of the Congress have convinced the General Assembly that insofar as the profession of criminal justice policy-makers and professors is concerned, the area of drug abuse prevention has gone largely by default and has been dealt with in many nations on an ad hoc basis, mostly with inadequate scientific preparation.

Be it resolved, that the criminal justice policy-makers from all parts of the world assembled in the A.I.D.P., vigorously assert their duty and obligation to play a leading role in the solution of the national and international drug abuse problem, so as to assure an efficient, humane and professional solution of these problems. To this effect, all members of the A.I.D.P. Congress pledge their best efforts vis-à-vis their own governments as well as vis-à-vis national and international organizations concerned with the issues.

*The following recommendations and options form a first and necessarily incomplete contribution toward this task.*

### ***I. Nature and Trends of drug abuse***

1. Legislative or extra-legislative social problem solving requires broad based factual knowledge. As regards problems of world-wide and even epidemic dimensions, a world-wide knowledge base is necessary. Thus, be it resolved, that all nations take immediate steps to assure maximum compliance with the United Nations Commission on Narcotic Drugs reporting requirements.

2. While duplication of costly research should be avoided, in view of the fact that relatively little is known about the causes of substance / including alcohol and drug / abuse, be it resolved that studies in causation should be undertaken and the results widely disseminated.

3. Much harm having been created by imperfect classification systems and terminology in the area of drug abuse prevention, a new conceptualization and classification system seems

necessary. For the preparation of and the discussions during the Congress the following terminology proved, itself useful.

- a) The term “substance use” indicates the area under consideration.
- b) Substance use may be of two distinct types:
  - 1) Use of / legal and illegal / substances which leads or significantly contributes to a major social dysfunctioning.
  - 2) Use which does not satisfy those conditions.
- c) The term abuse should be restricted to use which satisfies the conditions mentioned under b) 1.

## ***II. Legislation aimed at controlling drug abuse***

1. The national reports having revealed a wide disparity among punishments imposable for different drug offences, and it being doubtful whether cultural differences are accountable for these wide national differences, it appears necessary to review the statutory sanction schemes in all countries. A distinction should be made in legislation between legal intervention against illicit producers, manufacturers and traffickers on the one side, and possessors-consumers on the other side, allowing for flexible application of such legislation. By stigmatizing substance abusers as criminal or deviant, it is possible that more social problems are created than solved.

Therefore be it resolved that

- A) all national drug laws be reviewed and modified accordingly.
  - B) there be the possibility of decriminalizing or depenalising certain forms of conduct with regard to drugs. The experience of dealing with alcohol should be taken into consideration.
2. Whatever drug legislation may exist or be developed in any given country, the social policy issues of such legislation are extremely sensitive and the range of benefit and detriment deriving from such legislation is very significant. Be it resolved, that every nation create a governmental office charged with the task of constantly monitoring the effectiveness of such legislation and of the institutions created under such legislation, and of recommending amendments whenever needed.

## ***III. Law Enforcement***

1. As the example of a variety of nations indicates / e.g., France, U.S.A, Bulgaria /, efficient law enforcement is closely linked to the task. Consequently, it is resolved, that there be national and international training of law enforcement officers assigned to the task. Consequently, it is resolved, that national and international training programs for drug law enforcement officers, and other personnel working in the field of drug abuse be created and used to the widest possible extent.

2. Efficiency in drug law enforcement is not tantamount to solving the world's substance abuse problems. At this moment, there are no agreed-upon criteria of "success" in solving the drug abuse problem. Success in one respect may mean failure in another. Consequently, it is proposed that national efforts be directed at the establishment of success criteria and that these criteria be directed to the maximum prevention of disfunctioning of human beings as a result of drug abuse and at the minimum expenditure of national resources, including law enforcement, to achieve this end.
3. By all available criteria, prevention of substance abuse with regard to any substances which may be deemed particularly detrimental, can better be achieved by production and manufacture and distribution control. Consequently, it is proposed that the related legislation especially with respect to amphetamines and other psychotropic substances, be strengthened in all nations.

#### ***IV. Treatment and rehabilitation of drug offenders***

1. For drug addict offenders treatment and rehabilitation are far more significant than punishment. Consequently, governments are urged either as an alternative to punishment or in connection to punishment to provide rehabilitative conditions for drug abusers having committed an offence. However rehabilitative conditions should be imposed only where necessary to terminate the disfunctioning of the offender, in order to protect society from the dangers which may emanate from disfunctioning drug offenders.
2. Treatment regimes frequently rest on a misunderstanding of the problem and of the individual involved and endeavor to achieve unnecessary and unattainable goals. For many substance abusers, no more than normal rehabilitative efforts, but no medical treatment, are indicated. All treatment programs for substance abusers ought to be vigorously reviewed as to aim, method, and success rate.
3. Experience demonstrates that only a wide range of treatment approaches can hope to reach all the underlying problems of the wide variety of substance abusers. Governments ought to be encouraged to experiment with the multi-modality treatment approach to a more efficient prevention of substance abuse.
4. Substance abuse is largely a social and occasionally a mental health problem. To the largest extent possible, responsibility for organization of treatment services for substance abusers ought to be transferred from the Departments or Ministries of Justice to the Departments or Ministries of Health and Welfare.
5. Substance abuse education among youth has frequently been counterproductive to the desired end of prevention. Greatest care must be exercised in the design and execution of drug abuse education programs.
6. Be it resolved, that on the basis of world-wide collective experience, it should be the effort of all systems to help drug abusers to solve their problems and to protect general public against

the dangers emanating from drug abuse. This requires considerable community involvement.

#### ***V. International drug control***

1. All regions of the world are affected in some way by production, manufacture, trade, traffic or consumption of narcotic drugs and psychotropic substances, as well as by some secondary aspects of related problems.
2. The drug problem is of world-wide concern and requires urgently increased co-operation between all States and relevant International organizations and agencies.
3. Co-operation among States should be manifested initially by:
  - a) ratification of, or accession to, the Single Convention on Narcotic Drugs 1961, and the 1972 Protocol amending this Convention;
  - b) ratification of, or accession to, the 1971 Convention on Psychotropic Substances;
  - c) increased collaboration on the international, regional and bilateral level in programs dealing with law enforcement, judicial functions, scientific research, treatment-rehabilitation and any other appropriate measures to prevent drug abuse.
4. The emphasis of international and national drug control schemes shall be altered from purely repressive to more socially oriented.
5. In view of the various efforts made by the UN organizations its specialized agencies and other international organs and organizations, emphasis should be put on efficient coordination which should be ensured by the United Nations. With the view of ultimately achieving effective international control of narcotic drugs and psychotropic substances, other international control schemes -besides strengthening the existing system- should be considered. This could be done by e.g. a direct international control scheme. Another field of consideration is the integration of international drug control measures into broader systems of social and human protection.
6. The United Nations; international agencies and concerned organizations should develop more studies especially about psychotropic substances and their effect to alert the public at large and governments of the potential dangers involved in such substances and of the urgent need for putting them under efficient and constantly up-dated control.
7. All States are urged to provide more data and exchange of information as to all aspects of the problem of drugs so that the control systems can be scientifically and factually based.
8. The United Nations Fund for Drug Abuse Control (UNFDAC) should devote resources for evaluating intervention programs. Therefore it is recommended that UNFDAC is given increased resources *inter alia* for this purpose.

#### ***VI. Recommendation on the preparation of the Congresses of the A.I.D.P.***

Although mostly unacquainted with the classified-systematized approach to report-writing for

international comparison, most national reporters generated considerable enthusiasm for the questionnaire type; classified-systematized approach here used and join in recommending the resolution that in the future all Congress topics of the A.I.D.P. be prepared in this fashion to assure worldwide comparability of information for maximally efficient problem solving in the line with the most advanced thinking of the social and behavioral sciences and in furtherance of the interest of crime prevention and criminal justice.

### **Section III. Compensation of the victims of criminal acts**

*The Congress, convinced:*

- that the compensation of the victim, as a means to restoring the legal and social equilibrium violated by the criminal act and in consideration of the modern criminal policy, efficiently supplements the penal law sanctions, with particular respect to the re-socialization of the convict; furthermore convinced

- that an efficient compensation represents a public task based on the modern criteria of social solidarity, especially in cases when the offender is unknown, under no criminal procedure or convicted but insolvent,

*accepts the following conclusions:*

#### **A) Compensation of the victim from public funds**

1. The majority of the participants of the Congress recommend that the primary compensation for the victim of a crime should be made from public funds by the State or some other public Institution. The decision whether such compensation should be administered by a legally independent fund, a special compensation board, through existing social welfare or social insurance agency, should be left to the various legislators.

The minority of the participants favor compensation from public funds but recommend that such compensation should occupy only a subsidiary position leaving primary responsibility with the offender.

Some participants do not favor the creation of public 'Compensation arrangements,' believing either that existing institutions are adequate, or that public compensation fails of its object of criminal policy.

II. The supporters of the compensation for the victim from public funds recommend the consideration of the following principles by the legislator in constructing this new institution:

1. Compensation should cover at least damage caused by intentional crimes against life and limb. Compensation for the victim of a crime against property should be paid only in particularly serious cases when lack of such compensation would be intolerable for the victim.
2. The immediate victim of the crime should be entitled to compensation. In addition, those dependents should be entitled to compensation whose support has been affected by the crime.
3. Compensation should be a legal right as opposed to an “ex gratia” act.
4. If the compensation is paid by government body or public institution, the claim is transferred to the latter (*cessio legis*). In the enforcement of this claim against the offender the principles of modern criminal policy must also be taken into consideration (resocialization of the convict, protection of the economically weak offender).
5. Apart from other sources the public fund for compensation should also be drawn from tax revenues.
6. The decision whether the compensation should be awarded by a judicial or an administrative proceeding has to be left to the national legislator. Similarly, it has to be left to the national legislator whether the criminal court judge should be empowered to decide on the possibility or necessity of a compensation for the victim from public funds, in the course of his adjudication over the criminal act itself. Finally, it should be left to the national legislator whether the prosecutor should be entitled to claim the compensation for the victim from public funds.
7. Foreign nationals who, within the country (or on a vessel or aircraft of this country) fall victim to a crime (see para 1, above) should be compensated according to the same principles as citizens, regardless whether the foreigner's own State would grant reciprocity.

***B) Compensating the victim within the criminal proceedings (action civile, “adhaesionsprozess”)***

- I. The majority of the participants of the Congress favor the adhesion process in which the claim of the victim for compensation can be enforced within the criminal proceeding, admitting however that this process may have certain disadvantages.
- II. In the regulation of this process the national legislator should take into consideration the following principles:
  1. The victim must have the right to choose between an ordinary civil proceeding and the adhesion process.
  2. The adhesion process must necessarily be a mixed structure of civil and criminal procedural elements.

3. It should be left to the national legislator to decide whether the adhesion process might be instituted, in addition to the victim, by the prosecutor. The same applies to the question whether the court might award a compensation for the victim “ex officio”.
4. The procedural rights of the victim in the adhesion process must include at least the right to adduce evidence /also regarding the criminal case/ and the right to appeal /at least as regards the decision on the compensation claim/. The accused must have the same procedural rights as the complainant.
5. The obligation of the criminal court to decide on the civil claim remained controverted. It was recommended, however, that the adhesion process should be restricted to a decision on whether the claim was justified, when the decision as to the amount of compensation would be left to the appropriate civil court or to a subsequent special criminal procedure.
6. Execution in advance of the decision on the compensation claim must be ensured in order to provide the victim his remedy as rapidly as possible.
7. The judgment of a criminal court awarding civil compensation in the adhesion process should have the same status as the corresponding decision of a civil court for the purpose of foreign execution.

### ***C) Promoting victim compensation through other means***

Indirect measures for victim compensation:

1. Compensation as a pre-condition or decision in the conditional suspension of the penal procedure or of the execution of the penalty, in probation or conditional release, taking however into consideration the economic situation of the offender;
2. Consideration of a full or feasible compensation in punishment, clemency or, rehabilitation.

## **Section IV. The suppression of unlawful seizure of aircrafts**

Considering that international civil aviation is of great utility to all mankind and that in modern society and in the international community it has become valuable and quite important to everybody, it merits particular protection against the unlawful seizure of aircraft in the conflicts between nations and various groups by being kept out of the theatre of operations.

In its most frequent manifestations the unlawful seizure of aircraft is nothing but a form of terrorism; it may then be noted that considerable progress has been made on the international level by the adoption of conventions concerning the unlawful acts against the security of civil aviation / especially the conventions adopted at The Hague in 1970 and in Montreal in 1971/.

Hence, the International Association of Penal law, assembled at its XIth Congress, strongly recommends to all States that have not yet done so, to ratify these Conventions and to implement them in their national legislations with a view to augmenting their efficacy on the international and national level.

The International Association of Penal Law considers that these conventions -particularly those adopted at The Hague and in Montreal- create an obligation for the States to prosecute in a serious vein the offences envisaged in the above-mentioned conventions; it follows that premature pardoning, amnesties and other measures of a similar nature would mean that the sense and the spirit of these conventions are not fully respected.

The International Association of Penal Law, assembled in this Congress, also considers that, in the struggle against unlawful seizure of aircraft, the various methods and means of collaboration among the States should be furthered, including extradition and the idea of an International Penal Court.

## XIIth INTERNATIONAL CONGRESS OF PENAL LAW (Hamburg, 16 – 22 September 1979)<sup>12</sup>

*Topics:*

1. Crimes of carelessness. Prevention and treatment of offenders.
2. The protection of the environment through penal law.
3. The protection of human rights in criminal proceedings.
4. Immunity, extritoriality and the right of asylum in international penal law.

### **Section I. Crimes of carelessness. Prevention and treatment of offenders.**

*The participants in the 12th International Congress on Penal Law in Hamburg*

Recognizing the objectives of the criminal law under conditions of scientific and technical progress, as well as of social change in the contemporary world,

Acknowledging the increasing danger posed by the consequences of negligent offences with regard to the most important individual and social values and welfare,

Recognize that perfected forms and methods in the prevention and reduction of careless crime are a necessary element in the protection of the aforementioned values and welfare.

Considering the prevention and reduction of careless offences to be an integral part of the prevention and reduction of crime in general,

*the participants in the Colloquium have adopted the following Resolutions:*

1. Ever increasing attention should be paid to causes and conditions which facilitate the perpetration of negligent offences in the contemporary world. Particular importance is assigned to the study of conditions surrounding the commission of careless crimes in the realm of transportation, particularly of road traffic, as well as to other sectors of social life in which acts of carelessness will pose an increased danger to essential social and individual values, in particular occupational safety, the utilization of new types of energy and materials, and environmental protection.

2. Action against criminogenic factors which contribute to the commission of careless offences, as well as public education to encourage a sense of duty and adherence and appreciation of the standards of care, may be regarded as the primary strategy in the prevention of careless crime.

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<sup>12</sup> RIDP, vol. 50 1-2, 1980, pp. 225-247 (French); p. 226-228; 231-233; 238-241; 245-247. (English)

3. a) The decision of whether a careless act should be criminalized or decriminalized should take into account all aspects of the impact of such a decision upon economic, social and other factors in the concrete context of social evolution.

b) Cases of the most careless behavior from a social point of view, which entail damage to social and individual values and welfare should be considered breaches of criminal law.

c) Careless acts of less seriousness should be dealt with as administrative or civil sanctions. Social and educative measures should be widely employed in connection with prevention and deterrence of these less serious careless acts.

4. a) Criminal liability for careless acts should always be consonant with the principle of culpability with its subjective element according to prior legislation based on conduct violating standards of care in view of the seriousness of the harm caused that was foreseen or could have been foreseen as well as (where provided by law) the degree of danger of such breach.

b) No person should be punished because of unintended consequences of his act, or, if at all, only where he foresaw or could have foreseen these consequences.

5. Sanctions for careless offences should take into account the alternative forms of sanctions available as well as the characteristics of the offender. Sentences other than imprisonment should generally be used and where a sentence of imprisonment is imposed semi-detention or analogous measures should be used. There might also be used exemption from punishment but a requirement of community work or education.

6. Scientific research in the field of careless acts must be conducted on an interdisciplinary basis, with particular attention to the study of its causes and the conditions under which it occurs, to the typology and classification of offenders, and the development of adequate and multiple measures of prevention. The genesis of the behavior of careless criminal conduct must be studied using the data of sociology, criminology, psychology, and other social sciences. It would be desirable in the future to develop international collaboration and coordination of the efforts of the research workers and experts of different nations in the area of the prevention and reduction of careless offences.

## **Section II - The protection of the environment through penal law.**

### ***Preamble.***

1. The protection of the environment has become a pressing question in today's world. Humanity which is proud of its scientific and technical accomplishments, cultural and educational developments finds itself threatened by self-destruction.

2. It is therefore necessary to take energetic measures to protect life and its quality against

that which threaten them. This objective requires that the conflicts which can arise between economic development and the protection of the environment be resolved. It requires, likewise, coordination and cooperation not only at the national level but also at the international level.

***Recommendations at the national level***

3. In this sphere it is necessary above all to preserve the environment. The principal role belongs to non-penal disciplines. However, the penal law must, first of all, intervene to assure the efficacy of these non-penal disciplines, especially administrative law or civil law. In this role the penal law on the one hand performs auxiliary functions. On the other hand it is also necessary that the penal law intervene in an independent role in cases of serious attacks on the environment.

4. For the effective protection of the environment, it is indispensable to recognize, besides the protection of human life and health, values such as water, air or soil which constitute at the present moment the minimum to be protected by penal law. It is necessary to extend, as soon as possible, this protection to other values, especially the flora and fauna and the struggle against vibrations or excessive noises.

5. With regard to special penal law, it is implicit that it is not necessary to limit one's self to the traditional provisions but that it is also necessary to initiate or to develop specific provisions concerning environment. These provisions should provide for the application of penal sanctions both for violations of the administrative and civil regulations or administrative and judicial orders, or for any other forms of endangering the environment.

6. Serious attacks on the environment being most frequently committed by juridical persons and private, public or State enterprises, it is necessary either to admit the penal responsibility of these, or impose on them respect for the environment by civil or administrative sanctions.

7. Concerning individuals, it is necessary to retain the responsibility, not only of those who have substantively carried out the wrongful act but also of the directors and public functionaries who have given the order or permission to commit the offence or have permitted it to be committed.

8. In the concern for effectiveness one must not limit himself to monetary sanctions, but must provide to the extent, the juridical system permits a broad gamut of sanctions, especially such as the temporary interdiction of production, the closure of the enterprise, professional interdiction, publicizing the conviction and in the most serious cases the penalties deprivative of liberty.

9. In order to make the penal law for environment effective, it is necessary to facilitate by a gamut of appropriate measures the prevention discovery, and prosecution of offences. One important measure is to appeal to the conscience of the public concerning the importance of this type of offence.

### ***Recommendations at the international level***

10. It is not sufficient to protect the environment at the national level. In effect, the nature of the environment is such that the damage may harm non-national territories, especially the high seas or cosmic space, by acts of pollution, abusive exploitation of resources or any other attack on the environment...

11. On the other hand, the necessity of protection appears also when the harmful acts are committed or tolerated by one State against the environment of another State as well as by a foreign entity (an individual, juridical person, ship, etc.) or even when an attack on the environment arises by inadvertence or negligence from an international territory or on the national territory of a neighboring State.

12. It is necessary to elaborate a future international definition of the principles, norms and limits of the minimum tolerance the application of which will, above all, be realized on the basis of a common approach by the national courts.

13. Serious aggressive and deliberate acts against the environment must be classified as international crimes and must be punished in an appropriate manner.

14. The principle developments consist in the elaboration or application of conventions regional as well as universal, and environmental codes which shall serve as model for national laws. These conventions should impose the obligation on the signatory States to impose penal sanctions for acts dangerous to the environment and should provide in those cases for international assistance including extradition. In the absence of such conventions the extraterritorial application of the national law may offer a solution.

15. On the other hand, it is necessary to exchange information concerning attacks against the environment which affect the international community. The organizations which already exist should be encouraged to add the attacks against the environment to the field of their activities.

16. There is also an urgent need to pronounce the principles for the solution of the conflicts of laws with a view to reducing the tensions which result from the unilateral application of national laws.

17. Lastly, it seems highly desirable to develop the cooperation between the States, in the perspective of establishing regional courts, then an international court.

### ***General conclusions***

18. The above-mentioned recommendations are the minimum conditions which must be observed by each State to obtain the uniform protection of the environment for the common interest among developing countries and industrialized countries.

19. The conflict between the short-term economic interests and the long-term ecological interests should be resolved for the advantage of the latter interests.

### **Section III- The protection of human rights in criminal proceedings.**

#### ***Preamble***

*The XIIIth International Congress on Penal Law of the A.I.D.P. from 16th - 22nd September 1979, in Hamburg,*

having regard to the fundamental importance of safeguarding the innate dignity of every person in criminal proceedings,

having regard to the international and regional Covenants and Conventions on human rights and their interpretation through competent international instances,

aware of the fact that human rights principles expressed in legislative texts are not always fully implemented in the administration of criminal justice,

endeavoring in some selected areas of human rights to contribute to their further reinforcement by a precise formulation of certain minimum requirements,

expecting that basic theoretical principles should be implemented in practice throughout the world without consideration of political, ideological or religious frontiers and without any discrimination whatsoever,

*adopts the following resolutions.*

#### ***1. The presumption of innocence.***

The presumption of innocence is a fundamental principle of criminal justice. It includes inter alia:

a) no one may be convicted or formally declared guilty unless he has been tried according to law in judicial proceedings ;

b) no criminal punishment or any equivalent sanction may be imposed upon a person unless he has been proved guilty in accordance with the law;

c) no person shall be required to prove his innocence;

d) in case of doubt the final decision shall be in favor of the defendant.

#### ***2. Procedural rights (so-called « equality of arms »).***

The defense shall have substantial parity in proceedings and shall be given effective ways to challenge any evidence produced by the prosecution and to present evidence in defense.

The defendant must be informed of his rights at all stages of the proceedings.

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

### **3. Speedy trial.**

Criminal proceedings shall be speedily conducted without, however, interfering with the right of the defense adequately to prepare for trial. To this effect:

- a) adequate structures, institutions, resources and personnel shall be provided for the effective functioning of the criminal justice system;
- b) time limits should be established for each stage of the proceedings;
- c) it should be possible to sever complex criminal cases involving multiple defendants or charges, and this possibility should be used whenever reasonable;
- d) efforts aiming at decriminalization should be continued;
- e) different criminal proceedings should be established for cases of different gravity;
- f) mutual assistance in criminal matters should be further facilitated;
- g) administrative or disciplinary measures shall be taken against public officials who deliberately or by negligence cause unnecessary delay in any phase of the criminal proceedings;
- h) victims of delayed justice shall be entitled to compensation;
- i) empirical research and studies shall be conducted to enhance judicial economy and improve the efficiency of the criminal justice system.

### **4. Evidentiary questions.**

All procedures and methods for securing evidence in criminal cases which interfere with individual rights and liberties shall be based on the law.

The admissibility of evidence in criminal proceedings must take into account the integrity of the judicial system, the rights of the defense, the interests of the victim and the interests of society.

- a) Evidence obtained directly or indirectly by means which constitute violation of human rights such as torture or cruel, inhuman and degrading treatment shall be inadmissible.
- b) Otherwise unlawfully obtained evidence which is beyond doubt as to its veracity shall be admissible only subject to statutory provisions and judicial discretion on the basis of the values and interests involved.
- c) (*new b*) No one shall be convicted on the basis of an uncorroborated confession alone.

### **5. The right to remain silent.**

Anyone accused of a criminal violation has the right to remain silent and must be informed of this right.

## **6. Assistance of counsel.**

Anyone suspected of a criminal violation has the right to defend himself or to have competent legal assistance of his choosing at all stages of the criminal proceedings and to be so informed.

a) Counsel shall be appointed ex officio whenever the defendant by reason of personal conditions is unable to assume his own defense or to provide for such defense, and in those complex or grave cases where in the best interest of justice and in the interest of the defense such counsel is deemed necessary by the competent judicial authority.

b) Appointed counsel shall be paid reasonable fees at public expense whenever the defendant is financially unable to do so.

c) Counsel for the defense shall be allowed to be present and to assist the defendant at all critical stages of the proceedings.

d) Counsel for the defense or the defendant shall be provided with all incriminating evidence available to the prosecution as well as all exculpatory evidence as soon as possible but not later than at the conclusion of the investigation.

e) Any one detained shall have the right to access to, and to communicate in private with, his counsel personally and by correspondence subject only to reasonable security measures decided by a judicial officer.

f) No one may suffer any disadvantage for having fought with legal means for the protection of human rights in criminal proceedings.

## **7. Arrest and pre-trial detention.**

No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

a) No one shall be arrested or detained without reasonable grounds to believe that he has committed a criminal violation.

b) Arrest and detention shall only take place when necessary and should as far as possible be reduced to a minimum of cases and to the minimum of time. The risk of a continued criminal activity shall justify detention on remand only in the case of serious crimes or offences.

c) Detention shall not be compulsory but subject to determination by the competent judicial authority.

d) Alternative measures to detention shall be used whenever possible and may include:

- bail,

- undertakings by trustworthy individuals or groups,
  - limitations of freedom of movement,
  - imposition of other restrictions.
- e) Anyone arrested or detained shall be promptly brought before a judge or a judicial officer authorized by law to exercise judicial power and shall be informed of the charges against him; after appearance before such judicial authority he should not be returned to the custody of the ordinary prison authorities.
- f) Persons detained on remand shall be offered constructive activities consistent with their right to be considered innocent.
- g) No administrative preventive detention shall be permissible as part of any criminal proceedings.
- h) Any period of detention prior to conviction shall be credited toward the fulfillment of the sentence.
- i) Anyone who has been the victim of unlawful or unjustified detention shall have the right to compensation.

#### **8. Rights and interests of the victim.**

The rights and interests of a victim of a crime shall be protected, and in particular:

- a) the opportunity to participate in the criminal proceedings,
- b) the right effectively to pursue his civil interests.

#### **9. International protection.**

Governments are invited to ratify international covenants and conventions for the protection of human rights, to embody their relevant provisions into their domestic law and to accept all measures of implementation including the right of the individual to petition to competent international bodies.

#### **Special resolution**

*The Congress urges the adoption by the United Nations General Assembly of:*

- a) the A.I.D.P. Draft Convention for the Prevention and the Suppression of Torture;
- b) the A.I.D.P. Draft International Criminal Code submitted to the United Nations as a Draft Code of Offences against the Peace and Security of Mankind;
- e) the Draft Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (of the Sub-Commission on the Prevention of Discrimination and the Protection

of Minorities).

## **Section IV - Immunity, exterritoriality and the right of asylum in international penal law**

### ***I. Immunity.***

1. Immunity, as used in the international penal law, is an institution of public international law, which, however, has considerable repercussions on the criminal policy of the States. From the point of view of the penal law, immunity may be considered as an exemption from the substantive penal law or as an exemption from criminal jurisdiction.

2. For reasons of certainty of the law, a definition, as precise as possible of the scope of effects of immunity, by means of international conventions, is desirable.

3. For considerations of criminal policy, a gradual immunity would be preferable. In this field certain categories of offenses could be excluded from immunity. Thus the necessities of criminal policy would justify, e.g., the exclusion of traffic violations from immunity, except in the case of persons with general immunity.

4. It is only with reservations that immunity should be accorded to the diplomats at a conference. The beneficiaries of immunity and the scope of immunity should depend upon the object of the conference, the organizing body, the rank of the participants and the function that they exercise in the course of the conference. For reasons of certainty of the law, it is important to determine, before each conference begins, the categories of participants who are to be the beneficiaries of immunity and the scope of the immunity.

5. When applicable, immunity is to exclude any measure of criminal prosecution against the person who is the beneficiary. However, the initial search for evidence shall be permitted to the extent that it does not require participation by the beneficiary unless the sending State has expressly authorized it. The beneficiary shall have, nonetheless, the right to be present while such search for evidence is carried out.

6. In the interest of close cooperation between the States for purposes of the penal law, acts of international judicial assistance are allowed even against the beneficiaries of immunity to the extent that such acts do not apply constraints from which the beneficiaries are ordinarily exempt.

7. Immunity does not exclude the exercise of self defense, even against beneficiaries, to the extent that self defense is allowed by the law of the receiving State.

8. The sending State has the obligation to prosecute according to its own law offences committed by beneficiaries of immunity in the receiving State. It should also resolve, at the internal level, legal problems which may interfere with the application of its own penal law to an offence committed abroad (e.g. the repression of narcotics traffic committed by a beneficiary of immunity in the receiving State).
9. Whenever immunity is terminated, the receiving State has the right to prosecute for offences, outside the scope of the official functions, committed by the beneficiary during immunity.
10. Whenever an international criminal court is created, it should also have jurisdiction to try offences committed by a beneficiary during the period of immunity in the receiving State.
11. International organizations should, on the request of the receiving State, renounce the immunity of their members in cases of serious offence in order to make prosecution possible. This is most important since in some cases there is no sending State with the jurisdiction to prosecute.

## ***II. Extraterritoriality.***

1. The « extraterritorial» areas remain completely a part of the State in which they are located. The sovereignty of the receiving State extends to those areas and may be subject only to certain restrictions. The notion of « extraterritoriality » is therefore a fiction in so far as it concerns those areas; one should, instead, speak of « inviolability ».
2. The receiving State is prohibited, in principle, from taking compulsory measures of criminal law against inviolable spaces.
3. Acts which infringe on inviolable areas may be accomplished with the consent of the organ responsible for that area, if they are permitted or necessary according to the law of the receiving State. To the extent that such acts involve the protection of such areas, the consent of the responsible organs may be presumed. However, the execution of those acts must be immediately stopped in case of opposition.
4. If no other means are available, acts which infringe on the inviolable areas are permitted even against the will of the responsible organ if they are done for the protection of persons who are found outside such areas and who have been attacked by acts coming from within such inviolable areas. This rule will also apply for the protection of persons who are the victims of attack within the inviolable area, to the extent that this involves acts considered as grave offences by the law of the receiving State.
5. If a person sought for a non-political offence takes refuge in an inviolable area, the State responsible for that area must first be requested by the receiving State to surrender this

person, if surrender is not achieved following such request, the surrender may only be sought by political means.

**III. Right of asylum.**

1. Those who obtain asylum shall, in principle, be treated by the receiving State in the same fashion for penal purposes as any other foreigners who legally reside in that State.

2. The grant of asylum does not mean exemption from criminal prosecutions in the granting State. The granting State may prosecute a person who has obtained asylum for offences previously committed. It may also extradite him to a State other than the one in regard to which asylum has been granted to him. Minor offences which are connected with the flight of the person involved and his entry into the receiving State are to be excluded from prosecution (e.g. forgery of passport, illegal entry).

3. The effect of the grant of asylum should be broadened, in the interest of family unity, to the next of kin of the beneficiary (spouse, minor children), when there is reason to fear that the next of kin, in case of extradition, will be subjected to prosecution for political reasons, or that indirect pressures would be exerted on the beneficiary of asylum to return to the State with regard to which asylum was granted. The derived asylum of the next of kin remains in force in the granting State even if the primary beneficiary has himself been extradited.

4. Whenever extradition is not possible or not granted, the State of asylum must refer the case to its own criminal authorities for prosecution according to its own law. A State should also resolve, at the internal level, legal problems which may interfere with the application of its own penal law to an offence committed abroad.

## **XIIIth INTERNATIONAL CONGRESS OF PENAL LAW (Cairo, 1 – 7 October 1984)<sup>13</sup>**

*Topics:*

1. Crimes of omission.
2. Concept and principles of economic and business criminal law, including consumer protection.
3. Diversion and mediation.
4. Structures and methods of international and regional cooperation in penal matters.

### **Section I: Crimes of omission<sup>(\*)</sup>**

#### ***Certain tendencies of contemporary penal law***

1. The present-day situation emphasizes an ever-increasingly close reciprocal interdependence among individuals as well as between the individual and society. There ensues from this a complex series of "expectations" of determined lines of conduct and an equally greater increase of the phenomenon of omission (in a prejuridical sense).

2. Doctrine has been well-aware of this situation as evidenced by the scientific development of these topics in recent years.

3. The extent of the phenomenon differs from society to society, and its juridical regulation, particularly in the penal field, is equally influenced by the different ideologies, socio-economic systems and cultural traditions. However, one notes a growing tendency to extend the scope of penal action, either by legislators who -in the field of the special penal law- provide for a growing number of crimes of omission, or through judicial interpretation which applies -without clear-cut criteria- some provisions of penal laws to omissive behaviors and sanction a steadily increasing number of omissions as participation by omission in active conduct of another subject.

One should therefore highlight the general principles which could provide an adequate framework within which the legislator could act, taking into account the various interests to protect, and the judge could find precise criteria in conformity with the general rules on penal liability.

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<sup>13</sup> RIDP, vol. 56 3-4, 1985, pp.485-488; 501-504; 513-520; 539-543 (French); p. 489-492 ; 505-508 ; 521-527 ; 545-549 (English).

(\*) First section. Original: French.

### **Terminology**

Given the fact that the criterion for distinguishing between genuine and non-genuine crimes of omission is not uniform in the doctrine, and in order to avoid an unnecessary partiality, taking into account the fact that in the view-point of criminal policy, it is more important to distinguish between cases of legal typification and cases where typification depends on judicial interpretation of a type of offence by action, we adopt the terminology , “legally typified omissive offences” (known as genuine crimes of omission) and “non-legally typified omissive offences” (known as crimes of commission by omission or non-genuine of omission).

### **Legally described crimes of omission (also called genuine crimes of omission)**

In several countries one notes an increase in the number of crimes of omission described by the legislator (genuine crimes of omission) for reasons which do not always meet the requirements of modern criminal policy.

The rule that should govern the recourse to a penal sanction as a means of defending the interests of the individual and the society, which can only be the *ultima ratio*, should also apply to the obligations to act ascribed to the citizen.

On this basis, we believe that we can recommend the following to legislators:

- a) to always consider the real importance of the interest to be protected, as well as the fundamental duties of the individual towards society, when a decision is made to incriminate the violation of an obligation to act;
- b) to resort mainly to purely civil or administrative sanctions, in accordance with the general tendencies to decriminalize the less important offences; and particularly to limit the unintentional penal offences of omission, the prosecution of which could fall within the scope of administrative contraventions;
- c) to avoid abusing "blank penal provisions" which apply penal sanctions to certain offences against administrative regulations and standards.

### **Non-legally described omissive offences (also called crimes of commission by omission)**

The regulation of the crimes of commission by omission, where behavior liable to prosecution is not precisely described by law, raises serious problems as far as the principle of legality is concerned. It is to be feared, particularly in certain countries and at certain political moments, that the limits of given penal norms would be uncontrollably and arbitrarily extended. The provisions of the general part of some Penal Codes dealing with crimes of commission by omission have not always met the requirements of certainty and legality, neither do they satisfy the role of proportion between the omission committed and the sanction.

One hopes however, that by their interventions, national legislators would try to define the

conditions of incrimination of this type of offence in a more precise way.

The normative techniques appropriate to achieve this aim can, generally spoken, be of the following types:

1. the improvement of the regulations as already provided for by the general part of some Codes;

2. a detailed description of the incriminated offences in the special part of the Penal Code.

Should this second solution prove to be impractical, one should nevertheless improve the general rules existing in the Codes or elaborated by interpreters, ensuring the following minimal conditions:

a) the obligation to act, the violation of which contributes to cause a result that involves the penal responsibility of the perpetrator of the violation, should not only be moral or social, but strictly juridical, founded on a law, a role, a contract or any other juridically recognized source;

b) a person in order to be considered responsible, should be in the position of a so-called guarantor of the legally protected interest, having the power to dominate some essential conditions of the materialization of the typical event;

c) the legal duties which establish the function of a guarantor should be addressed to a specifically determined category of subjects, having a personal position described by law;

d) the omission should correspond to the achievement of the result contrary to the law through action;

e) one should limit the type of offences of commission by omission to attacks against legally protected interests that are essential to the individual or to society.

Consideration should be given to whether crimes of commission by omission could be subject to sanctions less serious than those provided for the corresponding offence committed by action.

### ***Culpability and dolus***

In all crimes of omission intent includes, at least, the knowledge of the factual situation for which the law stipulates the obligation to act.

In crimes of commission by omission intent covers the will not to prevent the result which is the legal constituting element of the offence.

In crimes of commission by unintentional omission, the fault also implies the possibility and the duty to foresee the result.

### ***Participation***

Participation by omission in an offence committed by a third party should be governed by the same principles mentioned above with regard to crimes of commission by omission:

- a) existence of a juridical obligation;
- b) position of guarantor of the interest protected by penal law;
- c) an omission corresponding to the occurrence of the typical event by action;
- d) restriction of criminal liability to more serious offences.

### ***Responsibility for omission within groups***

Given the great importance of the phenomenon of criminality in the field of enterprises and companies, it is necessary that legislators state precisely the conditions of responsibility for omissions within groups, and this in the respect for the general principles of personal responsibility.

## **Section II. Concept and principles of economic and business criminal law, including consumer protection**

### ***Preamble***

1. Economic and business criminality often adversely affects the entire economy or important parts of the economy and is of special interest today in many countries independent of their economic systems.
2. Generally, penal law is only one means of regulating economic and business life and sanctioning the violation of economic and business rules. Normally, penal law plays a subsidiary role. However, in some instances, penal law is of primary importance and provides a more appropriate means of regulating economic and business activity. In such cases it may interfere less with economic and business activity than administrative and civil regulations.
3. Proper justice and assistance to individual victims or groups of victims of economic and business offenses are necessary.

### ***Terminology***

4. The term "economic penal law" is here understood to encompass offenses against the economic order. The term "business penal law" refers to offenses involving private or public enterprises. Both are closely interrelated in the sense that the offenses violate legal regulations which organize and protect economic and business life.

### ***Protected interests***

5. In most cases, the use of penal law in this field is concerned with the protection of collective, not only individual, interest. Most of these collective interests, being particularly complex and

diffuse, are more difficult to identify and defend than individual interests. Therefore, there is a special need to protect these collective interests. Their protection by penal law should be assumed by the Penal Code.

### ***Technique of penal law***

6. Despite the peculiarities of economic and business penal law, the general principles of penal law, especially those protecting human rights should be applied. The burden of proof should not be shifted to the defendant.

7. General clauses in economic and business penal law should be avoided. Where it is necessary to use general clauses, such clauses should be interpreted narrowly. The prohibited conduct should be precisely described.

8. In connection with the description of offenses the use of the reference technique, that is, the technique pursuant to which activities regulated outside of the penal law are criminalized by reference, can have the danger of imprecision and lack of clarity and of delegating too much of the legislative power to the administration. The prohibited action or effect should be specified by the penal law in so far as possible.

9. Per se bans (*abstrakte Gefährdungsdelikte, delits-obstacle*) are a valid means of combating economic and business offenses so long as the prohibited conduct is clearly defined by the legislation and so long as the prohibition relates directly to clearly identified protected interests. The use of per se bans is not justified merely for facilitating proof.

10. Ways to prevent circumvention of the law should be studied.

### ***Culpability and criminal liability***

11. As a general rule of penal law, the principle of culpability should be applied in the field of economic and business offenses. Where strict liability offenses exist, they should at least be subject to the defense of impossibility. Reform efforts should be directed to abolish strict liability offenses as quickly as possible.

12. Criminal liability of directors and supervisors for offenses committed by employees should be recognized when there is both a breach of the specific duty of supervision by, and personal culpability (at least negligence) of, the director or supervisor. The general principles of participation are not affected by this recommendation.

13. Criminal liability of corporations and other legal entities is recognized in an increasing number of countries as an appropriate way of controlling economic and business offenses. Countries which do not recognize such criminal liability may wish to consider the possibility of imposing other appropriate measures on such entities.

### ***Administrative and civil remedies***

14. Normally, the introduction of administrative and civil remedies should be considered before

criminalizing certain acts of omissions harmful to economic and business life.

15. Administrative proceedings should provide guarantees of due process including the right of judicial review. Administrative bodies should not be permitted to impose prison sentences in the field of economic and business offenses.

#### ***Protection of victims***

16. The access of individual victims or groups of victims of economic and business offenses to judicial and administrative remedies should be facilitated. Associations of victims of such offenses, including consumer associations, should be permitted to participate in penal or administrative or civil proceedings. The system of sanctions for economic and business offenses should include the possibility of restitution.

#### ***International law and procedure***

17. In view of the transnational character of many economic and business offenses, the harmonizing of national laws in this field should be encouraged. This harmonization could be initiated by the development of a set of modern penal regulations proposed by appropriate international bodies or groups composed of criminal law specialists.

18. The protection of foreign interests by national penal law should be encouraged, particularly in connection with regional economic interests and organizations. Bilateral and multilateral agreements and treaties should be used to harmonize the effects of, and make more effective, local economic penal provisions, to reduce conflicts between national laws, and combat abuse of economic power in international relations.

19. The traditional exclusion of fiscal and similar offenses from extradition and mutual assistance treaties should be re-examined in the light of harmonious international relations and with due respect for human rights.

### **Section III. Diversion and mediation**

#### ***Preamble***

1. The phenomenon of informal diversion of those occurrences which would be crimes if they were evaluated according to criminal law, but which are either not perceived as such by those directly involved or are simply not reported to criminal justice agencies, play an important role in the prevention and control of crime. Realistic analysis shows that such occurrences often are resolved by their participants through or in cooperation with public or private institutions, for example, groups to which they belong, the socio-medical system, entities administering civil disciplinary and administrative measures, and the police. This is true whether an offence is serious or minor. Attempts at formal diversion should not interfere with such informal controls

and, where possible, should be harmonized with them.

2. Diversion may be applied in different jurisdictions in different ways consonant with social, political, cultural, economic and legal concepts and traditions. If for whatever appropriate reasons (e. g. distance or travel difficulties) law enforcement authorities cannot resolve a criminal matter swiftly, diversion might be placed in the hands of a community or other local or tribal leader, particularly in cases not evidently productive of community harm.

3. As used in these resolutions:

a) Diversion refers to any deviation from the ordinary sequence of events in the criminal justice process before adjudication.

b) Simple diversion means a unilateral official determination to discontinue criminal investigation or criminal proceedings before conviction. It includes (a) activities of public agencies exercising social control outside the criminal justice system; (b) exercise of police or prosecutorial discretion to forego criminal prosecution; and (c) alternative procedures in lieu of criminal prosecution; and (d) alternative procedures in lieu of criminal prosecution approved by a judicial authority.

c) Diversion with intervention means discontinuance of criminal investigation of proceedings before conviction combined with conditions which refer to non-penal ways of dealing with social conflicts, e.g., of a rehabilitative, therapeutic or educational nature, or compensation or restitution.

d) Mediation is a process directed to a reconciliation of conflicting concerns on the part of offenders, victims, family members of either, the community, and governmental entities. It envisions the active involvement of offenders in the settlement process.

e) Offender as used in these resolutions includes suspects, accused persons and defendants.

4. Diversion procedures do not run counter to the principle of compulsory prosecution and its invocation in penal law systems governed by that principle, if conditions embodied in a national legal system are met. Such conditions might recognize that diversion may not be implemented solely on the consent of the accused, but requires in addition the approval of proceeding authorities, followed by judicial approval of an interruption in an investigative inquiry or proceedings before adjudication.

### ***Purposes of diversion***

1. Modern criminal justice systems have experienced, and continue to experience, two divergent developments:

a) Criminal law is used as an expedient means of social control. It has been extended far beyond its classical scope, producing a serious danger of over-criminalization.

b) The effectiveness of using traditional criminal justice, especially punishment, as a functional means of social control has been viewed with growing skepticism. The concepts of rehabilitation, deterrence and retribution are seriously criticised. This has reopened the discussion about other measures to achieve the aims of criminal law.

2. Furthermore, criminal justice itself has come under criticism. The criminal justice process tends to reduce the interaction between those involved in a transaction to a consideration of the responsibility of only one of them. Those directly involved, particularly if they feel themselves victimized, are not able to resolve the conflict underlying the criminal transaction as they view it. Under such circumstances, the criminal justice process may well impair rather than promote peace among the participants.

3. From these perspectives, diversion should be considered a new desirable approach to contemporary problems of the criminal justice system, for at least two reasons:

a) Diversion may well counter the danger of over criminalization. It does not contract the scope of criminal law itself, but may mitigate its adverse effects;

b) Diversion may also help to overcome what has been called the punishment crisis, by facilitating appropriate responses to crimes whenever penal sanctions are thought inappropriate.

4. Diversion should not work further extension of the scope of coverage of criminal law, nor should it institutionalize or restrict what hitherto has been resolved through informal or covert dispute resolution. Replacing penal measures with measures stemming from diversion with intervention should not of itself warrant an increased severity in offender treatment.

#### ***Justification of diversion***

1. Diversion may be a preferred response whenever criminal trial processes are not required in the public interest. Diversion may appropriately be invoked whenever it may be expected to achieve a greater rehabilitative or preventive effect than criminal adjudication and punishment. However, the extent to which it actually does so depends on the nature of a specific diversion program. The success of any given rehabilitative program is notoriously difficult to assess. Therefore, care should be exercised not to confuse rehabilitative program motivation with actual success rates.

2. Diversion may help to avoid unnecessary stigmatization of offenders. Although the stigma associated with diversion may be less severe than that flowing from imposition of criminal sanctions, it is nevertheless fallacious to assume that diversion entails no stigmatization whatsoever. However, diversion with intervention may well support increased efforts to reduce stigmatization stemming from imposition of criminal punishment.

3. Diversion may be appropriate when a criminal trial might harm an offender, the victim or the family of either to an extent outweighing the benefits to be expected from public adjudication.

4. Diversion may serve to enable those directly involved to cope better with an underlying crime. Care must be exercised to involve them in the process of diversion.
5. Diversion may benefit crime victims if it accomplishes restitution or an apology and allows them to express their personal feelings and desires. The importance of this aspect of diversion should not be underestimated, because, in general, penal sanctions do not accomplish restitution or compensation for crime victims. Diversion, therefore, may well be viewed as desirable by the latter.
6. It has often been asserted that diversion serves to reduce prosecutorial and judicial caseloads. This assertion is of dubious merit. In all criminal justice systems, the problem of judicial overload is met through widespread use of so-called simplified procedures. If necessary, greater use might be made of such procedures consistent with basic standards of fair procedure. Decisions to divert or to invoke penal measures should not turn on technical aspects of caseload reduction. That may prove an incidental effect of diversion, but should not become a principal purpose.
7. Diversion may be advocated as a means to reduce the costs of administering a criminal justice system. That goal, however, may be ephemeral from the stand-point of national economy, because in fact diversion with intervention usually shifts costs from criminal justice agencies to other governmental or private entities.

#### ***Cases appropriate for diversion***

1. Cases involving youthful offenders are particularly appropriate for diversion. For purposes of social adjustment, every effort should be made to aid youthful offenders in advancing their social training.
2. Diversion also may be indicated in cases involving adult offenders. Decisions to select diversion with intervention must turn on the facts of individual cases and personal attributes of offenders.
3. Diversion is particularly appropriate if there is a permanent relationship of some kind between offender and victim, e.g., family, business, neighborhood, educational, or landlord-tenant.
4. In special cases diversion may be coupled if appropriate with a treatment program, for example, when offenders are alcohol-or drug-abusers.
5. Diversion need not necessarily be excluded in cases of recidivism. Rather, the circumstances of individual cases should control simple diversion or diversion with intervention for multiple offenders.
6. Diversion may be withheld if public confidence in administration of criminal justice will be impaired unless an offender is required to undergo criminal trial and adjudication.

### ***Procedures for diversion***

1. Two conflicting considerations may underlie diversion decisions. One is the principle of equality which requires that similar cases be treated similarly. A second is the principle of individualized treatment which mandates that each case be resolved on the basis of its peculiar facts. Neither principle should be accorded controlling authority. Instead, in cases involving petty offences, in which a thorough investigation into the circumstances of criminal activity and an offender's personal characteristics seldom is feasible, the principle of equality may control. In more serious cases and in cases involving youthful offenders, greater efforts are needed to achieve an individualized approach.
2. Responsibility for implementation of diversion measures with intervention may, and perhaps should, be allocated to institutions and persons outside the criminal justice system. Care should be exercised, however, not to subject diverted offenders to unduly coercive influences. In particular, only governmental bodies should be empowered to take compulsory measures. Measures infringing upon individual freedom (e.g. medical treatment) should require judicial authorization.
3. Public and official control should extend to both authorization and implementation of diversion with intervention.
4. Diversion determinations should rest on an evaluation of all available data, free from limitations affecting receipt and consideration of evidence at trial.
5. Diversion with intervention usually should require the free and voluntary consent of offenders, because they cannot be forced against their will into therapeutic or educational programs. Nevertheless, there should be a scope to recognize a de facto consent manifested through participation in, e.g. therapeutic or educational programs. The right of an offender to insist on trial should be respected.
6. Diversion with intervention should not be accomplished unless there is adequate evidence of an offender's guilt. However, simple diversion need not rest on a preliminary ascertainment of guilt if it is not noted in an offender's criminal record.
7. Diversion should not undermine an offender's constitutional or civil rights. If a private entity is entrusted with the development and supervision of a diversion program, it must also be responsible for protecting those rights. In particular, the right of an offender to consult with counsel prior to diversion with or without intervention, and to be represented by counsel in any proceeding to authorize with intervention, should be carefully protected.
8. Confidentiality of records concerning diverted offenders should be safeguarded, and neither the fact nor the content of criminal accusations against diverted offenders should be used adversely against them in such matters as employment and eligibility for public and private benefits.
9. Informal diversion procedures ordinarily may and should be conducted privately. However, judicial proceedings to authorize diversion with intervention may be open to the public.

10. Lay participation, including that of victims, in diversion determinations should not be required, but may be appropriate in light of a jurisdiction's social or cultural traditions.

11. Successful diversion should bar subsequent institution of prosecution related to the same occurrence. However, a victim should maintain a right to civil action unless he or she consented to diversion. Police investigation files should be closed.

12. The sanction of revived or renewed prosecution should be available if offenders subjected to diversion with intervention fail to comply with intervention conditions. However, care should be exercised that passage of time does not unduly prejudice the procedural rights of a formerly diverted offender and that a renewed prosecution does not become the standard criminal justice response to non-compliance. As a general rule, renewed prosecution should not be instituted against diverted offenders solely because they have failed to achieve treatment program goals.

### ***Mediation and related forms of dispute resolution***

1. Mediation and referral to community for informal action, e.g. conversations among those involved in or affected by a crime, have been insufficiently used in most jurisdictions; their use should be expanded.

2. Mediation appropriately may be entrusted to lay persons. Mediators should be respected in the community, experienced and specially trained, knowledgeable about community, and social traditions, and sensitive to human personality factors.

3. Mediation should require the free and voluntary consent of offenders and victims and should be shared by those affected by a crime. Care should be exercised, however, not to limit their right to access to the courts by making mediation the sole method of conflict resolution.

4. Mediation proceedings usually should be conducted privately.

5. If arbitration follows unsuccessful mediation efforts, a former mediator should be disqualified to serve as arbitrator in the same matter.

6. Admissions and statements made during mediation negotiations should not be useable as prosecution evidence during criminal prosecutions following unsuccessful mediation efforts.

### ***Implementation***

More emphasis should be placed in the future on diversion and mediation, including the conduct of experimental diversion and mediation programs and research into the causes of conflicts and methods of conflict resolution. The International Penal Association requests national governments to consider and, if appropriate to national circumstances and traditions, to institute diversion and mediation if they are not now recognized, or to strengthen their acceptance and implementation by government officials and citizens.

## **Section IV. Structures and methods of international and regional cooperation in penal matters**

### ***Preamble***

The Congress emphasizes the necessity of closer cooperation between States in the fight against the principal forms of criminality, independent of whether they are punishable directly under international law or under national law. This necessity has become more acute in recent years due to the growing phenomenon of criminal organizations on the international level, improved travel facilities, the extension of commercial relations and the development of world tourism.

To prevent offences committed in these circumstances from going unpunished, States are invited to harmonize and coordinate their legal rules.

Such cooperation must be organized in such a way as to ensure a fair trial which safeguards the rights and freedoms of the defendant and provides an improved social resettlement of the sentenced person. It must extend to the different phases of the proceedings: investigation, prosecution, judgment and enforcement of sanctions. Moreover, the legitimate interests of the victim should be taken into consideration.

It manifests itself already through the elaboration of conventions relating to certain criminal acts which cause damage to the community as a whole and sometimes providing universal jurisdiction for their repression.

It manifests itself also in different forms of international cooperation such as extradition (the subject of the 1969 Congress in Rome) and other measures provided by the inter-American Conventions, the Conventions concluded within the Council of Europe, various agreements among the Socialist countries and within the Benelux and the Scandinavian countries and the Organization of the Arab League.

*The Congress therefore:*

*Considers* it desirable to further develop these forms of cooperation with regard to substantive law and regulations of jurisdiction, as well as in the field of procedural law.

### ***Substantive Law***

1. *Encourages* the conclusion of international Conventions against acts which are unanimously recognized as reprehensible. It is, however, absolutely necessary that these Conventions contain penal law provisions whose scope is clearly defined, and they must recall the necessity for States to prepare national legislation for their application. States must create a penal system which makes violations of the provisions of these Conventions punishable.

2. *Calls* for international cooperation in the field of substantive criminal law to extend to the new forms of crime, particularly in the following areas:

- protection of data affecting privacy;
- protection of the environment and the cultural property;
- computer crimes;
- bribery and corruption of business managers;
- fraudulent international commercial transactions.

3. *Calls* on States to extend, as far as possible, the application of their domestic criminal law to the protection of foreign, communitarian or supra-national legal interests beyond individual legal interests, which are protected without respect to the nationality of the victim, in order to avoid situations where lacunae in the law make prosecutions impossible.

4. *Considers it necessary* that international Conventions relating to substantive criminal law contain the principle «*ne bis in idem*» in favor of any person prosecuted in a State party to the Convention so far as the facts are the same. In the event of a conviction or acquittal on the merits the decision should preclude any further prosecution on the same facts as long as this decision and the procedure upon which it is based are compatible with the public order. The principle «*ne bis in idem*» does not apply, if the sentence imposed has not been fully executed in the foreign country; in such a case, however, the period already served should be deducted from the sentence to be imposed.

#### ***Jurisdiction***

5. *Considers it desirable*, without regulating the various forms of jurisdiction exercised by States in criminal matters, that the establishment of several jurisdictions which may create positive conflicts does not result in simultaneous or consecutive prosecutions in different States; therefore, the States concerned should initiate consultations to determine in which of these States the prosecution would be appropriate.

6. *Invites* States to adopt the principle of universality in their national law for the most serious offences in order to ensure that such offences do not go unpunished; recalls, however, that the creation of an International Criminal Court even on a regional level remains a priority.

#### ***Procedural Law***

7. *Calls* for the establishment and extension of international instruments in the field of judicial assistance and calls on States, not only when they negotiate new Conventions but also when they apply already existing Conventions on judicial mutual assistance, to safeguard, in all stages of the criminal proceedings, the guarantees -in particular «*ne bis in idem*»- as contained in other international instruments such as the International Covenant on Civil and

Political Rights of 19 December 1966 and the European Convention on Human Rights of 4 November 1950 and its Protocols.

8. *Proposes* that, while the principle «*locus regit actum*» remains a basic principle of mutual assistance, the law of the requesting State should, if necessary, be taken into consideration. The presence and active participation of foreign judicial authorities as well as of representatives of the prosecution and defense should be authorized;

9. *Proposes* that, if a request for mutual assistance does not imply any coercive measures, the requirement of double criminality can be abandoned in order to grant the assistance requested.

10. *Encourages* the conclusion of international agreements on specific aspects of the recognition and enforcement of foreign judgments, and considers it desirable that States afford each other, in a general way, the widest possible measure of mutual assistance by providing for full recognition of the validity of judicial decisions enforced abroad.

11. *Invites* States to conclude agreements on the transfer of criminal proceedings to the country of nationality or residence of the offender. If the offender is detained in the country where the proceedings were initiated, the transfer should be effected only with his consent.

12. *Emphasizes* the importance of the instrument of transfer of the execution of sentences for the successful reintegration of offenders into society. If the offender is imprisoned in the sentencing State, such transfer should, however, be effected only with the offender's consent.

13. *Considers it necessary* that in cases of enforcement of foreign sentences the administering State be given some freedom to adapt the sanction to that provided in its own penal system without, however, aggravating the prisoner's penal situation. The administering State must inform the sentencing State of its decision and it must enforce the sentence in accordance with the principle of good faith. The modalities of enforcement should be governed by the law of the administering State, but the prisoner should nevertheless benefit from measures such as pardon taken in either of the two States.

14. *Invites* States also to conclude agreements on the supervision of conditionally sentenced or conditionally released offenders.

15. *Expresses* the wish that the application of new forms of cooperation (transfer of prosecution, transfer of prisoners for the enforcement of their sentence, supervision of conditionally sentenced or released persons) not be confined to the nationals of a State but should be extended to persons having their permanent or habitual residence in that State, with a view to facilitating their social resettlement.

16. *Calls* on States not to use these international instruments of transfer of proceedings and of prisoners in cases where the offender might face capital punishment or be confronted with any

other form of cruel, inhuman or degrading treatment. States should, moreover, abstain from using these instruments as a means of disguised extradition.

### **Conclusions**

17. *Considers* it desirable to facilitate mutual assistance, in particular in the new forms, such as transfer of proceedings, enforcement of sentences or supervision of sentenced persons. However, in taking such measures, States must ensure that the interests of the person prosecuted, the rights of defense and the legitimate interests of the victim are not violated.

18. *Proposes* that close cooperation be pursued through the conclusion of agreements at worldwide, regional or bilateral level or by adopting provisions in domestic law offering to other States, where necessary on the condition of reciprocity, special facilities to implement their criminal justice.

19. *Calls* on States to open such regional agreements to countries outside the geographic region and possibly also to groups of States in other regions.

20. *Invites* all States, international organizations, in particular the United Nations, as well as non-governmental organizations to take into consideration these recommendations and to implement their principles.

## **XIVth INTERNATIONAL CONGRESS OF PENAL LAW (Vienna, 2 – 7 October 1989)<sup>14</sup>**

*Topics:*

1. The legal and practical problems posed by the difference between criminal law and administrative penal law.
2. Criminal Law and modern bio-medical techniques.
3. The relations between the organization of judiciary and criminal procedure.
4. International crimes and domestic criminal law.

### **Section I. The legal and practical problems posed by the difference between criminal law and administrative penal law**

#### ***Introduction***

1. The field of administrative penal law has expanded and thus gained increased relevance due mainly to two developments: first, the expansion of state intervention in more and more areas has led to a proliferation of administrative regulations frequently accompanied by ancillary norms of administrative penal law providing for sanctions as retributive reactions to violations of the primary regulations. Second, an international trend toward removing violations of minor social importance from the traditional criminal law has led legislatures to redefine such violations as administrative penal infractions.

2. The decriminalization of transgressions is in accord with the principle of subsidiarity of penal law and is thus welcomed. An inflation of administrative penal law is, however, not desirable; purely administrative measures should be used as an alternative. In any event, legislatures and legal science should devote increased care to defining the proper limits of as well as the guiding principles applicable to administrative penal law.

3. Whether or not certain conduct should properly be punished according to criminal law or to administrative penal law cannot be determined categorically. It is therefore in most cases for the legislature to decide what conduct is to be sanctioned criminally or by administrative penal law. In making that decision, legislatures should take into consideration several criteria, especially the importance of the social interest affected by the conduct in question, the gravity of endangerment or harm to that interest, and the kind and degree of fault on the part of the offender.

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<sup>14</sup> RIDP, vol. 61 3-4, 1990, pp. 86-110 (French); p.111-134 (English)

4. The difference between criminal law and administrative penal law implies limitations on the kind and severity of sanctions available as well as on the restrictions of individual rights permissible in the course of administrative penal procedure.

5. Administrative penal law resembles criminal law in that it provides for the imposition of retributive sanctions. This similarity requires application of the basic principles of criminal law and of due process to the field of administrative penal law (*Cf art. 14 of the International Covenant of Political and Civil Rights; art. 6 of the European Convention on Human Rights*).

On the basis of these considerations, the Congress makes the following recommendations

### **1. Limitations**

a) Sanctions for administrative penal infractions should be reasonable and proportionate to the gravity of the infraction and the personal circumstances of the offender. Deprivation and restriction of personal liberty should not be available as a primary sanction or as an enforcement measure.

b) The amount of the administrative sanction, particularly of a pecuniary fine, shall not essentially exceed the maximum amount of a fine under criminal law.

c) Restrictions of individual rights in proceedings of administrative penal law must not be out of proportion to the gravity of the presumed offence. Pretrial detention, surveillance of mail and telephone lines as well as similar severe restrictions of individual rights should not be permissible in administrative penal proceedings.

### **2. Principles of substantive law**

a) Definitions of administrative penal infractions as well as of administrative penal sanctions should be fixed in accordance with the principle of legality. The lines between criminal offenses and administrative penal infractions should be drawn, with sufficient clarity, by the legislature. The use of distinctive terms for administrative penal infractions and sanctions is recommended.

b) Administrative penal responsibility of physical persons should be based on personal fault (intent or negligence).

c) However, the nature of administrative penal sanctions makes the field of administrative penal law more than criminal law conducive to the recognition of corporate liability.

d) Defenses of justification and excuse recognized in criminal law, including unavoidable mistake of law and extenuating circumstances, should likewise be available in administrative penal law.

### **3. Principles of procedure**

- a) The presumption of innocence and the principle that the defendant can be sanctioned only if the violation has been proved beyond a reasonable doubt should be respected in administrative penal law.
- b) In simple cases, the procedure can and should be expedited, but the defendant should retain the right to be informed of the charges and evidence brought against him, the right to be heard, including the right to present evidence, and the right to counsel.
- c) Proceedings in administrative penal cases can be conducted by administrative agencies or by other non-judicial bodies that can impose sanctions, but recourse to the judiciary and to adversary proceedings should be possible.
- d) If an act meets the definition both of a criminal offence and of an administrative penal infraction, the offender should not be punished twice; at a minimum, full credit should be given, in sentencing on a subsequent conviction, for any sanction already imposed in relation to the same act.

### **4. Access to Information and Legal and Empirical Research**

- a) In administrative penal law, citizens should have the right and the means of full access to all information, data, and decisions of administrative agencies concerning them, provided that the right of privacy is properly respected.
- b) Research in the field of administrative penal law should be facilitated, encouraged, funded and pursued to provide essential information in this field of law.

## **Section II. Criminal law and modern bio-medical techniques**

### **1. General considerations**

1.1 - Revolutionary progress in modern medicine and biotechnology has produced appreciable success in the struggle against diseases and in the improvement of the human wellbeing. It has also brought undesired side effects and dangers to man and mankind. To solve these new individual and social problems a reappraisal of traditional ethical principles is required. New regulations may also have to be introduced.

1.2 - The most important activities creating new problems and therefore possibly demanding new regulations are research with human beings (born and unborn), transplantation of organs, human artificial procreation and gene technology. In these domains, colliding interests are even more apparent than in traditional medical therapy.

1.3 - On the one hand, especially in the field of human experimentation, the protection of the research subject's self-determination by means of "informed consent" has to be considered as well as the protection of his life and his physical integrity against unjustifiable risks and, in some circumstances, the protection of his human dignity against humiliating experiments or the exploitation of his particular vulnerability. Modern reproductive medicine might lead not only to ignoring the interest of the prospective child but also to endangering the institutional protection of marriage and family. Modern genetic screening technology could also lead to discrimination in employment and insurance, and cause damage to the environment.

1.4 - On the other hand, one has to consider the right to free development of personality (including the right to procreation) as well as the freedom of science and research not only in the individual interest of each researcher but also in the general interest of further medical progress, progress ultimately supposed to serve the prosperity of human beings and mankind.

1.5 - In balancing these colliding interests, different points of view and results are to be expected due to the influence of different religious, ethical and political convictions on different legal cultures and social structures. In view of the frontier crossing character of these problems and an increasing interdependence among the various countries, internationally uniform standards and rules should be achieved if possible binding laws are to be introduced on an international level.

1.6 - To take care of these different interests requires differentiated means ranging from rather "soft" professional guidelines in order to reach or maintain a rather high medical-ethical standard to legal rules with diverse enforcement models and sanctioning methods. A strategy which integrates private law damages schemes with administrative measures and criminal sanctions would seem most adequate.

1.7 - The appropriateness of different control mechanisms regarding bio-medical procedures depends also on the ways in which the activities of health care in general and of research personnel in particular are supervised by respective countries' national legislation. This can also include differences between criminal and mere administrative sanctions. A further alternative can be the law's providing only a regulatory framework, in connection with a license authority controlling the work in this field, with that authority possibly creating rules by itself and taking the necessary enforcement measures.

1.8 - The employment of criminal law as a control mechanism has to be done on the basis of rational argumentation. Criminalization of medical activity as well as the threatening of penalties has to remain a means of "last resort" (*ultima ratio*): the first pre-condition has to be the worthiness of the endangering good and the blameworthiness of the endangering action (*Strafwürdigkeit*). Furthermore on the basis of a cost efficiency comparison of different means, the employment of criminal punishment must prove both as necessary (*Strafbedürftigkeit*) and suitable (*Straftauglichkeit*).

## **2. Medical progress requires medical research**

2.1 - New and hopefully better methods of treatment as well as new and hopefully better pharmaceuticals are not possible without having experimental tests performed on human beings prior to the techniques' general introduction into medical practice. Certainly, there already exist different national as well as international] principles and guidelines, in particular the Nuremberg Code, the Declaration of Helsinki (as adopted by the World Medical Assembly in 1964 and as revised in Tokyo 1975) and the Proposed International Guidelines for Bio-medical Research involving Human Subjects of the World Health Organization (WHO) and the Council for International Organization and Medical Science (CIOMS) of 1982. Since these declarations, however, are only statements of ethical principles, and rely on professional self-control, they are not easily sanctionable in case of breach. Therefore the protection of research subjects should also be clarified by law and, if necessary, violations should be made punishable by criminal law. When alternative methods of research and experimentation are available, such as computer simulation or animal research, they should be preferred to the use of human subjects.

2.2 - In the category of therapeutic research -that is research that has as its ambition the amelioration of the condition of the particular patient who is its subject- the ordinary rules for legitimating the provision of medical services apply. Even in this category, however, it seems appropriate that further protections -above and beyond the strict requirement of informed consent- be utilized, as for example, some institutional mechanism by which the risks (for the research subject) and benefits (for the medical treatment and for the research goal) of the proposed research can be evaluated by outside persons.

2.3 - Such a risk-benefit-evaluation is all the more necessary when a new technique or drug of still experimental character is to be used and where there is no prospect of immediate benefit for the research subject concerned, as for example, when a new drug is used on healthy subjects for the first time, or when a patient is included in a control group. Even if such trials may ultimately aim at medically prophylactic, diagnostic or therapeutic ends, nevertheless, we are still in the area of human experimentation (non-therapeutic research) for which - with perhaps the exception of some special rules for drug testing - there is a lack of express legal safeguards for research subjects in most countries.

2.4 - In cases of non-therapeutic research, whatever the anticipated scientific progress might be, the following obligations, in particular, should be strengthened by their express inclusion into criminal law:

- The researcher should be guided only by purely scientific purposes and not abuse his position vis-à-vis the research subject because of personal bias or political motives.
- In order to safeguard life and physical integrity, the research subject should never be exposed to any substantial danger of death or inappropriately serious risk to health.

- In order to safeguard self-determination, no one should be subjected to an experimental technique or drug testing without his express written and informed consent.

- In order to protect a research subject from possible damages, there should be some insurance scheme by which injured subjects may be adequately compensated.

2.5 - In order to protect research subjects and to secure a comprehensive benefit-risk-assessment, independent ethical committees should be installed with interdisciplinary composition including, in particular, legal expertise.

2.6 - Additional safeguards up to general prohibition should be provided for particularly vulnerable persons (such as minors, pregnant women, mentally or physically handicapped individuals, or any other people who are lacking ordinary capacity for insight and judgment). Such persons may at most participate in non-therapeutic research if the following conditions are met:

- When, as for example, with certain diseases of infancy or dementia in adults, the development or improvement of a treatment or drug cannot be accomplished without using the technique or treatment on persons of the same age or with the disease.

- Furthermore, in many cases of therapeutic or non-therapeutic research with impaired subjects a valid consent of the legal representative is required, subject to the review and approval of a competent authority. In the course of obtaining this consent, the individual himself shall be consulted to the maximum extent feasible. Nobody shall be included in non-therapeutic research against his express objection.

- In addition to the above requirements, minors and impaired adults shall be permitted to participate as research subjects in non-therapeutic research only when the research proposed involves minimal or no risk.

- Incarcerated or detained persons, including prisoners of war, should be exempted from non-therapeutic research.

2.7 - All factors for showing that all essential requirements mentioned before are met have to be comprehensively documented.

2.8 - Remuneration for participating in non-therapeutic research should be confined to expense allowance and to compensation for any injuries sustained; risk-oriented financial benefits should be excluded.

2.9 - In order to prevent a researcher or a research institution from carrying out human experimentation that would not be allowed in his own country which imposes less strict legal limitations, an internationalization of the legal rules should be attempted.

- National standards should at least be oriented to implementing principles which already have found international recognition in declarations, guidelines and conventions.

- Crimes against the rights of research subjects should be made international crimes on the basis of the principles of universality.

### **3. Organ transplants and artificial organs**

3.1 - The traditional criminal law does not sufficiently take account of special problems and needs which are connected with organ transplantation and the use of human tissue.

- While the general provisions for assault and battery are in the first instance directed against involuntary invasions into physical integrity, organ transplantation from a living donor concerns cases where the donor is willfully giving away part of his body: so far most penal codes lack sufficiently clear rules for ascertaining free consent and protecting against inappropriate risk.

- To the extent that the criminal law does not protect the corpse, the tissue of the newly dead is at risk for being appropriated for any and all purposes.

- If on the other hand the corpse is protected against any invasion, or if it is subject to the absolute control of the deceased's family or proxy, the opportunity to perform organ transplantation for a possibly life-saving treatment of another patient will be substantially limited, if not completely excluded.

3.2 - If such deficiencies and a lack of clarity exist, legal regulations for the conditions and procedures of organ transplantations and the use of artificial organs are desirable not only to provide organs for recipients, but also to safeguard organ donors as well as physicians. In making new law, distinctions should be drawn between transplantation from live donors and corpses.

3.3 - In cases of organ transplantations from live donors, the following conditions are of particular importance:

- The donor should receive full information about the risks, and the procedures to be followed and should expressly consent to it. - A special risk-benefit evaluation should be made with regard to organs or substances which cannot regenerate and/or the loss of which would endanger life or cause a serious risk to health.

- These limitations require intensified attention with regard to children and other persons with a limited legal capacity. Even with consent of the legal representative those people may be permitted to donate organs or tissue only if it is necessary for rescuing a near relative or a close friend from a clear and present danger to life and if there is no other donor available, who is medically suitable. In the same sense, this shall also apply to prisoners. The necessary consent of the legal representative is subject to review and approval by a competent authority. In cases where the donation of an organ is carried out on behalf of the legal representative, he should be excluded from the decision whether the procedure should be authorized.

3.4 - In deciding whether an organ or tissue may be transplanted from a deceased person, his or her prior express or presumptive will is primarily decisive.

- In case the will of the deceased cannot be ascertained by sufficiently reliable declarations or other factors, the decision of the next of kin is to be respected.

- A feasible alternative might be to permit the transplantation of organs or tissue insofar as the

deceased had not expressly objected to such a procedure prior to death and nothing is known about a contradictory will of a near relative.

3.5 - Not least, in order to prevent premature removals or organs it seems necessary to declare by generally binding roles the criteria for ascertaining death, and to regulate the procedures to be followed for ascertaining the criteria in the individual case. This should be accomplished by complying with internationally agreed standards and practices. The ascertainment of death should be undertaken by a physician who does not belong to either of the teams of removal or implantation.

3.6 - The patient's right to die in human dignity may not be infringed because of his suitability as an organ donor.

3.7 - To the extent that organ transplantations or the use of artificial organs has to be perceived as therapeutic experimentation, the conditions required for this situation (infra 2.2.) have to be fulfilled.

3.8 - The transplantation of gonads (ovary or testis) should be prohibited.

3.9 - Removing and reusing artificial organs without consent or other lawful authority should be forbidden.

3.10 - Commercialization of human organs and tissues should be prevented, if necessary by penal sanctions. In particular, national and international measures should be adopted to prevent the utilization of organs and tissues obtained through the exploitation of the economic needs of the donors or their relatives.

#### **4. Artificial human reproduction\***

4.1 - Many of the legal questions which arise in connection with medically assisted procreation (artificial insemination, in vitro fertilization, embryo transfer, surrogate motherhood) are still to be resolved in many countries. This applies to questions of family laws (such as parent-child relationship in cases of gamete donation or the duty of maintenance of donors), to the eventual right of a person to know his or her own ancestry, and to the status of the embryo (see 5.2.). Consequently, the question as to how far criminal sanctions might be necessary in this area - at least so far as the system of artificial reproduction by donor is concerned - is still open in most countries. To the extent possible, international accords should be reached in solving these problems.

4.2 - Bio-medical techniques in pursuance of human reproduction are not legally impermissible per se. While some hesitation is therefore advisable, there could be certain techniques which may require penal sanctions. Any necessary regulations, however, should be differentiated on

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\* During the final session, the Egyptian national group made reservations with reference to sections concerning heterologous insemination, since the procreation of a child by any other person than the husband is contradictory to basic principles of Islamic Law. The chair of section II, however, pointed out that the resolution passed does not preclude a prohibition of certain methods for medically assisted reproduction.

the basis of the peculiarities of the various reproductive techniques and take account of the biological knowledge of the beginning of human life.

4.3 - In areas of reproductive medicine, penal provisions should, if used at all, be directed only against activities on the impropriety of which a broad social consensus exists.

4.4 - If necessary, prohibitions by criminal law should be supplied by introducing certain procedures and duties of documentation, the violation of which should at least carry with it ethical or administrative sanctions.

4.5 - Regulations and sanctions ranging up to penal provisions may, in particular, be found necessary to deal with these subjects:

- The protection of significant interests of children who are procreated by way of reproductive medicine, in particular interests such as (and in accordance with the national law of adoption) the right of not being cut off from any possibility of learning of his own ancestry.
- Safeguards of minimal standards for gamete donation, in particular through the duty of informing about characteristics which might be relevant for the health of the recipient and her offspring.
- Prohibition of conserving gametes or embryos beyond a certain period.
- The restriction of post-mortal fertilization.
- The prohibition of extracorporeal cultivation of embryos beyond the development stage reached by natural nidation.
- The prevention of trade in gametes and embryos and of a commercialization of pregnancies by so-called surrogate motherhood including advertisement directed at such arrangements.
- Safeguarding the rights of self-determination of all parties involved (including gamete donors) as well as of the freedom of conscience of the physician.
- The prohibition of producing embryos for purposes other than for human procreation.

4.6 - The professional's duty of confidentiality must also be complied with in the area of medically assisted procreation. Any rights or duties of disclosure, as they may be determined by the interests of the child concerned, should be expressly regulated.

### **5. Research with and on living embryos**

5.1 - Apart from the more or less extensive abortion legislation enacted in most countries, special legal protections for the fertilized egg between conception and nidation (that is the point at which the embryo is fully embedded in the uterus) are lacking. As a result, researchers may do what they wish with extra-corporeally produced embryo that have not been implanted. They may simply allow them to die or remove them, for example by washing them away or using them for experimental purposes. The same freedom applies to embryos which have been removed from the woman before nidation is completed. If there exists ethical guidelines

on the interference with human embryos at all, usually they cannot be enforced or their breach sanctioned legally. This situation of under regulation is not satisfactory.

5.2 - The basis and scope legal protection of the as yet unimplanted human embryo depend to a great extent on the "moral status" attributed to it. Although no universal agreement exists on the issue of its moral status, and the international discussion is still going on, there is unanimity that -whatever may be said of possible restrictions- in principle human life is worthy of being protected from the very moment of conjugation of gametes, without regard to whether the early embryo has to be considered a "person" or as a being possessing its own fundamental rights.

5.3 - To the extent that an intervention with the embryo serves its own well-being as a therapeutic treatment, no particular legal objections can be made. In this case the rules for therapeutic research (see above 2.2.) are applicable. The rights and interest of other concerned parties, particularly those of the pregnant woman, are to be respected.

5.4 - On the other hand, very different opinions are expressed on the issue of non-therapeutic research on embryos.

- It is generally preferred that the production of embryos, for the sale purpose of research be subjected to state prohibition, if necessary by penal measures.

- It has been held desirable not to fertilize more human ova than needed for a single treatment.

- Apart from that, it is the prevailing opinion that manipulation of an embryo resulting in its intentional or unavoidable death is in any event admissible only if the embryo cannot be implanted in due course, if the research goal is strictly defined and oriented to achieve high ranking gains, which cannot be accomplished other than by research on human embryos, and if the embryo is not developed beyond the normal stage of nidation. This requirement, however, does not imply any assessment whether there are any present, research goals which would comply with the mentioned preconditions.

5.5 - Any sort of "ownership" or property rights of gamete donors in embryos is to be denied. This does not exclude the possibility of having to obtain the consent of the donor to authorize research on an embryo to which he or she is related.

5.6 - Manipulation of an embryo has to be subjected to special regulations setting out conditions and procedures. To the extent that this cannot be done by ethical rules and by safeguards against breaches (for instance by way of preventive control through ethics commission - see above 2.5.), penal law and its enforcement mechanisms should be taken into consideration.

## **6. Interference with human genotype (genome analysis, gene therapy)**

6.1 - The inviolability of genetic inheritance against artificial intervention should be protected by law.

6.2 - The limits of permissible interventions into human inheritance have to be settled by law. There is a need not only for special regulations to protect the individual against non-

therapeutical application of such treatment but also to preserve public health interests. This especially concerns the protection of the environment against pollution possibly caused by biotechnological experiments.

6.3 - The use of prenatal genetic diagnosis should be limited to the suspicion of genetic diseases which appear to be particularly dangerous for the further pre - or post-natal development of the embryo.

Employing prenatal screening to determine the embryo's sex for the purpose of an abortion that is not justified by medical reasons has to be rejected. Medical advice on the basis of a prenatal diagnosis is to be restricted to dangers threatening the health of the expected child. The required consent of a pregnant woman to prenatal screening is not to be made dependent on her willingness to a later absorption of the damaged child.

6.4 - While doing epidemiological tests on genetic damage, genetic diagnostics including the documentation related to the individual can only be used (if at all) if the test has a clear medical goal and the collected genetic information is reliably safeguarded from misuse. It is necessary that the person has consented upon full information before such tests are done. The same is true for all further collection, storage or use of genetic information.

6.5 – Special legal protections should be introduced to guarantee data privacy and to prohibit wrongful discrimination (for example in employment and insurance) on the basis of genetic screening or analysis, and (if necessary) these protections should be supported by criminal law.

6.6 - The use of genetic diagnostic techniques as instruments of forensic medicine should be regulated by legislation.

6.7 - There is no reason now to limit gene transfer in somatic cells for therapeutic purposes, so long as the rules provided for medical treatment are adhered to (see above 2.2.).

6.8 - Gene transfer to germ line cells for other than therapeutic purposes is unacceptable without exception. Moreover, gene transfer into the human germ line must be forbidden until the reliability and the safety of the germ line therapy have been proved by prior somatic cell therapy and animal tests. This research moratorium must at least be ensured by professional guidelines and/or administrative approval restrictions.

6.9 - Cloning experiments on human beings must be made criminal.

6.10 - Experiments aimed at developing hybrids and chimera creatures by means of karyogamy of human cells with those of animals must be criminalized.

### **Section III. The relations between the organization of the judiciary and criminal procedure**

There is an interdependence between the rules of criminal procedure and the organization of the judiciary which merits closer attention on the part of the researchers, both to doctrinal and empirical issues. Whenever consideration is given to modifying one or the other area, the legislator should bear this interdependence in mind. In making the adaptations, one must be particularly careful to maintain an equilibrium between protecting the fundamental rights of the parties and the efficiency of criminal justice.

#### **1. The infrastructure of criminal justice**

In order to better achieve the goals pursued by the administration of criminal justice, states must increase their financial resources and modernize their technical equipment. It should be noted that such economic measures regarding the administration of justice are to be directed towards qualitative improvement to the administration of criminal justice. For example, it would be impermissible to restrict the principle of collegiality for financial reasons.

#### **2. The authorities and their function**

2.1 - *The nomination and training of professional judges.* The quality of criminal justice, that is to say the capacity of the organs of criminal justice and of the rules of criminal procedure to achieve the principal objectives of the criminal process depends in large measure on the personal position and the professional qualifications of the judges.

It is therefore desirable that states

- direct their efforts in order that the selection, nomination, remuneration and conditions of work of the judges ensure to the fullest extent possible the acquisition of the requisite professional knowledge as well as the continuity of their professional education.
- adopt at the same time institutional (such as the Conseil Supérieur de la Magistrature) and procedural measures adequate to ensure, among other things, the independence and impartiality of the judges.
- ensure equality of treatment of all, without any discrimination based in particular on sex, in respect to entry into and treatment within the judicial profession.

2.2 - *Popular participation in the administration of justice.* The institution of popular participation in the administration of criminal justice, in the different forms in which it is found in different systems of criminal justice appears to be strongly anchored in their legal traditions and in their constitutional and political structures.

It would be desirable that jurisdictions of this sort apply all the ordinary rules of due process, including the right to appeal.

2.3 - *Specialized courts*. The establishment of specialized courts\* is acceptable when their purpose is to improve the quality of justice which they dispense without, however, abandoning the guarantees of due process.

Special "ad hoc" courts are forbidden.

2.4 - *The Supreme Tribunal*. The different systems assign to the supreme courts, on the one hand, control over proper application of the law and the safeguarding of individual guarantees and, on the other hand, the implementation of a uniform interpretation and –if possible– evolution of the law.

Whatever may be the type of supreme court -court of cassation for the control of legality or ultimate appeal court (jurisdiction of the third degree in the French sense)- a contemporary and widespread phenomenon is that of an excessive judicial workload which affects numerous supreme courts and has a tendency to compromise their effectiveness.

In this respect it would be desirable if the legislator, having regard to the values contained in the constitutional system, proceeded to elaborate solutions to this problem, always respecting the essential task of the supreme court. Among these solutions one could envisage modifications in procedure or in substantive law (e.g. rejecting manifestly ill-founded appeals *ex officio*, or suspending periods of prescription applicable to criminal procedure), in the organization of the judiciary (e.g. introducing a filtering chamber), in the activity of the bar (e.g. specialization by advocates) and also the improvement of the assistance placed at the disposition of the judges (qualified auxiliary personnel, for example, research assistants) and modern equipment.

2.5 - *The prosecution service*. In a spirit of impartiality and objectivity, the prosecution service must comply fully with its double role as guarantor of the application of law and as promoter of criminal process.

In countries having such a possibility, the prosecution service can receive general directives of criminal policy. However, with regard to specific cases the prosecution service must exercise the administration of criminal justice in full independence.

In order to ensure the equal treatment of persons involved in the criminal process and of coherence in respect of action taken by the prosecution service, it would be desirable for the prosecution service to elaborate guidelines inside the institution.

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\* This resolution does not relate to juvenile courts, due to their specific nature.

2.6 - *Examining the sufficiency of the case.* The judiciary must protect the individual against illegal or unjustified indictment. This goal can be reached, for example, by establishing a judicial organ of indictment.

2.7 - *The defense.* Every person has the right to effective assistance of counsel in all phases of criminal procedure, from the very beginning of an investigation.

In order to guarantee the effective application of this right, assistance financed by public funds must be granted to an accused or a victim who lacks adequate financial means to defend himself, as it is required in the interest of proper administration of justice.

2.8 - *Investigative organs and judicial authorities\**. In large measure the quality of criminal proceedings depends upon the quality of the organs entrusted with the investigation of crime and the research which they undertake.

It would therefore be desirable that each state pay particular attention to the recruitment and to the training of such personnel, to the provision of necessary equipment, and to the specification and regulation of the activities of such organs in order to ensure their effective operation and in order to safeguard the rights and interests of persons involved in the criminal process.

It is necessary that the organs operate under the direction and control of the prosecuting or other authority exercising judicial functions.

Any restriction of the fundamental rights must be put under the control of a judicial authority.

### **3. Differentiations and specialization in criminal procedure**

The different forms of criminality, among which are: organized crime, economic crime, petty offences, and international and transnational crime, necessitate a revision of the system of relations between judicial organizations and criminal procedure in order to better ensure the prevention and control of crime.

In order to achieve the above goals consistent with the norms contained in the constitutions of different states and with fundamental human rights, it is desirable to take all necessary measures in order to deal effectively with:

- organized crime by "organized justice" coordinated with all the relevant organs of the state;
- economic criminality with an adequate degree of specialization at the relevant operational levels;
- petty offences with a balanced adaptation of means to ends adopting among other solutions procedures and measures as alternative to those traditionally employed in criminal justice;

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\* This includes prosecution services organized on the Anglo-Saxon model.

- international and transnational crime by the intensification of ancient and new forms of cooperation among states, crossing the barriers posed by considerations of national sovereignty, and by the development of new principles of international criminal law (*civitas maxima*).

#### **Section IV. International crimes and domestic criminal law**

*Recognizing* the endeavors of the United Nations and the Council of Europe, the International Association of Penal Law (A.I.D.P.), the International Law Association (I.L.A.) and many individual scholars to codify international crimes in order to assure their prevention, prosecution and their repression, as well as the procedural guarantees, especially those formulated in international conventions on human rights.

*Taking into consideration* besides others:

- the Nuremberg principles as formulated by the International Law Commission (I.L.C.),
- the Vienna Convention of 1969 on the Law of Treaties (articles 60, 64),
- the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly Resolution 40/34),
- the Draft Code of Offences against the Peace and Security of Mankind as prepared by the I.L.C.,
- the League of Nations and the Draft Statutes for an International Criminal Court,
- the Drafts for an International Criminal Code and a Statute for an International Criminal Court, prepared by the "Foundation for the Establishment of an International Criminal Court" (Wingspread),
- the Model International Code presented by the A. I. D. P. 1925 and 1935 to the U. N. as well as its predecessors,
- the draft elaborated by the I.L.A., especially the Statutes for an International Commission of Criminal Inquiry and for an International Criminal Court (with five additional protocols),
- the latest report of the I. L. C. for the revision of the Draft Code of Offences against the Peace and Security of Mankind, and all private proposals to codify international crimes and to draft a statute for an International Criminal Court.

*The participants of the XIVth International Congress on Criminal Law in Vienna 1989 adopt the following resolutions:*

**Part I: Efforts to recognize and to codify international crimes**

1. In order to make international criminal law as effective as possible, international crimes should be divided into two categories, international crimes *stricto sensu* and *lato sensu*.

1. The first category should be defined as follows:

a) Such crimes shall be recognized by the international community according to the rules generally accepted for the creation of international law. Accordingly, direct criminal responsibility of individuals is based only on this recognition:

b) International crimes *stricto sensu* should be limited to violations of the highest values of the international community; if these requirements are met, other international crimes of the first category may be recognized in addition to those existing already.

2. The second category (international crimes *lato sensu*) could embrace international crimes which are recognized by rules of the international community not necessarily generally accepted and which deal with violations of values, the protection of which requires the cooperation of the states concerned.

The responsibility for such crimes is based on domestic law.

3. Heads of state and state officials are not excluded from criminal responsibility for international crimes. Neither the interest of a state nor any domestic legislation can justify international crimes *stricto sensu*.

The defense of having acted in compliance with superior orders shall excuse only this order if not manifestly illegal.

4. An international criminal court should be established by the international community in order to adjudicate international crimes *stricto sensu*. Nevertheless the states can request this court to also adjudicate cases concerning other international crimes falling within their jurisdiction. This proposal includes the possibility of the creation of a regional international criminal court.

**Part II: Legal problems emerging from the implementation of international crime in domestic law**

1. At present, the prosecution of international crimes is only possible before national courts (indirect enforcement model).

2. The states-parties to international conventions containing penal provisions should make all necessary efforts to incorporate these provisions into their domestic legislation. At the present stage of the development of international criminal law, the transformation of conventional provisions into domestic law by a specific act of national legislation is the most appropriate method. However, the direct application of international conventions is not excluded if they contain provisions of a sufficiently precise character.

3. The most important obligation resulting from international conventions containing penal provisions is to criminalize certain acts in domestic law. The explicit criminalization by creating new criminal provisions is the best method to fulfill this obligation. In doing so and as far as war crimes are concerned at least the "grave breaches" of the Geneva Conventions should be expressly formulated in domestic law.
4. The special character of the international crimes should not result in different principles of criminal liability. The special character of international crimes *stricto sensu* justifies that they are not subject to statutory limitation.
5. States should avoid jurisdictional gaps with regard to international crimes. However, multiple prosecutions before domestic courts of different states for the same offence should be avoided by the international recognition of the principle of *ne bis in idem*.
6. International cooperation in matters of international crimes should be improved. For example, the absence of a treaty, the absence of reciprocity, or the nationality of the offender should not be obstacles to such cooperation.
7. The improvement of international cooperation should not be to the detriment of the rights of the defendant. In particular, his rights under international human rights conventions should be respected.
8. The victims of international crimes, in particular those committed through abuse of power, should be assured access to justice, for example by giving them the possibility of initiating criminal proceedings.

## **XVth INTERNATIONAL CONGRESS OF PENAL LAW (Rio de Janeiro, 4 – 10 September 1994)<sup>15</sup>**

*Topics:*

1. Crimes against the environment. Application of the general part.
  2. Computer crimes and other crimes against information technology.
  3. Reform movements in criminal procedure and the protection of human rights.
  4. The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters.
- Resolution on the international criminal court.

### **Section I. Crimes against the environment. Application of the general part**

#### ***Preamble***

*Considering* the increasing risks to the present and future generations, their health, and the environment of which they are a part, posed by industrial and similar activities;

*Considering* worldwide concerns about the degradation of the environment caused, *inter alia* by the commission of crimes against the environment contrary to national and international laws;

*Considering* recent developments towards the recognition of crimes against the environment in national penal codes and environmental protection laws and in international conventions, recommendations and resolutions;

*Considering* the Council of Europe Resolution 77(28) on the *Contribution of Criminal Law to the Protection of the Environment*, Recommendation 88(18) on the *Liability of Enterprises for Offences*, Resolution No.I of the European Ministers of Justice adopted at their Conference in Istanbul in 1990 and the on-going work of the Council of Europe towards the development of a European Convention on the protection of the environment through criminal law;

*Considering* the United Nations General Assembly Resolution No. 45/121 of 1990 adopting the Resolution on the protection of the environment through criminal law submitted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders; the United Nations Economic and Social Council Resolution 1993/32 and June 1994 and the preparatory

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<sup>15</sup> RIDP, vol. 66 1-2, 1995, pp. 20-46 (French); p. 47-72 (English); pp.73-99 (Spanish).

documents of the forthcoming Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders on agenda item "*Action against national and transnational economic and organized crime and the role of criminal law in the protection of the environment*";

*Considering* the recommendations contained in the report of the International Law Commission to the UN General Assembly, 1991;

*Considering* the *Model for a domestic law of crimes against the environment* proposed by an International meeting of experts on environmental crime held in Portland, Oregon from 19-23 March 1994.

*Considering* the desirability of providing appropriate sanctions for serious crimes against the environment and for the reparation of damage to the environment;

*Having examined* and deliberated upon the recommendations of the AIDP Preparatory Colloquium on the application of criminal law to crimes against the environment held in Ottawa, Canada from 2-6 November 1992,

## ***Recommendations***

### ***I. General principles***

1. *Environment* means all components of the earth, both abiotic and biotic, and includes air and all layers of the atmosphere, water, land, including soil and mineral resources, flora and fauna, and all ecological inter-relations among these components.
2. The *Principle of Sustainable Development*, as articulated by the World Commission on Environment and Development in 1986 (better known as the Brundtland Commission) and adopted by the General Assembly of the United Nations in 1992, states that economic development to meet the needs of the present generation should not compromise the ability of future generations to meet their own needs.
3. The *Precautionary Principle*, as articulated by the United Nations Conference on Environment and Development held in Río de Janeiro in June 1992 and adopted by the General Assembly of the United Nations, states that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
4. States and society have a responsibility to ensure as far as possible that the *Principle of Sustainable Development* and the *Precautionary Principle* are respected by all natural persons and private and public entities involved in activities that have the potential to harm the environment.
5. To ensure the observance of the *Principle of Sustainable Development* and the *Precautionary Principle*, States must have available a wide range of compliance measures

including compliance incentives, enforceable compliance agreements, licensing and regulatory powers, and sanctions for failure to observe established standards. In appropriate cases, criminal law might be seen as providing cost-effective measures to ensure the protection of the environment.

## ***II. Specific issues in relation to crimes against the environment***

6. Consistent with the *principle of legality*, there should be certainty in the definition of crimes against the environment.

7. A distinction should be drawn between *sanctions* which are imposed for non-observance of established administrative and regulatory standards, which do not include deprivation of liberty or punitive closing of an enterprise, and *criminal sanctions* which are imposed to prevent and punish culpable acts or omissions that cause serious harm to the environment.

8. The minimum material element in offences against the environment subject to criminal sanctions should be:

(a) an *act or omission* that causes serious harm to the environment or to human beings; or

(b) an *act or omission* in contravention of established environmental standards that creates a real and imminent (*concrete*) endangerment to the environment or human beings.

9. The minimum mental element, with respect both to an act or omission and to its consequences, required in the definition of an offence against the environment subject to criminal sanctions should be knowledge, intent, recklessness (*dolus eventualis* or *culpa gravis* or its equivalent in national laws) or, in cases where serious consequences are in issue, culpable negligence.

10. Where it is established that an accused acted or omitted to act, knowing that serious harm to the environment would likely result, and such harm does in fact result, compliance with the terms of a license or permit or with standards and prescriptions laid down in regulations should be reasonably limited as a justification for the act or omission.

11. Consistent with the *principle of restraint*, criminal sanctions should be utilized only when civil and administrative sanctions and remedies are inappropriate or ineffective to deal with particular offences against the environment.

## ***III. Criminal liability of entities***

12. Conduct that merits imposition of criminal sanctions can be engaged in by private and public entities as well as by natural persons.

13. National legal systems should, wherever possible under their constitution or basic law, provide for a variety of criminal sanctions and/or other measures adapted to private and public entities.

14. Where a private or a public entity is engaged in an activity that poses a serious risk of harm to the environment or to human beings, the managers and directing authorities of such entity should be required to exercise supervisory responsibility in a manner to prevent occurrence of harm and the entity should be held criminally liable if serious harm results as a consequence of the failure of its managers and directing authorities to properly discharge this supervisory responsibility.

15. To minimize the risk of injustice arising from uneven application of laws concerning offences against the environment in different countries, domestic laws should specify as clearly as possible the criteria establishing liability of human agents within private or public entities who may be responsible for ensuring compliance with environmental laws for offences against the environment committed by such entities.

#### ***Private entities***

16. Where allowed under the constitution or the basic law of a country, notwithstanding the usual requirement of personal responsibility for criminal offences, proceedings against a private entity should be possible for offences against the environment even if responsibility for such offences cannot be directly attributed to any identified human agent of such entity.

17. Where a private entity is responsible for serious harm to the environment or human beings, proceedings against such entity should be possible for offences against the environment, regardless of whether the harm results from an individual act and/or omission or from cumulative acts and/or omissions over time.

18. Imposition of criminal sanctions or other measures against a private entity should not exonerate culpable human agents of such entity who are involved in the commission of offences against the environment.

#### ***Public entities***

19. Where a public entity, in the course of executing its public functions or otherwise, causes serious harm to the environment or to human beings or, in contravention of established environmental standards, creates a real and imminent (*concrete*) endangerment to the environment or human beings, it should be possible to prosecute the criminally responsible human agents of such entity for an offence against the environment.

20. Where it is possible under the constitution or basic law of a country to hold a public entity responsible for criminal offences committed in the course of executing its public functions or otherwise, proceedings against such entity should be possible for crimes against the environment even if responsibility for the crime cannot be directly attributed to any identified human agent of such entity.

#### **IV. Crimes against the environment**

21. Core crimes against the environment, that is crimes that are *sui generis* and do not depend on other laws for their content, should be specified in national penal codes

22. Where offences against the environment are subject to criminal sanctions, their key elements should be specified in legislation and not left to be determined by subordinate delegated authorities.

23. Core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions.

24. Within the framework of the constitution and the basic law of national legal systems, legislation should facilitate the participation of citizens in the initiation of investigation and prosecution of alleged crimes against the environment.

#### **V. Jurisdiction**

##### ***Trans-border crimes***

25. Where the harm or serious risk of harm (*concrete endangerment*) that underlies a core crime against the environment arises outside the jurisdiction of a State where the crime is committed, wholly or in part, it should be possible, subject to appropriate safeguards for the accused and to applicable international laws, to prosecute the accused in the State where the crime was committed or in any State where the harm or serious risk of harm arises.

##### ***Extra-territorial crimes***

26. Where the harm or serious risk of harm (*concrete endangerment*) that underlies a core crime against the environment arises in the global commons, States should agree on an international convention or implement existing international conventions that would enable them to prosecute the crime by applying, in the following order: the flag principle; the principle of nationality; the principle of *extradite or prosecute*; and, in cases of generally acknowledged international crimes, the principle of universality.

##### ***Extradition***

27. Crimes against the environment of particularly serious gravity should be made extraditable offences.

##### ***International Criminal Court***

28. In order to facilitate the prosecution of international crimes, in particular crimes against the global commons, the jurisdiction of the international court proposed by the International Law Commission and currently being considered by the General Assembly of the United Nations

should include crimes against the global commons.

### ***Implementation of international conventions***

29. Where international conventions respecting crimes against the environment are not self-executing under domestic law with respect to execution of criminal sanctions, signatory States should implement such conventions by enacting the necessary domestic legislation.

## **Section II. Computer crimes and other crimes against information technology**

### ***Preamble***

*Recognizing* the proliferation of information technology and the emergence of an information society which is bringing about fundamental changes in all aspects of life;

*Noting* that a range of anti-social activities are subverting information technology to the detriment of individuals and of all sectors of society;

*Aware* that the rapid expansion of interconnectivity of information technology in the world transcends traditional national boundaries, and involves both developed and developing countries;

*Concerned* that the abuse of information technology is occurring at the national and international level;

*Concluding*, therefore, that such activity is relevant to all states;

*Taking into account* the previous contributions of other learned bodies, non-governmental and inter-governmental organizations<sup>16</sup>.

### ***Recommendations***

#### ***1. Non penal preventive measures***

1. There is a growing recognition of the increasing range of non penal options for preventing computer crime. These measures and new creative approaches should be encouraged on the national, supranational and international level in order to keep pace with technological innovation.

2. Such measures could include, among others:

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<sup>16</sup> Such as the OECD, the Council of Europe, the European Community, the Commonwealth, the United Nations, Interpol and the International Chamber of Commerce.

- Implementation of voluntary security measures by computer users.
- Imposition of obligatory security measures in certain sensitive sectors.
- The creation and implementation of computer security legislation, policies and guidelines by national governments.
- Commitment by management and senior executives to security and crime prevention within an organization.
- Incorporation, explanation and promotion of security measures by the information technology industry.
- Development, promotion and cultivation of computer ethics by all sectors of society, especially educational facilities, professional societies and the public.
- Cultivation of professional standards in the data processing industry, including the possibility of disciplinary measures.
- Promotion of victim co-operation in the reporting of computer crime. Training and education of personnel in the investigative, prosecutorial and judicial systems.

## **II. Substantive criminal law**

3. Abuses of information technology affect computer -related economic as well as privacy-oriented interests and include situations where data processing and its components are only used as tools to commit violations of traditional values, as well as where they are the direct object of the misconduct.

4. To the extent that traditional values are injured or endangered by the misuse of data processing, the new *modi operandi* may reveal loopholes in traditional criminal law. On the other hand, the development of information technology reveals the emergence of new types of interests which call for legal protection, especially the integrity of computer systems and the data involved, and the availability and the exclusivity of certain data (data security and data protection).

5. To the extent that traditional criminal law is not sufficient, the modification of existing, or the creation of new offences should be supported if other measures are not sufficient (principle of subsidiarity). This also applies to areas where criminal law is an annex to other areas of law (as in the area of copyright law), and where the extension of criminal law follows from changes in substantive civil or administrative law.

6. In the enactment of amendments and new provisions, emphasis should be put on precision, clarity and on defining offences in terms of objective elements. In areas where criminal law is only an annex to other areas of law, this requirement should also be applied to the substantive part of that other law.

7. In order to avoid over criminalization, regard should be given to the scope to which criminal law extends in related areas. Extensions that range beyond these limits require careful

examination and justification. In this respect, one important criterion in defining or restricting criminal liability is that offences in this area be limited primarily to intentional acts.

8. In this regard, the previous work of the OECD and the Council of Europe has made important contributions in specifying the types of conduct that should be penalized by national law. The AIDP welcomes the guidelines for national legislators included in the Recommendation No. R (89) 9, adopted by the Council of Europe on 13 September 1989, which enumerates a list of acts that should, or could, be the subject of criminal sanctions.

The minimum list of acts, which the Council of Europe recommended should be criminalized if committed intentionally, is as follows.

a. *Computer-related fraud*

The input, alteration, erasure or suppression of computer data or computer programs, or other interference with the course of data processing that influences the result of data processing, thereby causing economic or possessory loss of property of another person with the intent of procuring an unlawful economic gain for himself or for another person (alternative draft: with the intent to unlawfully deprive that person of his property).

b. *Computer forgery*

The input, alteration, erasure or suppression of computer data or computer programs, or other interference with the course of data processing in a manner or under such conditions, as prescribed by national law, that it would constitute the offence of forgery if it had been committed with respect to a traditional object of such an offence.

c. *Damage to computer data or computer programs*

The erasure, damaging, deterioration or suppression of computer data or computer programs without right.

d. *Computer sabotage*

The input, alteration, erasure or suppression of computer data or computer programs, or interference with computer systems, with the intent to hinder the functioning of a computer or a telecommunication system.

e. *Unauthorized access*

The access without right to a computer system or network by infringing security measures.

f. *Unauthorized interception*

The interception, made without right and by technical means, of communications to, from and within a computer system or network.

g. *Unauthorized reproduction of a protected computer program*

The reproduction, distribution or communication to the public without right of a computer

program which is protected by law.

*h. Unauthorized reproduction of a topography*

The reproduction without right of a topography, protected by law, of a semi-conductor product, or the commercial exploitation or the importation for that purpose, without right, of topography or of a semiconductor product manufactured by using the topography.

The guidelines of the Council of Europe also identify, in an "optional list", the following additional areas that could also be criminalized, if committed intentionally:

*a. Alteration of computer data or computer programs*

The alteration of computer data or computer programs without right.

*b. Computer espionage*

The acquisition by improper means or the disclosure, transfer or use of a trade or commercial secret without right or any other legal justification, with intent either to cause economic loss to the person entitled to the secret or to obtain an unlawful economic advantage for oneself or a third person

*c. Unauthorized use of a computer*

The use of a computer system or network without right, that either: (i) is made with the acceptance of a significant risk of loss being caused to the person entitled to use the system or harm to the system or its functioning; or (ii) is made with the intent to cause loss to the person entitled to use the system or harm to the system or its functioning; or (iii.) causes loss to the person entitled to use the system or harm to the system or its functioning.

*d. Unauthorized use of a protected computer program*

The use without right of a computer program which is protected by law and which has been reproduced without right, with the intent, either to procure an unlawful economic gain for oneself or for another person, or to cause harm to the holder of the right.

9. Having regard to the progress in information technology, to the increase in related crime since the adoption of the 1989 recommendation of the Council of Europe, to the significant value of intangibles in the information age, to the desirability to promote further research and technological development and to the high potential for harm, it is recommended that states should also consider, in accord with their legal traditions and culture and with reference to the applicability of their existing laws, punishing as crimes (in whole or in part) the conduct described in the "optional list".

10. Furthermore, it is suggested that some of the definitions in the Council of Europe lists - such as the offence of unauthorized access- may need further clarification and refinement in the light of the progress in information technology and changing perceptions of criminality. For the same reasons, other types of abuses that are not included expressly in the lists, such as trafficking in wrongfully obtained computer passwords and other information about means of

obtaining unauthorized access to computer systems, and the distribution of viruses or similar programs, should also be considered as candidates for criminalization, in accord with national legal traditions and culture and with reference to the applicability of existing laws.

In light of the high potential damage that can be caused by viruses, worms, and other such programs that are meant, or are likely, to propagate into and damage, or otherwise interfere with, data, programs or the functioning of computer systems, it is recommended that more scientific discussion and research be devoted to this area. Special attention should be given to the use of criminal norms that penalize recklessness or the creation of dangerous risks, and to practical problems of enforcement. Consideration might also be given as to whether the resulting crime should be regarded as a form of sabotage offence.

11. In regard to the preceding recommendations, it is recognized that different legal cultures and traditions may resolve some of these issues in different ways while, nevertheless, still penalizing the essence of the particular abuse. States should be conscious of alternative approaches in other legal systems.

### **III. Specific issues of privacy protection**

12. The significance of protecting privacy interests in the transformed information age against new dangers emanating from the information technology should be recognized. However, the legitimate interests in the free flow and distribution of information within society must also be respected. Privacy interests include the right of citizens to access, by legal means consistent with international human rights, information about themselves which is held by others.

13. The discussion demonstrated that there are significant differences in opinion as to both the means by, and the degree to, which protection should be afforded by administrative, civil, regulatory and criminal law. There are also serious disagreements as to the extent to which criminal law should be involved in the protection of privacy. Therefore, non-penal measures should be given priority, especially where the relations between the parties are governed by contract.

14. Criminal provisions should only be used where civil law or data protection law do not provide adequate legal remedies. To the extent that criminal sanctions are used, the AIDP notes the basic principles, which should be taken into account by states when enacting criminal legislation in this field, as recommended in Recommendation (89) 9 of the Council of Europe. The AIDP proposes further that criminal provisions in the privacy area should in particular:

- be used only in serious cases, especially those involving highly sensitive data or confidential information traditionally protected by law;
- be defined clearly and precisely rather than by the use of vague or general clauses (*Generalklauseln*), especially in relation to substantive privacy law;

- establish a difference between the various levels of gravity of the offences and to respect the requirements of culpability;
- be restricted primarily to intentional acts; and
- permit the prosecutorial authorities to take into account, in respect of some types of offences, the wishes of the victim regarding prosecution.

15. Further study should be undertaken to attempt, with special regard to public data banks, to define a list of acts which should appropriately be criminalized. This could include intentional acts of infringement of secrecy and serious forms of illegal collection, use, transfer and alteration of personal data which create a danger to personal rights. A starting point for this study might be the tentative proposals that were considered by the select committee of experts on computer related crime of the Council of Europe.

#### **IV. Procedural law**

16. The investigation of computer crime and of other more traditional crimes in an information technology environment requires, in the interest of an effective social defense, the provision of adequate coercive powers for investigative and prosecuting authorities, which must be balanced equally by adequate protection for human rights and privacy interests.

17. In order to avoid abuses of official powers, all actions by government agencies that restrict human rights may be undertaken only if there are clearly-defined provisions of law consistent with international human rights standards. Unauthorized infringements of human rights by government agencies may render the evidence obtained invalid and give rise to criminal liability on the part of the agent acting in violation of law.

18. In the light of these general principles, there should be clearly defined:

- a. powers for conducting search and seizure in an information technology environment, particularly in regard to the seizure of intangibles and the search of computer networks;
- b. duties of active co-operation by victims, witnesses and other users of information technology, other than the suspect, (especially to make information available in a form usable for judicial purposes); and
- c. powers to permit the interception of communications in or between computer systems, and to use the obtained evidence in court proceedings.

19. In view of the multitude and variety of data that may be contained in data processing systems, the execution of coercive powers should be pursued in a manner that is proportional to the seriousness of the offence and that is least disruptive to an individual's lawful activities. In addition to traditional monetary values, the thresholds to commence investigations should take into account all the various asset values that exist in the information technology environment, such as loss of economic opportunity, espionage, violation of privacy interests, loss or risk of economic deprivation, and the cost of reconstructing the integrity of data.

20. The existing rules for the admissibility and reliability of evidence may create problems

when applied to the consideration and evaluation of computer records in judicial proceedings. Where necessary, appropriate changes should be made.

#### ***V. International co-operation***

21. The mobility of data in international telecommunication networks and the highly interconnected nature of modern information society makes international co-operation in the prevention and prosecution of computer crime particularly vital.

22. Since certain forms of international co-operation (such as extradition and even mutual assistance) may require double criminalization and since under existing law states may be limited in their ability to provide means of assistance to other states, effective international cooperation would be facilitated by both the above mentioned harmonization of substantive criminal law and the enactment of adequate coercive powers in all member states.

23. Moreover, co-operation is necessary in additional areas. This should include development of:

- a. International standards for the security of computer systems.
- b. Adequate measures for resolving questions of jurisdiction over transborder and other international computer crimes.
- c. International agreements among nations that take advantage of new information technology for more effective investigations, including agreements to provide for effective, prompt and lawful transborder search and seizure in interconnected computer systems, as well as other forms of international cooperation, while at the same time protecting the rights and freedoms of individuals.

#### ***VI. Future work***

24. In order to realize these objectives, associations of academics, governmental bodies, information technology professionals and international organizations should promote the implementation of these recommendations and the ongoing adoption of appropriate means of crime prevention in order to address the new challenges of information technology.

25. The academic and scientific community, as well as governments, should undertake further research concerning information technology crime. Such research should, in particular, examine the incidence of computer crimes, the extent of losses, the methods of commission and the characteristics of offenders. It should also deal with the development of new alternative measures that will permit the use of criminal sanctions as a last resort. Legal theory and policy should give special attention to the study and development of information law, taking into account the specific characteristics of information as compared to tangible objects, and investigating possible changes of general principles and paradigms of criminal law.

26. Law enforcement and prosecuting authorities should, at both the national and international levels, increase their efforts in combating computer crime, and coordinate their activities in

order to achieve effective global protection.

27. Associations of computer hardware and software industries and of consumers should be involved in addressing the issue of computer crime, and every effort should be made by non-governmental and inter-governmental organizations to involve industry associations in achieving international consensus.

28. The manual on computer-related crime prepared on the initiative and under the auspices of the United Nations as a means of consolidating information on world-wide activities in this field is welcomed, and it is suggested that the manual be updated, so as to keep the academic, governmental and inter-governmental communities aware of contemporary developments; and that a future revision of this manual and future work of the United Nations should take into account the principles of this Resolution.

### **Section III. Reform movements in criminal procedure and the protection of human rights**

#### ***Preamble***

Starting from the idea that each reform of criminal procedure law must narrowly conform to the rights guaranteed by the "Universal Declaration of Human Rights" of 10 December 1948 and the "International Covenant on Civil and Political Rights" of 19 December 1966 as well as the regional Conventions on human rights;

Taking into account the Resolutions of the XII International Congress of the IAPL (Hamburg 1979) that correspond to a great extent to the declarations mentioned above;

Convinced that the essential core of fundamental rights and liberties mentioned in these documents may not be restricted, even in the event of war or crisis threatening the existence of the nation;

Considering that even the fight against terrorism and organized crimes could only restrict these fundamental rights to the extent absolutely necessary to prevent entire sectors of criminality going unpunished;

Regarding the necessity to develop higher standards of reform that go beyond the level of such guarantees by means of concretization and definition in respective procedural systems and situations;

## ***Recommendations***

### ***I. The initial stages of the criminal process and the application of guarantees***

1. The protection of human rights must be guaranteed in each stage of the criminal procedure, even if the procedure is not necessarily opened by a formal decision of a judge or another official; it suffices when the prosecuting authorities begin state prosecution of a crime.

### ***II. The presumption of innocence and its consequences***

2. The accused has the benefit of the presumption of innocence throughout the procedure until a judgment becomes effective. The presumption is also applicable to justifications and excuses.

3. In the stage preceding judgment, the principle of innocence requires the application of the principle of proportionality with respect to all coercive measures. According to this principle, there must exist a reasonable relationship between the gravity of the government measure interfering with the criminal defendant's fundamental rights on the one hand, and the objective of the restraining measures, on the other hand. This must give the legislator impetus to provide, above all, for alternatives to pretrial detention, which must in every case remain an exception.

4. During trial and judgment, application of the presumption of innocence requires the impartiality of the judge. For this impartiality to exist, there must be a clear separation between the functions of the prosecution and the adjudicator. Furthermore, the judge rendering the judgment must not have participated in the preparatory stages. It is highly advisable that the judge rendering the judgment not be identical with the judge who admits the accusation against the suspect.

5. In accordance with the principle of the presumption of innocence, pretrial detention has to be ordered by a judge and must be motivated according to the particularities of the case. The pretrial detention may not be ordered and/or maintained if there are no strong indications of guilt and if the responsible authorities do not show a serious will to precede or continue the prosecution. Pretrial detention is also illicit when its duration goes beyond the duration of the punishment that the court will probably hand down with regard to the circumstances of the case at hand.

6. The defending attorney and, on request by the detainee, any close relatives or other close persons have to be informed about the facts, reasons and place of the detention as quickly as possible, that is not later than 24 hours.

7. In determining the punishment, the court may not consider other criminal acts committed by the accused which have not been proved and judged in fair proceedings.

8. Mass media coverage during criminal procedure must be prevented from having the effect of a preconviction of the accused or a sensational trial. If such an effect is to be anticipated, the broadcast of the hearing by radio or television can be restricted or prohibited.

### ***III. The intervention of the judge***

9. Temporary detention must be ordered by a judge, after considering the particularities of the case.

10. Each government measure affecting the fundamental rights of the accused, including those undertaken by the police must be authorized by a judge or be subject to a judicial review.

11. Regardless of Recommendation No. 10, each coercive measure taken or ordered by the prosecution or the police requires judicial confirmation within 24 hours.

12. Those means of proof that seriously impinge upon the fundamental right of privacy, such as wiretapping, may only be admitted in terms of evidence if they have been ordered by a judge and expressly provided for in law.

14. The mere confession of the accused does not necessarily give rise to a conviction without examination of the credibility of the confession.

### ***IV. Evidence***

13. The mere collection of evidence in the preparatory phase of the procedure is not sufficient as a basis for condemnation.

15. It is recommended that the legislature also determines the conditions under which genetic printings and eavesdropping are admissible.

16. The granting of criminal law privileges to secret witnesses and secret agents must remain an exception provided for only in cases of serious criminal acts or organized crime. If the identity of these persons is not revealed in the hearings, their declarations are invalid and inadmissible and cannot be used to motivate coercive measures. On the other hand, the protection of each witness threatened by criminal organizations must be guaranteed.

17. All evidentiary investigations must respect privileged professional secrecy.

18. Any evidence obtained by violation of a fundamental right, including any derivative evidence thereof, is invalid and inadmissible with respect to any stage of the procedure.

### ***V. Defense***

19. The right to a defense is to be guaranteed in every stage of the procedure.

20. No defendant may be forced to contribute directly or indirectly to his own criminal conviction. The accused (in the material sense of Recommendation No. 1 above) has the right

to remain silent and the right to know the content of the charges starting from the first police or judicial interrogation. This silence may not be used against him.

21. The State must guarantee from the very beginning of criminal procedure the defendant the right to counsel. This assistance is to be free if the defendant cannot afford an attorney. The State shall be in charge of the costs. If a public defender is appointed, he must understand the fundamental customs and social situation of the client.

22. The defendant in custody has the right to communicate in private with his attorney. The attorney should have the right to be present during each stage in the criminal investigation.

23. The defense council should have access to the documents of the prosecution by the first moment.

24. If the defendant does not speak or understand the language used during criminal procedure, an interpreter shall be appointed. If an assigned counsel has been appointed, he should basically know the customs and the social organization of his client.

#### ***VI. Principles of prosecution***

25. The principle of mandatory prosecution may be considered an important guarantee. Nevertheless, in view of the expediency of the criminal procedure and the lack of qualified personnel, this principle should be relaxed in the sense of controlled discretionary prosecution. There should be such relaxation at least in cases of petty damages, negligible fault of the accused or necessary Protection of the victim. In such cases, precise criteria should be set forth in order to limit the discretionary power of the prosecuting authorities.

26. Serious infractions must not be subject to summary proceedings or those proceedings open to the discretion of the accused. As far as other infractions are concerned, the legislator should determine the requirements of these proceedings and introduce means of guaranteeing the voluntary nature of collaboration between the accused and the judiciary, such as the assistance of counsel. Such proceedings are recommended for cases of light infractions in order to expedite the criminal procedure and afford the accused heightened protection.

#### ***VII. Rights of the victim***

27. The person who considers himself or herself damaged should have the opportunity of being an "accusing party" ("civil party" or "*acusador particular*"), free of charge if necessary, and request review by a court or another independent body if the prosecuting authorities refuse to prosecute the perpetrator. The damaged party should also have the right to influence the development of the penal procedure when there is a public charge. Above all, he or she should be able to participate in and contribute to the evidentiary hearing and assert a right of appeal. In the same situations, the victim should also have the right to ask a ruling from the tribunal on the damages.

28. In view of certain offences, a similar role of collaboration should be granted to associations that are legally recognized as defending general or collective interests.

29. Each person who considers her fundamental rights violated by an act of criminal procedure should have - in addition to the means pursuant to 8 and 9 above - the effective opportunity of requesting the review of these acts by a constitutional court, a supreme court or an international court of human rights.

### ***VIII. Future reforms***

30. The purpose of these recommendations is to stimulate future reforms of the penal procedure. Such reforms, as well as any other modernization of the fundamental rules of criminal process in any given country should be adopted by the respective parliaments in the form of a formal law. While preparing their debates, the parliaments are invited to seek out the advice and opinions of the criminal justice bar and the civic associations.

## **Section IV. The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters**

### ***Preamble***

*Considering* that international criminal law, as is the case with criminal law in general, seeks a balance between the protection of society through the efficient operation of the criminal justice system, the protection of the rights of the individual (defendant and victim), and the maintenance of the rule of law;

*Given* the recent phenomenon of the regionalization of international criminal law;

*Determining* next the position of the individual within the framework of this process.

### ***Recommendations***

#### ***I. The regionalization of International Criminal Law***

I. Although the control of crime remains basically the domestic responsibility of the individual State, the regionalization of formal and informal co-operation in criminal matters should be promoted for a variety of reasons. Among these are the need to increase effectiveness in the prevention and control of crime, in particular in respect of crime which manifests itself on the regional level, to increase domestic and international security, and to avoid practical difficulties in the day-to-day relations between States.

2. Institutional arrangements for co-operation in criminal matters and other forms of legal co-operation should be incorporated into the activities of regional organizations which have been established for the development of closer co-operation within the region concerned in economic matters, the improvement of the freedom of movement of persons, goods and capital or for other forms of development of the region. Such legal co-operation should not only be directed towards the economic objectives of the regional organization, but also towards the general interests of each participating State.
3. Harmonization of criminal laws and laws of criminal procedure of the participating States, although potentially helpful in co-operation in criminal matters, is often difficult to achieve and should not be made a prerequisite for the development of multilateral regional instruments for co-operation in criminal matters.
4. When developing multilateral regional instruments on co-operation in criminal matters, participating States should ensure that the exercise of forms of democratic control is guaranteed in their elaboration. Similarly, judicial control should be exercised over formal and informal cooperation at the law enforcement level, which includes police cooperation.
5. Regional instruments on co-operation in criminal matters should recognize the importance of developing policy-oriented criminological research programs, training programs, and information and documentation systems at a regional level for law enforcement personnel and other practitioners in criminal justice, of making available information and experience between regions.
6. The United Nations model for bilateral agreements for various types of international juridical co-operation in criminal matters might appropriately be used for the development of regional treaties. Similar models developed by certain regional inter-governmental organizations might be considered for the same purpose.
7. Regional instruments on co-operation in criminal matters may appropriately provide for mechanisms for the settlement of disputes. Such mechanisms might include the reaching of understanding through the exchange of diplomatic notes, submission of disputes to arbitration, international judicial litigation or for the rendering of advisory opinions.
8. Regional instruments on co-operation in criminal matters should be drafted in a way that minimizes the possibility of and necessity for reservations. One way of achieving this is through listing permissible or impermissible reservations. Another way, which might be combined with the first, might be to oblige States having entered reservations to periodically review the propriety of retaining them and to give special reasons for doing so.
9. When drafting regional instruments on co-operation in criminal matters, participating States should contemplate the possibility of suspending -and eventually denouncing- the instrument by one or several Parties in relation to another Party, if that other Party has committed a

material breach of its obligations under the instruments or if a fundamental change of circumstances has occurred in the political structure of such other Party.

10. In order to prevent impunity international co-operation for the prevention, investigation and prosecution of international crime should also be enhanced through the establishment of impartial permanent international courts of criminal jurisdiction, be it on a regional or a universal level, as recommended and pursued by the AIDP for decades.

## ***II. The protection of human rights in international cooperation in criminal matters***

11. The growing recognition in recent international instruments and domestic legislation of the importance of the protection of human rights within the framework of international co-operation in criminal matters should be encouraged. Similarly, the growing recognition of the individual as a subject of public international law should be fostered. The concern for the protection of human rights should not only justify certain restrictions that limit the scope of existing forms of co-operation but should also prompt the development of new forms of co-operation. The protection of human rights should not be considered as an obstacle to international co-operation, but rather as a way of reinforcing the rule of law.

12. When confronted with conflicting obligations under public international law pursuant to conventions on the protection of human rights. on the one hand, and on international co-operation in criminal matters on the other hand, States should let their obligations with respect to human rights prevail, either by refusing assistance, or by imposing conditions on the other State involved, or by reaching mutually acceptable agreements in the interest of the persons concerned.

13. States should review treaties on international co-operation in criminal matters to which they are bound as to their compatibility with internationally binding obligations concerning the protection of human rights.

14. States should, when concluding new treaties on international co-operation in criminal matters, as certain that such treaties do not create obligations which might result in the violation of fundamental human rights, such as the right not to be subjected to torture, or inhumane or degrading treatment, to discrimination, to arbitrary arrest, or expropriation or to criminal procedures which do not meet generally accepted principles of a fair trial.

15. When called upon to provide international assistance in criminal matters, States should not adopt a rule of non-enquiry into the fairness and legitimacy of procedures conducted in other States. They should take into account the extent to which rights and freedoms are effectively protected in such other States.

16. In the elaboration of new instruments on international co-operation in criminal matters, States should pay specific attention to the definition and protection of the rights and the interests of the individual in proceedings conducted in the course of the application of such

instruments. Such rights and interests may include, where relevant: the right to instigate the application of the instrument on his or her behalf, the right to be informed of any application of the instrument and the right of access to court in order to challenge the legitimacy of such an application.

17. The rights mentioned in Para. 6 should also be put into practice with regard to all existing instruments, particularly in cases of the transfer of prisoners. In view of the specific humanitarian aspects involved, existing instruments for the transfer of prisoners should be more extensively applied.

18. States where the laws of evidence in criminal proceedings restrict the use of evidence illicitly obtained, should apply the same restrictions with respect to evidence obtained through international assistance in criminal matters. In all States evidence that has been obtained in disregard of fundamental human rights should be excluded.

19. Abducting a person from a foreign country or enticing a person under false pretences to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution. The victim of such a violation should have the right to be brought into the position which existed prior to the violation. The violation entails liability in respect of the person concerned and the State whose sovereignty has been violated, without prejudice to any criminal liability of the persons responsible for the abduction. Similarly, procedures such as deportation or expulsion, deliberately applied in order to circumvent the safeguards of extradition procedures should be avoided.

20. Methods of providing the individual with the right of access to international judicial control over the application of international instruments on co-operation in criminal matters, in particular at the regional level, should be explored urgently and effectively implemented without delay.

### **Resolution on the International Criminal Court**

The International Association of Penal Law (AIDP), at its XVth International Congress of Penal Law, held in Río de Janeiro, September 4 -10, 1994 and attended by over 1,100 Jurists from 67 countries, hereby resolved the following which has been adopted by the General Assembly on 10 September 1994;

*Recalling* that throughout its 105-year history, the AIDP has promoted initiatives to establish international criminal justice under a system of law administered by an International Criminal Court;

*Noting* with appreciation the efforts of the International Law Commission to establish an International Criminal Court;

*Expressing* its satisfaction at the establishment of the International Criminal Tribunal for the former Yugoslavia and the parallel effort to establish a similar process for Rwanda;

*Committed* to ensuring the world community that major violators of international humanitarian law and international human rights law not be permitted to commit such violations with impunity;

*Convinced* that the establishment of a permanent international criminal court would significantly enhance observance of international law and respect for human rights;

*Equally convinced* that an international criminal justice system would contribute to respect to the effective enforcement of criminal law, particularly with respect to the control of organized crime, terrorism, illicit traffic in arms particularly weapons of mass destruction and nuclear material and violations of international humanitarian law ;

*Envisaging* a world order in which international criminal justice plays at the world level a role comparable to that national criminal justice plays at national levels;

*Insisting* that international criminal justice remains free from political influences and bias which might impede its integrity and effectiveness;

*Concerned*, however, that delays in the establishment of a permanent international criminal justice system exacerbate problems regarding the peaceful co-existence of nations, the peace and security of peoples everywhere and the quality of life of every human being;

*Calls* on the United Nations' organs, in particular the General Assembly and the Security Council, as well as the Secretary General, to devote the utmost effort to the speedy implementation of the above recommendations by calling for a plenipotentiary report for the establishment of a permanent International Criminal Court;

*Also calls* upon all governments to support the goals of international criminal justice and the work of the United Nations related thereto and to participate in the plenipotentiary conference called for above with a view to establish an effective international criminal justice system without delay;

*To that end* the International Association of Penal Law offers its full support and expertise to the United Nations and to interested governments.

*Resolved at Rio de Janeiro, Brazil, on 10 September 1994*

## **XVI<sup>TH</sup> INTERNATIONAL CONGRESS OF PENAL LAW (Budapest, 5-11 September 1999)<sup>17</sup>**

*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 XVI<sup>th</sup> International Congress of Penal Law**

From 5 to 11 September 1999, in Budapest, Hungary, the XVI<sup>th</sup> 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 XVI<sup>th</sup> 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 XVI<sup>th</sup> 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 XVI<sup>th</sup> 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

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<sup>17</sup> 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.<sup>18</sup> 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;

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<sup>18</sup> 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 commentary<sup>19</sup> 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.).

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<sup>19</sup> 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 Penalists<sup>20</sup>, 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.

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<sup>20</sup> 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.

**XVII<sup>TH</sup> INTERNATIONAL CONGRESS OF PENAL LAW  
(Beijing, 12 - 19 September 2004)<sup>21</sup>**

*Topics:*

1. Criminal Responsibility of Minors in National and International Legal Order.
2. Corruption and Related Offences in International Business Relations.
3. The Application of Principles of Criminal Procedure in Disciplinary Proceedings.
4. Concurrent National and International Criminal Jurisdiction and the Principle 'Ne bis in idem'.

**Section I. Criminal Responsibility of Minors in National and International Legal Order**

*The participants to the XVII<sup>th</sup> International Congress of Penal Law, held in Beijing from 12 to 19 September 2004,*

*Considering* that minors require special protection by society, and in particular by the legislature, as well as the social and judicial system,

*Considering* that youth necessitates a special adaptation of legal rules,

*Considering* that the protection of young persons, their harmonious development and socialization should be of particular importance, while at the same time ensuring the protection of society and taking account of the interest of victims of offences,

*Considering* that society's intervention with regard to minors must always keep account of the predominance of their interests,

*Considering* that the state of adolescence can be prolonged into young adulthood (25 years) and that, as a consequence, legislation needs to be adapted for young adults in a similar manner as it is done for minors,

*Conscious* of the diverse national situations as well as the cultural, social and economic differences that exist in the various countries,

*Recalling* the international standards and norms, as expressed in the Beijing Rules on the Administration of Juvenile Justice adopted by the United Nations in 1985,

*Have adopted the following recommendations:*

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<sup>21</sup> RIDP, vol. 75 3-4, 2004, pp. 761-783 (French); p. 785-806 (English); pp. 807-829 (Spanish).

### ***I. Justification of the Principle of Criminal Liability and the Different Categories of Age***

1. Minors are subjects of law with their own special characteristics. Because of these specificities, the legislative system should view the criminal liability of minors as a separate issue within the framework of the elements of crime.
2. The age for criminal majority should be set at 18 years. The legislation should determine from what age a special penal system could be applied. This minimum age should not be lower than 14 years at the time of the commission of the offence.
3. Minor offenders should be subjected predominantly to educational measures or other alternative sanctions that focus on the rehabilitation of the individual or, if the circumstances so require, exceptionally to penal measures in the traditional sense of the term.
4. Below the age of 14 years, only educational measures may be applied.
5. The administration of educational measures or alternative sanctions that focus on rehabilitation may be extended, at the demand of the concerned individual, to the age of 25.
6. Concerning crimes committed by persons over 18 years of age, the applicability of the special provisions for minors may be extended up to the age of 25.

### ***II. Judicial Establishment of Criminal Liability of Minors***

7. The criminal liability of minors and the consequences that result from such a liability must be decided by a specialized judicial authority that has a separate jurisdiction to that of adults. This special qualification of the organs concerned should include all other participants of the process. It would be desirable to extend the competence of this jurisdiction to all issues concerning minors.
8. The decision of this jurisdiction should be enlightened by preliminary multidisciplinary investigations open to questioning by the parties.
9. Special attention should be given to safeguarding the interests of victims and to treating them with humanity.

### ***III. Sanctions and Other Applicable Measures***

10. The death penalty, which in itself poses a serious problem with regard to human rights, shall never be imposed on an offender who was a minor at the time of the crime.
11. Life imprisonment in any form, corporal punishments, and torture or other inhuman or degrading treatment shall be prohibited. The maximum term of imprisonment should not exceed 15 years.
12. Pre-trial detention should only be applied in exceptional cases. The decision concerning such a detention must be made by a judicial body, founded on a reason provided by law, and

preceded by a hearing. Pre-trial detention should, as far as possible, be accompanied by educational support. It should, as far as possible, not be imposed on a person under 16 years of age.

13. Imprisonment must remain an exceptional sanction that may be pronounced only for serious offences and applied only to minors whose personality has been evaluated carefully. The pronouncing, and duration, of imprisonment must be strictly limited. Any imprisonment of minors should be enforced in a place different from that of adults. Every time it is possible, alternative measures to imprisonment, and to formal trial, must be applied. Although the primary concern has to be the re-integration of the offender, preference should be given to measures of mediation that take best account of the interests of the victims.

14. The application of educational and protective measures must be subject to the same requirements and guarantees as those foreseen for the punishment of minors. Any such measure is limited by the principle of proportionality.

15. In all cases, the maximum limits of proportionality should be observed.

#### ***IV. International Aspects***

16. Legislative systems, courts, prosecutors, and all other institutions dealing with minors should act in accordance with international instruments on the rights of the child. It is particularly important to ensure that domestic legislation, as well as judicial and administrative decisions, are in conformity with the treaties and conventions ratified by the State and in accordance with relevant international standards and norms.

17. The application of instruments on international cooperation in criminal matters must have special regard for the predominant interests of the child. The cooperation must never create a situation that is worse than the one to which the child would be exposed in the child's country of origin. Special emphasis has to be given to the right to consular protection and to refugee protection, respectively.

The respect of the right to a family life should be expressly stipulated, especially in extradition instruments. The alien child must have at least the same rights as those granted to children with citizenship.

## **Section II. Corruption and Related Offences in International Business Relations**

*The participants to the XVIIth International Congress of Penal Law, held in Beijing from 12 to 19 September 2004, have adopted the following recommendations:*

### ***I. The Relevance of Corruption and Related Offences***

The abuse of authority in exchange of an advantage (corruption), as well as related offences, causes severe harm. Corruption and related offences lead to substantial economic damage, impair the integrity and efficient functioning of public administration, frustrate the trust of the public in organs of the State, undermine the rule of law and democracy, distort fair economic competition, and impede economic development. Corruption and related offences can be means used by organized criminal groups to influence and penetrate political, administrative, and economic structures. Corruption and related offences are especially dangerous when carried out systematically or transnationally. It is therefore necessary to combat corruption and related offences by effective measures, both nationally and transnationally. The *United Nations Convention against Corruption* provides a universal framework for this purpose.

### ***II. The Necessity for a Multilateral Approach***

1. Prevention and control of corruption and related offences require a multitude of measures. In the first place, effective measures for the prevention of these offences are mandated. In addition, effective criminal laws against corruption and related offences are necessary to demonstrate their reprehensible nature and to deter potential offenders.

2. Combating corruption and related offences is difficult because such offences are often committed in secret, with no individual victim to complain. Moreover, corruption and related offences often transcend national borders. The successful fight against these offences therefore requires joint efforts by the international community, in particular:

- effective measures for the prevention of corruption and related offences;
- national criminal laws against these offences in accordance with international standards;
- effective investigation, prosecution, and adjudication, while safeguarding the human rights of suspects and witnesses;
- effective sanctions against persons convicted of corruption and related offences;
- effective international cooperation in criminal matters.

### **III. Measures for the Prevention of Corruption and Related Offences**

1. Effective measures for the prevention of corruption and related offences are of crucial importance.
2. A culture of good governance, transparency, legality, integrity and honesty, as well as public support, is indispensable to the prevention and control of corruption and related offences. Therefore, States are encouraged to initiate public awareness campaigns and to implement educational programs.
3. Ensuring good governance in the public sector is a prerequisite for prevention and control of corruption and related offences. The following measures may be useful for that purpose:
  - careful selection of staff with competence and integrity for public service;
  - adequate remuneration of public officials;
  - codes of conduct for public officials, including rules concerning conflicts of interest and incompatibilities;
  - involvement of more than one public official in the process of making critical decisions;
  - strict internal and external controls, including random audits;
  - corruption hotlines, with due regard to safeguarding the rights of persons who may be falsely accused;
  - specialized “corruption ombudsmen” and/or anti-corruption commissions with guaranteed independence;
  - development of lists of “warning signals” of corruption.
4. The highest possible degree of transparency and accountability to the public sector should be maintained to promote integrity and to fight corruption and related offences. The media and NGOs play an important role in ensuring transparency. States should ensure a public right of access to information. Disclosure of assets of certain public officials and their families should be considered.
5. The introduction of anti-corruption measures and compliance programs by private companies should be encouraged.
6. There should exist an appropriate legal framework for accounting and auditing standards, including effective penalties for grave violations.
7. National tax law should deny tax deductibility of bribes.

#### **IV. Criminal Laws Against Corruption and Related Offences**

##### **1. Corruption and Bribery of Public Officials**

1.1 Provisions concerning corruption and bribery of public officials should pertain to persons acting on behalf of the State or the public administration at any level of hierarchy and in any legislative, executive, administrative, or judicial function, including employees of national and local governments, members of national and local legislative bodies, judges, prosecutors, and employees of government controlled entities and corporations.

1.2 Corruption should be defined as demanding, agreeing to accept, or accepting, by any public official, at any time, an undue advantage, regardless of its nature, for himself/herself or another person or institution in connection with the actual or potential performance or non-performance of the public official's functions. Corruption should not require performance or even the intent of performing the act or omission for which the advantage is intended.

1.3 The following should be treated as aggravating circumstances:

- a) The fact that the public official demanded, agreed to accept, or accepted an advantage in connection with a violation of his or her official duties.
- b) The fact that the bribery was committed in connection with organized crime.

1.4 The fact that the public official has, before performing the act or the omission, withdrawn from the agreement and restituted any undue advantage received should be considered as a mitigating circumstance.

1.5 Bribery should be defined as promising, offering or giving, by any person, at any time, an undue advantage, regardless of its nature, to any public official or, upon his/her request, to another person, or institution in connection with the actual or potential performance or non-performance of the public official's functions. The aggravating and mitigating circumstances mentioned in 1.3 and 1.4 should be applied *mutatis mutandis*. The fact that the offender had a right to the public official's performance or non-performance of the act in question should also be treated as a mitigating circumstance.

##### **2. Corruption and Bribery in the Private Sector**

2.1 Corruption and bribery of executives and agents of enterprises violate fair competition and may also be harmful to the enterprise whose executive or agent is bribed.

2.2 Corruption in the private sector should be defined as demanding, agreeing to accept, or accepting, by an executive or an agent of an enterprise, at any time, an undue advantage, regardless of its nature, in exchange for an improper act or omission relating to the affairs of the principal.

2.3 Bribery in the private sector should be defined as offering, promising or giving, by any person, at any time, an undue advantage, regardless of its nature, to an executive or agent of any enterprise in exchange for an improper act or omission relating to the affairs of the principal.

### **3. Trading in Influence**

3.1 The law may define trading in influence as a criminal offence. Trading in influence is committed by any person who, asserting that he or she is able to exert influence on a public official, demands, agrees to accept, or accepts an undue advantage, regardless of its nature, for himself/herself or another person or institution in exchange for the promise or exercise of improper influence on any public official.

3.2 States may also make punishable the acts of offering or giving an undue advantage to a person trading in influence.

### **4. Sanctions**

4.1 Penalties for corruption, bribery, and related offences should be appropriate sanctions proportionate to the seriousness and the dangerousness of the offence.

4.2 Removal from public office should be a possible consequence of corruption. For perpetrators of bribery, exclusion from public sector contracts may constitute an additional sanction.

4.3 Bribes should be subject to confiscation. Offenders may also be deprived of privileges and proceeds derived from the offence. When confiscation is imposed, third parties' interests should be taken into account.

4.4 When the offence has been committed on behalf of a legal person, sanctions against the legal person should be available only if the offence has been committed in the interest or to the advantage of the legal person, and the offence was due to a lack of control of the legal person.

4.5 Effective disciplinary measures could complement criminal sanctions.

### **5. Related Offences**

5.1 Corruption and bribery are often connected with the commission of other offences such as fraud, embezzlement, breach of trust, extortion, agreements to unfairly restrict or influence competition, or the disclosure of legally protected secrets. The law should provide for adequate sanctioning of offences in this regard.

5.2 Money laundering laws providing for criminal penalties for the laundering of the proceeds of corruption should be enacted and effectively enforced.

## **6. International Aspects**

6.1 National criminal law should include bribery of public officials of foreign States and officials of public international organizations (foreign public officials). States should consider criminalizing corruption of officials of international organizations to which they belong.

6.2 States should establish jurisdiction over bribery of foreign public officials where the offence or any element thereof is committed in their territory. If a State does not extradite its nationals, it should establish jurisdiction over bribery of foreign public officials committed by its nationals.

6.3 International organizations should support efforts by States to investigate and prosecute corruption committed by their officials, in particular, by waiving immunity.

6.4 National criminal law may be extended to bribery in the private sector committed abroad by a national of the State.

## **V. Investigation, Prosecution, and Adjudication**

1. Investigation, prosecution, and adjudication of corruption and related offences should be free from improper political, economic, or other influences.

2. The law should provide sanctions for public officials who intentionally violate an obligation to report corruption cases to the appropriate authorities. Reporting requirements may be extended to private persons.

3. States should provide all necessary resources for effective investigation, prosecution, and adjudication of corruption and related offences.

4. The law should provide for appropriate methods for the investigation of corruption offences. These methods may, in serious cases, include undercover investigations and interception of communications.

5. States should consider affording incentives for persons to cooperate in the investigation or prosecution of corruption and related offences. For persons suspected of crime, incentives may include exemption from or mitigation of punishment.

6. States should protect witnesses in corruption cases. Persons who report acts of corruption should be protected from undue negative consequences.

7. Bank secrecy should not impede investigative or provisional measures ordered by a competent authority with regard to corruption and related offences in the context of a domestic investigation or in response to a proper request for international legal assistance.

8. The secrecy of tax files may be lifted for the investigation of serious corruption.

9. Statutes of limitations should allow for an adequate period of time for investigation, prosecution, and adjudication.

10. Immunities, where applicable, should not bar prosecution after expiration of an offender's term of office.

11. In the investigation, prosecution, and adjudication of corruption and related offences, proper safeguards, including judicial control, should be provided for the protection of human rights, especially the right of privacy, as well as the right to a fair trial and the right of defense.

12. States should consider establishing and maintaining specialized units for the investigation and prosecution of corruption and related offences. Staff of such units, as well as the judiciary, should receive adequate resources and training.

#### ***VI. International Cooperation***

1. In order to avoid safe havens for corruption offenders, States should provide effective international cooperation for the investigation, prosecution, and adjudication of corruption and related offences in accordance with their laws and international treaties. National laws on criminal procedure should, to the extent feasible and necessary, be harmonized for that purpose.

2. States should introduce mechanisms for returning assets derived from corruption in accordance with Chapter V of the *United Nations Convention against Corruption*.

3. The *United Nations Convention against Corruption*, as well as other international conventions, are valuable tools for promoting and coordinating international cooperation in combating corruption and related offences. Such conventions should include mechanisms for monitoring their implementation. States are encouraged to ratify and implement them.

4. Research and the international exchange of information on combating corruption and related offences should be promoted.

### **Section III. The Application of Principles of Criminal Procedure in Disciplinary Proceedings**

*The participants to the XVIIth International Congress of Penal Law, held from 12-19 September 2004, in Beijing, China,*

*Mindful of the resolution on principles of criminal procedure adopted by the XVth International Congress of Penal Law, held in 1994 in Rio de Janeiro, Brazil, as well as of the resolution on administrative penal law adopted by the XIVth International Congress of Penal Law, held in 1989 in Vienna, Austria,*

*Considering that it is important to apply basic principles of criminal procedure in disciplinary proceedings, at least where these relate to facts that may incur other than minor disciplinary sanctions,*

*Considering that the application of principles of criminal procedure to disciplinary proceedings cannot neglect the general principles of substantive nature, in particular the principle of legality of incriminations and of sanctions,*

*Considering that, in the majority of the countries, disciplinary law is used to impose sanctions in a growing range of settings, including in the military, in the police, in the public administration, in penitentiary or educational settings, and in liberal professions, sometimes even covering the relationship between the state authority and the public at large,*

*Considering that, although criminal law and disciplinary law both belong to the field of punitive justice, differences between the two proceedings can be justified, *inter alia*, by the specific nature of the offence or by purposes of simplification,*

*Have adopted the following recommendations:*

1. Disciplinary sanctions must be sufficiently clear and foreseeable. Sanctions and essential procedural rules must be provided for by law.
2. Sanctions for disciplinary infractions should be reasonable and proportional to the gravity of the infraction and to the personal circumstances of the person having committed the infraction. In particular, disciplinary proceedings may not be used as criminal justice 'in disguise.'
3. An impartial decision must be assured to the defendant on the grounds of precise guarantees, which are provided for by law. A separation between prosecuting and investigating powers, on the one hand, and judging and punishing powers, on the other hand, is advisable.
4. If sanctions are not imposed by an authority that is different from the one holding the prosecuting or investigation powers or that is not independent from the organization whose discipline has been breached, the defendant must be granted the right to appeal to an

independent and impartial tribunal, which must have the power to suspend execution of the sanction upon request of the defendant.

5. During disciplinary proceedings, even considering the need for simplification to which such proceedings must be inspired, the defendant must enjoy the essential rights of a fair and speedy trial, including: the presumption of innocence and the related principle *in dubio pro reo*; the respect of the rights of the defense, including the rights of the defendant to keep silent, not to cooperate in any way in establishing his own responsibility, and to examine or to have examined the witnesses against him and to obtain witnesses in his behalf under the same conditions as the witnesses against him; and the exposition of the grounds of the decision.

6. The access to documents and data of the public administration or of another organization sharing the disciplinary power, being relevant for the discovery of the truth, must be guaranteed to the defense, if no fundamental public reasons exclude it. In any case, no sanction is possible on the basis of evidence that is kept secret from the defense.

7. Throughout disciplinary proceedings, the defendant must have the right to effective assistance by an independent lawyer chosen personally or, alternatively, to choose to be assisted by another person having a good knowledge of the organization holding the disciplinary power. Where the interests of justice require it, the defendant must be entitled to free assistance by an independent lawyer by official appointment, when he has no economical means to remunerate him personally.

8. As a principle, hearings in disciplinary proceedings should be public, with the exception of proceedings concerning minor sanctions and of those situations in which there is a need to protect morality or minors, the private lives of the parties, or, in a democratic society, where there are reasons based on national security. The defendant shall have the right to request non-public hearings, unless this is strongly contrary to public interest.

9. When criminal guilt can be added to disciplinary guilt, and the disciplinary sanction adds to the criminal sanction, the defendant in the criminal proceedings cannot undergo a duplication of sanctions, unless justified by the difference of the interests protected by the disciplinary and the criminal sanctions. In the latter case, in principle no sanctions of the same type should be imposed.

10. Disciplinary authorities should not be allowed to have recourse to investigative measures having an intrusive or coercive character or a potential impact on a person's privacy that are not allowed for in criminal investigations. In any event, information or evidence obtained using torture is not admissible as a basis for disciplinary sanctions, nor may information or evidence obtained during disciplinary proceedings by recourse to investigative measures having an intrusive or coercive character or a potential impact on a person's privacy that are not allowed for in criminal investigations be used in criminal proceedings.

## **Section IV. Concurrent National and International Criminal Jurisdiction and the Principle ‘Ne bis in idem’**

*The participants of Section IV of the XVIIth International Congress of the International Association of Penal Law, held in Beijing, China (12-19 September 2004),*

*Recognizing* that the prohibition of double jeopardy, as expressed in the principle of “*ne bis in idem*,” is a demand of justice, legal certainty, proportionality, as well as of the authority of court decisions,

*Recalling* the resolution of Section IV B.4, adopted by the XVIth International Congress of Penal Law (1999), according to which *ne bis in idem* as a human right shall be “also applicable on the international or transnational level,”

*Keeping in mind* that the application of *ne bis in idem* shall not impede legitimate interests of the victim,

*Recalling* that the *ne bis in idem* principle appears at the domestic level as an exigency of individual justice and a citizen’s guarantee forbidding all multiple prosecutions and sanctions of an individual on substantially the same factual basis,

*Mindful* that in an era of globalization, due to increasing cross-border crime and extension of extraterritorial jurisdiction, concomitant or subsequent prosecutions by different national jurisdictions occur more frequently,

*Considering* that the establishment of International *ad hoc* Criminal Tribunals and recently of the permanent International Criminal Court entails new sources of double jeopardy problems in vertical concurrence between national and international jurisdictions, as well as by horizontal concurrence between different international jurisdictions,

*Have adopted the following resolutions:*

### ***I. General Principles - Requirements at the domestic level***

1. Transnational *ne bis in idem* presupposes internal prohibition of double prosecution. To achieve transnational recognition of *ne bis in idem*, it is necessary to safeguard this human right already within the national-internal legal order by clear provisions.

2. At any rate, double prosecutions and sanctions of a criminal nature have to be avoided.

Taking into account that criminal sanctions may not be the only means of sanctioning violations of the law, it should be considered that non-criminal prosecutions and decisions with an equivalent punitive effect likewise bar a new prosecution.

3. The “*idem*,” in terms of the object of the concurrent proceedings, should be identified with regard to substantially the same facts, provided that the first court or authority had the legal competence to examine and decide on all penal aspects of them.

4. The “*bis*,” in terms of double jeopardy to be prevented, shall not refer to only a new sanction; it should already bar a new prosecution.

5. As a general rule, any final judgment delivered by a criminal court convicting or acquitting the defendant or definitely terminating proceedings with respect to substantially the same facts shall bar a new prosecution .

5.1. Taking into account differences in national legislations, a definitive termination of prosecution may also be found in an out-of-court settlement or any other administrative, prosecutorial, or judicial decision that would permit a continuation, deferral, or reopening of the case under exceptional conditions only.

5.2. As not definitely decided upon and, thus, not barring a continuation of the proceeding are to be regarded cases in which ordinary remedies (such as complaints or appeals), both in favor of or against a defendant, are available, particularly taking into account the fact that a jurisdiction may not consider a case as *res judicata* prior to the exhaustion of ordinary remedies.

5.3. After the aforementioned stage, the reopening of a matter that has to be regarded as *res judicata* and, thus, an exception to *ne bis in idem*, may be allowed only on extraordinary grounds and clearly regulated by law. Such a reopening can, in particular, be justified in favor of the defendant and/or in the overwhelming interest of justice.

6. The demands of *ne bis in idem* are best served by the principle of recognition according to which the prohibition and inadmissibility of subsequent prosecutions and convictions should be the principal aim and consequence at the domestic level.

7. As long and to the extent that this status of recognition is not reached, States should take other appropriate measures to prevent double prosecutions and double sanctions.

8. A new proceeding, where exceptionally admitted, should, according to the principle of accounting or deduction, take into consideration a former sanction or should at least grant adequate mitigation.

## ***II. Horizontal transnational “ne bis in idem”***

1. Increasingly, concurrence of national criminal jurisdictions

- creates a risk of multiple prosecutions on the same factual basis,
- can be detrimental to the human rights of the individual concerned,
- might result in the non-identification of transnational crimes in their entirety,

- may have a negative impact on legitimate interests and the sovereignty of the states involved.

1.1. It is therefore necessary to develop preventive mechanisms in order to avoid problems emanating from concurrent national jurisdictions. Insofar as this is not possible, problems arising from conflicting jurisdictions should be settled by applying and developing international legal provisions on cooperation in criminal matters, with the final aim of establishing an international instrument on concurrent jurisdiction.

1.2. In this context, recognition of the principle of *ne bis in idem* in various international instruments, such as the International Covenant on Civil and Political Rights and various instruments of human rights and international humanitarian law, deserves appreciation, as well as the Resolution of Section IV B.4, adopted by the XVIth International Congress of Penal Law (1999), according to which *ne bis in idem* as a human right shall be “also applicable on the international or transnational level.”

1.3. Noting the number of conventions, which include *ne bis in idem* clauses, that are not yet signed, ratified, or acceded to by all States, all countries in the position to do so are encouraged to sign, ratify, or accede to them and/or to revise their policy by adopting the principle in their national legislation to attain an as-complete-as-possible common standard in the application of this principle. In this regard, it would be desirable that States limit or withdraw their reservations made under these conventions.

1.4. With respect to these efforts, however, an international *ne bis in idem* regulation should go further and, at least in regional areas determined by the same political-social structure and legal culture, and to the greatest extent possible, strive for mutual recognition of penal judgments and decisions and ensure a uniform application of transnational *ne bis in idem*.

2. Although the requirements for transnational *ne bis in idem* are basically the same as on the national-internal level (as described *supra* I.), certain peculiarities must be observed.

2.1. The *idem*, in terms of the “same act” the proceedings at issue are the object of, should, in principle, be identified according to the facts established in the preceding process and, in particular, by the indictment and/or the final decision as governed by the applied law. This factual approach provides a more objective and clearer criterion than that of juridical equivalence, which is very much affected by the differences between the respective national penal provisions and the rules on concurrence of offences.

2.2. If substantially the same facts constitute additional serious offences according to the second law applicable pursuant to Section I.3, which offences are not punishable and, thus, have not been dealt with in the first proceeding, a new proceeding may be admissible only if, according to the principle of deduction, the first sentence, in so far as fully or partly enforced, is accounted for.

3. With regard to the character of the concurrent proceedings and sanction systems, national differences should not allow a new proceeding *per se* but only on a strict territorial basis or if the first proceeding does not cover legitimate security interests of the other State or where the act was committed by a civil servant of that State in breach of his or her official duties.

4. Whether the same case was finally terminated should, in principle, be determined in the light of the first decision.

5. If the person concerned has been convicted in the first jurisdiction and the enforcement of the sanction is a condition for applying *ne bis in idem*, enforcement of the previous sentence should not be required if it can be recognized and enforced in the second state, as well as if the convicted person cannot be held responsible for the non-enforcement of the first sanction.

6. For avoiding concomitant or subsequent concurrent national proceedings, as well as for preventing “forum shopping” by the prosecuting authorities or the defense, both domestic measures and international agreements on certain priorities should be provided for.

6.1. Whenever there are relevant indications of a former or concomitant foreign proceeding on the same act, an *ex officio* examination should be performed and mutual information should be disclosed.

6.2. If an investigation is about to begin or has already begun in another foreign jurisdiction, preference should be given to the jurisdiction that will better serve the purposes of the proper administration of justice in terms of fair and efficient proceedings. In finding a solution, the following criteria should be taken into account:

- (a) the territory where the offence was committed;
- (b) the State of which the perpetrator is a national or resident;
- (c) the State of origin of the victim;
- (d) the State in which the perpetrator was apprehended;
- (e) the State where (incriminating as well as exculpatory) evidence, including witnesses, is most readily available.

Before the forum is finally chosen, the defendant should also enjoy the right to be heard on that choice.

6.3. If a conflict of jurisdictions cannot be resolved, in particular due to the fact that the case has already reached an advanced stage rendering the transfer of proceedings difficult, a former foreign sentence should, at least, be accounted for according to the principle of deduction.

7. To avoid abuses, *ne bis in idem* shall not apply if the first proceeding was conducted for the purpose of shielding the person concerned from criminal responsibility or was not conducted independently, impartially, and fairly in accordance with the norms of due process recognized

by internationally accepted legal standards, or was conducted in a manner which, under the circumstances, was inconsistent with an intent to bring the person concerned to justice.

In this respect, access to an international or supranational impartial authority should always be available.

8. *Ne bis in idem* should also be recognized as a human right in the field of international cooperation in criminal matters.

9. International agreements should also address problems of *ne bis in idem* with regard to the prosecution of legal entities and its compatibility with a parallel prosecution of individuals for substantially the same facts. International agreements should also address the indirect or secondary effects of foreign judgments.

### **III. Vertical national-supranational concurrence**

1. The question of the applicability of *ne bis in idem* in the vertical international concurrence, *i.e.*, between national and international courts, to some extent needs specific regulation.

2. No person shall be tried before a national court for acts constituting serious violations of international law under the statute of an international court for which he or she has already been tried by an international court.

2.1 Due to the specialized jurisdiction of the international courts, “downwards” an *idem* has to be determined primarily on the basis of substantially the same facts, thus barring domestic prosecution if the conduct of the accused qualifies both as an ordinary crime and, according to the judgment, as a serious violation of international humanitarian law or international human rights law for which the defendant has already been convicted or, due solely to reasons other than the lack of jurisdiction of the international court, acquitted.

2.2 Sentences already imposed have to be taken into account.

3. “Upwards,” the application of *ne bis in idem* should be guided by the principle that the special character of serious violations of international humanitarian law should receive full consideration and should not be disregarded as a result of domestic proceedings in which this character is not duly recognized.

4. Domestic jurisdictions should identify possible *ne bis in idem* conflicts in the vertical international concurrence and regulate them following the principles approved by this Resolution.

### **IV. Horizontal inter(supra)national concurrence**

1. Horizontal concurrence regulations between international jurisdictions should also follow the general rules, as set forth in Section II.

2. Procedures should be established, in particular, with the aim of guaranteeing the prosecution by the jurisdiction that will better assure the proper administration of justice in terms of fair and efficient proceedings.