THE INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM

AND CRIMINAL JUSTICE POLICY

PROMOTING CRIMINAL JUSTICE REFORM: A COLLECTION OF PAPERS FROM THE CANADA-CHINA COOPERATION SYMPOSIUM

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ICCLR & CJP
1822 East Mall
Vancouver, BC
Canada
V6T 1Z1
Tel: +604-822-9875
Fax: +604-822-9317
Email: icclr@law.ubc.ca

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Preface

One of the major projects of the International Centre for Criminal Law Reform and Criminal Justice Policy is a cooperative discourse between Chinese and Canadian criminal law experts. This volume reflects one of the products of this project, the periodic meetings comparing the experience of Canada and China in selected areas of criminal law and related topics. The volume contains the papers prepared for the symposium held in Vancouver June 19 – 21, 2007. It also includes other papers prepared under the auspices of the Centre on related topics.

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PROMOTING CRIMINAL JUSTICE REFORM: BEING A COLLECTION OF PAPERS PRESENTED AT THE CANADA-CHINA COOPERATION SYMPOSIUM, JUNE 2007, AND OTHER SELECTED PAPERS

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Introduction

Vincent Yang

Trends and Issues in the On-going Chinese Reform Process

Although the overall trends in the field of criminal justice reform in China over the past year have continued to exhibit a complicated mix of conflicting developments, there were clear indications of a continued effort to promote the rule of law, human rights and to improve governance.

The most important development in the reform process during the year was in October 2006 when the 6th Plenary Session of the 6th Congress of the Chinese Communist Party (CCP) adopted a resolution announcing its top priority to be "building a socialist harmonious society" by 2020 in order to "further improve socialist democracy and legal system, fully implement the policy of governing under the rule of law, and really respect and protect the rights and interest of the people." Although the Constitutional Amendments of 2004 had called for greater respect of human rights and the rule of law, this resolution of the CCP Central Committee was particularly significant in that it placed the need for legal reform ahead of the need for economic reform. While the true significance of this statement is going to require further study, it is clear that it served notice of a new top-level commitment to

continued reform in the broad area of law and justice, thus signaling more changes in near future.

The most significant judicial reform-related event of the year as far as the IISCJCP was concerned was inclusion of three law reform bills in the National People's Congress (NPC) 2007 Legislative Plan. All three of them relate to IISCJCP areas of focus. They were amendments to the Criminal Law, amendments to the Law of Criminal Procedure, and a long-delayed Law on Corrections and Treatment of Unlawful Activities intended to change the system of labour re-education. Although it is not clear how long it will take the NPC Standing Committee to pass these three pieces of legislation, the very fact of their notification in the 2007 Legislative Plan is a strong indicator of the government's continuing commitment to the legal reform process.

Also over the past year, the country's key judicial institutions and law enforcement agencies continued to implement their 3-5 year reform plans. In this regard, the Supreme People's Court (SPC), the Supreme People's Procuratorate (SPP), the Ministry of Justice (MOJ) and the Ministry of Public Security (MOPS), have all been working with provincial and local level judicial bodies in order to improve the legislative and regulatory environment for the day-to-day operation of the judicial system. In March 2007, both the SPC and SPP presented their Annual Working Reports to the NPC.

Also of significance during the year, in October 2006, the Standing Committee of the NPC passed a resolution amending the Organic Law of Courts to make it mandatory that all sentences carrying the death penalty be reviewed and approved by the SPC.

Furthermore, in order to reduce the possibilities of wrongful convictions in capital offence cases, the SPP, together with the SPC, issued new judicial interpretations demanding that appellate cases carrying the death penalty be heard by appellate courts in open trials rather than by way of documentary reviews. Although the SPC's procedures for reviewing death sentences are still evolving, these new procedures will almost certainly reduce the number of death sentences in the country. Interestingly, this area of criminal law reform has long been on the agenda of RCCJ – ICCLR cooperation. The SPC intends to continue to improve death sentence review procedures throughout 2007. Over the year, the President and Honorable President of RCCJ, Prof. Zhao Bingzhi and Gao Mingxuan, were both invited to participate in SPC consultation sessions that were chaired by the SPC President.

The SPP's 2007 Report to the NPC focused on the increased level of effort it has been devoting to improving the criminal justice system by concentrating on "strengthening legal supervision and safeguarding fairness and justice," which are the central themes of the SPP's ongoing procuratorial reform process. As a clear indication of its commitment to this 'cause', in 2006, the SPP disapproved 98,382 police arrests and issued 11,368 warnings with remedies in cases of illegal police investigations – all in an attempt to reduce the use of arbitrary detention by the police. Also during 2006, procuratorates ordered the releases of 233 people who had been in police custody for an unlawful period of time. In addition, procuratorates decided not to prosecute 7,204 people who had been accused of committing various criminal offences by the investigative departments with insufficient evidence. To address the problem of arbitrary detention, the Chinese government has issued several provincial level regulations requesting all law enforcement agencies, prosecution services and the courts to handle the criminal cases within the legally defined limitations.

Concrete results were achieved in preventing the use of torture in the interrogation process. In December 2006, the SPP issued two 'experimental' decrees, requesting procuratorates across the country to video-audio record entire interrogations in cases being investigated by a procuratorate. Also in January 2007, the SPP issued a notice requesting procuratorates to test and assess their recording equipment for compliance with unified technical standards. Moreover, it is now a requirement in some provinces that, in death penalty cases, the confessions or testimonies of victims or witnesses be declared inadmissible if the prosecution is unable to prove that they were not obtained through torture. In this regard, for the 2006 year, the SPP reported to the NPC that 930 government officials had been prosecuted for using illegal detention and torture to extract confessions.

The NPC is preparing to amend the Law of Criminal Procedure –likely towards the end of 2007. In aid of this process, teams of legal scholars at the Centre for Criminal Law and Justice (CCLJ) and the Research Centre of Procedural Law (RCPL) have published 'academic' proposals on the themes and issues that the amendment of this law should address. In fact, because such proposals are commonly developed in conjunction with national government agencies like the SPP, they often carry the weight of legislative drafts rather than of academic briefs. For example, the 2006 Annual Conference of the Research Society of Procedural Laws of China, which was co-chaired by Vice Presidents of the SPP and the SPC, was used as a platform for presenting reform-related research papers as well as for drafting amendments aimed at reforming the Law of Criminal Procedure. Similar to the Society's conferences in previous years, this Conference was organized and chaired by key members of the CCLJ, including the former President of the Society, Prof. Chen Guangzhong, who is

also the Chairman of CCLJ, and the new President of the Society, Prof. Bian Jianlin, who has been an executive of CCLJ.

Over the past several years, combating corruption has been one of the main preoccupations of legal and justice reform in China. In 2006, China's NPC Standing Committee adopted a 6th Amendment to the Criminal Law. This amendment was an important step on the way to Chinese compliance with the UNCAC and UNTOC in that it broadened the legal definition of the crimes of receiving and offering bribes and of money laundering. Under this amendment, new categories of 'commercial bribery' were created to target the rampant corruption taking place in the medical services and drug industries, as well as in other rapidly growing industries. In June 2006, the SPP together with other government and enforcement agencies launched a "crackdown" on commercial bribery in the priority industries of land development, construction and pharmaceuticals. Experts from both the CCLJ and RCCJ were frequently consulted by the national authorities in developing and reviewing these initiatives.

In 2006, the CCP announced its decision to hold its 17th National Congress in 2007. A series of initiatives have been launched to prepare for this Congress, the most dramatic of which has been in the anti-corruption area. In June 2006, the Vice Mayor of Beijing was dismissed for involvement in a major corruption case. In September 2006, the government began investigating the Party Secretary of Shanghai and a Member of the Political Bureau of the CCP for alleged corruption. In October 2006, the Director General of the National Statistics Bureau was removed from office for corruption. And in January 2007, the CCP Central Disciplinary Committee held its 7th Plenary to reinforce the party's anti-corruption campaign. The President of the CCP, Hu Jingtao, delivered a keynote speech to the Plenary. He called for greater

efforts to be made in the investigation of major corruption cases and for the introduction of more checks and balances in the country's governance system.

Of interest in this regard, 2006 saw the SPP expand its anti-corruption program by starting to monitor and keep records on individuals and companies offering bribes to state officials. In its Annual Report to the NPC, it reported that it had a 'blacklist' of 5683 cases based on investigations undertaken from January to November 2006. These cases involved 33,943 companies and 22,544 individuals. Over 70% of the listed companies and units were government agencies or state-owned enterprises.

Over the past year, China has also made significant progress in the area of international cooperation aimed at combating corruption and transnational organised crimes. For example, in 2006, NPC approved three important treaties, Treaties of Mutual Legal Assistance in Criminal Matters with France and Spain and an Extradition Treaty with Brazil. The quick approval of these treaties is a clear indication of the importance that the Government of China is now placing on cooperating with other counties to fight corruption and organized crime. As well, the SPP has been receiving assistance from other governments to help it prepare for implementing the UNCAC and the UNTOC. In August 2006, the SPP announced that procuratorates were to give priority to international cooperation when conducting their 'foreign affairs', and particularly when seeking the return of wanted criminals and stolen assets. In October 2006, the SPP hosted a major international conference in Beijing for the creation of the International Association of Anti-Corruption Authorities. This initiative was meant not only as a show of China's growing commitment to multilateralism but its willingness to cooperate internationally for the

purpose of implementing the UNCAC and TOC conventions. Both CCLJ and RCCJ have played an active and influential role in supporting these developments.

The past year also saw a number of important achievements in the field of prison reform with the expansion of the community corrections 'experiment' that had begun in Shanghai a number of years ago to a growing number of cities. For example, in July 2006, the Shenzhen municipal government adopted a regulatory framework on community corrections – significant because of its size and nearness to Hong Kong. To support this expansion of the community correction services, research continues to evaluate its achievements, and focus on the challenges as well as its financial requirements. As well it was recently decided that the SPP should enhance its "supervision" (or monitoring) of the service to ensure that laws and procedures related to criminal sentencing are being properly followed.

Legal and policy research continued to play a key role in the reforms of criminal justice throughout the year. Both the SPC and the SPP worked with key academic research institutes to be able to buttress their reform initiatives with hard evidence and legal argument. In this regard, the SPC has just completed a series of research and consultation projects to support its work in the area of judicial interpretation. The results of this research have been posted on the SPC and the People's Court websites. Likewise, the SPP, in implementing its 3-year reform plan, continued to invest heavily in its own jurisprudence-related research program. In July 2006, the SPP announced its approval of 49 major research projects for 2006, up from 29 in 2005. These research projects cover topics such as "the basic theories of the Chinese procuratorate system," "the relationship between Chinese constitutional government and the procuratorates," "concepts and theories of legal supervision," as well as

numerous hot topics related to amending the Law of Criminal Procedure and the Criminal Law. In order to improve its research capacity, the SPP has had to take a number of extraordinary measures, including the appointment of three senior law professors as part-time Director-General level officers. For example, Prof. Song Yinghui, who had been a senior member of the CCLJ and Executive Director of RPCL until he moved to the RCCJ in 2006, was appointed part-time Deputy Director General of the SPP's Legal and Policy Research Office. This improved research capacity should help procuratorates to identify their priorities and develop their strategies for addressing the many complicated reform issues that they are facing.

All these reforms require the support and participation of high-quality judges and prosecutors. Both the SPC and the SPP have continued their effort to enhance their training programs. In January 2007, the SPP released its "Regulations on the Training of Prosecutors." This document has replaced its 2002 Regulations. It requires that all the prosecutors receive a specified number of days of training each year. As well, the SPP decided to encourage local procuratorates to employ open competitions in the hiring and promotion processes. In March 2007, the SPC reported that some 230,000 judges and court workers had been provided with training in 2006, and the SPP reported that over 270,000 prosecutors and service administrators had received professional training during the year. Professors from the country's law schools and academic institutions have played a key role in the delivery of these massive country-wide training programs.

Current Roles and Priorities of Key Chinese Partner Organizations

As the judicial/legal reform process in China has moved forward, the research and professional associations supporting it have had to adjust their priorities and strategies to the changes taking place in the legal/judicial policy environment.

The Centre for Criminal Law and Justice: key partner organization for Project A (Criminal Procedure).

Over the last year, the legal scholars at CCLJ and RCPL carried out a series of focused activities aimed at developing recommendations for improving several key aspects of Chinese criminal procedures. In April 2006, the CCLJ sponsored a special lecture on the application of social research methods to researching procedural laws. Although this was only an introductory level lecture, it was indicative of the serious effort being made in Chinese judicial circles to apply scientific research methods to the law reform process. In May 2006, the CCLJ/RCPL hosted a team of American legal experts to conduct a mock trial for law school students. In the same month, the institute and a local prosecution office in Shangdong organized a Symposium on the Disclosure of Evidence and Trial Procedure Reform. Then in June 2006, the CCLJ/RCPL co-organized a Symposium on Comparative Criminal Procedural Law with the New York State University Law School. In the same month, CCLJ associates participated in a joint symposium organized by ICCLR and the RCCJ in Beijing to discuss criminal justice reform.

In July, at the invitation of ICCLR, the Chairman of the CCLJ/RCPL led a delegation of four experts on a study tour to Canada. Its focus was on the implementation of the

UNCAC and UNTOC as well as on the monitoring and control of police wrongdoing in the process of criminal investigation.

Also in July 2006, the CCLJ and ICCLR released a joint publication on the protection of human rights in trials of first instance. It presents eleven general thematic research papers, including two comprehensive reviews, and nine focused research papers addressing 'hot issues' ranging from judicial independence to summary trial procedure. As well, the book includes a series of Canadian essays on such issues as wrongful convictions in the war against terrorism, gender analysis of Canadian criminal procedural reforms, and the rules of confession and evidence in common law countries. The last part of the book is made up of two reports: one on a research tour to Canada by CCLJ faculty in the summer of 2005 and the other on a CCLJ investigative field study in Guangdong province into the practical issues of human rights in trials of first instance.

In August 2006, the CCLJ and the Vera Institute of Justice organized a conference to announce a joint publication on the application of empirical research methods to the justice reform process. The CCLJ also hosted a workshop in Beijing to discuss the findings of an experiment into the use of house arrest and non-prosecution as a way of handling juvenile cases.

In late September 2006, the CCLJ released its most recent research publication on "Re-Amending the Law of Criminal Procedure of China". This book is a systematic presentation of the CCLJ's recommendations for amending the 'hot button' issues in the Law of Criminal Procedures. According to its Chief Editor, the book incorporates many of the ideas that the CCLJ has obtained through its partnership with ICCLR

over the past 10 years. In late September 2006, a CCLJ/RCPL team of scholars played a key role in organizing the 2006 annual national conference of the China Procedural Law Research Society, which provided delegates from across the country with an opportunity to exchange views on the key issues related to the on-going reform of the Law of Criminal Procedure. During October 2006-March 2007, the CCLJ organized a series of seminars to discuss key issues relating to the reforms of criminal procedures, ranging from pre-trial procedural reforms to the death sentence review and approval procedure.

Regarding its ongoing work of preparing specific draft amendments to the LCP, the CCLJ continued to focus on four priority issues: (i) implementing fair trial standards; (ii) reforming pre-trial procedure, including the rules on the use of compulsory measures in criminal investigations; (iii) improving the system of criminal defense; and (iv) developing rules of evidence. As well, regarding all of the CCLJ and RCPL activities listed above, CCLJ scholars continued to work with other jurists, various senior Chinese officials and representatives of the SPC and SPP to develop recommendations for amending the LCP.

During the reporting period, there were three instances in which the impact of the legal research work of the CCLJ and RCPL on the reform process was particularly evident. In late July, Prof. Bian, one of the founding members of the CCLJ and the new Director of the RCPL, delivered a report to the Ministry of Education 2006 Working Conference of Major Research Centres of Social Sciences. It focused on the application of empirical research methods to legal reform research. In August, the SPP appointed Prof. Song of the CCLJ to the position of part-time Deputy Director General of the Legal and Policy Research Office of the SPP. Prof. Song led an

IISCJCP-sponsored study tour team to Canada in 2004. In late 2006, the RCPL was officially recognized as the Research College of Procedural Laws (RCPL), an indication of its growing stature in China's legal community.

While preparing this Annual Program Progress Report in April 2007, the CCLJ and ICCLR completed their final editing of a major joint publication on the implementation of the United Nations CAC and TOC. The End-of-Project Report will provide more details on this activity.

The Research College of Criminal Jurisprudence: key partner organization for Project B (Criminal Law).

The RCCJ celebrated its first anniversary as a College at the Beijing Normal University in August 2006. Over the period April 2006 to March 2007, it continued researching an increasingly broader range of issues related mainly to the reform of Criminal Law and related laws. During October 2006 to March 2007 alone, the RCCJ published on its website over 100 new research papers discussing important legal and policy reform issues including the change of sentencing policies, the implementation of the UNTOC and UNCAC in relation to extradition and mutual legal assistance, the criminalization of additional forms of corruption, restorative justice, community corrections, and other "hot topics" in the reform of China's substantive criminal law. However, in taking on all of these issues, the RCCJ has continued to maintain its focus on six priority areas: (i) developing recommendations to reduce the use of the death penalty, especially in cases involving non-violent offences; (ii) proposing a new adjudicative system pertaining to labour re-education; (iii) preparing proposals for legislative reforms aimed at implementing the UN

conventions related to combating corruption, transnational organized crime, terrorism and cyber crime; (iv) developing recommendations to create and improve the systems of extradition, mutual legal assistance and asset recovery; (v) advising the government on ways to improve the systems for controlling and preventing torture, illegally extended detention and other abuses of powers in the administration of criminal justice; and (vi) promoting accession to the Rome Statute of the International Criminal Court. (Note: In November 2006, ICCLR received approval from DFAIT to assist the RCCJ in promoting the accession and implementation of the Rome Statute of the International Criminal Court in China. ICCLR has cooperated with the RCCJ between April 2006 and February 2007 in its program of research, awareness raising, and regional and international seminars.)

In the past year, the RCCJ has made significant progress in strengthening its institutional capacity. It is now a well-established College on the campus of Beijing Normal University. In 2006, the President of RCCJ became the Dean of a new Law School at BNU. The team of RCCJ has turned the Department of Law in Beijing Normal University to a much stronger School of Law in 2006. This new School will be the most convenient channel to deliver the RCCJ research findings in legal education. The RCCL has established 6 research institutes, 10 research centers, an advisory committee and a foundation. Its staff complement continues to expand. In August 2006, the Executive Director of RCPL joined RCCJ as Vice President. Using this increased staff complement, the RCCJ is currently executing 39 research projects, including several national-level projects for the Government of China, the SPC, the SPP and the China Law Society. The success of the June 2006 Sino-Canada Symposium on the Reform of Criminal Justice in Beijing, organized jointly by RCCJ and ICCLR was a real testimony to the growing influence and status of the College.

Since then, the RCCJ has organized 26 special workshops and seminars, whereby Chinese and foreign scholars (from the United States, Germany, South Korea, United Kingdom, Canada, to name a few) continued to address some of the similar issues that were discussed in the RCCJ-ICCLR June 2006 Conference and Death Penalty Workshop, such as, the death penalty, anti-corruption initiatives, and international cooperation. Interestingly, the official Chinese television station, CCTV, also aired a "Joint RCPL/CCLJ and RCCJ New Year Event in early 2007, indicating the good will and increased cooperation between these two working partners of ICCLR.

The China Prison Society: key partner organization for Project C (Correctional Systems Reform).

CPS experts have been continuing their documentary research into international standards and Canadian best practices in prison administration and community corrections. Although the CPS was completing its transition to a new board, its staff members were still able to use the last six months to move ahead on several research projects and reforms based on its established priorities of: (i) continuing the MOJ's pilot projects in prison reform; and (ii) expanding the community corrections program to 18 provinces. The pilot projects in prison reform are being replicated at an increased pace throughout the country with sites in both most-developed Shanghai and least-developed Jiangxi. At the same time the scope of their subject matter has been expanding and now includes work on the introduction of a more transparent, fair and humane administration and correctional programming in the form of open days for public visitations, the participation of the public and inmates in prison management, the development of new regulations regarding prison guards, increased inmate access to telephones, legal aid for prisoners, inmate access to lawyers, better

correctional programs, the implementation of new complaint systems and counseling services, and the preparation of amendments to the Prison Law and related regulations. With regard to community corrections, the number of research publications on this topic has increased dramatically of late, particularly those supporting the adoption of a national law on community corrections.

In the past year, there have been several signs that the actual operation of China's correctional service has been improving, although the system still has serious problems. Specifically, it seems that progress has been made on: (i) increasing the level of public participation in corrections by setting up 'assistance and education committees' involving representatives of the community and by inviting the public to visit and help inmates; (ii) improving the transparency of, and reducing corruption in, corrections facilities through the publication of prison administrative guidelines and policies, as well as through publicizing cases of corruption involving prison officials; (iii) undertaking preliminary initiatives of restorative justice by organizing meetings for offender-victim reconciliation; (iv) creating community correction offices with sustainable government support and assistance from private business; (v) organizing extensive training programs for prison officers and other correctional workers; and (vi) improving prison and community corrections facilities.

SECTION 1:

EFFECTIVE PARTNERSHIPS IN THE REFORM OF CRIMINAL JUSTICE

《刑事诉讼法修改专家建议稿》重点问题概述

Overview of Key Issues in Experts' Recommendation on the Re-amendment of Criminal Procedure Law in China

陈光中 Chen Guangzhong *

2003 年 10 月第十届全国人大常委会将刑事诉讼法的再修改列入本届人大常委会五年立法规划。为了配合此次立法规划，由中国政法大学刑事法律研究中心陈光中教授主持的刑事诉讼法再修改课题于 2004 年初启动。随后课题组一方面通过国际交流等途径广泛了解和掌握域外刑事诉讼立法最新动态，并于 2004 年 12 月出版了《21 世纪域外刑事诉讼立法最新发展》一书；另一方面通过国内调研和选择基点进行试点等方式，深入了解和掌握中国刑事司法实践状况。在此基础上，课题组于 2005 年 9 月开始以增、删、改等方式对现行刑事诉讼法逐条地提出修改建议。

课题组草拟《中华人民共和国刑事诉讼法修改专家建议稿》（以下简称《建议稿》）的基本思路是：（一）坚持民主、科学、创新和务实的诉讼理

* 中国政法大学终身教授，中国政法大学刑事法律研究中心刑事诉讼法再修改课题组主持人。
Professor, China Univeristy of Political Science and Law, Chairman, Centre for Criminal Law and Justice.

念，即：控制犯罪与保障人权相结合、实体公正与程序公正并重、客观真实与法律真实相结合、公正优先并兼顾效率。（二）坚持以宪法为根据。一方面贯彻和落实宪法“国家尊重和保障人权”的规定，加大刑事诉讼中人权保障的力度；另一方面，维护宪法权威，坚持在不违背现行宪法的条件下提出切实可行的修改建议。（三）坚持借鉴外国经验与中国国情相结合，坚持与联合国刑事司法准则相衔接。《建议稿》重点关注和考虑了中国刑事诉讼法如何与《公民权利和政治权利国际公约》、《联合国反腐败公约》以及《联合国打击跨国有组织犯罪公约》的衔接问题。（四）坚持从实际出发，着重解决司法实践中明显存在、人民群众反映比较强烈的诸如刑讯逼供、证人不出庭作证、辩护难、申诉难等问题。

就刑事诉讼法再修改的框架结构而言，充分考虑到目前中国的立法、司法实践状况，我们起草的《建议稿》在刑事诉讼法典的总体框架上基本保持不变，只是作了些适当的改动。目前，课题组已经草拟出了共 450 条的《建议稿》（尚未最后定稿）。现将《建议稿》中对现行中国刑事诉讼法修改的重点问题概述如下，以供立法部门参考，并与国内外同行专家交流和切磋。

一、刑事诉讼法第一编第一章“任务和基本原则”的修改

1、修改刑事诉讼法的制定宗旨。现行刑事诉讼法第 1 条对刑事诉讼法制定宗旨的规定是：“为保证刑法的正确实施，惩罚犯罪，保护人民，保障国家安全和社会公共安全，维护社会主义社会秩序，根据宪法，制定本法”。考虑到“人民”在我国是一个政治范畴，在外延上不包括严重的刑事犯罪分子，而刑事诉讼法要保护的是包括涉嫌严重犯罪的嫌疑人、被告人的一切人的基本权

利。同时考虑到司法公正和诉讼效率是刑事诉讼的基本价值目标，《建议稿》将刑事诉讼法的制定宗旨修改为“为保证刑法的正确实施，惩罚犯罪，保障人权，实现司法公正，提高诉讼效率，根据宪法，制定本法”。

2、进一步完善程序法定原则。现行刑事诉讼法第 3 条第 2 款关于程序法定原则的表述是：“人民法院、人民检察院和公安机关进行刑事诉讼，必须严格遵守本法和其他法律的有关规定。”根据法治国家的授权原则，并特别考虑到对违反法定程序的行为进行程序性制裁是程序法定原则的重要内容，《建议稿》将程序法定原则独立作为一条，并分两款作如下表述：“人民法院、人民检察院和公安机关进行刑事诉讼，必须严格遵守本法和其他法律的有关规定，不得超越本法和其他法律所规定的权限。”“对违反法定程序的诉讼行为，人民法院或人民检察院应当根据违法的轻重程度及结果情况，决定违法行为是否有效。”

3、将人民法院统一定罪原则改造为无罪推定原则。现行刑事诉讼法第 12 条规定：“未经人民法院依法判决，对任何人都不得确定有罪。”这并非严格意义上的无罪推定原则。基于无罪推定原则是现代刑事诉讼之基石，《建议稿》第 10 条第 1 款根据国际社会的通行表述，将无罪推定原则表述为：“人民法院依法作出生效裁判确定有罪之前，任何人应当被推定为无罪。”此外，为了保证无罪推定原则所派生的罪疑作有利于被追诉人处理的精神在实践中能得到真正的贯彻和落实，该条第 2 款还规定：“不能认定犯罪嫌疑人、被告人有罪或无罪的，按无罪处理；不能认定犯罪嫌疑人、被告人罪重或罪轻的，按罪轻处理。”

4、增加规定比例原则。比例原则是现代公法一项非常重要的原则，被誉为公法的“帝王条款”。在刑事诉讼中，比例原则的确立对于合理划分国家权

力与公民个人权利的界限，防范国家权力滥用，保护公民个人权利具有非常重要的意义。为此，《建议稿》增加规定了此原则，并将其表述为：“人民法院、人民检察院和公安机关实施强制性诉讼行为，应当严格限制在必要的范围内，并与所追究罪行的严重性、犯罪嫌疑人、被告人的社会危险性相适应。”

5、增加规定不得被迫自证其罪原则。基于不得被迫自证其罪原则对于防止刑讯逼供、保护被追诉人合法权利的重要意义，并考虑到《公民权利和政治权利国际公约》关于这一原则的规定，《建议稿》第 12 条确立了不得被迫自证其罪原则，并规定为：“不得强迫任何人证明自己有罪或作其他不利于自己的陈述。”至于此原则是否包含沉默权，可结合中国实际加以解读。

6、增加规定刑事和解原则。考虑到：刑事和解制度既体现了中国“和为贵”的传统和谐文化，又有利于提高诉讼效率和有效地解决刑事犯罪所带来的各种纠纷和矛盾；以及刑事和解制度、恢复性司法在国际社会的蓬勃发展趋势，《建议稿》在第 20 条将刑事和解作为中国刑事诉讼法的一项原则予以规定，即：“犯罪嫌疑人、被告人与被害人及其近亲属达成和解的，人民法院、人民检察院和公安机关可以考虑当事人的和解意愿，并根据案件情况依法不追究犯罪嫌疑人刑事责任，对被告人从轻、减轻或者免除处罚。”

7、增加规定一事不再理原则。鉴于一事不再理原则（禁止双重危险规则）在保障人权、维护司法权威和裁判稳定性方面的重要意义，考虑到中国刑事司法实践中存在的重复追诉之现实，结合国际社会一事不再理原则相对化的发展趋势，《建议稿》第 21 条在中国确立了相对的一事不再理原则，即：“在人民法院作出生效裁判之后，任何人不得因同一行为再次受到起诉和审判，但是法律另有规定的除外。”

8、增加规定国际法优先原则。鉴于中国已经签署和批准的国际公约都规定了不少与刑事诉讼有关的内容；而中国刑事诉讼制度与这些国际公约的规定在某些方面存在一些差异。为此，《建议稿》参照国际社会的通行做法，在第22条增加规定了国际法优先原则，即：“中华人民共和国缔结或者参加的国际条约与本法及相关法律的规定不同的，适用国际条约的规定，但是中华人民共和国声明保留的条款除外。”

9、增加规定未成年人特别保护原则。考虑到未成年人犯罪在中国迅速发展的状况，以及对未成年人犯罪被追诉人的特别保护对于保障人权以及社会长治久安的重要意义，《建议稿》第23条将未成年人特别保护作为中国刑事诉讼法的一项基本原则予以规定，即：“人民法院、人民检察院和公安机关办理未成年人刑事案件时，应当考虑未成年人的身心特点，遵循教育、感化和挽救的方针，坚持教育为主、惩罚为辅，充分保护未成年人的权益。”

二、刑事辩护制度的修改

10、完善辩护人的职责。现行刑事诉讼法第35条关于辩护人职责的规定存在两个突出问题：一是在辩护的内涵上对程序性辩护体现不够；二是过分强调了辩护人有证明被告人无罪的举证责任。针对这两个问题，《建议稿》第54条将辩护人的职责修改为：“辩护人应当根据事实和法律，收集、提出犯罪嫌疑人、被告人无罪、罪轻或者减轻、免除其刑事责任以及维护其诉讼权利的材料和意见，维护犯罪嫌疑人、被告人的合法权益。”

11、明确侦查阶段律师的辩护人地位。根据现行刑事诉讼法第96条的规定，犯罪嫌疑人尽管在侦查阶段可以获得律师的帮助，但是没有明确赋予律师

的辩护人地位，从而使得律师在侦查阶段的介入名不正、言不顺。为此，《建议稿》明确规定侦查阶段犯罪嫌疑人聘请的律师的辩护人地位。

12、扩大指定辩护的范围。鉴于法律援助对于保障人权的重要意义，考虑到适当扩大中国刑事法律援助范围的条件已经基本成熟，结合国务院《法律援助条例》的相关规定，《建议稿》第 53 条扩大了指定辩护的范围，这主要表现在：第一，将部分案件指定辩护的时间提前至侦查阶段，即如果被追诉人是：（一）盲、聋、哑或者限制行为能力的人；（二）第一次讯问或采取强制措施时不满十八周岁的未成年人；（三）可能被判处无期徒刑、死刑的人，自侦查阶段就有权获得指定辩护。第二，进一步扩大了审判阶段指定辩护的范围。在现行刑事诉讼法审判阶段制定辩护的基础上，《建议稿》增加规定：“具有下列情形之一，人民法院应当指定承担法律援助义务的律师为其提供辩护：（一）涉嫌或被指控与他人共同犯罪，其他犯罪嫌疑人、被告人已委托辩护人的；（二）具有外国国籍或无国籍的；（三）所涉案件有重大社会影响的。”

13、通过加强保障辩护人阅卷权的方式解决辩护方的知情权。针对现行刑事诉讼法造成的司法实践中律师阅卷难的突出问题，《建议稿》结合中国实际不明确规定证据展示制度，而是一方面提前了辩护人了解案件材料的时间，另一方面扩大了辩护人阅卷的范围。《建议稿》第 55 条规定：“侦查期间，辩护律师有权向侦查机关了解犯罪嫌疑人涉嫌的罪名，除涉及国家秘密外，可以查阅、摘抄、复制犯罪嫌疑人的陈述笔录、技术性鉴定材料以及本案的诉讼文书。”“自审查起诉之日起十日后至一审判决前，辩护律师有权到检察机关查阅、摘抄、复制本案全部材料。其他辩护人经人民检察院许可，也可以查阅、摘抄、复制上述材料。”“在第二审程序、死刑复核程序、再审程序中，辩护律师有权到人民法院查阅、摘抄、复制本案全部材料。其他辩护人经人民法院

许可，也可以查阅、摘抄、复制上述材料。”“侦查机关、人民检察院和人民法院应当为辩护人依法查阅、摘抄、复制案件材料提供条件和便利。”

14、加强辩护律师调查取证权的保障。调查取证难也是司法实践中存在的一个突出问题，并且一般认为主要原因出在现行刑事诉讼法第 37 条和第 38 条的规定上。为此，《建议稿》第 57 条和第 58 条从以下三个方面对这两条进行了修改：一是取消了辩护人调查取证需征得被调查人同意的不合理规定，二是强化了辩护人申请公安司法机关调查取证的权利；三是严格控制对辩护人法律责任的追究。第 57 条规定：“辩护律师有权向有关单位和个人调查、收集与案件有关的证据和材料。有关单位或个人不予配合的，辩护律师可以申请人民法院、人民检察院和公安机关收集、调取。”“人民法院、人民检察院和公安机关同意收集、调取证据的，应当吸收提出申请的辩护律师参加；不同意的，应当以书面方式说明理由并附卷。” 第 58 条规定：“辩护人不得帮助犯罪嫌疑人、被告人隐匿、毁灭、伪造证据或者串供，不得威胁、诱骗证人作伪证。”

三、证据制度的修改

15、确立证据裁判原则。证据裁判原则是证据法中的一项基本原则，已为中国诉讼法学理论界和现代法治国家或地区立法所普遍认可，中国的司法实践也基本上遵循证据裁判原则。因此，《建议稿》在第五章（“证据”章）首条开宗明义地规定：“认定案件事实，应当以证据为依据。”

16、确立非法证据排除规则。从立法上解决非法证据排除问题，是我们在起草《建议稿》时重点考虑的问题。《建议稿》用以下 3 个条文规定了非法证据排除规则：（1）非法言词证据的绝对排除。第 77 条规定：“禁止以下列方

法收集犯罪嫌疑人、被告人、被害人陈述和证人证言：（一）刑讯或其他使人在肉体上剧烈疼痛的方法；（二）威胁、诱骗；（三）使人疲劳、饥渴；（四）服用药物、催眠；（五）其他残忍、不人道或有辱人格的方法。”“以上述非法方法收集的证据不得作为本案提起公诉、判决有罪的证据。”（2）非法实物证据的裁量排除。第 78 条规定：“禁止以非法方法搜查、扣押，非法监听，非法侵入他人住宅以及以其他非法方法收集物证、书证和音像、电子资料；严禁违反法定的程序进行勘验、检查。”“以上述非法方法收集的证据，由人民检察院、人民法院根据取证行为违法的程度和案件的具体情况决定是否可以采用。”（3）非法证据排除的证明责任及证明标准。第 79 条规定：“在犯罪嫌疑人、被告人及其法定代理人、辩护人认为指控犯罪的证据为非法取得并提出相关线索时，侦查机关应当提供确实、充分的证据证明其为合法取得，人民检察院、人民法院在调查核实后有合理根据地认为该证据系非法取得的，应当认定该证据为非法证据。”

17、对证明标准和推定的规定。证明标准是近些年来理论界争论的一个热点问题。我们认为，现行刑事诉讼法将有罪证明标准规定为“犯罪事实清楚、证据确实充分”，其基本精神是正确的，不必修改，只是在一定情况下过于绝对。为此，《建议稿》坚持客观真实与法律真实相结合，对推定的适用作出了规定，即：“第 74 条 下列事实推定为真实，但有相反的证据足以推翻的除外：（一）已生效刑事裁判确定的事实；（二）国家工作人员的财产或者支出明显超过合法收入，差额巨大，不能说明其来源是合法的，差额部分为非法所得；（三）非正常持有属于国家绝密、机密文件、资料或者其他物品拒不说明来源与用途的，为非法持有；（四）在内海、领海运输、收购、贩卖国家禁止进出口物品的，或者运输、收购、贩卖国家限制进出口货物、物品，数额较

大，没有合法证明的，为走私；（五）交通肇事后当事人逃逸或者故意破坏、伪造现场，毁灭证据，使交通事故责任无法认定的，为当事人负全部责任。”“在跨国有组织犯罪、腐败犯罪案件中，有关犯罪的故意、明知、目的等主观心理可以根据案件客观实际情况推定。”另外，在第 83 条规定：“对程序事实的证明，应当达到优势证据的程度。”

18、完善证人证言制度。这主要包括：（1）规定了近亲属和律师的拒绝作证特权制度，即“证人有权拒绝提供可能使近亲属受到刑事追诉或者有罪判决的证言。但是涉及国家机关工作人员利用职权实施的犯罪除外。”“律师对于在履行职务过程中得知的有关委托人秘密的事实，有权拒绝提供证言，但当事人本人同意，或者危害国家安全、重大公共利益以及正在实施或者准备实施的犯罪事实除外。”（2）明确了证人必须出庭并规定书面证言原则上不能作为定案的根据，即“除法律另有规定的情形外，证人未出庭所作的书面证言，不能作为定案的根据”。（3）规定了证人作证的经济补偿制度。（4）进一步细化了证人保护制度，明确规定了禁止接触令、提供临时住所等特殊的证人保护措施。

19、完善鉴定制度。这主要包括：（1）赋予了当事人与控诉机关平等的鉴定启动权，即规定“当事人有权就专门性问题申请鉴定，也可以直接委托具有鉴定人资格的人进行鉴定。”（2）明确了鉴定人负责制，即规定“鉴定人进行鉴定后，应当写出鉴定意见，并且签名或盖章。”“多个鉴定人共同鉴定的，如果意见一致，可以推荐一人撰写鉴定意见，但每个鉴定人都应当签名或盖章。鉴定人之间意见分歧的，应当在鉴定结论上写明分歧的内容和理由，或者分别提交鉴定意见。”（3）增加规定了专家辅助人制度，即“人民检察院和当事人可以聘请有关专家作为专家辅助人，协助审查、判断鉴定意见。专家

辅助人有权要求鉴定人提供便利条件。”“专家辅助人可以出席法庭，经法庭许可可以对鉴定意见发表意见。”

四、强制措施的修改

20、进一步改革和完善监视居住制度。基于在目前的司法实践中有关机关常常滥用监视居住，变相羁押被追诉人。《建议稿》本着严格控制监视居住的适用、强化被监视居住人权利的精神，重点从以下三个方面对现行的监视居住制度进行了改造：

（1）提升了监视居住的适用条件，缩小了监视居住的适用范围。根据《建议稿》第 108 条第 1 款规定，监视居住的适用对象仅仅限于“对于罪该逮捕但证据不足或者不宜逮捕，同时又没有固定住处的犯罪嫌疑人、被告人”。

（2）强化了被监视居住人的权利保障。第 108 条第 3 款规定：“执行机关在执行监视居住后 24 小时之内应当通知被监视居住人的家属或者其所要求通知的人，并且将通知结果告知被监视居住人。”第 110 条规定：“被监视居住人除享有本法规定的其他诉讼权利以外，还有下列权利：（一）向执行机关查询是否已经通知其家属或被要求通知的人；（二）在没有第三人在场、且不受监听的条件下，随时会见其辩护人、近亲属；（三）通过电话、邮件等途径与其辩护人、近亲属进行联系，不受法律规定以外的限制；（四）根据合理的实际需要自费改善居所的居住条件和生活条件；（五）在执行机关指派的专人陪同下，到医疗保险指定医院或者其他符合条件的医院进行身体检查或接受适当的治疗；（六）如果近亲属病危或者死亡，有权经过执行机关批准前往探视或者奔丧；（七）人身不受器械约束。”

（3）明确规定了被监视居住人的救济权。根据第 111 条第 2 款的规定，被监视居住的人对监视居住决定不服的，可以向人民法院申诉。

21、进一步改革和完善逮捕制度。《建议稿》本着从严控制逮捕的适用以及强化逮捕程序的正当性之精神，对现行的逮捕制度从以下二个方面进行了修改和完善：

（1）提高了逮捕的条件。根据第 121 条的规定，对现行刑事诉讼法规定的逮捕条件作了两点修改：一是将在适用上难以掌握的逮捕证明标准“对有证据证明有犯罪事实”修改为“对有确实证据证明有重大犯罪嫌疑”；二是将“可能判处徒刑以上刑罚”修改为“可能判处三年有期徒刑以上的刑罚”。

（2）增加规定了对检察机关逮捕决定的司法审查程序。第 129 条规定：“被逮捕人及其法定代理人或者近亲属不服人民检察院逮捕决定的，可以向决定或者批准逮捕的人民检察院同级的人民法院提出申诉。”“人民法院对于不服逮捕决定的申诉，应当举行听证，听取人民检察院、被逮捕人及其法定代理人、辩护人的意见；必要时，可以通知证人出庭作证。”“申诉和听证不影响逮捕的执行。”“人民法院应当自受理申诉之日起五日内进行听证，当庭分别情形做出裁定，并且书面通知批准或者决定逮捕的人民检察院、被逮捕人及其法定代理人、辩护人：（一）认为逮捕合法，并且没有超过法定的羁押期限的，应当驳回申诉，维持逮捕；（二）认为逮捕合法，但是已经超过法定的羁押期限的，应当通知人民检察院和公安机关立即释放被逮捕人；（三）认为逮捕不合法的，应当撤销逮捕决定，并且通知人民检察院和公安机关立即释放被逮捕人。”

五、侦查制度的修改

22、强化讯问犯罪嫌疑人程序的正当性。《建议稿》着重从以下四方面强化了讯问犯罪嫌疑人程序的正当性：

（1）明确、细化了讯问时的相关时间限制，如增加规定“传唤、拘传犯罪嫌疑人的，两次讯问的时间间隔不得少于十二小时”“对于在押犯罪嫌疑人的讯问，每次讯问时间不得超过十二小时，两次讯问的时间间隔不得少于十二小时”“严禁夜间讯问犯罪嫌疑人，但符合以下条件的除外：（一）因扭送而夜间到案的；（二）因紧急拘留夜间到案的；（三）为解救人质、阻止已着手实施的恐怖犯罪、危害公共安全犯罪或其他关系个人生命健康的重大犯罪活动而进行讯问的。”

（2）明确了讯问前的告知义务。《建议稿》第 225 条规定：“在第一次讯问犯罪嫌疑人时，侦查人员应当告知犯罪嫌疑人享有以下诉讼权利：（一）申请回避的权利；（二）聘请律师的权利；（三）申请法律援助的权利；（四）请求公安机关调查有利证据的权利；（五）犯罪嫌疑人在押的，申请取保候审的权利。”

（3）确立了讯问时律师的有限在场权。《建议稿》第 231 条规定：“对于应当指定辩护的案件，讯问犯罪嫌疑人时，应当有律师在场。”

（4）确立了讯问时的录音录像制度。《建议稿》第 229 条规定：“对于以下案件，讯问犯罪嫌疑人时，应当全程录音或者录像：（一）危害国家安全的犯罪案件；（二）职务犯罪的犯罪案件；（三）杀人、抢劫、强奸、放火、爆炸、投毒等严重侵犯人身权利和危害公共安全的犯罪案件；（四）其它犯罪嫌疑人可能被判处十年以上有期徒刑的案件。”

23、秘密侦查和技术侦查手段的法制化。目前中国的刑事诉讼法对秘密侦查和技术侦查手段基本上没有规定。而这类侦查手段的法制化，既有利于加强其程序控制、保障人权，也有利于追诉机关更好地利用这些手段控制犯罪、指控犯罪。为此，《建议稿》对派遣秘密侦查员、诱惑侦查、监听、截取和收集电子信息、秘密拍照、犯罪心理测试等秘密侦查和技术侦查手段的适用案件范围、条件、程序以及相关公民的权利保障和救济等问题作出了规定。

24、改革和完善侦查终结制度。对现行刑事诉讼法规定的侦查终结制度，《建议稿》着重以下三个方面进行了修改和完善：

（1）增加规定了因和解而撤销案件制度，《建议稿》第 241 条规定：“对于因轻伤害、交通肇事或损毁财物引起的轻微犯罪案件，犯罪嫌疑人和被害人已经达成和解并提出的，公安机关可以撤销案件。”

（2）根据司法实践的需要区分了对人的案件的撤销和对事的案件的撤销。如《建议稿》第 240 条规定，在侦查过程中，如果发现犯罪行为不是犯罪嫌疑人、被告人所为的，应当对犯罪嫌疑人撤销案件，但是对于发生的犯罪事实，应当继续侦查。

（3）确立了解除犯罪嫌疑人身份制度。如《建议稿》第 246 条规定，自第一次讯问犯罪嫌疑人之日起，经侦查两年期满，仍不能依法侦查终结的，应当书面通知犯罪嫌疑人对他解除嫌疑身份。已经采取强制措施的，应当解除强制措施。

六、起诉制度的修改

25、确立起诉状一本主义。中国现行刑事诉讼法第 150 条规定，人民检察院起诉时需要移送证据目录和主要证据复印件。这一规定的弊端在于：既不能防止法官先入为主，又增加了复印成本；而且实践中许多地方司法机关不愿意按照此规定移送主要证据复印件，又回复到了卷宗移送主义的做法。同时考虑到辩护律师在一审前已有阅卷权，《建议稿》第 259 条主张采用起诉状一本主义的做法，该条规定：“人民检察院提起公诉，应当向人民法院送交起诉书、证人名单和证据目录”“起诉书应当载有明确的被告人、指控犯罪事实、指控罪名和适用的法律条文，但是不得附加证据，也不得在起诉书中对证据进行描述”。

26、审查起诉的改革。这主要表现在：

（1）确立附条件不起诉（暂缓起诉）制度。即第 263 条第 1 款规定：“对于犯罪嫌疑人可能判处三年以下有期徒刑、拘役、管制或者单处罚金的案件，人民检察院根据犯罪嫌疑人的年龄、品格、境况、犯罪性质和情节、犯罪原因以及犯罪后的悔过表现、赔偿情况等，认为不起诉更符合公共利益的，可以确定一年以上、三年以下期间为对被不起诉人的考验期。除本法另有规定的以外，期间届满，人民检察院不再就本案提起公诉”。

（2）确立审查起诉阶段的刑事和解制度。根据第 264 条的规定 可能判处三年以下有期徒刑、拘役、管制或者单处罚金的案件，被害人与犯罪嫌疑人自愿和解的，人民检察院可以根据案件不同情况分别作出裁量不起诉或附条件的不起诉。

七、一审程序的修改建议

27、确立庭前预备会议。与起诉状一本主义相配套，《建议稿》设计了庭前预备会议制度。第 280 条规定：“人民法院决定开庭审判后，对于被告人委托辩护人的，必要时，合议庭可以在开庭审判前召集公诉人和辩护人举行庭前预备会议，处理以下事项：（一）决定是否容许公诉人提出证据目录以外的证据或者证人名单以外的证人；（二）决定是否批准辩护人关于调取、保全有关证据的申请；（三）辩护人提出的排除证据的申请；（四）被害人和被告人是否有和解协议和从轻处罚要求；（五）法庭证据调查的范围、顺序和方法；（六）其他需要处理的问题”。

28、改革法庭调查的顺序，突出被告人在一审程序中的主体性地位。根据中国现行刑事诉讼法第 155 条的规定，在公诉人宣读完起诉书、被告人针对起诉书指控的犯罪事实进行陈述后，无论被告人是否认罪都由公诉人讯问被告人。这一规定的弊端在于：即使被告人不认罪，证据调查也依然从公诉人、被害人讯问被告人开始，从而使被告人几乎沦为审判的客体。因此，《建议稿》改变了这一不科学的做法，规定“被告人不承认起诉书指控的犯罪的，公诉人应当提出证据进行证明。被告人、辩护人可以提出证据进行反驳。”“被告人承认起诉书指控的犯罪的，审判人员应查明被告人的认罪是否自愿。被告人自愿承认有罪的，公诉人应当讯问被告人，并出示证明被告人有罪的主要证据。被告人、辩护人可以提出从轻、减轻或者免除处罚的证据。”

29、简易程序的改革和完善。《建议稿》对简易程序的改革主要体现在以下两个方面：一是扩大了简易程序的适用范围，将现行刑事诉讼法规定的“对依法可能判处三年以下有期徒刑、拘役、管制、单处罚金的公诉案件”改为

“对依法可能判处五年以下有期徒刑、拘役、管制、单处罚金的公诉案件”。二是赋予了被告人适用简易程序的选择权和否决权。如《建议稿》第 334 条规定只有“被告人对适用简易程序无异议的”，人民法院才能采用简易程序；第 337 条规定：“对于公诉案件符合适用简易程序条件的，被告人及其辩护人有权向人民检察院提出适用简易程序的请求，人民检察院应当同意并建议人民法院适用简易程序。”“对于自诉案件，自诉人没有提出适用简易程序建议的，被告人有权请求人民法院适用简易程序”。

30、增加规定处罚令程序。为了提高诉讼效率，《建议稿》借鉴国外处罚令程序的相关规定，在一审程序中增设了处罚令程序，如第 330 条第 1 款规定：“对于犯罪事实清楚、证据充分、被告人认罪的轻微刑事案件，人民法院可以应人民检察院的请求对案件不开庭审理，直接向被告人签发处以管制、单处罚金、免予刑事处罚以及其他必要处分的处刑命令”。根据第 333 条的规定，处罚令作出后，如果被告人在 14 日内未提出异议的，处罚令生效，不得上诉和抗诉。

31、增加规定缺席审判制度。考虑到《联合国反腐败公约》的相关规定以及中国当前反腐斗争中资产追缴面临的问题，《建议稿》规定了缺席审判制度。如《建议稿》第 346 条规定：“有证据证明重大贪污贿赂犯罪案件的被告人确已逃往国外的，人民法院可以进行缺席审判。”第 347 条规定：“人民法院进行缺席审判，应当经过人民检察院建议或者同意，并且报请最高人民法院批准。”第 349 条规定：“在开庭审判一个月前，人民法院应当为被告人指定律师担任辩护人，并向其送达起诉书副本”。

32、将现行刑事诉讼法规定的两种无罪判决合并为一种。根据现行刑事诉讼法第 162 条的规定，一审法院在以下两种情形下应当作出无罪判决：一是依

据法律认定被告人无罪的，应当作出无罪判决； 二是证据不足，不能认定被告人有罪的，应当作出证据不足、指控的犯罪不能成立的无罪判决。我们认为，现行刑事诉讼法将这两种无罪判决并列是有缺陷的。为了鲜明地体现疑罪从无的精神，《建议稿》第 315 条将这两种无罪判决合并，规定“依据法律认定被告人无罪的，或者证据不足，不能认定被告人有罪的，应当作出无罪判决”。

八、二审程序的修改

33、二审程序的改造。这主要包括：（1）将现行刑事诉讼法规定的二审全面审改为有限审，如第 360 条规定：“对上诉、抗诉的案件，二审法院的审理范围限于上诉、抗诉范围，但有利于被告人的除外。”（2）二审开庭审理原则的强化。第 361 条规定，第二审人民法院审理上诉案件，原则上需要开庭审理，只有辩护人、被告人同意不开庭审理的，方可不开庭审理。（3）在二审程序中确立疑罪从无原则。根据《建议稿》第 364 条的规定，二审法院可以以事实不清、证据不足为由直接作出无罪判决。（4）上诉不加刑原则的进一步强化。《建议稿》进一步明确了上诉不加刑原则的要求和内涵，并增加规定“只有被告人一方上诉的案件，发回重审的，一审法院不得加重被告人刑罚”。（5）对一审程序违法制裁力度的加强。《建议稿》第 366 条在现行刑事诉讼法第 191 条的基础上增加规定了对一审程序违法的，二审法院除可以发回原审法院重审外，还可以指定与原审法院同级的其他法院重审；并补充规定依照法律规定应当出庭作证的证人、鉴定人未出庭的，二审法院必须撤销原判，发回重审。

九、死刑复核程序的修改

34、死刑复核程序的适度诉讼化。在明确死刑由最高人民法院核准的前提下，《建议稿》主张死刑复核程序应当适度诉讼化，从以下两个方面进行改革：一是主张被告人、人民检察院和被害人有不同程度的死刑复核程序参与权，即第 375 条规定：“被告人在死刑复核程序中有权委托律师进行辩护。被告人没有委托辩护律师的，最高人民法院应当指定承担法律援助义务的律师为其提供辩护。”“人民检察院在认为必要的时候可以派员参与死刑复核活动。被害人、被害人的近亲属及其委托的诉讼代理人经申请也可以参与死刑复核活动。”二是死刑复核程序的听审制度。《建议稿》第 376 条第 4 款和第 5 款规定：“被告人及其辩护人对原审判决认定的关键事实提出异议的，最高人民法院应当进行听审程序。”“听审由最高人民法院死刑复核庭合议庭主持，检察人员、被告人及其辩护人、被害人及其诉讼代理人就案件事实、法律问题进行陈述、辩论。合议庭认为必要时应当通知证人、鉴定人到场。”

35、确立死刑特赦制度。基于贯彻落实宪法规定的特赦制度以及联合国《公民权利和政治权利国际公约》的相关规定，《建议稿》赋予了被判处死刑的人申请特赦的权利，即规定：“经死刑复核程序核准死刑的被告人及其近亲属有权向全国人民代表大会常务委员会申请特赦”，并规定了配套的申请程序。

十、审判监督程序的修改

36、进一步明确再审的理由，落实有例外的一事不再理原则。《建议稿》第383条的规定：“符合下列情形之一的，人民法院应当重新审判：（一）有新的证据证明原判决、裁定认定的事实确有错误的；（二）据以定罪量刑的证据不确实、不充分或者证明案件事实的主要证据之间存在矛盾的；（三）原判决、裁定适用法律确有错误的；（四）原侦查、起诉、审判活动严重违反法定程序的；（五）侦查人员、检察人员、审判人员在办理该案件过程中，有受贿、徇私舞弊、枉法裁判行为的。”“根据前款规定重新审判，不得作出对被告人更加不利的判决，具有下列情形之一的除外：（一）以上原因导致应当被判处十年以上刑罚的被告人被判处无罪，或者应当被判处无期徒刑、死刑的被告人被判处的刑罚低于十年的；（二）被告人及其辩护人、亲友贿赂、威胁、引诱、欺骗办案人员或者证人、鉴定人、被害人等造成错判的。”“法院主动决定再审，不得作出不利于被告人的裁判。”

37、提高再审程序审理法院的级别，限制再审次数。《建议稿》第384条规定：“基层人民法院、中级人民法院的终审裁判由上一级人民法院再审。高级人民法院的终审裁判由最高人民法院或者最高人民法院指令的其他高级人民法院再审，最高人民法院的终审裁判由最高人民法院再审。”“有权再审的法院，对同一案件只能再审一次。但是最高人民法院对于有充分根据认为被判罪人为无罪的，有权重复提起再审或者指令高级人民法院和中级人民法院再审”。第387条规定：“为有利于被告人提起的再审，不得改判对被告人不利的罪名或加重被告人的刑罚。”

十一、涉外程序和司法协助制度的增设

38、增设涉外程序和司法协助一编。中国加入 WTO 以后，与国外的经济贸易、社会交往越来越多，跨国的经济犯罪和腐败犯罪也日益增加；随着国际恐怖主义抬头，恐怖犯罪、有组织犯罪的逐渐上升，对这些犯罪的侦查、取证等工作所带来的问题也越来越多。而中国现行刑事诉讼法仅在第 17 条对国际刑事司法协助问题进行了规定。此外，近些年来我国先后缔结或加入了《关于制止非法劫持航空器的公约》、《反对劫持人质国际公约》、《联合国打击跨国有组织犯罪公约》、《联合国反腐败公约》等十余个含有刑事司法协助方面内容的国际公约。为了弥补中国现行立法上的不足，也为了恪守“条约必须遵守”的原则，《建议稿》增设了涉外程序和司法协助一编，在内容上分为两章，即涉外刑事诉讼程序和司法协助，共 15 条，除其中一条是对现行刑事诉讼法的第 17 条进行修改外，其余 14 条都为新增加的内容。

中国刑事证据制度的改革

Reform of Criminal Evidence System in China

陈光中[*] 刘 玫[**] Chen Guangzhong, Liu Mei

运用证据认定案件事实是刑事诉讼活动的重要基础和基本内容。近年来，中国刑事司法实践中相继出现的若干错案暴露出的突出问题撞击和质疑着现存的刑事证据制度。证据制度的改革和完善已成为中国刑事立法的必然趋势和当务之急。

一、刑事证据立法模式

中国有关刑事证据的规定采用了在诉讼法典中加以规定的类似大陆法系的立法模式，主要体现于《中华人民共和国刑事诉讼法》（下文简称《刑事诉讼法》）的第一编第五章“证据”、第二编第二章“侦查”以及第三编第二章“第一审程序”。其中，第一编第五章是以证据问题为对象的专设章节，第二

[*] 中国政法大学刑事法律研究中心主任，终身教授。
Professor, China Univeristy of Political Science and Law; Chairman, Centre for Criminal Law and Justice
[**] 中国政法大学刑事诉讼法学研究所所长，教授。
Professor, China Univeristy of Political Science and Law; Director, Institute of Criminal Procedural Law

编第二章和第三编第二章则在某些条文中对有关证据的问题有所涉及。作为专门以证据问题为对象的部分，“证据”一章共包括 8 项条文，涉及证据种类、收集方法、口供补强规则、证言之审查判断、证人资格与义务、证人保护等内容。这些条文比较原则，缺乏可操作性，难以适应刑事诉讼过程中复杂的实践需要，因此，司法机关在其司法解释中针对收集证据、审查判断证据的相关实践问题做出了进一步的规定。

关于刑事证据制度改革应当选择的立法模式，法律界存在两种主张：（1）借鉴英美法系的做法，制定一部统一的证据法典，将刑事、民事、行政诉讼中涉及证据的相关问题都在该法典中加以系统规定；（2）仍将证据制度作为刑事、民事、行政三大诉讼法典各自的有机组成部分，刑事证据制度的改革通过在修改刑事诉讼法过程中重点修改有关证据的相关条文来实现。笔者认为，中国的法律传统总体上更接近于大陆法系模式，现有的三大诉讼法典中都规定了证据法的内容，若要分别从中抽出证据法部分，制定独立的证据法典，难度很大。因此，维持现在的立法模式，即，将证据制度作为刑事诉讼法的组成部分加以重点规定的模式，既是兼顾立法传统与中国实际情况的做法，又可以顺利推动《刑事诉讼法》的再次修改，事半功倍。中国立法部门将采取第二种立法模式对刑事证据制度进行改革。

自 1996 年修改《刑事诉讼法》的十余年来，随着中国改革开放的不断深入，人们的法律观念也相应地发生变化。法律是社会生活的反映。在某种程度上，现有的《刑事诉讼法》已经无法满足中国社会的需要和人们的价值取向，也难以解决刑事司法实践的突出问题。据此，2003 年 10 月第十届全国人大常委会将《刑事诉讼法》的再修改列入本届人大常委会五年立法规划。本次刑事诉讼法的修改是针对重点问题的修改，而非全面修改。根据全国人大常委会

2007年立法计划，今年10月常委会第三十次会议将安排审议《〈刑事诉讼法〉修改草案》。该草案由立法部门起草，但在此过程中多次征求公检法机关、律师以及法学教授的建议。为了配合本次立法规划之实施，笔者组织的刑事诉讼法再修改课题组（陈光中教授主持，刘玫教授参加，下同）经过时近三载的努力，出版了陈光中教授主编的《中华人民共和国刑事诉讼法再修改专家建议稿与论证》（中国法制出版社，2006年9月。下文简称《再修改专家建议稿》），该书的出版获得了立法界、司法界以及法律学术界的普遍关注和重视。[1]刑事证据制度在本建议稿中作为重要内容加以改进和完善，修改后的第五章“证据”条文增至28条，增加了若干更加符合正当程序要求的实质性规定，如证据裁判原则、非法证据排除规则、证人出庭保障措施等。此前，笔者还曾于2000至2003年间组织课题组完成了《中华人民共和国刑事证据法专家拟制稿（条文、释义与论证）》（中国法制出版社，2004年1月。下文简称《刑事证据法专家拟制稿》），拟制此稿的初衷并非期待立法机关颁行一部专门的刑事证据法典，而是希望能够为未来刑事诉讼法再修改过程中的刑事证据制度改革提供参考和做出贡献。

下文将结合本次刑事诉讼法再修改的相关内容，对刑事证据制度改革提出若干展望性的主张。

[1] 陈光中教授曾于1993年接受全国人大常委会法工委的委托，组织本领域的专家组成课题组，起草刑事诉讼法修改建议稿，以供立法机关在1996年修改刑事诉讼法时作为参考。课题组于1995年出版的《中华人民共和国刑事诉讼法再修改专家建议稿与论证》对1996年刑事诉讼法的成功修改起了推动作用。

二、刑事证据制度改革的指导理念

价值权衡和利益抉择是制度改革所面对的首当其冲的问题，权衡和选择的结果直接决定着改革的基本理念，并对立法的修改起着指导作用。笔者认为，中国的刑事证据制度改革应当与联合国刑事司法准则相衔接，借鉴和吸收国外刑事诉讼立法的有益经验，并与中国的具体实际情况相结合。在此基础上，证据制度改革应当遵循以下指导理念：

（一）惩罚犯罪与保障人权的有机结合。

惩罚犯罪和保障人权是刑事诉讼的两大目的。其中，追究和惩罚犯罪体现着对秩序价值的追求。如果没有发生犯罪的可能，也没有对国家行使刑罚权恢复秩序的合理预期，刑事诉讼制度便失去了存在的前提。刑事诉讼中的保障人权通常仅狭义地理解为保障被追诉人的权利。具体而言包括两个方面：在实体结果上，保证无罪者不受刑事追究和惩罚，保证有罪者依法受到公正的惩罚；在诉讼程序上，保证案件当事人（特别是被追诉人）以及其他诉讼参与人在正当程序中充分行使其诉讼权利。

惩罚犯罪和保障人权之间的权衡反映出秩序、自由等主要价值之间的平衡势态和张力关系，刑事法律对两者关系的调整效果则体现出该法律对本领域社会关系的调节能力。放眼当今世界各国刑事证据制度的改革趋势和发展动向，惩罚犯罪和保障人权两大目的之间的平衡是各国刑事司法普遍遵循的原则。刑事证据规则的设置，皆以调整两大目的关系为基本依据。

2004年修改后的《中华人民共和国宪法》第33条新增一款“国家尊重和保护人权”，为中国刑事司法的人权保障提供了宪法依据。近年来，中国政府提出了构建和谐社会的社会发展政策，该政策背后的人本主义思想与国际刑事司法准则中的人权保障精神两相契合，为中国刑事司法的人权保障提供了政策支撑。目前，惩罚犯罪与保障人权相结合的思想已经在中国官方发布的相关文件中有所体现。例如，中华人民共和国最高人民法院、最高人民检察院、公安部、司法部2007年3月9日联合发布的《关于进一步严格依法办案确保办理死刑案件质量的意见》的第二部分，便明确地将“坚持惩罚犯罪与保障人权相结合”列为一条重要的办案原则。综上，中国的刑事证据制度改革应当并且能够在保障人权方面强化力度，实现惩罚犯罪与保障人权的有机结合。

（二）程序正义与实体正义的动态并重。

程序正义与实体正义是司法正义不可偏废的两个方面，犹如车之两轮、鸟之两翼。在刑事证据制度中，程序正义主要着眼于刑事证明活动过程本身，要求依照法定程序收集证据，并由法院独立公开地依据直接、言词原则对证据进行审查，充分保障诉讼参与人尤其当事人的相关诉讼权利；实体正义则主要要求通过运用证据准确认定案件事实，为正确适用实体法律、对案件做出公正处理提供基础条件。

实体结果是评价程序正义程度的重要指标。司法实践证明：当事人参与刑事诉讼程序的主要目的并非追求过程的公正，而是为了在结果上获得一个有利于自己的公正裁决。由此可以说明：程序的价值首先在于保证实体价值的实现，如果程序的设计是公正的，并得到遵守，多数情况下实体公正能得到实

现。但这并不等于赞同程序工具主义。程序亦有其独立价值，这些独立价值本身就是社会正义的必要组成部分，体现着民主、法治、人权、文明等精神，并直接影响着案件结果的可接受性，换言之，从尊严、平等等价值维度加以分析，人们如何被对待与他们获得何种实体结果同样重要。

据此，作为刑事证据制度理念基础的程序正义与实体正义是互有联系但却有异于彼此的两个范畴，它们各自有其独立的价值内涵和判断标准，虽然相互影响，但却不能相互代替。当两者发生矛盾时，刑事证据制度应当根据实际情况灵活做出价值判断，并没有什么理由非得在两种公平之间制造出孤注一掷的选择。程序正义与实体正义并重的理念已经得到了中国相关实务部门的认同，上述《关于进一步严格依法办案确保办理死刑案件质量的意见》也明确将“坚持程序公正与实体公正并重，保障犯罪嫌疑人、被告人的合法权利”列为一条重要的办案原则，指出“人民法院、人民检察院和公安机关进行刑事诉讼，既要保证案件实体处理的正确性，也要保证刑事诉讼程序本身的正当性和合法性”。鉴于“重实体、轻程序”的传统思想对中国刑事证据制度的负面影响，笔者认为，在坚持程序正义与实体正义动态并重的前提下，未来的证据制度在具体规则的设计上应当着力提升程序的价值。

（三）公正优先，兼顾效率。

诉讼效率指收集、审查证据时所投入的司法资源（包括时间、人力、财力、设备等）与所取得的诉讼成果之间的比例关系。公正与效率是相辅相成、辩证统一的两项基本诉讼价值，只有正确处理两者关系，才能实现刑事证据制度的公正高效。笔者认为，公正是司法的灵魂和生命线，是刑事证据制度追求

的首要价值；因此，刑事证据制度应当在保证司法公正的前提下追求司法效率，亦即公正优先、兼顾效率。中国的司法实务部门已经多次对“公正优先，兼顾效率”的刑事诉讼理念给予肯定。最高人民法院院长肖扬在第五次全国刑事审判工作会议上强调“必须坚持司法公正优先、兼顾诉讼效率，效率必须服从质量。在案件审理过程中，一定要充分听取意见，认真核实证据，绝不能为了赶进度而匆忙下判。同时，严格遵守案件审理期限的规定，在保证案件质量的前提下，努力提高办案效率，防止案件久拖不结。”[2]

综上，笔者认为，中国的刑事证据制度改革将在现行刑事诉讼法典框架结构下，以中国的实际情况为出发点和落脚点，关注国际刑事司法准则，借鉴海外刑事证据制度的有益经验，重点解决中国当前刑事证据制度实践中存在的突出问题。在“惩罚犯罪与保障人权有机结合”、“程序正义与实体正义动态并重”、“公正优先，兼顾效率”等基础理念的指引下，严格按照法定正当程序收集和调查证据，将追究犯罪、发现真实与程序的正当性结合起来。

三、中国刑事证据制度改革的几个重要问题

（一）不得强迫自证其罪原则

作为国际社会普遍认可的一项基本原则，不得强迫自证其罪原则在若干国际人权公约中均有直接或间接的体现。联合国《公民权利和政治权利国际公约》第 14 条第 3 款（庚）项明确规定受刑事控告者“不被强迫作不利于他自己

[2] http://cpc.people.com.cn/GB/64093/64371/64375/5028087.html

的证言或强迫承认犯罪”。关于违背该原则所取得证据的证据能力，该公约中没有做出规定，但人权事务委员会在本公约第 13 号一般性意见第 14 段中指出：“第 3 款（庚）项规定，被告不得被强迫作不利于他自己的证言或强迫承认犯罪。在考虑这项保障时应记住第 7 条和第 10 条第 1 款[3]的规定。强迫被告供认或作不利于他自己的证言的常用方法往往违反这些规定。法律应当规定完全不能接受用这种方式或其他强迫办法获得的证据。”[4]据此，人权事务委员会对违背不得强迫自证其罪原则所取得证据的证据能力持否定态度，并“呼吁缔约国在其法律中设定对使用此类证据的相应禁止”[5]。

中国政府已于 1998 年 10 月 5 日签署了《公民权利和政治权利国际公约》，现正等待全国人大常委会批准。中国目前的刑事法律制度中对不得强迫自证其罪原则的基本精神有所体现，如《刑事诉讼法》第 43 条规定“严禁刑讯逼供和以威胁、引诱、欺骗以及其他非法的方法收集证据”，又如《刑法》第 247 条将刑讯逼供和暴力取证的行为规定为犯罪。但是，无论相关立法还是具体实践，中国的刑事司法制度仍然与国际司法准则具有一定差距，有待通过立法加以补充。

对于是否应当确立不得强迫自证其罪原则，中国法律理论界和实务界目前还存在一定争论，但主流观点认为应当在刑事诉讼立法中加以确立。笔者认为，首先，该原则的确立有助于防止刑讯逼供，对保护被追诉人合法权利具有重要意义；其次，中国已经签署《公民权利和政治权利国际公约》，未来一经

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[3] 此处指的是《公民权利和政治权利国际公约》第 7 条和第 10 条第 1 款。
[4] HRI/GEN/1/Rev.7. (General Comments), http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f?Opendocument
[5] [奥]曼弗雷德·诺瓦克：《民权公约评注（上册）》，毕小青、孙世彦 主译，生活·读书·新知三联书店，2003 年，第 260 页。

批准便将对中国生效，根据“条约必须信守”的国际法原则，缔约国必须贯彻公约的刚性规定，因此，确立不得强迫自证其罪原则有助于推进国内刑事证据制度与联合国刑事司法准则之间的衔接。针对目前中国刑事证据制度存在的问题，笔者认为应当将不得强迫自证其罪原则规定为刑事诉讼的一项基本原则[6]，并对相关制度加以改革，具体包括：（1）取消《刑事诉讼法》第 93 条规定的“如实供述义务”，代之以“不得强迫犯罪嫌疑人违背自己的意愿进行陈述”[7]。至于该原则是否包含沉默权，可以结合中国实际加以解读。；（2）讯问犯罪嫌疑人、被告人必须遵循严格的法定程序，在法定的时间和地点进行。这一问题已经得到中国相关实务部门的重视，上述《关于进一步严格依法办案确保办理死刑案件质量的意见》第 11 条便要求“提讯在押的犯罪嫌疑人，应当在羁押犯罪嫌疑人的看守所内进行”；（3）建立全程同步录音、录像制度[8]，鉴于中国地域广袤，各地经济发展不平衡，如果在所有地区的所有案件中实施全程同步录音、录像制度，存在较大困难，因此建议逐步推行这一制度，可以首先考虑在严重犯罪案件的讯问活动中实施；（4）在应当指定辩护的案件中，确

[6] 《再修改专家建议稿》在第 12 条中规定：“不得强迫任何人证明自己有罪或作其他不利于自己的陈述。”

[7] 参见《再修改专家建议稿》第 226 条。陈光中主编：《中华人民共和国刑事诉讼法再修改专家建议稿与论证》，中国法制出版社，2006 年，第 475 页。

[8] 中国的刑事司法领域已经出现全程同步录音、录像制度的实践。2006 年，为了加强执法规范化建设，贯彻尊重和保障人权的宪法精神，最高人民检察院开始逐步在全国检察机关推行讯问职务犯罪嫌疑人全程同步录音录像，并就这项制度提出四条原则：1、全程同步原则；2、程序规范原则；3、客观真实原则；4、严格保密原则。为了进一步对该项制度的具体实施加以规范，最高人民检察院与 2006 年 12 月印发了《人民检察院讯问职务犯罪嫌疑人实行全程同步录音录像技术工作流程（试行）》和《人民检察院讯问职务犯罪嫌疑人实行全程同步录音录像系统建设规范（试行）》，要求检察人员遵照执行。但职务犯罪案件毕竟只是众多刑事案件的一部分，有许多刑讯逼供现象发生在公安机关负责侦查的案件中，因此，如何将同步录音、录像制度向纵深推进是一个重要问题。最近，在中国最高人民法院、最高人民检察院、公安部、司法部 2007 年 3 月 9 日联合发布的《关于进一步严格依法办案确保办理死刑案件质量的意见》中指出“讯问犯罪嫌疑人，在文字记录的同时，可以根据需要录音录像”，这一规定为死刑案件适用讯问录音、录像制度奠定了基础。

立讯问时的律师在场权制度[9]；（5）确立非法证据排除规则（具体见下文），等等。

（二）非法证据排除规则

非法证据排除规则通常指执法机关及其工作人员使用非法行为取得的证据不得在刑事审判中采纳的规则。联合国《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》（下文简称《禁止酷刑公约》）第 15 条规定：“每一缔约国应确保在任何诉讼程序中，不得援引任何业经确定系以酷刑取得的口供为证据，但这类口供可用作被控施用酷刑者刑求逼供的证据。”此句中的“酷刑”，根据该公约第 1 条，是指“为了向某人或第三者取得情报或供状，为了他或第三者所作或涉嫌的行为对他加以处罚，或为了恐吓或威胁他或第三者，或为了基于任何一种歧视的任何理由，蓄意使某人在肉体或精神上遭受剧烈疼痛或痛苦的任何行为”。根据上述规定，以酷刑取得的口供仅在指控刑讯逼供的案件中才具有证据能力。

中国已于 1986 年签署了《禁止酷刑公约》，并于 1988 年批准了该公约。作为公约的缔约国，中国的刑事立法和司法实践应当贯彻该公约第 15 条的精神。然而，《刑事诉讼法》仅规定“严禁刑讯逼供和以威胁、引诱、欺骗以及其他非法的方法收集证据”，对于违反该规定所取得证据的证据能力没有做出任何排除性规定。这一缺陷后来在相关司法解释中得到了一定回应：1998 年《最高人民法院关于执行〈中华人民共和国刑事诉讼法〉若干问题的解释》

[9] 参见《再修改专家建议稿》第 231 条。陈光中主编：《中华人民共和国刑事诉讼法再修改专家建议稿与论证》，中国法制出版社，2006 年，第 478 页。

（下文简称《若干问题的解释》）第61条规定“凡经查证确实属于采用刑讯逼供或者威胁、引诱、欺骗等非法的方法取得的证人证言、被害人陈述、被告人供述，不能作为定案的根据”；1998年《人民检察院刑事诉讼规则》第265条第1款也作出了类似上述规定；2001年《最高人民检察院关于严禁将刑讯逼供获取的犯罪嫌疑人供述作为定案依据的通知》中进一步要求“发现犯罪嫌疑人供述、被害人陈述、证人证言是侦查人员以非法方法收集的，应当坚决予以排除”。但由于缺少证明责任、运作程序等具体制度支撑，而且“查证属实”的证明标准难以达到，实践中，非法取得的证据仍然往往堂而皇之地成为定罪证据，刑讯逼供屡禁难绝。近年来出现了几起影响力较大的错案，其定罪的口供都是刑讯取得的，引起了社会的普遍关注。

笔者认为，中国刑事证据制度改革中确立的非法证据排除规则应当包含以下几个方面的内容：

1、确立绝对的非法言词证据排除规则。

之所以建议确立绝对的非法言词证据排除规则，主要是基于下述原因：（1）程序公正和实体公正是刑事司法的灵魂。非法获得的言词证据，不仅破坏了程序的正当性，其真实性也难以保障。将此种证据用作定案依据，违背了基本的诉讼理念，不利于诉讼目的的实现。（2）刑事证据制度改革旨在解决中国当前司法实践中存在的突出问题。实践中，刑讯逼供等非法取证行为是导致错案发生的严重隐患，应当采取断然措施加以遏制。（3）与国际刑事司法准则相衔接，并借鉴国外的相关立法。

此外，有必要进一步细化和具体规定言词证据的非法收集方法，从而使该规则更具有可操作性。可以考虑将此类非法收集方法界定为：（1）刑讯或其他使人在肉体上剧烈疼痛的方法；（2）威胁、诱骗；（3）使人疲劳、饥渴；

（4）服用药物、催眠；（5）其他残忍、不人道或有辱人格的方法。凡以上述方法收集的证据，均不得用作本案提起公诉、判决有罪的证据。

2、确立相对的非法实物证据排除规则。

之所以建议确立相对的非法实物证据排除规则，主要是基于下述原因：（1）刑事证据制度中存在着多元化的价值判断，程序公正的价值追求不能绝对化。一方面，非法取得的实物证据破坏了正当程序，不予排除有违程序公正的要求；另一方面，非法取得的实物证据往往具有真实性，绝对排除不利于发现事实真相。因此，司法者根据各案情况加以裁量之后决定是否排除是兼顾程序公正与实体公正的做法。（2）借鉴其他国家的立法例。英、加、德等许多国家采取的是相对的非法实物证据排除规则；即使在对非法物证采取绝对排除态度的美国，也已确立了若干例外。

在具体条文设计上，可以将相对的非法实物证据排除规则规定为：禁止以非法方法搜查、扣押，非法监听，非法入侵他人住宅以及以其他非法方法收集物证、书证和音像、电子资料；严禁违反法定的程序进行勘验、检查。以上述非法方法收集的证据，由人民检察院、人民法院根据取证行为违法的程度和案件的具体情况决定是否可以采用。

3、非法证据排除的证明责任和证明标准

非法证据的证明责任和证明标准是将非法证据排除规则落到实处的重要保障。司法实践中排除非法证据的案件非常少见，这并不是因为少有非法取证的案件，而是因为现行《刑事诉讼法》和相关司法解释：首先，没有对非法证据的证明责任做出明确规定，从而使非法证据的排除在启动环节上便出现了问题；其次，将非法证据的证明标准规定为“查证属实”，要求过高，缺乏可操作性。基于此，笔者认为可以对非法证据的证明责任和证明标准做出如下规

定：在犯罪嫌疑人、被告人及其法定代理人、辩护人认为指控犯罪的证据为非法取得并提出相关线索时，侦查机关应当提供证据证明其为合法取得，人民检察院、人民法院在调查核实后有合理根据地认为该证据系非法取得的，应当认定该证据为非法证据。也就是说，就证明责任而言，只有在被追诉方提出了非法取证的异议和相关线索后，侦查机关才有必要提供证据证明其证据收集程序的合法性。就证明标准而言，在检察机关和法院听取被追诉方以及侦查机关的意见并经必要的调查后，只要有合理根据认为该证据系非法取得时，就应当认定该证据为非法所得。将证明标准规定为“有合理根据”，并把裁量权交给检察机关和法院，这便增强了实践中排除非法证据的可能性。

（三）证人出庭作证

证人出庭作证符合程序正义与实体正义的双重要求。一方面有利于查明事实真相；另一方面也保障了被告人的对质权。联合国《公民权利和政治权利国际公约》第 14 条第 3 款（戊）项规定凡受刑事控告者均有权“讯问或业已讯问对他不利的证人，并使对他有利的证人在与对他不利的证人相同的条件下出庭和受讯问”。据此，证人出庭作证是国际刑事司法准则确认的内容。大陆法系的直接、言词原则，英美法系的传闻规则以及与此配套的其他制度为证人出庭提供了制度保障。

目前，在中国，证人出庭率极低（还不到 1%）已经成为刑事诉讼的一大难题[10]。部分检查官担心证人出庭改变证言，影响公诉成功率，这一现象背后

[10]笔者在 2005 年间曾组织一项关于刑事案件证人出庭的调查，在中国西南地区某省会，2004 年该市刑事案件总量为 6810 件，出庭案件数仅为 26 件，出庭人数 68 人，出庭率仅为 0.38%。

存在以下原因：（1）法律及司法解释中的制度缺陷。现行《刑事诉讼法》在第47条规定了证人的出庭义务，但又在第157条规定了可以宣读未到庭证人的证言笔录；（2）法律及司法解释没有规定证人应出庭而不出庭时所要承担的责任和后果；（3）关于证人出庭保障，法律也缺乏具体有效的保护措施。（4）传统的书面审判方式仍然在司法实践中产生作用，侦查仍然是刑事诉讼的中心环节，法官对案件的裁判依赖于侦查卷宗。有学者将之称为“案卷笔录中心主义”。

笔者认为，证人出庭问题是中国刑事证据制度改革乃至整个刑事诉讼制度改革的重要环节。证人出庭的相关立法的完善至少应当包括如下内容[11]：

（1）将证人出庭作证作为一项一般性的义务加以规定。为了确保证人出庭作证，建议法律对证言笔录的证据能力做出明确规定，即，除法律另有规定的情形外，证人未出庭所作的书面证言，不能作为定案的根据。

（2）对证人出庭作证的例外加以规定。该例外除了包括因死亡、患精神病或其他严重疾病、下落不明、不在中国境内等客观原因无法到庭的情况外，基于诉讼效率之考虑，还包括控辩双方对证言笔录无异议的情况。

（3）明确规定在审判中可以宣读庭前证言笔录的具体情形：一是证人表示不能回忆起某项事实时，需要帮助其回忆的；二是证人在法庭上提供的证言与其在审判前进行的陈述有矛盾，且不能以其他方法确定的。

（4）对应出庭而不出庭的证人规定强制到庭措施和司法处分措施。证人无正当理由拒绝出庭，经劝说无效的，法院可以拘传证人出庭作证；证人无正当理由拒绝提供证言，经劝说无效的，法院可以处以罚款、拘留。

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[11] 参见《再修改专家建议稿》第85、88-90、289-298条。陈光中主编：《中华人民共和国刑事诉讼法再修改专家建议稿与论证》，中国法制出版社，2006年，第339-340、342-345、543-553页。

（5）对于侦查活动中的事实，可以通知侦查人员以证人身份到庭作证，侦查人员不得拒绝作证。侦查人员作证时的身份是证人。

（6）对证人及其近亲属规定具体有效的保护措施。一方面，在审判前后提供信息保密、人身保护等有效保护措施，如，签发书面命令禁止被追诉人及其他对证人构成威胁的人接触该证人及其近亲属，派员提供人身保护，提供安全的临时住所等；另一方面，在条件允许时，审判过程中可以使用特殊的作证方式，如，远程作证，通过技术设备使证人作证的声音失真，采取只有法官才能看见证人的方式等。

（7）制定证人出庭作证的经济补偿制度，。具体而言，补偿内容可以包括证人因作证而支付的交通费、住宿费、误工费等合理费用；如果证人要求，可以采取预先给付的补偿方式，但若证人后来无正当理由拒绝作证或作伪证，则应当责令返还；补偿机关在各诉讼阶段分别是公安机关、人民检察院、法院。

（四）证明标准

刑事证明标准是指依法运用证据证明被告人有罪所需要达到的程度。诉讼证明标准理论上涉及认识论、价值观，实务上又直接关系到被追诉人的生命权、自由权、财产权、名誉权等，问题至关重要，又十分复杂。中国现行《刑事诉讼法》中规定的有罪证明标准是“犯罪事实清楚、证据确实充分”。实践中，对这一证明标准存在不同见解。有观点认为这一标准太高，实际无法达到，建议改为采用“排除合理怀疑”的证明标准。笔者认为，证明标准与错案率之间构成反比例关系——证明标准越高，错案率越低；证明标准越低，错案

率越高，据此，现行法律中规定的“犯罪事实清楚、证据确实充分”是一个保证不错判无辜且符合中国用语习惯的证明标准，问题的关键在于如何对这一证明标准加以正确的解读和运用。所谓“犯罪事实清楚”，并不是要求将案件的一切细节事实查明清楚，而是要求将对定罪量刑具有意义的基本事实、关键事实查明清楚；所谓“证据确实充分”就是要求利用确实的证据构成一个完整的证据体系，对主要犯罪事实（即被告人实施了犯罪行为）的证明达到唯一性（或称排他性）的程度。概言之，“犯罪事实清楚、证据确实充分”的证明标准就是要求司法裁判者根据确实充分的证据达到主观上对犯罪事实认识清楚，从而实现诉讼中主观认识与客观事实的统一。

2006 年 11 月，中国最高人民法院院长肖扬在第五次全国刑事审判工作会议上发表讲话，回顾了从 1997 年以来人民法院刑事审判工作的经验与取得的成就，提出当前刑事审判工作必须坚持的指导原则和基本要求，其中包括必须“坚持事实清楚证据确实充分的裁判原则”。肖扬指出：“如果认定犯罪的事实不清、证据不足，特别是影响定罪的关键证据存在疑问，不能排除合理怀疑得出惟一结论的，就应当坚决按照‘事实清楚，证据确实充分’的裁判标准，果断做出证据不足、指控的犯罪不能成立的无罪判决。”[12]在主要事实、关键证据上坚持结论的唯一性，这一证明标准，对于人民法院准确认定犯罪事实，避免错案的发生，具有特别重要的意义。

因此，笔者认为中国的刑事证据制度仍然应当采用原有的“犯罪事实清楚、证据确实充分”的证明标准。但必须指出，证明标准应当具有层次性，针对不同的事实宜采用不同的证明标准。（1）对定罪量刑具有决定意义的基本

[12] http://cpc.people.com.cn/GB/64093/64371/64375/5028087.html

事实、关键事实，应采用唯一性（即排他性）标准，尤其在被告人可能被判处死刑的案件中，这一点已经得到国际刑事司法准则的确认，联合国《保障死刑犯权利的保障措施》第4条规定“只有在对被告的罪行根据明确和令人信服的证据而对事实没有其他解释余地的情况下，才能判处死刑”，本句中的“没有其他解释余地”便是一种排他性的表述。（2）对于故意、明知、目的等犯罪主观要件，可以适度降低证明标准，甚至可以根据客观实际情况予以推定。适用推定在《联合国反腐败公约》和《联合国打击跨国有组织犯罪公约》中得到了明确规定[13]。“推定”根源于经验法则或推理法则，一般具有合理性，但其可靠性只能达到较高盖然性的程度，低于排他性和排除合理怀疑。笔者认为，对于某些犯罪的主观要件加以推定的合理性在于两方面：第一，不少犯罪者的内心状态具有较强隐蔽性，控诉机关很难将对其主观要件的证明达到确定性的程度，而且，诉讼期限更使这一问题难上加难；第二，从政策角度，这种规定体现了对某些犯罪的严厉打击态度，符合中国现阶段提出的“宽严相济”刑事政策。

结 语

中国的刑事证据制度改革正在稳步推进。我们期待并相信，在立法、司法机关以及法学界专家的共同努力下，通过刑事诉讼法再修改，中国的刑事证据制度改革必将更加符合民主、法治和现代化的要求。

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[13]《联合国反腐败公约》第28条（作为犯罪要素的明知、故意或者目的）：“根据本公约确立的犯罪所需具备的明知、故意或者目的等要素，可以根据客观实际情况予以推定。”《联合国打击跨国有组织犯罪公约》第5条第2款有近似规定。

中加双方在人权公约研究上取得的成果

Research Results of Canada-China Projects of UN Documents on Human Rights

程味秋[*]　刘　玫[**] Cheng Weiqiu, Liu Mei

Abstract
摘要

This paper discusses the history of cooperation between the Centre for Criminal Law and Justice of China University of Political Science and Law and the Canadian International Centre for Criminal Law Reform and Criminal Justice Policy in their research on international human rights conventions and the accomplishments they have achieved over the years. The two centres started their cooperation in 1996 with the China/Canada Criminal Justice Project (CCCJP) focusing on the study of UN's Human Rights Conventions and China's Criminal Law Reform, and jointly published "The United Nations Standards and China's Legal System of Criminal Justice". Since 2000, as an extension to the project on the Human Rights Conventions,

[*] 中国政法大学教授
Professor, China University of Political Science and Law
[**]中国政法大学刑事诉讼法学研究所所长，教授，法学博士。
Professor, China Univeristy of Political Sciene and Law; Director, Institute of Criminal Procedural Law

the two centres have jointly conducted the Implementing International Standards in Criminal Justice in China Project (IISCJP) and have jointly published several books including “Compendium of United Nations Documents on Human Rights and Criminal Justice”, “A Study on Issues in Ratifying and Implementing International Covenant on Civil and Political Rights”, “Training Manual on International Covenant on Civil and Political Rights – International Standards and Chinese Rules of Fair Trial”, “A Study on Issues of Fair Trial” and “Criminal Trial of the First Instance and Protection of Human Rights” . This paper introduces the time, place, people involved, and research methods as well as summarizes the impact of these projects on the legislation and administration of criminal justice in China.

本文介绍了中国政法大学刑事法律研究中心和加拿大刑法改革与刑事政策国际中心在人权公约研究上的合作历史以及多年来取得的丰硕成果。两中心自1996年开始进行“联合国人权公约与中国刑事法制改革”项目合作，并于1998年合作出版了《联合国刑事司法准则与中国刑事法制》；作为人权公约研究的后续项目，从2000年开始，两中心共同开展国际人权公约在中国的批准与实施项目的研究，双方合作出版了《联合国人权公约和刑事司法文献汇编》、《<公民权利和政治权利国际公约>批准与实施问题研究》、《公民权利和政治权利国际公约培训手册》、《审判公正问题研究》、《刑事一审程序与人权保障》等书。本文介绍了项目调研的时间、地点、人员构成、研究方法等情况，并概述了项目成果对中国刑事立法、司法的影响。

中加双方在国际公约研究上取得的成果

Research Results of the Canada-China Project of UN Documents on Human Rights

程味秋[*]　刘　玫[**] Cheng Weiqiu, Liu Mei

主席，

女士们，先生们：

我想借此机会简要谈谈中国政法大学刑事法律研究中心和加拿大刑法改革与刑事政策国际中心在国际公约研究上取得的成果。

我们两个中心是从 1996 年开始进行“联合国人权公约与中国刑事法制改革”项目合作的，并于 1998 年合作出版了《联合国刑事司法准则与中国刑事法制》(The United Nations Standards and China’s Legal System of Criminal Justice)一书。当时正值中国政府先后签署了《经济、社会和文化权利国际公约》和《公民权利和政治权利国际公约》，因此，这本书的出版，在中国和国际上产生了一定的影响。

[*] 中国政法大学教授
Professor, China University of Political Science and Law
[**]中国政法大学刑事诉讼法学研究所所长，教授，法学博士。
Professor, China Univeristy of Political Sciene and Law; Director, Institute of Criminal Procedural Law

作为人权公约研究的后续项目，从 2000 年开始，我们共同开展国际人权公约在中国的批准与实施项目的研究。其间， 中加两国专家、学者的互访，加方赴华开办培训班和在华召开高层次的国际研讨会等，促进了两国专家、学者和实务部门在公约的批准和实施问题方面的交流与合作。

从 2000 年底以来，关于在宣传公约和促进公约的批准和实施方面，中加合作出版了以下 3 本书：

第一本是《联合国人权公约和刑事司法文献汇编》(Compendium of United Nations Documents on Human Rights and Criminal Justice)。

第二本是刑事法律研究中心、中国法学会与加拿大刑法改革与刑事政策国际中心合作，得到加拿大国际发展署的大力支持和资助，历时 1 年 10 个月，于 2002 年 4 月出版了 50 万字的《<公民权利和政治权利国际公约>批准与实施问题研究》（A Study on the Issues of Ratifying and Implementing of International Covenant on Civil and Political Rights）。该书由 3 个部分组成，第一部分是中方专家、学者的系列专题研究成果；第二部分是建议书全文及其英文本； 第三部分是加方学者论文。为了扩大影响，我们向全国人大常委会、最高法院、最高检察院、外交部、司法部、公安部、中国法学会以及高等院校和法律科研机构，广泛地赠送了这本书。

第三本是《公民权利和政治权利国际公约培训手册》（Training Manual on International Covenant on Civil and Political Rights）。

以上三本书的出版，在促进我国对公约的批准和实施以及传播和研究公约方面起到良好的作用。

从 2002 年 10 月至 2003 年 9 月，由加拿大国际发展署、公民社会项目资助，我们先后进行了 3 次关于审判公正问题的调研。根据协议，我们选择 3 个

不同地区的城市进行调研，每次 6 个人，为期 10 天，共 30 天，由中心主任陈光中教授带队，有教授、副教授和博士生参加。在年龄结构上，老中青相结合，中青年占多数，其中女性成员超过 1/3。

第一次是华东地区（国内较发达地区）的江苏省南京市和扬州市，于 2002 年 10 月 27 日至 11 月 6 日进行；第二次是华南地区（国内中等地区）的海南省海口市和琼海市，于 2003 年 3 月 2 日至 3 月 12 日进行；第三次是西北地区（欠发达地区）的陕西省西安市，于 2003 年 8 月 24 日至 9 月 3 日进行。

调研的方式有文件收集、法官走访、座谈、阅卷、旁听法庭审判和参观监狱。通过三次调研，大大地丰富了我们对公正审判问题上司法实践的了解，共收集了 237 份材料，计 2636 页，其中有起诉书、辩护词、判决书、法院的有关规定、审判经验总结和有关数据。为了使调查更加深入，第二次调研加强了阅卷工作。我们要求海南中级法院提供 50 个已审结的案卷档案供我们阅读，而且要求是连续编号的案卷，不经过事先挑选，以了解更为真实的情况。每阅毕一个案卷，当时均作两页的摘要，复印了起诉书和判决书。通过阅卷和旁听审判，表明法官的证据意识和证明观念都比较强，在庭审中对于证据的调查详略适当，对于影响定罪和量刑的证据予以充分注重；有罪判决的案件，都做到了犯罪事实清楚，证据确实充分，或基本事实清楚，基本证据确凿，没有发现证据不足判有罪的案件。这些就为调研打下较扎实的基础。此后，对 50 个案件的案情、证据采用的情况和法院判决又逐个作了整理。

每调查一个城市，都撰写不少于 2 万字的调研报告及 3 千字的英文摘要。在此基础上，经过讨论和研究，针对调查中发现的问题，撰写一份总结报告，明确提出我们对司法改革、完善与修改法律的主张和建议，在加拿大公民社会项目和美国福特基金会的资助下，刑事法律研究中心于 2004 年 1 月召开了

《〈公民权利和政治权利国际公约〉的批准对我国刑事诉讼立法、司法之影响》的学术研讨会，将总结报告提供给与会者，以征求校外专家的意见。研讨会结束之后， 撰写成题为《关于审判公正的调研和改革建议》(A Consolidated Investigative Report on Fair Trial Issues with Recommended Reforms)，四万余字，发表在国际中心和我中心的合作项目之一、双方共同撰写的于 2004 年 10 月出版的《审判公正问题研究》(A Study on Issues of Fair Trial)一书之中。

我中心与国际中心于 2005 年 8 月合作立项，决定开展“刑事一审程序与人权保障”的课题研究，并于同年 12 月赴广东省广州市和东莞市进行有关一审程序的专项调研，收集了大量司法实务中在一审程序方面的问题、意见以及改革建议。在此基础上，中方专家学者对我国刑事一审程序与人权保障，分 11 个专题进行系统梳理后写成文章；加方专家学者分别从错案预防、性别分析、非法证据排除、自白处理、证据规则等角度介绍了加拿大和国际上的一些理论动态。《刑事一审程序与人权保障》(Criminal Trial of the First Instance and Protection of Human Rights)一书已于 2006 年 3 月出版。

2006 年 4 月，我中心与国际中心合作立项，开展“在刑事司法领域贯彻《联合国打击跨国有组织犯罪公约》和《联合国反腐败公约》的国际标准”课题研究。本课题是两中心近年来在刑事法律研究领域的又一次合作，经过中加双方研究人员的共同努力，于 2007 年 3 月圆满完成。

（一）项目活动

1、考察与调研。为了收集司法实务中的相关问题以及改革建议，我中心课题组分别于 2006 年 7 月和 10 月前往加拿大对“两公约的贯彻实施”以及“量刑程序”等问题加以考察，并于同年 10 月赴甘肃省开展专项调研，在此基础上撰写考察报告和调研报告，为本课题的研究提供了宝贵的实证资料。

2、讲座与座谈。2006年12月14日，加拿大刑法改革与刑事政策国际中心的专家学者以及加拿大皇家骑警联邦总署、地方警署的多名高级警官前来中国政法大学举办讲座并参加座谈，就有组织犯罪的趋势与现状、检察官对警察的监督、警署公信之构建、跨国有组织犯罪与腐败犯罪的性别分析等专题进行演讲；中国相关实务部门的工作人员、法学界的专家学者以及中国政法大学的研究生们聆听了讲座，并积极参与了座谈会上的交流与互动。

（二）项目成果

数易其稿、现已付梓的《联合国打击跨国有组织犯罪公约和反腐败公约程序问题研究》一书是本项目的研究成果。作为科研性的学术专著，本书融理论与实践于一体，从若干角度对联合国两公约所涉及的程序问题和最新动态加以论述。在中方作者方面，课题组特邀请实务部门的专家以及学术界的知名教授参与本书的撰稿，他们对两公约的相关问题有较深研究，部分中方作者曾参加《联合国打击跨国有组织犯罪公约》和《联合国反腐败公约》的谈判。

参与本书撰写工作的中方成员为：

陈光中（中国政法大学刑事法律研究中心主任，终身教授，博士生导师。本书主编。）

刘 玫（中国政法大学刑事诉讼法学研究所所长，教授，法学博士。本书中方副主编。）

程味秋（中国政法大学教授，曾任联合国预防和控制犯罪委员会委员。）

黄 风（北京师范大学刑事法律科学研究院教授，博士生导师。曾任中华人民共和国司法部司法协助外事司正司级巡视员。中国政府参加联合国拟订《反腐败公约》谈判代表团成员。）

陈正云（中华人民共和国最高人民检察院职务犯罪预防厅副厅长，法学博士。中国政府参加联合国拟订《反腐败公约》谈判代表团成员。）

张 毅（中华人民共和国司法部法制司法律法规处处长，法学博士，中国政府参加联合国拟订《打击跨国有组织犯罪公约》谈判代表团成员。）

锁正杰（中华人民共和国公安部法制局副处长，法学博士。中国政府参加联合国拟订《反腐败公约》谈判代表团成员。）

陈 东（中华人民共和国最高人民检察院反贪污贿赂总局大要案侦查指挥中心副主任，法学博士。）

李 翔（中国人民大学法学博士、博士后；华东政法学院法律学院副教授。）

秦 策（南京师范大学法学院副教授。）

以及，中国政法大学的博士研究生。

《联合国打击跨国有组织犯罪公约和反腐败公约程序问题研究》一书将提交给中国立法部门和相关政府部门、法学研究机构、法学院校、法律图书馆和法律培训机构。我们相信，作为一本具有影响力的著作，该书将对两公约在中国的贯彻实施以及中国刑事诉讼制度改革做出重要贡献。

综上所述，中国政法大学刑事法律研究中心和加拿大刑法改革与刑事政策国际中心已有长达 12 年的合作历史，在国际公约研究上成果累累，富有成效，我们十分珍惜，并且真诚希望双方继续谱写新的篇章。

谢谢！

司法体制改革背景下的检察改革

Procuratorial Reforms within the Context of the Judicial Reform in China

张智辉 Zhang Zhihui*

Abstract
摘要

The root motive for China's innovation of judicial system is to meet objective needs of the country's social development. Under the circumstances of judicial innovation, the prosecutorial institutions have adopted a series of measures to boost the reform of procuratorate.

I. Basic ideas of the prosecutorial reforms

Basic ideas of the prosecutorial reforms are to strengthen legal supervisions; to maintain fairness and justice; to ensure that fairness and justice are implemented throughout the society; to provide powerful judicial guarantees for building up a

* 最高人民检察院检察理论研究所所长
Director General of the Institute of Procuratorial Theory, Supreme People's Procuratorate of the People's Republic of China

harmonious socialistic society; and to pioneer new phases for construction of socialism with Chinese features.

The prosecutorial reforms shall start with the most outstanding requirements and the most intensive problems reported by the dumb millions; shall set out from the practicalities, which are based on Chinese situations; shall carefully summarize the practical prosecutorial experiences accumulated for decades of years, especially since the implementation of the "reform and opening to the outside" policy; shall absorb the experiences abroad and favorable results of democracy civilizations of human beings, and actively and stably strive forward. The measures and their implementation of the prosecutorial reforms shall accord with the constitution and regime of China, and be favorable for promoting the self improvement of a socialistic system; shall show the requirements for constructing socialistic political civilizations, and organically unify the leadership of the CPC Party, enabling the people to govern themselves and managing state affairs legally, and lay a more solid foundations for constructing socialistic country under the rules of law; shall be positive for safeguarding the healthy and orderly development of a socialistic market economy, legally maintain the benefits of various Economic Agents, safeguard the legal rights and benefits of the dumb millions, and serve the continuous liberation and development of the productivity.

II. Courses and main contents of prosecutorial reforms

Prosecutorial reforms in China have experienced four major development phases: the first phase was from 1978 to 1987, when exploring reforms were predominated by construction of working systems and expansion of legal supervising areas were

carried out. The second phase was from 1988 to 1992, which included: setting up internal restriction mechanisms for the cases investigated of its own accord and strengthening the construction of special institutions; setting up the offence exposing systems, deploying impeachment work; continuing to carry out experimental units for legal supervision of civil and administrative prosecutions and experimental units at local offices of key villages and towns etc. The third phase, from 1993 to 1997, included: to probe into the perfection of the prosecutorial power, prosecutorial functions and prosecutorial working procedures centering on the amendment of criminal laws, and criminal procedure laws; to strengthen the anti-corruption and spy working mechanism; and start to probe into the reform working organizations and cadre personnel systems in light with the prescriptions of the Public Procurators Law. The fourth phase is from 1998 to present, and the major reformation contents are: to execute the publicity system for prosecution affairs; to execute the mechanism that the chief procurator dealing with the cases comprehensively; to set up the expert consultation system; to improve the work of the Procuratorial Committee; to try out the public examination system for non-prosecution cases; to try out the evidence disclosure system before holding a court; to try out the sound recording and video recording system; and to implement the people's supervisor system to the cases which are directly accepted and scouted by the prosecutorial institutions; etc.

III. Theoretical conceives for boosting prosecutorial reforms

Further prosecutorial reforms shall lay emphasis on resolving the following three problems:

(I) The problem of management system: to ensure the prosecutorial power to be executed independently through changing the current management system.

(II) The problem of personnel: to improve the treatment of procurators through the reformation of the empanel system and the management system of the procurators, to reasonably configure the supporting prosecutorial personnel, change the current personnel management system of the prosecutorial institutions, and boost the specialization constructions of the prosecutorial institutions.

(III) Configuration problem of authorities: To strengthen the authority configurations of the prosecutorial institutions and to resolve the problems that the concurrent authorities do not accord with the actual needs.

中国司法体制改革的根本动因是社会发展的客观需要，在司法体制改革的背景下，检察机关采取了一系列措施推进检察改革。

一、 检察改革的基本理念

检察改革的基本理念是强化法律监督，维护公平正义，保障在全社会实行公平正义，为构建社会主义和谐社会、开创中国特色社会主义建设新局面提供强有力的司法保障。

检察改革要从人民群众反应最突出的要求、最强烈的问题入手；要从实际出发，立足于国情，认真总结几十年来特别是改革开放以来的检察实践经验，

吸引国外的一些经验和人类法制文明的有益成果，积极稳妥地推进。检察改革的各项措施及其实施要符合中国的国体和政体，有利于促进社会主义制度的自我完善；要体现建设社会主义政治文明的要求，把实现党的领导、人民当家作主与依法治国有机统一起来，为建设社会主义法制国家奠定更坚实的基础；要有利于保障社会主义市场经济的健康有序发展，依法维护各种经济主体的利益，保障人民群众的合法权益，为不断解放和发展生产力服务。

二、 检察改革的历程及主要任务

中国的检察改革，经历了四个主要的发展阶段；第一阶段是 1978 年至 1987 年，主要进行了以工作制度建设和拓宽法律监督领域为内容的探索式改革。第二个阶段是 1988 年至 1992 年，改革的主要内容是建立自行侦查案件的内部制约机制和加强专门机构的建设；建立举报机构，开展举报工作；继续开展对民事、行政诉讼实行法律监督的试点和重点乡镇派出机构的试点工作等。第三阶段是 1993 年至 1997 年，改革的内容主要是围绕刑法、刑事诉讼法的修改探讨检察权、

检察职能以及检察工作程序的完善；健全反贪污贿洛侦查工作机制，结合检察官法的规定，开始探索改革工作机构和干部人事制度。第四个阶段是 1998 年至今，改革的主要内容是实行公开制度；全面实行主诉检察官办案制度；建立专家咨询制度；改进检察委员会工作；试行不起诉案件公开审查制度；试行庭前证据开示制度；试行录音录像制度；对检察机关直接受理侦查案件实行人民监督员制度等。

三、 推进检察改革的理论构想

进一步检察改革应当着重解决三个方面的问题；

（一）管理体制问题。通过改革现行的行政化管理体制，保证检察权的独立形势。

（二）人员问题。通过改革检察官的选任制度和对检察官的管理制度，提高检察官的待遇，以及合理配置检察辅助人员，改革现行的检察机关人事管理制度，推进检察机关的专业建设。

（三）职权配置问题。完善检察机关的职权配置，解决检察机关的现有职权与实际需要不相适应的问题。

司法体制改革背景下的检察改革

Procuratorial Reforms within the Context of the Judicial Reform in China

张智辉 Zhang Zhihui*

中国司法体制改革的根本动因是社会发展的客观需要。中国现行的司法体制是 1949 年新中国成立后逐渐建立起来的。从总体上看，中国现行的司法体制与国家的政治经济体制和基本国情是相适应的。但是，最近 20 年来，中国社会发生了巨大的变化：（1）市场经济的建立和发展，促进了人们的公平、平等意识，整个社会对司法公正的要求越来越强烈；（2）社会民主的扩大和法制宣传教育的深入，强化了人们的法律意识，人们对司法机关严格执法的呼声越来越高；（3）人们生活水平的不断提高，增强了人们自我保护的意识，越来越多的人寻求法律手段来解决矛盾和纠纷，司法公正得到人们的普遍关注。（4）在经济体制转型过程中，社会矛盾和犯罪问题比较突出，刑事案件不断增加，司法效率不高就成为人们关注的焦点；（5）在市场经济体制下，与计划经济体制相适应的司法体制与市场经济体制要求之间的矛盾越来越突

* 最高人民检察院检察理论研究所所长Director General of the Institute of Procuratorial Theory, Supreme People's Procuratorate of the People's Republic of China

出。特别是随着市场经济的建立和发展，司法腐败和司法不公现象日益突出，这直接影响到人们对国家司法的信任和信心，影响到社会的稳定和发展。在这种大背景下，中国执政党从建设社会主义法治国家和构建社会主义和谐社会的高度出发，及时提出了进行司法体制改革的要求。

自十五大政治报告中提出“依法治国，建设社会主义法治国家”和“推进司法改革，从制度上保证司法机关依法独立公正地行使审判权和检察权”以来，社会各界，尤其是法学理论界和司法机关围绕着“司法改革”进行了许多理论上的研讨和实务上的探索。2003 年，十六大报告再次提出了司法体制改革的任务，并明确了司法体制改革要实现以下目标：（１）通过改革和完善司法机关的机构设置和职权划分，从制度上保障司法机关依法独立行使审判权和检察权；（２）通过改革和完善司法机关内部的司法管理制度，进一步健全合理、公正、高效的司法运作体制；（３）通过司法体制改革，保障在全社会实现公平和正义。按照中央的要求，司法机关围绕司法体制和工作机制改革，进行了许多探索，力图完善中国的司法体制，建立公正、高效、廉洁的司法机关。在这种司法体制改革的背景下，检察机关采取了一系列措施推进检察改革。

一、检察改革的基本理念

检察改革的基本理念是强化法律监督，维护公平正义，保障在全社会实行公平正义，为构建社会主义和谐社会、开创中国特色社会主义建设新局面提供强有力的司法保障。

中国现行的检察制度是新中国在政权建设和法制建设进程中作出的历史性选择，其产生具有科学的理论基础、坚实的政治基础和深厚的实践基础。与其他国家的检察制度相比，中国检察制度的基本特色主要体现在以下几个方面：第一，在宪法地位上，人民检察院被确定为国家的法律监督机关，也是司法机关，由人民代表大会产生，对它负责，受它监督；第二，在具体职能上，人民检察院依法履行审查批准和决定逮捕、公诉、职务犯罪侦查以及对刑事诉讼、民事审判和行政诉讼实施法律监督等职能，这些职能内在地统一于检察机关的法律监督属性；第三，在组织体制上，为保证法律在全国统一正确实施，宪法规定最高人民检察院领导地方各级人民检察院和专门人民检察院的工作，上级人民检察院领导下级人民检察院的工作；第四，在行使职权上，人民检察院依法独立行使检察权，不受行政机关、社会团体和个人的干涉；第五，在决策机制上，各级人民检察院设立检察委员会，实行检察长统一领导与民主集中制相结合。这种检察制度的优点是：它规定检察机关是国家法律监督机关而不是单纯的公诉机关，担负着维护法律统一正确实施、维护社会公平和正义的职责，为检察机关在国家政治、经济和社会生活中充分发挥作用提供了广阔的空间；它明确检察机关在国家机构体系中独立于行政机关和审判机关，强调行政机关、社会团体和个人不得干涉检察活动，规定检察机关上下级领导关系，为检察机关依法独立公正行使检察权提供了有力的保障。这种检察制度包含着中国在法治建设中形成的许多行之有效的经验和做法，是符合中国国情的，也是有其自身优势和生命力的。因此，司法体制改革要在坚持宪法确立的检察机关作为法律监督机关的前提下，通过对现行检察制度中不符合社会发展和依法治国要求的内容进行变革，突破制约检察工作发展的体制性障碍，充分发挥检察机关法律监督在建设社会主义政治文明，保障实现社会公平和正义方面的作用。

为此，检察改革要从人民群众反映最突出的要求、最强烈的问题入手；要从实际出发，立足于中国的国情，认真总结几十年来特别是改革开放以来的检察实践经验，吸收国外的一些经验和人类法治文明的有益成果，积极稳妥地推进。检察改革的各项措施及其实施要符合中国的国体和政体，有利于促进社会主义制度的自我完善；要体现建设社会主义政治文明的要求，把实现党的领导、人民当家作主与依法治国有机统一起来，为建设社会主义法治国家奠定更加坚实的基础；要有利于保障社会主义市场经济的健康有序发展，依法维护各种经济主体的利益，保障人民群众的合法权益，为不断解放和发展生产力服务。

二、检察改革的历程及其主要内容

中国的检察改革，作为中国司法体制改革的重要组成部分，是一个随着改革开放的逐步深入而不断探索的过程。从检察机关恢复重建以来，检察改革可以说经历了四个主要的发展阶段：第一阶段是 1978 年至 1987 年。该阶段主要进行了以工作制度建设和拓宽法律监督领域为内容的探索式改革。第二个阶段是 1988 年至 1992 年。改革内容包括：建立自行侦查案件的内部制约机制和加强专门机构的建设；建立举报机构，开展举报工作；继续开展对民事、行政诉讼实行法律监督的试点和在重点乡镇派出机构的试点工作等。第三个阶段是 1993 年至 1997 年。改革的内容主要有：围绕刑法、刑事诉讼法的修改探讨检察权、检察职能以及检察工作程序的完善；健全反贪污贿赂侦查工作机制；结合检察官法的规定，开始探索改革工作机构和干部人事制度。其中，取得重大成效的是反贪污贿赂工作机制的建设。第四个阶段是 1998 年至今。改革的主

要内容是：实行检务公开制度；全面实行主诉检察官办案制度；建立专家咨询制度；改进检察委员会工作；试行不起诉案件公开审查制度；试行庭前证据开示制度；试行录音录像制度；对检察机关直接受理侦查案件实行人民监督员制度；等等。经过以上改革探索与实践，检察改革取得了一定成绩，积累了有益的经验，促进了各项检察工作的健康发展。

近年来，检察改革的主要内容有：

1、实行检务公开，增强检察工作的透明度。自 1998 年 10 月，全国检察机关实行检务公开，即要求检察机关公开其内设机构设置情况及工作职能；司法活动的法律依据；直接受理立案侦查案件的范围、立案标准；司法活动原则、工作制度、规程和要求；诉讼参与人的诉讼权利和义务；检察机关受理举报、控告、申诉的工作规程等八项内容。通过实行检务公开，将检察工作置于人民群众的有效监督之下，增强了检察工作的透明度，保证了检察机关公正司法。

2、改革和完善对诉讼活动的法律监督机制，切实维护司法公正。在中国，检察机关是国家的法律监督机关。为加强对诉讼活动的法律监督，维护司法公正，检察机关改革和完善了以下四方面的制度：一是建立和完善了行政执法与刑事司法相衔接的制度，拓宽了检察机关立案监督渠道，明确了监督范围和衔接程序，有效地监督纠正了有案不立、有罪不究、以罚代刑等问题，从而加强了检察机关对刑事立案和侦查的法律监督。二是进一步完善了对法院审判活动的监督制度，明确了检察机关对法院刑事、民事、行政审判活动监督的重点、具体标准和监督程序，加强了对法院审判活动的监督。三是完善对刑罚执行活动的监督制度，重点加强了对社区矫正、减刑、假释、保外就医、暂予监外执行的法律监督。四是完善了对司法人员渎职行为的监督制度，通过调整检

察机关直接受理案件的侦查分工，整合了对司法人员职务犯罪的监督资源，加大了惩处的力度。

3、进一步完善检察机关接受监督和内部制约制度，切实保障检察权的正确行使。一是对检察机关直接受理侦查的案件，实行人民监督员制度，接受人民监督员的监督，从而加强了检察机关的外部监督力度。二是改革和完善对职务犯罪侦查的监督制约制度。即对检察机关立案侦查的职务犯罪案件，讯问犯罪嫌疑人时，实行全程同步录音录像制度；实行检察机关直接受理侦查案件立案、逮捕报备制度和撤案、不起诉报批制度。三是建立健全对检察人员违法违纪的投诉制度，保证及时发现和处理违法违纪的检察人员，有效地保障了检察权的正确行使。

4、创新检察工作机制，提高了执法水平和办案质量。一是通过对职务犯罪侦查实行一体化机制，强化了对职务犯罪侦查工作的统一领导和指挥。二是对未成年人犯罪、初犯、偶犯和轻微犯罪案件，坚持教育、感化、挽救方针，分别不同情况采取轻缓的刑事政策，探索建立依法快速处理轻微刑事案件工作机制，提高办案效率，节约司法资源。三是建立健全了保障诉讼参与人权利的工作机制，全面实行当事人权利义务告知制度，落实保障律师依法履行职责制度。四是深化审查逮捕方式改革，增强了审查逮捕法律文书的说理性，初步形成了适时介入侦查、引导侦查取证、强化侦查监督的良性监督机制。五是深化公诉方式改革，全面推行主诉检察官办案责任制，探索开展量刑建议、适用简易程序、被告人认罪案件普通程序简化审等公诉制度改革。六是完善和落实首办责任制、责任倒查制和检察长接待群众上访、联合接访、下访等制度。

5、深化干部管理体制，加强检察队伍建设，全面提高了检察机关的法律监督能力。一是建立了统一的国家司法考试制度，提高了进入司法机关的门

槛，有效地保证了司法人员具有较高的法律素质。二是探索推行上级院检察官缺额从下级院检察官中进行遴选的制度，保证了上级检察机关的检察官具有更高的水平。三是完善检察官的培训制度，使各级检察机关的检察官都能够不断进行业务培训，保证了检察官的司法水平不断提高。

6、关于检察委员会工作改革。检察委员会是检察机关讨论决定重大案件和其他重大问题的议事和决策机构。为充分发挥检察委员会的作用，1999 年 4 月，最高人民检察院就改进和加强检察委员会工作专门发布了有关文件。几年来，各级检察机关贯彻高检院的有关指示精神，积极探索，大胆实践，在提高检察委员会议事水平和议事质量方面，取得初步成效。

7、推进检察业务的信息化工作机制建设，逐步实现办公、办案的信息化，推动了办案质量的提高。近年来，中国检察机关以信息化建设工作为重点，组织实施了一系列网络建设工程，为实现检察机关办公自动化、办案现代化提供了一定的物质技术条件，全国检察机关的信息化程度正在逐步提高，办公、办案现代化建设取得较大进步，对创新办案方式和管理模式，提高办案水平和工作效率，发挥了积极作用。

第一阶段是 1978 年至 1987 年，进行了以工作制度的建设和拓宽法律监督领域为内容的探索式的改革。第二个阶段是 1988 年至 1992 年，改革内容包括：建立自行侦查案件的内部制约机制和加强专门机构的建设；建立举报机构，开展举报工作；继续开展对民事、行政诉讼实行法律监督的试点和在重点乡镇派出机构的试点工作等。第三个阶段是 1993 年至 1997 年，改革的内容主要有：围绕刑法、刑事诉讼法的修改探讨检察权、检察职能以及检察工作程序的完善；健全反贪污贿赂侦查工作机制；结合检察官法的规定，开始探索改革工作机构和干部人事制度。其中，取得重大成效的是反贪污贿赂工作机制的建

设。第四个阶段是 1998 年至今。1998 年 10 月，最高人民检察院发布了《关于在全国检察机关实行检务公开的决定》，随后全国检察机关全面推行检务公开制度，检察业务机制改革初步拉开序幕。1999 年 2 月，最高人民检察院制定了《检察工作五年发展规划》，明确规定了今后五年检察改革的任务。1999 年全国检察机关推行了六项改革措施，2000 年，最高人民检察院制定了《检察改革三年实施意见》，确定了六项改革目标。这一时期检察改革的突出特点是围绕符合检察工作特点和规律的检察管理、工作制度和业务工作运行机制，进行了不断的探索和创新。2003 年 8 月，经中央批准，最高人民检察院决定在部分省检察机关实行了人民监督员试点工作，2004 年 8 月高检院发布了《关于人民检察院直接受理侦查案件实行人民监督员制度的规定（试行）》，人民监督员制度试点工作稳步实施。2005 年 9 月最高人民检察院发布了《关于进一步深化检察改革的三年实施意见》，对 2005 年至 2008 年检察改革的主要任务和措施作出明确规定。经过几年的探索与实践，检察改革取得了一定成绩，积累了有益的经验，促进了各项检察工作的健康发展。

三、推进检察改革的理论构想

根据中共中央关于司法体制改革的初步意见和近年来检察改革理论研究的成果，我个人认为，进一步的检察改革应当着重解决以下三个方面的问题：

（一）管理体制问题。

通过改革现行的管理体制，保证检察权的独立行使。尽管宪法和人民检察院组织法都规定，人民检察院依法独立行使检察权，十五大和十六大政治报告中都明确提出要推进司法体制改革，从制度上保障检察机关依法独立行使检察

权，但是在实际的制度设计上并没有真正解决这个问题。在实践中，检察机关履行法律监督职责，往往受到诸多干扰和阻力，其中根本的问题还是制度上的制约。因此，深入检察改革，首先应当是在国家司法体制改革乃至政治体制改革的总体框架内积极推进检察机关领导体制的改革，从制度上保障宪法规定的最高人民检察院领导地方各级人民检察院和专门检察院的工作、上级人民检察院领导下级人民检察院的工作。这方面的改革，既涉及到检察机关领导成员的选举任免制度和检察机关人事管理制度，也涉及到国家对司法机关的财政保障制度。

管理体制问题，也涉及到检察机关自身的管理模式问题。检察机关内部的行政化管理模式，经过这些年的改革，已经有了很大的改变。但是应该说，还没有完全体现检察权行使的规律，行政化的色彩还比较浓厚。这种管理模式还在很大程度上制约着检察权的充分行使和正确行使。检察机关应当按照司法机关的管理模式和办案的客观要求进一步深入管理模式的改革，突出检察机关的职能活动，消减非检察业务方面的事务，保证检察机关能够把更多的资源用在履行法律监督职责上、保障检察人员能够把更多的精力用在办理案件上。

（二）人员问题。

法律的执行是靠人来完成的，人的素质高低决定着公正执法的水平。要保证检察机关依法独立、公正、高效地行使检察权，关键是建立一支高素质的检察官队伍。但是从目前我国检察官队伍的实际状况看，还远远不能完全适应履行法律监督职责的需要，特别是与人民群众日益增长的司法需求相比，还有较大的差距。如何提高检察官队伍的整体素质，仍然是制约检察事业发展的关键问题，是困扰检察机关的重大问题，因而也是检察改革所要着力解决的问题。

关于人员问题，主要涉及到四个方面：一是检察官的选任问题。按照修改后的检察官法的规定，检察官应当从通过国家统一司法考试的人员中选任。但是由于全国每年能通过国家统一司法考试的人数极少，并且集中在经济发达地区的大中城市，在全国许多经济欠发达的地区，检察机关无法招聘到通过国家统一司法考试的法律专业人才，有的地方甚至长期招聘不到正规法律院校毕业的本科生，严重影响了检察官队伍的建设。二是检察官的管理问题。检察机关目前普遍实行的检察官管理制度仍然是行政化的管理。一方面，通过政治教育、年度考核、民主测评等方式来管理检察官，不符合检察官工作的特点和要求；另一方面，按照行政干部管理的办法和程序解决检察官的晋升问题，使检察官的晋升与其专业水平和办案质量没有必然联系，不利于检察官队伍的专业化建设。检察官的晋升和退休也与一般国家干部按照同一标准来控制，完全不考虑检察官职业的特殊性，这种管理模式严重影响了检察官队伍的专业化。三是检察官的待遇问题。检察官法从 1985 年制定到 2002 年修改，其中提出的检察官等级和检察官津贴问题至今没有落实。对检察官的福利待遇完全按照普通国家公务员的标准解决，甚至在某些方面还不如其他公务员。这种状况，即不利于培养检察官的职业尊荣，不利于保持检察官队伍的稳定，也不利于检察官建立抵御各种诱惑的心理防线。四是检察辅助人员的问题。由于检察官队伍的专业化问题没有得到应有的解决，检察官与检察辅助人员之间的界分也就无法明确。检察机关中哪些人员属于检察辅助人员，检察辅助人员的工作职责是什么，待遇如何确定，目前还没有明确的规定和区分。检察官与检察辅助人员之间在管理上、履行职责上以及在福利待遇方面都缺乏规范化的管理机制。这不仅严重影响了检察机关的队伍建设，而且影响到检察权行使的效率。

这些问题，既需要检察机关积极想办法解决，也需要国家司法制度改革的整体推进，单纯靠检察机关自己是难以解决的。解决这些问题的出路，在于高度重视检察机关和检察人员的职业要求，改革现行的检察机关人事管理制度。这方面的改革应该说还是任重而道远。

（三）职权配置问题。

在中国，检察机关担负着法律监督的任务。要切实履行法律监督的职责，就必须具有相应的职权。宪法和法律在规定检察机关是国家的法律监督机关的同时，明确规定了检察机关的职权。但是从实践中看，法律规定的检察机关的职权并不能完全满足法律监督的实际需要。推进检察改革，需要进一步完善检察机关的职权配置，解决检察机关的现有职权与实际需要不相适应的问题。这方面的问题主要是：第一，对刑事诉讼过程中限制公民人身权利和财产权利的强制措施的监督需要完善，以便充分保障人权。第二，对民事判决裁定执行的监督需要建立。目前，法律没有关于民事判决裁定执行监督的规定，民事案件由法院自己裁判、自己执行，没有任何外在的监督制约机制，导致一些法官贪污受贿的现象比较严重，也不符合权力制约的原理，有必要建立对民事判决裁定进行法律监督的制度。第三，对行政处罚的监督需要完善。目前，除了行政处罚法的原则规定外，行政机关自己制定具体行政处罚的规则、自己作出行政处罚的决定、自己执行行政处罚的决定，几乎没有任何外部的监督制约。这种状况，不符合权力制约的原理，容易导致行政处罚权的滥用。检察机关作为国家的法律监督机关，应当加强对行政处罚活动的法律监督。第四，对监督对象的义务性规定。检察机关要履行法律监督职责，就需要监督对象承担相应的义务。但是目前中国的法律在规定检察机关职权的同时很少规定监督对象的义务，以致一些监督对象不接受检察机关的法律监督，或者在检察机关进行调查

时不予合作，致使检察机关履行法律监督职责的活动常常受到不应有的障碍，严重影响了法律监督的效果。第五，检察机关的侦查权需要加强。一方面，法律已经赋予了检察机关职务犯罪侦查权，检察机关要行使好这个权力，完成职务犯罪侦查的任务，就需要具有侦查活动所必需的侦查手段。而目前法律赋予检察机关职务犯罪侦查的手段是十分有限的，不能适应职务犯罪侦查的需要。特别是中国加入的《联合国反腐败公约》所规定的一些侦查手段，检察机关目前还不能行使。另一方面，检察机关作为国家的法律监督机关，要有效地履行法律监督职责，客观上就需要具备一定的了解法律实施情况特别是违反法律的情况的条件，而这种条件与法律赋予检察机关的侦查手段是密切相关的。没有必要的手段，检察机关就难以及时了解法律实施过程中违反法律的情况，因而也就难以对其实行法律监督。

这些问题都涉及到检察权的配置问题，需要通过制定和法律有关法律加以解决。当然，检察机关自身也面临一个在现有法律规定的范围内如何充分行使职权的问题，如何通过自身的能力建设，不断加大办案力度和提高办案水平，充分发挥法律赋予检察机关的现有职权来履行法律监督职责，亦是检察改革的重要内容。

Recent Influences in Canadian Criminal Law Reform

加拿大刑法改革中近期遇到的影响因素

Annemieke Holthuis 安妮米柯·霍尔休伊斯[*]

Abstract
摘要

加拿大刑法随着各种影响因素而作出调整和回应，其中本文着重提到的影响因素包括：政府立法提案和优先事项、国会审议和听证委员会的质询、各省和地区的关注、司法判决和立法议员的个人努力。 本文介绍了上述因素对加拿大刑法如何构成影响。文章结论指出，加拿大刑法改革者面对两项急待解决的挑战：少数党政府在实施刑法改革中有关“程序”性的挑战，和更深层及更“体系”性的挑战。本文在介绍刑法改革遇到的影响因素当中，在或多或少的程度上也反映了这些挑战。

The criminal law in Canada adapts and responds to various influences, including those highlighted in this paper: government bills and priorities, parliamentary reviews and commissions of inquiry, provincial and territorial concerns, judicial decisions,

[*] 加拿大司法部刑法政策室顾问Counsel, Criminal Law Policy Section, Department of Justice

and the efforts of individual parliamentarians. The paper reviews these influences on Canadian criminal law. The paper concludes that there are two immediate sets of challenges face criminal law reformers in Canada: those of "process" associated with carrying out criminal law reform work in a minority government context and those which are deeper and more "systemic". To a greater and lesser extent, the influences on criminal law reform outlined in this paper reflect these challenges.

Recent Influences in Canadian Criminal Law Reform

加拿大刑法改革中近期遇到的影响因素

Annemieke Holthuis 安妮米柯·霍尔休伊斯[*]

Introduction

The criminal law in Canada adapts and responds to various influences, including those highlighted in the following brief overview: government bills and priorities, parliamentary reviews and commissions of inquiry, provincial and territorial concerns, judicial decisions, and the efforts of individual parliamentarians. A historical overview of the development of criminal law in Canada is beyond the scope of this paper. Rather it takes a snapshot of the last two years of criminal law reform in Canada, reviewing factors that influence the development of Canadian criminal law, areas of ongoing and future policy development in Canada and some challenges to criminal law reform.

[*] 加拿大司法部刑法政策室顾问Counsel, Criminal Law Policy Section, Department of Justice

Background

Jurisdiction to legislate: Parliament

In Canada, the authority to legislate in the area of criminal law and criminal procedure is granted under the *Constitution Act, 1867*, to the federal Parliament while the provinces are responsible for the administration of the criminal law. All legislative authority must be exercised in a manner consistent with the *Canadian Charter of Rights and Freedoms*, enacted by the *Constitution Act, 1982*. The Minister of Justice and Attorney General of Canada, under the *Department of Justice Act*, is the Minister responsible for law reform, including in relation to criminal law.

Department of Justice

The Minister is assisted in this work by the Department of Justice's Policy Sector and in particular the Criminal Law Policy Section. The Section is responsible for monitoring trends in the criminal law, developing options for criminal law and related reforms and supporting the Minister in their implementation. The Section is responsible for the development of amendments for various statutes, including the:

- *Criminal Code*
- *Canada Evidence Act*
- *Anti-terrorism Act*
- *Identification of Criminals Act*
- *Security of Information Act*
- *Crimes Against Humanity and War Crimes Act*
- *Corruption of Foreign Public Officials Act*

- *Extradition Act*
- *Mutual Legal Assistance in Criminal Matters Act*

The Section is also involved in the development of other related criminal statutes, such as the *Controlled Drugs and Substances Act.*

Within the Department of Justice, the Section works closely with the Department's Youth Justice Section, which is responsible the development of policy and legislation relevant to the youth justice system in Canada, and with the Policy Centre for Victims Issues and other sections of Justice. Within the federal government, the Section also works closely with the Department of Public Safety, the Department of Foreign Affairs and International Trade, and other government departments.

Provinces and Territories

The federal Department of Justice works in concert with other federal, provincial and territorial counterparts. These include the Ministries of Justice and Attorneys General of the provinces and territories responsible for the administration of criminal justice in their province. These Ministers and their officials are consulted on various criminal law issues and concerns by means of the Coordinating Committee of Senior Officials in Criminal Law (CCSO). The Heads of Prosecution in the provinces and territories are also consulted on proposed legislative initiatives, as are special working groups such as those established to address organized crime and justice efficiencies. Other stakeholder groups are also often consulted in the development of the criminal law, including the Canadian Bar Association, the Canadian Association of Chiefs of Police and where appropriate, the judiciary.

International

Canada is also active internationally in the areas of criminal law and criminal justice policy. The Department of Justice, directly or in cooperation with the Department of Foreign Affairs, works with the Organization of American States, the United Nations, particularly the UN Commission on Crime Prevention and Criminal Justice, the G-8, the Canada-US Cross-Border Crime Forum, Asia Pacific Economic Cooperation, the Organization for Economic Cooperation and Development, the Commonwealth, the Council of Europe and the Organization for Security and Co-operation in Europe. The Department of Justice also has liaison officers in Brussels and in Paris.

Influences on Criminal Law Reform - Government Bills and Priorities[1]

The Government of Canada has been active in the area of criminal law reform during this Parliamentary session. The Government of Prime Minister Stephen Harper has made tackling crime one of his government's priorities.[2] The following section reviews the Government's work to address particular forms of crime and sentencing and penalty issues, criminal procedures and other amendments, as well as institutional changes.

[1] The status of Government bills is as of May 31, 2007.
[2] See *Tackling Crime* webpage, Government of Canada, http://www.tacklingcrime.gc.ca/index_e.asp; See also *STAND UP FOR CANADA*, Conservative Party of Canada, Federal Election Platform 2006, http://www.conservative.ca/EN/2590/

- **Addressing Particular Forms of Crime**

Criminal law reform initiatives seek to address particular forms of crime such as street racing, impaired driving, sexual offences aimed at young children, crimes involving firearms or other restricted weapons, and requiring the payment of criminal interest rates.

(i) Street racing

Deaths as a result of people racing their cars on city streets led to the introduction by the previous Liberal government in September 2005 of Bill C-65. that Bill defined "street racing" and provided that street racing should be treated as an aggravating factor during sentencing on offences such as the dangerous operation of a motor vehicle causing bodily harm, dangerous operation of a motor vehicle causing death, criminal negligence causing bodily harm and criminal negligence causing death. A mandatory driving prohibition order was required by this legislation where a judge determines that street racing is involved in one of those offences. With the dissolution of the 38th Parliament in November 2005, this Bill died on the order paper.

On June 15, 2006, following the general election, the then Justice Minister Vic Toews introduced a similar bill, Bill C-19.[3] Bill C-19 proposed to amend the *Criminal Code* to create new street-racing offences: namely causing death by criminal negligence while street racing (liable to imprisonment for life) and causing bodily harm by

[3] *Minister Of Justice Proposes New Street Racing Offence*, Department of Justice Canada news release, June 15, 2006, http://justice.gc.ca/en/news/nr/2006/doc_31820.html

criminal negligence while street racing (liable to imprisonment for a term not exceeding fourteen years). Assented to in December 2006 and now in force,[4] these amendments to the *Criminal Code* also increase the maximum punishments for some offences in street racing situations and provide for mandatory orders prohibiting an individual from driving after the conviction of certain offences. Special provisions also address repeat offenders.

(ii) Impaired driving

Bill C-32, *An Act to amend the Criminal Code (impaired driving) and to make consequential amendments to other Acts* adds new offences to the existing impaired driving regime.[5] The Bill proposes new offences for activities such as operating a motor vehicle while in possession of controlled substances, operating a motor vehicle with a concentration of alcohol over the legal limit and causing bodily harm or death to another person. The Bill also created offences for refusing to provide a breath or bodily fluid sample when the accused knew or ought to have known that his or her operation of the vehicle caused an accident resulting in bodily harm or death. These offences carry significant penalties, including liability to imprisonment for life if death is caused or results.

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[4] For text of the Bill, see http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=1&Mode=1&Pub=Bill&Doc=C-19_4

[5] For text of the Bill, see http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=1&Mode=1&Pub=Bill&Doc=C-32_1
For a historical review of efforts to address impaired driving in the *Criminal Code*, see Laura Barnett, Law and Government Division, Library of Parliament, *Legislative Summary to Bill C-32*, 20 December 2006, http://www.parl.gc.ca/LEGISINFO/index.asp?List=ls&Query=4875&Session=14&Language=e

The Bill would expand police authority to demand: physical coordination tests at roadside, additional tests by officers special trained to detect evidence of drug impairment, and for the provision of bodily fluid samples for drug analysis.

The Bill would also clarify the nature of the evidence a person accused of driving with a concentration of alcohol over the legal limit can introduce to raise a reasonable doubt that they were not committing the offence. Finally, the Bill increases the minimum penalties for impaired driving offences, particularly for second and subsequent offences, and extends the maximum term from six to eighteen months' imprisonment.[6]

Bill C-32 was introduced in the House of Commons on November 21, 2006 and was referred to the Standing Committee on Justice and Human Rights for consideration on February 6, 2007. The Committee commenced its review May 30, 2007.

(iii) Measures to protect young persons from sexual offences

Bill C-22[7], introduced on June 22, 2006, would amend the *Criminal Code* to raise the age from 14 to 16 years at which a person can consent to non-exploitative sexual activity. The Bill seeks to protect young persons, including fourteen and fifteen year olds from exploitation by persons older than them.

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[6] The minimum fine for first offences is increased (from $600 to $1,000O, while the minimum terms of imprisonment go up for second and subsequent offences, as does the maximum term that may be imposed on summary conviction (from 6 months to 18 months)

[7] *An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act*, for text of the Bill, see http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4804&List=toc-1

To address concerns that the sexual relations between young persons might be inappropriately criminalized, the Bill creates several defences to criminal liability.[8] At the House Committee stage of the legislative process, Opposition parties amended the Bill to make permanent the proposed transitional defence that the accused is married to the complainant. The Bill as passed by the House of Commons on May 4, 2007, incorporates this amendment.

At third reading of the Bill, Rob Moore, Parliamentary Secretary to the Minister of Justice noted that the government preferred Bill C-22 as introduced but that the government recognized that "[t]here are …. processes in place at the provincial and territorial level to enable the clear objective and intent of Bill C-22's reforms to be realized in practice".[9] The Bill is now in the Senate where it is being debated on Second Reading.

(iv) Measures relating to firearms

(a) Reverse onuses in bail hearings for firearm related offences

Bill C-35 proposes to amend Canada's bail regime for people who are charged with certain serious offences involving firearms or other regulated weapons. These

[8] One defence is available where the complainants are close in age (not less than two years older) and the accused does not have a relationship of trust or authority over the complainant or their relationship is not one of dependence or exploitation. It is a defence that the complainant engaged in consensual sexual relations if the accused is less than five years older than the complainant and is not in a position of trust or authority towards the complainant or a person with whom the complainant has relationship of dependence or exploitation.
[9] Debates of the House of Commons, 39th Parliament, 1st Session, Hansard, No. 146, May 3, 2007 at paras. 1049-1050.

offences include attempted murder, aggravated sexual assault, kidnapping, robbery and extortion.[10]

While normally the onus is on the Crown to demonstrate why bail should not be granted, the Bill proposes to shift the onus so accused persons must demonstrate why they should not stay in custody until their trial. The Bill would also apply a "reverse onus" if an accused is charged with: any indictable offence involving firearms or other regulated weapons if committed while the accused is under a weapon prohibition order, or firearm trafficking or possession for the purpose of trafficking or firearm smuggling.

As well, the courts would be required to take into account additional factors relating to firearm offences in deciding whether an accused should be released or detained pending trial.

Bill C-35 was introduced on November 23, 2006. On May 29, 2007, the House of Commons Legislative Committee voted to refer the Bill back to the House for Third Reading.

(b) Removing the requirements for licensed firearms owners to register certain firearms

[10] An *Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences)*; for text of the Bill, see http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=2529825&file=4

Under the current legislative framework, an individual must hold both a licence and a registration certificate for authorized possession of a firearm. The requirement for owners of non-restricted firearms (commonly known as long-guns) to obtain registration certificates for their firearms became an election campaign issue in 2006.

Measures taken early in the Government's mandate included transferring responsibility for the firearms registry to the RCMP from the previous Firearms Centre and declaring a one-year amnesty period to protect Canadians from incurring criminal liability, if they held or previously held a valid license but did not hold a registration certificate for a long-gun. To qualify, they must also be taking steps to comply with other legal requirements (i.e. licensing, registration or disposal). Following public consultations, the amnesty, which expired on May 16, 2007, was recently extended for another year.

On June 19, 2006, the Government introduced a bill that proposes to remove the requirement of licensed firearms owners to obtain registration certificates for firearms such as hunting rifles and shotguns.[11] At the same time, the bill incorporates measures to facilitate criminal investigations such as requiring businesses to maintain their records relating to the sale of these non-restricted firearms. This Bill remains before the House of Commons.

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[11] Bill C-21, *An Act to amend the Criminal Code and the Firearms Act (non-registration of firearms that are neither prohibited nor restricted)*., For text of the Bill, see http://www2.parl.gc.ca/content/hoc/Bills/391/Government/C-21/C-21_1/C-21_1.PDF

(v) Requiring the payment of a criminal interest rate

The *Criminal Code* criminalizes the entry into an agreement to receive interest at a criminal rate (defined by the Code as an effective annual interest rate exceeding 60%), or receiving such a payment or partial payment. Bill C-26, which is now law,[12] amends the *Criminal Code* by exempting small, short-term loans ("Pay Day Loans") provided by persons, licensed or otherwise authorized to enter into such agreements in provinces that have legislated measures to protect the recipients of payday loans and specified a limit on the total cost of those loans. The amendments are intended to assist provincial regulation of the pay day loan lending industry.[13]

- **Addressing sentencing and penalty issues**

Law reform activities have also focused on sentencing and penalties, bringing forward changes to *Criminal Cod*e's conditional sentencing regime for certain serious and violent crimes, increasing certain mandatory minimum penalties, and amending the *Criminal Code*'s dangerous offender provisions.

(i) Conditional Sentences

Section 742.1 of the *Criminal Code* permits a judge to order an offender to serve his or her sentence in the community under a conditional sentence order subject to certain

[12] The Bill was introduced in the House of Commons on October 6, 2006 and received Royal Assent on May 3, 2007. For text of the Bill, see http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=2908868&file=4

[13] See Backgrounder, Bill C-26, http://canada.justice.gc.ca/en/news/nr/2006/doc_31900.html

mandatory, as well as discretionary, conditions. Conditional sentences will be available if the judge imposes a sentence of imprisonment of less than two years for an offence that is not punishable by a mandatory minimum penalty and if the judge is satisfied that permitting the offender to serve his or her sentence in the community will not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in the *Criminal Code*. Bill C-9[14] amends section 742.1 of the *Criminal Code* to prohibit conditional sentences for serious personal injury offences, terrorism offences and organized crime offences prosecuted by way of indictment for which the maximum term of imprisonment is ten years. The Bill received royal assent on May 31, 2007 and will come into force in six months.[15]

(ii) Mandatory Minimum Penalties

Bill C-10[16] seeks to amend the *Criminal Code* to provide for escalating minimum penalties (of five, seven and ten years based on the number of previous convictions) for serious offences involving the use of a restricted or prohibited firearm, or if the offence was committed in connection with a criminal organization. The Bill also provides for escalating minimum penalties (of between one and five years) for other firearm-related offences. Two new offences of breaking and entering to steal a firearm and robbery to steal a firearm are also proposed.

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[14] *An Act to amend the Criminal Code (conditional sentence of imprisonment).* See http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4702&List=toc-1 for the text of the Bill.

[15] News Release, http://www.justice.gc.ca/en/news/nr/2007/doc_32024.html

[16] *An Act to amend the Criminal Code (offences involving firearms),* for the text of the Bill, see http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4691&List=toc-1

At the second reading stage of the legislative process, Opposition parties expressed concerns about imposing additional mandatory minimum penalties. These included concerns about increases in the prison population and the need for more jails, the effectiveness of mandatory minimum penalties in reducing crime,[17] concerns about the limitation on judicial discretion, and the need to focus on preventing crime as opposed to incarceration.[18]

The Standing Committee on Justice and Human Rights considered the Bill over some fourteen meetings and proposed amendments which effectively reduced the Bill's contents to creating the two new offences mentioned above. The mandatory minimum penalty provisions did not survive the Committee's review. However, the Government proposed further amendments to the Bill at the Third Reading stage of the Bill.

Bill C-10, as further amended, proposes escalating penalties of five years' imprisonment on a first offence and seven years on a second or subsequent offence for eight specific serious offences involving the actual use of firearms. Those offences are: attempted murder, discharging a firearm with intent to injure a person or prevent arrest, sexual assault with a weapon, aggravated sexual assault, kidnapping, hostage taking, robbery, and extortion. For these offences, a conviction in the last ten years, excluding the time spent in custody, for using a firearm in the commission of

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[17] See Debates of the House of Commons, 39th Parliament, 1st Session, No. 39, June 13, 2006 at paras. 1225-1230 (Michael Ignatieff, MP (Lib.))

[18] Debates of the House of Commons, 39th Parliament, 1st Session, No. 39, June 13, 2006 at paras. 1820-1825 (Carole Freeman, PM. Bloc Qué.) http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Pub=Hansard&Mode=1&Parl=39&Ses=1&Doc=33#Int-1569862 and at paras.

an offence will count as a prior conviction. The penalties above will also apply when the offence is committed in connection with a criminal gang or if a restricted or prohibited firearm is used. Bill C-10 also proposes escalating penalties of a lesser duration for four serious offences that do not involve the actual use of a firearm.[19] On May 29, 2007, the House of Commons approved the Bill at Third Reading and it received First Reading in the Senate the next day.

(iii) Dangerous offenders

Introduced in the House of Commons on October 17, 2006, Bill C-27[20] amends the existing dangerous offender and long-term offender provisions of the *Criminal Code* which apply when sentencing persons convicted of violent or sexual offences.[21] These regimes may result in indefinite incarceration or a period of incarceration followed by a long-term supervision order.

Among other things, Bill C-27 adds a presumption to the existing means of proving that a person is a dangerous offender. It would presume an individual is a dangerous offender for certain primary designated offences (liable to imprisonment for ten years or more) unless the offender proves, on a balance of probabilities, that he or she no longer presents a threat to others.[22] Bill C-27 also states that even when the statutory conditions for imposing a dangerous offender designation are met, a court must

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[19] The offences are: illegal possession of a restricted or prohibited firearm with ammunition, firearm trafficking, possession for the purpose of firearm trafficking, and firearm smuggling.

[20] *An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace)*, for text of the Bill, see http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=1&Mode=1&Pub=Bill&Doc=C-27_1

[21] See also the Library of Parliament's Legislative Summary to Bill C-27, http://www.parl.gc.ca/legisinfo/index.asp?Language=E&query=4841&Session=14&List=ls#1presumption

[22] See ss. 753(1)(a) and (b) of the *Criminal Code*.

consider whether other lesser means (either a long-term offender designation or a sentence for the underlying offence) would adequately protect the public.

Bill C-27 also amends the *Criminal Code*'s provisions on recognizance orders. A judge may issue a recognizance order where a person fears, on reasonable grounds, that a named person will commit certain violent or sexual offences. This would have the effect of requiring the named person to abide by specific conditions and to keep the peace. A breach of the order would constitute an offence. Under Bill C-27, a recognizance order or peace bond could be extended in duration from one year to a period not exceeding two years where the person has been previously convicted of a sexual offence against a person less than 14 years of age. Amendments would clarify that a judge may include a broad range of conditions regarding residency, electronic monitoring (where available) and treatment conditions. The Bill is presently before a Legislative Committee of the House of Commons which is expected to commence its review on June 5, 2007.

- **Addressing criminal procedure and other amendments.**

Parliament is currently considering other bills that relate to criminal procedure, language of the accused, sentencing[23] and that make changes to Canada's National

[23] Bill C-23, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* was introduced in the House of Commons on June 22, 2006. Referred to the House Standing Committee on Justice and Human Rights on October 16, 2006, the Committee commenced its review on May 2, 2007. For text of the Bill, see http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4805&List=toc-1.

DNA Data Bank, which is responsible for analyzing DNA samples obtained from these convicted persons as well as from certain crime scene investigations.[24]

Among other things, the Bill expands the persons who may be subject of a DNA order, creates an offence for the failure to appear for DNA sampling as judicially ordered, and permits the arrest of the person for the purposes of taking a DNA sample. As well, the Bill permits certain information in the National DNA Data Bank to be shared with any Canadian law enforcement agency or laboratory if the information is to be used to investigate a criminal offence. Amendments would permit DNA data bank information to be shared with foreign governments, international organizations in the same way that it would be shared within Canada, provided that information sharing agreements have been concluded for this purpose.

- **Responding to International Events, Treaty-making and Treaty Implementation**

International treaties signed by Canada must be implemented into domestic law in order to have force or effect. Canada signed the *United Nations Convention Against Corruption* (UNCAC) in May 2004 and the *Convention* as a whole came into force in December 2005. Technical amendments to Canadian criminal law were needed

[24] Since 2000, the Royal Canadian Mounted Police have been responsible for the National DNA Data Bank which assists police forces nationally with the use of this forensic technology in criminal investigations. Its operations were considered by Parliament and the subject of legislation in 2005. Bill C-18, *An Act to amend certain Acts in relation to DNA identification*, introduced in Parliament on June 8, 2006, builds on these earlier amendments. Assented to by the House of Commons on March 28, 2007, it was introduced in the Senate the following day. The Senate Committee on Legal and Constitutional Affairs is expected to begin its review of Bill C-18 on June 7, 2007. For text of the Bill, see http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4781&List=toc-1

before Canada can ratify and implement fully the Convention. On May 31st, 2007, Bill C-48, *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption* became law. Bill C-48 includes these technical amendments including clarifying that *Criminal Code* bribery offences can be committed directly or indirectly and that the benefit may be conferred on an official or another person for the benefit of the official. The Bill also amends the definition of "official" to clarify that it applies to a person elected to discharge a public duty. Finally, the Bill extends the *Criminal Code* provisions for the forfeiture of the instruments used in the commission of an offence to the offence of bribery of foreign public officials.

Another recent example of the influence of international treaties relates to Canada's presentation in February 2007 of its 17th and 18th reports on implementation of the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD) to the UN Committee on the Elimination of all Forms of Racial Discrimination. The Committee's Concluding Observations, issued on March 5, 2007, raised concerns about various race-based issues in the Canadian criminal justice system.[25] These included concerns about the need for the collection of sufficient statistical and other data on race-based issues in the justice system as well as concerns about racial profiling in the context of national security measures by law enforcement and with respect to aboriginal persons more generally. The Government has been asked to report to the UN Committee about four specific issues, including the issue of discrimination in the criminal justice system, within a year. It will be considering some of the Committee's Concluding Observations in the context of its

[25] See http://www.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.18.pdf

Action Plan Against Racism, which includes initiatives to explore options to address racial profiling and various programs to address the overrepresentation of aboriginals in the criminal justice system.

- **Institutional Changes**

The Government has also recently implemented two institutional initiatives – the creation of the Public Prosecution Service of Canada and a Federal Ombudsman for Victims of Crime.

Creation of the Public Prosecution Service of Canada

The passage of the *Federal Accountability Act* led to the creation of the Office of the Director of Public Prosecutions in December 2006.[26] The Director of Public Prosecutions acts under and on behalf of the Attorney General of Canada in prosecuting offences under federal law. These duties were formerly carried out by the Department's Federal Prosecution Service.

The Director is to exercise powers independent of the Attorney General of Canada and has the authority to conduct conducts prosecutions on behalf of the Crown, except where the Attorney General specifically assumes the conduct of a prosecution or provides publicly issued written instructions about a prosecution. The Director's responsibilities include managing federal prosecutors and advising law enforcement agencies or investigative bodies in respect of particular investigations or prosecutions,

[26] S.C. 2006, c. 9, which, in s. 121, enacted the Director of Public Prosecutions Act.

including with respect to offences under the *Canada Elections Act*. As well, the Director may exercise any powers or perform any duties or functions of the Attorney General under the *Extradition Act* or the *Mutual Legal Assistance in Criminal Matters Act*.

An annual report of the Director's activities must be provided to the Attorney General, who is to table the report in Parliament.

Establishment of a Federal Ombudsman for Victims of Crime

Concerns about the responsiveness of the Canadian criminal justice system to victims of crime led to the Government's recent appointment of the first Federal Ombudsman for Victims of Crime. As well, the Government provided funds to support victims services over the next few years, in particular to assist victims to attend sentencing hearings and parole hearings of the convicted persons and to improve victims services in Northern Canada.[27]

The Federal Ombudsman for Victims of Crime's role is to help victims to access federal programs and services, to raise the concerns and needs of victims in policymaking and to assist victims of offenders under federal supervision.[28]

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[27] *A time to listen, a time to act***,** address by The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, National Victims of Crime Awareness Week 2007, April 23, 2007, http://www.justice.gc.ca/en/news/sp/2007/doc_32004.html

[28] See Press release, http://www.justice.gc.ca/en/news/nr/2007/doc_32001.html and Backgrounder, http://www.justice.gc.ca/en/news/nr/2007/doc_32002.html

Influences on Criminal Law Reform - Private Members' Bills

A number of private members bills which address issues of criminal law are presently before various Senate and House Committees for consideration.

Certain Bills seek to create new offences, clarify existing Code provisions or take away certain justifications for the use of force. Bill C-299 proposes to create new offences for fraudulently obtaining, selling or disclosing identification information[29], with intent to use or knowing it will be used to commit fraud or personation. Bill C-376 would establish new summary conviction offences for driving while impaired offences with a lower legal limit of blood-alcohol than the present impaired driving offences.[30] In the Senate, Bill S-206 proposes to clarify that the definition of "terrorist activity" includes suicide bombings,[31] while Bill S-207 seeks to protect children from the use of parental force.[32]

Minimum and maximum penalties for motor vehicle theft for first and repeat offenders are established in Bill C-343. Other Bills seek to increase the penalties for

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[29] Identification information would mean "information about any person, living or dead, that is capable of being used, whether alone or in conjunction with other information, to identify that person". Subclause (1.1), Bill C-299, for text of the Bill, see .
http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=4752&Session=14&List=toc

[30] The new limit would be 50 milligrams of alcohol in 100 millitres of blood, rather than 80 milligrams.

[31] *S-206, An Act to amend the Criminal Code (suicide bombings),*
http://www2.parl.gc.ca/content/Senate/Bills/391/public/S-206/S-206_1/S-206_cover-e.html, before the Senate Legal and Constitutional Affairs Committee.

[32] Bill S-207, *An Act to amend the Criminal Code (protection of children)* removing the parental justification for the correction of children by force, http://www2.parl.gc.ca/content/Senate/Bills/391/public/S-207/S-207_1/S-207_cover-e.htm - before the Senate Human Rights Committee.

the luring of children over the Internet,[33] and increase maximum penalties for cruelty to animal offences.[34]

Still other Bills propose new civil remedies for victims of terrorism[35] and limits on the permissible locations of lottery machines.[36]

Influences on Criminal Law Reform – Ongoing Department of Justice Policy Development and the identification of Emerging Issues and Concerns

The Department of Justice's overall priorities include developing an effective and accessible justice system; protecting Canadian communities; and supporting other government departments and agencies in achieving Government of Canada priorities.[37] Policy development in support of these broad objectives is one of the Department's roles.[38]

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[33] *Bill C-277, An Act to amend the Criminal Code (luring a child)*, http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4731&List=toc-1, before the Social Affairs, Science and Technology Committee,

[34] S-213, An Act to amend the Criminal Code (cruelty to animals), http://www2.parl.gc.ca/content/Senate/Bills/391/public/pdf/s-213_3.pdf before the House Justice and Human Rights Committee.

[35] S-218, An Act to amend the State Immunity Act and the Criminal Code (civil remedies for victims of terrorism), http://www2.parl.gc.ca/content/Senate/Bills/391/public/S-218/S-218_1/S-218_cover-e.htm before the Senate Legal and Constitutional Affairs Committee.

[36] S-211, An Act to amend the Criminal Code (lottery schemes), http://www2.parl.gc.ca/content/Senate/Bills/391/public/S-211/S-211_3/S-211_cover-e.htm - before the House Justice and Human Rights Committee.

[37] Implementation of the transition of employees between the Department and the PPSC remains a key issue over the next year. *Report on Priorities and Planning 2007-2008*, Department of Justice Canada, http://www.tbs-sct.gc.ca/rpp/0708/Jus-Jus/jus-jus01_e.asp#messageMOJ.

[38] Other roles include providing legal advisory, litigation and legislative services to the Government and developing and funding justice-related programs, which are often delivered by the provinces and territories. *Ibid.*

At the same time, a significant challenge in criminal law reform remains the identification of emerging issues and priorizing legislative reform. Public concerns highlight some issues. Difficulties faced by prosecutors and other criminal justice participants may reveal more. International developments in the OAS, the G-8 and the UN Commission on Crime Prevention and Criminal Justice and others also assist in the identification of such issues.

Some issues form the basis of consultations papers in which public input is sought. For example, the Department has previously issued a consultation paper on disclosure of Crown information in criminal trials.[39] Other areas that were the subject of consultations include proposed amendments to address new technological advances while permitting lawful access by law enforcement agencies to private communications,[40] and the legislation and operations of the DNA Data Bank.[41]

Influences on Criminal Law Reform – Provincial and Territorial Concerns

As noted, special mechanisms have been established to consult with Ministers and Attorneys General of the provinces and territories and the Heads of Prosecution authorities on criminal law reform initiatives. For example, a Steering Committee on Justice Efficiencies and Access to the Justice System, comprised of six federal and provincial Deputy Ministers of Justice, six judicial representatives and three members of the private bar, made recommendations for the conduct of mega-trials, early case

[39] See Disclosure Reform - Consultation Paper,http://www.justice.gc.ca/en/cons/disc-ref/1.htm November 2004.
[40] See Lawful Access Consultations, http://www.justice.gc.ca/en/cons/la_al/index.html
[41] See DNA Databank Consultation Paper 2002, http://www.justice.gc.ca/en/cons/dna_adn/index.html

consideration and the management of cases going to trial.[42] Their reports are now being reviewed by the Department. Other areas of cooperation include work with the FPT Working Group on Victims of Crime and other partners to identify and respond to victims issues.

Influences on Criminal Law Reform - Court decisions and court procedures

Judgments of the Supreme Court of Canada and provincial appellate courts, particularly in relation to challenges under the *Canadian Charter of Rights and Freedoms*, clearly shape criminal law initiatives. For example, Bill C-27 amending the dangerous offender provisions takes into account the Supreme Court of Canada judgment in the 2003 *R. v. Johnson* case, in which the court interpreted those provisions.[43] As well, the Minister of Justice has a statutory duty to scrutinize new legislation to determine "… whether any provisions are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* "and if so, report the inconsistency to the House of Commons.[44]

With respect to the courts themselves, reforms of criminal court processes are being considered at the provincial level and implemented to address issues such as mental illnesses and drug addiction. Specialized courts to which low risk offenders may be diverted and connected with community and medical resources may be one means of satisfying "…the traditional criminal law function of

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[42] See Backgrounder, Steering Committee on Justice Efficiencies and Access to the Justice System, http://www.justice.gc.ca/en/esc-cde/index.html
[43] [2003] 2 S.C.R. 357, 2003 SCC 46.
[44] *Department of Justice Act*, R.S, 1985, c. J-2, s. 4.1

protection of the public by addressing in individual cases the real rather than the apparent causes that lead to conflict with the law".[45]

Influences on Criminal Law Reform - Parliamentary reviews

Parliament is increasingly incorporating into newly enacted legislation a requirement to conduct a subsequent parliamentary review of the Act or of specific provisions. These reviews are generally conducted by a parliamentary Committee of the House, the Senate or both, within three or five years of royal assent or the coming into force of the Act or the provision in issue. The committees are asked to examine the provisions and the operations of the Act in question and to provide a report setting out recommendations for government action, including legislative and policy reforms. Generally, the government is asked to provide a response to the recommendations within a specified time period.

Recent parliamentary reviews have touched on a wide range of criminal law issues. Two reviews of the 2001 *Anti-terrorism Act*, which enacted *Criminal Code* amendments defining terrorist activity and creating new terrorism and terrorist financing offences, along with amendments to some seventeen other statues, recently concluded in the Senate and the House of Commons.[46] The Senate Special

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[45] See *The Challenges We Face*: Remarks of the Rt. Honourable Beverly McLaughlin, Chief Justice of the Supreme court of Canada, http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp, citing remarks by Brian Lennox, Chief Justice of the Ontario Court of Justice at the opening of the Ottawa Mental Health Court.

[46] The Committees released their main reports in February and March of this year. *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, Special Senate Committee on the Anti-terrorism Act; The Honourable David P. Smith, Chair; February 2007; *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues*, Final Report of the Standing Committee on Public Safety and National Security; Garry Breitkreuz, MP, Chair; Subcommittee on the Review of the Antiterrorism Act, Gord Brown, MP. Chair, March 2007.

Committee on the *Anti-terrorism Act* and the House Subcommittee on the Review of the *Anti-terrorism Act* made a total of 100 recommendations, including proposed changes to the terrorism offences, to the mechanisms for the listing of terrorist entities and to measures taken to protect the charitable sector from abuse. The House Subcommittee formally requested a government response to its recommendations and the Government has 120 days from the date of the tabling of the report (on March 27, 2007) to do so.

Other recent parliamentary reviews include the review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* addressing terrorist financing and money laundering issues and the review of sections 25.1 to 25.4 of the *Criminal Code*,[47] which authorize the commission by police of what would otherwise be a criminal offence (the "law enforcement justification" provisions of the *Code*).[48] As well, reviews of the *Criminal Code* DNA provisions and the establishment of the DNA databank and provisions relating to sex offence records are past due.[49]

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[47] These provisions were enacted by *Bill C-24, An Act to amend the Criminal Code (organized crime and law enforcement)*, which in s. 46.1 provided for a review of these Criminal Code provisions three years after the coming into force of that section (as of February 1, 2002) by a committee of the House, Senate or both. The Review began in May 2006.

[48] The Committee issued an interim report, noting that it did not have sufficient evidence of an operational nature to permit it to make recommendations for amendment to the *Criminal Code* provisions. The Committee expressed its intention to fulfil its mandate and perhaps hold further hearings, *in camera*, if necessary: Interim Report of the Standing Committee on Justice and Human Rights, Review of ss. 25.1 to 25.4 of the Criminal Code, (Adopted by the Committee on June 21, 2006; Presented to the House on June 22, 2006) http://cmte.parl.gc.ca/Content/HOC/committee/391/just/reports/rp2315361/JUST_Rpt01/JUST_Rpt01-e.pdf

[49] See *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30, s. 3.1 requiring comprehensive review after three years of coming into force of the Act; the *DNA Identification Act*, *S*..C. 1998, c.37, s. 13, calling for a five-year review as of June 30, 2000.

Influences on Criminal Law Reform – Commissions of Inquiry and similar processes

Like parliamentary reviews, commissions of inquiry under the *Inquiries Act* or similar processes provide means for an in-depth examination of an issue or an event with recommendations for future government policy making. Commissioners are generally given powers under Part I of the *Inquiries Act* such as the power to hold hearings, call evidence and witnesses and report on their recommendations. Several significant inquiries recently concluded and several are ongoing.

The *Commission of Inquiry into Actions of Canadian Officials relating to Maher Arar* examined the detention of Maher Arar in the United States, his subsequent removal to Syria where he was imprisoned and tortured and actions taken after his return to Canada. The first part of Mr. Justice O'Connor's inquiry was a factual inquiry into the events themselves.[50] The second part of the inquiry involved a policy review examining mechanisms for review and oversight of the Royal Canadian Mounted Police's national security activities. Justice O'Connor recommended, among other things, the creation of a new "Independent Complaints and National Security Review Agency for the RCMP" to oversee the law enforcement activities of the RCMP and

[50] As the Press Release announcing the first report notes,

> … Commissioner O'Connor addresses many issues such as: the RCMP's national security activities, the information sharing practices of other government agencies; some recommendations touch upon the investigative interaction with countries with questionable human rights records as well as the issue of Canadians detained in other countries; some recommendations concern the need for Canadian agencies engaged in national security investigations to have clear policies and more training on issues of racial, religious or ethnic profiling:

Press Release, Arar Commission releases its findings on the handling of the Maher Arar case, September 18, 2006, http://www.ararcommission.ca/eng/ReleaseFinal_Sept18.pdf

the Canadian Border Services Agency and recommended the mandate of an existing Security Review Committee be expanded to review the activities of four other government departments.[51] Information could be exchanged, investigations referred as between these bodies and joint investigations conducted, assisted by the management of an "Integrated National Security Review Coordinating Committee" which Justice O'Connor also recommends be established. The Government is studying the report's recommendations.

In his first report, Mr. Justice O'Connor called an independent review of the cases of Messrs. Almalki, El Maati and Nureddin, Canadians who were similarly imprisoned and tortured in Syria. This review is presently being conducted by a former Justice of the Supreme Court of Canada who has been asked to report by January 31, 2008.[52]

Another public inquiry is presently examining the events examined the circumstances surrounding the bombing of Air India Flight 182 in 1985, which resulted in the deaths of 331 Canadians.[53] The *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* is being conducted by another former Justice of the Supreme Court of Canada, the Honourable John C. Major. Amongst other issues, the Commission was asked to determine,

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[51] These include Citizenship and Immigration Canada, Transport Canada, Financial Transactions and Reports Analysis Centre of Canada and Foreign Affairs and International Trade. Press Release, December 12, 2006, http://www.ararcommission.ca/eng/PolicyReviewDec12-English.pdf

[52] Internal Inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Aboužˇ-Elmaati and Muayyed Nureddin, Terms of Reference, http://www.publicsafety.gc.ca/media/nr/2006/nr20061212-3-en.asp

[53] This Commission was asked to consider earlier reports, including the report of the Honourable Bob Rae, Lessons to be Learned, *Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* November 23, 2005,http://www.publicsafety.gc.ca/prg/ns/airs/_fl/rep1-en.pdf

> "… whether Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations,…
>
> whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases, and …
>
> whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation and, if not, the changes in practice or legislation that are required to address these challenges...".[54]

Recommendations on these issues may lead to further criminal law reform.

Conclusion

Two immediate sets of challenges face criminal law reformers in Canada: those of "process" associated with carrying out criminal law reform work in a minority government context and those which are deeper and more "systemic".

[54] Terms of Reference, http://www.majorcomm.ca/en/termsofreference/

The partisan dynamics in a Parliament where no one political party constitutes a majority of the Members of Parliament[55] are clearly more difficult for governments than the dynamics in a Parliament led by a majority government. However, the deeper and more long standing challenges to an effective and accessible justice system were summarized recently by the Chief Justice of the Supreme Court of Canada, the Rt. Honourable Beverly McLaughlin. She noted four major challenges presently facing the civil and criminal justice systems in Canada: "the challenge of access to justice, the challenge of long trials, the challenge of delays in the justice system, and the challenge of dealing with deeply rooted, endemic social problems" such as mental illness.[56] The influences on criminal law policy reform outlined summarily in this paper reflect, to a greater and lesser extent, these two sets of challenges. As the Government of Canada and Parliament take up these challenges, so will the criminal law evolve.

[55] The composition of the House of Commons (as of May 23) consists of 125 Conservative Party members, 100 Liberal Party members, 49 Bloc Québécois members, 29 New Democratic Party members, 3 independents and 2 vacancies. In contrast, the current composition of the Senate is composed of a majority of Liberal Senators.
[56] *Supra*, note 46.

A Review of Selected Trends and Topics Regarding Criminal Law Reform in Canada

加拿大刑法改革中的一些趋向和课题

Eileen Skinnider 艾琳•斯金纳德[*]

Abstract
摘要

虽然犯罪在世界的任何地区都不是新鲜事情，但是有些人论证说今天的犯罪从其规模和表现方法上都前所未有。随着现代社会活动和互动方式中因果的变化，犯罪也不断地在演变。在过去的 10 年中，在国际层面有着持续和广泛的呼声，要求制订和执行更加严峻的刑法，这特别关系到有组织犯罪、腐败犯罪、对妇女和儿童的暴力犯罪、青少年犯罪以及较近出现的恐怖主义犯罪。加拿大的刑事司法制度也难免受到此类意见影响，并且在近年来为了回应内外压力进行了不同的改革。

随着要求严峻刑法的呼声，有人提出了这样的担心：加拿大的刑法已经变得只会反应、临时制宜和单为了回应媒体对犯罪的渲染以及公众对犯罪的惧怕而进行改革。其结果是，加拿大刑法典－实体法、程序法、证据法－已变得非常复杂和累赘。众多的声音一直在呼吁加拿大进行刑法改革，以“原则的方式制定新的现代刑法典”。有些人觉得是时候从新考虑刑法原则，对刑法的限制和内容也需要从新作出思考。

[*] Associate, International Centre for Criminal Law Reform and Criminal Justice Policy 刑法改革与刑事政策国际中心顧問

本文将探索加拿大刑法改革中出现的一些广义趋向和一些由学者通过问卷调研的选择课题。本文的第一部分审议立法议会和法院这两个改革主要参与机关的近期趋向。该部分还分析在国际层面发生的广义趋向、公众对于刑事司法体系的某些看法和最近的统计数据。本文的第二部分介绍了一些选择课题：首先审视了媒体的作用，力图认识公众所据称“认为”的犯罪问题与刑事司法统计数据所反应的现实之间的持久“争战”。第二个考虑的课题是对该持久“争战”提出的众多回应之一：以原则方式审议和从新制定刑法典。第三个探索的课题是对以原则方式改革提出的另一建议，即建立独立法律改革委员会的必要。

While crime is not new to any region of the world, some argue that today crime is unprecedented both in magnitude and in manifestation. Crime is seen to be evolving as cause and consequences of change in the way modern societies function and interact. Weak and collapsed governments, mass poverty, income inequality, corrupt behaviour and armed conflict have become weapons and shields for criminals, traffickers and terrorists. Technology, international trade and the unprecedented movement of people and businesses around the world have been perceived to have resulted in increasingly porous borders that create new opportunities for exploitation by criminals. The Canadian criminal justice system is not immune to these perceptions, pressures and international trends. Over the past 10 years, at the international level, there has been constant and widespread calls for toughening the criminal law, especially as it relates to issues of organised crime, corruption, violence against women and children, crime by youth, and now more recently terrorism. The Canadian system has undergone different reforms in recent years to respond to pressures, both internal and external.

Along with these calls for toughening the criminal law, concern has been raised that the reform of criminal law in Canada has become more reactive, ad hoc, responding to media sensationalization of crime and the public’s fear of crime. As a result, the Canadian Criminal Code, the substantive law, procedural law and evidentiary law, has become complex and cumbersome. Over the years there has been a whole range of new offences that have been “grafted” onto the existing Criminal Code, different procedures, different investigative

powers and new defences. It has been described by many as a “patchwork quilt”, “a hodgepodge of language and provisions”, and as an example of “a lack of a principled approach to a statute which labours under the misnomer of a Code”. There have been many voices calling for law reform in criminal law in Canada, for a “principled approach to a new and modern criminal law statute”. Some feel that it is time to rethink the principles of criminal law, its limits and its content need to be rethought.

This paper will explore some of the broad trends taking place in criminal law reform in Canada and some selected topics that have been surveyed by various academics. Part one of this paper examines the recent trends by the two main actors in law reform: the legislature and the courts. Recent criminal justice legislation over the last ten years and the current Bills before Parliament are reviewed. The jurisprudence of the Supreme Court of Canada is also explored to determine trends. The first section also provides a backdrop of broad trends taking place at the international level, as this can add to pressure to respond at the domestic level but can also be seen to reflect the situations happening in domestic systems. It also includes a summary of some of the perceptions by the public of the criminal justice system in Canada and compares this to criminal justice statistics to put the recent reforms into context.

The second part of the paper highlights some selected topics. First the role of the media is examined in an attempt to understand the continued “battle” between what the public purportedly ‘thinks” of crime and the reality as reflected by criminal justice statistics. The next topic that is considered is one of the proposed responses to this “battle”, the call for a principled review and recodification of the Criminal Code. The third topic explored is another suggested response to a principle approach to reform and that is the need for independent law reform commissions.

A Review of Selected Trends and Topics Regarding Criminal Law Reform in Canada

加拿大刑法改革中的一些趋向和课题

Eileen Skinnider 艾琳•斯金纳德[*]

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[*] Associate, International Centre for Criminal Law Reform and Criminal Justice Policy 刑法改革与刑事政策国际中心顧問

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Introduction

While crime is not new to any region of the world, some argue that today crime is unprecedented both in magnitude and in manifestation.[1] Crime is seen to be evolving as cause and consequences of change in the way modern societies function and interact. Weak and collapsed governments, mass poverty, income inequality, corrupt behaviour and armed conflict have become weapons and shields for criminals, traffickers and terrorists.[2] Technology, international trade and the unprecedented movement of people and businesses around the world are perceived to have resulted in increasingly porous borders that create new opportunities for exploitation by criminals. Over the past 10 years, at the international level, there has been constant and widespread calls for toughening the criminal law, especially as it relates to issues of organised crime, corruption, violence against women and children, crime by youth, and now more recently terrorism. The Canadian criminal justice system is not immune to these perceptions and has undergone different reforms in recent years to respond to pressures, both internal and external.

Along with these calls for toughening the criminal law, concern has been raised that the reform of criminal law in Canada has become more reactive and ad hoc, responding to media sensationalization of crime and the public's fear of crime. As a result, the Canadian Criminal Code, the substantive, procedural and evidentiary law, has become complex and cumbersome. Over the years there has been a whole range

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[1] Antonio Marie Costa *"Global Threats to Global Governance: crime and Terrorism Undermine Development, Security and Justice"* (2004) Paper delivered at the Confronting Globalization: Global Governance and the Politics of Development Conference, Vatican, April 2004 found at www.unodc.org/unodc/en/speech_2004-04-30.1.html.

[2] A.M. Costa, *supra* note 1.

of new offences that have been "grafted" onto the existing Criminal Code, different procedures, different investigative powers and new defences.[3] It has been described by many as a "patchwork quilt"[4] and "a hodgepodge of language and provisions"[5]. There have been many voices calling for law reform in criminal law in Canada, for a "principled approach to a new and modern criminal law statute".[6]

This paper will explore some of the broad trends taking place in criminal law reform in Canada and some selected topics that have been surveyed by various academics. Part one of this paper examines the recent trends by the two main actors in law reform: the legislature and the courts. Recent criminal justice legislation over the last ten years and the current Bills before Parliament are reviewed. The jurisprudence of the Supreme Court of Canada is also explored to determine any trends. The first section also provides a backdrop of broad trends taking place at the international level as this can add to pressure to respond at the domestic level but can also be seen to reflect the situations happening in domestic systems. It also includes a summary of some of the perceptions by the public of the criminal justice system in Canada and compares this to criminal justice statistics to put the recent reforms into context.

The second part of the paper highlights some selected topics. First the role of the media is examined in an attempt to understand the continuing "battle" between what the public purportedly 'thinks" of crime and the reality as reflected by criminal justice

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[3] Morris Manning *"Rethinking Criminal Law in the Age of the Charter of Rights and Freedoms: The Necessity for a 21st Century Criminal Code"* (2002) 21 Windsor Y.B. Access Just. 455.
[4] Morris Manning, *ibid* and Don Stuart *"Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution"* (2000) 28 Man L.J. 89.
[5] Morris Manning, *supra* note 3.
[6] Manning, *supra* note 3 and Don Stuart, *supra* note 4.

statistics.[7] The next topic that is considered is one of the proposed responses to this "battle", the call for a principled review and recodification of the Criminal Code. The third topic explored is another suggested response to a principle approach to reform and that is the need for independent law reform commissions.

Part I: Recent Trends in Criminal Law Reform in Canada

1. The Overall Context

1.1 Reflecting Trends at the International Level

Criminal justice reform was highlighted during one of the official workshops at the most recent United Nations Crime Congress held in Bangkok in 2005.[8] This Workshop discussed how many States have been experiencing a number of pressures to reform their criminal justice systems and to increase access to justice.[9] These demands are being made by offenders, victims, local communities and specific nations as well as the international community. In many countries, there is a sense that criminal justice systems are not providing equal access to justice for all parties which has led to both rising public expectations about criminal justice and a

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[7] Anthony Doob describes this as a battle, see Anthony Doob and Carla Cesaroni *"The Political Attractiveness of Mandatory Minimum Sentences"* (2001) 39 Osgoode Hall L.J. 287.

[8] Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, adopted at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005 (A/CONF.203/L.5) and the Background Paper: Workshop 2: Enhancing Criminal Justice Reform including Restorative Justice, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005 (A/CONF.203/10).

[9] Background Paper: Workshop 2, *ibid.*

confidence crisis that the criminal justice is not satisfying those expectations.[10] This has resulted in increased public demands for reform.

There is increasing concern that many criminal justice systems are becoming over-burdened, with more lengthy and costly trials as well as overcrowding in prisons. Even relatively well-resourced criminal justice systems are under pressure to cut costs. Efforts have focused on diversion and reducing the size of prison populations. Furthermore the rise of victim advocacy has contributed to not only an increased interest in restorative and informal justice but also to some extent calls for more punitive measures.

All countries are experiencing demands from the international community to respond to priority crimes including: crimes involving terrorism; organised crime; money laundering; corruption; trafficking in women and children; trafficking in drugs, firearms and explosives; and cyber crime. The recent elaboration of various international conventions in the field of criminal justice requires States to implement obligations of criminalization, prevention, training and international cooperation.[11]

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[10] See Hough, M. and Roberts, J.V. (2004) Confidence in Justice: an International Review. Findings, No 234. London: Home Office, Research, Development and Statistics Directorate and also see a survey conducted in the US found that more than four out of five respondents favored the idea of "totally revamping the way that the [criminal justice] system works" (see L. Sherman (2002) *"Trust and Confidence in Criminal Justice"* National Institute of Justice Journal, 248, 22-31). This desire for radical change reflects a lack of confidence in the way that the system currently functions or is perceived to function.

[11] These instruments include the *Convention Against Transnational Organised Crime* (UNTOC) and its Protocols, the *Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children* (the Trafficking Protocol in force 2003); the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (the Smuggling Protocol in force 2004); the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunitions* (in force July 2005). and the *Convention Against Corruption* (the UNCAC). The Convention can be found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html.

With attention on these priority crimes, there are more calls to reform criminal procedure in such a way as to provide more power to the police and less power for the accused.[12] The UN Crime Congress Workshop recognized that one of the biggest current challenges facing the administration of justice is the careful balancing of the right of the accused with the newly acknowledged rights of the victims while still achieving the critical objective of doing justice.[13] The fundamental values of fair trial as reflected in the international human rights instruments and the rule of law are continually being challenged when using criminal justice to address new and old fears of security, personal as well as national.

1.2 Perceptions of the Criminal Justice System

When faced with these increased demands for criminal justice reform, a fundamental question is "How do we envision our criminal justice system and what values do we want to instill in the system through reform?". A criminal justice system is seen as one way to ensure that everyone has the right to live in a just, peaceful and safe society. Criminal law protects members of society from harmful and socially unacceptable behaviour and is used as a powerful tool by the government to control crime and protect society.[14] As such, criminal law is seen as a deterrent and as punitive. However, in addition, our criminal justice system has a number of principles

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[12] Klaus Volk, *"The Principles of Criminal Procedure and Most Modern Society: Contradictions and Perspectives"* Paper delivered at the International Society for the Reform of Criminal Law in The Hague, Netherlands 2003, found at www.isrcl.org/volk.pdf.

[13] Background Paper: Workshop 2, *ibid*. Also this challenge is articulated in Kader Asmal, *"Human Rights and the Administration of Criminal Justice: Law Reform in the Age of Globalism"*, Paper delivered at the International Society for the Reform of Criminal Law in Johannesburg, 2000 found at www.isrcl.org/paper/asmal.pdf.

[14] Vicki Schmolka *"Principles to Guide Criminal Law Reform"* Appendix B – Background Material to Minister's Roundtable on Criminal Law (Toronto November 2002) found at http://www.justice.gc.ca/en/cons/roundtable/nov102/appendixb.html.

that are seen as cornerstones, one being the presumption of innocence and the need for the state to have the burden of proof beyond a reasonable doubt. Individual rights of the accused person are to be safeguarded against the power of the state as this provides protection to all individuals from the arbitrary use of the state's power of arrest, detention and punishment.[15] The coming into force of the Canadian Charter of Rights and Freedoms in 1982 clarified these principles.

A general statement of what is expected from our criminal justice system was reflected in a broad criminal policy document in 1982 entitled "The Criminal Law in Canadian Society".[16] This report identified two main purposes of the criminal justice system which follows the traditional models of crime control (security goals) and due process (justice goals). There is tension between the due process model, which emphasizes individual rights protections, and the crime control model, which emphasizes efficiency and the truth-seeking process in the administration of justice.[17] In Canada, there is a constant dynamic to balance the goals of controlling crime and protecting individual rights.

However, as Kent Roach has argued, the criminal justice system's values can no longer be simply explained by the traditional models of crime control and due

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[15] Don Stuart summarizes five main values he sees in criminal justice in Canada: (1) The criminal justice system is all about presumption of innocence, fair labeling and just state punishment; (2) Individual rights of accused against the power of the state must be carefully safeguarded before, during and after trial, and must take precedence over rights of victims; (3) The rule of law and a just adversarial system require the law to be as clear and comprehensive as possible; (4) There are no magic answers about what causes criminal behaviour, how to treat and stop it, and how to predict dangerousness; and (5) The criminal sanctions are a blunderbuss power which must be used with restraint, with prison as a last resort. Don Stuart, *supra* note 4.

[16] Department of Justice Canada, The Criminal Law in Canadian Society, (1982: Department of Justice Canada).

[17] Herbert Packer's legal theory which incorporates both the due process model and the crime control model is described in Julianne Parfett *"A Triumph of Liberalism: the Supreme Court of Canada and the Exclusion of Evidence"* (2002) 40 Alberta Law Review 299.

process.[18] In looking at the development of law reform and recent criminal justice policies, the rise of the victim's rights discourse and the development of restorative justice practices have altered the traditional view. Not all are happy with this development. For instance, David Paciocco believes that the function of a criminal trial "to test whether there is sufficient evidence of a condemnable wrong to provide society with moral authority to collectively label, stigmatize, ostracize and punish one of its citizens" is being re-configured to have a negative impact on individual rights.[19] He argues this is because everyone is being given a voice in the criminal law, which has resulted in the muffling of the accused's rights. As such, the community views are asserting a significant influence on the development of criminal law.[20]

So what are the views of the community toward crime and the criminal justice system? Some of the main perceptions that the public has are that we are living in a more violent society, crime is escalating and new forms of crime are emerging.[21] One Member of Parliament noted recently that current justice bills before Parliament are:

> "[B]eing driven in part by a degree of political pretence. There is a pretence out there that Canadian society is beset with crime, that crime is escalating, and that violent crime is taking over our communities".[22]

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[18] Rosanna Langer *"Book Review of Kent Roach's Due Process and Victims' Rights: The New Law and Politics of Criminal Justice"* (2001) 39 Osgoode Hall L.J. 713.
[19] D.M. Paciocco, *"Book Review of the Charter's Impact on the Criminal Justice System by J. Cameron*" (1996-1997) 28 Ottawa L. Rev. 249 as cited in Manning, *supra* note 3.
[20] *ibid*.
[21] This belief is also one which is held in the United Kingdom as reflected in the prime minister's speech on 'rebalancing of criminal justice systems" 18 June 2002, where he says "criminal justice systems across the developed world are under strain. Most face rising crime. All are grappling with new forms of crime". Found at www.number-10.gov.uk/output/Page1717.asp.
[22] Mr. Derek Lee (Scarborough-Rouge River, Lib) 39:1 Hansard – 143 (2007/4/30).

The nature of crime is also believed to be changing, with more focus on organised crime, with increasing links to terrorism, the transnational nature of crime, computer-based crimes, knowledge and information crimes, and identity thefts.[23]

There seems to be a belief that criminal law can control crime and provide security. This can be seen in pleas for zero tolerance and calls for government policy to include enhanced control and excessive punishment. Along with this have been expressed views that "criminals have too many rights at the expense of the victims".[24] There is a belief that criminal justice systems have traditionally acted with the desire to protect, at all costs, the civil liberties of the innocent and have now become cumbersome, out of date and often ineffectual in convicting the guilty.

Another view is that our criminal justice system has become less and less effective. It has been suggested that there has been a decrease in public confidence in many aspects of the justice system, such as criminal courts, prison and parole systems. According to a recent statement made by the Canadian Minister of Justice:

> "[I]n my view, [our justice system] hasn't kept up with the realities of the 21st century. It moves too slowly. It doesn't give voice to the victims of crime."[25]

However, law enforcement agencies still seem to enjoy the confidence of the public. According to a 1999 Survey, the majority of Canadians believe their local police are doing a good job.[26] Canadian's views of the courts are not as favorable as their views of the police. Less than one-quarter of the respondents felt that the criminal courts

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[23] Research and Statistic Division, Justice Department, presentation at the round table discussion in 2002 see http://www.justice.gc.ca/en/cons/roundtable/nov102/toc.html.
[24] Don Stuart, *supra* note 4.
[25] The speech of the Minister of Justice at the Canadian Bar Association conference *"Towards a More Effective Justice System"*, August 14, 2006.
[26] Juristat *"Public Attitudes Toward the Criminal Justice System"* Vol. 20, no. 12 (December 2000: Canadian Centre for Justice Statistics). The 1999 Survey is the General Social Survey (GSS).

were doing a good job, particularly in the categories of determining guilt, helping the victim and providing justice quickly.[27] The courts rated a bit higher when those surveyed were asked whether they ensure a fair trial for the accused. The prison and parole system were rated much less positively than local police.[28]

There is also the expressed view that there is a need to get tougher in sentencing.[29] The belief is that severe penalties, such as mandatory minimum sentences, will deter crime. As Professor Doob notes, "our society has always recognised that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law".[30] Mandatory minimum penalties are seen as powerful forces that can be used to keep Canadians safe. Locking up an offender for "at least" some minimum time sounds like good crime control, especially since people seem to overestimate the likelihood that an offender will re-offend. The public's desire for harsh punishment is often expressed in public opinion polls.[31] Public attitudes in this regard are generally based on media

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[27] *ibid.*

[28] *ibid.* 26% of the population felt that the prison system was doing a good job at supervising and controlling prisoners, while 14% felt that it was doing a good job at helping prisoners become law-abiding citizens. Regarding the parole system, only 15% of population believed that it was doing a good job at releasing offenders who are not likely to re-offend and 13% believed it was doing a good job at supervising offenders on parole.

[29] Juristat *"Criminal Victimization: An International Perspective: Results of the 2000 International Crime Victimization Survey"* Vol. 22 no.4 (May 2002: Canadian Centre for Justice Statistics). As the Juristat on ICVS notes "Canadians appear to have grown more punitive in their attitudes toward sentencing".

[30] Anthony Doob cited *R v Smith* and Mr. Justice McIntyre's dissent: "there can be no doubt that Parliament, in enacting the Narcotic Control Act, was aiming at the suppression of an illicit drug traffic, a truly valid social aim. The deterrence of pernicious activities, such as the drug trade, is clearly one of the legitimate purposes of punishment. Our society has always recognised that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law. In view of the seriousness of the offence of importing narcotics, the legislative provisions of a prison sentence cannot by itself b attacked as going beyond what is necessary to achieve the valid social aim". Anthony Doob and Cesaroni, *supra* note 7.

[31] Research suggests however that severity may not be the issue – the public is upset with sentencing generally, which gets expressed in terms of sentencing severity, Doob and Cesaroni, *ibid.*

summaries of court proceedings. What is interesting is that research reveals that when respondents are given more detailed information about a specific case they are likely to recommend sentences that are no harsher than those imposed by the judges.[32]

While public attitudes towards the criminal justice system and crime are not always easy to assess or understand, it is probably fair to say that the current general public attitude towards crime is impatient and punitive.[33] The public often has an unrealistic expectation that the criminal justice system can effectively deal with every conceivable social problem. However, as Don Stuart notes, there are "no magic answers about what causes criminal behavior, how to treat and stop it, and how to predict dangerousness".[34]

The nature of public reaction and assessment and thus public attitudes toward the criminal justice system is complex.[35] While it is beyond the scope of this paper, there has been much written on the social attitudes to the criminal justice process and the links to both personal characteristics and other beliefs regarding the nature of crime

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[32] See Doob, A.N. and Roberts, J.V. *"Social psychology, social attitudes and attitudes towards sentencing"* (1984) 16 Canadian Journal of Behavioral Science 269 and Canadian Sentencing Commission, "Sentencing reform: A Canadian approach" (Ottawa: 1987) as cited in Juristat on *"Public Attitudes"*, *supra* note 26.

[33] Yvon Dandurand and Brian Tkachuk *"Meeting the Challenges of Violent Crime: A Canadian Perspective"* (1998) International Centre for Criminal Law Reform and Criminal Justice Policy.

[34] Don Stuart, *supra* note 4.

[35] While politicians speak of listening to Canadians who express fear of crime and that their priorities is to ensure that people are safe in Canada, the 2000 International Crime Victimization Survey would illustrate that the majority of people in Canada as well as in the other industrialized countries surveyed feel safe or fairly safe. Canada had the second highest rate at 83%. This is similar to the findings of the 1999 GSS which also indicated a high proportion of Canadians felt safe when walking alone in their area after dark at 88%. While these surveys are a bit dated, the question is whether the public feels more unsafe than 7 years ago? Juristat "Criminal Victimization: An International Perspective: Results of the 2000 International Crime Victimization Survey" Vol. 22 no.4 (May 2002: Canadian Centre for Justice Statistics). The 2000 ICVS asked respondents three questions related to fear of crime: fear of walking alone at night, fear of being home alone at night, and fear of a break-in.

and the operation of the criminal justice system.[36] The surveys indicate that the more a person fears for their own personal safety, the more likely they are to be dissatisfied with the criminal justice system and also to prefer the imposition of prison sentences.[37]

1.3 Do the Perceptions Reflect Reality – the Statistics

In a recent speech by the Prime Minister, his main message was that crime rates are high by historic standards and that there is now a trend to more serious crime.[38] He stated:

> "Even if Canada's crime rates are low by international standards, they are still very high by our own historical standards… When I was a boy growing up in Toronto, we knew nothing of street gangs or crack houses. And gun crime was almost unheard of. That began to change in the 1960s. And during the next three decades the violent crime rate in this country more than tripled".[39]

The Prime Minister's statement, while true in that reported crime rates are higher than they were in 1959 when he was born, fails to tell the whole story provided by criminal justice statistics. As one criminologist has said the question of whether reported crime rates have gone up or down depends on one's starting point.[40]

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[36] For instance, the level of public satisfaction is often related to a variety of factors including, the respondent's sex, age, level of education, previous contact with the criminal justice system, history of victimization and satisfaction with personal safety. For more information see Flanagan, McGarrell and Brown, *"Public perceptions of the criminal courts: the role of demographic and related attitudinal variables"* (1985) 22 Journal of research in Crime and Delinquency 66 and Sprott and Doob, *"Fear, victimization and attitudes to sentencing, the courts and the police"* (1997) 39 Canadian Journal of Criminology 275.

[37] Juristat, *"Public Attitudes Toward the Criminal Justice System", supra* note 26.

[38] Globe and Mail *"Does Harper's message match the statistics?"* (Monday April 30, 2007).

[39] *ibid*. Speech made by the Prime Minister at an awards dinner for the York Regional Police Force.

[40] Ross Hastings, University of Ottawa criminologist interviewed for the Globe and Mail article, *supra* note, 38.

The recent statistics about violence in Canada create a very different picture from the one that can be drawn from viewing the legislative changes and statements being made by politicians. In 2005, Canada's crime rate fell by 5%.[41] Decreases were seen in most crimes, with the exception of the serious crimes of homicide, attempted murder, assault with a weapon, aggravated assault and robbery.[42] Youth crime rate dropped 5% with violent youth crime declining by 2% and youth property crime down by 12%.[43]

Historically, a review of information from Statistics Canada show that crime rates increased throughout the 1960s, 1970s and 1980s, peaking in 1991. Crime rates then steadily declined since 1992, somewhat stabilizing in the early 2000s.[44] The overall crime rate fell almost 25% from 10,342 crime incidents per 100,000 people in 1991 to 7761 in 2005.[45] The violent crime rate fell by 7.6% from 1991 to 2005. Therefore contrary to what most Canadians believe, violent crime is down.

In the same speech while addressing "worrying trends" toward more serious crime, the Prime Minister noted that "for instance, the most recent report by the Canadian Centre for Justice Statistics shows an increase in homicide, attempted murder, serious

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[41] Juristat "*Crime Statistics in Canada*", Vol. 26, no. 4 (July 2006: Canadian Centre for Justice Statistics).

[42] The overall decrease was driven by declines in non-violent crimes, with property crime falling 6% and other Criminal Code offences falling 5%. In particular large drops were reported for break-ins, 7%, motor vehicle thefts, 7%, counterfeiting, 20% and thefts under $5000.00, 6%. *ibid*.

[43] The youth crime rate is measured by the number of youths formally charged plus youths cleared by means other than the laying of a charge, see *ibid*.

[44] Valerie Pottie Bunge, Holly Johnson and Thierno Balde *"Exploring Crime Patterns in Canada"* Crime and Justice Research Paper Series (June 2005: Statistics Canada). Official statistics have been systematically collected since 1962 through the Uniform Crime Reporting Survey. More specifically, there have been four general trends in the crime rate between 1962 and 2000: rates increased fairly steadily up to the early 1980s, leveled off throughout the decade, increased again in the early 1990s before declining steadily throughout the 1990s. Since 2000, the crime rate has stabilized, increasing slightly in 2003 but declining again in 2005.

[45] 2005 is the most recent yearly statistics gathered by the Canadian Centre for Justice Statistics. See Juristat *"Crime Statistics in Canada*", Vol. 26, no. 4 (July 2006: Canadian Centre for Justice Statistics).

assault and robbery. Gang-related homicides in Ontario doubled in a single year and 70% of those murders involved guns".[46] However as another criminologist points out, what the Prime Minister does not mention is that the rates of many other violent crimes went down in 2005, so the overall violent crime rate did not change.[47] The overall trend in homicide and attempted murder has largely been declining since the late 1970s. As explained by Prof. Doob:

> "[H]omicide rates in 2005, for example, were 2/3 of the level reported in 1977, and since that year, they had generally drifted downward until 2004. The rate increased in 2004 and 2005, bringing them back to mid-1990s levels. Attempted murder rates rose by 14% in 2005, but were still 20% lower than in 1995".[48]

While robbery rate was 3% higher in 2005 than in 2004, it was about 15% lower than a decade ago and 25% lower than the 1991 peak. It is fair to say that one of these worrying trends, the robbery rate, has generally been declining since 1991. Sexual assault rates remained unchanged in 2005, but was 25% lower than a decade ago. The sexual assault rate peaked in the early 1990s and has generally been declining since.

Gang-related homicides have increased from 1995 to 2005, but numbers move up and down dramatically from year to year. It should be noted that 2005 was the first year that the Centre for Justice Statistics asked police forces to include homicide that are "suspected" of being gang-related. In 2005, there were 107, which was 16% of all homicides, 35 more than in 2004. It should be remembered that homicides account for only a relatively small proportion of all crime, .02%, and still remains below the

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[46] Globe and Mail article, *supra* note 38.
[47] Prof. Anthony Doob interviewed for the Globe and Mail article, *supra* note 38.
[48] *ibid*. Also see Juristat in *supra* note 41 which provides further information: "after increasing 13% in 2004, the homicide rates increased 4% in 2005. There were 658 homicides in 2005, 34 more than in 2004. The 2005 homicide rate was the highest since 1996. Attempted murders were also on the rise, up 14% from the previous year".

peaked rate in 1975.[49] The largest increase occurred in the province of Ontario, where the number of gang-related homicides doubled from last year. Two-thirds of all gang-related homicides were committed with a firearms.

The Prime Minister also had something to say about gun violence: "in this city [Toronto] police report that almost 1000 crimes involving firearms or restricted weapons have been committed so far this year. Nearly 40% of them were committed by someone who was on bail, parole, temporary absence or probation. Gun crime is a menace to public safety and protecting Canadians must be the first priority of our bail system".[50] The 2005 statistics do show that 2005 was the third consecutive annual increase in firearms homicides, however this rate is virtually the same as it was 20 years ago.[51] The longer-term trend in the use of firearms to commit homicide has seen a general decline since the mid-1970s, similar to the trend in total homicides.

To place Canada's crime rate in perspective, crime comparisons to other industrialized countries have been made. Consistently with previous years, the 2005 statistics show that the United States had a much higher rate of violent crimes, while Canada generally had slightly higher levels of property crimes. In 2004, the rate of homicide in the United States was nearly triple to the rate recorded in Canada.[52] The United States rate of aggravated assaults were 85% greater than in Canada and a rate of robbery was 59%.

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[49] Juristat *"Homicide in Canada"*, Vol. 26, no. 6 (July 2006: Canadian Centre for Justice Statistics).
[50] Globe and Mail article, *supra* note 38.
[51] Juristat, Homicide, *supra* note 49.
[52] According to the Juristat, *ibid* there were 5.5 homicides per 100,000 population in the US as compared with 2.0 homicides per 100,000 in Canada.

The reliability of statistics depends on reporting behaviour of the population as well as the changes in methodology. Also statistics can be used selectively so as to provide a partial picture, depending on one's agenda. While understanding the causes of crime patterns in Canada is beyond the scope of this paper[53], it is clear from the review of recent statistics, there appears to be a disconnect between the public perceptions of crime and actual crime patterns being recorded by Statistic Canada.

2. Trends in Law Reform from the Legislature

In Canada, as in other common law countries, criminal law reform involves various actors. The government, that is to say, politicians, make and reform the law. The Ministry of Justice employs lawyers who prepare and draft Bills that are debated by parliament. This section briefly highlights some of the trends seen in criminal justice legislation over the last ten years as well as Bills currently before Parliament. For our Chinese colleagues for whom this paper is written, a summary of recent criminal justice legislation is set out in Appendix 1 and a similar summary of the current bills being debated in Parliament is set out in Appendix 2.

Several major reforms have taken place in the last decade. These have included measures to combat organised criminal groups[54], anti-terrorism provisions[55], changes

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[53] To understand more about the analysis behind crime patterns, see *"Exploring Crime Patterns in Canada" supra* note 44. This paper notes that there has been considerable speculation as to the causes behind the crime patterns, such as the changing age structure of the population; changing economic conditions; a change in policing style; increased numbers of police officers; rising incarceration rates; dramatic changes in drug markets; and changing social values. Also important legislative changes are examined.

[54] Bill C-95 – *An Act to Amend the Criminal Code (Criminal Organizations) and to Amend Other Acts in Consequence*, 1997 and Bill C-24 – *An Act to Amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c.32 found at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-24/C-24-4/C-24TOCE/html.

to the Young Offenders Act[56] and measures taken in the area of firearm regulation[57]. New offences and procedures have been introduced for a range of criminal behaviour, from terrorist activities and hoaxes relating to terrorist activities to participation in organised criminal groups, obtaining proceeds of crime and trafficking in persons.

More recently, eleven Bills were introduced in Parliament within the last year by the newly elected conservative government of which two have passed so far.[58] These Bills deal with bail reform, the offence of impaired driving, dangerous offenders, conditional sentencing, mandatory minimum sentencing, street racing, targeting child sexual predators, corruption and strengthening the national DNA data bank.

Other papers at this symposium will be exploring in more detail the legislative response to criminal law reform so this paper proposes to highlight some of the broader trends that appear to arise from the legislation. There are, of course, many issues that could be discussed and there are text books written about each one of them, therefore due to the scope of this paper only five will be mentioned. These include: (1) responding to international criminal justice instruments; (2) the ad hoc practice of creating "new offences"; (3) responding to calls for tougher sentencing; (4) the increased recognition of victims' rights; and (5) responding to concerns of inefficiencies in the criminal justice system.

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[55] Bill C-36 (2001) introduced the Anti-Terrorism Act and Bill C-55 (2004) Public Safety Act.
[56] Bill C-7 (2002) Youth Criminal Justice Act.
[57] Bill C-10A (2003) An Act to Amend the Criminal Code (Firearms) and the Firearms Act, SC 2003, c. 8.
[58] For a summary of these Bills, see Appendix 2.

2.1 Responding to International Criminal Justice Instruments

Canada has played an active role in the negotiations of a number of criminal justice instruments that have been passed over the last few years, such as the UN Convention Against Organised Crime, the Protocols on Trafficking in Persons and Smuggling of Migrants, the UN Convention Against Corruption, and the Rome Statute Establishing the International Criminal Court. It has also responded to the obligations created by the UN Security Council resolution 1373 which calls on States to respond to events of 9/11 with appropriate anti-terrorism legislation. These instruments require States Parties to implement obligations which include criminalization and international cooperation measures.

With respect to corruption, Canada signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997 and subsequently passed Bill S-21 in 1998 before ratifying the OECD Convention. Bill S-21 expressly stated that the Act was intended to meet the obligations set out in the Convention and revised the Criminal Code to ensure that the requirements of the criminalization provisions in the Convention were met.[59] More recently, a Bill has been tabled to introduce technical amendments to the Criminal

[59] The Corruption of Foreign Public Officials Act came into force as part of Bill S-21, which also amended other federal laws to combat corruption, notably the Income Tax Act and the Criminal Code. The Act creates three offences: bribing a foreign public official, laundering property and proceeds, and possession of property and proceeds.

Code that will allow Canada to ratify and implement the UN Convention Against Corruption.[60]

Regarding organised crime, since 1997 the government has enacted two major pieces of legislation providing for such things as the creation of an agency to combat money laundering, the creation of new offences of participating in a criminal organization and broadening the powers of law enforcement authorities to seize property used in crime and to initiate forfeiture proceedings.[61] The amendments to the Criminal Code in 2001 by Bill C-24 conforms more to the UN Convention definition than the 1997 definition contained in Bill C-95.[62] Bill C-53 which passed at the end of 2005 introduced a "reverse onus" provision in forfeiture of property proceedings.[63] In 2005, amendments to the Criminal Code introduced new offences pertaining to trafficking in persons, also following closely the provisions contained in the UN Protocol on Trafficking in Persons.

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[60] Bill C-48. These provisions include clarifying that corruption offences in the Criminal Code can be committed directly or indirectly, and whether the benefit is conferred on an official or another person for the benefit of the official; providing for the forfeiture of instruments used in the commission of an offence of bribery of foreign public officials, under the Corruption of Foreign Public Officials Act; amending of the definition of "official" that applies to corruption offences in s. 118 of the Criminal Code to clarify that it includes a person "elected" to discharge a public duty and to codify the interpretation that have been given to the words by Canadian courts.

[61] Bill C-95 and Bill C-24, *supra* note 54.

[62] It reduces the number requirement in a group from five to three, which is the number set out in the UN Convention. However, as discussed in the recent case of *R v Accused No. 1*, the UN Convention expressly requires a nexus between the creation of the group and the purpose or aim of the group of committing one or more serious crimes. Such nexus is not required in the Canadian definition of "criminal organization". The Canadian definition is also broader than the UN definition in that it allows for the aim of the group to be not only the commission of a serious offence but also the facilitation of a serious offence. Both have the requirement that the offence be committed in order to obtain, directly or indirect, a material benefit. The new Canadian definition also adds the limit of excluding a group formed "randomly for the immediate commission of a single offence". See Eileen Skinnider *"Defining Organised Crime in Canada: Meeting our Obligations Under the UN Convention Against Transnational Organised Crime and its Protocols Against Trafficking of Persons and Smuggling of Migrants?"* (Feb 2006: ICCLR) found at www.icclr.law.ubc.ca.

[63] Bill C-53, *An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act*, S.C. 2005 c. 44 (royal assent 25 November 2005).

The Crimes Against Humanity and War Crimes Act was passed in 2000 to ensure that Canada could ratify the Rome Statute. The Anti-Terrorism Act was introduced shortly after the passing of Security Council resolution in the fall of 2001. These Bills not only created new offences to deal with these "priority crimes" but also revised criminal procedures to provide more power to the police during investigations. For instance, the immunity system giving police officers, generally those "undercover" the power to commit certain offences as part of their investigation of crime was established in Bill C-24 which dealt with organised crime.[64] Other amendments revised the bail hearings and the electronic surveillance regime for investigations of organised crime and terrorism activities. In addition to responding to obligations arising from these recent international criminal justice instruments, Canada must continue to ensure compliance with the obligations under the international human rights instruments. There has been much written about the challenge of not eroding the fundamental values of fair trial and the rule of law when addresses fears for security.[65]

[64] The immunity scheme provided for in Bill C-24 was in response to the 1999 Supreme Court of Canada case of *R v Campbell and Shirose*. In that case, the Court held that the police had to abide by the rule of law. They were not immune from criminal liability for committing acts during an investigation which, in ordinary circumstances would be illegal, unless authorized by Parliament through legislation. The police had engaged in a reverse sting operation where they had offered to sell drugs, which at the time was not authorized by the Narcotic Control Act. The Court ordered a new trial to consider whether there should be a stay of proceedings because of an abuse of process. The Court noted the new Controlled Drugs and Substances Act would legalize reverse sting operations in the future and that Parliament could establish public interest immunities for police operations if these were clearly set out. *R v Campbell and Shirose* [1999] 1 S.C.R. 565 (SCC).

[65] One example is Ronald Daniels, Patrick Macklem and Kent Roach, editors The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (2001: University of Toronto Press).

2.2 The ad hoc Practice of Creating "New Offences"

One trend that has been consistently raised by a number of academics is that recent law reform is ad hoc and reactive. More and more offences have been added to the Code over the past ten years, creating a complex and virtually unmanageable Code. Actually this is not just limited to the past ten years. Since the Criminal Code was created in 1892, there have only been a few sessions of Parliament where Bills have not been introduced to change the statutory criminal law.[66] While most of these reforms have been described as "ad hoc reactive measures"[67] there have in the past been some attempts to conduct a more comprehensive review of the criminal justice system, such as the 1979 promise to establish a five year criminal law review[68] and the 1987 work by the Law Reform Commission of Canada[69].

Some believe the reason for this ad hoc practice is that criminal law has increasingly being used to attempt to solve a host of social and economic problems. Some academics believe that the "criminal net is being cast too wide"[70], making more and more acts criminal. They raise the concern that criminal law is not being restricted to behavior that is truly criminal. As one commented: "we've spent 20 years criminalizing everything".[71] Some scholars see this "flood of legislative reforms" as

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[66] Manning notes that from 1892 to 1989, only four sessions of Parliament have Bills not been introduced to change the statutory criminal law. Since that time, there have been yearly introductions, some minor, some major, Morris Manning, *supra* note 3.
[67] Don Stuart, *supra* note 4.
[68] In 1979, the PC government of Joe Clark promised to establish a five year criminal law review of all aspects of the criminal justice system, but never happened, due to vote of no-confidence abolished the government.
[69] In 1987, the Law Reform Commission of Canada reported on re-codifying the Criminal Code. A draft was produced in 1988. Not yet materialized.
[70] Minister's Roundtable on Criminal Law (Toronto November 2002) found at http://www.justice.gc.ca/en/cons/roundtable/nov102/appendixb.html.
[71] 2002 Roundtable report, *ibid*.

having responded to various interest groups calling for a law and order agenda.[72] Academics argue that politicians must resist the temptation to create a new offence every time there is a crisis. This was raised by Kent Roach in his review of the Anti-Terrorism Act[73] and by Don Stuart's review of the organized crime legislation[74]. Other academics opine that some of these amendments have been made in order to "patch what have been perceived as holes created in the legislative provisions by an overly active Supreme Court of Canada".[75]

2.3 Responding to Calls for Tougher Sentences

A number of the bills being debated before Parliament respond to calls to get tough on sentencing. While there is a strong belief amongst the public that more severe sentences would actually deter criminals, criminologists say this has not been proven. What normally deters criminals is the prospect of getting caught. Bill C-9 was introduced in May 2006 and proposes changes to limit conditional sentences or "house arrest" for serious crime. Currently, when a court can sentence a convicted person to imprisonment of less than two years, it may decide that such sentence can

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[72] Don Stuart, *supra* note 4.
[73] Kent Roach *"Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism"* (2002) 47 McGill L. J. 893.
[74] Don Stuart, *supra* note 4.
[75] Manning, *supra* note 3. Also see note 59 which discusses the *Campbell and Shirose* case and the legislative response that followed.

be served in the community if certain criteria exist.[76] Bill C-9 proposes that a conditional sentence no longer be an option for anyone convicted of an offence prosecuted by indictment that carries a maximum prison sentence of ten years or more. Notwithstanding the fact that amongst these offences are designated violent and sexual offences, major drug offences, crimes committed against children, and impaired driving causing death or bodily harm, some other offences with a ten year maximum sentence can be much less serious depending on the circumstances. The Criminal Code generally sets a wide range of sentences for most offences, to allow a short or alternative sentence for less serious acts and the maximum sentence for the most egregious examples.

The government believes that violent offenders "deserve more than a slap on the wrist" and that people who commit serious crime "deserve a harsher penalty than sitting back and enjoying the comforts of home".[77] The Canadian Bar Association does not support Bill C-9 citing it is too broad and would remove a valuable sentencing option for many cases where public safety does not require

[76] The conditional sentence was introduced in 1996 after the passing of Bill C-41 and was seen as providing the courts with an alternative to incarceration and a means to reduce the incarceration rate of adults in Canadian prisons, a rate which has been reported as one of the highest in the world. See "Conditional Sentences" by John Howard Society of Alberta (2000: John Howard Society of Alberta) found at http://www.johnhoward.ab.ca/PUB/A1.htm. During a conditional sentence, the offender is supervised and must abide by a number of conditions set out by the judge. There are a number of compulsory conditions such as keeping the peace, going to court when required and reporting to a criminal justice supervisor regularly. The judge can also impose other conditions which are case specific, such as requiring the offender to remain at home, except for work or medical emergencies, or to stay at home during the evening and weekends, pay restitution to the victim, perform community services or attend a treatment program. The current criteria include: (i) the offence does not involve a mandatory minimum penalty of imprisonment; (ii) the sentence cannot exceed two years less a day; (iii) the judge is convinced that public safety will not be threatened by allowing the offender to serve a sentence in the community; and (iv) the conditional sentence is consistent with the purposes and principles of sentencing in the Criminal Code.

[77] Speech by then Minister of Justice Vic Toews at "What Works Conference 2006, Closing Remarks" (November 2006).

incarceration.[78] It favors an approach that "takes into account all sentencing principles and relies on judicial discretion in sentencing". It argues that judges should retain the ability to make the punishment fit the crime and follow established sentencing principles of proportionality, restraint and the obligation of imposing the least restrictive sanction appropriate in the circumstances.

Bill C-10 seeks to increase mandatory minimum penalties for firearm-related and gang-related offences and was also introduced in May 2006. While the Criminal Code already contains a number of mandatory minimum sentences, this proposed Bill would introduce an escalating penalty scheme for certain offences, meaning the minimum penalty escalates for second and third offences.[79] The legislation covers both offences where a firearm is actually used in the commission of the offence[80] and other offences relating to firearms such as trafficking and smuggling of firearms.[81] The Canadian Bar Association in its response to the proposed Bill C-10 suggests that it would introduced a "complicated escalating penalty scheme" and that it "will not improve public safety an will more likely add to the current strains on the justice

[78] Canadian Bar Associations Submission to the Commons Committee on Justice and Human Rights, found at www.cba.org/CBA/submissions/pdf/06-42-eng.pdf.

[79] For example, if the offence is gang-related or if a restricted or prohibited firearm is used, then the minimum mandatory penalty that a judge would be required to impose would be five years for a first offence, seven years if the accused had one prior conviction involving the use of a firearm to commit an offence and then ten years if the accused had more than one prior conviction for using a firearm to commit an offence.

[80] Mandatory minimum penalties are proposed for offences involving the use of a firearm which include attempted murder, discharge of a firearm with intent, sexual and aggravated sexual assault, kidnapping, hostage taking, robbery and extortion. This would also extend to offences committed in connection with a gang.

[81] New or higher mandatory minimum penalties are proposed for several serious "non-use" offences: unauthorized possession of a restricted or prohibited firearm with ammunition; firearms trafficking; possession for the purpose of trafficking; making an automatic firearm and firearms smuggling; also for a new offence that would be created – robbery where a firearm is stolen. Mandatory minimum penalties are proposed for non-use offences of possession of a firearm obtained by crime and possession of a firearm contrary to a court order; a new offence that would be created – breaking and entering and stealing or intending to steal a firearm; and for a separate offence of "using" a firearm or imitation firearm in the commission of other offences.

system at great cost to Canadians".[82] It cites the fact that Canada's violent crime rate is stable and much lower than the United States. If the intent of the Bill is to impose harsher sentences, judges already have sentencing tools to achieve that goal, if the offence and the offender warrant an unusually harsh response. It says this is another Bill that will remove trial judges' discretion to impose a fair and appropriate sentence. Mandatory minimum penalties do not allow the judge to weigh all sentencing principles which include rehabilitation.

Another Bill before Parliament is Bill C-27 which would make it easier for the courts to designate an offender as dangerous.[83] An individual will be presumed to meet the criteria of a dangerous offender when he or she has received a third conviction for a violent or sexual crime that is subject to a federal sentence of at least two years. The onus is on the offender to prove that they do not qualify as a dangerous offender. Some have characterized this Bill as being similar to the American "three strikes and your out" legislation. However the Bill does not make the designation of a dangerous offender automatic upon the third conviction. There is a hearing where the offender has the opportunity to explain why they should not be designated as dangerous and the judge retains discretion. The Bill also introduces reforms to peace bond provisions[84] which would extend the supervision period after designated offenders are

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[82] CBA submissions, *supra* note 78.

[83] The Dangerous Offender designation began in 1947 with legislation creating the "Habitual offender" designation. Since then, the provisions have been amended a number of times, most recently in 1997. The current onus is on the Crown to prove the Dangerous Offender sentence is appropriate in the circumstances. The new Bill codifies the principle established in the 2003 decision of the SCC in *R v Johnson*.

[84] Peace bonds first appeared in the Criminal Code in 1892. In recent years, specialized forms of s. 810 have been created. In 1991, s 810.1 was added targeting individuals who police fear may commit a sex offence against someone 14 years old or younger. S. 810.2 was created in 1997, focus on individuals that appear likely to commit violent or sexual offences. Both s. 810.1/2 are designed to be preventative and not punitive. It is not necessary for an offender to have committed a criminal offence in order for a judge to make an order against the individual. Breaches of peace bonds can result in up to 2 years imprisonment.

released back into the communities, from 12 months to 24 months. The provisions clarify that strict supervisory, monitoring and residency conditions can be imposed by the court to protect the general public from harm.

2.4 Increasing Focus on Victims' Rights and Vulnerable Groups

The increased concern about victims has been one of the major changes in criminal justice reform in the last decade.[85] There have been major changes in the consideration of evidence[86], criminal procedure[87], substantive criminal law[88] and sentencing[89] to give regard to the concerns of victims. For instance, in 1999 Bill C-79 amended the Criminal Code to provide new provisions for victims of crime. In 2005, Bill C-2 amended the Criminal Code provisions dealing with child pornography and created new sexual exploitation and voyeurism offences. It further abolished the requirement for a competency hearing for children under 14 years of age under the Canadian Evidence Act. Also that year, new provisions were passed to criminalize trafficking in persons as well as changes to the procedure to provide protection to the victims as well as restitution provisions. Most recently, Bill C-22 has been introduced in parliament which, as the government states, targets those who sexually prey upon children, and proposes to raise the age at which youth can give lawful consent to

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[85] Kent Roach *"Crime Victims and Substantive Criminal Law"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum, editors Don Stuart, R.J. Delisle and Allan Manson (1999: Carswell) at 219.
[86] Evidence law has been affected by legislation and common law reform to make it easier to prosecute sexual violence.
[87] Disclosure regimes have also been affected by legislation designed to protect the privacy and equality rights of complainants in sexual assault cases.
[88] Bill C-49 and C-72 has been accompanied by preambles recognizing the disproportionate victimization of women and children by crimes of sexual and domestic violence and their claims to the equal protection of the law.
[89] In 1988, Parliament provided for victim impact statements and victim fine surcharges. Bill C-41 introduced the provision of reparation for and acknowledgment of harm done to victims as new purposes of sentencing.

sexual activity from 14 to 16 years of age.[90] The proposed amendments would include a close-in-age exception so that teenagers who engage in consensual sexual activity will not be criminalized.[91] Furthermore, the government has just created an Ombudsman for Victims of Crime.[92]

Kent Roach notes that concerns about victims have been used by some to promote restorative justice, crime prevention and responses that address the needs of the crime victims.[93] The emphasis on victim's rights has also been used by others to call for more punitive measures in the criminal law. The worrying thing is that the tendency when promoting a more punitive model is to use the rights of victims as a reason to limit the rights of the accused. In recent statements from the current Minister of Justice, the term of "balancing" when weighing the rights of the accused and the rights of the victims has been used. He says: "this approach must be tough, but at the same time balance. It respects the rights of the accused but does not allow their rights to take precedence over community safety".[94] Jamie Cameron and David Paciocco

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[90] The age of protection, or age of consent, refers to the age at which the criminal law recognizes the legal capacity of a young person to consent to sexual activity. Below this age, all sexual activity with a young person, ranging from sexual touching to sexual intercourse is prohibited. The current age of consent is 18 years old when the sexual activity involves exploitative activity. This applies to such cases as prostitution, pornography or where there is a relationship of trust, authority, dependency or any other situation that is otherwise exploitative of a young person. Under the current law, the age of consent for non-exploitative sexual activity is 14 years old.

[91] This would permit 14 and 15 year old youth to engage in sexual activity with a partner who is less than 5 years older. Another time-limited exception would also be available for existing marriages and equivalent relationships. The proposed reforms maintain an existing close-in-age exception that exists for 12 and 13 year olds who engage in sexual activity with a peer who is less than 2 years older, provided the relationship is not exploitative. The legislation also maintains the existing age of protection of 18 years old for exploitative sexual activity.

[92] Department of Justice website announcement, see http://www.justice.gc.ca/en/news/nr/2007/doc_32002.html

[93] Kent Roach, *supra* note 85.

[94] Speech for Minister of Justice at the Canadian Bar Association "Towards a More Effective Justice System", August 14, 2006.

have raised their concerns that accused persons have experienced "remarkable setbacks".[95]

Kent Roach notes that in any future law reform discussions there will be a need to realize that an increased voice has been given to victims and as a result we are in "the midst of a paradigm shift".[96] This of course challenges traditional concepts of the nature and goals of criminal law, which is seen as a matter between the accused and the state. It also will likely complicate the task of a principled review for law reformers. However he concludes that the role of victims cannot be ignored in future criminal justice law reform or attempts at codification. He suggests that the lack of recognition of the concerns of victims is perhaps one of the reasons why law reform in the last decade or so has been so piecemeal and reactive. He says include their concerns and rights now or else they will emerge during a crisis and at that time politicians will respond to them on an "ad hoc" basis.

2.5 Responding to Concerns of Inefficiencies

There have been a number of discussions amongst federal and provincial Ministers of Justice to address inefficiencies in the criminal justice system. The aim of these types of proposed reforms is for the simplification and acceleration of the criminal justice

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[95] As cited in Manning, *supra* note 3. As stated earlier, they are concerned that everyone is given a voice in criminal law, with community views having a significant influence on the development of criminal law. They argue that this is in conflict with the long held belief that the "function of a criminal trial is to test whether there is sufficient evidence of a condemnable wrong to provide society with moral authority to collectively label, stigmatize, ostracize and punish one of its citizens".

[96] Kent Roach, *supra* note 85.

process without undermining the rule of law and basic standards of fair trial. Cost-efficiency is seen as a major consideration.

Over the past decade, the federal and provincial justice ministry representatives have been examining Preliminary Inquiry reforms. A debate has gone on for a long time reflecting deep divisions in the profession. There were some reforms introduced in 2002 through Bill C-15A but there continue to be calls for more reform in this area. Reclassification of offences has also been explored over the years. This involves changing an offence that can only be prosecuted by indictment into one that can be prosecuted either by indictment or summarily at the discretion of the prosecution, called a “hybrid” offence. The Crown is thereby given discretion to choose to proceed summarily which is generally less costly and more efficient in those cases where the facts suggest the case is a less serious one of its type. When the Crown proceeds summarily the accused is exposed to lesser penalties and therefore, it is argued, that the protections provided by the more elaborate indictable process are not necessary.

There have also been discussions regarding disclosure provisions of the defence. While Bill C-15A introduced a limited obligation on the defence to disclose expert reports, this has remained a contentious issue. Disclosure obligations of the Crown and police in complex cases have also been the subject of discussion. The Crown’s constitutional duty to disclose all relevant information to the defence in complex trials have highlighted how the sheer volume of information can create enormous burden for the Crown and defence, resulting in significant additional logistic and resource burdens in complex cases. Proposed amendments to facilitate the electronic disclosure of materials to defence and other management mechanisms have been debated.

More recently, Bill C-27 sets out revisions to the Criminal Code provisions that deal with impaired driving offences. The Bill proposes to increase penalties[97], provide more tools for police[98] and sharply limit witnesses' evidence[99]. Bill C-23 introduces amendments to enhance criminal procedure efficiency, strengthen sentencing measures and clarify the court-related language rights provisions.[100] Some of the amendments are to make certain processes more effective through greater use of

[97] Drivers will be charged if in possession of an illicit drug; new offence of being in care or control of a vehicle while in possession of a controlled substance under the Controlled Drugs and Substance Act. Drivers with blood alcohol levels exceeding .08 will face a life sentence penalty in the case of causing death; and a max of 10 years in cases of causing bodily harm. Impaired drivers will face higher mandatory minimum penalties. For first offences, a fine will increase from $600 to $1000. For second offence, sentencing increases from 14 days to 30 days. For third offences, sentencing increases from 90 days to 120 days.

[98] Police will be able to demand that a person suspected of driving while impaired by alcohol or drug participate in a sobriety test at the roadside. Police will be able to demand that a person suspects of driving while impaired by drug participate in physical tests and bodily fluid sample tests. Standardized Field Sobriety Tests (SFST), administered at the roadside, when there is a reasonable suspicion that a driver has a drug in the body. Drug Recognition Expert (DRE) evaluations, when a police officer believes a drug-impaired driving offence was committed. This includes a situation where the driver fails the SFST. The DRE evaluations are administered at the police station. A sample of bodily fluid, should the DRE officer identify that the impairment was cause by a class of certain drugs. Refusal to comply with these demands would be a criminal offences, punishable by the same Criminal Code penalties for refusing a demand for an alcohol breath test. DRE testing is currently used across Canada, but only when the driver voluntarily participates.

[99] The proposed legislation will aid in the prosecution of driving while impaired by alcohol. By restricting the use of "evidence to the contrary" (also known as the two-beer" defence) in court, these reforms will help limit impaired drivers to scientifically valid defences. (in recent decades, drivers charged with impaired driving were able to avoid conviction for being over 80 by calling witnesses, often friends, to give sworn testimony that the accused drank small amounts of alcohol (only 2 beers) which would not be enough to make their BAC over 80. This 2 beer defence had the effect of invalidating the presumption that BAC readings of approved instruments equaled the driver's BAC at the time of driving, despite the fact that those instruments were rigorously tested with no indication of improper operation or malfunctioning. The proposed legislative changes will restrict challenges to the BAC result. Evidence for challenges can include evidence that the machine was not functioning properly or was not operated properly. In addition, the Alcohol test record, which is printed by the breath test machine and confirms that it is in good working order, will be admitted as evidence.

[100] June 2006 introduced An Act to Amend the Criminal Code (Criminal Procedure, Language of the Accused, Sentencing and Other Amendments).

technology, such as that which would facilitate obtaining out-of-province search warrants, and by consolidating and rationalizing existing provisions.[101]

3. Recent Case Law from the Supreme Court of Canada

3.1 The Courts and Law Reform

The Courts have a limited ability to engage in law reform. As Tilbury explains:

> "The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adopted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals, who may be vitally interested in making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature."[102]

Despite the courts limited ability in law reform, some academics believe that since the Charter, the Supreme Court of Canada has "engaged in the practice of continuing

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[101] These include changes to the process with respect to the challenge of jurors to, among other things, assist in preserving their impartiality; summary dismissal by a single judge of the court of appeal when an appeal has erroneously been filed with that court; an appeal of a superior court order with respect to things seized lying with the court of appeal. a summary conviction trial with respect to co-accused that can proceed where one of the co-accused does not appear; and the re-classification of the offence of possession of break and enter instruments into a dual procedure offence to allow the crown to determine whether this offence should be prosecuted by way of indictment or by the more expeditious procedure of summary conviction.

[102] Michael Tilbury *"Why Law Reform Commissions? A Deconstruction and Stakeholder Analysis from an Australian Perspective"* (2005) 23 Windsor Y.B. Access Just. 313.

to revise the criminal law in accord with what are perceived by it to be Charter values".[103] They argue that the Courts have little choice but to be activist, saying that they can only work with the material they have.[104] One academic suggests that politicians have abdicated their responsibility to take leadership and left it to the judges to decide what the criminal law should be.[105] He also suggests that the Criminal Code is in the sorry shape it is in because of that. Some see this judicial activism as providing the best protection against what is perceived as law and order expediency on the part of Parliament.[106]

Other academics believe that the Courts play a more limited role in law reform, some suggesting that they pay too much deference to legislators and sometimes as a result Charter standards are set too low. Some academics raise concerns that the Courts have been "put on trial over the last decade and held up to increased public and political scrutiny and at times impatience with their decisions".[107] There is criticism of "judicial activism"[108] and most recently a debate as to how to nominate judges to the Supreme Court of Canada. The increased pressure on the courts by the public and

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[103] Morris Manning, *supra* note 3.
[104] *ibid*.
[105] 2002 Roundtable report, *supra* note 70.
[106] Don Stuart, *supra* note 4.
[107] Kent Roach, *supra* note 73.
[108] Canon's model has 6 different dimensions of judicial activism, which range from "majoritarianism" (the degree to which policies adopted through democratic process are judicially negated) to "availability of an alternate policymaker" (the degree to which a judicial decision supersedes serious consideration of the same problem by other agencies). The term "judicial activism" is regularly used by politicians, interest groups and other actors in the public sphere, who often inject arguments about it social merits or dangers into political debates as a means of enhancement of partisan standpoints. While there is a lot of problems with the definition of judicial activism, one has to recognise that there has been lots of debate on the role of the judiciary. This scope of this paper does not allow for thorough analysis of the models of judicial activism. For more information see Margit Cohn and Mordechai Kremnitzer *"Judicial Activism: A Multidimensional Model"* (2005) 18 Can L.J. & Juris 333.

the government must be responded to by reiterating the independence and impartial role of the judiciary.

The recent case of R v Henry provided the Supreme Court of Canada an opportunity to clarify what it sees as its role in interpreting legislation and how its judgments should be viewed by the legal profession.[109] The Court said that it is a misunderstanding that each phrase in a judgment of this Court should be treated as if enacted in a statute. Such an approach is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience. The traditional view is that "a case is only an authority for what it actually decides". The legal point decided by this Court may be as narrow as the jury instruction at issue in Sellars or as broad as the Oakes test.[110] All obiter does not have the same weight, the weight descreases as one moves from the dispositive ratio decidenti to the wider analysis which is intended for guidance and should be considered authoritative. Beyond that there will be commentary and examples which are intended to be helpful but not considered binding. The object of all this is to promote certainty in the law and not to stifle its growth and creativity.

3.2 Some Trends

Each year, academics review the jurisprudence from the Supreme Court of Canada, analysing trends and highlighting major decisions. It can be difficult to make pronouncements as to whether the Supreme Court of Canada is moving in one

[109] *R v Henry* [2005] S.C.J. No. 76 (SCC).
[110] *Sellars v The Queen* [1980] 1 S.C.R. 527 and *R v Oakes* [1986] 1 S.C.R. 103.

direction or another but some years or in some areas of law, trends may be easier to see. This section summarizes some of those more recent reviews.

Some academics note that there has "been a dearth of decisions with real significance" dealing with substantive criminal law.[111] For instance, the 2004-2005 term has been described as one without trends in this area.[112] One observation made is that the majority of cases coming from the Court are concerned with the nuances of liability of specific offences and defences and "few principles of overarching application emerge".[113] For substantive criminal law, the cases have been seen to be very technical in nature.

However there have been a few exceptions to this trend where case law has covered interesting doctrinal issues and important social policy dimensions. These includes cases on criminal law and mental illness[114], the deliberate spread of HIV[115], the use of force by parents and teachers against children under their care[116], the constitutionality of criminalizing possession of marijuana[117] and the ability of prisons to protect the lives of prisoners[118].

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[111] Isabel Grant *"Developments in Substantive Criminal Law: the 2003-2004 Term"* (2004) 26 S.C.L.R. (2d) 215 at 215.
[112] Ian Smith and Gary Trotter *"Developments in Criminal Law: The 2004-2005 Term"* (2005) 30 Supreme Court Law Review (2d) 207 at 207.
[113] *ibid* at 208.
[114] R v Demers [2004] S.C.J. No. 43 (SCC), the Court finds that a permanently unfit accused cannot be detained indefinitely if he or she does not present a danger to the public. R v Fontaine [2004] S.C.J. No.23 (SCC). expands the defence of the mental disorder automatism
[115] R v Williams [2003] S.C.J. No. 41 (SCC) the SCC upholds a conviction for attempt of a man who has knowingly passed on the HIV virus to his partner.
[116] Canadian Foundation for Children, Youth and the Law v Canada (AG) [2004] S.C.J. No. 6 (SCC).
[117] R v Malmo-Levine [2003] S.C.J. No. 79 (SCC).
[118] R v Kerr [2004] S.C.J. No. 39 (SCC) involved a murder by a penitentiary inmate who felt that carrying a lethal homemade weapon was necessary to protect his life in a prison where the institution was out of control.

Regarding recent criminal procedural cases, the Supreme Court has made a number of significant decisions in recent years. In the 2005-2006 term, there were seven criminal cases where Charter claims failed. In R v C.D., First Nations constables were able to set up a RIDE program outside reserves and therefore the accused who were stopped were not held to be arbitrarily detained contrary to section 9 of the Charter.[119] R v Orbanski confirmed that the police may question motorists about their drinking and administer the roadside screening device test without providing the motorist an opportunity to retain counsel, with the Court holding that the accused's section 10(b) rights were justifiably suspended under section 1 of the Charter.[120] In R v Chow, wiretap evidence was held admissible in accordance with section 8 of the Charter despite the fact that the accused was not "named" in the wiretap authorization.[121] The Court also held that the accused was not entitled to a separate trial to compel the co-accused to testify. In R v Spence, it was held that counsel for the accused did not have the right to challenge jurors on the basis of sympathy for the race of the victim of the alleged crime.[122] In R v Pires, the Court affirmed the right to cross-examine the affiant police officer in proceedings to obtain wiretap authorization subject to the Garofoli test.[123] In R v Wiles, the mandatory 10 year firearms prohibition required by section 109(1) of the Criminal Code was upheld as not constituting "cruel and unusual" punishment and therefore not in violation of section 12 of the Charter.[124] In R v Henry, it was stated that section 13 of the Charter does not preclude cross-examination of the accused on prior inconsistent statements based on voluntary

[119] R v C.D. [2005] S.C.J. No. 79 (SCC).
[120] R v Orbanski [2005] S.C.J. No. 37)SCC).
[121] R v Chow [2005] S.C.J. No. 22 (SCC).
[122] R v Spence [2005] S.C.J. No. 74 (SCC).
[123] R v Pires [2005] S.C.J. No. 67 (SCC).
[124] R v Wiles [2005] S.C.J. No. 53 (SCC).

testimony from an earlier trial on the same indictment.[125] The decision in R v Henry is notable in this group as the Court took the opportunity to look back on 20 years of its own jurisprudence interpreting the protection against self-incrimination in section 13 of the Charter and took the rare step in reconsidering a number of its previous decisions in the area.[126]

In the 2004-2005 term, the court released decisions in three main areas dealing with evidence: the co-conspirator's exception to the hearsay rule, the common law confessions rule and similar fact evidence.[127] The Court held in R v Mapara that double hearsay is admissible under the co-conspirators exception to the hearsay rule.[128] The reliability and necessity requirements are still met regardless of the nature of the hearsay. The Police did not exceed the terms of the wiretap authorization when the recorded conversation between the accused and a third party during a three way call which was initiated by the "target". In R v Grandinetti, the Court refused to apply the person in authority requirement of the confessions rule flexibility in favour of the accused and gave it a narrow interpretation.[129] One observation of the decisions in Mapara and Grandinetti is that the "Court favours considerations such as efficiency and the ability to prosecute over fairness to the accused and reliability".[130] This is perhaps a shift from past decisions where the court had made protection of the

[125] R v Henry [2005] S.C.J. No. 76 (SCC).
[126] Gary Trotter *"R v Henry: Self-Incrimination and Self-Reflection in the Supreme Court"* (2006) 34 S.C.L.R. (2d) 409.
[127] Sandra Forbes and John Adair *"Developments in the Law of Evidence: The 2004-2005 Term"* (2005) 30 S.C.L.R. (2d) 333.
[128] R v Mapara [2005] S.C.J. No. 23 (SCC).
[129] R v Grandinetti [2005] 1 S.C.R. 27 (SCC).
[130] Sandra Forbes and John Adair, *supra* note 127. They argue that the Court moves from a flexible and discretionary approach to the exceptions to the hearsay rule and towards a more predictable categorical approach. The focus is not on the rights of the accused. The focus is on what approach is practical in the circumstances, does not unduly hinder the prosecution and does not overburden the courts.

accused's rights a priority by emphasizing that a sufficient degree of reliability and voluntariness is generally a precondition to admissibility and specifically, in relation to hearsay and confessions. In R v Perrier, the Court looked at the admissibility of similar fact evidence against an accused where the similar acts had been found to be committed by a gang of which the accused was a member.[131] One observation of this case is that the Court continued to apply a cautious and careful approach designed to protect the rights of the accused in the context of what can be extremely prejudicial evidence.

In the 2003-2004 term, the Court dealt with the issue of search and seizure, refined the mental disorder provisions, addressed the interaction of the long-term offender and dangerous offender provisions and also dealt with the newly created provisions in the Anti-terrorism Act.[132] It also rendered significant decisions in three areas of the law of evidence: the scope of cross-examination[133], the crown's duty to disclose all relevant evidence[134] and the test for admissibility of fresh evidence where the crown has breached that duty, and solicitor-client privilege.[135]

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[131] R v Perrier [2004] S.C.J. No. 54 (SCC).
[132] For a good review see Gary Trotter and Ian Smith *"Developments in Criminal Procedure: the 2003-2004 Term"* (2004) 26 S.C.L.R. (2d) 289.
[133] R v Lyttle [2004] 1 S.C.R. 193 (SCC), the Court confirms a broad right of cross-examination unfettered by the need to provide evidentiary foundation for the questioning.
[134] R v Taillerfer; R v Duguay [2003] S.C.J. No. 75, this case dealt with Crown's obligation to disclose all relevant information to an accused, whether inculpatory or exculpatory, subject to the exercise of the crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Infringement of the right to disclose is not always an infringement on the right to make full answer and defence. Must show that there was a reasonable possibility that failure to disclose affected the outcome at trial or the overall fairness of the trial.
[135] For a good review see Sandra Forbes and Davit Akman *"Developments in the Law of Evidence: the 2003-2004 Term"* (2004) 26 S.C.L.R. (2d) 355.

One scholar compares the Supreme Court of Canada's case law on the Charter from ten years ago and says that the Court's output has fallen off considerably.[136] He also notes that the once "revolutionary" period of Charter interpretation which moved the Canadian criminal justice system sharply away from a crime control model toward a due process model appears to be ending.[137] Some argue that the "dust has settled" and that by and large, the Charter issues in criminal law have been thoroughly litigated and are firmly established.[138] Others respond that there continues to be much uncertainty around a number of basic Charter issues.[139] Even questions that may seem settled are open for reconsideration under the Canadian common law constitutional system, for example in the area of self-incrimination as reviewed in R v Henry. As Stribopoulos notes this flexibility is essential for the long term health of our Constitution and the integrity of the Supreme Court of Canada.[140]

As noted earlier, some academics have highlighted a recent trend where the Supreme Court appears to be showing more deference to Parliament's legislative authority. Don Stuart notes that "on the Charter front the tide has clearly changed. In Mills a unanimous Court meekly spoke of the need to dialogue with Parliament and upheld Parliament's enactment of the views of the dissenting opinion in O'Connor as to access to medical and other records of complainants in sexual assault cases."[141] In dealing with the terrorism cases, the Courts were seen to be cautious and as one

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[136] James Stribopoulos *"Has Everything Been Decided? Certainty, the Charter and Criminal Justice"* (2006) 34 S.C.L.R. (2d) 381.
[137] *ibid*.
[138] Justice Moldaver speech at the Sopinka Lecture on advocacy at the criminal lawyers Association Annual Fall Conference, October 2005, as cited in Stribopoulos, *supra* note 142.
[139] Stribopoulos, *supra* note 136.
[140] *ibid*. However, he also notes that too much uncertainty in some areas such as the scope of police powers as discussed in R v Orbanski should be avoided.
[141] Don Stuart, *supra* note 4.

academic noted, inclined to leave many questions for another day.[142] Another commented that the majority's decision in the terrorism cases is a rare example of the Court's willingness to sacrifice or downplay the interests of the accused to achieve what it considers to be a more important purpose.[143] However others note that it is difficult to say this is a general trend as there are times where a unanimous court invalidates Criminal Code legislation.[144]

Another example of deference to Parliament is in the case of upholding mandatory minimum sentences.[145] The sentiment expressed in the dissent in R v Smith[146] of society recognizing the necessity to suppress certain social evils by legislating a prison sentence has become the majority in R v Morrissey. R v Smith's dissent also

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[142] Ian Smith and Gary Trotter, *supra* note 112.
[143] Sandra Forbes and Davit Akman, *supra* note 135.
[144] An example is R v Demers, *supra* note 121.
[145] R v Morrissey (SCC) "Perhaps the most egregious hypothetical reviewed are the individuals playing with guns. Firearms are not toys. There is no room for error when a trigger is pulled. If the gun is loaded, there is sufficient probability that any person in the line of fire could be killed. The need for general deterrence is as great (if not greater) for the hypothetical offenders playing with guns as it is for people such as the appellant…. In such circumstances, there can be no question that the four-year minimum is as appropriate as it is for the appellant. The four year minimum sentence equally sends a message to people who are in a position to harm people to take care when handling their weapon. Hunting accidents occur all too easily. When individuals with weapons are hunting in such a degree of proximity, extra steps are necessary to ensure that other hunters are not harmed…. Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence… serves a general deterrent function to prevent others from acting so recklessly in the future."
[146] R v Smith (SCC) Mr. Justice McIntyre's dissenting opinion: "there can be no doubt that Parliament, in enacting the Narcotic Control Act, was aiming at the suppression of an illicit drug traffic, a truly valid social aim. The deterrence of pernicious activities, such as the drug trade, is clearly one of the legitimate purposes of punishment. Our society has always recognised that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law. In view of the seriousness of the offence of importing narcotics, the legislative provisions of a prison sentence cannot by itself b attacked as going beyond what is necessary to achieve the valid social aim…In view of the careful and extensive consideration given to this matter by Parliament and the lack of evidence before this Court suggesting that an adequate alternative to the minimum sentence exists which would realize the valid social aim of deterring the importation of drugs, I cannot find that the minimum sentence of 7 years goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives".

takes the position of not second guessing parliament, as noted: "in view of the careful and extensive consideration given to this matter by parliament and the lack of evidence before this Court suggesting that an adequate alternative to the minimum sentence… goes beyond what is necessary for the achievement of a valid social aim".[147]

Part II. Selected Topics

1. The Impact of the Media on Public Perception, Political Action and Law Reform

1.1 The Moral Panic Theory

Public attitudes towards the criminal justice system and public fear of crime are not always easy to assess and to understand. To assist in understanding the impact of the media on public perception, the politician's reaction to that public perception and how this influences law reform, Stanley Cohen developed an analysis of what he describes as the "moral panic" theory.[148] He defines "moral panic" as:

> "a condition… merges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by… right thinking people; socially accredited experts pronounce their diagnoses and solutions; ways to cope are evolved….; the condition then disappears, submerges or deteriorates".[149]

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[147] *ibid*.
[148] Professor Rosemary Way provides a good example of how the media manipulates and the politician use opportunism using Stanley Cohen's "moral panic" theory in Rosemary Cairns Way *"The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism"* (1994) 39 McGill L.J. 379.
[149] Stanley Cohen Folk Devils and Moral Panics 2nd ed. (New York: St Martin's Press, 1980).

Professor Way explores Cohen's thesis in three phases.[150] The first phase deals with the role of the media, exploring how the media defines and conceptualizes the threatening behaviour, often using stereotypical language and failing to address the complexity of the problem. The result of the increased media attention to a problem has often resulted in increased outrage by the public over how ineffective the criminal justice system seems to be in addressing the problem. The second phase is the politization of what is identified as a threat and the reconfiguration of the problem as one which is amenable to legislative intervention. The third phase is where the solution to the problem is by adopting a law to address the problem.

The media's role

As we have seen in the previous part of this paper, Canadian's fear of crime appears to be inconsistent with the reality of the declining crime rate described by the statistics. With crime being reported daily in the mass media, it has become a prominent fact of life for the majority of Canadians. Crime is always in the news. As the old saying goes, "if it bleeds, it leads". Television is very influential showing vivid images of death and destruction instantaneously and repeatedly.[151] To many Canadians, this has been a violent era.

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[150] Rosemary Way, *supra* note 148.

[151] As Elaine Davis notes the late 1980s and 1990s are periods in which, along with the visual images of death shown immediately and repeatedly on the nation's televisions. Elaine David *"The 1995 Firearms Act: Canada's Public Relations Response to the Myth of Violence"* (2000) 6 Appeal 44.

It has been suggested that the media helps shape the attitudes and perceptions of the public.[152] For many people, knowledge about various things for which they have no experience comes from the media. Various studies indicate that most people rely upon newspapers, television and other media their main source of education with respect to information about crime, offenders and the criminal justice system.[153] For example, as one study found, 5 out of 6 respondents closely followed crime-related issues and stories in the media.[154] Newspapers and television were reportedly their most important sources of information about crime and justice issues.

The media tends to report on certain difficult cases which are sensationalized, in a process which gathers momentum by virtue of repetition even though the case itself may be an anomaly and as such, of no particular importance in the grand scheme of things. This not only shapes the public perception but also mobilizes the public to call for action and the politicians to react, with the media advocating simplistic solutions. The media often include in their stories the message that the criminal justice system has been unable to address the perceived problem or not effective in so doing. Emphasizing the failure of the criminal justice system increases the dissatisfaction of the public. Also in some stories, the media seems to suggest that the problem arises from relatively new behaviour, characterizing the problem as different from before,

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[152] See Dekeseredy and Schwartz (1996) and Surette (1998) as cited in Juristat *"Public Attitudes Towards the Criminal Justice System" supra* note 26. The term "media" refers to channels of communication that serves many diverse functions such as communicating news and information or providing entertainment. In discussing news media, there sometimes can be a fine line between journalists and entertainers. In Nicholas Cowdery's paper, he describes the phenomenon of talkback shows which "encourage robust debate on issues by people who are not fully informed. They see themselves more as entertainers than journalist, see Nicholas Cowdery *"Getting Justice Wrong: Myths, Media and Crime"* paper delivered at the 2001 International Society for the Reform of Criminal Law conference.

[153] See Erickson, Baranek and Chan (1991) and Roberts (1992) as cited in Juristat, *supra* note 26.

[154] See Bradford (1995) as cited in Juristat, *supra* note 26.

such as “stalking” or “gangsterism”. Part of the story is that we are all at increased risk and therefore criminalization of the behavior and increased penalties will provide us some safety and is an appropriate and necessary response.

By not discussing the complexities of the problem at hand and understanding the cultural or social-economic assumptions that underlie the problem, the media provides a “comfortable forum for outrage over this abuse without requiring an engagement on its systemic nature”.[155] The public and politicians can react with outrage without questioning their own actions or assumptions. Of course not all media is sensationalized or simplifications of complex problems. There are numerous examples of quality reporting, for example the recent article in the Globe and Mail questioning whether the Prime Minister’s message on crime reflect the statistics.[156] However some journalists have acknowledged that they believe decreased resources and tight deadlines have pressured journalists to report on what they perceive as easier and straightforward stories as opposed to more complex socio-economic stories.[157]

The role of politicians

The perceived attitudes of the population have implications for the criminal justice system and its processes. Media can create inaccurate perceptions in the minds of the public about crime and the criminal justice system, its goals and what can be achieved. The public’s fears and insecurities are sometimes then used as a basis for developing

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[155] Rosemary Way, *supra* note 148.
[156] Globe and Mail *“Does Harper’s message match the statistics?”* (Monday April 30, 2007).
[157] From a discussion at the International Centre for Criminal Law Reform *“Law in a Fearful Society Symposium”* (September 30 and October 1, 2004: Vancouver, British Columbia) see http://www.icclr.law.ubc.ca/law_fear.htm.

policies for law reform. One Member of Parliament recently stated what he believes is driving the current justice bills before Parliament:

> "There is a pretence out there that Canadian society is beset with crime, that crime is escalating, and that violent crime is taking over our communities. It is true that television and the Internet are giving us access to a lot more information. We are seeing a lot more of it, but data on crime shows the opposite. It shows that crime is reducing. I do not have to repeat too much of that. The data is out there. Since 1991, for reasons that sociologists have not ever been able to fully explain, our violent crime rates and our overall crime rates are decreasing and continue to do so. Thus, there is a pretence that we have a crime problem. While we actually do have crime problems, we just do not have the escalating crime problem that some politicians are urging upon us".[158]

Politicians play a major role in criminal law reform and it is therefore important to understand the pressures to which they react. There is a need by politicians to be seen to be responding to the community's concerns. They want to be seen to be acting instantly in a way that will attract votes at the next election.[159] Of course, there are politicians that call for debate and informed review, as seen from the quote in the previous paragraph. There are also mechanisms in the legislative law reform process that allows for consultation, such as dissemination of consultation papers to the legal profession, committee hearings, parliamentary reviews and commissions of inquiries.[160] By taking up the cries expressed by the public as reported in the media, politicians shift the focus from defining the problem to looking for solutions.

The laws

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[158] Mr. Derek Lee (Scarborough-Rouge River, Lib) 39:1 Hansard – 143 (2007/4/30).
[159] Rosemary Way, *supra* note 148.
[160] For more information on these process, see Annemieke Holthuis *"Recent Influences on Criminal Law Reform in Canada"* paper for the Symposium on Canada-China Cooperation in Promoting Criminal Justice reform" (June , 2007).

There is a constant demand for criminal law reform to respond to specific horrific events that have been given much media attention. Some have argued that reforms to criminal law and procedure have "come to dominate the political agenda because of their symbolic weight and because they are relatively inexpensive compared with other more structural reforms".[161] Kent Roach says we have a "habit of expanding our criminal law in a symbolic attempt to recognise tragic crimes and in a desperate and frequently vain quest for safety, an increased sense of security and an understandable desire to express concern for those victimized by crime".[162]

The passing of a law represents a coping mechanism to address a perceived threat, even if the solution may be more apparent than real. As Rosemary Way notes, the criminalization of the problem may simply assuage public concern about the violence while deflecting political energy away from the systematic analysis and response which is needed.[163] However merely creating a new offence may have little impact on the lives of victims or potential victims. This is not to say that criminal law has no role to play here, but rather that it should not be seen as providing all the solutions.

When our politicians respond with legislation, this can implicitly confirm Canadian's fears that violence is increasing. It also reiterates the message that the law has the power to right all wrongs. These laws become part of a political agenda which emphasizes public safety and law and order solutions to problems of crime and violence. The public perception that the system of law enforcement and justice are not working is much easier to address with a new law creating a new offence rather

[161] Rosanna Langer, *supra* note 18.
[162] Kent Roach, *supra* note 73.
[163] Rosemary Way, *supra* note 148.

than by tackling the socio-economic issues that are the source of many problems. When easy solutions such as measures to "get tough on crime", ultimately do not appear to solve the problem of crime, this may "add to the public perception of a justice system that does not work, when significantly more resources are spent prosecuting and incarcerating offenders, while inevitable crime continues to occur."[164]

By using law reform as a politically expedient response, there sometimes is very little meaningful debate in parliament or meaningful committee review or consultation with various effected groups as these laws are being drafted. Some argue that such reactive laws are often not necessary. Don Stuart arguing that the Organised Crime Bills of 1997 and 2001 were not necessary as Canada had already strong laws against group criminality, murder, bombing, illegal drugs, proceeds of crime and the police had already wide powers respecting seizure, authorization of electronic surveillance and few limits on undercover operations.[165] Kent Roach made similar arguments regarding the new provisions in the anti-terrorism laws.[166] Rosemary Way argued this view regarding the 1995 criminal harassment laws.[167] While law and order is an easy thing for politicians to push, fortunately the media has less impact on the day to day decision making within the justice system itself. This reinforces the importance of ensuring and maintaining the independence and impartial decision making of prosecutors and judges.

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[164] CBA submissions on Bill C-10, see www.cba.org.
[165] Don Stuart, supra note 4.
[166] Kent Roach, *supra* note 73.
[167] Rosemary Way, *supra* note 148.

1.2 "Guns, Gangs and Violent Crime"

Stories about gangs and guns have been increasingly covered in the media. In the 1990s, one could read many articles and hear news stories about the fight between two biker gangs. One particular incident which involved the killing of an innocent bystander, a young boy resulted in public outrage with regard to the Quebec biker gangs responsible.[168] Bill C-95 which was passed through Parliament on the eve of a federal election in 1997 was a response to pleas from Quebec officials to address what was perceived as the escalating fight between these two biker gangs.[169] That piece of legislation created new offences regarding organised crime and added to police powers to seize proceeds of crime, electronic surveillance, reverse onus bail provisions, special peace bond provisions and tougher and consecutive sentencing provisions. In 2001, again on the eve of a federal election, another Bill was passed to deal with organised crime. There had also been increased media attention particularly focusing on a Montreal crime reporter who was shot the day after he published an expose on organised crime.

Other significant events, like the Ecole Polytechnique massacre, was seen as one of the main incidents that resulted in the 1995 Firearms Act which increased legislative control of firearms and introduced more mandatory minimum penalties.[170] It focused on the aspect that firearms played in that violent event and the government was seen as responding to demands by the public that something should be done. Even back in

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[168] Don Stuart, *supra* note 4.
[169] *ibid*.
[170] Elaine Davies, *supra* note 151.

1995, when the then Justice Minister introduced the gun control legislation, he spoke about criminal sanctions, noting:

> "[T]here is a disturbing trend particularly in urban areas toward violence with firearms. Five Canadians each week are victims of homicide by gun…. To strengthen the law and to provide real deterrents in sentencing we will introduce new strong penalties for ten specific serious crimes… Those who choose to use a firearm in such a way must know that they will surely incur severe consequences".[171]

Recent events, like the "summer of the gun" in 2005 in Toronto, have added to the national attention on crime and especially gun-related crimes.[172] This also increased the level of rhetoric by all the political parties which were in the midst of an election in 2005 promising to be tougher on crime. The Prime Minister summed up the main message in November 2006 when he stated "as you know, cracking down on gang, gun and drug crime has been one of the top priorities of Canada's new government since we took office nearly ten months ago… We made it a priority because Canadians had made it very clear to us that they wanted the scales of justice rebalanced".[173]

Another message the media has taken up is the need for harsher penalties, particularly for violent and repeat offenders. As previously discussed, the majority of the public overestimates the amount of crime that involves violence and they also overestimate the likelihood that offenders will re-offend. As the Canadian victimization surveys confirm, Canadians are becoming more punitive. The fad of the "three strikes your out legislation", which started in California in 1994 as a result of a highly publicized

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[171] Statement made by Allan Rock, then Justice Minister as cited in Elaine Davis, *ibid*.
[172] Globe and Mail story, *supra* note 38.
[173] Statement of the Prime Minister, *supra* note 80.

kidnap killing during an election year, has spread to other American states and other States.[174] Notwithstanding the known and documented studies on the ineffectiveness of the three-strikes legislation, some Canadian politicians call for bringing in three-strike legislation for violent and sexual offenders.[175] In ignoring the research that exists, politicians' actions are more than likely directed toward fulfilling Canadians' wish for something to be done to stem violence.[176]

Media also assists politicians in getting out their message. Being able to state that mandatory minimum sentences will make us safe from bad people is a simple and straight forward message and easy enough to present in a short sound bite over the media. It is much more difficult to explain the complexity of the problem and the concerns of such penalties. Media and politicians promote mandatory minimum policies and speak about them as a way to fight crime. Politicians rely on them as providing an effective deterrence message. The message is that mandatory minimum sentences "are seen as powerful forces that can be used to keep Canadians safe".[177] Initiatives such as this, directed toward locking up an offender for "at least" some minimum time sounds like an effective means of crime control to the general public.

However the research clearly shows that such penalties do not deter criminals any more than less harsh and proportionate sentences.[178] A survey of practitioners in the criminal justice system showed that most are not in agreement with the proposition

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[174] Doob and Cesaroni, *supra* note 7.
[175] Stockwell Day in 2000 announced that they would bring in three-strike legislation for violent and sexual offenders, cited in Doob and Cesaroni, *supra* note 7.
[176] Elaine Davies, *supra* note 151. Another good example is the sex offender registry which was instituted notwithstanding studies that suggested that the money would be better spent vetting those who are in positions of authority over vulnerable people such as children rather than on a registry.
[177] Doob and Cesaroni, *supra* note 7.
[178] *ibid*.

that mandatory minimum are such powerful tools. Over half of trial judges surveyed by the Sentencing Commission believed that mandatory minimum penalties restricted their ability to carry out a just sentence. Some believed that they contributed to inappropriate agreements between prosecutors and defence counsel. Most defence counsel and about one –third of prosecutors surveyed believed that such penalties caused prosecutors and defence to enter into agreement that would not normally have entered into.[179] It is generally accepted that, to the extent that criminals consider the consequences of their actions at all, they take into account the likelihood that they will be caught rather than the penalty they might receive if convicted. As reported in a 1994 government report "police, lawyers and judges may alter their behaviour in a variety of ways aimed at mitigating the impact of mandatory minimum penalties on accused for whom the mandatory penalty is perceived to be unduly harsh".[180] The report lists the concerns: including shifting discretion from the impartial judiciary to the adversarial prosecutor; increasing trial rates; increasing prison population; and increasing the likelihood of pressured plea negotiations.[181]

In exploring why mandatory minimum sentences are still so popular with politicians, one commentator suggests: "The reason is that most elected officials who support such laws are only secondarily interested in their effects; officials' primary interests

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[179] Anthony Doob and Carla Cesaroni, *supra* note 7. In a survey carried out by the CSC, 57% of trial judges surveyed stated that mandatory minima restricted their ability to carry out a just sentence. Only 9% of trial judges indicated that MMS "never restricted their ability to impose a just sentence". Trail judges in the mid-late 1980s also indicated that MMS contributed to inappropriate agreements between Crown and defence counsel". Most defence counsel and about 1/3 of Crown surveyed by the CSC indicated that MMS caused Crown and defence to enter into agreements that they would otherwise avoid. They cite Chief Justice McRuer in the Report of the Royal Commission on the Revision of the criminal Code in 1952 wherein he stated that mandatory minimum penalties "tends to corrupt the administration of justice by creating a will to circumvent it".

[180] 1994 Report commissioned by the Firearms Control Task Force and Research Section of the DoJ reviewed the evidence available on the impact of Mandatory Minimum Sentences.

[181] For more discussion on the concerns of the impact of mandatory minimum sentences will have on the criminal justice system, see Elizabeth Sheehy *"Mandatory Minimum Sentences: Law and Policy: Introduction"* (2001) 39 Osgoode Hall L.J. 261.

are rhetorical and symbolic. Calling and voting for mandatory penalties, as many state and federal officials repeatedly have done in recent years, is a demonstration that officials are "tough on crime". If the laws "work", all the better, but that is hardly crucial. In a time of heightened public anxiety about crime and social unrest, being on the right side of the crime issue is much more important politically than making sound and sensible policy choices".[182]

The most recent Bills being debated before parliament continue down this road. As stated by the Minister of Justice at a fall conference, the proposed bills "send a clear message that using guns to commit crimes will not be tolerated…. Serious or repeat firearm offenders who use a firearm when committing an offence will spend more time behind bars, so they won't be able to threaten communities".[183] He further claimed that "we will not tolerate gun and gang-related crimes in our communities…. By ensuring that tougher mandatory minimum sentences are imposed for serious and repeat firearms crime, we will restore confidence in the justice system, and make our streets safer."[184] The Canadian Bar Association responded to the proposed Bill C-10 which would introduced what it called a "complicated escalating penalty scheme" and said that it "will not improve public safety and will more likely add to the current strains on the justice system at great costs to Canadians".[185] It cited the fact that Canada's violent crime rate is stable and much lower than the United States. If the intent of the Bill is to impose harsher sentences, judges already have sentencing tools to achieve that goal, if the offence and the offender warrant an unusually harsh

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[182] Anthony Doob and Carla Cesaroni, *supra* note 7.
[183] Minister of Justice's Closing Remarks at the What Works Conference 2006, *supra* note 34.
[184] *ibid*.
[185] CBA submissions, *supra* note 168.

response. It said this is another Bill that will remove trial judges' discretion to impose a fair and appropriate sentence. Mandatory minimum penalties do not allow the judge to weigh all sentencing principles which include rehabilitation.

As Professor Blakesley succinctly summed up the role of the media and the reactive approach by some politicians can have a negative effect on principled and comprehensive criminal law reform: "It is easy to fall into the trap: politicians gain popularity and votes by looking 'tough on crime', especially organised crime. They become even more popular when they are able to say bad things about courts that try to rectify the constitutional problems created by bad laws. Sadly, often the news media exacerbate the problem by pandering to public fear and appetite for salacious material. Outcries from interest groups are shrill, raising the cost to anyone who wishes to promote reasoned and constitutional laws. This all creates an atmosphere that tends to ignore the larger picture and which may actually hurt the battle against crime, while damaging human rights and democracy".[186]

2. Calls for Recodification

A number of academics have called for recodification of the Criminal Code. They view the Criminal Code as unwieldy, with now over 840 provisions, many of which are long and complex.[187] Some view that new crimes and procedures are being added year after year as a response to what has been described as using criminal law for political expediency. Don Stuart states that "it is time to halt the unremittingly

[186] Prof Christopher Blakesley recently reviewed several national studies presented at an international conference in 1997 as to the dangers of adopting ill-considered criminal legislation on organised crime, as cited in Don Stuart *"A Case for a General Part"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 95.

[187] Manning, *supra* note 3.

reactive law and order agenda of subsequent Minister of Justice over the past 20 years and to influence a Minister of Justice to insist on a proactive and principle review of federal legislation such as the Criminal Code and the Canadian Evidence Act".[188] Calls for recodification do not necessarily mean establishing rigid and definitive codes. There will continue to be the need for judicial interpretation and legislative change by Parliament. Rather the call for recodification is to make the criminal law clearer and simpler with less duplication. Recodification is to ensure that the law is more accessible. Morris Manning believes that the law is in real danger of "becoming increasingly difficult to discover and less evident in trials"[189] and as such the rule of law is in jeopardy.

The calls for recodification and a principled review of the criminal justice system are nothing new. As Gerry Ferguson points out, even when the first Criminal Code was created back in 1892, it was a direct by-product of the codification movement in England.[190] A Royal Commission on the Revision of the Criminal Code established in 1949 made substantial revisions to the Criminal Code in 1951.[191] These revisions were seen as not actively reforming the legal principles but rather to simplify the Criminal Code, removing inconsistency and duplication. The next federal report calling for a comprehensive review of the criminal law was in 1969, the Report of the Canadian Committee on Corrections.[192] In response to this call, the Law Reform

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[188] Don Stuart, *supra* note 4.
[189] Manning, *supra* note 3.
[190] Gerry Ferguson *"From Jeremy Bentham to Anne Mclellan: Lessons on Criminal Law Codification"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Alan Mason (1999: Carswell) at 192.
[191] Report of the Royal Commission on Revision of the Criminal Code (Feb 22, 1952) as cited in Gerry Ferguson, *ibid* at 201.
[192] Report of the Canadian Committee on Corrections (The Ouimet Report) (1969).

Commission of Canada was created in 1971. The Commission published many reports and working papers on their review of the criminal law, procedure, sentencing and evidence.[193] However much of their work did not translate into actual legislative reform. In 1979 the then Minister of Justice announced that a fundamental review of the Criminal Code would take place but before anything could happen an election was called and the Minister was no longer in office.[194] In 1982, another Minister of Justice issued a report "The Criminal Law in Canadian Society" to address continued calls for an overall policy on criminal justice to guide a review.[195] The Law Reform Commission was abolished in 1992 after many reports, draft codes and laws were written but few of which actually resulted in changes to the law.

In 1995, several academics were invited by the Minister of Justice for a focused consultative process on the White Paper, however nothing materialized.[196] By 1998, it was clear that a comprehensive recodification was not on the list of priorities of the Ministry of Justice.[197] In 1998, a conference on "Making Criminal Law Clear and Just" provided a number of ideas for reform of every aspect of the justice system.[198] To date, there has been no significant movement towards recodification.

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[193] For a good summary, see Gerry Ferguson, *supra* note 190.
[194] Minister of Justice Jacques Flynn in the short-lived Joe Clark PC government, see *ibid*.
[195] The Criminal Law in Canadian Society, *supra* note 16.
[196] The White Paper on a General Part to the Criminal Code was first prepared by the federal government on the eve of an Ottawa conference of The Society for the Reform of Criminal Law on "100 Years of Criminal Codes", see Don Stuart *"A Case for a General Part"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 95.
[197] Statement made by Minister of Justice Anne McLellan, as cited in Don Stuart, *ibid.*
[198] See various articles from Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell).

Calls for recodification raise concerns of whether clarity and justice are best achieved by legislative action or through judicial development.[199] Some argue that expressing rules in statutory form increases accessibility, consistency, efficiency and legitimacy in the process.[200] Others argue against codification because the "flexible application of common law principles is better suited to the pursuit of principle and sound policy".[201] Christine Boyle raises concerns of codifying a general part to the Criminal Code arguing that for a feminist criminal lawyer she sees a risk that codification would entrench mainstream views which have traditionally marginalized the vulnerable in society.[202] Others argue that there are many settled areas of the law as a result of judicial consideration and recodification could open these areas of the criminal law to new litigation.

Any recodification will be subject to judicial interpretation. And further any judicial interpretation can be subject to statutory intervention. Some say that the critical issue is to ensure that any revisions, whether by legislative intervention or judicial interpretation is informed by underlying common law and constitutional values and not just by demands of social police.[203]

One of the main questions is whether there is the political will necessary to conduct a principled review necessary for recodification. While such a review might matter more to the day to day operations of the system and impact on victims and offenders,

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[199] Hamish Stewart *"Clarity, Justice and Interpretation"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 78.
[200] Ronald Delisle as cited in Hamish Stewart, *ibid.*
[201] David Paciocco as cited in Hamish Stewart, *ibid.*
[202] Christine Boyle *"Commentary"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 146.
[203] Hamish Stewart, *supra* note 199.

as one academics writes, “unfortunately, the value of such reforms cannot be reduced to a sound bite that will generate votes at the next election”.[204] High-profile voter friendly crime issues are more easy to pass in Parliament than a comprehensive meaningful review. However, Morris Manning provides two examples where in the past Ministers of Justice have risen above political expediency to reform the criminal law despite opinion polls, including the bail reforms in 1972 and the abolishment of the death penalty in 1976.[205] Most recently, the 2002 Roundtable report recognizes that any reform must take into account the capacity of Parliament to carry out the work.[206] It is recognised that Parliament does not have the capacity to deal with an entire new Code. At the Roundtable, there was a consensus that comprehensive reforms would be much more manageable if written in stages or chunks.

3. Role of Law Reform Commissions

The government has recognised in the past that criminal law reform through ad hoc amendments to the existing Code is inherently flawed.[207] To ensure systematic reform of the law, a research and policy development phase was considered essential. Law reform commissions were seen as able to provide independent legal policy advice.[208] The role that these commissions play in law reform differs from the role the legislature and courts play in law reform. Commission do not themselves change the law but can really only provide advice on how law should be reformed. In a society

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[204] Don Stuart, *supra* note 196.
[205] Manning, *supra* note 3.
[206] 2002 Roundtable report, *supra* note 70.
[207] Gerry Ferguson, *supra* note 190.
[208] Michael Tilbury, *supra* note 109. In his paper he says his discussion leaves open the more fundamental question of whether the function of law reform commissions ought to be the provision of legal policy advice.

where the public is inundated with media reports of sensationalizing crime, and politicians reacting to often uninformed public perceptions, law reform commissions can add value to legal policy discussions in providing independent and informed advice. They can help to depoliticize the process of law reform.

Modern institutional law reform commissions first emerged in common law countries in the 1960s.[209] They were considered to be most prolific in the early to mid-1980s. However by the late 1980s to early 1990s, things had changed. In the 1990s many law reform agencies in common law countries were abolished, restructured or downsized. Tilbury suggests that with the influence of neo-liberalism emphasizing individuals over society, this lessened the space for law reform commissions to engage in legal policy advice. Law Reform Commissions are generally separate from the ordinary machinery of government and are independent of government control.[210] The President of the Australian Law Reform Commission lists what he sees as essential characteristics of law reform commissions: "permanent, full-time, independent, authoritative, generalist, interdisciplinary, consultative and implementation-minded".[211]

Law reform commissions, composed largely of lawyers, have commitment to certain legal values, such as fairness, efficiency, clarity and certainty.[212] Most governments will accommodate these considerations. But they will not accept a commission that they regard as hostile to their political agenda. For some, law reform commissions

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[209] The English and Scottish Law Commissions were established in 1965. Tilbury, *supra* note 109.
[210] Part of Hulbert's 1986 list of distinctive characteristics of law reform commissions, William Hurlburt, Law Reform Commissions in the United Kingdom, Australia and Canada (1986).
[211] Tilbury, *supra* note 102.
[212] *ibid*.

may be seen as ineffectual, especially if measured against implementation legislation or they may simply be regarded as expensive luxuries.[213] Some argue that there is no longer a need for law reform commissions as there are now many different sources for legal policy advice: such as parliamentary committees, government departments, working groups, royal commissions, private consultants.

In Canada, the Law Reform Commission was first created in 1971 with the intention of being a permanent government institution for monitoring the need for Canadian law reform.[214] The Canadian Law Commission's function was to ensure "a just legal system that meets the changing needs of Canadian society and of individuals in that society". The reason given for its abolishment in 1993 was to save costs. Some of the Commissions wide range of reports on law reform included: a draft Code of Substantive Criminal Law (1987); Report on General Principles for Recodification of Criminal Procedure (1988); draft new Code of Criminal Procedure (1991). The Supreme Court of Canada would refer to positions adopted by the Law reform Commission frequently when making judgments.

The Law Commission of Canada was revived in 1997, established by the Law Commission of Canada Act. This replaced the Law Reform Commission of Canada which had been dissolved in 1993. On September 25, 2006, the government removed funding to the Commission although the Act establishing the commission has not been repealed. The Canadian Bar Association voiced its concerns over the demise of

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[213] *ibid*.
[214] Gerry Ferguson, *supra* note 190.

the Law Commission of Canada as well as the Court Challenges Program.[215] It argued that an independent Law Commission can "engage in innovative research and adopt a multi-disciplinary approach to law reform, engaging experts in law, social sciences and humanities to study these issues on a macro level".[216] It also responded to suggestions from some Ministers that Canadian Bar Association could fill the role played by a law reform commission. It stated that it was "simply unrealistic to expect this work to be done by an organisation with a different mandate and no funds for the task, through the volunteer efforts of CBA members who are primarily lawyers with full-time legal practices".[217]

Conclusion

As one eminent jurist summarizes:

> "Under the social contract between state and individual, the latter surrenders to the former the right, and perhaps, the power to exact penalties upon those who do him/her harm and, in return, expects to receive from the former the freedom to live an unthreatened life within the limits of the social consensus and the law. As politicians and citizens move further and further apart, the politicians seek ever more stridently to tap into what they call "public opinion". Whether the opinion they aim at is genuinely that of the public and not merely an echo of the tabloid screech is not important. For the politicians, there is no difference. There is nothing very difficult in recognizing that if citizens feel unable to live within their own society without threat or fear, law and order becomes a totem for the politicians. And so, the criminal law, its enforcement, the administration of criminal justice, the penal system become the stuff of party politics. Slogans such as "tough on crime and tough on the causes of crime" ring through the chattering classes and pound at the

[215] Canadian Bar Association "*Study of the Effects of Abolishing the Court Challenges Program and the Law Commission of Canada*" (CBA: November 2006).
[216] *ibid*.
[217] *ibid*.

> remainder of society through the media. The statistics of crime are massaged to show that the government of the day has or has not been successful in "returning the streets to the residents". No government in any jurisdiction of which I have any experience shows any sign of stepping back from the puerile superficiality of the debate to think beyond giving the state and its agents increasing powers and visiting punishment of increasing severity upon those defendants who actually emerge from investigation and trials as convicted criminals. The fallacies have been known to us all for decades".[218]

What are the principles to guide law reform? At the 2002 Minister's Roundtable the principles to consider when reforms are being developed continue to be those articulated in the 1982 report "Criminal Law in Canadian Society".[219] The criminal law should be employed to deal with conduct for which the means of social control are inadequate or inappropriate and in a manner which interferes with individual rights only to the extent necessary. Criminal law needs to be clear and accessible. The criminal law should clearly define powers necessary to facilitate the conduct of criminal investigations. Penalties are to reflect the gravity of the offence and the degree of responsibility of the offender, as well as reflect the need for protection of the public and for adequate deterrence. Regarding sentences, preference should be given to the least restrictive alternative that is adequate and appropriate in the circumstances. Wherever possible, criminal law should also promote victim's concerns.

Do these principles continue to have a place in law reform development in Canada? Or has criminal law reform simply become an exercise in political expediency? Academics, like Kent Roach, emphasis the need to uphold proposed law reform to

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[218] Michael Hill QC in his message from the President" in the June 2001 issue of The Reformer, cited in Cowdery's paper, *supra* note 152.
[219] 2002 Roundtable report, *supra* note 70.

such principles and the need to do this during the legislative process and not to wait for challenges to the courts.[220] There needs to be greater engagement with law reform, more attention to empirical studies, and a more comprehensive and principled approach.

[220] Kent Roach, *supra* note 73.

Appendix 1 – Federal legislative highlights over the last decade

Recently passed federal legislation

2007

Bill C-26 – provides an exemption to small short-term loans to the criminalization of the payment of a criminal interest rate.

2006

Bill C-19 – introduced amendments to increase the maximum penalties for offences involving street racing. **2005**

An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act, SC 2005, c. 44 (Bill C-53)

-Provides a reverse onus of proof in proceeds of crime applications involving offenders who have been convicted of a criminal organizational offence or certain offences under the Controlled Drugs and Substances Act. The court shall make an order of forfeiture against any property of an offender if the court is satisfied that the offender has engaged in a pattern of criminal activity or has an income unrelated to crime that cannot reasonably account for all of the offender's property. The offender has to show, on a balance of probabilities, the property is not proceeds of crime.

An Act to Amend the Criminal Code (Trafficking in Persons) SC 2005, c. 43. (Bill C-49)

-Creates three new offences, prohibits trafficking in persons; prohibits a person from benefiting economically from trafficking; prohibits the withholding or destroying of identity, immigration or travel documents to facilitate trafficking in persons. Also provisions to expand the ability to seek restitution to victims.

An Act to Amend the Criminal Code and the Cultural Property Export and Import Act, SC 2005, c. 40

-Amends the Criminal Code to prohibit certain offences, including theft, robbery, mischief and arson against cultural property protected under the 1954 Convention for the Protection of Cultural Property in the Even of Armed Conflict. Allows for prosecution of such offences when committed outside Canada by Canadians.

An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, SC 2005, c. 32

-Amends the child pornography provisions, creates a new sexual exploitation and voyeurism offence, and abolishes the requirement for a competency hearing for children under 14 years of age under the Canada Evidence Act.

An Act to Amend the Criminal Code, the DNA Identification and the National Defence Act SC 2005 c. 25

-Amends provisions to authorize DNA data banking orders against offenders serving sentences for certain offences.

An Act to Amend the Criminal Code (Mental Disorders) and to Make Consequential Amendments to other Acts SC 2005 c 22

-Amends the Criminal Code to permit courts to hold inquiries in respect of, and stay proceedings against, permanently unfit accused who pose no threat to public safety.

2004

An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence Gathering) SC 2004 c. 3

-New offences of insider trading, tipping and employment related intimidation. Creates new procedural mechanisms to require persons and financial institutes to provide documents, data, etc.

Public Safety Act, SC 2004 c. 15 (Bill C-55)

-New offences relating to hoaxes regarding terrorist activities and revision to the electronic surveillance scheme.

The Sex Offender Information Registration Act SC 2004, c.10

-provisions requiring offenders to report and creating a new offence for failure to comply.

An Act to Amend the Criminal Code and Other Acts SC 2004 c. 12

-Amendments which establish more serious offences for setting traps likely to cause death or bodily harm, permit the use of reasonable force on board aircrafts to prevent the commission of certain offences.

An Act to Amend the Criminal Code (Hate Propaganda) SC 2004

-Expands the definition of 'identifiable group' for the purpose of these provisions.

2003

An Act to Amend the Criminal Code (Firearms) and the Firearms Act, SC 2003 c. 8 (Bill C-10A)

-Amendments relate to the firearms as well as amends the Firearms Act.

An Act to Amend the Criminal Code (Criminal Liability of Organizations) SC 2003, c. 21 (Bill C-45)

-amendments deal with criminal liability of organizations.

2002

Youth Criminal Justice Act (Bill C-7)

-replaces the old Young Offenders Act.

Criminal Law Amendment Act 2001 (Bill C-15A)

-makes amendments to the Criminal Code which addresses a variety of issues relating to such substantive matters as child sexual exploitation via the internet, criminal harassment, and home invasions, and such procedural matters as preliminary inquiries, conviction reviews and disclosure of expert evidence.

Court Administration Service Act (Bill C-30)

-covers amendments to the Criminal Code and the Canada Evidence Act.

2001

Bill C-24 amendments focus on organized crime and law enforcement.

C-36 introduced the Anti-Terrorism Act.

2000

Bill C-19 enacts the Crimes Against Humanity and War Crimes Act.

Bill C-22 enacts the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

1999

Bill C-79 amends the Criminal Code providing new provisions for victims of crime.

Extradition Act, 1999

1998

Bill S-21 introduces the Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts

1997

Bill C-16 introduces new provisions dealing with powers to arrest and enter dwellings.

Bill C-17 enacts the Criminal Law Improvement Act.

Bill C-46 amends the Criminal Code relating to production of records in sexual assault cases.

Appendix 2 - Bills before Parliament

Recent Bills before Parliament
2007

(1) Bill C-9 – introduces amendments to end conditional sentencing or "house arrest" for serious and violent offences.
(2) Bill C-10 – introduces amendments to increase mandatory minimum penalties for firearm-related offences.
(3) Bill C-18 – proposes strengthening the national DNA Data Bank.
(4) Bill C-21 – introduces measures to remove the requirement for licensed firearms owners to register certain firearms.
(5) Bill C-22 – introduces amendments to increase the age at which youth can consent to sexual activity, in order to better protect them against sexual exploitation by adult predators.
(6) Bill C-27 – introduces amendments to toughen the Dangerous Offender provisions and creates stricter peace bond provisions.
(7) Bill C-32 - introduces amendments to the Criminal Code that focus on impaired driving. It proposes to increase penalties; provide more tools for police and sharply limit witnesses' evidence.
(8) Bill C-35 – introduces a reverse onus for serious crimes involving firearms.
(9) Bill C-48 - introduces technical amendments to the Criminal Code that will allow Canada to ratify and implement the UN Convention Against Corruption.
(10) Bill C-23 – introduces amendments to the Criminal Code to make certain process more effective through greater use of technology and by consolidating and rationalizing existing provisions; strengthen sentencing measures; and clarify court-related language rights provisions.

Appendix 3 – Recent Supreme Court of Canada jurisprudence

R v McKay [March 23, 2007]	Defence of property
R v Spencer [March 8, 2007]	Evidence - statements
R v Trochyn [2007]	Evidence – similar fact and post-hypnotic
R v Angelillo [December 8, 2006]	Appeal – fresh evidence Sentence – consideration of other offences
R v Khelawon [December 14, 2006]	Evidence - hearsay
R v Larch [2006]	Sentencing
R v Dery [November 23, 2006]	Offences - attempts
R v R.D. [November 16, 2006]	Offences – criminal negligence
R v Krieger [October 26, 2006]	Jury – direction by trial judge
R v Hazout [October 5, 2006]	Appeals – right of appeal Procedure – adjournments
R v Shoker[2006]	Sentencing – conditions of probation
R v Kong [September 8, 2006]	Defence – self-defence
R v Wiles [December 22, 2005]	Charter, section 12 (cruel and unusual punishment).
R v MacKay [December 15, 2005]	Offence - assault
R v Boulanger [July 13, 2006]	Offence – breach of trust
R v Pham [June 21, 2006]	Narcotic offence- knowledge

R v Gagnon [May 4, 2006]	Appeal - jurisdiction
R v Graveline [April 27, 2006]	Appeal - grounds
R v Rodgers [April 27, 2006]	Charter – section 8 and DNA data banking
R v Chaisson [March 30, 2006]	Appeal – role of appeal court
R v Lavigne [March 30, 2006]	Criminal organization – proceeds of crime
R v Pittiman [March 23, 2006]	Appeal – inconsistent verdicts
R v Labaye [December 21, 2005]	Offences – keeping a common bawdy house
R v Stender [June 10, 2005]	Sexual assault - consent
R v Henry [December 15, 2005]	Charter – section 13, self incrimination
R v C.D. [December 16, 2005]	Sentencing – Youth Criminal Justice Act
R v Dionne [May 19, 2005]	Theft – recent possession
R v Spence [December 2, 2005]	Charter – section 11(d) and 11(f)
R v Boucher [December 2, 2005]	Impaired driving – evidence to the contrary
R v Escobar-Benavidez [2005]	Evidence – Corbett application
R v Rodrique [November 17, 2005]	Dangerous weapons
R v Pires and R v Lising [2005]	Wiretap – cross-examination on affidavit
R v R.C. [October 28, 2005]	DNA data bank – young offender
R v Turcotte [September 30, 2005]	Charter – section 7 – evidence admissibility
R v G.R. [July 22, 2005]	Offence – included offence
R v Woods [June 29, 2005]	Charter – section 8
R v Orbanski and R v Elias [2005]	Charter – section 10(b)
R v Gunning [May 19, 2005]	Defence – defence of property Charge to jury
R v Fice [May 20, 2005]	Sentencing – conditional sentence
R v Mapara [April 27, 2005]	Evidence – hearsay rule
R v Chow [April 27, 2005]	Procedure - severance

中国刑法立法新进展
—1997 年刑法典施行以来

Recent Developments in Criminal Law in China -- Since the Implementation of the Criminal Code in 1997

李希慧 Li Xihui*

Abstract
摘要

This paper briefly discusses the legislative progress in the area of criminal law in China since 1997 when the Criminal Law of the People's Republic of China became effective. The paper contains three parts:

* 北京师范大学刑事法律科学研究院中国刑法研究所所长、教授、法学博士；中国法学会刑法学研究会秘书长；国际刑法协会中国分会理事。**Director of the Institute for Chinese Criminal Law at the Research College for Criminal Jurisprudence, Beijing Normal University**

The first part illustrates the documents in the area of criminal law promulgated by the Chinese legislature[1] since the Criminal Law in 1997, including one piece of special legislation on criminal law, six amendments to the Criminal Law and nine interpretations to the Criminal Law.

The second part elaborates on the contents and characteristics of the Chinese criminal laws since the Criminal Law became effective in 1997. The contents include:

1. Additions of new categories of offences. The additions are: fraudulent purchase of foreign currencies; hiding and purposeful destruction of accounting vouchers, books, and financial statements; financing of terrorist activities; placing false hazardous substances; fabricating and purposefully spreading false information of terrorism; smuggling of waste substances[2]; engaging child labour in dangerous and heavy labour; obstructing the administration of credit cards; stealing, buying and illegally providing credit card information of others; damaging weapons and equipment by faults; military facilities, and military communications; serious accidents endangering public safety at mass activities; failure to report or misreport accidents endangering safety; false bankruptcy; breach of trust by damaging the interests of public-listed corporations; obtaining loans and financing credits by cheating; breach of trust by using entrusted assets; use of funds against regulations; organizing disabled people and children to beg; and perverting arbitration.

[1] The Chinese legislature here refers to the National People's Congress (NPC) of China.
[2] Both the translator and the editor failed to verify the English translation of the title of this legislation/regulation so this is translated to our best intelligent guess.

2. Revision of some components of crimes. Major revisions have been made on the components of crimes for unauthorized deposit or transfer of foreign exchange; unauthorized establishment of financial institutions; insider trading and disclosing inside information; money laundering; producing and selling sub-standard medical equipment; crime involving responsibilities for major and serious accidents; briberies received by corporate and enterprise staff; briberies offered by corporate and enterprise staff; manipulating transactions and prices of securities and futures; and illegal issuance of financial instruments.

3. Revisions of mandatory sentence for several crimes. For example, the maximum 10-year sentence for organizing and leading terrorist activities has been raised to life imprisonment; the maximum 7-year sentence for the crime involving responsibilities for major and serious accidents has been raised to 15 years; the maximum 5-year sentence for manipulating security and future markets has been raised to 10 years, the mandatory sentence for gambling (setting up gambling venues) has been raised from three years to 10 years, and the penalty for harbouring, transferring, buying stolen goods or selling stolen goods on others' behalf has been raised from three years to seven years.

The promulgation of criminal legislation after the implementation of Criminal Law in 1997 demonstrates the following three characteristics:

1. Criminalization, namely, behaviours and actions endangering the society not covered under the 1997 Criminal Law have been added as crimes.

2. Enlarging the scope of existing crimes, namely including more behaviours, more targets of crime, more parties of crime and lowering standards for criminalization to capture a larger scope for existing crimes already established.
3. Raising the mandatory sentence for existing crimes. From the perspective of the legislative method, the promulgation of a single piece of special criminal legislation will fade out from future legislative work in China, and amendments to the Criminal Law will become the main trend for future legislation of criminal laws in China.

Part Three briefly analysed the reasons for the characteristics of the content and format of the criminal legislation in China after the implementation of the Criminal Law in 1997. It points out that the above-mentioned characteristics are determined by the reality of the Chinese society and existing legislative status quo. At a time when economy and politics keep changing and developing, it is reasonable to criminalize behaviours and actions that threaten the society and to enlarge the scope of the existing crimes. The previous mandatory sentence for several crimes were set too low, and an appropriate increase in the penalty realizes the principle of penalty matching crimes. The legislation of criminal laws is moving towards the trend of having one single integrated collection of the Criminal Law and its amendments due to the advantages inherent in the Criminal Law amendments.

本文就中国 1997 年刑法典施行后的刑法立法进展作了简要的介绍。文章分三个部分：

第一部分介绍了 1997 年刑法典施行后中国立法机关制定的刑法文件，包括 1 个单行刑法、6 个刑法修正案以及 9 个刑法立法解释。

第二部分阐述了1997年刑法典施行后中国刑法立法的内容与特点。其内容包括：1.增设新的犯罪。即增设了骗购外汇罪；隐匿、故意销毁会计凭证、会计账簿、财务会计报告罪；资助恐怖活动罪，投放虚假危险物质罪；编造、故意传播虚假恐怖信息罪；走私废物罪；雇用童工从事危重劳动罪；妨害信用卡管理罪；窃取、收买或者非法提供他人信用卡信息资料罪；过失损坏武器装备、军事设施、军事通信罪；大型群众性活动重大安全事故罪；不报、谎报安全事故罪；虚假破产罪；背信损害上市公司利益罪；骗取贷款、金融信用票证罪；背托运用受托资产罪；违规运用资金罪；组织残疾人、儿童乞讨罪；枉法仲裁罪。2.修改了一些犯罪的构成要件。主要修改了逃汇罪；擅自设立金融机构罪；内幕交易、泄露内幕信息罪；洗钱罪；生产、销售不符合标准的医用器材罪；重大责任事故罪；公司、企业人员受贿罪；公司、企业人员行贿罪罪；操纵证券、期货交易价格罪；非法出具金融票证罪等犯罪的构成要件。3.修改了一些犯罪的法定刑。如将组织、领导恐怖活动组织罪的最高刑从10年有期徒刑提高到无期徒刑；将重大责任事故罪的最高刑由7年有期徒刑提高到15年有期徒刑；操纵证券、期货市场罪的最高刑从5年有期徒刑提高到10年有期徒刑；赌博罪（开设赌场）的法定刑由原来的3年有期徒刑提高到10年有期徒刑；窝藏、转移、收购或者代为销售赃物的犯罪的最高刑由原来的3年有期徒刑提高到7年有期徒刑。

上述中国1997年刑法典施行后的刑法立法的内容表明了以下三个特点：1.犯罪化。即将1997年刑法典完全没有涉及的危害社会的行为增设为犯罪。2.扩大已有犯罪的范围，即通过扩大行为方式、行为对象、犯罪主体以及降低构罪标准等方式将原有犯罪范围予以扩大。3.提高已有犯罪的法定刑。从刑法立法

的形式上讲，单行刑法将淡出中国以后的刑法立法，刑法修正案将担当起中国未来刑法立法的重任。

第三部分对 1997 年刑法典施行后中国刑法立法在内容和形式上所呈现出的特点的原因作了简要分析，指出，上述特点的呈现是由中国的社会现实和立法现状所决定的。在经济、政治不断变革、发展的时期，将一些新的危害社会的行为犯罪化以及将已有犯罪的范围扩大化都在情理之中。某些犯罪的原有法定刑过低，对其予以适当的提高体现了罪责刑相适应原则。刑法立法形式走向刑法修正案单一化，这是由刑法修正案自身所具有的优势决定的。

中国刑法立法新进展
—1997 年刑法典施行以来

Recent Developments in Criminal Law in China -- Since the Implementation of the Criminal Code in 1997

李希慧　Li Xihui*

中国的第一部刑法典即《中华人民共和国刑法》于 1980 年 1 月 1 日起施行，在该部刑法典施行 17 年多之后，中国的立法机关于 1997 年颁布了经过修订后的刑法典，该刑法典自 1997 年 10 月 1 日起施行，通常被称为 1997 年刑法典。在 1997 年刑法典颁布施行后，中国立法机关的刑法立法活动依然十分活跃，取得的立法成果也相当丰硕。本文就中国 1997 年刑法典施行后的刑法立法进展作一简单的介绍。

* 北京师范大学刑事法律科学研究院中国刑法研究所所长、教授、法学博士；中国法学会刑法学研究会秘书长；国际刑法协会中国分会理事。Director of the Institute for Chinese Criminal Law at the Research College for Criminal Jurisprudence, Beijing Normal University

一、1997年刑法典颁布后中国立法机关制定的刑法文件概览

1997年刑法典颁布后，中国刑法立法机关先后制定了一个单行刑法和6个刑法修正案。一个单行刑法即《全国人大常委会关于惩治骗购外汇、逃汇和非法买卖外汇犯罪的决定》（1998年12月29日颁布并施行）。六个刑法修正案分别是：（1）《中华人民共和国刑法修正案》（1999年12月25日通过，1999年12月25日起施行）；（2）《中华人民共和国刑法修正案（二）》（2001年8月1日通过，2001年8月31日起施行）；（3）《中华人民共和国刑法修正案（三）》（2001年12月29日通过并施行）；（4）《中华人民共和国刑法修正案（四）》（2002年12月28日通过并施行）；（5）《中华人民共和国刑法修正案（五）》（2005年2月28日通过并施行）；（6）《中华人民共和国刑法修正案（六）》（2006年6月29日公布并施行）。

除了上述一个单行刑法和六个刑法修正案外，1997年刑法典颁布以来，中国的全国人大常委会还先后颁布了9个立法解释，即：《关于＜中华人民共和国刑法＞第93条第2款的解释》（2000.4.29）；《关于＜中华人民共和国刑法＞第二百二十八条、第三百四十二条、第四百一十条的解释》（2001.8.31）；《＜关于中华人民共和国刑法＞第三百八十四第一款的解释》（2002.4.28）；《关于＜中华人民共和国刑法＞第二百九十四条第一款的解释》（2002.4.28）；《关于＜中华人民共和国刑法＞第百一十三条的解释》（2002.9.29）；《关于＜中华人民共和国刑法＞第九章渎职罪主体适用问题的解释》（2002.10.28）；《关于＜中华人民共和国刑法＞有关信用卡规定的解释》（2004.12.29）；《关于＜中华人民共和国刑法＞有关出口退税、抵扣税款的其他发票规定的解释》（2005.12.29）；《关于＜中华人民共和国

刑法＞有关文物的规定适用于具有科学价值的古脊椎动物化石、古人类化石的解释》（2005.12.29）。关于立法解释是否属于刑法立法的表现形式，在中国法学界尚存分歧。一种观点认为，立法解释属于法律解释的一种，因此，它不是立法；另一种观点认为，立法解释是国家立法机关作出的，因此，属于立法的范畴。上述第二种观点为多数学者所赞同，处于通说的地位，笔者亦认可该观点。但由于立法解释毕竟是就已有的刑法规定的含义所进行的阐释，而不是对刑法规范的创制，因此，下文所论及的刑法立法并不包括刑法立法解释。

二、1997年刑法典颁布后中国刑法立法的内容与特点

1997年刑法典颁布后中国刑法立法的内容主要包括以下几个方面：

（一）增设新的犯罪

1997年刑法典施行后增设新犯罪的具体情况如下：

《关于惩治骗购外汇、逃汇和非法买卖外汇犯罪的决定》增设了骗购外汇罪，该罪是指使用伪造、变造的购买外汇所需的凭证、单据，或者重复使用购买外汇所需的凭证、单据，以及用其他方式骗购外汇，数额较大的行为。

《刑法修正案》第1条增设的隐匿、故意销毁会计凭证、会计账簿、财务会计报告罪，该罪是指隐匿、故意销毁会计凭证、会计账簿、财务会计报告，情节严重的行为。

《刑法修正案（三）》第4条增设了资助恐怖活动罪，该罪是指资助恐怖活动组织或者实施恐怖活动的个人的行为；该修正案第8条增设了投放虚假危险物质罪和编造、故意传播虚假恐怖信息罪，前罪是指投放虚假的爆炸性、毒害性、放射性、传染病病原体等物质，严重扰乱社会秩序的行为；后罪则是指

编造爆炸威胁、生化威胁、放射威胁等恐怖信息，或者明知是编造的恐怖信息而故意传播，严重扰乱社会秩序的行为。

《刑法修正案（四）》第4条增设了走私废物罪、雇用童工从事危重劳动罪。前罪是指逃避海关监管将境外的固体废物、液态废物和气态废物运输进境，情节严重的行为。后罪是指违反劳动管理法规，雇用未满16周岁的未成年人从事超强度体力劳动的，或者从事高空、井下作业的，或者在爆炸性、易燃性、放射性、毒害性等危险环境下从事劳动，情节严重的行为。

《刑法修正案（五）》第1条增设了妨害信用卡管理罪和窃取、收买或者非法提供他人信用卡信息资料罪。前罪包括以下几种情形：（1）明知是伪造的信用卡而持有、运输的，或者明知是伪造的空白信用卡而持有、运输，数量较大的；（2）非法持有他人信用卡，数量较大的；（3）使用虚假的身份证明骗领信用卡的；（4）出售、购买、为他人提供伪造的信用卡或者以虚假的身份证明骗领的信用卡的。后罪是指窃取、收买或者非法提供他人信用卡信息资料的行为。《刑法修正案（五）》第3条增设了过失损坏武器装备、军事设施、军事通信罪，该罪是指过失致使武器装备、军事设施、军事通信遭受损坏，造成严重后果的行为。

《刑法修正案（六）》增设了以下犯罪：1.大型群众性活动重大安全事故罪（第3条），是指举办大型群众性活动违反安全管理规定，因而发生重大伤亡事故或者造成其他严重后果的行为。2.不报、谎报安全事故罪（第4条），是指负有职责的人员，在安全事故发生后，不报或者谎报事故情况，贻误事故抢救，情节严重的行为。3.虚假破产罪（第6条），是指公司、企业通过隐匿财产、承担虚构的债务或者以其他方法转移、处分财产、实施虚假破产，严重损害债权人或者其他人利益的行为。4.背信损害上市公司利益罪（第9条），

是指上市公司的董事、监事、高级管理人员违背对公司的忠实义务，利用职务便利，操纵上市公司从事一定的行为，致使上市公司遭受重大损失的行为。5.骗取贷款、金融信用票证罪（第10条），是指以欺骗手段取得银行或者其他金融机构贷款、票据承兑、信用证，保函等，给银行或者其他金融机构造成重大损失或者有其他严重情节的行为。6.背托运用受托资产罪（第12条），是指商业银行、证券交易所、证券公司、期货经纪公司、保险公司或者其他金融机构，违背受托义务，擅自运用客户资金或者其他委托、信托的财产，情节严重的行为。7.违规运用资金罪（12条），是指社会保障基金管理机构、住房公积金管理机构等公众资金管理机构，以及保险公司、保险资产管理公司、证券投资基金管理公司，违反国家规定运用资金，情节严重的行为。8.组织残疾人、儿童乞讨罪（第17条），是指以暴力、胁迫手段组织残疾人或者不满14周岁的未成年人乞讨的行为。9.枉法仲裁罪（第20条），是指依法承担仲裁职责的人员，在仲裁活动中故意违背事实和法律作枉法裁决，情节严重的行为。

（二）修改了一些犯罪的构成要件

1.逃汇罪构成要件的修改。《关于惩治骗购外汇、逃汇和非法买卖外汇犯罪的决定》第3条对《刑法》第190条逃汇罪的构成要件作出了以下修改：（1）将该罪的主体由原来只能由国有公司、企业或者其他国有单位构成修改为所有的公司、企业或者其他单位都可以构成。（2）将原来构罪标准的“情节严重”修改为“数额较大”。

2.对《刑法》第168条规定的犯罪的构成要件的修改。修订前的《刑法》第168条规定的是国有公司、企业单位人员失职罪、国有公司、企业单位人员滥用职权罪，其主体为国有公司、企业直接负责的主管人员。《刑法修正案》

第 2 条扩大了该罪的主体范围，即将“国有公司、企业单位直接负责的主管人员”修改为“国有公司、企业、事业单位的工作人员”。

3.擅自设立金融机构罪构成要件的修改。修订前的《刑法》第 174 条第 1 款规定的擅自设立金融机构罪的罪状是：“未经中国银行批准，擅自设立商业银行或者其他金融机构的”，《刑法修正案》第 3 条修改为“未经国家有关主管部门批准，擅自设立商业银行、证券交易所、期货交易所、证券公司、期货经纪公司、保险公司或者其他金融机构的”。修订前的《刑法》第 174 条第 2 款规定的罪状是：“伪造、变造、转让商业银行或者其他金融机构的经营许可证的，依照照前款的规定处罚。”《刑法修正案》第 3 条则将上述规定修改为“伪造、变造、转让商业银行、证券交易所、期货交易所、证券公司、期货经纪公司、保险公司或者其他金融机构的经营许可证或者批准文件的”。

4.内幕交易、泄露内幕信息罪构成要件的修改。《刑法修正案》第 4 条将内幕交易、泄露内幕信息罪的主体由原来的证券交易内幕信息的知情人员或者非法获取证券交易内幕信息的人员修改为证券交易、期货交易内幕信息的人员或者非法获取证券交易内幕信息、期货交易内幕信息的人员。内幕信息由原来的证券交易内幕信息扩大为包括证券交易内幕信息和期货交易内幕信息。

5.《刑法修正案》第 5 条将《刑法》原第 181 条规定的犯罪行为由“编造并传播影响证券交易的虚假信息，扰乱证券交易市场”修改为“编造并传播影响证券、期货交易的虚假信息，扰乱证券、期货交易市场”；同时，将该条规定的诱骗投资者买卖证券的犯罪修改为诱骗投资者买卖证券、期货合约的犯罪。

6.《刑法修正案（二）》将《刑法》第342条原规定的“非法占用耕地改作他用，数量较大，造成耕地大量毁坏”修改为“非法占有耕地、林地等农用地，改变被占用土地用途，数量较大，造成耕地、林地等农用地大量毁坏”。

《刑法修正案（三）》第1条将《刑法》第114条原规定的“放火、爆炸、决水、投毒或者以其他危险方法破坏工厂、矿山、油田、港口、水源、仓库、住宅、森林、农场、谷场、牧场、重要管道、公共建筑物或者其他公私财物”修改为“放火、决水、爆炸以及投放毒害性、放射性、传染病病原体等物质或者以其他危险方法危害公共安全”。该修正案第2条将《刑法》第115条原规定的“放火、爆炸、投毒或者以其他危险方法致人重伤、死亡或者使公私财产遭受重大损失”修改为“放火、决水、爆炸以及投放毒害性、放射性、传染病病原体等物质或者以其他危险方法致人重伤、死亡或者使公私财产遭受重大损失”。

《刑法修正案（三）》第5条将《刑法》第125条第2款原规定的“非法买卖、运输核材料的，依照前款的规定处罚。”修改为“非法制造、买卖、运输、储存有毒性、放射性、传染病病原体等物质、危害公共安全的，依照前款的规定处罚。”

《刑法修正案（三）》第6条将《刑法》第127条第1款原规定的“盗窃、抢夺枪支、弹药、爆炸物”修改为“盗窃、抢夺枪支、弹药、爆炸物的，或者盗窃、抢夺毒害性、放射性、传染病病原体等物质，危害公共安全”；将该条第2款原规定的“抢劫枪支、弹药、爆炸物或者盗窃、抢夺国家机关、军警人员、民兵的枪支、弹药、爆炸物的”修改为“抢劫枪支、弹药、爆炸物的，或者抢劫毒害性、放射性、传染病病原体等物质，危害公共安全的，或者盗窃、抢夺国家机关、军事人员、民兵的枪支、弹药、爆炸物”。

洗钱罪构成要件的修改。《刑法修正案（三）》第 7 条将洗钱罪的上游犯罪由 1997 年刑法典第 191 条所规定的“毒品犯罪、黑社会性质组织犯罪、走私犯罪”三类犯罪增加为四类犯罪，即在前述三类犯罪的基础上增加了恐怖活动犯罪。《刑法修正案（六）》第 16 条则进一步将洗钱罪的上游犯罪由上述四类扩大为七类，即在前述四类犯罪的基础上增加了“贪污贿赂犯罪、破坏金融管理秩序犯罪、金融诈骗犯罪”三类。

《刑法修正案（四）》第 1 条将《刑法》第 145 条规定的生产、销售不符合标准的医用器材罪的构罪标准“对人体健康造成严重危害”修改为“足以严重危害人体健康”。

《刑法修正案（四）》第 5 条将《刑法》第 339 条原规定的“以原料利用为名，进口不能用作原料的固体废物”修改为“违反国家规定，将境外的固体废物进境倾倒、堆放、处置”。

《刑法修正案（四）》第 6 条将《刑法》第 344 条原规定的“违反森林法的规定，非法采伐、毁坏珍贵树木”修改为“违反国家规定，非法采伐、毁坏珍贵树木或者国家重点保护的其他植物的，或者非法收购、运输、加工、出售珍贵树木或者国家重点保护的其他植物及其制品”。

《刑法修正案（四）》第 7 条将《刑法》第 345 条第 3 款原规定的“以牟利为目的，在林区非法收购明知是盗伐、盗伐的林木，情节严重的”修改为“非法收购、运输明知是盗伐、滥伐的林木，情节严重”。

《刑法修正案（五）》第 1 条将《刑法》第 196 条规定的信用卡诈骗罪的第一种行为方式“使用伪造的信用卡”修改为“使用伪造的信用卡，或者使用以虚假的身份证明骗领的信用卡”。

《刑法修正案（六）》第1条将《刑法》第134条原规定的“工厂、矿山、林场、建筑企业或者其他企业、事业单位的职工，由于不服管理、违反规章制度，或者强令工人违章冒险作业，因而发生重大伤亡事故或者造成严重后果的”修改分为两款，其中第1款规定“在生产、作业中违反有关安全管理的规定，因而发生重大伤亡事故或者造成其他严重后果的，处三年以下有期徒刑或者拘役；情节特别恶劣的，处三年以上七年以下有期徒刑。”；第2款规定“强令他人违章冒险作业，因而发生重大伤亡事故或者造成其他严重后果的，处5年以上有期徒刑。”

《刑法修正案（六）》第2条将《刑法》第135条原规定的“工厂、矿山、林场、建筑企业或者其他企业、事业单位的劳动安全设施不符合国家规定，经有关部门或者单位职工提出后，对事故隐患仍不采取措施，因而发生重大伤亡事故或者造成其他严重后果”修改为“安全生产设施或者安全生产条件不符合国家规定，因而发生重大伤亡事故或者造成其他严重后果”。

《刑法修正案（六）》第7条将《刑法》第163条原规定的公司、企业人员受贿犯罪的主体范围扩大为“公司、企业或者其他单位人员”；第8条将《刑法》第164条原规定的对公司、企业人员行贿犯罪的对象“公司、企业人员”修改为“公司、企业或者其他单位人员”。

《刑法修正案（六）》第11条将《刑法》第182条原规定的“操纵证券、期货交易价格，获取不正当利益或者转嫁风险，情节严重”修改为“操纵证券、期货市场，情节严重”。

《刑法修正案（六）》第13条将《刑法》第186条第1款、第2款分别规定的违反向关系人发放贷款罪、违法发放贷款罪合并为一罪，将“向关系人发放贷款”规定为从重处罚情节。

《刑法修正案（六）》第15条将《刑法》第188条原规定的构成非法出具金融票证罪的标准由“造成损失较大”修改为“情节严重”。

《刑法修正案（六）》第19条将《刑法》第312条原规定的“明知是犯罪所得的赃物而予以窝藏、转移、收购或者代为销售”修改为“明知是犯罪所得及其产生的收益而予以窝藏、转移、收购或者代为销售或者以其他方法掩饰、隐瞒”。

（三）修改了某些犯罪的法定刑

《刑法修正案（三）》第3条将组织、领导恐怖活动组织罪的法定最高刑从10年有期徒刑提高到无期徒刑。

《刑法修正案（六）》第1条将《刑法》第134条规定的重大责任事故罪的法定最高刑由原来的7年有期徒刑提高到15年有期徒刑。（强令违章冒险作业，因而发生重大伤亡事故或者造成其他严重后果，情节特别恶劣。）

《刑法修正案（六）》第11条将《刑法》182条规定的操纵证券、期货市场罪的最高刑从5年有期徒刑提高到10年有期徒刑。

《刑法修正案（六）》将《刑法》第303条规定的赌博罪（开设赌场）的法定刑由原来的3年有期徒刑提高到10年有期徒刑。

《刑法修正案（六）》第19条将《刑法》第312条规定的窝藏、转移、收购或者代为销售赃物的犯罪的最高法定刑由原来的3年有期徒刑提高到7年有期徒刑。

由上所述，中国1997年刑法典施行后的刑法立法从内容上讲，具有以下特点：（1）犯罪化。即将《刑法》完全没有涉及的危害社会的行为增设为犯罪；（2）扩大已有犯罪的范围，即通过扩大行为方式、行为对象、犯罪主体以及降低构罪标准等方式将原有犯罪范围予以扩大。（3）提高已有犯罪的法

定刑。前文所述的几种犯罪的法定刑都有较大幅度的提高。从刑法立法的形式上讲，刑法修正案修改、补充刑法单一化的趋势已十分明显。在 1997 年刑法典施行后，中国的刑法立法文件只有一件是单行刑法即《全国人民代表大会常务委员会关于惩治骗购外汇、逃汇和非法非法买卖外汇犯罪的决定》，其余的均是刑法修正案。单行刑法将淡出中国以后的刑法立法，刑法修正案将担当起中国未来刑法立法的重任。

三、1997 刑法典之后中国刑法立法之评析

1997 年刑法典施行后中国刑法立法在内容上之所以呈现出上述三个特点，这是由于中国的社会现实和立法现状所决定的。

中国正处于一个经济、政治不断变革、发展的时期，在这种变革、发展迅速的情况下，一些新的严重危害社会的行为也会随之出现，为了维护社会的正常秩序，使社会进一步地发展，就有必要对一些新的严重危害社会的行为予以犯罪化。例如，随着信用卡被广泛地使用，妨害信用卡管理，窃取、收买或者非法提供他人信用卡信息资料的行为时有发生，从而就有必要将这些行为规定为犯罪。又如，在日益重视经济发展和经济效益的社会环境下，人们的安全意识越来越淡薄，因而安全事故不断发生，不报、谎报安全事故的行为也随之出现，将这类行为规定为犯罪理所应当。

对一些已有的犯罪的构成要件进行修改，有的是因为立法者在当时立法时考虑得不够周全，将应该规定为犯罪的情况没有纳入犯罪之中，例如，将公司、企业人员受贿罪修改为公司、企业、其他单位人员受贿罪，就是因为立法机关在制定 1997 年刑法典时忽略了公司、企业之外的其他单位从事管理但不

具有国家工作人员身份的人员也会实施受贿行为的情况，因此，有必要将公司、企业人员受贿罪修改为公司、企业或者其他单位人员受贿罪。

对一些犯罪的法定刑的提高，并不意味着中国的刑法立法具有重刑化的趋势，而是因为立法者原来对这些犯罪所确定的法定刑没有体现罪责刑相适应原则，即立法者当时没有正确地估价这些犯罪的社会危害性可能达到的严重程度，导致法定最高刑过低，对其调整势在必行。

刑法立法形式走向刑法修正案单一化，这是由刑法修正案自身所具有的优势决定的。由于刑法修正案是对原有刑法条文内容的修改，因而，修改的内容直接列入到原有条文之中，具有不破坏原刑法条文整体性的优点，便于查阅。而采用诸如“决定”、“补充规定”之类的单行刑法形式对刑法典进行修改、补充，会导致刑法立法文件形式人为的多样化，破坏刑法的整体性，查阅起来也不方便。

总之，1997 年刑法典施行后中国刑法立法的内容和形式的走向是正确的，与中国经济、政治和社会的发展是相适应的。笔者相信，中国刑法立法将根基于中国的实际，在理性和科学精神的指引下，不断地发展和完善。

中国刑事诉讼立法的回顾与展望

Review and Outlook on China's Criminal Procedure Laws

刘万奇[*] 周欣[**] Liu Wanqi, Zhou Xin

Abstract
摘要

The legislature progress of compiling, revising and re-revising the Criminal Procedure Law of China has been a showcase of the country's status in the development of rule of law and democracy. The Chinese Criminal Law started from scratch, progressed from less than satisfactory to gradually becoming satisfactory. It transformed from adopting the criminal procedure guideline of punishing crimes to maintain social order to accommodating the modern society notions of rule of law such as the emphasis on both the substance and procedures, the combination of punishing crimes and protection of human rights as well as the balance of judicial justice with procedural efficiency. In terms of procedural system and process, it has

[*] 刘万奇，中国人民公安大学法律系主任，教授，法学博士，中国法学会刑事诉讼法学会常务理事。
Dean at the Law Department of the People's Public Security University of China
[**] 周欣，中国人民公安大学法律系副主任，教授，中国法学会刑事诉讼法学会理事。
Deputy Dean at the Law Department of the People's Public Security University of China

gradually shifted from the investigation-oriented approach to the trial-oriented approach, where the trial has also been transformed from inquisitorial mode to adversarial mode.

On March 17th, 1996, the 8th National People's Congress conducted the first large-scale revision of the Criminal Procedure Law, content of which was increased from 164 to 225 articles. The Law adjusted and repositioned the four major functional departments of investigation, defence, prosecution, and trial.

Specifically manifested are four aspects: firstly, the function of investigation emphasizes on its double-role in both combating crimes and protecting human rights. Secondly, the function of defence highlights the reinforced protection of the legal rights of suspects and accused. Thirdly, the function of prosecution mainly strengthens the legal supervision of the procedures for filing a case and investigating it. Fourthly, the trial function emphasizes the neutrality and fairness of the trial judge.

The revision of the Criminal Procedure Law has these major tasks: to further balance the relation between judicial fairness and procedural efficiency, and between combating crimes and protecting human rights; to properly handle the relation between the effects of domestic laws and international conventions; to seek reasonable and appropriate allocation of resources among public security, prosecution and judiciary; to strive to upgrade the quality of investigation; to further consolidate the adversary nature of trials; and to improve on the review process of capital punishment.

Particular trends in the reform progress are:

Firstly to revise the basic principles for the Criminal Procedure Law. Some commonly recognized basic international principles for proceedings have been added, among which are: presumption of innocence, independence of judiciary, statutory criminal procedure, double jeopardy, and the rule of exclusion of inadmissible evidence.

Secondly, to transform the modes of investigation. Chinese investigation mode should as soon as possible be transformed from inquisitorial to the “triangular” procedural structure constituted of the prosecution, the defence and the neutral party, namely, adding the writ of summons and the lawyer defence system to realise the balance between the prosecution and the defence in the course of investigation and to exhibit the adversarial characteristics of judiciary neutrality.

Thirdly, to adjust the relation between the police and prosecution. In view of our country’s defective relationship between the police and prosecution, which is unfavorable to the accurate and efficient execution of the right to criminal prosection. It is necessary to strengthen the cooperation and communication between the police and the prosecution so as to push forward an accurate and efficient execution of the prosecution.

Fourthly, to enlarge the scope of defence. For example, to give lawyers the power for extensive and meaningful investigation in a practical sense to collect evidence; to extend the scope of legal aid recipients; and to ensure the lawyer’s right to discovery.

Fifthly, to enhance the quality and efficiency of the trial of first instance. For example, mediation is recommended for cases of private prosecution; categories of cases applicable for simplified procedure need to be appropriately increased; and court appearance of witnesses in general procedure has to be strengthened.

Above all, a scientific and rational construction and optimization of a judicial system suitable for the Chinese situations needs to take two aspects into consideration. One is that human kind has a common need for a minimum level of justice and that the Chinese criminal procedure reform is inevitably in line with the international tide for judicial reform. The other is that the realization of any system depends on the level of acceptance from the "localized resources" of that country in realistic terms, namely, the extent, ways, and time in which the internationalized rules and notions are implemented in China cannot but to be realized with the "localized" ways. Therefore, the Chinese judicial reform has a premise, i.e. adequate respect should be provided for the positive factors embedded in our traditional domestic legal culture.

中国刑事诉讼法的制定、修改及其再修改的立法进程，集中反映和体现了国家法治化、民主化的建设发展状况。中国刑事诉讼法典从无到有，从不完善到逐步完善，从将惩罚犯罪，维护社会秩序作为刑事诉讼的指导思想转变为强调实体与程序并重、惩罚犯罪与保障人权相结合、司法公正与诉讼效率兼顾等现代社会的法治理念，并在诉讼制度、诉讼程序上逐渐将侦查为中心转变为审判为中心，将纠问式的审判模式转变为对抗式的审判模式。

1996 年 3 月 17 日，全国第八届全国人民代表大会对刑事诉讼法进行了第一次大范围的修正，修改后的刑事诉讼法由 164 条增加到了 225 条。刑事诉讼

法主要对侦查、辩护、检察、审判四大职能部门进行了重新调整和定位。具体表现在四个方面：

第一，侦查职能注重打击犯罪与保障人权的双重功效。第二，辩护职能着重加强对犯罪嫌疑人、被告人合法权益的保护。第三，检察职能主要强化对立案程序、侦查程序的法律监督。第四，审判职能强调审判法官的中立性和公正性。

再修法刑事诉讼法时的主要任务是：进一步摆正司法公正与诉讼效率、打击犯罪与保障人权的平衡关系，处理好国内法与国际公约的效力关系，寻求公检法三机关司法资源的合理配置，努力提高侦查质量，进一步强化审判中的对抗性，完善死刑复核程序。具体的改革动态是：第一，修改刑事诉讼法律基本原则。新增一些国际上共识的基本诉讼原则。其中包括：无罪推定原则、司法独立原则、程序法定原则、一事不再理原则、非法证据排除规则等。第二，转变侦查模式。中国的侦查模式应当尽快从单一的纠问式转变为追诉方、辩护方和中立方组成的“三角形”诉讼结构，即增设令状主义、律师辩护制度，以体现侦查阶段的控辩平衡，司法中立的抗辩制特征。第三，调整警检关系。针对目前我国现有警检关系不利于刑事追诉权准确而高效行使的弊端，加强警察对检察机关的配合与相互沟通，促进追诉权准确而高效行使。第四，扩大辩护范围。如，赋予律师广泛的、有实际意义的调查取证权；扩大法律援助对象的范围；确保律师的先悉权等。第五，提高一审质量与效率。如，自诉案件鼓励采用调解程序；适当增加简易审判程序的种类；强化普通程序的证人出庭。

总之，科学、理性建构、完善适合中国国情的司法制度要注重两个方面的问题：一是，由于人类存在着对一些最低限度的正义的共同需求，因此，中国的刑事诉讼法改革必然顺应国际司法改革的潮流；另一方面，任何制度的现实

化都依赖于现实国家“本土资源”对其的接受度，即或国际化的规则与理念，在中国的实施程度、方式与时间也必然依“本土化”的方式实现。因此，中国的司法改革，必须以对本国的传统法律文化中的积极因素给予足够的尊重为前提。

中国刑事诉讼立法的回顾与展望

Review and Outlook on China's Criminal Procedure Laws

刘万奇[*] 周欣[**] Liu Wanqi, Zhou Xin

"自从新中国成立以来，迄今为止，还从来没有一部法律的制定和修改，像这次刑事诉讼法的修改这样，引起社会各界，特别是公、检、法、司各个职能部门如此广泛的关注和如此激烈的争鸣。"[1]这是学者对中国 1996 年第一次修改刑事诉讼法时的真实写照。刑事诉讼法的修改之所以引起如此广泛的关注和重视，是因为该法与宪法的关系极为密切。"学者有称刑事诉讼法为实用之宪法"[2]刑事诉讼法本身就是一部重要的人权保障法，通过它可以反映和衡量一个国家民主与法治的发展水平，考察和了解该国司法制度的实际运行状况。因此，刑事诉讼法的修改就是中国的最高权力机构向全国公民发出的国家司法改革的信号，具有引领性作用。中国刑事诉讼法从制定到修改直至再修改，每迈

[*] 刘万奇，中国人民公安大学法律系主任，教授，法学博士，中国法学会刑事诉讼法学会常务理事。
Dean at the Law Department of the People's Public Security University of China
[**] 周欣，中国人民公安大学法律系副主任，教授，中国法学会刑事诉讼法学会理事。
Deputy Dean at the Law Department of the People's Public Security University of China
[1] 崔敏：《中国刑事诉讼法的新发展》，中国人民公安大学出版社 1996 年 4 月出版，第 2 页。
[2] 林山田：《刑事诉讼法》，台湾三民书局 1990 年 8 月增订三版，第 8 页。

出一步都十分艰难，都是各方权力（权利）与利益的重新调整与平衡。本文以新中国刑事诉讼法的确立、发展和最新的改革动态为主线，向各位同仁介绍中国二十多年的司法改革状况，期盼有更多的国际友人对中国司法制度的改革给予热情关注和大力支持。

一、新中国刑事诉讼法的制定与第一次修改概况

（一）中国刑事诉讼法制定的简要回顾

在延续数千年的中国古代司法制度中，“诸法合律”的格局一直保持到清朝末年，在清政府被迫同意开展的刑事诉讼改制活动中，引进和借鉴了西方法律制度。对其旧有的制度进行历史性变革是以《大清刑事民事诉讼法》（暂缓施行）为标志。尽管清末刑事诉讼改制最终以清政府的垮台而告终。但是，从德国、日本等国家引进和移植的西方近代前卫的刑事诉讼原则、诉讼制度和程序，为中国刑事司法制度从封建社会跨入现代法治社会奠定了良好的基础。

北洋政府和国民党政府基本上都是以清末《刑事诉讼律草案》为蓝本进行的修改和增补，形成了旧中国半封建半殖民地的刑事诉讼法。

直至 1949 年 2 月，中国共产党宣布废除了国民党六法全书，同时，国家立法机关积极筹备，试图制定一整套适合新中国的法律体系。但是，由于诸多原因，直到 1979 年 7 月才由全国人民代表大会以法典形式制定和颁布了新中国第一部刑事诉讼法典，该法典分为四编，共 164 条，并于 1980 年 1 月 1 日起正式实施。

经过16年的实践证明，这部法律中规定的诉讼任务、基本原则、诉讼制度和程序基本上符合中国国情。它在打击犯罪、维护社会治安，保障改革开放和促进经济建设等方面都发挥了重要作用。

（二）中国刑事诉讼法第一次修改的主要内容

1996年3月17日，全国第八届全国人民代表大会对刑事诉讼法进行了第一次大范围的修正，修改后的刑事诉讼法由164条增加到了225条。刑事诉讼法主要对侦查、辩护、检察、审判四大职能部门进行了重新调整和定位。具体表现在四个方面：

1．侦查职能注重打击犯罪与保障人权的双重功效。

1996年以前，中国实行的是审问式侦查模式，侦查机关居于绝对支配性地位，被追究者未获得诉讼主体地位，只有协助、配合侦查的义务。这可从当时侦查机关使用率最高的收容审查制度[3]和以限制人身自由为标志的强制措施期限以及在侦查阶段犯罪嫌疑人未能获得律师帮助等方面反映出来。

为了顺应有效人权保障的国际潮流，修改后的刑事诉讼法规范了侦查行为和强制措施，其中最重要的是取消了性质不明、法律依据不足、弹性很大而且缺乏有效监督的收容审查制度；同时，又考虑到中国现阶段犯罪率有增高趋势，立法者又通过降低逮捕条件、延长拘留时间等措施，以保障公安、司法机关对刑事案件的追诉功能。

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[3] 收容审查制度虽系行政措施，却被广泛用于公安机关的侦查活动中，即在未有正式逮捕、刑事拘留前，先以“收审”方式限制人身自由，待基本事实查清后再对被“收审”作出进一步处理。“收审”只需公安机关自行决定和执行，也未有具体的关押期限，因此，1996年修改后的刑事诉讼法取消了该制度。

2．辩护职能着重加强对犯罪嫌疑人、被告人合法权益的保护。

随着中国社会主义民主的发展和健全，刑事诉讼法增大了保障诉讼当事人，特别是犯罪嫌疑人、被告人诉讼权利的力度。在修改后的刑事诉讼法中，增加了对犯罪嫌疑人、被告人权利保护的条款，这无疑是对过去单一的诉讼价值观的积极纠偏。在这方面的体现主要有：一是，确立了一些有利于犯罪嫌疑人、被告人保护的原则，如未经人民法院判决不得对任何人确定有罪，以及法庭在证据不足、不能认定被告人有罪时应当作出无罪判决等；二是，加强了律师的法律帮助和辩护作用，如，提前了律师介入诉讼的时间，即犯罪嫌疑人在被侦查机关第一次讯问后或者被采取强制措施之日起，可以聘请律师为其提供法律咨询、代理申诉、控告和申请取保候审。在侦查阶段，受委托的律师有权会见犯罪嫌疑人，向侦查机关了解其涉嫌的罪名，同时，将辩护律师介入诉讼的时间提前至审查起诉阶段，在审查起诉阶段和审判阶段辩护人都有不同程度的调查取证权等。

3．检察职能主要强化对立案程序、侦查程序的法律监督。

为了充分发挥公、检、法三机关在刑事诉讼中各自的职能作用，更好地体现“分工负责、互相配合、互相制约”的诉讼原则，修改后的刑事诉讼法加强了人民检察院对公诉案件的立案、侦查的法律监督，并且缩小了人民检察院自行侦查案件的管辖范围，同时废除了实行多年的免予起诉制度。

首先，人民检察院对公安机关办理的刑事案件享有“立案监督”权，《刑事诉讼法》第 87 条规定，人民检察院认为公安机关对应当立案侦查的案件而不立案侦查的，或者被害人认为公安机关对应当立案侦查的案件而不立案侦查，向人民检察院提出的，人民检察院应当要求公安机关说明不立案的理由。

人民检察院认为公安机关不立案理由不能成立的，应当通知公安机关立案，公安机关接到通知后应当立案。这就是检察院行使法律监督权的具体体现。

其次，人民检察院对公安机关侦查活动有权进行的监督。这主要通过审查批捕和审查起诉两条途径。《刑事诉讼法》第 66 条规定：公安机关认为需要逮捕犯罪嫌疑人时，应当写出提请批准逮捕书，连同案卷材料、证据，一并移送同级人民检察院审查批准。此外，该法第 136 条还规定：凡需要提起公诉的案件，一律由人民检察院审查决定。人民检察院审查案件的时候，必须查明采取的强制措施是否适当以及侦查活动是否合法。这是典型的“侦查监督”。

再次，调整了人民检察院自侦案件的范围。1996 年以前，中国经济犯罪案件不断增加，人民检察院直接受理的刑事案件范围越来越广，这种状况直接影响人民检察院充分发挥“法律监督”职能。所以，修改后的刑事诉讼法将自侦案件的范围限定在“贪污贿赂罪、国家工作人员的渎职罪以及国家机关工作人员利用职务侵犯公民民主权利的犯罪。”这样可以使人民检察院集中主要精力应对数量剧增的公安机关移送的刑事案件。

最后，人民检察院废除了免予起诉制度[4]。立法机关在 1979 年的刑事诉讼法中设置此项制度的原因主要是为了体现“区别对待”的刑事政策，使案件得到及时分流，有利于节约司法资源，但是，其最大的弊端是造成审判权的分割，允许检察院对被追诉人作出有罪决定，严重违反了刑事诉讼的基本原则——法院独立行使审判权，同时也剥夺了被追诉人的辩护权、上诉权。此外，检

[4] “免予起诉制度”，是 1979 年中国刑事诉讼法中规定的一项诉讼制度。其含义是：对于已经构成犯罪，但是依照刑法规定不需要判处刑罚或者可以免除处罚的行为人，在审查起诉阶段，由检察院单方对其作出认定其有罪同时免予起诉的决定。

察院单方作出的免予起诉决定没有任何监督机制，所以，修改后的刑事诉讼法废除了免予起诉制度，同时将此类案件纳入酌定不起诉5的范畴。

4．审判职能强调审判法官的中立性和公正性。

立法者在总结过去审判实践经验的基础上，针对以往在审判程序中一度存在的“先定后审”、“控审不分”、合议庭的职责权限不明确等弊端，对刑事审判方式作了重大改革，采纳了日本的“起诉状一本主义”的起诉方式，修改后的刑事诉讼法第 150 条规定，人民检察院向法庭提起公诉时，只移送起诉书和证据目录、证人名单和主要证据复印件或者照片。[6]这样规定实质将庭前实体审改为程序审。

与此同时，修改后的刑事诉讼法通过明确审判中的举证责任构建了控辩双方的对抗式审判模式。1979 年的刑事诉讼法规定，“由审判人员向被告人出示物证”，实际上就是让法官承担指控犯罪的举证责任，这带有明显的“纠问主义”色彩。修改后的刑事诉讼法设计了“控辩举证对抗式”的新型庭审模式，即规定由控辩双方“向法庭出示物证”，这样规定，明确了控方负有举证责任，提高了被告方在庭审中的地位，同时也淡化了法官的倾向性、主动性。

此外，这次修改立法还增补了若干项基本原则，对于其他的诉讼制度和诉讼程序，也都有程度不同的修改和补充。

1996 年的刑事诉讼法通过对诉讼制度、诉讼模式、诉讼程序的修改，实际上体现了一些很重要的诉讼理念的转变：如强调实体与程序并重、惩罚犯罪与

[5]修改后的刑事诉讼法第 142 条第 2 款规定：“对于犯罪情节轻微，依照刑法规定不需要判处刑罚或者免除刑罚的，人民检察院可以作出不起诉决定。”又称“酌定不起诉”。

[6] 详见《中华人民共和国刑事诉讼法》的 150 条。

保障人权相结合、侦查为中心转变为审判为中心、纠问式的审判模式转变为对抗式的审判模式、司法公正与提高诉讼效率兼顾等。

二、修改后的刑事诉讼法在实施中遇到的新问题及其原因

（一）新法未能充分发挥作用的外部原因

由于诉讼理念的转变远远难于诉讼法的修改本身。所以，修改后的刑事诉讼法在10年的运行过程中并不是一帆风顺的。从当时司法改革的整体环境上看，某些外部原因影响了修改后的刑事诉讼法作用的有效发挥。

首先，立法者的诉讼价值理念仍然停留在传统的犯罪控制论的模式中，尽管修改后的刑事诉讼法在加强人权保障方面迈出了一大步。但在犯罪控制与权利保障的诉讼价值产生冲突时并没有得到妥善的协调，以查明实体真实，有效打击犯罪为刑事诉讼宗旨的基本理念没有根本性变化，传统的犯罪控制观念仍然居于诉讼价值的首位。

其次，在修改刑事诉讼法的过程中，有关方面的宣传力度没有跟上，致使在实际运行时，相关机关和人员（公安机关、检察院、法院、诉讼参与人）都有不适的感觉，甚至有的执法人员对新法的某些规定表现出较大的反感和抵触情绪。

再次，相应的配套措施与条件阙如。由于有些前期工作准备不充足，特别是涉及人力、物力、财力变化较大的部门，相应的办案条件、经费资源不能及时到位，有的改革措施无法落实，最终导致修改后的刑事诉讼法未能发挥应有功效。

最后，由于相关人员对立法技术研究不够深入，因此，修改增设的条文之间、前后条文之间存在不一致、不协调的现象。为了协调这些“规定”和“解释”，1998 年 1 月“中央六部委”[7]联合出台了一个 48 条的“规定”。随后不久，最高人民法院、最高人民检察院、公安部各自分别出台了《关于执行刑事诉讼法若干问题的解释》、《人民检察院实施＜刑事诉讼＞规则》、《公安机关办理刑事案件程序规定》。甚至一些地方人大也出台了适用于本省的有关“规定”和“解释”。公安、司法机关各自出台的司法解释，有的明显与刑事诉讼法的精神相违背，且这些多头的“规定”和“解释”之间，存在着某些冲突和矛盾，严重损害了刑事诉讼法的统一性、权威性。

（二）修改后的刑事诉讼法在具体实施过程中突显的问题

1．侦查阶段存在的突出问题。

“刑讯逼供”、“超期羁押”、“律师会见难”成为侦查阶段的三大顽疾。

首先，侦查人员在讯问犯罪嫌疑人时，采用刑讯逼供和变相刑讯逼供的行为仍然存在。究其原因，一方面，刑事诉讼法中没有确立侦查人员讯问犯罪嫌疑人时律师可以到场的权利，也没有赋予被讯问人沉默权；另一方面，非法证据排除规则没有确立，侦查人员通过刑讯获得口供在法庭上仍然可以作为定罪的根据。

[7] “六部委”是指，最高人民法院、最高人民检察院、公安部、国家安全部、司法部、全国人大常委会法制工作委员会。

其次，对被追诉人适用取保候审率极低，监视居住成为变相羁押的一种方式，同时，刑事拘留、逮捕羁押率过高，超期羁押问题难以解决。从中国 1996 年刑事诉讼法对逮捕条件的修改情况看，修改者的目的是为了降低逮捕的门槛，让其与刑事拘留更好的衔接。但是，问题主要出在两个方面：第一，现行法律规定逮捕条件的标准不够具体，不好把握；第二，人民检察院的内部考核标准以及人民法院的错案追究制等规定导致批准逮捕的权力机关在受到这些考核标准的压力下，无形中将批捕的条件升高了，高到与能够起诉、定罪的标准合而为一的程度。因此，实践中出现公安机关报送检察院批捕的案件退捕率越来越高，在是否达到逮捕条件的问题上，侦查机关与检察院出现标准不一，认识差距较大。这是导致变相羁押、超期羁押现象屡禁不止的主要原因。

最后，在侦查实践中，侦查机关担心律师会见犯罪嫌疑人可能影响侦查效率，或者担心律师会见犯罪嫌疑人时人身安全受到威胁，因此，在会见时间、次数以及会见方式上作出限制，致使律师与犯罪嫌疑人的秘密交流无法得到保障，会见的作用未能充分发挥出来。

2．检察院行使法律监督权存在的主要缺陷。

根据中国宪法的有关规定，人民检察院是国家的法律监督机构。因此，在刑事诉讼中，检察院不仅是公诉机关，代表国家主持公诉，同时，其还有权对刑事诉讼活动的全过程进行法律监督。但是，从修改后的刑事诉讼法的运行实况来看，人民检察院对公安机关的立案监督、侦查监督都存在问题，具体表现在以下几个方面：

（1）检察机关在立案监督中的问题：一是立案监督的范围有限。目前，人民检察院对公安机关的立案监督仅限于公安机关应当立案而作不立案决定的案件，对于公安机关不应立案而作立案决定的，立法没有赋予人民检察院相应的

监督权。实践中，某些公安机关滥用立案权，违法插手经济纠纷，人民检察院既使知情也无权加以制止并纠正。二是立案监督的知情途径狭窄。对于公安机关应当立案而不立案的情况，人民检察院现阶段主要是通过被害人向其申诉的途径而得知。对于没有被害人的案件，或者被害人由于主客观原因没有提出申诉的案件，人民检察院往往无从得知。这也是人民检察院对实践中大量存在的行政机关“以罚代刑”进行监督的重要隘口之一。

（2）检察机关在侦查监督中的问题：一是侦查监督的时间滞后。根据现行法的相关规定，公安机关除逮捕须经人民检察院事先审查批准之外，其他各项侦查活动，包括拘传、取保候审、监视居住、拘留等限制和剥夺公民人身自由的强制措施，以及搜查、扣押等涉及公民住宅、人身及财产权利的强制性措施与其他专门调查活动，均可自行决定适用。对此，人民检察院只能在审查起诉阶段进行事后审查，即使能够发现问题也为时已晚，不利于公民合法权益的维护。二是侦查监督的方式有限。在公安机关所进行的各项侦查活动中，除了复验、复查人民检察院可以派员参加以外，对于其他侦查活动，人民检察院均无权参与。这也意味着，对于绝大多数侦查活动的合法性，检察机关只能借助于书面审查，即通过对公安机关移送的相关材料进行阅卷而加以确定。这显然也不利于及时而有效地发现侦查违法并加以纠正。

3．审判阶段存在的突出的问题。

控辩式审判方式的出现是刑事诉讼法改革的一大成果，但存在的问题也不容忽视。突出反映在四个方面：一是庭前审查形同虚设。由于办案经费、办案人员等诉讼资源不配套，致使有些地方的公诉机关在移送主要证据的复印件时几乎把所有的有罪证据都移送到法院，法院“先定后审”的问题没有从根本上得到解决。二是辩护人在审判阶段的阅卷权无法保障。由于庭前审查由实体审

改为程序审，致使辩护人在开庭前看不到全案卷宗。开庭前控辩双方的证据互相保密，开庭时突然袭击，影响了庭审中控辩双方的对抗性。三是证人出庭作证难。证人是否一定要出庭，证人当庭作证是否属于一般原则，刑事诉讼法中无明确规定，同时又由于证人的诉讼义务观念不强等原因，实践中证人出庭作证率较低，特别是一审案件中 99％以上的证人不出庭作证，[8]这种状况既侵犯了被告人的质证权，也不利于案件事实真相的准确查明。四是一审与二审定罪标准不一致，一审裁判时要求“疑罪从无”，而二审规定发回重审。实践中，二审法院为了回避矛盾，普遍采用发回重审，且没有次数限制，所以，法律规定出现自相矛盾的情况。

三、再修改刑事诉讼法的外部动因与改革最新动态

（一）再修改刑事诉讼法的外部动因

时隔十年，国内外形势发生了巨大变化，首先，中国已经加入或签署了一些国际公约，其中最重要是联合国〞两权公约〞，[9]公约里有大量的关于刑事司法的国际最低标准的内容，它们是刑事司法最起码要达到的、应当实现的标准。这对即将再修改的刑事诉讼法提出了更高要求。其次，中国宪法制定通过了一些修正案。其中，有几条宪法修正案对刑事诉讼法有着重要影响，如，宪法修

[8] 2003 年底，中国政法大学刑事法律研究中心由陈光中教授主持的刑事诉讼法再修改课题组委托四川大学左卫民教授负责在西部地区进行证人出庭作证的实证研究，研究结果为在某市法院系统 19 个刑庭(该市法院系统共 22 个刑庭，由于各种原因，仅获得了 19 个刑庭的数据)2004 年度审结的 6810 件案件中，有证人出庭的案件仅 26 件，证人出庭率仅占 0.38％。

[9] “两权公约”是指 1966 年 12 月 16 日联合国大会通过的《公民权利和政治权利国际公约》和《经济、社会和文化权利国际公约》。

正案中规定的“国家尊重和保障人权”，人权概念、人权保障进入了宪法的规定，这是一个很重要的立法背景。这个背景意味着，修改刑事诉讼法在指导思想方面、在观念上有了一个重大的变化，这是中国刑事诉讼法向人权保障方向进一步完善的法律依据，这对刑事诉讼法的再修改将产生重大影响。再次，党中央提出“依法治国”、“构建和谐社会”、“坚持科学的发展观”，中国的刑事政策由“严打”转变为“宽严相济”，这就必然使中国传统的刑事诉讼制度乃至国家刑事政策面临新的挑战。所以，对刑事诉讼法进行再修改已是形势所迫，迫在眉睫。

基于此，2003 年 10 月第十届全国人大常委会将刑事诉讼法的再修改列入本届人大常委会五年立法规划。2007 年刚召开的全国人大常委会立法计划近日出台。根据这一计划，全国人大常委会今年将修改民事诉讼法、刑事诉讼法等一批现行法律。

（二）中国刑事诉讼法改革最新动态

再修法刑事诉讼法时的主要任务是：进一步摆正司法公正与诉讼效率、打击犯罪与保障人权的平衡关系，处理好国内法与国际公约的效力关系，寻求公检法三机关司法资源的合理配置，努力提高侦查质量，进一步强化审判中的对抗性，完善死刑复核程序。在此介绍几个改革热点问题。

1．修改刑事诉讼法律基本原则。

有学者建议，再修改的刑事诉讼法既应当有废除的原则，也有需要修改的原则，但是，最主要的是应当新增一些国际上共识的基本诉讼原则。其中包

括：无罪推定原则、司法独立原则、程序法定原则、一事不再理原则、非法证据排除规则等。

2．转变侦查模式。

有学者建议，中国的侦查模式应当尽快从单一的纠问式转变为追诉方、辩护方和中立方组成的“三角形”诉讼结构，即增设令状主义、律师辩护制度，以体现侦查阶段的控辩平衡，司法中立的抗辩制特征。具体方案：第一，在侦查阶段，设立一个防止侦查权滥用，及时对侦查活动进行监督的司法审查和司法授权机制。第二，建立对强制措施的司法控制机制。在侦查程序中注入控、辩、裁三方主体参与的诉讼构造，并按照控辩双方平等对抗、法官居中裁判这一诉讼原则进行运作，使得有关强制措施问题的裁判能够严格按照法定的条件和程序进行，从而在侦查阶段也能充分发挥司法监督和辩护作用。第三，加强侦查阶段中被追诉方的诉讼权利。包括防御性权利，例如，拥有为准备辩护所必需的时间和便利条件；拥有获得律师有效协助；拥有不被迫自证其罪等权利，这些权利都是一种自我保护性措施。救济性权利，例如，向中立性司法机构要求对其所进行的拘留、逮捕措施的合法性进行审查，如果发现错误，要求赔偿经济损失；要求上级法院对下级法院所作的裁判予以复审等项权利。

3．调整警检关系。

有学者建议，针对目前我国现有警检关系不利于刑事追诉权准确而高效行使的弊端，加强警察对检察机关的配合与相互沟通，促进追诉权准确而高效行使。具体措施如下：第一，建立检察机关引导侦查取证的机制，即检察官适时地介入侦查，根据起诉的需要，对警察调查取证的方向、证据收集、提取与保全的程序和方法等进行指导或提出建议。第二，建立警察出庭作证制度。即规定在审判阶段，当控辩双方就证据的收集方法和程序产生争议，进而影响证据

的可采性时，涉案的侦查人员有出庭作证的义务。第三，建立警检沟通和交流机制。在宏观上，公安部与最高人民检察院可以共同协商制定关于刑法上各类罪证明标准的适用规则，地方各级公安机关与检察机关应结合本地犯罪的特点和办案需要制定相应的细则，以统一办案人员的思想认识；同时在微观上，具体办案的公安人员与检察人员也可就特殊个案的证明标准的适用进行协商确定，统一认识。

4．扩大辩护范围。

有学者建议，目前我国刑事辩护中存在一些问题。其中，有些问题不是通过法律的规定予以解决。比如，提高辩护率的问题，仅通过法律规定完善难以解决，还要通过其他各种努力。但是，有些问题可以通过法律解决，或者说法律的完善有助于问题的解决。例如，扩大辩护范围；赋予律师广泛的、有实际意义的调查取证权；扩大法律援助对象的范围；确保律师的先悉权等。这些可以通过修改刑事诉讼法进一步完善。

5．提高一审质量与效率。

有学者建议，第一、自诉案件鼓励采用调解程序。调解制度是我国人民司法工作中的优良传统和宝贵经验。它作为一种典型的非刑罚化措施，在平等、自愿、合法的基础上，按照当事人之间达成的协议结案，不仅可以防止当事人之间的矛盾进一步激化、有利于维护社会的稳定，而且还可以有利于及时、妥善地解决刑事纠纷，有效的提高了诉讼效率。刑事自诉案件的审判实践中普遍采用调解的方式，取得了良好的社会效果，应进一步总结和推广经验，适当增加调解结案的数量。第二，适当增加简易审判程序的种类。正当程序的简易化是世界各国刑事审判改革的共同趋势之一。为了提高诉讼效率，体现审判程序中控辩双方的平等性，对于某些案件，可以考虑将适用简易程序的选择权交给

被告人，只要符合刑事诉讼法规定的案件范围，被告人认罪并同意适用简易程序的，就可以适用，无须人民法院、人民检察院同意，尽量减少周转环节，最大程度地发挥简易程序作用。第三、强化普通程序的证人出庭。在考虑对诉讼效率及司法资源有限性的现实情况，进一步完善刑事诉讼法，确立证人出庭作证的制度，如强化对证人的保护，为证人出庭提供一定的经济补助，明确证人不出庭的制裁措施等，具体建议是：（1）建立证据开示制度；（2）在证据开示的基础上，如果控辩双方对证人证言的内容无异议，提供该证言的证人无需出庭作证，对证人证言有分歧，且该证言对于认定案情有重要影响时，该证人应当出庭作证，否则判决无效；（3）重要证人因病重、死亡、下落不明或在国外等客观原因不能出庭作证的，法律应当明确范围，而不能作概括性的规定。

总之，科学、理性建构、完善适合中国国情的司法制度要注重两个方面的问题：一是，由于人类存在着对一些最低限度的正义的共同需求，因此，中国的刑事诉讼法改革必然顺应国际司法改革的潮流；另一方面，任何制度的现实化都依赖于现实国家“本土资源”对其的接受度，即或国际化的规则与理念，在中国的实施程度、方式与时间也必然依“本土化”的方式实现。因此，中国的司法改革，必须以对本国的传统法律文化中的积极因素给予足够的尊重为前提。

SECTION 2:

INTERNATIONAL STANDARDS AND THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (TOC) AND THE UN CONVENTION AGAINST CORRUPTION (CAC)

反腐败公约视野下中国腐败资产追回机制的实践与法律完善

Practice and Law Improvement of China's Mechanisms for Recovery of Corrupt Assets within the Framework of the United Nations Convention against Corruption

周信权[*] Zhou Xinquan

Abstract
摘要

As the course of globalization is pushed forward and international contacts are getting increasingly frequent, the number of criminals, who escape abroad and transfer their illicit money abroad after having committed a crime by taking advantage of duty, is increasing. This has become a major obstacle to the procuratorial authorities, who try to punish commission of crime by taking advantage of duty. To effectively carry out overseas illicit asset recovery, we can only resort to international judicial cooperation. In the United Nations Convention against

[*] 广西壮族自治区人民检察院
The People's Procuratorate of Guangxi Zhuang Autonomous Region

Corruption, there are some specific articles concerning recovery and return of corrupt assets, which provide effective routes within international law for the prosecutorial authorities of China to carry out overseas recovery of illicit assets. China's mechanisms for recovery of illicit assets are basically in conformity with those provisions on recovery of illicit assets in the United Nations Convention against Corruption. However, a few discrepancies still exist. Therefore, it is necessary to identify the Chinese provisions that are incompatible with the United Nations Convention against Corruption and the corresponding solutions. Accordingly, the effective integration of China's domestic law and the Convention can be realized and significant reinforced efforts can be made to overseas recovery of illicit asset.

随着全球化进程的推进和国际间交往的频繁，职务犯罪分子作案后潜逃出境或将赃款转移至境外日益增多，已成为检察机关惩治职务犯罪的一大障碍。要有效地开展境外追赃，只能通过各国之间的司法合作。《联合国反腐败公约》对腐败资产的追回与返还作了具体规定，为我国检察机关开展境外追赃提供了有效的国际法上的途径。我国腐败资产追回与《联合国反腐败公约》对腐败资产的追回的规定总体上是一致的，但仍有不少不协调的地方差异。有必要对国内涉及《联合国反腐败公约》内容的法律法规，找出与公约不相兼容的条款，研究解决的办法，实现国内法与公约的有效衔接，以切实加大境外追赃的力度。

反腐败公约视野下中国腐败资产追回机制的实践与法律完善

Practice and Law Improvement of China's Mechanisms for Recovery of Corrupt Assets within the Framework of the United Nations Convention against Corruption

周信权[*] Zhou Xinquan

2003 年 10 月 31 日，《联合国反腐败公约》（以下简称《公约》）在第 58 届联合国大会上获得通过，12 月 10 日，我国政府签署了该公约。2005 年 10 月 27 日，我国全国人民代表大会常务委员会通过了加入《公约》的决定。《公约》作为联合国通过的第一项用以指导国际反腐败斗争的法律文件，对腐败资产的追回与返还的具体规定，为我国检察机关开展境外追赃提供了有效的国际法上的途径。我国检察机关境外追赃机制与《公约》对腐败资产的追回与返还的规定总体上是一致的，但个别之处仍有差异。当然，《公约》只是为国际社会共同打击腐败犯罪提供了一个法律框架，其效能的发挥，还有待有关缔

[*] 广西壮族自治区人民检察院
The People's Procuratorate of Guangxi Zhuang Autonomous Region

约国之间通过双边条约或在国内法中对《公约》规定的内容加以具体落实。只有这样，它尚不能成为我国开展境外追赃的“利器”。本文结合我国检察机关境外追赃的理论及司法实践，以《公约》为参照，试就完善检察机关境外追赃的合作和方法，提出一些粗浅的看法。

一、《公约》关于腐败资产追回机制的规定

腐败资产，是指犯罪分子因实施腐败犯罪活动而取得的资产及其产生的利益，它既包括犯罪所得、财产、设备或者其他工具，也包括这些资产产生的利益，如利息、孳息等。追缴腐败资产，是一国的司法机构获取腐败犯罪罪证的重要举措和步骤，是保护公共利息、恢复法治、维护公平正义的重要手段，也是遏制腐败犯罪、促进人类社会和谐发展的需要。

公约所规定的腐败资产追回，是指在国际司法合作或协助框架下，一国的资产因腐败犯罪被转移到另一国后，资产流出国通过一定的途径直接主张对该资产的合法所有权，或者资产流入国应请求国（资产流出国或者来源国）的请求对该资产予以归还的机制。

随着全球化进程的推进和国际向交往的频繁，腐败分子犯罪后潜逃出境或将赃款转至境外日趋增多，已成为各国惩治腐败犯罪的一大障碍。据世界银行初步估计，全世界每年约有 2 万亿美元涉及腐败资金进行跨国流动，相当于全球 33 万亿美元生产总值的 6%，跨国腐败犯罪正在对各国的经济、政治和社会稳定造成巨大威胁，已成为世界各国共同关注的一个国际问题。如何抓获外逃贪官和追回被转至境外的腐败资产，成为国际反腐败斗争的热门话题。最广泛开展国际合作和协助，最大限度地追逃和追赃，成为各国反腐败的共同愿望和

迫切要求。为了加强全球打击腐败犯罪的通力协作，顺应各国反腐斗争的客观需要， 2003 年 10 月 31 日第 58 届联合国大会审议通过了《公约》。

《公约》的诞生，反映了国际社会反腐败的强烈愿望和坚强决心，公约首次确立的被转至境外的腐败资产必须返还的原则，及创设的腐败资产追回机制，尤其值得称道。《公约》第 51 至 58 条对腐败资产追回与返还作了具体的规定，构建了腐败资产追回的国际法律机制。这一机制是一个完整的体系，主要包括资产的监测、扣押、冻结和没收及返还等环节。公约规定了两种追回机制，即直接追回机制和间接追回机制。一是直接追回腐败资产机制。公约第五十三条规定：“各缔约国均应当根据本国法律：(一)采取必要的措施，允许另一缔约国在本国法院提起民事诉讼，以确立对通过实施根据本公约确立的犯罪而获得的财产的产权或者所有权……”据此，直接追回是指当一缔约国的资产因腐败被转移到另一缔约国，在另一缔约国没有采取没收等措施处置时，通过一定的途径，主张对该资产的合法所有权而予以追回。直接追回有三种途径：(1)请求国可以在被请求国法院就位于被请求国领土内的腐败犯罪所得提起民事诉讼，以主张对该资产的所有权。(2)被请求国法院根据本国的法律，命令犯罪分子向遭受腐败犯罪行为侵害的另一缔约国进行补偿或损害赔偿。(3)缔约国允许本国法院或主管机关在必须就没收作出决定时，承认另一缔约国对所转移的腐败犯罪所得的财产主张的合法所有权。 二是间接追回腐败资产机制。根据公约第五十四条规定，间接追回是指当一缔约国依据本国法律或者执行另一缔约国法院发出的没收令，对被转移到本国境内的腐败犯罪所得进行没收后，再将其返还给另一缔约国的资产追回方式。间接追回机制由两个阶段组成，包括：（1）被请求国的没收，（2）被请求国根据本国的法律程序返还请求国。被请求国的没收有两种方式，一种是依据被请求国本国的法律，对被转

移至其本国境内的腐败犯罪所得进行没收。另一种是由被请求国的主管机关根据本国的法律程序，执行请求国法院发出的没收令。第一种没收方式的实现，根据公约第五十四条第一款第二项的规定，是由各缔约国根据其本国法律，采取必要措施，使拥有管辖的主管机关能够通过洗钱犯罪或者对可能发生在其管辖范围内的其他犯罪作出判决，或者通过本国法律授权的其他程序，下令没收这类外国来源的财产。即需要由被请求国的主管机关通过国内法律程序，如刑事定罪，对相关资产予以没收。第二种没收方式的实现，根据公约第五十四条第一款第一项的规定，是由各缔约国根据其本国法律，采取必要的措施，使其主管机关能够执行另一缔约国法院发出的没收令。该被执行的没收令是指请求国法院作出的生效裁决，因而涉及承认和执行外国法院作出的裁判问题。在上述两种主要方式之外，公约还特别规定了在犯罪人死亡、潜逃或者缺席而无法对其起诉的情况或其他有关情况下，各缔约国有义务根据其本国法律，采取必要的措施，以便能够不经过刑事定罪而没收这类财产。

《公约》所创设的资产追回机制，极大地拓宽了各缔约国就如何追回腐败资产开展国际合作的渠道，促进了各缔约国就资产追回问题开展国际合作的可能性，使腐败分子认识到，即使将财产转至境外，最终也将是除了到得应有惩罚外一无所获，这无疑是对腐败分子的极大震慑。国际社会普遍认为，腐败资产的追回机制是公约的核心部分则公约所建立的五大机制中最重要的和最具强制性的机制，也是公约的突出贡献和最大成果。

然而，我们也应该清醒地认识到，《 公约》只是为国际社会共同开展境外追赃提供了有效的国际法上的路径，其效能的切实发挥，最终还有赖于各缔约国间的双边合作，以及各国国内法相应的具体规定。因此，腐败资产追回的国际合作之路仍将漫长而艰巨。各缔约国应在《公约》的法律框架下，积极合

作，不断探索创新境外追赃的合作渠道和方法，并切实完善国内法，使之与《公约》的有关规定相衔接，从而共同构筑起腐败资产追回的有效机制。

二、我国开展境外腐败资产追回的实践

众所周知，很长时间以来，贪官外逃问题一直是中国社会各界关注的焦点之一。据有关方面的不完全统计，我国自改革开放以来，至少有超过４０００名腐败官员或其他人员逃往境外，并带走了约５００多亿美元的资金。其中，颇为引人注目并令人深思的是，涉案金额达２５０亿元并畏罪潜逃至加拿大至今尚未能引渡回国的赖昌星一案。

中国历来十分重视对腐败资产的追缴。《中华人民共和国刑法》（以下简称《刑法》和《中华人民共和国刑事诉讼法》（以下简称《刑事诉认法》）对此作了原则规定。《刑法》第64条规定：“犯罪分子违法所提的一切财物，应当予以追缴或者责令退赔……”，《刑事诉讼法》第198第第1款、第3款分别规定：“公安机关、人民检察际、人民法院对于扣押、冻结犯罪娣人、被告人的财物及其孳息，应当妥善保管，以供核查……”“人民法院作出的判决生效后，对被扣押、冻结的赃款物及其孳息，除依法返还被害人的以外，一律上缴国库。”中国政府及其司法机关依照法律的规定，不断加大打击腐败和追赃力度，为国家和集体挽回了大量经济损失。据统计，权2005年。全国检察机关通过查办职务犯罪案件，追缴赃款赃物和非法所得折合人民币74亿多元，有效地维护了法制的尊严。

随着反腐败斗争的深入开展，针对携款外逃的腐败犯罪分子不断增多的严峻形势，中国政府不断重视和加强了反腐败国际合作中的境外追逃追赃工作。

一方面，中国政府积极开展双边国际司法协助和中外执法合作项目，为共同打击跨国腐败犯罪，拓展的创新境外逃追赃机制作了有益的探索，并取得了明显成效，据不完全统计，仅 1998 年以来，中国政府通过开展区域司法协助、引渡、国际刑警组识缉捕等途径，成功地将 70 多名逃往境外的贪官押解回国，并追回了部分赃款。其中包括贪污挪用公款 4.8 亿美元、潜逃境外 2 年半的中国银行广东开平支行原行长余振东，贪污、挪用公款 13 亿港元的广东省国际投资公司香港分公司原副总经理黄贵州，贪污国家巨额资金的贵州省交通厅长卢万里等等。

——国际司法协助。从 1987 年 9 月到至 2006 年 4 月，中国政府先后与 48 个国家缔结了 72 个双边司法协助的协定或条约。其中，既包括俄罗斯、泰国、菲律宾、哈萨克斯坦、吉尔吉斯、蒙古共和国等周边国家，也包括美国、加拿大、法国、南非等一些较远的国家。这些条约或协定中的相当一部分涉及到反腐败国际合作及腐败资产追回方面的内容。如中美关于刑事司法协助的协定，全文 23 条，第 1 条第 2 款关于“适用范围”中规定：“协助应包括：……（七）执行查询、搜查、冻结和扣押证据的请求：（八）在没收程序中提供协助……。”正是根据这一协定，中方要求美方对中国银行开平支行原行长余振东等人贪污、挪用公款一案提供刑事司法协助。2002 年 12 月美方将余振东拘押，并于 2003 年 9 月将所没收的余振东的赃款 355 万美元全部返还中国，2004 年 4 月 16 日美方在对余振东宣判后的当天即将其遣返中国。

——引渡。为了加强惩罚犯罪方面的国际合作，中国于 2000 年 12 月 28 日通过了《中华人民共和国引渡法》（以下简称《引渡法》），并先后与 25 个国际缔约结了引渡条约。依据《引渡法》、引渡条约及有关国际公约，我国将部分外逃贪官引渡回国受审，并追回部分赃款，如，原广东中山市实业发展

公司经理陈满雄夫妇挪用公款 7 亿元人民币后潜逃泰国长达 7 年之久，经外交努力和泰方支持，最终将犯罪嫌疑人引渡回国受审。

——国际刑警组织下的执法合作。通缉逃犯是国际刑警组识的一个重要合作领域。作为国际刑警组织成员国的中国，积极开展了与其他成员国间的境外追逃追赃执法合作，据统计，从 1997 年年到 2005 年 1 月，中国通过国际刑警组识先后将 230 多名外逃嫌疑犯缉捕回国，也将潜逃至中国的嫌疑犯遣送回其本国。如，2004 年，美国国土安全部照会中国警方，请求协助对逃往上海的涉嫌共谋、贿赂公务官员和向美国走私货物的顾文桢的缉捕、遣返，中国警方对顾采取强制措施并将其从上海押解回美国。

另一方面中国政府积极参加和会同有关国家制定有关国际公约，为反腐败国际合作有章可循和增强境外追赃实效作出了贡献。目前，中国加入了 25 个含有司法协助内容的多边公约或条约。特别是中国政府积极支持《公约》的起草工作，本着真诚合作、实事求是的精神参与了该公约的谈判与起草过程，为公约的制定发挥了建设作用，并于 2003 年 12 月 10 日签署了《公约》，2005 年 10 月 27 日十届全国人大常委会第 18 次会议批准加入了《公约》。这充分表明了中国加强反腐败国际合作的鲜明立场，体现了对国际反腐败事业的有力支持。《公约》的加入，既为各国开展反腐败国际合作奠定了法律基础，为遣返外逃腐败犯罪人员，追缴被非法转移到境外的资产提供了国际法依据，同时，也将对我国建立健全惩治和预防腐败体系，完善与腐败资产追回合作机制相衔接的国内法律制度，发挥重要的促进作用。

由于《公约》属于国际公约范畴，公约的大多数条款必须通过各缔约国的国内法予以实施。为更好地落实《公约》的各项规定，实现公约与中国政治的协调运作，法学界与司法实务部门正在掀起对《公约》的学习研究热潮：本着

“言必行、行必要，信守承诺”的原则，中国立法机关把与《公约》相衔接作为下一步修订《刑法》和《刑事诉讼法》的依据和重要内容之一。

三、影响我国开展境外腐败资产追回工作的障碍

我国腐败资产追回与《公约》对腐败资产的追回的规定总体上是一致的，但仍有不少不协调的差异，在一定程度上影响了我国开展境外腐败资产追回工作的效果。

1.请求主体确定的困难。

在以往的司法实践中，我国执法机关在被害单位和境外执法机关的协助下，开展了以民事诉讼方式在境外主张财产所有权，以达到返还被害人财产为目的的执法合作探索。因此，现在国内法尚需进一步明确，当被害单位无力或难以在境外提起民事诉讼时，由谁代表政府在境外提起民事诉讼，以及与此相关的具体程序。

2.举证证明资产产权或所有权的困难。

犯罪嫌疑人或被告人往往进行周密的预谋后才实施犯罪行为，在犯罪所得向境外转移时，为了逃避侦查常常会采取各种手段掩盖其犯罪行为，通常情况下难以被及时发现。如果被请求追回的是银行的存款，那么请求方不仅仅要证明有关钱款的权利人通过犯罪获取了相当数额的资金，而且还应当证明在犯罪所得资金与被存放在外国账户中的资金之间存在着连续的和不间断的转移链条；这一链条在任何环节上的中断或者衔接不严密，都可能使犯罪分子凭借其

他的资金来源推翻对该账户存款的犯罪所得性质的认定，从而可能导致追缴活动的失败。

3.确定目标资产范围的困难。

被请求国对被转移到本国境内的财产采取相应的扣押、冻结、没收时，一般都要求请求国提供证据材料，以证明请求所针对的财产属于犯罪所得或者属于通过犯罪所获取的收益。但由于犯罪嫌疑人为了掩盖其资金的来源通常都会经过一些环节使其非法所得转换为合法的形式。如将境内某一账户资金变成现金，再更换新的户名或者更换新的存款银行后变为新的账户资金汇往境外，或者将有关资金投入到某些合法交易之中，提取产生于这种交易的合法收入进行转移。这些资金往往还与其他事实上是合法的资金混合在一起，要证明目标资金中的一部分是属于非法来源往往是非常困难的。如果被转移的犯罪资金被转换成购置房地产或其他资产，就更加复杂。因此，如何确定目标资产的范围将是追回资产国际合作中的一个难点。

4.国内法中相关法律程序的欠缺造成的困难。

(1)缺席审判制度的缺位使我们利用间接追回机制请求他国没收财产时遇到困难。根据公约关于财产间接追回机制的有关规定，如果一国的资产因腐败犯罪被卷往他国，那么资产流出国的法院可以向流入国发出没收令，请求资产流入国的有关机关代为没收这些财产，而由于资产流入国在将没收的财产返还给资产流出国时通常要求资产流出国出示法院作出的没收财产的生效判决，因而公约第五十四条第一款第三项要求，缔约国天特别是资产流出国天应当建立缺席审判程序，以便在腐败分子因各种原因特别是因外逃而无法出席审判时，

法院能不经定罪而直接作出没收财产的裁判。根据我国现行的法律规定，法院只有在作出判决时才能决定没收赃款赃物。被告人因潜逃、死亡等原因无法出席法庭审判时，我国将无法作出没收其犯罪所得的生效裁判。这给我国利用公约申请资产流入国追回资产造成了严重障碍。(2)冻结、扣押适用条件的缺位导致我国的搜查令和扣押令在境外很难得到执行。根据公约关于资产间接追回机制的有关规定，资产流出国的法院或主管机关可以向资产流入国发出冻结令或者扣押令，资产流入国在接到冻结令或扣押令时应当予以执行，但根据公约第五十四条第二款的规定，资产流入国执行令状的前提是“该冻结令或者扣押令必须提供合理的根据，使被请求国相信有充足理由采取这种行动”。我国现行的法律规定中，针对财产的冻结和扣押措施依附于逮捕甚至是立案的条件，公安司法机关在没有合理根据的情况下也可以签发冻结令和扣押令。这种状况的存在很可能导致我国法院和有关主管机关签发的冻结令和扣押令因无法达到公约规定的“合理的根据”要求而被资产流入国拒绝执行，从而给我国的资产追回工作造成障碍。

5.被请求国的国内法律规定造成的困难。根据公约第五十三条、五十四条、五十七条的规定，能返还的资产有两种：(1)贪污的公共财产；(2)能证明合法所有权的财产。返还资产的条件是：(1)必须提供资产来源国的生效法律判决；(2)符合被请求国的国内法规定。在请求追缴的资产不是贪污的公共财产，或资产流出国难以有效证明资产性质是公共资产或有合法所有权的情况下，以及不能提供生效法律判决的情况下是很难追回的，即使满足了上述条件，返还成功与否在很大程度上还取决于被请求国的国内法规定。如有的国家

法律就明确规定对没收财产的返还与分享必须以两国间存在相关协议为前提，如美国和加拿大、澳大利亚等国。

四、完善我国腐败资产追回机制的建议

为了落实条约必须遵循的原则和切实加大境外腐败资产追回的力度，针对我国腐败资产追回机制与《公约》不相兼容的条款进行反思，研究、落实解决的办法，实现国内法与《公约》的有效衔接，是当前的迫切任务。

一是建立先行民事审判决的诉讼制度。《公约》第 53 条第 1 款规定，允许对腐败犯罪被告人提供独立了民事诉讼。仍照我国现行法律，民事诉讼程序中允许缺席判决的，但针对犯罪行为造成的损失只能提供起诉刑事附带民事诉讼，且刑事带民事诉讼应当同刑事案件一并或之后审判。因此，有必要对我国现行的相关诉讼制度进行必革：规定犯罪嫌疑人或被告人在案发后，或者在刑事诉讼以进行期间死亡、潜逃或者缺席的情况下，只要能够查明存在作为犯罪所得的财物或者犯罪嫌疑人、被告人具有承担相应民事责任的能力，检察机关或被害人就有权就损害赔偿、财物返还或没收等问题提起民事诉讼，并在民事被告人缺席情况下进行审判，人民法院有权判决有关当事人承担返还财物、赔偿损失等民事责任，或者判决没收有关财的。没收的财物既可以是犯罪所得，也可以是混合收益，还可以是犯罪所得带来的收益。

二是建立刑事缺席审判制度，根据《公约》的规定，缔约国执行另一国的没收令，不以生效判决为前提。但是，要实现腐败资产的返还，则必须依据请求国的生效判决。我国现行刑事审判制度中未建立缺席审判制度，这意味着在犯罪嫌疑人、被告人潜逃境外的情况下，我国无法进行审判。因此，应规定在

腐败犯罪嫌疑人、被告人逃跑时，可以进行缺席审判。考虑到对被告人权益保障的需要，可将缺席审判制度作为诉讼制度的一种例外，按照“限制适用范围”、“严格适用条件”、“规范适用程序”和“不适用死刑”的要求设计程序，而且规定被告人享有在缺席时聘请律为其辩护的权利以及在归案后对判决提出不服即可推翻原判决重新进行审判的权利。

三是完善冻结、扣押制度。根据《公约》第 54 条 2 款的规定，冻结令、扣押令须提供“合理的根据”， 以使被请求国相信有充足理由采取行动，由于我国法律并未对冻结、扣押规定具体的适用条件，实践中对冻结、扣押款物条件的掌握宽严不一，这就可能出现我国发出的搜查令、扣押令在国外难以得到执行情况。因此，应完善我国的法律规定，将在财产的冻结和扣押措施纳入强制措施体系，并对其适用条件作出明确具体的规定，以使我国签发的扣押令和冻结令能够在国外和签约国得到及时有效执行。

四是确立非法证据排除规则。当今世界许多国家已经确立了非法证据排除规则。一般来说，西方发达国家的非法证据排除比较严格，特别是美国、加拿大，以及一些西欧国家。非法证据排除规则的主要内容是因非法取证权利受侵害的人可以对刑事司法中，特别是侦查活动中非法取证的行为提出反对意见，要求法院排除有关证据。目前中国在反腐败的国际合作中主要是作为请求国要求有关国家合作追捕逃往境外的腐败分子和追回资产，因此国内取证的行为应当合法，以防止在境外被质疑或排除。我国有不少涉嫌腐败案件的犯罪嫌疑人为了逃避惩罚将腐败犯罪所得转移到美国、加拿大、澳大利亚等国家，或者为了避免惩罚而逃跑到境外，要开展境外追赃和境外追逃，这些国家的有关部门可能要求我国提供这些腐败犯罪嫌疑人的犯罪证据或进行搜查、扣押的法律批

准手续，并要求支持这些批准手续的证据应合乎非法证据排除规则。因此，有必要研究并借鉴国际公认的做法，确立非法证据排除规则。

五是确立正当法律程序。《公约》序言指出：“承认在刑事诉讼和民事或行政诉讼中的关于财产权的司法活动中的正当法律程序的基本原则”，这不仅有利于保护被告人的人权，也有利于追捕腐败分子和追回腐败所得。“正当法律程序”或称“正当程序”，是指保证司法活动公正性保护刑事活动涉及的每一个人，包括犯罪嫌疑人和被告人的生命权、自由权、财产权、隐私权等合法权利免受非法干涉的一系列规则。它要求国家行使刑事司法权力的部门在对个人的权利加以限制或剥夺时应当严格按照法律规定的程序，而且，这个程序本身必须是正当的和合理的。刑事诉讼正当法律程序原则可以体现在审前阶段和审判阶段，包括很多内容，其中国际社会所公认的有以下几个方面；１）限制人身自由必须具有正当法律程序；２）无罪推定与不强迫自证其罪；３）得知被指控的性质和理由；４）由合格的法庭进行审理；５）被告人出庭和辩护的权利；６）诉讼迅速和公开审判权；７）与证人对质的权利；８）一事不再理或禁止双重危险；９）禁止酷刑和其他残忍的、不人道的或侮辱性的刑罚。

在追捕潜逃境外的腐败分子、开展境外追赃的实践中，一些腐败分子本人往往以回国以后得到不公正审判待遇为借口请求外国给予庇护，企图逃避回国受审和避免被追缴犯罪所得；而一些国家也往往以请求国的司法中缺乏正当法律程序的某些因素提出疑问或条件，从而增加了追捕腐败分子、开展境外追赃的难度。我国目前的刑事法律中没有“正当法律程序”的提法，法律和司法实践中有关正当程序的内容与国际公认的正当法律程序的要求还有一定差距。因此，有必要确立正当法律程序，这样将使我国与外国在反腐败领域的刑事司法

国际合作在同等的原则下进行，必将减少反腐败国际合作的困难，增加追捕潜逃境外的腐败分子、开展境外追赃的可行性。

六是完善保护善意第三人权利的制度。为落实《公约》关于追回 腐败资产时要注意对善意第三人保护的规定，我国在执行请求国返还财物的请求时，为确保不会对善意第三人的权益造成损害，应建立相应的通知制度和退还保证制度。规定在没收或者返还前，有关单位或者个人有权对没收或者返还的财物向司法机关提出异议的 权昨，并在返还前要求方提供书面保证或者提供物的担保，以便在出现错误发还时请求方能够有关财物返还。

六是建立允许他国分追回资产的财政制度。《公约》第 57 条第 4 款、第 5 款规定：被请求国可从被没收的腐败资产中扣除为没收而进行侦查、起诉或者审判程序而发生的合理费用；缔约国可特别考虑就所没收财产的最后处分逐案订立协定或者可以共同接受的安排。实事求是地看，被请求国在对腐败财资产进行查封、扣押、没收时，确实需要耗费人力、财产，对追缴到的资产进行分享符合情理。而且，充许协助国对赃款进行分割，可调动被请示国开展司法协助的积极性，从而加快司法协助，因此，我国应转变腐败资产属于国有资产应全额追回，不能与外国分享的传统观念，务实建立允许他国分享追回资产的财政制度。

七是建立承认与执行外国法院判决和裁决的司法审查制度。我国民事诉讼法规定的“司法协助”专章，但刑事诉讼法却没有这样的规定。为加强与缔约的刑事司法协作和协助，落实《公约》关于资产追回的有关规定，按照对等互惠原则，我国应建立承认与执行外国法院判决和裁决的司法审查制度，审查权可由各省、自治区、直辖市高级人民法院行使，并由最高法院复核。

八是建立和完善反洗钱工作机制。《公约》，其中有关反洗钱的内容占了大量篇幅，提出了反洗钱制度的重点是验证客户身份，保存交易记录以及报告可疑交易，并在《打击跨国有组织犯罪公约》的基础上对重要公职人员账户强化审查等新的要求。腐败犯罪与洗钱是紧密相关的，开展境外追赃要与反洗钱密切结合起来，双管齐下，从根本上预防和惩治腐败分子的跨国洗钱活动，打击在我国洗钱犯罪极为严重的上游犯罪——贪污贿赂犯罪。目前，要做好反洗钱与反腐败的国际合作，必须做好以下几项工作：

1.吸取和借鉴其他国家控制腐败犯罪的跨国洗钱经验，完善反洗钱法律体系。①尽快出台金融监管部门制定的反洗钱规章制度，与规定预防、监控洗钱活动的基本法律制度的《反洗钱法》，有关制裁、打击洗钱犯罪的《中华人民共和国刑法》法律条款等共同构成我国全面预防、控制和打击洗钱犯罪活动的基本法律框架，以综合调动多方面的力量对洗钱犯罪进行追踪和监测，形成全面预防监控洗钱活动的反洗钱“法网”。②调整洗钱犯罪定义范围。我国刑法规定洗钱罪的上游犯罪包括走私犯罪、毒品犯罪、黑社会性质组织犯罪与恐怖组织犯罪等 4 类犯罪。与多数国家相比，上游犯罪范围显得较窄。修改刑法的规定，将贪污、贿赂、腐败犯罪和其他严重犯罪规定为洗钱罪的上游犯罪，既是反洗钱工作的需要，也是无法阻挡的趋势。③扩大反洗钱义务主体领域。当前，国际国内反洗钱的客观形势要求必须把反洗钱义务的主体延伸到社会主体的各个方面，包括从反洗钱监管机构、司法机关到金融机构、特定非金融机构等多个层面，构建全面的预防洗钱犯罪体系。我国《反洗钱法》只是在总则中对特定非金融机构的反洗钱义务做出了描述，今后不但应该对这些特定的非金融机构制定一些必要的具体规定，而且，要进一步把从事房地产销售、贵金属和珠宝交易等机构纳入反洗钱涵盖的义务主体。另外，从国际经验看，只有政

府、企业、银行、个人的反洗钱意识不断成熟与合理化，反洗钱才能获得坚实的社会土壤。，在扩大反洗钱义务主体范围的同时，要转变反洗钱的社会意识，提高普通公众对反洗钱的理解，积极配合反洗钱机构的执法并提供必要信息，共同构造完善的反洗钱情报网。

2. 建立资金监控与快速反应机制。中国人民银行、财政、税务、工商、海关、外汇管理、外交、司法、纪检、银监、保监、证监、涉港澳台等各职能部门要各司其职，互相配合，在控制腐败分子跨国洗钱的合作上，要进一步加强力度，建立起以情报信息为先导的跨国洗钱资金监控与快速反应机制。要强化金融机构监测腐败资产转移的责任，建立可疑交易和限额交易强制报告制度；完善对利用外资和境外投资的监管，健全外商出资撤资审核、评估制度；进一步完善储蓄实名制和公职人员财产审报与境外资产报告制度；建立金融、海关、检察、公安、外交等部门间的信息共享及按照对待互惠原则的与相关缔约国间的信息、情报交换机制，增强快速反应能力，提高境外追赃水平。

3.加强反腐败与反洗钱的国际合作。通过缔结相关的双边、多边条约，在腐败案件的诉讼移管、调查取证、引渡、移交赃款赃物等方面加强国际合作。一方面要控制本国的腐败分子向境外洗钱，追缴境外的腐败资产，另一方面也要预防和打击境外的腐败分子在中国境内洗钱，树立起负责任的大国形象。积极参加国际组织，尤其是要尽快成为金融行动特别工作组(FATF)的正式成员，而不仅仅是观察员，开展广泛的国际交流。

《联合国反腐败公约》、《联合国打击跨国有组织犯罪公约》与中国刑事司法改革

UN Convention Against Corruption, UN Convention Against Transnatioal Organized Crime and Criminal Justice Reform in China

刘　玫[*]　Liu Mei

摘要
Abstract

China actively and fully participated in the drafting and negotiating process of the "United Nations Convention against Transnational Organized Crime" (UNTOC) and "United Nations Convention Against Corruption" (UNCAC), and ratified these two conventions in August 2003 and October 2005 respectively. Accordingly, the linkage of China's criminal justice reform to the international standards stipulated in these two conventions and their effective implementation in the Chinese administration of criminal justice has become an issue of common concern among the Chinese law practitioners and academics.

[*] 中国政法大学刑事诉讼法学研究所所长，教授，法学博士。
Professor, China Univeristy of Political Science and Law; Director, Institute of Criminal Procedural Law

This paper applies the international standards stipulated in these two conventions to China's existing criminal justice system and examines the linkage issue between the legislation and administration of criminal justice in China and the international standards in terms of special investigation means, protection of witnesses, reverse onus of proof and the presumption of innocence, asset recovery, crime prevention organizations and international criminal legal assistance. It also summarizes and discusses the efforts to implement the international standards undertaken by the Chinese legal academics and practitioners.

Part Three of the paper summarizes an overview of the cooperation in the "Implementation of International Standards in Criminal Justice Program" and presents the research results achieved from the program.

中国积极参加了《打击跨国有组织犯罪公约》和《反腐败公约》起草和谈判的全程工作，并分别于 2003 年 8 月和 2005 年 10 月批准了这两项公约，如何使中国的刑事司法改革与两公约中的国际标准相衔接从而在司法实践中有效贯彻两公约内容已成为中国法律实务界和理论界普遍关注的问题。本文以两公约中的国际标准对中国现行刑事司法制度加以考量，从特殊侦查手段、证人保护、证明责任倒置与推定、资产追回、犯罪预防机构、国际刑事司法协助等方面分析了中国现行刑事立法、司法与两公约之国际标准之间的衔接问题，归纳并介绍了中国法学理论界和实务部门为贯彻两公约之国际标准所作的努力。文章的第三部分总结了中加双方关于"两公约的贯彻实施"项目的合作概况，介绍了本次合作所取得的研究成果。

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UN Convention Against Corruption, UN Convention Against Transnatioal Organized Crime and Criminal Justice Reform in China

刘　玫[*]　Liu Mei

《打击跨国有组织犯罪公约》和《反腐败公约》是联合国在本世纪初通过的有关预防犯罪和刑事司法的两项重要国际公约，其内容将对各缔约国未来的刑事立法、司法活动以及缔约国之间的国际合作机制产生意义重大的影响。作为联合国安理会常任理事国，中国积极参加了《打击跨国有组织犯罪公约》和《反腐败公约》起草和谈判的全程工作，并分别于 2003 年 8 月和 2005 年 10 月批准了这两项公约，为两公约的成功制定和顺利生效发挥了建设性作用。

当前，在《中华人民共和国刑事诉讼法》再修改已被列入本届全国人民代表大会立法规划的背景之下，如何使中国的刑事司法改革与两公约中的国际标

[*] 中国政法大学刑事诉讼法学研究所所长，教授，法学博士。
Professor, China Univeristy of Political Science and Law; Director, Institute of Criminal Procedural Law

准相衔接从而在司法实践中有效贯彻两公约内容已成为中国法律实务界和理论界普遍关注的问题。

一、以两公约之国际标准对中国刑事司法制度的考量

目前中国的刑事立法和司法尚缺少某些与两公约内容相对应的具体制度，这将在一定程度上影响两公约在中国的有效贯彻。[1]具体问题如下：

1、特殊侦查手段

为了提高侦查犯罪的能力，《打击跨国有组织犯罪公约》第 20 条以及《反腐败公约》的第 50 条均规定了各缔约国应当在适当情况下使用控制下交付、电子或其他形式的监视、特工行动等特殊侦查手段。《反腐败公约》还进一步规定缔约国应允许法庭采信经由这些特殊侦查手段所获得的证据。在中国，虽然这些特殊侦查手段早已在实践中有所采用，并经实践证明富有成效，但在《中华人民共和国刑事诉讼法》（下文简称《刑事诉讼法》）中却没有涉及。目前中国涉及技术侦察的法律主要是 1993 年《中华人民共和国国家安全法》和 1995 年《中华人民共和国人民警察法》，其中只有原则性规定，《刑事诉讼法》第二编第二章中规定的侦查方法基本属于常规性的侦查手段。在日益复杂的现代化犯罪面前，这些常规侦查手段已经显得有些力不从心；而实践中已采用的特殊侦查手段因缺少具体立法加以引导和规范，其合法性往往受到质疑，且涉案公民的基本人权也难以得到保障。

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[1] 两公约中的条款分为刚性和弹性两类，中国现行制度与前一类条款的冲突或差别需要及时通过制度改革加以解决，与后一类条款的冲突或差别则可以在两公约宗旨精神的指引下，根据中国的具体实际情况，酌情自行决定是否解决、何时解决、如何解决。

2、证人保护[2]

《打击跨国有组织犯罪公约》第24、25条和《反腐败公约》第32条分别对证人、被害人、鉴定人的保护问题做出规定。此外，鉴于腐败犯罪的特殊性，《反腐败公约》第33条特别提出了保护举报人的问题。两公约在证人保护问题上强调了三个方面：一是保护范围，不但酌情扩大至亲属，而且包括其他与证人关系密切的人；二是效果，即保护的有效性；三是多方位，包括限制信息披露、人身转移、安全的作证方式等。中国目前的证人保护制度与两公约的要求尚有较大差距，而且，保护制度的不完善也是导致中国目前证人出庭率偏低的重要原因之一。中国现行《刑事诉讼法》只在第49条和第85条第3款中做出原则性规定，没有具体有效的保护措施，实践中缺乏可操作性。

3、证明责任倒置与推定

根据《打击跨国有组织犯罪公约》第12条第7款以及《反腐败公约》第31条第8款的规定，在公约所涉犯罪的案件的没收事宜上，可以考虑由被追诉人承担证明财产合法来源的责任。相对于刑事案件中追诉方承担证明责任的一般原则而言，这是一项关涉证明责任倒置的规定。《中华人民共和国刑法》（下文简称《刑法》）第395条“巨额财产来源不明罪”在巨额财产的来源合法性方面也采用了证明责任倒置[3]。但值得注意的是，两公约中的证明责任倒置并非用于定罪事项，而是用于没收事项，而没收属于刑事诉讼行为范畴；中国《刑法》中第395条的证明责任倒置则直接涉及定罪问题。因此，尽管中国

[2]鉴于联合国《打击跨国有组织犯罪公约》和《反腐败公约》规定的证人保护措施主要是针对证人、被害人、鉴定人而规定的，而被害人、鉴定人又都属于英美法系中“证人”的范畴，本文所讨论的证人保护制度是指针对包括被害人、鉴定人在内的广义的证人的保护制度。

[3]《中华人民共和国刑法》第395条第1款：“国家工作人员的财产或者支出明显超过合法收入，差额巨大的，可以责令说明来源。本人不能说明其来源是合法的，差额部分以非法所得论……”

《刑法》中有关“巨额财产来源不明罪”的证明责任倒置与两公约中没收事项的证明责任倒置在一定程度上存在着相似的精神旨趣，但两者的性质并不相同。

《打击跨国有组织犯罪公约》第5条第2款和《反腐败公约》第28条规定对公约所涉犯罪的主观要件可以根据客观实际情况予以推定，体现了对相关犯罪的严厉打击态度。目前中国的法律中还没有对犯罪主观要件适用推定的规定。

4、不经刑事起诉和定罪的资产追回

《反腐败公约》第54条规定了在犯罪人死亡、潜逃或缺席的情况下，可以考虑不经刑事起诉和定罪而没收腐败犯罪所得财产。在这一问题上，中国目前的刑事诉讼立法与公约的精神有一定不同。第一，根据中国《刑事诉讼法》第198条第3款，没收的物品只能是法院生效判决所确定的赃款赃物，因此，犯罪所得财产的没收以刑事定罪为必要前提和执行依据。然而，在中国，如果犯罪人死亡、潜逃或缺席，便无法进行刑事审判。第二，刑事案件中的民事问题只能通过附带民事诉讼或刑事判决生效后另行提起民事诉讼解决，这两种途径均以刑事审判的启动为前提。

5、犯罪预防机构

《反腐败公约》第6条专门就预防性反腐败机构的设立做出规定，《打击跨国有组织犯罪公约》第9条第2款也间接地涉及了犯罪预防机构的问题。中国现有的腐败犯罪预防机构主要是近年来各级检察院从其反贪部门中分离出来的职务犯罪预防部门。在实地调研过程中，我们发现，该部门存在着人力、物力资源方面的局限，其实际作用并不理想。

6、国际刑事司法协助

加强国际刑事司法协助是《打击跨国有组织犯罪公约》和《反腐败公约》的主要目标之一，现行《刑事诉讼法》对涉外刑事诉讼程序以及刑事司法协助仅有一条原则性规定，相关实践无法在《刑事诉讼法》中找到具体制度基础，目前主要依据的是司法解释中有关涉外刑事案件的规定。

二、中国法学理论界和实务部门为贯彻两公约所作的努力

（一）中国法学理论界为贯彻两公约所作的努力

自中国签署和批准联合国《打击跨国有组织犯罪公约》和《反腐败公约》以来，中国法学界的专家学者对中国刑事司法实践与两公约国际标准之间的衔接问题给予高度关注，并对中国的刑事司法制度改革提出了若干建议。其中，最具有代表性和影响力的当属资深法学家陈光中教授组织刑事诉讼法学界知名专家学者编写的《中华人民共和国刑事诉讼法再修改专家建议稿与论证》（下文简称《专家建议稿》）中提出的改革建议，具体包括：

1、关于特殊侦查手段

《专家建议稿》在“侦查”一章中对派遣秘密侦查员、诱惑侦查、监听通讯等特殊侦查手段做出了详细规定。界定了特殊侦查手段所适用的案件范围、批准权主体、适用期限以及适用方式等问题，将控制犯罪与人权保障两大诉讼目标有机地结合在具体制度中。

2、关于证人保护

《专家建议稿》为证人及其近亲属设计了具体有效的保护措施。一方面，提供信息保密、人身保护等有效保护措施，如，签发书面命令禁止被追诉人及

其他对证人构成威胁的人接触该证人及其近亲属，派员提供人身保护，提供安全的临时住所等；另一方面，在条件允许时，审判过程中可以使用特殊的作证方式，如，远程作证，通过技术设备使证人作证的声音失真，采取只有法官才能看见证人的方式等。

3、关于推定

《专家建议稿》在第 74 条第 2 款中建议，在跨国有组织犯罪、腐败犯罪案件中，有关犯罪的故意、明知、目的等主观心理可以根据案件客观实际情况推定。之所以提出这一建议，正是因为考虑到两公约中相关规定的合理性及其实践意义。

4、关于与刑事诉讼相关的民事诉讼以及刑事缺席审判

为了解决资产追回方面的困难，《专家建议稿》做出了两方面努力：一是建议将目前中国的“刑事附带民事诉讼”修改为“与刑事诉讼相关的民事诉讼”，在一定程度上减弱民事诉讼部分对刑事诉讼部分的依附性，从而进一步建议由于被追诉人潜逃或隐匿而导致刑事诉讼程序中止以达半年以上的，必要时可以先行提起民事诉讼；二是建议尝试建立刑事缺席审判制度，考虑到刑事缺席审判对被告人诉讼权利的影响，《专家建议稿》对这一制度的适用做出了严格限制。

5、涉外刑事诉讼程序与司法协助

《专家建议稿》新增一编“特别程序”，专门对涉外刑事诉讼程序与司法协助的具体制度做出规定。该部分结合中国的刑事司法实践，对办理涉外刑事犯罪案件的司法协助的原则、范围、延迟、执行、审批、费用及备案等内容进行了详细设计。

（二）中国实务部门为贯彻两公约所作的努力

1、成立国家预防腐败局

为了实现预防腐败工作的法制化、规范化，加大预防腐败工作力度，适应开展反腐败国际合作的需要，中国正积极组建国家预防腐败机构，其主要职能是进行宣传、教育，进行制度的建设、机制体制的创新，以及在反腐败问题上开展一些源头性的工作。国家预防腐败局将设在中华人民共和国监察部，具体的主管部门还在研究之中，但这个专门机构的级别会比较高。该国家级预防腐败专门机构成立之后，各地方政府亦将对应设置相应级别的预防腐败机构。

2、完善有关洗钱犯罪的法律规定

2006 年，中国颁布了《中华人民共和国刑法修正案（六）》（下文简称《刑法修正案（六）》）以及《中华人民共和国反洗钱法》（下文简称《反洗钱法》）。《反洗钱法》对反洗钱监管、反洗钱调查、反洗钱国际合作等内容做出了详细规定，其中包含了若干有关洗钱案件中刑事侦查程序、国际执法合作以及国际司法协助的具体条文。一方面，将中国目前反洗钱工作中的有效做法以国家立法的形式加以明确；另一方面，也与两公约的相关规定加以衔接。《刑法修正案（六）》颁行于《反洗钱法》之前，其第 16 条[4]对洗钱犯罪的上游犯罪加以扩充，更加符合两公约对洗钱犯罪的界定，也更利于实践中有效控制洗钱犯罪。

[4] 《刑法》第 191 条第 1 款将洗钱犯罪的上游犯罪规定为毒品犯罪、黑社会性质的组织犯罪、走私犯罪。《刑法修正案（六）》第 16 条将之扩充为毒品犯罪、黑社会性质的组织犯罪、恐怖活动犯罪、走私犯罪、贪污贿赂犯罪、破坏金融管理秩序犯罪、金融诈骗犯罪。

3、《刑事诉讼法》再修改

根据中国全国人大常委会2007年立法计划，今年10月常委会第三十次会议将安排审议《〈刑事诉讼法〉修改草案》。本次“《刑事诉讼法》再修改”将对中国的刑事诉讼制度加以改革和完善，与国际刑事司法准则的衔接问题将在新的《刑事诉讼法》中有所体现。

2002年2月至2003年10月，包括中国在内100多个国家及28个国际组织和非政府组织代表在奥地利维也纳，就《联合国反腐败公约》前后进行了7轮谈判，终于完成了《公约》的起草工作。中国政府积极支持《公约》的拟订工作，中国代表团在《公约》的谈判过程中发挥了建设性作用。《公约》于2003年10月31日经第58届联合国大会审议通过，12月9日至11日在墨西哥梅里达召开高级别政治签署会议后，供各国开放签署。中国政府于2003年12月10日签署了《公约》，2005年10月27日，十届全国人大常委会第十八次会议审议并批准了《联合国反腐败公约》，同时对第66条第2款声明保留。2005年12月14日，《联合国反腐败公约》正式生效。

《反腐败公约》所确立的防治腐败机制，是各国反腐败经验的总结。加入公约，对中国建立惩治和预防腐败体系有重要促进作用，并将为逐步解决中国查办涉外案件中的“调查取证难、人员引渡难、资金返还难”问题提供国际合作依据。近年来，中国的反腐败工作取得了较大成效，但其中的具体措施仍需在实践中不断完善，相关制度仍需与《反腐败公约》进一步衔接。

跨国公司商业贿赂问题及其预防

Prevention of Corruption in International Investment and Business

张悦　Zhang Yue*

摘要
Abstract

I. Introduction

In recent years, multinational corporations in China have been frequently found to carry out business briberies, which not only are in violation of foreign laws such as the US Foreign Corrupt Practices Act (FCPA) but also highly alerted the Chinese government and its judicial institutions. This phenomenon has further speeded up the studies on strategies to prevent business corruption among a group of large-sized Chinese corporations moving towards the international arena.

*中国商业对外贸易总公司总经理助理、高级研究员
Senior Researcher, Assistant to the President of China National Commercial Foreign Trade Corp.

II. Bribery Issues Involving Multinational Corporations with Business in China

(I) Cases of Multinational Corporations Carrying out Business Briberies in China

1. Names of cases

2. Offences under the US law and issues generated

(II) Analysis

1. Monopoly is the basis on which multinational corporations to use business briberies in China;

2. Benefits are the lures for multinational corporations to use business briberies in China;

3. “Hidden rules” in business are the excuses for multinational corporations to use business briberies in China;

4. Inadequate and ineffective monitoring and legal loopholes offer an objective setting for multinational corporations to use business briberies in China.

III. Defects in Chinese Laws against Business Briberies

(I) Narrow definition of business briberies in the existing laws

(II) Limitations of accountability in the administrative laws

(III) Gaps between the execution of administrative laws and that of the criminal laws

(IV) Absence of system to guard against overseas business briberies

IV. Preventive Measures towards Multinational Corporations Using Business Briberies

(I) Reinforcing regulations against business briberies

1. Strengthening the cooperation with law enforcement agencies

2. Accepting administrative supervision from the governments

3. Setting up ethical standards for business conducts
4. Setting up a healthy procedure for decision making and management
5. Improving the internal accounting and audit systems of enterprises
6. Launching educational training against business briberies

Conclusion

China is actively engaged in combating business briberies. According to the requirement of the International Convention Against Corruptions, enterprises must also set up the corresponding mechanisms to effectively prevent and control corruptive practices.

一、引言

近年来，外国跨国公司在华商业贿赂事件频频发生，不仅触犯了美国的海外反腐败法（Foreign Corrupt Practices Act，简称 FCPA)等外国的法律，也引起了中国政府和司法机关的高度重视，更促使一批正在迅速走向世界的中国大型公司加紧研究预防商业活动中腐败活动的对策。

二、跨国公司在华商业贿赂问题

（一）跨国公司在华进行商业贿赂案例

1、案件名称

2、触犯的美国法律和引起的问题

（二）分析

1、行业垄断是跨国公司在华进行商业贿赂的基础；

2、利益驱动是跨国公司在华进行商业贿赂的诱因；

3、商业“潜规则”是跨国公司在华造行商业贿赂的借口；

4、监管不到位和法律缺位是跨国公司进行商业贿赂的客观因素。

三、中国反商业贿赂法律制度的缺陷

（一）现行法律对商业贿赂行为的界定片面

（二）行政法律责任单一

（三）行政执法与刑事司法不衔接

（四）反海外商业贿赂制度缺乏

四、跨国公司商业贿赂的预防措施

（一）加强反商业贿赂立法和执法：

1、扩大商业贿赂的定罪范围；

2、完善商业贿赂法律责任体系；

3、增加反海外商业贿赂规章

4、加强反商业贿赂执法力度

（二）加强预防商业贿赂的各项制度

1、加强与执法部门合作

2、接受政府的行政监督

3、制定商业活动操守标准

4、健全决策和管理程序

5、改善企业内部会计和审计制度

6、开展反商业贿赂的教育培训

结论

中国正在积极开展打击商业贿赂的行动。根据国际反腐败公约的要求，企业也必须建立相应机制，以有效预防和控制腐败行为。

跨国公司商业贿赂问题及其预防

Prevention of Corruption in International Investment and Business

张悦　Zhang Yue*

一、引言

近年来，外国跨国公司在华商业贿赂事件频频发生，不仅触犯了美国的海外反腐败法（Foreign Corrupt Practices Act，简称 FCPA）等外国的法律，也引起了中国政府和司法机关的高度重视，更促使一批正在迅速走向世界的中国大型公司加紧研究预防商业活动中腐败活动的对策。

二、跨国公司在华商业贿赂问题

（一）跨国公司在华进行商业贿赂案件

1、案件名称

*中国商业对外贸易总公司总经理助理、高级研究员
Senior Researcher, Assistant to the President of China National Commercial Foreign Trade Corp.

在 2004 和 2005 年之际，中国大陆发生了“朗讯风波”、“张恩照事件”、“谢瑞麟事件”以及“德普案”等多起境外跨国公司在内地涉嫌商业贿赂案件。这些案件在社会上引起了极大的震动，并惊动了中央政府。

2、触犯的美国法律和引起的问题

令人尴尬的是，这些案件发生在中国内地，最后却以被外国法律惩处而告终，惊现中国反跨国公司商业贿赂监管之缺漏。以“德普案”为例，2005 年 5 月 20 日，美国司法部做出了一份对美国 Diagnostic Products Corporation (以下简称 DPC 公司)的处罚报告。报告指出，从 1991 年到 2002 年的 11 年间，美国 DPC 公司的子公司中国天津德普诊断产品有限公司向中国的医疗机构和医生行贿了 162.3 万美元的现金，用来换取这些医疗机构购买其母公司 DPC 公司的产品，从中赚取了 200 万美元。美国司法部认定该行为触犯了美国《反海外腐败法》有关“禁止美国公司向外国有关人员行贿”的规定，DPC 公司被罚向美国司法部支付 200 万美元的罚款和向美国证券交易委员会上缴 204 万美元的非法所得，并同时缴纳 75 万美元的预审费等费用。

应当承认，跨国公司在华商业贿赂现象已经非常严重，这些案件只是跨国公司在华商业贿赂现象的冰山一角。商业贿赂的泛滥，已经成为制约中国经济发展的瓶颈。

（二）跨国公司在华商业贿赂的成因

跨国公司在华进行商业贿赂的成因有以下四个方面：

1、行业垄断是跨国公司在华进行商业贿赂的基础。商业贿赂和垄断经常相伴而生,在垄断行业和政府严格管制的行业中，权力稀缺往往加重了资源稀缺，商业贿赂的可能性更大。目前之所以商业贿赂在中国的医疗、电信、金

融、房地产等行业在最为普遍一个重要原因就是这些行业都属于垄断行业，只要手中拥有配置资源的权力，从购销、采购到项目审批的每个环节都可能发生不良的商业道德行为。

2、利益驱动是跨国公司在华进行商业贿赂的诱因。逐利是市场的本性，合法的逐利行为是社会财富的推动力，而当贿赂成为市场交易利器的时候，一些“精明”的商人就不再会通过提高产品质量、降低生产成本谋取利润,因为商业贿赂的成本更低、并存在超乎寻常的利润空间。

3、商业“潜规则”是跨国公司在华造行商业贿赂的借口。中国强调人际关系,跨国公司在进入中国市场的过程中,曾经因为这些与西方完全不同的文化特质付出过高昂的代价。随着跨国公司本土化战略的实施,许多跨国公司认为要在中国的商业社会里发展,必须利用这一“中国商业潜规则”，向灰色的潜规则妥协。

4、监管不到位和法律缺位是跨国公司进行商业贿赂的客观因素。客观地说,中国国内法律特别是刑法对商业贿赂有着严厉的规定，如《刑法》规定犯受贿罪最高可处以死刑。但这些法律条文因涉及《反不正当竞争法》、《刑法》及其他许多部门法规而显得过于分散,且在法律定义上也有疏漏之处,加之立法层级不高,这些因素综合在一起导致在反商业贿赂实践中,貌似严厉实则效果不彰。

三、中国反商业贿赂法律制度的缺陷

（一）现行法律对商业贿赂行为的界定片面

这种片面界定主要表现在两方面：

1、受贿对象范围狭窄。禁止商业贿赂的目的是防止经营者以不正当的利益引诱交易，保障市场公平竞争的秩序。不论经营者贿赂的对象是交易活动的对方单位或个人，还是对交易可能产生影响力的第三人，只要其行为的目的是为了争取不正当交易机会，就构成了商业贿赂行为。但是中国《反不正当竞争法》和《关于禁止商业贿赂行为的暂行规定》将贿赂对象限定在经营者交易的对方单位和个人，导致实践中某些对交易具有影响力的第三人收受商业贿赂的行为得不到法律的惩处。例如在医药购销中，医生接受药品销售企业回扣，但由于其不是交易的当事双方，工商局不能对其行为直接处罚，而只能处罚作为经营者的药品销售企业，导致医疗行业的回扣之风屡禁不止。

2、刑法规定的受贿罪主体范围狭窄。中国刑法规定的贿赂犯罪主体，是按主体身份划分的。刑法明文规定可以构成商业贿赂罪的主体包括国家机关、国家工作人员和公司企业及其工作人员。但是实践中的商业贿赂主体并不局限于这几类，如拥有处方权的医生和具有教材指定权的教师等在市场竞争中具有特殊地位的人员，由于其既不属于国家工作人员，又不属于公司企业工作人员，因此不能适用刑法规定的受贿罪和公司、企业人员受贿罪。这导致在商业受贿主体上出现了一个法律真空地带，大量严重受贿人员得以钻法律的漏洞，逍遥法外。

（二）行政法律责任单一

在中国，商业贿赂的法律责任包括行政责任、民事责任，构成犯罪的，还要承担刑事责任。中国商业贿赂的行政责任形式比较单一，只有罚款和没收非法所得两种形式，且罚款数额相对较低，法律震慑作用小，与商业贿赂所能获得的巨大利润相比，经营者宁愿承担被处罚的风险。就民事责任而言，商业贿赂行为的受害者对商业贿赂给自己造成的损失，有权向经营者提出民事赔偿请

求。但是由于商业贿赂形式一般比较隐蔽，第三人难以取得充分的证据来提起民事诉讼，导致法律关于商业贿赂民事责任的规定形同虚设，在实践中几乎没有经营者因商业贿赂行为而提起民事诉讼的实例。

（三）行政执法与刑事司法不衔接

根据中国《刑法》和《反不正当竞争法》规定，当商业贿赂行为构成犯罪时，国家工作人员受贿案件和向国家工作人员行贿的案件由检察机关管辖，公司、企业人员行贿案件和受贿案件及银行等金融机构人员受贿案件由公安机关管辖。当商业贿赂行为尚不足以构成犯罪时，应由监管商业贿赂行为的“监督检查部门”对其查处，具体指县级以上人民政府工商行政管理部门以及法律、行政法规规定的其他部门。在中国商业贿赂的执法实践中，由于多个行政执法机关对商业贿赂行为具有监督检查权，实际操作中可能导致对同一行为的管辖权冲突问题。同时，就行政部门和司法部门而言，由于部门利益的存在和沟通机制的缺乏，行政部门在一部分构成商业贿赂犯罪案件的处理上，往往不能及时将其移交给司法部门，而通常由其内部消化。而司法部门由于缺乏对企业的日常监督，难以及时发现形式隐蔽的商业贿赂行为，只能被动地依靠举报等来立案侦查，形成多头监管、头头不管的尴尬局面。

（四）反海外商业贿赂制度缺失

中国加入世界贸易组织后，越来越来的企业和产品走出国门、走向世界。随着对国外市场开拓的加剧，国内各企业在对国外市场占领上的竞争也日益激烈。正如德普公司在中国以行贿为其开道从而迅速占领市场一样，中国企业在利益的驱使下，难免会采取同样的手段以赢得在国外市场上的一席之地。中国现行《反不正当竞争法》和《暂行规定》中并没有明确规定其适用对象是否包括在国外行贿的经营者，因此对发生在国外的经营者的商业贿赂行为显得鞭长

莫及。若任其发展，个别企业在跨国经营中的不正当竞争行为将严重损害到其他同类企业的利益，不利于国际竞争中中国企业在产品和服务质量上的整体提升。同时，企业的商业贿赂行为不仅反映出单个企业诚信的缺失，更严重损害了国家的整体形象，因此，反海外商业贿赂法律制度的缺失是中国商业贿赂治理中的一个空白。

四、跨国公司商业贿赂的预防

（一）加强反商业贿赂立法和执法

目前，中国关于商业贿赂的法律规定比较单薄，散见于《反不正当竞争法》、《暂行规定》和《刑法》等法律性文件中，立法层次较低，规定也不完善，制定一部统一的反商业贿赂法是大势所趋。笔者认为，在制定统一的反商业贿赂法时应考虑以下几个问题：

1、调整商业贿赂的定罪范围

调整立法对商业贿赂行为的规定范围主要包括两个方面：

一是重新界定商业贿赂行为。根据《反不正当竞争法》和《暂行规定》，商业贿赂仅指在商品的购买和销售中经营者采用财物和其他手段贿赂对方单位或个人的行为。实践证明，我国现行法律调整的商业贿赂行为的范围过窄，在制定统一的反商业贿赂法时，应该适当扩大其范围。首先，商业贿赂行为不仅发生在商品的购买和销售环节，商品认证、市场准入、金融信贷等领域也可能发生商业贿赂的行为，为了将这些行为都纳入法律的调整范围，应该将商业贿赂行为定义为在商业过程中为谋取不正当的商业利益所发生的一切行为。其次，商业贿赂的对象也不仅仅局限于交易的对方，还包括对市场竞争具有影响

力并且帮助行贿方在竞争中获取不正当交易机会的第三人，因此，商业贿赂的对象应该定义为交易活动的对方单位和个人以及对市场竞争具有影响力的第三人。

二是在商业贿赂犯罪中增加职业受贿罪。中国现行刑法规定，商业贿赂犯罪的受贿主体按其身份的不同适用不同的罪名。国家工作人员接受商业贿赂的，按受贿罪论处；非国有性质的公司、企业以及其他单位接受商业贿赂的，按企业、公司人员受贿罪论处。法无明文规定不为罪，对于既不具有国家工作人员身份又非公司、企业人员的个人，如非营利性质医院的医生、足球裁判等具有特殊职业的人员，不能对其受贿行为进行定罪处罚。因此，应该增加职业受贿罪或业务受贿罪，将一些因为处于特殊职业而在商业竞争中对交易机会具有影响力的个人纳入到刑法对商业贿赂犯罪的调整范围。

2、完善商业贿赂法律责任体系

关于商业贿赂的法律责任应从以下两方面加以完善：首先，增加商业贿赂行政责任的种类。中国商业贿赂行政责任仅有罚款和没收违法所得两种，形式过于单一，达不到有力惩处的效果。中国应借鉴美国《反海外腐败法》的有关规定，增加资质罚等责任形式，如撤销其从事相关行业的行政许可、禁止其产品出口等，这种处罚对于企业来说比罚款和没收违法所得更为致命，更能有效遏制商业贿赂行为。另外，罚款数额应当适当予以提高，增大经营者的违法成本，起到实质的震慑作用。另一方面，在民事责任方面，针对实践中鲜有经营者因商业贿赂行为而承担民事赔偿责任的现状，中国立法应考虑建立起有关机关的证据协助机制。在商业贿赂执法和司法实践中，由于工商行政管理机关和检察院等国家机关具有法律规定的监督检查权，在调查商业贿赂案件时能取得一般单位和个人所不能取得的证据，因此，经过申请，这些具有监督检查权的

机关可以将取得的证据提供给有关单位或个人，协助他们对商业贿赂行为提起民事诉讼。

3、增加反海外商业贿赂规定

为保证跨国经营中的公平竞争秩序，在中国的反商业贿赂法律体系中有必要增加关于海外商业贿赂的规定。笔者认为，首先，在制定中国统一的反商业贿赂法时，应对海外商业贿赂行为作出原则的规定，明确禁止海外商业贿赂行为。其次，由于海外商业贿赂行为较之一般国内商业贿赂行为的复杂性，中国应该借鉴美国制定《反海外腐败法》的经验，制定一部单行的反海外商业贿赂法，在适用对象、企业义务、检查监督和法律责任方面作出更详细的规定。

4、加强反商业贿赂执法协调力度。

立法当然是重要的，但有法不依，有令不行则更是有损法律的尊严。在中国，商业贿赂作为一种“潜规则”，长期游离于执法部门的视野之外，因而长期大行其道。因此，反商业贿赂，重点是在于法律的严厉执行。一方面需要严格执法、违法必究，加大商业贿赂的打击力度，对违法者保持足够的法律威慑力；另一方面，要提高执法水平，准确区分正常行为和商业贿赂的界限，只有打击真正的违法行为，保护正常的商业行为，才能既维护法律的权威，又保障社会的公正。

（二）加强预防商业贿赂的各项制度

1、加强执法部门间的协调与合作

由于中国刑法中对商业贿赂的构罪条件表述比较模糊，仅以“数额较大”作为标准立案，然而对数额较大的起点却并未确定，刑事司法部门往往依据内部的一些指引性文件作为依据定案，这在很大程度上造成了刑事司法部门与行政执法部门之间在商业贿赂治理工作中的管辖冲突。因为行政执法部门在查处

商业贿赂案件时，往往根据部门利益和自身判断决定是否将案件移送刑事司法部门处理，这样很可能造成将一起本可以犯罪论处的商业贿赂案件仅通过罚款、警告等方式结案。所以，加强司法部门与行政执法部门之间的工作衔接与协调势在必行。由此，我们首先就必须在刑法条文中明确对商业贿赂犯罪的构罪数额标准，不够标准的一律由行政执法部门处理，只有明确了管辖权限，才能切实形成打击商业贿赂的合力。

2、深化行政监管体制改革。中国市场经济改革的过程，就是政府、经营者和消费者三方博弈的过程。要想改变中国企业的垄断格局，首先要改革不合理的政府管制，而要改革不合理的政府管制就必须改变管制背后失衡的力量对比。加强市场管理机构的独立性和权威性，打破这种“政企同盟”是中国市场经济改革的关键。对国有企业特别是国有垄断企业高层管理人员的权力要加以控制，应明晰产权人，强化监控机制，完善信息披露。在国有企业的采购中尽量使交易公开化、透明化，杜绝暗箱操作，堵住商业贿赂的漏洞。提高投资透明度，重大工程、采购设备实行招投标制，对存在行贿受贿的采购合同、投资合同予以撤销，建立重大工程项目信息库和举报网站，重大工程决策和采购设备失误实行个人责任追究制。另外，可以实行向国有大型企业派驻稽查特派员制度和委派会计师制度，国有大型企业设置监事会，由国务院派驻代表对国有资产质量和保值增值状况进行监督。

3、制定商业活动操守标准

为营造整个社会的抵制商业贿赂的良好风气，各行各业都应当制本行业的商业活动操守标准。这些标准应当包括以下三项基本内容：一是诚信经营，“诚实守信”是建立市场经济秩序的基石。企业在从事生产经营活动中，要严格遵守国家有关法律法规，履行社会公德和义务，切实维护消费者的权益，杜

绝失信行为，形成“诚信为本，操守为重”的职业道德风尚；二是禁止欺诈行为，企业要做到不以不正当手段争项目、争利益，不违反国家的计价政策及计价规范，共同营造“公平、合理、有序”的竞争环境；三是抵制商业贿赂，要加强企业经营、管理人员和从业人员的教育，自觉做到不行贿、不受贿，自觉抵制不正当竞争，遏制恶性竞争。加强企业内部管理，建立健全自律机制，制定企业道德规范和防治商业贿赂规章制度，并切实落实到位。

4、改善企业内部会计和审计制度

企业进行商业贿赂时，总是伴随着做假账和提供虚假财务信息的行为，如设立账外账户、虚列支出、入账去向不明的债务和使用虚假账簿、故意在法律规定的期限前销毁账簿等以隐瞒行贿行为。因此，禁止企业使用商业贿赂手段，必须有会计和审计制度支持。如美国的相关法律和联合国反腐败公约等都对企业会计制度作出了严格规定，如美国规定，企业因任何原因做假账均构成犯罪。我们可以借鉴国外的立法经验，在我国反商业贿赂法中设立严格的企业会计和审计制度，包括会计账簿管理、财务状况披露和会计审计标准等。对会计账簿和财务报表中的弄虚作假行为设置适当的民事责任、行政责任和刑事责任。

5、开展反商业贿赂的宣传教育

加强反商业贿赂的宣传教育和行业自律建设，构建防治商业贿赂的思想道德防线，是预防商业贿赂的一项必不可少的措施。要充分利用电视、广播、报纸、网站等媒体，曝光典型商业贿赂案件，广泛宣传有关政策和法律法规，提高全社会对商业贿赂严重性和危害性的认识，加强警示教育。同时，加强行业自律建设，建立相应的职业道德规范和行业协会，对一些轻微的商业贿赂行为依靠道德规范给予处分，贯彻行业处罚，以弥补法律的不足。

结论

综上所述，包括跨国公司在内的各经济行为体从事非生产性的商业贿赂，并不是因为其道德观念和谋利的行为方式发生了变化，而是因为制度安排，即个人选择环境的改变。只要制度上存在“租”，就会产生商业贿赂现象，惟一的解决办法就是制度创新。

以制度创新抑制商业贿赂，就是要建立这样一种制度：加大商业贿赂的成本，减小商业贿赂的收益，使商业贿赂的净收益小于寻求生产性利润的净收益，从而把经济人从非生产性寻利的商业贿赂行为中，引导和转变成生产性寻利行为中来。这样一种制度必须做到“四不”，即使经济人不能为、不敢为、不必为和不愿为。所谓“不能为”，是指通过制度创新消除租金存在的基础，使经济人无租可寻，或者以拍卖的形式将寻租过程公开化，把租金收归国有；所谓“不敢为”，是指在经济人头上时刻悬着两把“利刃”，一是有效的监督，二是严厉的惩罚，使他们片刻不能忘记一旦有非生产性创租的商业贿赂，就会身败名裂，前程尽毁；所谓“不必为”，是指为经济人铺平道路，确保他们能按其贡献大小获得相应的利益，过上体面的生活，从而不必去冒险从事商业贿赂；所谓“不愿为”，是指对经济人进行思想教育，通过“境界”的提高改变其偏好体系，不再寻求商业贿赂。通过这4个方面的有机配合和有效的制度创新，最终使贿赂双方“当事人”在严刑峻法、苛条密制和高薪清誉面前不敢贿、不能贿和不愿贿。唯如此，才能从根本上遏制跨国公司的商业贿赂行为。在反贿防腐战略中，“严刑峻法”是保障，“高薪清誉”是前提，“苛条密制”才是关键。

Protection and Treatment of Witnesses and Informants under the United Nations Convention Against Corruption and under Canadian Law

联合国反腐败公约及加拿大法律对证人和线索提供者的保护和对待

Gerry Ferguson 格里•符谷深 *

Abstract
摘要

大家都同意腐败是严重的全球性问题。但是，侦办、调查和起诉腐败可以是一项艰巨和挑战性的任务。腐败经常牵涉到有权力的政府官员、有可支配的各种方式掩盖腐败的商界巨头和公司。为了有效地打击腐败，必须鼓励注意到腐败行为的公民和员工报告这些腐败行为，并在需要时担负证人责任。无容置疑，由于这些人员与执法者合作，必须保护他们免于任何形式的报复。《联

* 维多利亚大学法学院教授
Professor, University of Victoria; Associate, International Centre for Criminal Law Reform and Criminal Justice Policy

合国反腐败公约》认识到提供线索者和证人在打击腐败中的重要性，所以《公约》中纳入针对这些事项的特别条款。《公约》包含三大条款：

（1） 第 32 条－保护证人、专家证人和受害人

（2） 第 33 条－保护检举腐败的人（吹哨告警者）

（3） 第 37 条－鼓励参与腐败犯罪的人与执法机关合作

我在本文中陈述《公约》的三大条款和加拿大的国内法律如何处理相关的问题。我特别陈述了加拿大的证人保护计划、有关保护检举者的立法、保护向警方提供线索者的身份和协助出庭作证者的证据规则，如：不准公众进入法庭、不准将证人身份和证词公开的法庭命令、允许证人在屏幕后或法庭外某地点作证。最后，我审视了鼓励犯罪者在腐败调查和起诉中与执法机关合作合作的方法：提供金钱奖赏、免于起诉和减刑。但是我们必须承认，这些激励犯罪者合作的方法牵涉到提供的信息和证据不可靠的风险。

Everyone agrees that corruption is a serious global problem. However, detection, investigation and prosecution of corruption can be a difficult and challenging task. Corruption often involves powerful government officials, business leaders and corporations who have various means at their disposal to hide their corruption. To effectively combat corruption, it is important that citizens and employees who become aware of corrupt practices be encouraged to report such practices and to act as witnesses where necessary. Needless to say, such persons must be protected from all forms of reprisal for their cooperation. The *United Nations Convention Against Corruption* recognizes the importance of informants and witnesses in combating

corruption and has included special provisions in the *Convention* to address these matters. The *Convention* has three main provisions:

(1) Article 32 - Protection of Witnesses, Experts and Victims

(2) Article 33 - Protection of Persons Reporting Corruption (Whistleblowers)

(3) Article 37 - Encouraging Persons Who have participated in Corruption Offences to Cooperate with Law Enforcement Authorities

In this paper I address these three *Convention* Articles and the way in which they are treated in Canadian domestic law. In particular I address the Witness Protection Program in Canada, Whistleblower legislation, the protection of the identity of police informants and evidentiary rules for the assistance of witnesses testifying in court, such as excluding the public from the courtroom, non-publication orders of a witness' identity and testimony, and allowing witnesses to testify behind a screen or from a location outside the courtroom. Finally, I examine methods for encouraging offenders to cooperate in corruption investigations and prosecutions by offering financial rewards, immunity from prosecution or mitigation of punishment. However it must be recognized that these incentives for such cooperation involve the risk of producing information and evidence which is not credible.

Protection and Treatment of Witnesses and Informants under the United Nations Convention Against Corruption and under Canadian Law

联合国反腐败公约及加拿大法律 对证人和线索提供者的保护和对待

Gerry Ferguson 格里•符谷深 [*]

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[*] 维多利亚大学法学院教授
Professor, University of Victoria; Associate, International Centre for Criminal Law Reform and Criminal Justice Policy

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I. INTRODUCTION

Everyone agrees that corruption is a serious global problem.[1] However, detection, investigation and prosecution of corruption can be a difficult and challenging task. Corruption often involves powerful government officials, business leaders and corporations who have various means at their disposal to hide their corruption. To effectively combat corruption, it is important that citizens and employees who become aware of corrupt practices be encouraged to report such practices and to act as witnesses where necessary. Needless to say, such persons must be protected from all forms of reprisal for their cooperation. The *United Nations Convention Against Corruption*[2] recognizes the importance of informants and witnesses in combating corruption and has included special provisions in the *Convention* to address these matters.[3] The *Convention* has three main provisions:

(1) Article 32 - Protection of Witnesses, Experts and Victims

(2) Article 33 - Protection of Persons Reporting Corruption (Whistleblowers)

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[1] Corruption is a serious offence because
(1) it undermines the ideals of good governance and it violates respect for the rule of law,
(2) it causes the public to lose faith in the fairness and integrity of government and the administration of justice,
(3) it assists the growth of organized crime,
(4) it impedes and deters economic investment and development by foreign investors in countries where corruption is widespread, and
(5) its adverse impacts are borne disproportionately on the poor and disadvantaged members of society.

[2] The *Convention* can be found at <www.unodc.org/unodc/en/crime_convention_corruption/html>. China ratified the *Convention* on January 13, 2006. China has signed (October 5, 1998) but not yet ratified the *International Covenant on Civil and Political Rights* which can be found at <www.unhchr.ch>. Canada has ratified the *ICCPR*. Canada has signed the *Convention against Corruption* and will ratify it after the few technical amendments in Bill C-48, "An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption" which was introduced in Parliament in March 2007, are enacted.

[3] There are similar but not identical provisions in the *U.N. Convention Against Transnational Organized Crime*, articles 24, 25 and 26.

(3) Article 37 - Encouraging Persons Who have participated in Corruption Offences to Cooperate with Law Enforcement Authorities

In this paper I will address these three *Convention* Articles and the way in which issues in these Articles are treated in Canadian domestic law.

II. PROTECTION OF WITNESSES

A. The U.N. Convention Against Corruption

1. Article 32 of the Convention

Article 32 of the *Convention Against Corruption* is entitled "Protection of Witnesses, Experts and Victims". Article 32 of the *Convention* provides as follows:

> 1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.
> 2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
>
> (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
>
> (b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.
>
> 3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
> 4. The provisions of this article shall also apply to victims insofar as they are witnesses.

> 5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

2. Comments on Article 32 of the Convention

(a) Article 32(1) requires States "to take appropriate measures" to provide effective protection from retaliation or intimidation for witnesses who give testimony in corruption cases and, where appropriate, for their relatives and persons close to them.

(b) The State obligation to take appropriate measures is limited to measures that are "in accordance with its domestic legal system" and are "within its means". Effective protection measures can be quite expensive and therefore there is a real concern that in some States such measures may be non-existent or severely restricted due to lack of financial resources.

(c) Article 32(1) expressly states that it applies to "witnesses who give testimony". However, the *U.N. Legislative Guide for the Implementation of the Convention*[4] suggests that the provision should not be narrowly interpreted and should apply to all persons who cooperate in the investigation and prosecution of corruption cases, whether or not they actually give testimony.[5]

(d) Article 32(2) indicates that witness protection measures may include:

(i) procedures for physical protection including relocation and non-disclosure of witnesses identity and whereabouts;

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[4] UNODC, Legislative Guide for the Implementation of the United Nations Convention Against Corruption [UN, New York, 2006] can be found at <www.unodc.org/pdf/corruption/coc_legislativeguide.pdf>.

[5] Eileen Skinnider, "The Protection of Witnesses and Victims in the U.N. Convention Against Corruption", Canada-China Implementation of International Standards in Criminal Justice Project (January, 2007).

(ii) special evidentiary rules to ensure the safety of witnesses, such as permitting testimony to be given through video or other adequate means.

(e) The above measures are merely suggestions; they are not mandatory. Article 32(2) also indicates that witness protection measures must not "prejudice the rights of the defendant, including the right to due process." This latter clause recognizes the real tension that exists in trying to provide evidentiary rules for the effective protection of witnesses that do not inappropriately or unfairly prejudice the due process rights of the defendant.

(f) The United Nations Office on Drugs and Crime (UNODC) has drafted a Model Witness Protection Bill as a guide to States that are interested in establishing a formal witness protection program.[6]

B. Canadian Law Dealing With the Protection of Witnesses

1. Witness Protection Program

A national Witness Protection Program was created in Canada by the *Witness Protection Program Act, 1996*.[7] The Program is administered by the Commissioner of the Royal Canadian Mounted Police (RCMP). The purpose of the witness protection program is to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to the RCMP or, by agreement on a cost-recovery basis, with persons who provide assistance to other domestic or foreign law enforcement agencies. The *Act* gives a broad definition

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[6] UNODC, *Model Witness Protection Bill 2000* is available at <www.unodc.org>. The Model Bill and the 2005 Council of Europe Recommendations, along with Witness Protection legislation and programs in Australia and England, are briefly summarized in Skinnider, *supra* note 5, at 12-16..

[7] Statutes of Canada, 1996, c. 15, available at <www.canlii.org>. Provinces can enact their own Witness Protection legislation and plans. Quebec has done so.

to the word "witness" to include any person who gives information, evidence or assistance in any police investigation or prosecution, as well as persons who are in close relationship to that witness. The Program is not restricted to witnesses who give testimony in court. The *Act* defines "protection" as including "relocation, accommodation and change of identity as well as counselling and financial support for those or any other purposes in order to ensure the security of the protectee or to facilitate the protectee's re-establishment or becoming self-sufficient."

Under s. 5 of the *Act*, the Commissioner is allowed to determine whether a person should be admitted to the program and the type of protection to be provided. Under s. 6 of the *Act*, a witness shall not be admitted to the Program unless a recommendation has been made by a law enforcement agency. If admitted, the Commissioner and the witness must enter an agreement setting out their obligations. Section 7 of the *Act* requires the Commissioner to consider the following factors when deciding whether to admit a witness into the Program[8] and the witness must disclose all information relating to these factors:

(a) the nature of the risk to the security of the witness;

(b) the danger to the community if the witness is admitted to the Program;

(c) the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness in the matter;

(d) the value of the information or evidence given or agreed to be given or of the participation by the witness;

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[8] The Commissioner's decision to refuse to admit an applicant into the Program is open to judicial review and the applicant is entitled to disclosure of all non-privileged documents that deal with the merits of that decision. See *Persons Seeking to Use the Pseudonyms of John Witness and Jane Dependant v. Canada (Commissioner of the Royal Canadian Mounted Police) (T.D.*, [1998] 2 F.C. 252 also available at <www.canlii.org>.

(e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;

(f) the cost of maintaining the witness in the Program;

(g) alternate methods of protecting the witness without admitting the witness to the Program; and

(h) such other factors as the Commissioner deems relevant.

Under s. 8 of the *Act*, the Commissioner is under an obligation to take such reasonable steps as are necessary to provide the protection referred to in the protection agreement.[9] A witness in the Program is deemed to have the following obligations under a protection agreement:

(i) to give the information or evidence or participate as required in relation to the inquiry, investigation or prosecution to which the protection provided under the agreement relates,

(ii) to meet all financial obligations incurred by the protectee at law that are not by the terms of the agreement payable by the Commissioner,

(iii) to meet all legal obligations incurred by the protectee, including any obligations regarding the custody and maintenance of children,

(iv) to refrain from activities that constitute an offence against an Act of Parliament or that might compromise the security of the protectee, another protectee or the Program, and

[9] The Commissioner and members of the RCMP can be sued for failing to take such reasonable steps: see *Canada v. Smith*, 2002 FCA 348 available at <www.canlii.org>.

(v) to accept and give effect to reasonable requests and directions made by the Commissioner in relation to the protection provided to the protectee and the obligations of the protectee.

Witnesses often remain in the Program for life. However, under s. 9 of the *Act*, the Commissioner may terminate the protection agreement for a serious breach by the protectee of the obligations under the agreement. When the Commissioner refuses to admit a witness to the Program or terminates a protection agreement, written reasons explaining that decision must be provided. Before terminating a protection agreement, the Commissioner must give the protectee an opportunity to make representations as to why the agreement should not be terminated.[10]

Section 11(1) of the *Act* prohibits the disclosure of information about the location or identity of a current or former "protectee".[11] Section 21 makes it a serious offence to contravene s.11(1). Sections 11(3) creates an exception to allow the Commissioner to disclose such information where (1) the protectee has consented, (2) the information has already been disclosed, or (3) disclosure is essential in the public

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[10] See *John Doe v. Canada (Attorney General)*, 2006 FC 92, also available at <www.canlii.org> in regard a judicial review of the Commissioner's decision to terminate a protectee who was in the Program. The Court found that the Commissioner had violated the protectee's right to procedural fairness. The Commissioner had not allowed the protectee to respond to the criticisms made against him by the police before making the decision to terminate. The Court held that "this failure to permit the Applicant to respond is such a clear contravention of the basic principles of fairness and natural justice that it is sufficient to quash the Assistant Commissioner's decision."

[11] In *R. v. McKay* 2002 ABQB 615 also available at <www.canlii.org>, the Court held that s.11 of the *Witness Protection Program Act* prohibits the Commissioner from disclosing information related only to the protectee's current location. It does not authorize the Commissioner to withhold personal information about the protectee, information about ongoing police investigations or information which would identify police techniques, from an accused person where such information is relevant to the prosecution of that accused person. See also *R. v. James*, 2006 NSCA 57, also available at <www.canlii.org>, where the Court held that the application for disclosure of information about a protected witness should be made in Federal Court since there was already a broad Federal Court confidentiality order in effect in respect to the protected witness' separate lawsuit against the Program.

interest[12] or disclosure is essential to establishing the innocence of a person. Section 12 of the *Act* requires the Commissioner to consider the following factors before disclosing information about the protectee:

(a) the reasons for the disclosure;
(b) the danger or adverse consequences of the disclosure in relation to the person and the integrity of the Program;
(c) the likelihood that the information will be used solely for the purpose for which the disclosure is made;
(d) whether the need for the disclosure can be effectively met by another means; and
(e) whether there are effective means available to prevent further disclosure of the information.

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[12] There has been recent criticism of the Witness Protection Program in regard to the case of Richard Young, see "Richard Young's Cruel Charade", the *Globe and Mail*, March 23, 2007 and the *Globe and Mail* editorial of the same date entitled 'What we can't discuss about witness protection'. In 2000, Young, a 22-year-old man, offered himself as an informant to the RCMP. At the time, the RCMP did not seriously investigate his background, his motives for becoming an informant and the fact that he was considered by many to be a pathological liar. Months later, Young befriended Barry Liu who the RCMP were investigating as a major drug trafficker in Victoria and who was facing a number of drug charges. Months later, Young concocted a story that Liu had recently contracted for the killing of two prosecutors, a judge, an RCMP officer and a former defence lawyer. The RCMP moved into high gear, for weeks and months, to protect the "intended targets". Young's RCMP status was also elevated from police informant to police agent. He was given instructions by the RCMP to buy cocaine from Liu. Liu was then arrested on those trafficking charges and Young was placed in the Witness Protection Plan with a new identity and location along with paying-off his former debts of $130,000. To lend credibility to his concocted story, Young hired a few Asian youths to follow the "targeted" RCMP officer. In a subsequent judicial hearing against Liu, a Victoria judge ruled that the "surveillance activity was a cruel charade orchestrated entirely by the machinations of Mr. Young". Subsequently the charges against Liu were dismissed. Notwithstanding his unreliable and concocted evidence, and hundreds of thousands of dollars of RCMP payments to him, Young was allowed to stay in the Witness Protection Plan. Long after these incidences, Young was convicted of killing another person while using his new identity. The RCMP have steadfastly maintained that the *Witness Protection Program Act* prevents them from releasing any information about Young's new identity or the homicide for which he was convicted. In its article and editorial on the Young case, the *Globe and Mail* criticized the Program for shielding the RCMP from public scrutiny in relation to the types of witnesses that are allowed into the Program and details about offences which these protected witnesses subsequently commit. More recently, a senior RCMP officer informed members of a Parliamentary Committee, which is examining the *Witness Protection Program Act*, that the RCMP are "very, very close" to finalizing the withdrawal of Mr. Young from the Witness Protection Program. However that withdrawal will not result in disclosure of information about Young's RCMP-created identity or his homicide conviction. See T. Naumetz, "Ex-Victorian to be Ousted from Witness Program", *Victoria Times-Colonist*, June 8, 2007. To date, there seems to have been inadequate consideration of whether the RCMP Commissioner should exercise his or her discretion to disclose information about Mr. Young's protected identity under s. 11(3) of the *Witness Protection Program Act*.

Relevant Data

In the past ten years, approximately 1,000 persons have been admitted to the RCMP Witness Protection Program, 70% of whom are RCMP witnesses and the other 30% have been referred from other police services, including some foreign police services.[13] Under s.16 of the *Act*, the Commissioner is required to submit an annual report to the Minister.[14] The following is a table of data from the most recent (2005-2006) report.

Number of	**2005 - 2006**	**2004 - 2005**
Total Number of New Cases[15]	53	86
Secure identity changes	54	35
Relocation outside province of origin	22	25
Relocation within province of origin	9	15
Voluntary Terminations	21	16
Involuntary Terminations[16]	7	8
Refusal of protection by witnesses[17]	15	11
Instance of failure of protection caused by RCMP	0	0
Lawsuits filed in court or complaints with the Commission for public Complaints against the RCMP in relation to the program	3	3
Total Cost of the Program[18]	$1,932,761.16	$2,656,287.51

2. Protection of Police Informant's Identity

[13] G. McArthur and T.T. Ha, "Coming Clean on Witness Protection", *Globe and Mail*, June 5, 2007 at A5.
[14] The annual reports are available online at <www.ps-sp.gc.ca>.
[15] On average, 30 to 35 cases per year are recommended by police agencies other than the RCMP.
[16] All involuntary terminations involved serious breaches of the Program.
[17] The main reason for witnesses refusing to enter the Program were unwillingness to relocate or other witness restrictions.
[18] Excludes RCMP wages, expenses and administrative costs.

Under Canadian law,[19] the prosecutor has a general legal duty to disclose all relevant information to the accused before trial. This legal duty is designed to assist the accused to make full answer and defence to the criminal charges. The accused's right to make full answer and defence is a principle of fundamental justice under s. 7 of the *Charter of Rights and Freedoms*. However, the prosecutor's duty to disclose is not absolute. It is subject to the following limitations:

(a) the prosecutor must not disclose information protected by the law of privilege;

(b) the prosecutor may delay production of the identity of witnesses if that is necessary to protect them from harassment or danger; and

(c) the prosecutor may delay disclosure of information if early disclosure may impede completion of an investigation, but delayed disclosure on this account is not to be encouraged and should be rare.

Under Canadian law, the identity of police informants is privileged information. Thus, the prosecutor is not required to disclose the identity of police informants. However, if the informant becomes a witness giving testimony, the privilege of non-disclosure of their identity disappears. Professors Paciocco and Stuesser[20] describe the privilege in the following words:

> An informant's identity is protected, as a fixed rule of law. Whether to disclose the informant's identity is not, as with government secrets, a matter of discretion for the judge. There is no balancing of interests to see whether or not the privilege exists in a given case. If you like, the decision has been made: the public interest is best served by protecting the identity of informants. It is accepted that informants play an important role in solving crimes, particularly drug-related offences. It is further accepted that the

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[19] *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

[20] D. Paciocco and L. Stuesser, *The Law of Evidence* (Irwin Law Inc., 4th ed., 2005) at 252-254.

informants need to conceal their identities both for their own protection and to encourage others to come forward with information. Given these two rationales, it follows that the privilege is not for the Crown or the informant alone to waive. A valid waiver of the privilege requires the consent of both.

The rule protects the informant's identity; it does not protect the information provided. However, the information should not be divulged where to do so threatens to reveal the informant's identity. In the case of anonymous tips, where it may be impossible to determine which details of the information provided by an informer will or will not result in that person's identity being revealed, then none of those details should be disclosed.

The rule, although fixed, is not absolute. The one and only exception to the rule protecting the informant's identity is where the evidence is needed to demonstrate the innocence of an accused person…. The Supreme Court of Canada in *R. v. Scott* outlined in more specific detail where the exception would apply. Each of these situations goes to establish the accused's innocence or a defence. Where the informant is a material witness, his or her identity must be revealed. Similarly the informant's identity must be revealed where the informant has acted as an *agent provocateur*, and the accused provides an evidentiary basis for the defence of entrapment. The law distinguishes between an "informant" and an "agent". An informant merely furnishes information to the police; an agent acts on the direction of the police and goes into the field to participate in the illegal transaction in some way. The identity of informants is strongly protected, whereas the identity of agents is not. The innocence at stake exception also applies where the accused seeks to establish that a search was not undertaken on reasonable grounds and therefore contravened section 8 of the *Charter*. This last exception has been extended to cases where wiretap authorizations are challenged.

When an accused seeks disclosure of privileged informant information on the basis of the "innocence at stake" exception, the following procedure will apply:

- First, the accused must show some basis to conclude that without the disclosure sought his or her innocence is at stake.
- If such a basis is shown, the court may then review the information to determine whether, in fact, the information is necessary to prove the accused's innocence.
- If the court concludes that disclosure is necessary, the court should only reveal as much information as is essential to allow proof of innocence.

- Before disclosing the information to the accused, the Crown should be given the option of staying the proceedings.
- If the Crown chooses to proceed, disclosure of the information essential to establish innocence may be provided to the accused.

[Footnotes omitted.]

3. Relevant Differences in Common Law and Civil Law Criminal Justice Systems for Protection of Witnesses

Differences in the common law adversarial system and the civil law inquisitorial system can lead to different forms of treatment and protection of witnesses in the two systems. Eileen Skinnider has summarized some of these differences as follows:

> The differences in legal tradition between civil law and common law jurisdictions are reflected in the position of victims of crime and witnesses in the proceedings. In common law jurisdictions, emphasis is on the oral testimony of witnesses. Lawyers, acting as adversaries, take the lead in questioning the witness at trial, while the judge acts essentially as a referee. This means that the general rule is that the witness is required to testify in court in person and be subject to cross-examination by the other party. Testimony is recorded verbatim by the court reporter or electronically.
>
> In civil law jurisdictions, there could be a series of court hearings held over an extended period. Documents play a more important role than witness testimony. The judge actively investigating the case conducts the questioning of witnesses. Instead of a verbatim record of the proceedings, the judge's notes and findings of fact comprise the record. In some civil law jurisdictions, such as the Netherlands and Switzerland, witness are not generally required to put in a personal court appearance. Under strict conditions, the Dutch courts may also allow a threatened witness to provide statements anonymously.[21]

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[21] See Skinnider, *supra* note 5, at 5, relying upon European Committee on Crime Problems, Committee of Experts on transnational Criminal Justice "Code of Minimum Standards of Protection to Individuals Involved in Transnational Proceedings" Report by Ms. Danai Azaria, Strasbourg, 16 September 2005.

Additional differences in the adversarial and inquisitorial systems are summarized in my paper on "Tainted Witnesses"[22] as follows:

> In adversarial systems, the two parties (the accused and the prosecution) generally determine and control the evidence which is presented to the court, whereas in civil law systems, the investigating judge and the court largely determine and control the presentation of evidence. In the accusatorial trial system, the judge takes no initiative for producing evidence and is purely reactive. All evidence is brought into the trial through witnesses called by either the defence or the prosecution. Witnesses are examined and cross-examined by the opposing parties in court before the judge (and jury if there is one). Evidence is discredited by the opposing party through the cross-examination of an adverse witness or by calling new witnesses. The judge's role during the questioning of witnesses is generally passive and is limited to making determinations on the admissibility of evidence. If the trial is by judge and jury, the trial judge decides all questions of law, including the admissibility of certain types of evidence. The jury, composed of 12 ordinary, randomly selected citizens without any specialized legal training, then decides whether the admissible evidence establishes the accused's guilty beyond a reasonable doubt. Before the jury begins its deliberations, the trial judge gives the jury some legal instructions on how they should consider and weigh the evidence which they have heard.
>
> The adversarial system is often compared to a system of battle between the prosecution and the defence. The system is built on the assumption that the truth is most likely to be found, if both sides are given an opportunity to present the strongest arguments for their case, and then those arguments are considered and decided upon by the judge as a neutral arbiter. In the adversarial system, the parties investigate the facts themselves before the trial occurs. Thus, the trial judge does not act as an inquisitor and generally remains a passive party throughout the

[22] See G. Ferguson and L. Neudorf, "The Use of Evidence of Tainted Witnesses: International and Canadian Standards" prepared for the Canada-China Program on the Implementation of International Standards in Criminal Justice, 2006, at 8-10.

proceedings.[23] The accused has the choice to testify as a witness at his or trial, or to remain silent. If the accused does testify, the accused is examined and cross-examined by the parties but is generally not questioned by the judge (or jury).

By contrast, the inquisitorial system does not engage in as clear a distinction between prosecuting and judging as does the common law system. In an inquisitorial system, the *juge d'instruction* commences an initial investigation and prepares a dossier that forms the foundation of the case. Both incriminating and exculpatory evidence is gathered by the *juge d'instruction* who is granted a range of investigatory powers and may hear witnesses, visit the scene of the crime and conduct searches, although these powers are now often performed through a public prosecutor or the police in many civil law jurisdictions.[24] The investigatory stages of the trial occur *in camera* and the questioning of the suspect plays a central part in these proceedings. In many civil law systems, a key part of the inquisitorial process is the interrogation of the defendant who may be obligated or expected to answer questions put to him by the judge. Technically speaking, the accused may choose to remain silent, but a refusal to answer questions may be used against the accused as evidence of his or her guilt. After producing the dossier, the *juge d'instruction* will decide whether there is sufficient evidence to move the case on to trial. If there is sufficient evidence to go to trial, the trial will be held in front of a different judge. In some civil law jurisdictions trial is by professional judge alone, while in other jurisdictions, trial is by professional judge and lay assessors or jurors.

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[23] The trial judge possesses a narrow power of investigation to call witnesses at trial where it is essential to establish the truth, although in practice this occurs rarely. However, one of the more controversial aspects of the 2002 terrorism provisions in the *Criminal Code* is the establishment of a new form of investigative hearings conducted by a judge whereby anyone, including a suspect, whom the judge believes on reasonable grounds may have information about terrorist offences, can be examined by the judge and shall be required to answer such questions, although his or her answers are granted use and derivative use immunity. See s. 83.28(8) and (10) of the Canadian *Criminal Code*. These provisions have been held to be constitutional: see *R. v. Bagri* (2004), 184 C.C.C. (3d) 449 (S.C.C.).

[24] For example, the *juge d'instruction* was abolished in Germany in 1974 and in Italy in 1988. This was made easier because of the elevated role of prosecutors in civil law systems. They are often equated with magistrates or judges: see M. Delmas-Marty and J.R. Spencer, *European Criminal Procedure* (Cambridge University Press, 2002) at 11 and 30.

4. No Anonymity for Witnesses Giving Testimony

Although the Council of Europe has recommended the use of anonymous witnesses as an exceptional measure, and the European Court has held that the use of anonymous witnesses does not necessarily violate the *European Convention on Human Rights* provided certain safeguards are followed,[25] Canadian law does not provide for the use of anonymous witnesses. As the Council of Europe Recommendation recognizes, there are many risks involved in the use of anonymous witnesses. Eileen Skinnider summarizes these risks as follows:

> The Explanatory Memorandum on the Council of Europe's Recommendation reviews anonymous witnesses with the case law from the European Court of Human Rights. It provides that the starting point is to recognise the risk entailed in allowing anonymity. The fact is that the defence cannot verify the genuineness, accuracy and sincerity of the statements. Nor will the defence have the opportunity to bring to light reasons why the witness might be considered unreliable without knowing the identity or verifying his personal history. The defence will not have the opportunity to raise the witnesses' personal history which could involve former mental disorders or simply former episodes of habitual lying, or perhaps have an undisclosed relationship or some form of contact or indirect connection with the accused in the past which should be made known or taken into consideration when verifying the witnesses' credibility.[26]

The European Court has indicated that a conviction should not be based solely or to a decisive degree on anonymous statements.

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[25] Discussed in Skinnider, *supra* note 5, at 16-18.
[26] *Ibid.*, at 16-17.

5. Limited Protections for Witnesses Giving Testimony in Canada

(a) Delayed Disclosure of Identity

As previously indicated, prosecutors may delay disclosure to the defendant of the identity of witnesses if that is necessary to protect witnesses from harassment or danger.

(b) Exclude Public From the Courtroom

The accused has the right to a trial in public under s. 11(d) of the *Charter of Rights and Freedoms*. That right is subject to reasonable limits. Section 486(1) and (2) of the *Criminal Code* gives the trial judge discretion to exclude members of the public from the courtroom for all or part of the trial if such exclusion is necessary to protect participants involved in the trial. This exclusion relates to members of the public, but does not extend to the accused. In addition, the *Charter* requires that orders of exclusion must be exercised with great restraint.

(c) Non-Publication of the Identity of Victims and Witnesses

Section 486.5 of the *Criminal Code* authorizes a judge to order that no information that could identity the victim or witness be published in any way if such an order is considered necessary for the proper administration of justice.

(d) Testimony Behind Screen or Outside Courtroom

Allowing witnesses to testify from behind a screen, or in a separate room, can be a useful device in reducing a witness' fear, intimidation or trauma of testifying in front of an accused. It can also assist in keeping the current appearance or disguise of a witness as a secret. Section 486.2(4) of the *Criminal Code* states that in organized crime and terrorist offences, a judge may order that a witness testify

> (a) outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and

(b) outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.

Likewise, an accused (but not his lawyer) may be prohibited from personally cross-examining a witness. Section 486.3(2) of the *Criminal Code* states:

> (2) In any proceedings against an accused, on application of the prosecutor or a witness, the accused shall not personally cross-examine the witness if the judge or justice is of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination.

III. PROTECTION AGAINST UNJUSTIFIED TREATMENT FOR PERSONS REPORTING CORRUPTION: WHISTLEBLOWERS

A. The U.N. Convention Against Corruption

1. Article 33 of the Convention

Article 33 of the *Convention* is entitled "Protection of Reporting Persons". Article 33 provides as follows:

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

2. Comments on Article 33 of the Convention

(a) Persons who report corruption are frequently referred to as "whistleblowers". While Article 33 recognizes the importance of providing measures to protect whistleblowers against unjustified treatment, it does not impose any mandatory requirement to do so. States must simply "consider" doing so.

(b) Article 33 suggests that whistleblowers should be protected against unjustified treatment if their report of facts concerning corruption offences are made "to competent authorities in good faith and on reasonable grounds". Their information may later be shown to be incorrect or disclosed in breach of confidentiality rules, but the whistleblowers are to be protected as long as they have acted in good faith and on reasonable grounds.

(c) Article 33 is not limited to public sector corruption and thus legislation protecting whistleblowers should apply to the reporting of both public and private sector corruption.

(d) Although Article 33 does not specify what specific whistleblower protection measures should be considered, the United Nations Office on Drugs and Crime has produced a "UN Anti-Corruption Toolkit" which provides guidance to countries that are interested in enacting whistleblower protection legislation.[27] Many countries have now adopted some form of whistleblower legislation.[28] The UN Toolkit suggests that such legislation should include the following five elements:

(1) physical protection for whistleblowers where necessary,

(2) creation of a criminal offence for employers or others who retaliate against whistleblowers,

(3) protection against dismissal or demotion, or other harassment of employees for whistleblowing,

(4) clear and alternative procedures for reporting suspected corruption,

(5) protection against frivolous or malicious allegations of corruption.

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[27] UNODC, The Global Programme Against Corruption "UN Anti-Corruption Toolkit" (3rd edition, Vienna, September 2004) Tool #36, found at <www.unodc.org/pdf/corruption/publications_ toolkit_sep04.pdf>.

[28] See brief discussion of Australian legislation in Skinnider, *supra* note 5, at 25-27.

B. Protection under Canadian Law for Persons Reporting Corruption

Canada has adopted both criminal and administrative legislation to protect whistleblowers.

1. *Criminal Code* Protection

Section 425.1 of the *Criminal Code* was enacted in 2004 to create a special criminal offence, punishable by a maximum of 5 years imprisonment, for employers or others who retaliate, or threatened to retaliate, against employees who have reported, or intend to report, the commission of offences or crimes.

Section 425.1 provides as follows:

> 425.1(1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
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> (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
>
> (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

Section 425.1 applies to both public and private sector employees and protects whistleblowing employees against disciplinary measures, demotion, termination or other adverse treatment.

2. Administrative, Public Sector Policy and Legislation

Federal and provincial governments have provided some guidance and protection to whistleblowers through creation of administrative policies and rules. It is only recently that such protection has also been created by legislation.

(a) Policy

At the federal government level, Lisette Lafontaine in her June 2006 paper entitled "Canada's Experience with the Implementation of International Conventions Against Corruption"[29] summarized the federal policy as follows:

> Reporting wrongdoings is currently governed by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, which applies to any wrongdoing. The definition of "wrongdoing" applies to the Criminal Code corruption offences. The policy requires deputy ministers to establish internal mechanisms to manage the disclosure of wrongdoing, including - at a minimum - a designated Senior Officer, who will be responsible for receiving and acting on such disclosures. The designated Senior Officer reports directly to the deputy minister for the application of the policy. The policy also provides for a Public Service Integrity Officer responsible for receiving and acting on disclosure from public servants of any department who believe they cannot disclose within their own department or who believe that the disclosure to the Senior Officer was not appropriately addressed.

Federal public servants are bound by the *Values and Ethics Code for the Public Service*. The *Code* encourages public servants to report wrongdoing, but does not make reporting mandatory. The *Policy on Internal Disclosure* provides that such reports can be made in confidence and without threat of reprisal. In this regard, Lisette Lafontaine states:

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[29] Prepared for the "Seminar on International Cooperation on Anti-Corruption Including Fair Investigation Practices" in Beijing, P.R. China, June 5-6, 2006 as part of the ICCLR's Canada-China Program.

> Currently, public servants who report any wrongdoing, including an act of corruption, are protected by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*. This policy provides that no employee shall be subject to any reprisal for having made a good faith disclosure in accordance with this policy. Employees and managers who retaliate may be subject to administrative and disciplinary measures up to and including termination of employment. The policy also provides for a procedure for employees who believe they are subject to reprisal as a direct consequence of having made a disclosure in accordance with the policy. The Senior Officer to whom the disclosure was made, or the Public Service Integrity Officer, is responsible to protect from reprisal employees who disclose in good faith information concerning wrongdoing.

(b) Legislation

There have been several legislative proposals at the federal government level to enact whistleblower legislation. These legislative proposals have been criticized by some persons as both inadequate and ineffective. Eileen Skinnider[30] has summarized the proposed and current legislation as follows:

> Regarding public sector corruption, there have been a number of private member bills introducing whistleblowing legislation over the years.[31] Pressure to pass legislation to protect whistleblowing by public servants increased after the sponsorship scandal.[32] In March 2004, Bill C-25, the *Disclosure Protection Act* was introduced which would require heads of federal organizations to establish internal disclosure mechanisms. Complaints would be investigated by the public service integrity commissioner who in turn would report to a cabinet minister and not directly to Parliament. Bill C-25 was widely criticized and died on the order paper when the 2004 election was called. Some of the criticisms

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[30] Skinnider, *supra* note 5, at 24-25.

[31] For example in 2003, Bill C-201.

[32] The sponsorship scandal refers to a government program designed to promote Canadian unity in Quebec. The Auditor General of Canada investigated the program and accused the government of squandering $100 million in bogus payments to several Quebec advertising firms that allegedly did little or no work for the money. Those allegations were the subject of a judicial inquiry. See the Gomery Inquiry at <www.gomery.ca/en/index.asp>. The two Gomery Reports are now available at <www.cbc.ca/news/background/groupaction/gomery report>.

included concerns that the reporting process was not truly independent because the integrity commissioner would not report directly to Parliament, meaning that the whistleblower would have had to report problems to the same government that was implicated in the scandal.[33] Another concern was that the whistleblower would have to go through an internal process before having access to a third party.

Bill C-11, the *Public Servants Disclosure Act*, was rushed through Senate in December 2005 just before Parliament went into recess for the election. Bill C-11 created an independent Public Sector Integrity Commissioner who reports directly to Parliament, rather than through the designated Minister. Bill C-11 has also been criticized for shortcomings in the protection of whistleblowers.[34] This Act sets up an internal regime for reporting of wrong doing but does little to protect whistleblowers or to ensure that their allegations are investigated. Some critics say this Act will silence whistleblowers, protect alleged wrongdoers and prevent the public from learning about scandals.[35] Some specific criticisms of Bill C-11 is that the Act does not allow for public ruling of cases, so the public may never learn about the allegations or the outcome of investigations. The Act requires whistleblowers first to report their allegations to their direct superior, who may well be the wrong doers or an accessory to the wrongdoing. The Act only covers public servants, and does not cover private contractors, which the government employs extensively. The Act does not provide for financial protection for the person who reports corruption, such as costs of legal representation, yet the accused wrongdoers typically have entire financial and legal resources of their organization at their disposal. The identity of the wrongdoer will be protected. This Act has been described as "… an act to protect ministers from whistleblowers and not an act to protect whistleblowers".[36]

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[33] CBC News Online "Whistleblower legislation Bill C-25, Disclosure Protection", 28 April 2004.

[34] Maria Barrados, "Whistleblowing legislation" speech delivered at Laurentian University, February 2005, <www.psc-cfp.gc.ca/speech/2005/whistleblowing_e.htm>.

[35] Critics such as Joanna Gualtieri of FAIR and Allan Cutler, whose allegations eventually led to the Gomery Inquiry, have stated that the provisions of Bill C-11 would have effectively silenced Cutler and prevented the truth from emerging. Reviews of this Act and other proposed provisions on whistleblowing can be found at <http://fairwhistleblower.ca/faa/2006-05-10_submission.html>.

[36] *Ibid.*

> The recently elected Canadian government introduced the *Accountability Act*, which contains provisions dealing with whistleblower protection.[37] This Act was enacted just this month, December 2006. This Act gives the Public Service Integrity Commissioner the power to enforce compliance with the Act. It covers all Canadians who report government wrongdoing and removes the government's ability to exempt Crown corporations. It also requires prompt public disclosure of information revealed by whistleblowers, except where national security or the security of individuals is affected. Also whistleblowers are to have access to the courts and to be provided with legal counsel. It also establishes monetary rewards for whistleblowers who expose wrongdoing and save taxpayers dollars. The criticisms of this Act include the concerns that it creates a mandatory internal process that makes it easier for the bureaucracy to identify and silence whistleblowers.[38] It also does not redress all forms of harassment and it strips public servants of their right to access the courts.

(c) Effectiveness of Whistleblower Legislation

Many commentators have noted that whistleblower legislation, by itself, will not necessarily result in increased reporting of corruption and other wrongful conduct. In this respect Eileen Skinnider notes:

> Research shows that the existence of whistleblower protection laws is not enough to encourage would-be whistleblowers.[39] In a survey carried out among public officials in New South Wales, Australia regarding the effectiveness of the protection of the Whistleblowers Act 1992, 85% of the interviewees were unsure about either the willingness or the desire of their employers to protect them. Some 50% stated that they would refuse to make a disclosure for fear of reprisal.[40] Further research in Queensland showed that despite a specific Act, public servant's concerns about

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[37] The Accountability Act has been passed by the Commons and Senate and was enacted December 2006. See <www.conservative.ca/EN/1091/63073>.

[38] A review of this Act and the concerns are found at the fairwhistleblower website, *supra* note 126.

[39] UNODC Toolkit, *supra* note 17.

[40] UNODC Toolkit, Toolkit #36, *supra* note 2. The Independent Commission against Corruption (ICAC) of New South Wales concluded that, in order to help the Whistleblowers Act work, there must be a real commitment within the organisation to act upon disclosure and to protect those making them and an effective internal reporting system must be established and widely publicized in the organisation.

reprisals was a major inhibitor to making disclosures. Also it appeared that public sector organizations did not inform their staff about the Act or how to make disclosures.[41] While 90% of respondents supported the concept of legal protection, 70% did not know or did not believe that their employers were serious about providing protection, while 25% did not believe that the Act had the power to provide protection and 50% would refuse to make disclosure for fear of reprisal.[42]

IV. ENCOURAGING PERSONS WHO HAVE PARTICIPATED IN CORRUPTION OFFENCES TO COOPERATE WITH LAW ENFORCEMENT AUTHORITIES

A. The U.N. Convention Against Corruption

1. Article 37 of the U.N. Convention

Article 37 of the *Convention* is entitled "Cooperation with Law Enforcement Authorities". Article 37 provides as follows:

> 1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.
> 2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.
> 3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial

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[41] "Why people don't report corruption: Barriers to the success of the NSW Protected Disclosures Act" delivered by Lisa Zipparo to the 12th Annual Conference for the Australian and New Zealand Society of Criminology, 8-11 July 1997, Griffith University, Queensland. 90% of respondents supported the concept of legal protection for making disclosures and 75% stated that they would not make a disclosure without it. However, 71% did not know or did not believe that their employers had the capacity to provide protection.

[42] Lisa Zipparo paper, *ibid.*

> cooperation in the investigation or prosecution of an offence established in accordance with this Convention.
> 4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.
> 5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provisions by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

2. Comments on Article 37 of the Convention

(a) Article 37(1) requires States to take measures to encourage offenders or accomplices of corruption offences to provide information or evidence to competent authorities to assist in the investigation and prosecution of corruption offences and the recovery of proceeds of such corruption. Although the obligation to encourage offenders to cooperate is mandatory, no specific measures are mandatory.

(b) Article 37(2) suggests mitigation of punishment as one possible method to encourage offender cooperation. Article 37(3) suggests immunity from prosecution as another possible method. However, mitigation of punishment and immunity are not mandatory requirements under Article 37.

(c) The Council of Europe has provided recommendations to States on how to encourage those who have been involved in crimes of corruption to cooperate with law enforcement authorities.[43]

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[43] Council of Europe, Recommendation Rec (2005) 9, discussed in Skinnider, *supra* note 5, at 29.

B. Encouraging Offender Cooperation Under Canadian Law

The Canadian legal system recognizes that effective detection and prosecution of corruption and other crimes will often require the adoption of measures to encourage cooperation and assistance from one or more persons (offenders or accomplices) who have been involved in the crime. These methods can include (1) providing physical protection under the Witness Protection Program, (2) providing financial compensation and rewards for cooperation, (3) providing immunity from prosecution, or (4) providing mitigated punishment.

(a) Financial Rewards

Police authorities and prosecutorial authorities have the authority and resources to pay financial compensation to informers and accomplices who provide information and evidence in regard to the investigation and prosecution of crimes. The use of paid informants to infiltrate organized crime gangs is common in Canada.

(b) Immunity from Prosecution

In common law countries like Canada, the prosecutor has exclusive jurisdiction to decide which criminal charges, if any, will be laid or prosecuted. Thus the Canadian prosecutor has the power to enter into full or partial offence immunity agreements with the accused without the approval of judges or courts. The police do not have legal authority to make immunity agreements. Immunity agreements are part of the larger process of plea negotiation or plea bargaining.[44]

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[44] See Gerry Ferguson and D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974), 52 Canadian Bar Review 497, and Gerry Ferguson, "The Role of the Judge in Plea Bargaining" (1972-73), 15 Criminal Law Quarterly 26. For recent analysis, see Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005), 50 Criminal Law Quarterly 14.

(c) Mitigation of Sentence

If an accused pleads guilty or is convicted of an offence, the judge has exclusive authority to decide on the appropriate sentence. Section 718.2 of the *Criminal Code* states that a sentence "should be increased or decreased to account for any relevant aggravating or mitigating circumstances." The *Criminal Code* does not list mitigating circumstances but Canadian courts have held that cooperation with law enforcement authorities is a mitigating factor. The amount of mitigation will vary depending on the degree of cooperation. In *R. v. H.(C.N.)*,[45] the Ontario Court of Appeal stated:

> [40] There is a division in the authorities as to when co-operation with the police should be considered a mitigating factor and, if so, the amount of the "discount" from the usual sentence that can be expected. The courts have found that co-operation with the police is a substantial mitigating factor where the accused has provided extensive information that has led to the prosecution of others for serious offences. For example, in *R. v. John Doe* (1999), 142 C.C.C. (3d) 330 (Ont. S.C.J.), Hill J. imposed a conditional sentence of two years less one day on a charge of importing 1.5kg. of cocaine, a case that he acknowledged would ordinarily call for a sentence of four to five years.
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> [41] The appellant, relying on the *John Doe* case, submits that to be relevant to sentencing, the accused's information or assistance must be of practical use in the sense that it can be acted upon. The appellant refers to the following passage from p. 341 of that case:
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> > [I] am of the view that the mere providing of information which is already known to the police, or which fails to prove reliable in the sense of leading to arrests, seizures, or to the banking of useful intelligence information in the view of the authorities, is not worthy of sentencing credit.

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[45] (2002), 170 C.C.C. (3d) 253 (Ont. C.A.).

[42] In my view, this is too narrow an expression of the circumstances in which credit should be given for assistance to the police. I prefer the somewhat broader view taken by the majority in *R. v. Cartwright* (1989), 17 N.S.W.L.R. 243 (New South Wales C.A.), at 252-53:

> In order to ensure that such encouragement is given, the appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. What is to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless the offender discloses everything which he knows. To this extent, the inquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.
>
> *Again, in order to ensure that such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective*. The information which he gives must be such as *could* significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities, as comprehended by the offender himself . . . [emphasis added].

[43] Many of the policy considerations for giving credit for assistance to the police apply whether or not the information turns out to be useful in

fact. Hill J. listed those considerations in the *John Doe* case at pp. 339-340:

> (1) The authorities can apprehend serious criminals including upper-level offenders in criminal organizations . . .
>
> (2) The police are able to seize contraband or to prevent the distribution of drugs . . .
>
> (3) The speedy proferring of information is encouraged by those who have it as part and parcel of their acceptance of responsibility for the matters with which they are charged . . .
>
> (4) The known availability of a sentence reduction for meaningful assistance to the police encourages other informers to come forward . . .
>
> (5) The spectre of substantial sentencing leniency for informer assistance encourages criminals to have less confidence in each other . . .
>
> (6) A sentence for an offender who has helped the police may be one of intense severity in prison on account of such matters as fear of reprisals or removal to a prison far from family . . .
>
> (7) Time spent in jail may, of necessity, have to be in solitary confinement or protective custody for the informer prisoner's protection . . .
>
> (8) In some cases, the accused/informer's family may be at risk of vengeance from the criminal element . . .
>
> (9) Where the informer's identity is known, as in the instance where he or she provides testimony against others, the risks to the informer and family may subsist after release . . .
>
> (10) Where an informer's identity is known, that person's days of living by crime are probably at an end . . .

[44] Finally, in *Madden*, this court reduced the sentence imposed by the trial judge by one year because the judge failed to give sufficient weight to the appellant's co-operation with the police, even though no seizures or arrests were made. In *Madden*, the appellant had participated in a controlled delivery that failed through no fault of the appellant.

> [45] Accordingly, I conclude that, in view of the findings made by the trial judge, this court is entitled to consider the respondent's co-operation as an extenuating circumstance that would permit a sentence outside the six to eight year *Cunningham* range. That said, in my view, the reduction for that factor should be modest in this case, something in the range of one year. The respondent provided information most of which, with very little effort, the police could have obtained themselves by searching the respondent's belongings. The degree of co-operation was far different than the assistance provided in the *John Doe* case.

Although the judge decides whether, and how much mitigation of punishment is given, the prosecutor's recommendation to the judge is very influential. As part of a plea bargain in exchange for the offender's cooperation, the prosecutor and defence counsel will often make a joint recommendation to the judge as to the appropriate mitigated sentence. A judge is expected to follow that recommendation, especially when it has been reached by way of a plea bargain, unless there is very good reason not to follow it. In *R. v. Sinclair*,[46] the Manitoba Court of Appeal has summarized the law as follows:

> [17] Thus, the law with respect to joint submissions may be summarized as follows:
>
> > (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
> >
> > (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
> >
> > (3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea

[46] (2003), 185 C.C.C. (3d) 569 (Man. C.A.).

> bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
>
> (4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.
>
> (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

(d) Offender Cooperation and the Danger of Tainted Evidence

Offering financial compensation, mitigation of punishment, or immunity from prosecution to offenders in exchange for their cooperation in the investigation and prosecution of other offenders creates serious risks of producing false or biased evidence. The truthfulness and reliability of evidence given by accomplices who are offered significant incentives to testify against other offenders must be carefully examined and assessed before it is relied upon.

Article 37 of the *Convention Against Corruption* obviously anticipates the use of such evidence. That article does not specify what safeguards should be used, if any, before using such evidence. However, due process rights in various international conventions provide some safeguards. For example, the accused's right, under Article 14(3)(e) of the *International Covenant on Civil and Political Rights* [ICCPR], to examine witnesses should provide some opportunity to the accused to seriously question the accomplice's credibility. Likewise, the accused's right to adequate time

and facilities to prepare his defence in Article 14(3)(b) of the *ICCPR* has been interpreted by the U.N. Human Rights Committee as including access to documents and other evidence which the accused requires to prepare his case. This access to evidence should include any information or documents relating to the accomplice's agreement to cooperate in the investigation and prosecution of other suspected offenders.

Under Canadian law, the evidence of accomplices or participants in an offence is generally considered tainted because it is usually "self-serving". For example, the Supreme Court of Canada has noted three reasons why an accomplice's evidence may be unreliable: (i) an accomplice may falsely testify in order to try to deflect blame onto others, thereby minimizing his involvement in the crime and thereby receiving a lesser punishment; (ii) an accomplice may have motivation to falsely accuse others in order to deflect blame from his friends or associates; (iii) accomplices are morally guilty criminals and therefore their testimony is automatically less believable. Originally, the law applied a rule that the evidence of accomplices could not be relied upon unless that evidence was corroborated in a strict legal sense. Canadian law no longer has a mandatory rule requiring corroboration of an accomplice's evidence. An accomplice's evidence is now admissible without corroboration but a clear and sharp warning is normally given (and sometimes must be given) by the judge to the jury about the dangers of relying upon such evidence without other supporting evidence.[47]

In Canadian criminal law, an accused is provided with a robust set of legal rights and procedural safeguards to ensure that he has the opportunity to present a full

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[47] See *R. v. Vetrovec*, [1982] 1 S.C.R. 811 and G. Ferguson and L. Neudorf, "The Use of Evidence of Tainted Witnesses: International and Canadian Standards" prepared for the Canada-China Program on the Implementation of International Standards in Criminal Justice, 2006.

defence. The accused is permitted to directly question the integrity of evidence put forward by the prosecution. The *Charter of Rights and Freedoms* is a constitutional bill of rights which enshrines and guarantees many legal rights for the accused. Sections 7 through 14 of the *Charter* provide the source for these constitutional legal rights. If a right guaranteed in the *Charter* is violated, the accused can seek an appropriate remedy in the circumstances which could consist of the categorical exclusion of improperly obtained evidence, a new trial or a conviction being overturned.

Several rights and procedures are important in the context of permitting the accused to identify and respond to the testimony of tainted witnesses. As noted earlier, the prosecution has a legal obligation to disclose all relevant evidence in its possession to the defence in advance of the trial. The Supreme Court has held that all types of evidence must be disclosed, including incriminating and exculpatory evidence and witness statements whether or not the prosecution intends to call the witness. Apart from information protected by any legal privilege, the defence is entitled to all of the details of any immunity agreement or other favourable consideration given to the informant or witness.[48] The accused would therefore be alerted to a potentially tainted witness and would be able to prepare a defence and cross-examination in response. It should also be noted that the prosecution has an ethical obligation to not lead evidence that the prosecutor knows is false or completely untrustworthy.

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[48] See *R. v. Basi*, [2007] B.C.J. No. 1234 (Q.L.) (S.C.) at para. 91.

One of the most important rights that the accused possesses in the common law adversarial system is the right to cross-examination witnesses.[49] Although the right to cross-examination is not expressly created by statute or the *Charter*, it is considered a fundamental component of an adversarial process. Cross-examination allows the accused to directly challenge testimony provided by a prosecution witness before the jury. The accused is entitled to ask broad questions and generally question the credibility of the witness. The accused can introduce a witness' prior criminal record and other relevant matters such as compensation, immunity or mitigation of punishment which indicate the witness may be lying. A vigorous cross-examination is viewed by the common law as the best way in which to expose a tainted witness and to arrive at the truth. In this respect, the common law adversarial system gives the accused more opportunity to attack the credibility of a tainted witness than does the inquisitorial system in which questioning of witnesses is controlled by the judge.

There are also other ways in which the accused can identify and counter tainted evidence. An accused is permitted to call his own witnesses to testify at trial. Defence witnesses can contradict testimony provided by other witnesses or impeach the credibility of prosecution witnesses. This ability of the defence to call its own witnesses can assist in reducing the credibility of a potentially tainted witness before the jury. In addition to calling its own witnesses, the accused is permitted to address the judge and jury at the conclusion of the trial. The content of the closing statement is generally accorded broad latitude by the trial judge. Defence counsel can use this opportunity to draw the judge's or jury's attention to the untrustworthiness of tainted

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[49] In Canada the Supreme Court of Canada has held that an accused has the right to cross-examine witnesses without unwarranted constraint and that this right is guaranteed as a principle of fundamental justice under s. 7 of the Canadian *Charter of Rights and Freedoms*: see *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 (S.C.C.), also available at <www.canlii.org].

prosecution witnesses. The defence can note specific inconsistencies in the witnesses' testimony or highlight other evidence that contradicts their evidence.

Brief Introduction to the International Association of Anti-Corruption Authorities

Gao Yuntao*

Abstract

The first and foremost objective of the International Association of Anti-Corruption Authorities (IAACA) is to provide a forum whereby national authorities are able to strengthen their domestic anti-corruption systems and procedures, and also develop cross-border channels of communication and cross-border institutional relationships. This primary objective of the IAACA takes as its foundation the comprehensive set of anti-corruption standards, measures and rules which United Nations Convention against Corruption (UNCAC) prescribes for UN member countries. Implementing these anti-corruption measures that UNCAC prescribes is likely to prove an arduous challenge for some countries.

One strong reason for establishing the IAACA has therefore been the drive to reduce, if not eliminate, such inter-jurisdictional obstacles that stand in the way of the international fight against corruption. As noted, the IAACA will seek to act as a

* Deputy Director General of the International Judicial Cooperation Department of the Supreme People's Procuratorate of the People's Republic of China

forum for open discussion on how best to free up and mobilise whatever mechanisms are needed to combat corruption world-wide. Nor does the IAACA process need to be a monolithic one. Rather it can be stimulated through IAACA organising, for example, a variety of regional work-shops and conferences bringing together the regional parties who most frequently deal with one another, and focussing on anti-corruption issues most common to that particular region. To this end, the IAACA is very open to the idea of inviting professional and private sector practitioners, with expertise in anti-corruption issues, to take part in such discussions and events. The IAACA will also lobby national governments to support such a process. Again, the rationale here is that organised and sustained pressure in search of a common objective will yield detectible results in the fight against corruption.

Brief Introduction to the International Association of Anti-Corruption Authorities

Gao Yuntao*

Excellencies, Distinguished Guests, Ladies & Gentlemen,

Speaking as a member of the Secretariat of the International Association of Anti-Corruption Authorities (or "IAACA" as I will hereafter refer to the Association) and on behalf of the Supreme People's Procuratorate of the People's Republic of China, it is my very great pleasure to introduce the IAACA to all delegates to the conference here in Vancouver.

The First Annual Conference and General Meeting of the International Association of Anti-Corruption Authorities, held in Beijing, China from 22 to 26 October 2006, the representatives of the Anti-Corruption Authorities of 137 Member States of the United Nations and 12 international organizations gathered in Beijing, Peoples' Republic of China, and voted Mr. Jia Chunwang, the Prosecutor General of the Supreme People's Procuratorate of the People's Republic of China as the president of the IAACA.

* Deputy Director General of the International Judicial Cooperation Department of the Supreme People's Procuratorate of the People's Republic of China

1. **Origins and Objectives of the IAACA**

Establishing the IAACA was first suggested by delegates attending the December 2003 conference in Merida, Mexico, convened to sign the UN Convention Against Corruption (UNCAC). Delegates at the Merida meeting recognised the need for a specialist, and international anti-corruption body dedicated to assisting implementation of the UNCAC. Indeed Article 49 of the UNCAC advocates establishing joint investigation bodies to encourage more cooperation at the international level between purely national anti-corruption authorities. Models for the sort of role the IAACA can fulfil are afforded, for example, by the International Criminal Police Organisation, the International Association of Prosecutors, the International Association of Judges, the International Bar Association and the World Jurists' Association.

Establishing the IAACA along such lines was further discussed in the course of several subsequent meetings, beginning with the 11th UN Congress on Crime Prevention and Criminal Justice in Bangkok and also at the first Prosecutors General Conference of ASEM, held in Shenzhen, China, in 2005. We also reverted to this topic at a meeting in Vienna last January to draft the rules of procedure for UNCAC, and also in the course of the International Association of Prosecutors executive committee meeting in Kampala, Uganda the following month (February). Strong indications of support for such a body have been received from national anti-corruption all around the world, and including Argentina, Azerbaijan, Australia, Fiji, France, India, Latvia , Malaysia, Namibia, New Zealand, Pakistan, Romania, South Africa, Singapore, Uganda, United Kingdom, Venezuela and Viet Nam, etc.

An initial draft statute establishing the IAACA, based on the advice of experts from Argentina and the UK was drawn up in the course of the first Prosecutors General Conference of ASEM in Shenzhen in December 2005. This draft was reviewed by experts from Bermuda, Hong Kong, Singapore, South Africa, Sri Lanka and the UK, and also unanimously approved at a special meeting in Vienna last April attended by parties representing some 20 different national anti-corruption authorities. The same draft statute has also been endorsed by the UN Office on Drugs and Crime (UNODC) in UNODC's capacity as custodian of UNCAC.

The IAACA's first and foremost objective is to provide a forum whereby national authorities are able both to strengthen their domestic anti-corruption systems and procedures, and also develop cross-border channels of communication and cross-border institutional relationships. This primary objective for the IAACA takes as its foundation the comprehensive set of anti-corruption standards, measures and rules which the UNCAC prescribes for UN member countries. Implementing these anti-corruption measures that the UNCAC prescribes is likely to prove an arduous challenge for some countries. How effectively each UN member country is able to implement the full range of anti-corruption prescribed by UNCAC is likely to be conditioned by two factors.

Firstly, the internal resources and capabilities of all national governments are ultimately finite. Secondly, where corruption operates across national borders, many additional and self-evident problems arise. These problems arise from differences in national cultures and legal and political systems that differentiate one country from another. Specific examples of such differences relate to different interpretations of what constitutes criminal conduct when assets are transferred from one national

jurisdiction to another. Or again, many procedural differences may affect the way different countries go about requesting legal assistance from counterpart governments overseas.

One strong reason for establishing the IAACA has therefore been the drive to reduce, if not eliminate, such inter-jurisdictional obstacles that stand in the way of the international fight against corruption. As noted, the IAACA will seek to act as a forum for open discussion on how best to free up and mobilise whatever mechanisms are needed to combat corruption world-wide. Nor does the IAACA process need to be a monolithic one. Rather it can be stimulated through the IAACA organising, for example, a variety of regional work-shops and conferences bringing together the regional parties who most frequently deal with one another, and focussing on anti-corruption issues most common to that particular region. To this end, the IAACA is very open to the idea of inviting professional and private sector practitioners, with expertise in anti-corruption issues, to take part in such discussions and events. The IAACA will also lobby national governments to support such a process. Again, the rationale here is that organised and sustained pressure in search of a common objective will yield detectible results in the fight against corruption.

As already noted, the problems which corruption poses for individual home governments domestically are greatly compounded when corrupt parties operate internationally. Where there is such a problem with corruption operating internationally (instanced by the involvement of organised, or bribery of overseas government officials, or the transfer of illegally obtained assets between different countries), it can only be sensible for national anti-corruption authorities to coordinate with one another in their common fight against such corruption. Obtaining evidence from abroad, the arrest and extradition of those suspected of corruption, and

the recovery of assets from overseas will all take place much more effectively where there is cooperation between authorities whose national laws and systems may have been abused by such criminals.

A major part of the IAACA's role will be to stimulate and facilitate such cooperation on a direct government to government basis so that it takes place more effectively and frequently than it may have done hitherto. Partly, this may be achieved by participants in the IAACA proceedings agreeing and documenting a framework of codes of best practise and memoranda of understanding for tackling corruption world-wide. Partly also and informally , a better coordinated drive to reduce international corruption may develop naturally through anti-corruption specialists in one country getting to know their counter-part specialists in another country via the forum that the IAACA meetings and events will provide.

Additional sharing of information is likely to be an important feature of any better coordinated fight against international corruption. To this end the IAACA has set as one of its current year projects the compilation of three manuals, dealing separately and for all jurisdictions, with, firstly "International Instruments on Anti-Corruption", secondly "Anti-Corruption Laws", and thirdly, "Anti-Corruption Authorities". These three volumes should provide an invaluable source of information on the way different jurisdictions have structured their judicial and executive resources for combating corruption. Via the association's web-site ‘www.iaaca.org’, the IAACA will publish a regular dossier of developments pertinent to the international fight against corruption.

As well as facilitating better coordinated requests for legal assistance in combating anti-corruption, and compiling relevant dossiers on anti-corruption law and practice. The IAACA also plans to put together a database covering sources of expert information on anti-corruption policy issues, and investigation techniques. On request, and subject to availability of finance, the IAACA will also put together teams of experts to provide legal and technical assistance in the areas of corruption prevention and detection, and asset recovery. It is envisaged that technical assistance of this nature will be of particular assistance to developing countries whose fight against corruption may need accelerating due to local constraints on human resources and/or expertise and Treasury support.

None of us I am sure underestimate the scale of the problem and arduous nature of the challenge presented by corruption world-wide. Global problems such as corruption do, however, require globally coordinated solutions and remedies of the sort that the IAACA aspires to facilitate.

2. Nature and Strategy of the IAACA

(1) Active Response to Implementation of UNCAC

Corruption is universally recognised as an evil phenomenon which undermines democracy and the rule of law, violates human rights, distorts markets, erodes the quality of life and permits organised crime, terrorism and other threats to human security to flourish. Nor, despite many parties' best endeavours in the past, does this evil phenomenon show any sign of abating. Corruption therefore continues to infect all countries, big and small, rich and poor.

The fact that the UN Convention Against Corruption (which I will hereafter refer to as "UNCAC") enters into force on 14 December 2006 is without doubt a remarkable achievement. This is, however, only a beginning. Now we must all bend our best efforts to ensuring that UNCAC is implemented as effectively as possible from the outset.

Establishing the IAACA is a pro-active response to the need for UNCAC to be implemented from the outset with maximum effectiveness. Effective implementation of the UNCAC is the IAACA's major objective, working on the comprehensive set of guidelines which the UNCAC provides for deterring, and, as far as possible, preventing corruption. Inevitably a major part of this deterrence and prevention will involve civil codes of conduct for regulating government or private sector business as well as, ultimately, punitive action against those found guilty of corrupt practice. The IAACA will assist this process by encouraging practical and effective measures aimed at strengthening international cooperation between national anti-corruption authorities.

(2) Independent, Non-Political and Professional

I would now like to say a word about what I see as the distinguishing hall-marks of the IAACA, by comparison with somewhat similar international organisations. Article 1.2 of the IAACA's draft constitution clearly stipulates that the Association is to be independent and non-political in the stance it adopts the fight against corruption. It will therefore be a professional, non-governmental and not for profit body. Its institutional members will be the competent national authorities charged, in their respective home countries, with the task of investigating and prosecuting corruption.

The nature of the powers will of course vary from state to state. Some national authorities will have powers to both investigate and prosecute corruption; others will have the power to either investigate or prosecute corruption. Some will be focused on anti-corruption work, to the exclusion of other economic crimes such as theft, or manipulating the stock market; others will deal with anti-corruption work as well as many other economic crimes. One major difference between the IAACA and other international legal/judicial organisations (such as the International Criminal Police Association, or International Association of Prosecutors) will therefore be in the composition of the association's membership. While other such international bodies largely consist of members drawn from the same professional discipline, the IAACA's membership will embrace a diversity of professional disciplines. The common denominator between such professional disciplines within the IAACA will be a shared focus on the need for international corruption in the fight against corruption.

(3) A Not for Profit Organisation

The IAACA is also a not for profit international organisation. The association's funding comes mainly from donations, with the principal such present donor being the Government of China. Going forward, other such governmental donations will of course be welcome. Both institutional and individual members of the IAACA will pay annual dues on the basis of an equitable assessment of what their right level is. I believe such dues should never become an excessive financial burden on any one institution or individual member. In such cases we will consider whatever exceptional circumstances apply and waive or reduce such dues accordingly.

(4) Annual Conferences

The IAACA's annual programme already includes some significant projects. Our first priority is to put on a firm footing arrangements for a series of future annual IAACA conferences. Such annual conferences have a key role to play in establishing a process of dialogue whereby national anti-corruption authorities will be able to discuss, communicate, collect and share information and experience. Delegates with expertise in the field of combating corruption will be equally welcome whether from countries with well-established anti-corruption authorities, or from countries where such authorities have only recently or not yet been established.

The Supreme People's Procuratorate of China, being one of the most important anti-corruption authorities in China is fully prepared to use its best endeavours not only to hosting this year's conference but also to host the second annual IAACA conference in China with the general theme of "Direct International Cooperation Against Corruption". Participants are encouraged to come to the IAACA's conference, bringing their ideas, suggestions and experiences to share with other IAACA members. Notwithstanding the considerable amount of work involved in organising such conferences, such is the importance of their subject matter that I am confident other members of IAACA will be keen to host future annual conferences.

(5) Information and Database

Further to the IAACA's ongoing work programme, the Association has particularly noted the absence of any compilation, or database covering national and international laws in relation to deterring, investigating and prosecuting corruption. Following a

good deal of research, the IAACA staff have therefore already collated for publication a substantial body of existing international anti-corruption instruments and laws from different jurisdictions, as well as background material specific to various national anti-corruption authorities. This is, however, only a beginning our ultimate objective is to provide IAACA members with a comprehensive updated legal database on matters relating to the fight against international corruption. This database will be kept up to date through continuous dialogue between IAACA staff and individual IAACA member countries.

An IAACA web-site is already in existence. Its content is in English and of necessity so far somewhat limited in scope. We would therefore encourage all IAACA members to visit the web-site, review what is on it and help expand the its content by contributing further material setting out the nature and extent of anti-corruption legislation and executive action in their respective home jurisdictions. So far as concerns having the web-site text in additional languages besides English, we are contemplating having Russian and Chinese texts with additional languages being added later on. Publication of web-site material of the sort referred to above will provide IAACA members with a database on a wide variety of anti-corruption corruption legislation and case law. Other information of a forensic nature (finger-prints, passport details etc.) may also be included on the web-site as it develops.

(6) Professional Training

Further important facets of the IAACA strategy will include professional training programmes in the field of anti-corruption work, and mutual exchanges of personnel to broaden the expertise of such personnel in this sort of work. In China, we envisage

establishing an international exchange centre for the further training of staff in the strategy and techniques of anti-corruption investigation, prosecution and general prevention. It is envisaged that the centre will be staffed by people having a particular expertise in the strategies and skills that have proved most useful in combating corruption around the world. Anti-corruption staff from the IAACA member countries will be welcome to attend the centre to receive professional training. Such training, and accommodation during the time it takes place, will be provided free of charge, meaning that those attending will only have to bear to cost of travel between China and home country.

(7) International Cooperation Against Corruption

The IAACA's long term strategy is to set in place the appropriate machinery for combating corruption globally. In certain instances constraints imposed by national jurisdictions tend to stand in the way of fully effective investigations into corruption world-wide. Examples of this problem can be found in the sort of obstacles that national anti-corruption authorities encounter in tracing both suspects who have absconded from their home country as well as the assets they may have taken with them. The process of seeking evidence from abroad regarding such criminal activities is often unduly complicated and protracted in the time it takes. Delays arise due to the problem of finding ways through unfamiliar political and legal systems while operating in a foreign language. It may take months or even years to complete the procedures required for obtaining such legal assistance abroad. Not infrequently cases get abandoned due to such delays.

The IAACA will therefore hope to adopt an increasingly active role in promoting direct international cooperation in extradition, mutual legal assistance and asset recovery. In the longer term the IAACA is considering setting up an international Coordination Centre to provide emergency back-up where undue problems arise in obtaining an international arrest warrant, or in the freezing and seizure of assets believed to represent the proceeds of corrupt practise. The IAACA also hopes to formulate a set of policy guide-lines on direct cooperation between countries in order to combat corruption more effectively. This is likely to be an extremely challenging task as different parties may well have widely differing views on the feasibility of such international cooperation against corruption.

Finally, I would like to welcome you to attend The Second Annual Conference and General Meeting of the International Association of Anti-Corruption Authorities, held in Bali of Indonesia from 20 to 23 November 2007.

I would like to thank for your courteous attention to what I have had to say on these matters. Thank you very much.

Implementation Issues and Procedures related to the Recovery and Return of Assets under both the UN Convention against Transnational Organized Crime and the UN Convention against Corruption

Douglas Breithaupt

Introduction

This paper will explore issues related to the implementation of the UN Convention against Transnational Organized Crime and the UN Convention against Corruption, paying special attention to the recovery and return of assets. Of necessity, the focus of the paper will be primarily on the latter Convention, which contains a chapter exclusively dedicated to asset recovery. The paper will also briefly outline Canadian laws and practices that are relevant to these issues.

Background

The United Nations Convention against Transnational Organized Crime (UNTOC) is the pre-eminent international instrument dealing with transnational organized crime. The negotiations were concluded in 2000 and the Convention entered into force in September 2003.

During the negotiations of the UNTOC, it was determined that it was desirable to negotiate a separate instrument against corruption, which would be able to address the issue of corruption more broadly and not be limited by a transnational organized crime focus. In the end, the UNTOC included some corruption offences (Art. 8) and some anti-corruption preventive measures (Art. 9).

Negotiations of the UN Convention against Corruption (UNCAC) commenced in earnest in January 2002 and concluded in October 2003. It is the first global convention against corruption. It is comprehensive, multidisciplinary in nature and balanced.

Both Conventions were negotiated in Vienna and they tackle different sorts of crime. Just as the 1988 Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances served as a useful precedent for the negotiators of the UNTOC, so did the UNTOC serve as a model for the negotiators of the UNCAC.

Each convention includes measures dealing with preventive measures; criminalization and law enforcement; international cooperation; technical assistance and information exchange; and a mechanism for implementation. The UNCAC is more extensive than the UNTOC (discounting the Protocols), and contains eight distinct chapters. Although there is a fair amount of duplication1, nevertheless each Convention is geared towards and well-suited to addressing the problems confronting

[1] It is sensible for some duplication to exist. For example, the same definitions for “property”, “proceeds of crime”, “freezing” or “seizure” and “confiscation” apply in Article 2 of both Conventions.

the international community in respect of transnational organized crime and corruption respectively.

The negotiators of the UNCAC took the provisions of UNTOC into account and were careful not to "reinvent the wheel" except to the extent necessary. During the negotiations, they were also cognizant of a variety of pre-existing international anti-corruption instruments.2

One area that really sets the UNCAC apart from the UNTOC is the treatment given to asset recovery. In this respect, the UNCAC broke new ground. Article 1(b) of the UNCAC includes as a stated purpose of the Convention, the promotion, facilitation and support of international cooperation and technical assistance in the fight against corruption, including in asset recovery. A complete chapter in the UNCAC is devoted to asset recovery and throughout the Convention there are specific references to asset recovery or the return of proceeds of crime.3

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[2] Examples included the Inter-American Convention against Corruption, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and various Council of Europe instruments.

[3] See, for example, Article 46(3)(k) regarding mutual legal assistance, Articles 60(1)(h) and 60(5) dealing with technical assistance, and Article 60(4)(b) concerning the work of the Conference of the States Parties.

Phenomenon of Grand Corruption

There was strong impetus for creating a chapter on asset recovery in the UNCAC. Prior to the negotiations, there had been examples of "grand" corruption cases, which in some cases involved regimes that were controlled by corrupt officials who looted State treasuries. According to the United Nations, the estimates of the amount of money looted in the 1990s from the Philippines, Haiti and Nigeria, for example, range from $500 million to as high as $5 billion."4

The vocabulary in use and the conceptual framework underpinning the early part of UN discussions focussed on the "repatriation" of assets, but in time it was understood, having regard to the various scenarios that could be in play, that it was more appropriate to speak of the return of assets to their legitimate or rightful owner.

While the focus of some countries was invariably on developing within the UNCAC an "inalienable right" to recover illicit assets, attention also had to be paid to the legal and procedural safeguards of the countries whose assistance would be sought, covering such matters as due process, fair trial rights and the rights of bona fide third parties.

Preventive Measures

The link to prevention was also an obvious one, both from the point of view of preventing the theft of public monies and property in the first place and, secondly, of

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[4] United Nations Office of Drugs and Crime, The Global Programme Against Corruption: UN Anti-Corruption Toolkit (3rd ed., Vienna, September 2004) at p. 574.

having in place procedures to permit the effective tracing of such monies and property, and being able to prove rightful ownership.

While there is some focus on preventive measures in the UNTOC, there is, understandably, a much greater emphasis given to preventive and good governance measures in the UNCAC. In the UNCAC, general preventive measures are found in Chapter II of the Convention, while preventive measures more specifically directed towards asset recovery appear in Chapter V, the asset recovery chapter.

Both Conventions include provisions on measures to prevent money-laundering. Article 14 of the UNCAC is almost identical to, but goes slightly beyond, the requirements of Article 7 of the UNTOC.

Both Articles require the creation of a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, and call upon States Parties to ensure the ability of competent authorities to cooperate and exchange information at the national and international levels as prescribed by its domestic law. In addition, States Parties are to consider: creating a financial intelligence unit to collect, analyze and disseminate information regarding potential money laundering; implementing feasible measures to detect and monitor the cross-border movement of cash and appropriate negotiable instruments. Where the Conventions differ, essentially, is in relation to Article 14(3) of UNCAC, which specifically calls upon States Parties to consider requiring financial institutions to collect information on originators of electronic fund transfers, maintain information throughout the payment chain and apply enhanced scrutiny to fund transfers containing incomplete originator information. Under both Conventions, States Parties are also to endeavour to develop

and promote judicial, law enforcement and financial regulatory authority cooperation ranging from the global to bilateral levels.

Criminalization and law enforcement measures

Article 3 of the UNTOC deals with the scope of application of the Convention, which applies to the prevention, investigation and prosecution of offences established in accordance with Articles 5 (participation in an organized criminal group), 6 (laundering of proceeds of crime), 8 (corruption) and 23 (obstruction of justice) of the Convention, as well as with "serious crime" as defined in Article 2, that is, an offence punishable by four years or more. To fall within the Convention, the offences must be transnational in nature and involves organized criminal groups.

In the UNCAC, there is a mix of mandatory and optional criminal offences. They cover both public and private sector corruption and include a range of offences, from well-known and established offences (e.g. bribery of domestic officials) to offences that may not be known to some countries (e.g. trading in influence) to an offence which may be acceptable in some countries but not in others, namely, illicit enrichment.

Article 12 of the UNTOC and Article 31 of the UNCAC deal with freezing, seizure and confiscation in much the same way. These Articles set out measures that should be taken by States Parties to enable the confiscation of proceeds of crime and instrumentalities and stipulate that States Parties should not decline to act on the ground of bank secrecy. However, Article 31(3) of UNCAC also calls for the

adoption of measures to regulate the administration of frozen, seized or confiscated property.

Asset Recovery

Chapter V of the UNCAC is linked in many ways with the rest of the Convention, but it also stands alone to some extent, since it includes its own specific preventive measures, as well as provisions on international cooperation. For some States, Chapter V may be regarded as the heart of the Convention. It is certainly the site of the major breakthrough in international law and represents an extensive and novel treatment of asset recovery.

Article 51 of the UNCAC emphasizes that the return of assets is a fundamental principle of the Convention and that States Parties are expected to provide one another with the widest measure of assistance and cooperation in this area. International cooperation is essential in order to combat grand corruption.

Article 52 provides a mini-code of preventive measures designed specifically to enhance the recovery of assets and to supplement the more general preventive measures found in Chapter II, including Article 14.

Article 52 reinforces the “Know Your Customer” rule for financial institutions by obliging States Parties to require these institutions to verify the identity of their customers; take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and conduct enhanced scrutiny of accounts of persons entrusted with prominent public functions and their family members and

close associates. The goal is to detect suspicious transactions in order to report them to competent authorities, without interfering with legitimate bank business.

To facilitate the implementation of these Article 14 objectives, States Parties are to issue advisories and notify financial institutions on the types of person – both natural and legal – and the types of accounts to which enhanced scrutiny should apply. Such efforts, either by the State Party itself or by its financial oversight bodies, would be expected to provide useful guidance and foster the effective and consistent application of these practices.

Article 52 also promotes adequate record-keeping and seeks to prevent the creation of "shell banks" (that is, banks without a physical presence) and invites States Parties to direct their financial institutions not to enter into or continue correspondent banking relationships with such institutions. This Article also requires States Parties to consider establishing effective financial disclosure systems for appropriate public officials, with appropriate sanctions for non-compliance, as well as providing for information sharing with other States Parties. States Parties are also to consider requiring appropriate public officials having an interest in or signing authority in respect of foreign accounts to report that relationship to the appropriate authorities, maintain appropriate records and have in place appropriate sanctions. It is, therefore, left to the State Party to determine which public officials would be covered.

The UNCAC aims to increase the utility of civil proceedings as a means to recover property. For example, Article 43(1) provides not only that States Parties shall cooperate in criminal matters, but also that they consider assisting each other in investigations of and proceedings in civil and administrative matters relating to

corruption. In addition, Article 53 requires each State Party to permit another State Party to initiate a civil action in its courts to establish title or ownership in property acquired through the commission of an offence established in accordance with the Convention; permit its courts in cases where another State Party is not a party to the proceeding to order payment or compensation to the other State Party that has been harmed by such offences5; and permit its courts, in deciding the issue of confiscation, to be able to recognize another State Party's claim as a legitimate owner of such property.

In order to make mutual legal assistance effective for the purposes of confiscation under Article 55, Article 54 of the UNCAC requires States Parties to take the necessary measures to permit their competent authorities to enforce a foreign confiscation order and for permitting them to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence. As well, the State Party must consider allowing confiscation without a criminal conviction, when the offender cannot be prosecuted.

Article 54(2) of the UNCAC obliges States Parties to freeze or seize property on the basis of a foreign freezing or seizing order, or of a request, where there is a reasonable basis for the requested Party to believe that there are sufficient grounds for taking such actions and that the property would eventually become subject to an order for confiscation. Article 54(2)(c) introduces the concept of the preservation of property for confiscation on the basis, for example, of a foreign arrest or criminal charge related to the acquisition of such property.

[5] This particular provision does not specify whether criminal or civil procedures are to be followed.

Article 13 of the UNTOC and Article 55 of the UNCAC address the issue of international cooperation for the purposes of confiscation. They do so almost in the same way. In a departure from the UNTOC, Article 55(7) and (8) of the UNCAC reflect an agreement that cooperation may be refused, or provisional measures lifted, if the requested Party does not receive sufficient and timely evidence, or if the property is of de minimis value. There is an expectation, however, that the requested State Party will consult with the requesting State Party, whenever possible, before lifting any provisional measure. Finally, it is stated that the Article shall not be construed as prejudicing the rights of bona fide third parties.

The principle of spontaneous information sharing has been extended specifically to asset recovery in the UNCAC by Article 56.

Article 57 of the UNCAC sets out a series of provisions governing the return of confiscated proceeds and other property, which generally favours a return to the requesting State Party, but applies different rules depending on the strength of the property interest of the requesting State Party. Thus, in the case of embezzlement (Article 17) or the laundering of embezzled public funds (Article 23), they are to be returned to the requesting State Party from whom the funds were embezzled. In the case of proceeds of other offences covered by the Convention, they are to be returned to the requesting State Party, provided that the State Party reasonably establishes prior ownership, or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property. Finally, in all other cases, property is to be returned to the requesting State Party, but can also be returned to another prior, legitimate owner or be used to compensate the victims of the crime.

This breakdown marks a departure from the approach taken in Article 14 of the UNTOC, where the confiscating State had exclusive property in the proceeds but could give "priority consideration" to returning proceeds to another State Party for the purpose of compensating victims or for returning such proceeds or property to their legitimate owners.

Article 57 allows the requested State Party to deduct reasonable expenses incurred in the investigations, prosecutions or judicial proceedings leading to the return or disposition of the confiscated property, unless they agree otherwise. Also, where appropriate, States Parties are encouraged to give special consideration to concluding agreements or arrangements on a case-by-case basis relating to the final disposition of confiscated property.

Under Article 58, States Parties are obliged to cooperate with each other to prevent and combat the transfer of proceeds of corruption and to promote the recovery of such proceeds. To that end, they are to consider establishing a financial intelligence unit.

By Article 59, States Parties are also bound to consider concluding bilateral or multilateral arrangements to enhance international cooperation in this area.

Canadian Measures

Canada has comprehensive measures in place to address the issues presented by the UNTOC and the UNCAC, including the matters dealing with money laundering and asset recovery. Canada's legislative framework includes such statutes as the Criminal

Code, the Corruption of Foreign Public Officials Act, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, the Mutual Legal Assistance in Criminal Matters Act, the Seized Property Management Act, the Extradition Act and the Office of the Superintendent of Financial Institutions Act.

Part XII.2 of the Criminal Code deals comprehensively with proceeds of crime. This regime includes the offence of laundering proceeds of crime (section 462.31) and provides for search and seizure of proceeds of crime (section 462.32); for a restraint or freezing order (section 462.33) and for the forfeiture of proceeds of crime (section 462.37). The judge can order the property to be forfeited to the government that prosecuted the offender (either the federal or a provincial government), unless a third party, not involved in the offence, had a valid and lawful interest in the property, in which case the court would order the property returned to that person (section 462.41). An innocent third party can include a requesting State Party in the case of corruption involving public funds. Thus, the proceeds of crime provisions allow for the return of seized or confiscated property to the valid owner. Return of property can also be affected through the use of the section 490 provisions of the Criminal Code dealing with the disposal of seized property. Provision is made for the forfeiture of offence-related property upon conviction (section 490.1), or when an accused has died or has been at large for more than six months (section 490.2). The Act deems that forfeited property belongs to Canada, but pursuant to the Seized Property Management Act, the assets are available for return through the sharing with a cooperating State, providing that there exists a reciprocal bilateral agreement.

Under the Criminal Code, an application may be made to a judge for a management order in relation to seized or restrained property (s. 462.331), while the Seized Property Management Act provides rules for the management of such property.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act sets out record-keeping and client identification requirements for financial service providers, provides for the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments and created a financial intelligence unit (FIU) for Canada, known as the Financial Transactions and Reports Analysis Centre (FINTRAC). Financial institutions are obliged to report suspicious transactions to FINTRAC. When FINTRAC determines that there are reasonable grounds to suspect that some information would be relevant to investigating and prosecuting a money laundering offence, the Centre must disclose this information, for example, to the appropriate police force. FINTRAC can also enter into an agreement for exchanging information with foreign FIUs and, to date, has entered into agreements with counterpart agencies in 39 jurisdictions around the world.

In June 2002, FINTRAC became a member of the Egmont Group of FIUs, which was established to enhance cooperation and information exchange in support the anti-money laundering and terrorist financing regimes of member States. More recently, on July 7, 2006, the Canadian Minister of Finance announced that Toronto has been selected as the permanent headquarters of the secretariat of the Egmont Group. The Canadian Government will contribute $5 million over the next five years to help the secretariat get established.6

[6] http://www.fin.gc.ca/news06/06-055e.html

Canada has now assumed the presidency of the Financial Action Task Force and the Government recently announced that Canada has joined the Asia/Pacific Group on Money Laundering, after having been an observer in that organization since 2000.

On October 5, 2006, the Minister of Finance introduced Bill C-25, which contains legislative proposals to strengthen Canada's money laundering and terrorist financing regime. The proposed amendments would, among other things, bolster measures for client identification, record-keeping and reporting, and allow FINTRAC to disclose more information to law enforcement and other domestic and international agencies.

In Canada, specialized, integrated units have been established to investigate and prosecute serious financial crime. For example, the RCMP has 13 Integrated Proceeds of Crime (IPOC) sections, which include lawyers from the Department of Justice, forensic accountants from Public Works and Government Services Canada, tax investigators from the Canada Revenue Agency and customs officers from Canada Border Services Agency. As well, the RCMP has created nine Integrated Market Enforcement Teams, which have been designed to enhance the protection of Canada's capital markets through the detection, investigation and prevention of serious corporate and financial markets crime.

The Mutual Legal Assistance in Criminal Matters Act provides for the direct enforcement of foreign requests for the restraint and confiscation of proceeds of crime. Canada may provide, inter alia, assistance for enforcement of orders for the restraint, seizure and forfeiture of property situated in Canada. The Act, however, requires that in order to enforce a foreign order for restraint or seizure, the Attorney General must be satisfied that a person has been charged in the requesting State with

an offence that, if it were committed in Canada, would be an indictable offence in Canada. These pre-conditions would also apply with respect to the enforcement of a foreign forfeiture order, but in addition, the Attorney General would also have to be satisfied that the person is convicted of such an offence without the possibility of a further appeal. Canadian legislation does not allow the enforcement of foreign orders based on a civil process, although that process is available in some countries.

Conclusion

Money laundering is addressed by both Conventions, but it is the UNCAC that principally focuses on asset recovery. These matters present a range of issues to take into account in implementing the Conventions.

Return of Fugitives pursuant to UNCAC and UNTOC – the Canadian experience

Janet Henchey

Introduction

This paper will deal with the Canadian experience with respect to the return of fugitives pursuant to a multilateral agreement such as the United Nations Convention Against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC). The paper will focus on extradition but will also address transfer of proceedings and transfer of sentences.

Extradition under the UNCAC and UNTOC

The provisions of the UNCAC and UNTOC provide that these Conventions may be used as the legal basis for extradition between States parties that do not have a bilateral extradition agreement in relation to offences that are covered by the convention, provided that the offence is punishable under the domestic law of both the requesting and requested state (dual criminality). Extradition is subject to the conditions provided for by the domestic law of the requested state. Both the UNCAC and UNTOC provide as follows:

- States parties that refuse extradition on the basis that the person sought for extradition is one of its nationals must be prepared to submit the case for which extradition is sought to their competent authorities to be dealt with in the same manner as had it been a domestic prosecution.
- States parties may agree to extradition on the condition that any sentence that may be imposed after prosecution, be served in the requested state.
- Person sought for extradition will be guaranteed fair treatment.
- There is no obligation to extradite in circumstances in which the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions.
- A request for extradition cannot be refused solely because the offence can also be considered to involve fiscal matters.

Extradition From Canada

On June 17, 1999 a new *Extradition Act* came into force for Canada. The 1999 *Extradition Act* provides a comprehensive and modern scheme of extradition which is applicable to all requests for extradition made to this country. The International Assistance Group (IAG) was created in 1988, and is part of the Federal Prosecution Service (FPS) at the Headquarters of the Department of Justice in Ottawa. The IAG was established to carry out the functions assigned to the Minister of Justice as the central authority for Canada under the *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act*, and to provide advice to the Minister on his or her responsibilities under these statutes. The group manages and co-ordinates extradition and mutual legal assistance requests made to Canada, as well as those made by Canada to other countries.

Canada's assistance under the *Extradition Act* may be engaged on the basis of 1) a bi-lateral extradition treaty between Canada and the state or entity making the request, 2) a multilateral agreement to which both Canada and the requesting party are signatories and which contains a provision on extradition such as the UNTOC and UNCAC, 3) a specific agreement entered into between Canada and the requesting state or entity with respect to a person or persons in a particular case, and 4) a general designation of the requesting state or entity as an "extradition partner" under the *Extradition Act* thereby allowing the extradition partner full recourse to the provisions of the *Extradition Act* notwithstanding the absence of an extradition treaty. [1] To date, Canada has entered into 51 bilaterial extradition treaties and is a party to a further 20 multilateral instruments with extradition and mutual legal assistance obligations.

Canadian Extradition Procedure

The Minister of Justice is responsible for the implementation of extradition agreements, the administration of the *Extradition Act* and, dealing with requests for extradition or provisional arrest under the *Extradition Act* or an applicable agreement.

Provisional Arrest

A request for provisional arrest may precede a formal request for extradition. Provisional arrest refers to a request for the apprehension of an individual, generally

[1] In addition to a number of members of the Commonwealth, Canada has designated as extradition partners, two non-commonwealth countries, Costa Rica and Japan, as well as the International Criminal Court, and International Criminal Tribunals concerned with the prosecution of persons responsible for violations of international law in Rwanda and in the Former Yugoslavia.

in circumstances of urgency or a similar ground of public interest, prior to the preparation of the documentary material upon which the formal extradition will be requested. A provisional arrest request may be made through Interpol.

The Minister has the discretion to approve an application for a provisional arrest warrant if satisfied that a) the offence in question is subject to certain minimum penalty requirements set out in the *Act*, and 2) the extradition partner will make a formal request for the extradition of the person subsequent to the person's provisional arrest.

Once a formal extradition request is received the Minister may, if satisfied that 1) in the case of requests for the prosecution of the person certain minimum penalty requirements established by the *Act* have been met, or 2) in the case of persons already convicted and who are sought for the enforcement of a sentence, certain minimum lengths of sentence as defined by the *Act* remain to be served, issue an authority to proceed. An authority to proceed authorizes counsel for the Attorney General to proceed with an extradition hearing, where the judge will consider whether the person should be committed for extradition.

Formal Request for Extradition

When the matter is not urgent, the extradition process will commence with a request for extradition and supporting documentation (record of the case and statement of law). The Minister may, after receiving the request and supporting documents, issue an authority to proceed. Upon issuance of the ATP, the Attorney General may apply *ex parte* to a superior court judge in the province in which the person is believed to be

located, for the issuance of an arrest warrant or summons. (*Extradition Act*, section 16).

Court proceedings

Upon arrest, whether pursuant to a request for provisional arrest or following a request for extradition, the person sought must be brought before a judge for a bail hearing (*Extradition Act*, section 17). A person arrested in Canada pursuant to a request for provisional arrest or extradition must be brought before a judge within twenty-four hours of arrest, or if no judge is available within that time period, the person must be brought before a judge as soon as possible. The person is entitled to be considered for release from custody pending the extradition hearing. In Canada, there is not a presumption against bail in extradition matters. The decision respecting bail may be reviewed by a judge of the court of appeal (*Extradition Act*, section 18(2)).

Generally, the person whose extradition is sought appears at the extradition hearing and participates, with the assistance of legal counsel. In the case of a person sought for the purpose of prosecution, the judge will determine if the evidence provided by the extradition partner is such that the person would be committed for trial in Canada if the offence had occurred in this country. In the case of a person sought for the imposition or enforcement of a sentence the judge will determine if the person has been convicted with respect to a matter that corresponds to a Canadian offence.

The *Extradition Act* does not provide a statutory timeline within which a hearing must take place. The extradition judge may be asked to deal with various pre-hearing motions (e.g. motions for disclosure, applications for abuse of process).

If the presiding judge is satisfied with respect to the sufficiency of the evidence, he/she will order the person committed for extradition pending the decision of the Minister of Justice on surrender. (*Extradition Act*, section 29(1)). Otherwise, the person is discharged and released (*Extradition Act*, section 29(3)).

Evidence at the extradition hearing

The *Act* allows evidence to be presented at the extradition hearing in a variety of ways: 1) in the usual manner applicable to Canadian domestic proceedings such as through the testimony of witnesses, or 2) in reliance on the provisions for the introduction of evidence set out in an applicable extradition arrangement, or 3) by means of a "record of the case". Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

The record of the case was introduced in the 1999 *Extradition Act* to simplify the introduction of evidence. It is a document summarizing the evidence available to the extradition partner for use in the prosecution, and is admissible at the hearing even if it contains evidence otherwise inadmissible in Canadian domestic proceedings, as long as certain safeguards are respected. These safeguards include having a judicial or prosecuting authority of the extradition partner certify that the evidence summarized is available for trial and is either sufficient to justify prosecution or gathered in accordance with their law.[2] If the presiding judge is satisfied with the evidence, he or she will order the person detained pending the Minister's decision whether to surrender the person. Otherwise, the person will be discharged and released.

[2] In the recent decision in the *United States of America v. Ferras et.al.*, 2006 SCC 33 (July 21, 2006) the Supreme Court of Canada upheld the constitutionality of the provisions of the *Extradition Act* which provide for the use of a record of the case as a streamlined method for introducing evidence at an extradition hearing.

Ministerial/Executive Phase

The judicial phase of the extradition process is a determination of the sufficiency of the evidence provided in support of extradition. The ultimate decision with respect to the whether the person will be surrendered to the extradition partner is that of the Minister of Justice. At this phase of the process the Minister considers any representations from the person or the person's counsel with respect to why the person should not be extradited or concerning any conditions to which the surrender order should be subject. In reaching a decision on surrender, the Minister is obliged to weigh the submissions of the person against Canada's international obligations with respect to extradition. The Minister must respect the rights of the person sought as guaranteed by the *Canadian Charter of Rights and Freedoms* and must be satisfied that surrender would not be contrary to the principles of fundamental justice[3].

Further, the *Extradition Act* obliges the Minister to deny surrender if he or she is satisfied that surrender would be unjust or oppressive having regard to all of the relevant circumstances, or the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

Except when a bilateral treaty says otherwise, the Minister must also refuse to surrender if the offence is statute barred in the requesting state, the foreign

[3] Section 7 of the *Canadian Charter of Rights and Freedoms* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

prosecution is for a military offence which is not also a criminal offence and the offence constitutes a political offence or an offence of a political character.

The Minister *may* also refuse surrender if there has been a prior acquittal for the conduct, the person has been convicted *in absentia*, the person is a young offender, the person has been charged in Canada for the same conduct or the offence took place outside the territory of the requesting state.

Fundamental Justice

In determining whether or not surrender would be contrary to fundamental justice, the Minister will consider the totality of the circumstances in the foreign state but in general must be satisfied that the person sought will receive a fair trial and be treated in a fair and humane manner while in custody in the requested state. This does not mean that the judicial system in the foreign state needs to have the same safeguards as does the Canadian judicial system. Allowance must be made for the inevitable differences between legal systems.[4] Some of the factors that will be considered by the Minister in assessing an allegation that surrender would be contrary to fundamental justice, include: any history of human rights violations in the foreign state; accession by the foreign state to human rights conventions and treaties; and, protections afforded by the foreign judicial system, including the right to counsel, an independent judiciary, access to legal aid, rights of appeal and the right to apply for bail. In *Suresh* v. *Canada*[5], the Supreme Court of Canada found that surrender to a jurisdiction in which a person faced a substantial risk of torture would be contrary to fundamental justice.

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[4] *R. v. Kindler* (1991), 67 C.C.C. (3d) 1 (S.C.C.), at p. 55; *United States v. Burns* [2001] 1 S.C.R. 283 ; *R v. Schmidt* (1987), 33 C.C.C. (3d) 193 (S.C.C.) at p. 215

[5] *Suresh* v. *Canada*, [2002] 1 S.C.R. 3

Political Offence Exception

The political offence exception found in the *Extradition Act* and in all Canadian bilateral extradition treaties permits refusal of extradition for offences of a political character. This exception is grounded in the belief that individuals have a right to resort to political activism to foster political change. This exception can be difficult to interpret and is not intended to be used to justify violent criminal behaviour in support of a cause. As such murder, manslaughter, kidnapping, hostage taking and offences involving the use of bombs or incendiary devices are specifically excluded from the political offence exception. Caselaw has narrowed the scope of this exception to apply only to circumstances in which there has been a struggle of individuals to abolish an existing government and the offence charged was committed in furtherance of that uprising.[6]

Section 46 (2) of the Canadian *Extradition Act* specifies that conduct that constitutes an offence mentioned in a multilateral extradition agreement for which Canada, as a party, is obliged to extradite, does not constitute an offence of a political character.

Assurances- the Death Penalty

Pursuant to section 40(3) of the *Extradition Act*, the Minister may seek assurances from the requesting state as a precondition to surrender when he is of the view that it would be contrary to fundamental justice to order surrender without such assurances. The Supreme Court of Canada in *United States v. Burns* [7] held that absent "exceptional circumstances", in cases in which the imposition of the death penalty is

[6] *Gil v. Canada* [1994] Fed CA.
[7] *United States v. Burns* [2001] 1 S.C.R. 283.

a "reasonably anticipated" [8] consequence of extradition, there is a requirement that the Minister seek and obtain an assurance that the death penalty will not be imposed if the person is convicted in the requesting state. Section 7 of the *Charter*, as interpreted by the Court in *Burns*, thus generally prohibits extradition to face the death penalty, and imposes an "exceptional" burden to depart from this general rule. There is as yet, no jurisprudence to explain what is meant by exceptional circumstances. In light of the facts of the *Burns* case, which involved the violent beating deaths of the person sought's parents, it would appear that exceptional circumstances do not necessarily refer to the seriousness of the offence.

Appeal and Judicial Review

The person sought may appeal against an order of committal to the court of appeal of the province in which the order of committal was made (*Extradition Act*, section 49). He or she must give notice of appeal or application of leave to appeal within thirty days of the decision of the judge in respect of committal. However, the court may, either before or after the expiry of the thirty days extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

Ordinarily, the appeal from committal will be deferred by the court of appeal until the Minister makes a decision in respect of surrender of the person (*Extradition Act*, section 51(2)).

The decision of the Minister of Justice on surrender is subject to judicial review to the court of appeal in the province (*Extradition Act*, section 57). The application for

[8] *Burns*, supra, at para 60.

judicial review must be filed within thirty days of the decision being communicated. However, the time for so doing may be extended with leave of the court.

While there is no statutory time frame within which an application for judicial review must be heard, pursuant to section 57(5) of *Extradition Act*, an application for judicial review shall be scheduled for hearing by the court of appeal at an early date.

If the appellate court upholds the decisions of the extradition judge and the Minister, the person sought may seek leave to appeal either or both decisions to the Supreme Court of Canada.

The person sought must be surrender within forty five days of the Minister's decision or if an appeal or judicial review is pending within forty five days after the final decision of the court. (*Extradition Act*, section 69). Section 42 of the Act provides that the Minister may amend his/her surrender order at any time before its execution.

Consents and Waivers

The person sought may dispense with the requirement for the calling of any evidence at an extradition hearing by consenting to his committal for extradition, in which case the matter will immediately proceed to the ministerial or executive phase of the proceedings. It is also open to the person sought to consent to their surrender and dispense with making submissions to the Minister. A person who consents to their surrender will be ordered surrendered to the requesting state but will still be afforded the protection of specialty. In other words, the requesting state will be precluded from prosecuting the person sought for any offence that predates his surrender, other than those offences for which surrender was ordered.

It is also open to a person sought for extradition to waive the entire extradition process. Under these circumstances, the person sought will be immediately surrendered to the requesting state without the protection of specialty.

Canadian Citizenship and Extradition

Under Canadian criminal law, there is a very limited jurisdiction to prosecute extraterritorial crime. As a result Canada has no prohibition against the extradition of its nationals. There is a limited exception to this rule that may apply in circumstances in which there is jurisdiction in both Canada and the requesting state to prosecute a Canadian citizen. This may happen in cases in which the alleged offence is transnational in scope and is alleged to have been committed partly in Canada and partly in the requesting state. In those circumstances when the subject of the extradition request is a Canadian citizen who could be charged in Canada in relation to the conduct for which extradition is sought, an assessment must be made of the evidence and circumstances of the case to determine whether or not it would be equally effective to prosecute that person in Canada. This process, known as a *Cotroni*[9] assessment, arises from the right of Canadian citizens pursuant to section 6 of the *Canadian Charter of Rights and Freedoms* to enter and remain in Canada. The Supreme Court of Canada has found extradition to be a justifiable infringement of that right in circumstances in which it would not be equally effective to prosecute a Canadian citizen in Canada. Some of the factors that must be considered in this assessment include the location of the evidence, the impact of the offence, the jurisdiction with the most interest in prosecuting the offence, which police force played the major role in the development of the case and where charges have been

[9] *USA v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.).

laid. Extradition will be refused and prosecution pursued in Canada if the Minister concludes that a Canadian prosecution would be equally effective.

Transfer of Proceedings and Sentences

The transfer of proceedings is provided for under the UNCAC and the UNTOC (at articles 21 and 47 respectively) but has limited application in the Canadian context as, generally Canada does not have the jurisdiction to prosecute extraterritorial offences. It is possible in a circumstance in which a Canadian citizen has committed an offence abroad over which Canada has jurisdiction that a request could be made for a transfer of proceedings.

Article 17 of the UNTOC and article 45 of the UNCAC provide that States parties may wish to consider entering into bilateral or multilateral agreements for the transfer of sentences. The transfer of sentences is provided for in Canadian law pursuant to the *International Transfer of Offenders Act*[10]. Canada has concluded ten bilateral treaties and accedes to three multilateral conventions on the transfer of offenders.[11] Currently Thailand is the only Asian country with which Canada has entered into a transfer of offenders treaty.

Pursuant to the *International Transfer of Offenders Act*, a person serving a sentence in a foreign prison may transfer their sentence to Canada subject to the terms of a

[10] Statutes of Canada 2004, c. 21.

[11] Canada has entered bi-lateral treaties for the transfer of offenders with Bolivia, Brazil, Cuba, France, Mexico, Morocco, Peru, Thailand, the United States and Venezuela and is a party to the following multi-lateral conventions: the Convention on the Transfer of Sentenced Persons (Council of Europe), the Scheme for the Transfer of Convicted Offenders within the Commonwealth, and the Inter-American convention on Serving Criminal Sentences Abroad.

treaty, with the consent of the offender, the foreign country and Canada and on the basis that Canadian rules of parole and sentence management will be applied to the sentence once the transfer has been completed.

Conclusion

The return of fugitives, although provided for in the UNCAC and the UNTOC is subject to the domestic requirements of the States parties. These requirements in the Canadian context include a requirement for a judicial assessment of double criminality and a finding that surrender to the foreign state would not violate the rights of the person sought for extradition under the *Canadian Charter of Rights and Freedom*.

Canada's Experience with the Implementation of International Conventions against Corruption

加拿大执行国际反腐败公约的经验

Lisette Lafontaine 莉塞特 • 拉芳婷

Abstract
摘要

引言

加拿大目前加入了四项关于腐败刑事司法的国际协议：1997 年 3 月 6 日生效的美洲国家组织《美洲反腐败公约》、1999 年 2 月 15 日生效的经济合作与发展组织《打击国际商业交易中向外国公务员行贿行为公约》、2003 年 9 月 29 日生效的《联合国打击跨国有组织犯罪公约》和 2005 年 12 月 14 日生效的《联合国反腐败公约》。

加拿大曾参与此等协议和欧洲议会各项反腐败协议的谈判，目前也是美洲国家组织公约和经济合作与发展组织公约的成员国。加拿大在 2004 年 5 月签署《联合国反腐败公约》，现在正努力完善本国立法，致力待加拿大法律符合联合国公约的全部要求时成为该公约成员国之一。

除了经济合作与发展组织公约未明确提及预防措施之外，这些国际公约普遍要求其成员国将腐败行为列为犯罪，采取措施预防公共部门的腐败行为，相互间对违反公约犯罪行为的侦查和起诉工作提供援助，同时参与后续机制。[1]

本文主要讨论加拿大执行《联合国反腐败公约》（英文简称 UNCAC）的现行法律、政策、项目和其它措施，此公约是该类反腐协议中最新订立且内容最为广泛的公约。

一. 将腐败行为列为犯罪

自从 1892 年制定《加拿大刑事法典》以来，加拿大一直禁止各类腐败行为。在颁布此刑事法典之前，对腐败行为加以禁止的是适用于加拿大的英国普通法之贿赂犯罪条款。

现行的加拿大刑法禁止本国公务员的主动贿赂（即提供或给予贿赂）和被动贿赂（即要求或接受贿赂），也禁止向外国公务员主动行贿。 运用影响力进行交易和造成利益冲突的行为也构成犯罪，例如收受礼物等等。加拿大刑法通过禁止秘密佣金的条文防止私人企业的腐败行为。此外，许多并非腐败特有的犯罪行为也可作为腐败和贪污行为，例如违背诚信、偷窃和欺诈行为等。在加拿大，清洗犯罪收益—包括腐败所得—也构成犯罪，并且得以查封与没收。参与和企图从事与此等犯罪相关的行为也构成犯罪。刑事责任延申至法人团体，如公司等。

《联合国反腐败公约》要求各成员国将以下行为列为犯罪：本国和外国公务员的贿赂、为私人企业工作或指导私人企业工作之人员的贿赂、以及公共部门和私人企业内的贪污行为。该公约还要求成员国考虑将公务员运用影响力进行交易、滥用职权和违法致富列为犯罪。公约所要求列为犯罪的全部行为在加拿大早已列为犯罪行为。

二. 预防性措施

采取预防腐败的措施是公约的一个重要环节。这些措施包括：公务员（包括国会议员）的行为守则、公共部门的聘任和升迁准则、出任公职的资格和政党的

[1] 《美洲反腐败公约》原先并没有后续机制的规定，但随后增加了相关规定。

资金筹措、政府采购制度及公务帐目管理、获取信息和参与民众社会的程序以及预防洗钱措施。加拿大政府体制在很久以前就已设立此等措施。

三. 国际合作

《联合国反腐败公约》要求各成员国在以下四个范畴内互相合作：侦查和起诉、引渡、恢复资产以及技术援助和信息交流。

《联合国反腐败公约》规定，成员国相互间对违反公约行为的侦查和起诉及相关的引渡方面提供协助，这与加拿大在履行双边司法互助条约(英文简称MLAT)以及引渡条约下的责任相似。加拿大司法部门内部已有一个特殊的律师工作组，负责对他国根据司法互助条约提出的引渡和援助要求作出响应。该工作组可为响应根据《联合国反腐败公约》提出的要求而扩大工作范围。

加拿大法律规定，在恢复有刑事管辖权之法庭下令没收的财产时要提供司法互助。如果要求国提供充份且令人信服的信息，此类援助可包括冻结、扣留或没收财产。

作为各项国际公约的成员国，加国已经根据各项公约的规定，透过加拿大国际发展署(CIDA)和其它联邦政府部门与机构提供培训和技术援助。加国目前的援助政策很可能会扩展到《联合国反腐败公约》下的各个成员国。

INTRODUCTION

Canada is currently involved in four international agreements dealing with the criminal aspect of corruption: the OAS *Inter-American Convention against Corruption*, which came into force on March 6, 1997; the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* which came into force on February 15, 1999*;* the *United Nations Convention against Transnational Organized Crime*, which came into force on September 29, 2003; and the U.N. *Convention against Corruption,* which came into force on December 14, 2005.

Canada was involved in the negotiations of all these agreements, as well as various Council of Europe anti-corruption instruments, and is currently a Party to the OAS and OECD Conventions. Canada signed the U.N. Convention in May 2004 and is

committed to becoming a Party once we are satisfied that Canada's legislation meets all the requirements of the Convention.

Except for the OECD Convention that does not specifically deal with preventive measures, these Conventions generally all require Parties to criminalize acts of corruption; to take measures to prevent public sector corruption; to provide assistance to each other for the investigation and prosecution of convention offences; and to participate in a follow-up mechanism. [2]

This paper deals mostly with Canadian laws, policies, programs and other measures that are in place in Canada to implement the U.N. *Convention against Corruption* (UNCAC), which is the most universal and recent of these instruments.

I. CRIMINALIZATION OF ACTS OF CORRUPTION

The Canadian Criminal Code has prohibited acts of corruption since its enactment in 1892. Before the enactment of the Code, corruption was prohibited by the British Common Law offence of bribery that applied in Canada.

The Canadian criminal law currently prohibits active bribery (i.e. offering or giving of a bribe) and passive bribery (i.e. demanding or accepting a bribe) of domestic public officials, and it prohibits active bribery of foreign public officials. Trading in influence and acts creating conflicts of interest, such as accepting gifts, are also criminal offences. Private sector corruption is dealt with in Canadian criminal law through the prohibition of secret commissions. In addition, a number of offences, not specific to corruption, can also apply to acts of corruption and embezzlement, such as breach of trust, theft, and fraud. Canada also criminalizes laundering proceeds of crime, including those of corruption, and provides for their forfeiture. Participation and attempt in relation to these offences constitute offences. Criminal liability extends to legal entities, such as corporations.

The U.N. Convention requires States Parties to criminalize the bribery of domestic and foreign public officials, the bribery of persons who direct or work for private sector entities, and embezzlement in the public and private sectors. States Parties are also required to consider criminalizing trading in influence, abuse of functions and

[2] The *Inter-American Convention against Corruption* did not provide for a follow-up mechanism, but one was subsequently created.

illicit enrichment by public officials. All required Convention offences are already criminal offences in Canada.

II. PREVENTIVE MEASURES

The adoption of measures to prevent corruption is an important element of the Convention. These measures include codes of conduct for public officials, including members of Parliament; rules for hiring and promotions in the public service; candidature to public offices and funding of political parties; systems for government procurement and management of public finances; procedures for access to information and participation of the civil society; and measures to prevent money-laundering. Such measures have been in place in the Canadian government for a long time.

III. INTERNATIONAL COOPERATION

The UN Convention requires States Parties to cooperate in four areas: investigations and prosecutions; extradition; asset recovery; and technical assistance and exchange of information.

The obligations created by the Convention to provide international assistance for the investigations or prosecutions of Convention offences and for related extraditions are similar to Canada's obligations under bi-lateral Mutual Legal Assistance Treaties (MLAT) and Extradition Treaties. There is already a specialized group of lawyers within the Department of Justice who has responsibility for responding to requests for assistance from foreign countries for extradition and assistance under MLAT. This group could expand its operations to requests made under UNCAC.

Canada's law provides for mutual legal assistance in the recovery of property confiscated by order of a court of criminal jurisdiction. This assistance includes freezing, seizure, or forfeiture, where the information provided by the requesting State is sufficient and compelling.

Canada already provides training and technical assistance under international conventions of which it is a Party, through the Canadian International Development Agency (CIDA) and other federal departments and agencies. Canada's current assistance policy would likely be extended to the States Parties of the UN Convention.

Canada's Experience with the Implementation of International Conventions against Corruption

加拿大执行国际反腐败公约的经验

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INTRODUCTION

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Except for the OECD Convention that does not specifically deal with preventive measures, these Conventions generally all require Parties to criminalize acts of corruption; to take measures to prevent public sector corruption; to provide assistance to each other for the investigation and prosecution of convention offences; and to participate in a follow-up mechanism. [3]

Since the U.N. *Convention against Corruption* (UNCAC) is the most universal and recent of these instruments, my remarks will deal mostly with Canadian laws, policies, programs and other measures that are in place to implement the UNCAC, unless otherwise specified.

I. CRIMINALIZATION OF ACTS OF CORRUPTION.

The Canadian Criminal Code has prohibited acts of corruption since its enactment in 1892. Before the enactment of the Code, corruption was prohibited by the British Common Law offence of bribery that applied in Canada.

The Canadian criminal law currently prohibits bribery of both domestic and foreign public officials; acts creating conflicts of interest, such as accepting gifts; and breach of trust. Private sector corruption is dealt with through the prohibition of secret

[3] The *Inter-American Convention against Corruption* did not provide for a follow-up mechanism, but one was subsequently created.

commissions. In addition, a number of offences, not specific to corruption, can also apply to acts of corruption and embezzlement, such as breach of trust, theft, and fraud.

The U.N. Convention includes provisions concerning the criminalization of the bribery of domestic and foreign public officials and of persons who work for or direct private sector entities, and embezzlement in the public and private sectors. States Parties are also required to consider criminalizing trading in influence, abuse of functions and illicit enrichment by public officials. Except for illicit enrichment, which would create substantial problems in relation to the Canadian Charter of Rights and Freedoms, all other required Convention offences are already criminal offences in Canada.

A. Offences of bribery of domestic public officials

Different Criminal Code offences apply to different categories of Canadian officials. These offences include: bribery for judges and Members of the federal Parliament or a provincial legislature (section 119); bribery of police, court officers and anyone involved in the administration of criminal law (section 120); bribery of government officials, including trading in influence of federal and provincial officials (section 121); and bribery of a municipal official (section 123). While some offences are specific to categories of officials, the offence of section 121 has been found by the courts to apply also to members of the federal Parliament and provincial legislatures.

The offences of bribery cover both active bribery (i.e. offering or giving of a bribe) and passive bribery (i.e. demanding or accepting a bribe). The bribery of judges and legislators and the bribery of criminal law officers carry a maximum penalty of 14

years, which is the second highest penalty in Canadian law, after a life sentence. The bribery of federal and provincial public servants and municipal officials carries a maximum penalty of five years. The judge decides on the appropriate sentence based on the facts of the case, mitigating and aggravating factors and other sentencing principles applicable to the case, but the sentence cannot exceed the maximum provided for in the Criminal Code.

While the offences are drafted to cover the activities specific to each group, there are common elements to all of them.

1) What constitutes bribe

The Code does not use the word “bribe” but rather enumerates what constitutes a bribe. It is money, valuable consideration, office, place or employment for the offences applying to judges, legislators and criminal law officials; it is a loan, reward, advantage or benefit of any kind for the offences applying to federal and provincial public servants and to municipal officials.

These enumerations can be summarized by saying that they cover any valuable benefit that the official would derive from carrying out official duties, over and above the remuneration and benefits provided by law, by a contract of employment, or by the employer.

2) Received or given directly or indirectly

The offering or giving constitutes an offence when it is made either by the person who requires an official act, or through intermediaries. The same applies to the act of

demanding or receiving, that constitutes an offence whether it is demanded or received by the official himself or herself, or by an intermediary.

Most Criminal Code bribery offences provide specifically that the offence can be committed directly or indirectly, but not all. However, the courts have applied general principles of interpretation of the laws to read in "directly or indirectly" when it was not specifically included.

3) Given to the official or a third party

The U.N. Convention requires that bribery offences extend to cases where the benefit was provided to a person other than the official, when the bribery is given for the purpose of making the official act or refrain from acting in official duties.

Canadian law specifies that the offence is committed when a benefit is demanded or accepted for the official or any other person, and when it is offered or given to the official or anyone for the benefit of the official. What is important is that there be a nexus between the benefit conferred on anyone, which also constitutes a benefit to the accused. For example, the designation by an official of someone else to whom the benefit should be conferred should not absolve the official of criminal liability. In the case of active bribery, it is the individual who bribes that decides who should be the recipient, thus the necessity to prove that the bribe is given for the benefit of the official. This requirement ensures that a benefit to the official is an essential element of the offence in all bribery offences.

Some, but not all, Criminal Code bribery offences provide specifically that the benefit must be demanded for anyone or given to anyone for the benefit of the official.

Uniformity of wording is something that Canada could consider for future amendments, in order to create greater clarity.

4) Given for a purpose related to the official duties

To constitute bribery, the benefit must be conferred for an act or omission related to official duties. Some Canadian bribery offences provide for this in general terms (section 119) and other are more specific as to what acts constitute an official act (sections 120, 121 and 123). The offence under section 121(1)(a) specifies that the offence is committed whether or not, in fact, the official is able to do or omit to do what was proposed in exchange for the benefit that was received.

B. Offence of breach of trust

In addition to the offences of bribery of domestic public officials, section 122 of the Criminal Code makes it an offence for any official, to commit a fraud or breach of trust in connection with official duties. An act constitutes a breach of trust when an official acted, or failed to act, in a manner contrary to his or her official duties and benefited from this act or abstention. The offence of breach of trust could also apply to cases where public officials accept a bribe for acting or refraining to act in official capacity, since accepting bribery would constitute a breach of trust. A person found guilty of breach of trust is subject to a maximum penalty of five years.

C. Offences of bribery of foreign public officials

This offence was enacted in 1999 to allow Canada to ratify the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business*

Transactions. The requirement to criminalize under this Convention is limited to active bribery in the context of international business transactions. In the case of the UN Convention, article 16 also provides that bribery be given "in order to obtain or retain business or other undue advantage in relation to the conduct of international business". It should be noted that, while Parties are required to criminalize active bribery of foreign public officials, they are asked to consider criminalizing passive bribery, i.e. acceptance of bribes by foreign public officials.

The offence of bribery of a foreign public official is not part of the *Criminal Code*, but is included in a separate criminal statute: the *Corruption of Foreign Public Officials Act.* The Act extends the definition of "foreign public official" to include officials of public international organisations, as required for the criminal offence by the OECD and UN Conventions. The offence in the *Corruption of Foreign Public Officials Act* consists in offering or giving a benefit in order to induce the official to do, or refrain from doing, an official act, or to use influence to obtain an act or decision from his organisation. It addresses cases where bribery is intended to obtain or retain an advantage in the course of business.

The maximum penalty is the same as the penalty for bribery of domestic officials, i.e. a maximum penalty of 5 years.

Canada does not criminalize the passive bribery of foreign public officials" Article 16(2) requires Parties only to consider doing covering such conduct. It should be noted that, in this respect, as Article 15 of the Convention requires States Parties to criminalize the bribery of domestic public officials, States Parties should be in a position to punish the corrupt behaviour of their own officials.

D. Offence of conflict of interest for public servants

The Canadian criminal law goes further than the requirements of the Convention by criminalizing some forms of conflict of interest. Under section 121 of the Criminal Code, it is an offence for a person dealing with the government to give a gift or any benefit to a government employee or official, unless he has the consent in writing of the head of the department with which the person is dealing; and it is an offence for a government official, to accept a benefit from a person dealing with the government, unless the official has the consent in writing of the head of the department of which he is an official. The offence is committed even when the recipient is employed in a department different from the department with which the donor is dealing. This offence does not require the official to act, or refrain from acting, for the benefit of the donor when the gift is given. The offence is committed even when the donor expects nothing in return and the recipient has done nothing to earn the benefit given. When consent is not asked, or when it is refused, the gift should be returned.

E. Offences of trading in influence

The UN Convention requires States Parties to consider the criminalization of trading in influence, which is defined as giving or accepting an undue advantage for using real or supposed influence over a public authority in order to obtain an undue advantage from the public authority (article 18).

Section 121(1)(d) and (e) of the Criminal Code criminalize conduct where a person who has, or pretends to have, influence over a government minister or official, demands or accepts a benefit, as consideration for exercising influence in connection

with government business or appointment. Offering or giving a benefit to a government minister or official for exercising influence in connection with government business or appointment is criminalized. The Code provides that the offence is committed even if the person who receives the benefit does not actually have influence on the government, but pretended, or was perceived as, having this influence.

F. Offences of theft and fraud (embezzlement)

The UN Convention also contains provisions on embezzlement of property in the public sector and in the private sector (articles 17 and 22). Canada does not have a specific offence of embezzlement, but the offences of theft and fraud cover the conduct contemplated by these articles. Other offences in the Canadian Criminal Code are also relevant.

The offence of theft in the Canadian Criminal Code consists in converting something to its own use, fraudulently and without right, with intent to deprive the owner of it. Because corporations and public entities are legal persons, they can be owners and, therefore, they can be victims of theft by their own officials.

The offence of fraud consists in defrauding the public or any person (which includes a corporation) by deceit, falsehood or other fraudulent means. For a public official, misappropriating public money or any other thing of value would constitute theft or fraud. For an employee or officer of a corporation, misappropriating money and any other thing of value belonging to the corporation could also constitute theft or fraud.

G. Offences of private sector corruption

The UN Convention does not require the criminalization of bribery in the private sector but requires States Parties to consider doing so (article 21). Bribery in the private sector is criminalized in Canada by the offence of secret commissions. Section 426 of the Canadian Criminal Code makes it an offence, for anyone, to offer or give a benefit to an agent as a consideration for the agent doing, or not doing, any act or favouring anyone in relation to the affairs of the agent's principal or employer. It is also an offence for an agent to demand or accept from anyone a benefit for consideration of doing, or not doing, any act, or favouring anyone, in relation to the affairs of the agent's principal or employer.

H. Illicit enrichment

The UN Convention requires Parties to consider criminalizing the unexplained increase in the assets of a public official, in so far as it is consistent with its Constitution and the principles of its legal system.

No such offence exists in Canada. Canada will consider the matter, in light of its Constitution, including the Canadian Charter of Rights and Freedoms, and the principles of its legal system. When presented by a similar provision in the Inter-American Convention against Corruption, Canada issued a Statement of Understanding upon ratifying the convention, which indicated that Canada would not criminalize the offence of illicit enrichment since to do so would be contrary to the presumption of innocence guaranteed by Canada's Constitution.

I. Laundering and concealment of proceeds of crime

The UN Convention requires criminalisation of the laundering of proceeds of crimes (article 23), as well as their concealment and continued retention (article 24). Laundering is defined in the article 23 of the Convention as conversion or transfer of property for the purpose of disguising the illicit origin of the property. The Convention also requires Parties to criminalize attempts, participation, aiding and abetting, counselling, and inciting laundering of proceeds from corruption offences.

The Canadian *Criminal Code* includes a whole regime that applies to proceeds from the commission of any indictable offence, including all Convention offences. This regime criminalizes the laundering of proceeds, which is defined as dealing in any manner and by any means with any proceeds with intent to conceal or convert them, knowing or believing that they were obtained or derived by the commission of an indictable offence (section 432.31). The Criminal Code provides for search, seizure, and detention of proceeds until final determination by a court of criminal jurisdiction that the property is proceeds of crime. When a person has been convicted and the court is satisfied that the property is proceeds of crime, section 462.37 provides that the judge shall order the property to be forfeited to the government that prosecuted the offender (either the federal or a provincial government), unless a third party, not involved in the offence, had a valid and lawful interest in the property, in which case the court would order the property returned to that person (section 462.41).

The concealment of proceeds is covered in “dealing in any manner” in the definition of the offence of laundering under section 462.31. In addition, section 354 of the *Criminal Code* makes it an offence for a person to possess property or proceeds that

the person knows to have been obtained by an indictable offence, which includes offences required by the Convention. Since possession is necessary to conceal, prohibiting possession would satisfy the requirement of the Convention.

The criminalisation of aiding, abetting or counselling the commission of an offence of laundering is implemented by the general provisions of the Criminal Code, which provide that aiding, abetting, counselling, or conspiring for, the commission of any offence is an offence (sections 21, 22 and 465 of the Criminal Code).

J. Obstruction of justice

Article 25 requires States Parties to criminalize bribery or intimidation of witnesses in proceedings related to Convention offences, and the intimidation of justice and law enforcement officials in relation to official duties related to Convention offences.

In Canada, the requirements of this section are met by the offences of intimidating a justice system participant under section 423.1 of the Criminal Code, which makes it an offence to use violence against a person, or to threaten or harass a person in order to impede the administration of the criminal justice system or the performance of duties by a justice system participant. As well, section 139 of the Criminal Code prohibits the obstruction of justice, including bribery to abstain from giving evidence, or to do or refrain from doing something as a juror.

K. Participation and attempt offences

The UN Convention requires Parties to criminalize participation in offences, such as an accomplice, assistant or instigator (article 27).

Canada's Criminal Code provides that a person is a party to an offence when this person aids or encourages a person to commit it (section 21), or counsels the commission of an offence that is committed (section 22). Section 464 of the Criminal Code makes it an offence to counsel the commission of an offence that is not committed. The UN Convention also invites, but does not require, Parties to criminalize attempts and preparation. Canada criminalizes attempts (section 24), but not acts of mere preparation that do not amount to an attempt. The distinction between the two is a qualitative one involving the relationship between the act that constitutes the attempt and the complete offence, with consideration being given to the proximity of the act to the completed offence. An attempt is something more than mere preparation to commit a crime.

L. Application of general principles

1. Jurisdiction

The Convention requires State Parties to establish their jurisdiction over Convention offences committed on their territory or on vessels and aircrafts registered in that State. The Convention also authorizes Parties to establish active and passive nationality jurisdiction, but does not require them to do so.

In general, Canada exercises territorial jurisdiction over Criminal Code offences, including the Convention offences. When Canada exercises nationality jurisdiction, and it does so for a very small number of offences, it is generally because nationality jurisdiction is required under an international convention. This is not the case under the U.N. Convention. When faced with the option of adopting nationality jurisdiction in respect of other corruption conventions, Canada has chosen not to do so, taking the position that it can effectively enforce Convention offences, using territorial jurisdiction.

Canada's courts have interpreted Canada's territorial jurisdiction to apply to offences committed in a foreign country when there is a "real and substantial link" between the offence and Canada. The "real and substantial link" test can have a wide scope and, in the case of the bribery of foreign public officials, could be expected to give Canada jurisdiction to prosecute where there is Canadian corporate involvement. Canada can also extradite its nationals. Canada has indicated that it would be prepared to reconsider its position if it encountered cases where territorial jurisdiction did not allow a sufficient basis for Canada to prosecute Canadian corporations involved in bribery of foreign public officials.

2. Liability of legal persons

The UN Convention requires Parties to establish criminal, civil or administrative responsibility of legal persons, without prejudice to the criminal liability of individuals, for Convention offences. Parties are also required to make legal persons subject to effective and proportionate sanctions.

Canada has a regime of corporate criminal liability that distinguishes between negligence offences and offences involving fault other than negligence. Convention offences fall under the regime applying to fault other than negligence. Under this regime (section 22.2 of the Criminal Code), a corporation can be held criminally responsible when one of its senior officers, with the intent to benefit the corporation and acting in his area or responsibility, either participated in an offence, or directed other representatives of the corporation to do so. The corporation would also incur criminal liability if a senior officer, with the intent to benefit the corporation, did not take measures to prevent other representatives from participating in an offence when this senior officer knew they were about to do so.

When a corporation is found guilty, section 735 of the Criminal Code provides that the penalty of imprisonment will be replaced by a fine of an amount in the discretion of the court.

Civil liability is within provincial jurisdiction. There are regimes of civil liability at the provincial level that would allow a person who suffered damages as a result of the illegal practices of a corporation to sue that corporation for damages.

In addition, government departments and agencies, such as Export Development Canada and the Canadian International Development Agency, could refuse to do business with corporations which are involved in corruption until these corporations can demonstrate that they have taken measures to prevent this to happen in the future.

3. Knowledge, intent and purpose

The Convention (article 28) provides that, when they are elements of the offence, knowledge, intent and purpose may be inferred from factual circumstances.

This is consistent with Canada's principles of criminal evidence.

4. Statute of limitation

The Convention requires Parties to establish a long statute of limitation period for Convention offences and a longer period when the alleged offender has evaded justice.

This is not an issue in Canada since there is no statute of limitation for indictable offences, and all Convention offences are indictable offences in Canada. As a result, an indictable offence can be prosecuted as long as the offender is alive.

5. Freezing, seizure and confiscation

Article 31 of the Convention requires Parties to provide for seizure and confiscation of proceeds of Convention offences and instrumentalities used in the commission of these offences.

The Criminal Code provides for search and seizure of proceeds of crime (section 462.32); for restraint or freezing order (section 462.33) and for forfeiture of proceeds of crime (section 462.37).

The Convention also requires Parties to establish a regime for the administration of assets seized. The Criminal Code provides for judicial management orders of seized

property and the *Seized Property Management Act* provides rules for the management of property under seized or management orders.

The Criminal Code also provides for the forfeiture of offence-related property upon conviction (section 490.1). Offence-related property is defined as property by means of which a Criminal Code indictable offence is committed, or that is used in connection with the commission of such an offence, or is intended to be used in committing such an offence.

The Convention also prevents Parties to oppose bank secrecy to the seizure of bank records. Bank secrecy is not an issue in Canada, where search and seizure of bank records are subject to the general rules applying to search and seizure, including being authorized by judicial order.

6. Protection of witnesses, experts, victims and reporters

Article 32 of the Convention requires Parties to take appropriate measures to protect witnesses and their relatives.

Section 423.1 of the Canadian Criminal Code makes it an offence to intimidate a justice system participant to impede performance of duties, to intimidate a journalist to impede transmission of information on a criminal organisation, or to intimidate the general public to impede the administration of criminal justice. A witness is a justice system participant.

In addition to the criminal law, the federal government and most provinces have legislation to protect witnesses. The federal *Witness Protection Program Act* can be

found at: http://laws.justice.gc.ca/en/W-11.2/. The Act provides for the creation of a program for the protection of witnesses and prohibits disclosing information on the location or identity of a witness admitted in such a program. This program may involve creating a new identity for the person, relocation, and subsistence money. Provinces, which conduct most criminal prosecutions, have similar legislation.

7. Consequences of corruption and compensation

The Convention requires Parties to take measures to address consequences of corruption, and to ensure that legal remedies are available to compensate those who suffered damage as a result of corruption (article 34 and 35).

In Canada, contract law and civil remedies for damages are under provincial and territorial jurisdiction. The laws of all provinces and territories provide that a person who suffers damages as a result of the actions of another person may initiate proceedings to seek compensation. This principle would apply to a person who lost a contract to a competitor who obtained the contract through corrupt practices. As well, a contract obtained by corrupting an employee or an official would be considered as fraudulent, and could be nullified or rescinded at the request of the innocent party.

8. Encouraging reporting of Convention offences

The Convention requires States Parties to take measures to encourage a party to a Convention offence to provide information to authorities for investigative and evidentiary purposes.

The Canadian *Criminal Code* includes sentencing principles, which provide that a judge can reduce a sentence on account of mitigating factors. Cooperating with the

investigation of an offence could be considered a mitigating factor. In practice, prosecutors sometimes agree to lay lesser charges, or seek a lesser sentence, in exchange of the accused giving evidence against an accomplice.

II. PREVENTIVE MEASURES.

The adoption of measures to prevent corruption is an important element of the Convention. These measures include codes of conduct for public officials; rules for hiring and promotions in the public service; candidature to public offices and funding of political parties; systems for government procurement and management of public finances; procedures for access to information and participation of the civil society; and measures to prevent money-laundering. Such measures have been in place in the Canadian government for a long time.

A. Codes of conduct for public officials

At Canada's federal level, there are six main codes of conduct for public officials: the *Values and Ethics Code for the Public Service,* which applies to public servants at the middle and lower levels of the public service; the *Conflict of Interest and Post-employment Code for Public Office Holders,* which applies to public servants at the highest level of the public service; the *Conflict of Interest Code for Members of the House of Commons,* which applies to Parliamentarians who are members of the House of Commons; the *Conflict of Interest Code for Senators,* which applies to Parliamentarians who are members of the Senate; *A guide for Ministers and Ministers of State,* which applies to ministers and junior ministers; and the *Ethical Principles for Judges,* which applies to the judiciary. The codes mentioned above apply at the

federal government level. Similar codes govern public servants and office holders at the provincial or territorial level. A number of government agencies, generally service providers or agencies of a commercial nature, which operate at arm's length from the government, have their own codes of conduct that apply to their employees, but these codes are required to follow the same principles as the codes applying to public servants.

These codes of conduct impose obligations to prevent not only conflicts of interest, but also appearances of conflict of interest. The obligations are proportional to the level of responsibility of the officials they apply to, the heavier obligations applying to officials with the most decision-making power.

Oversight bodies oversee the application of these codes and promote the policies that underlie them: the Public Service Integrity Officer oversees the application of the *Values and Ethics Code for the Public Service;* the Ethics Commissioner oversees the application of the *Conflict of Interest and Post-employment Code for Public Office Holders* and the *Conflict of Interest Code for Members of the House of Commons*; the Senate Ethics Officer oversees the application of the *Conflict of Interest Code for Senators;* the Prime Minister oversees the application of *A guide for Ministers and Ministers of State*; and the Canadian Judicial Council oversees the application of *Ethical Principles for Judges.* In addition, a number of departments and agencies have their own ethics advisory committees and public complaint committees.

1. *Values and Ethics Code for the Public Service*

This Code is issued by the Treasury Board Secretariat, which is the government department that acts as the employer of public servants appointed through the Public Service Commission, who constitute the majority of lower and middle level public servants. The Code is meant to guide public servants in their professional obligations and is part of the conditions of employment in the Public Service.

The Code requires public servants to avoid having private interests that would be affected by government action in which they participate, and to avoid assisting, beyond their professional duties, private interests in their dealing with the government. When such a situation arises, there is an obligation for public servants to report, in a Confidential Report to the deputy minister of their Department, outside activities or assets and liabilities that might give rise to a conflict of interest with respect to their official duties. The Code provides a list of assets that should be reported in a Confidential Report, as well as those that do not require a Confidential Report (mainly personal and domestic assets, such as residence, household goods and personal effects, automobile, bank accounts and government bonds). The Code also provides for remedies in case of conflict of interest: in some cases, disclosure will be sufficient to deal with a potential conflict of interest; in other cases, the public servant will be required to withdraw from the activity or dispose of the asset. Assets that require divestment are those that constitute a real, apparent, or potential conflict of interest in relation to a public servant duties and responsibilities, as determined by the Deputy Minister, who is the highest public servant in a department. When divestment is required, it is done by means of sale, or by placing the asset in a blind trust that meets the requirements of such trusts.

The Code also reminds public servants of the Criminal Code provisions on corruption, including those that prohibit, for a public servant, accepting or soliciting a gift from a person dealing with the government.

After they leave the Public Service of Canada, public servants remain for a year under some obligations: they cannot deal with their former department on behalf of other people (lobbying) or accept employment from an entity with which they were dealing in their official capacity in the year before leaving the Public Service.

The Code requires deputy ministers to designate a senior officer to assist public servants to resolve issues of conflict of interest. The Public Service Integrity Officer advises deputy ministers on the application of the Code, reviews Confidential Reports, and reports annually on cases of breaches of the Code. Failure to comply with the requirements of the Code gives rise to disciplinary action, including termination of employment.

Finally, the Code encourages public servants to report wrongdoings in the workplace to the designated senior officer of their department, or to the Public Service Integrity Officer, for resolution of the issue. The *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* ensures that these reports can be made in confidence and without fear or reprisal.

2. *Conflict of Interest and Post-employment Code for Public Office Holders*

This Code applies to ministers and their staff and to the higher levels of the public service whose members are appointed to office by order of the Governor General on

advice of Cabinet (Order in Council). The Code is issued by the Prime Minister and requires a higher degree of disclosure than the Code applying to the public service (in 1.). The Code establishes principles to which office holders must conform in conducting their duties, and sets out the duties of the Ethics Commissioner. The Ethics Commissioner is responsible for administering this Code and applying the conflict of interest measures of compliance. Office holders must sign an agreement to observe the Code, as a condition of their holding office.

The Code requires office holders to make a Confidential Report to the Ethics Commissioner upon appointment. In addition to assets and liabilities that might create a conflict of interest with the official's duties - assets and liabilities that must be reported by public servants at lower levels of the public service - this Confidential Report must cover all the office holder's assets and liabilities, as well as income received in the 12 months prior to assuming office and the income the office holder is entitled to receive in the next 12 months. The Report should also include outside activities, including philanthropic activities. For Ministers, the report must also include this information concerning assets, liabilities, income and activities of their spouse and dependant children. Ministers are also required to report all benefits from a government contract derived by them, their families, or private corporations in which they have an interest. On liabilities, ministers are required to include in the declaration the source and nature of all their liabilities over $10,000, but not their value.

Based on the Confidential Report, the Ethics Commissioner will prepare a Public Declaration that summarizes information included in the Confidential Report. The

Public Declaration is placed in a public registry that can be consulted at the office of the Ethics Commissioner.

The Code establishes 3 categories of assets:

- declarable assets are those that require vigilance to ensure that they cannot give rise to a conflict of interest; they are the object of a public declaration;
- controlled assets are those that can be affected in their value by government decision or policy; the office holder must divest of these assets;
- exempt assets, which are for the private use of the office holder and assets that are not commercial in nature; these assets need neither be included in the public declaration nor divested.

The Code also sets rules to determine which benefits are acceptable and those that are not, and which acceptable benefits should be included in a public declaration. Benefits to be included in a public declaration include travel on a private aircraft and gifts over $200 or gifts from the same source that total $200 during a 12 month period.

The Code classifies outside activities in 3 categories:

- prohibited activities, which include the practice of a profession or business activity, and the holding of an office in a corporation or a union organisation;
- permissible activities, which have been approved by the Ethics Commissioner or, in the case of ministers, by the Prime Minister in consultation with the Ethics Commissioner;
- permissible activities, which are subject to public disclosure, including past and current directorship.

The Prime Minister is responsible for taking appropriate measures when the Ethics Commissioner advises that the office holder is not in compliance with the Code. These measures include termination of employment.

Office holders are also required to inform the Ethics Commissioner of all firm offers of outside employment that could place the office holder in conflict of interest, and to disclose immediately the acceptance of an offer to both the Ethics Commissioner and the office holder's superior.

Office holders are also subject to post-employment compliance measures. They can never act for a party they were dealing with on behalf of the government, or give advice based on information on government policies and programs that is not available to the general public. There are other restrictions that apply for a period of two years for ministers and one year for other office holders: they cannot accept employment with an entity they were dealing with in the year prior to leaving government employment, and they cannot make representations to their former department on behalf of such an entity. In the case of former ministers, the prohibition to make representations extend to their former Cabinet colleagues.

Current office holders are required to report to the Ethics Commissioner their official dealings with former office holders. They are prohibited to have official dealings with a former office holder in respect to a transaction when the Ethics Commissioner has determined that the former office holder was acting in contravention to the compliance measure with respect to this transaction.

3. *Conflict of Interest Code for Members of the House of Commons*

This Code has been adopted by the House of Commons as an Appendix to its Standing Orders and applies to all its members, including those who are also Cabinet ministers.

This Code contains a number of provisions that are similar to those applying to public office holders. Members of the House must make confidential statements to the Ethics Commissioner about all their assets, liabilities, sources of income and benefits derived from government contract, and those of their families. The Ethics Commissioner prepares a disclosure summary based on the confidential statement. Disclosure summaries are available for consultation by the public.

The Ethics Commissioner will enquire into breaches to the Code when requested to do so by another Member who has reasonable grounds to believe a Member has not complied with his or her obligations. The Ethics Commissioner must report the conclusion of the inquiry to the Speaker of the House, who shall table it. If a breach has occurred, the Ethics Commissioner may recommend appropriate sanctions, and the House will vote on the report of the Ethics Commissioner. It is the House of Commons that is responsible for the enforcement of this Code.

A Member must also disclose to the Clerk of the House, for transmittal to the Ethics Commissioner, any private interest that could be affected by a matter before the House or a Committee of which he is a member, and refrain from debating or voting on this matter.

4. *Conflict of Interest Code for Senators*

The Code for Senators includes provisions similar to those applying to Members of the House. Senators must make a confidential disclosure statement to the Senate Ethics Officer on matters such as source and nature of income; assets and liabilities other than personal property; corporations or associations the Senator is a director; and source and nature of any government contracts or business arrangement of which the Senator, or a corporation in which he or she has a significant interest, is a party. A public disclosure summary is prepared by the Senate Ethics Officer and is available for public inspection at the office of the Senate Ethics Officer.

5. *Guide for Ministers and Ministers of State*

In addition to the provisions of the *Conflict of Interest and Post-employment Code for Public Office Holders,* Ministers must also follow specific guidelines for conduct. The G*uide for Ministers and Ministers of State* is issued by the Prime Minister. It includes a chapter on Standards of Conduct, including a section on conflicts of interest. The guide reminds Ministers that they also have to comply with the codes applying to public office holders and to Parliamentarians, and that they will be held accountable to the Prime Minister and to Parliament for their compliance with these codes. The Guide prohibits ministers from intervening with a judiciary or quasi-judicial tribunals, except for seeking information on the status of a matter. It also provides guidelines on how to deal with an agency that has an "arm's length" relationship with the government (i.e. an agency that has a large degree of independence) for Ministers who are responsible before Parliament for such an agency.

6. *Ethical Principles for Judges*

The *Ethical Principles for Judges* include rules for ensuring the impartiality of judges, and the appearance of impartiality. Judges may engage in charitable activities, provided it does not reflect adversely on their impartiality or interfere with their judicial duties, but they should not solicit funds, be involved in organisations likely to be involved in litigation, or give legal advice. They should not be engaged in any political activity or an activity that could appear as a political activity. Judges do not have to disclose their assets and liabilities, but they must disqualify themselves from cases in which they believe they are unable to judge impartially and cases where a reasonable person could suspect a conflict of interest between the judge's interest (or the interest of the judge's immediate family, close friends or associates) and the judge's duty. If the judge's interest is trifling, the judge may disclose the interest to the parties in the case, and seek their consent for hearing the case. Since the administration of justice is within provincial jurisdiction, some provinces include the obligation to disclose interests in the rules of procedure.

B. Rules for hiring and promoting public servants (article 7)

The Public Service Commission is responsible for the appointment of qualified persons. Appointment and promotion in the public service are made in accordance with the principles of the *Public Service Employment Act.* These principles include merit, non-partisanship, representativeness, and use of both official languages, i.e. French and English. The Public Service Staffing Tribunal provides recourse for contesting particular appointments. Annual reports must be tabled in Parliament on the application of the *Public Service Employment Act*.

C. Rules for the management of public money and procurement

At the federal level, there is a very specific and structured framework for controlling financial management, based on the *Financial Administration Act* and Regulations, as well as Central Financial and Accounting Policies and Departmental Financial Policies (Systems and Procedures). The framework applies to all federal Government Departments and Agencies. The *Financial Administration Act* provides for the financial administration of the Government of Canada, the establishment and maintenance of accounts, parliamentary control of all public funds, and the publication of annual Public Accounts. Provinces have similar requirements for financial administration.

The *Financial Administration Act* creates the Office of Auditor General, who oversees the government administration of public moneys. The role of the Auditor General of Canada is to audit government operations and to provide the information that helps Parliament to hold the government accountable for the administration of public funds. The Auditor General reports annually to Parliament through the Speaker of the House of Commons. The Auditor General is independent from the government as an Officer of Parliament and is appointed for a 10-year term. The Auditor General is free to recruit staff and set the terms and conditions of their employment, and has the right to ask the government for any information required to meet the responsibilities of the position.

Strict rules also apply to government procurement. The *Contracting Policy*, established by the Treasury Board, governs the procurement of goods and services by all departments. This policy is based on a competitive process. It requires that bids

be solicited from potential contractors before any contract is entered into, unless an exception is provided for in the regulations. These exceptions include: the value of the contract does not exceed $25,000; there is a pressing emergency; only one person is capable of performing the contract. The policy also provides that a person who has been convicted of fraud against the government is unable to bid for a contract, unless the person was granted a pardon.

D. Rules for the financing of political parties

The *Canada Elections Act* requires that contributions received by registered parties and expenses incurred for election and leadership campaigns be reported to the Chief Electoral Officer. Contributions can only be made by individuals and are generally subject to an aggregate annual limit of $5,000. There is a limited exception allowing for contributions of up to $1,000 from corporations and trade unions. Contribution limits are adjusted annually for inflation.

E. Rules for lobbyists

At the federal level, the Lobbyists *Registration Act* requires all those who are paid for trying to influence public office holders on behalf of another person to register with the Government. The Act also provides for a code of conduct for lobbyists. The *Code* establishes mandatory standards of conduct for all lobbyists communicating with federal public office holders. These standards are a counterpart to the obligations that federal officials must honour when they interact with the public and with lobbyists. Similar rules of conduct, either in legislation or guidelines, exist at the provincial and territorial level.

F. Rules for reporting wrongdoings in the workplace

Reporting wrongdoings is currently governed by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace,* which applies to any wrongdoing. The definition of "wrongdoing" applies to the Criminal Code corruption offences. The policy requires deputy ministers to establish internal mechanisms to manage the disclosure of wrongdoing, including – at a minimum – a designated Senior Officer, who will be responsible for receiving and acting on such disclosures. The designated Senior Officer reports directly to the deputy minister for the application of the policy. The policy also provides for a Public Service Integrity Officer responsible for receiving and acting on disclosure from public servants of any department who believe they cannot disclose within their own department or who believe that the disclosure to the Senior Officer was not appropriately addressed.

The Public Servants Disclosure Protection Act, was passed on November 25, 2005 but not yet in force, would legislate and strengthen the existing policy requiring internal mechanisms for disclosure. It would replace the Public Service Integrity Officer with a Public Sector Integrity Commissioner whose appointment is approved by a resolution of Parliament. The Commissioner is given investigative powers in relation to disclosure. The Commissioner's inquiries will not replace criminal investigations in the case where the wrongdoing amounts to a criminal offence, because evidence gathered by the Commissioner cannot be used in criminal proceedings, but the Commissioner's evidence can be turned over to law enforcement personnel to assist their investigation.

G. Protection for public servants who report wrongdoings in the workplace

Currently, public servants who report any wrongdoing, including an act of corruption, are protected by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.* This policy provides that no employee shall be subject to any reprisal for having made a good faith disclosure in accordance with this policy. Employees and managers who retaliate may be subject to administrative and disciplinary measures up to and including termination of employment. The policy also provides for a procedure for employees who believe they are subject to reprisal as a direct consequence of having made a disclosure in accordance with the policy. The Senior Officer to whom the disclosure was made, or the Public Service Integrity Officer, is responsible to protect from reprisal employees who disclose in good faith information concerning wrongdoing.

When in force, the *Public Servants Disclosure Protection Act* would make statutory the protection from reprisal for good faith disclosures, and would strenghten this protection. .

H. Access to information legislation

Public access to government information enhances government transparency and promotes the participation of the civil society in accordance with article 13 of the UN Convention. The *Access to Information Act* provides a right of access to federal government information, subject to certain exemptions and exclusions. The Act also delineates the process for making a request; it establishes the Office of the Information Commissioner to receive and investigate complaints; and it provides a further right of review by the Federal Court of Canada.

Under the Act, government institutions have 30 days to respond to access requests, with possibility to claim extended period if there are many records to examine, other government agencies to be consulted, or third parties to be notified. Applicants must pay a fee for copied information. Access rights are subject to specific and limited exemptions, when the information affects individual privacy, commercial confidentiality, national security, or the frank communications needed for effective policy-making. Such exemptions permit government agencies to withhold material. Dissatisfied applicants may turn to the Information Commissioner who investigates applicants' complaints, and the results of the Commissioner's investigation can be reviewed by the Federal Court of Canada. . The provinces and territories have similar access to information legislation.

I. Measures to prevent money-laundering: FINTRAC

In Canada, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PC(ML)TFA), requires financial institutions, security dealers, real estate brokers, portfolio managers and other financial advisors, to keep information and records on their clients, including identification of account holders, records of large cash transactions, deposit slips, account statements, etc. The Act also requires them to take measures to ascertain the identity of their clients and determine whether clients are acting on behalf of a third party.

The Act also requires financial institutions to report suspicious transactions to the Financial Transactions and Reports Analysis Centre (FINTRAC), created by the Act, and makes it an offence not to report. A suspicious transaction is defined as a

transaction in respect of which there are reasonable grounds to suspect that it is linked to a money-laundering offence or a terrorist-financing offence.

When, after analysis, FINTRAC determines that there are reasonable grounds to suspect that some information would be relevant to investigating and prosecuting a money laundering offence, the Centre must disclose this information to the appropriate police force or other law enforcement body. FINTRAC can also enter into an agreement for exchanging information with a foreign organisation with similar powers as provided under article 58 of the UN Convention.
The Act can be found at: http://laws.justice.gc.ca/en/title/A.html

III. INTERNATIONAL COOPERATION

A. Legal assistance in investigations and prosecutions

The obligations created by the Convention to provide international assistance for the investigation or prosecution of Convention offences are similar to Canada's obligations under bi-lateral Mutual Legal Assistance Treaties (MLAT). The execution of Canada's treaty obligations are governed by the *Mutual Legal Assistance in Criminal Matters Act*. The International Assistance Group (IAG), a specialized group of lawyers within the Department of Justice was designated to handle requests for assistance from foreign countries under MLAT. IAG reviews and coordinates all requests for extradition or mutual legal assistance made to or by Canada in criminal matters, with the assistance of the International Liaison Branch of the RCMP, which is the federal police force. IAG appears in court when a request for assistance requires a judicial order in Canada, such as restraint, seizure, or forfeiture of property located in Canada. Where a request for assistance requires no judicial

order in Canada for its execution, the request is generally executed entirely by law enforcement officials.

The IAG group is already handling requests for assistance under the Inter-American Convention against Corruption and is likely to be designated by Canada as central authority under article 46(13) of the UN Convention to handle requests for assistance under the Convention.

B. Extradition

Article 44 of the UN Convention deals with extradition requests. Its implementation process is similar to the implementation of mutual legal assistance requests. The same International Assistance Group handles requests for extradition, in accordance with the *Extradition Act* and various bi-lateral treaties. When an extradition request requires a judicial order in Canada for its execution, such as a warrant of arrest or a committal order, it is a lawyer from the International Assistance Group who seeks the order. The *Extradition Act* allows a person against whom an extradition order is sought to challenge the decision before the Canadian courts and to appeal the decisions.

Canada requires a treaty for accepting extradition requests, but has in the past accepted Conventions, such as the OAS *Inter-American Convention against Corruption*, as legal basis for cooperation on extradition. The same situation would likely apply to the U.N. Convention.

C. Asset recovery

The Convention requires Parties to take measures to prevent transfer of proceeds of crime (article 52). Canada satisfies this requirement with the measures outlined in Part II – I, and in particular with the responsibilities exercised by FINTRAC.

Canada's law provides for mutual legal assistance in the recovery of property confiscated by order of a court of criminal jurisdiction, when the predicate offence is an indictable offence when committed in Canada. The foreign forfeiture order must be a final order issued by a court of criminal jurisdiction in the requesting State, and not be subject to an appeal in that State. The legal assistance provided by Canada includes freezing, seizure, or forfeiture, where the information provided by the requesting State is sufficient and compelling.

The legislation provides a number of grounds that might bring the Canadian Minister of Justice to refuse to enforce a final criminal forfeiture order, such as: the request has been made for discriminatory reason; the enforcement of the order would prejudice an ongoing proceeding or investigation, would impose an excessive burden on the resources of the Canadian criminal justice system, or might prejudice Canada's security or national interest; and it is in the public interest to refuse the request.

Canada's legislation allows for the return of proceeds of crimes to an innocent third party. This innocent third party can be the requesting State in the case of corruption involving public funds.

D. Technical assistance and information exchange

Canada provides training and technical assistance under international conventions of which it is a Party, such as the Inter-American Convention against Corruption. In general, Canada provides assistance through the Canadian International Development Agency (CIDA). CIDA has a number of programming channels, which facilitate the sharing of experience in combating corruption, such as contributions to multilateral organizations that are combating corruption, to local governmental and nongovernmental partners, and, through country-to-country arrangements, direct financing support to government agencies and other public institutions, such as Auditor General's Offices, Ombudsman's Offices, Comptroller's, Finance Ministries, Government Procurement Agencies, Electoral Offices, etc.. In many countries, CIDA provides financing for Public Sector Reform, which can be used for the purposes of analysis or the identification of larger reform programs.

Other federal departments and agencies are also involved in mutual technical assistance. For example, the International Cooperation Group within the Department of Justice is active in providing support to countries to modernize their justice systems. As well, the RCMP is involved in a range of overseas training initiatives, both on its own and under the auspices of CIDA, focusing on subjects such as police management and intelligence analysis.

Canada’s current assistance policy toward the Parties to the Inter-American Convention against Corruption will likely extend to the States Parties of the UN Convention.

SECTION 3:

HUMAN TRAFFICKING

中国打击跨国有组织犯罪的实践和做法

Chinese Practices in Fighting Against Transnational Organized Crime

李树恒Li Shuheng*

Abstract
摘要

With economic globalization accelerating, transnational organized crimes, such as terrorism and economic crimes, extremism, illegal migrant, smuggling, drug trade and money laundering, have been with intelligentized, complicated and high-tech features. “Across-border crime” has become an international phenomenon and such transnational organized crime has seriously threatened the countries’ stability, economic development and their people’s livelihoods. Any state could hardly fight against such crime effectively only with its own force. However, by strengthening the countries and areas’ bilateral and mutual law-enforcement cooperation, such crime could be beaten and suppressed. The United Nations Convention Against

*黑龙江省人民检察院副检察长
Deputy Chief Prosecutor Heilongjiang Provincial People’s Procuratorate, P.R. China

Transnational Organized Crime has provided the international law basis for international cooperation on fighting against such crime. China' related laws and regulations are basically consistent with such Convention, but there are still some differences. Therefore, it is necessary for China to join such Convention and to strengthen cooperation with other member states in fighting against such crime.

随着经济全球化进程的加速，国际恐怖活动、极端主义、跨国经济犯罪、非法移民、走私、贩毒及涉及上述犯罪的洗钱犯罪等跨国有组织犯罪活动愈来愈呈现出高科技化、智能化和复杂化的特点，“犯罪无国界”已成为一种国际现象。跨国有组织犯罪已对当今各国社会安定、经济发展和人民生活构成严重威胁。任何一个国家仅靠自己的力量，难以有效地打击跨国犯罪活动。只有各国和地区携起手来，加强双边和多边执法合作，才能从根本上打击和遏制各种跨国犯罪活动。《联合国打击跨国有组织犯罪公约》为各国开展国际合作打击跨国有组织犯罪提供了国际法上依据。中国法律规定与《公约》总体一致，但也有不少差异。有必要通过对比，研究解决办法，实现中国国内法与《公约》最大可能的衔接，以促进中国开展国际合作打击跨国有组织犯罪活动。

中国打击跨国有组织犯罪的实践和做法

Chinese Practices in Fighting Against Transnational Organized Crime

李树恒Li Shuheng*

2000 年 12 月 12 日至 15 日《联合国打击跨国有组织犯罪公约》（以下简称《公约》）在意大利巴勒莫开放供各国签署，随后直至 2002 年 12 月 12 日在纽约联合国总部开放供各国签署。这是国际合作打击跨国有组织犯罪迈出了具有里程碑意义的一步，也是联合国在防控日益严重的跨国有组织犯罪方面着眼建立全球合作机制的第一个综合性法律文献。目前，公约签署国已达 147 个，批准国已届 40 多个。中国于 2003 年 8 月 27 日通过了《公约》。

面对各种跨国有组织犯罪日益猖獗的严峻形势及其呈现出高科技化、复杂化、智能化的特点，中国政府一方面积极参与国际合作，联手打击跨国有组织犯罪。另一方面根据《公约》关于“各缔约国应健全国内相关立法，建立司法、执法机关之间富有成效的合作与协助，加强打击和预防跨国有组织犯罪的经验、信息和资料的交流与分享” 的要求，加大立法力度，不断完善相关法

*黑龙江省人民检察院副检察长
Deputy Chief Prosecutor Heilongjiang Provincial People’s Procuratorate, P.R. China

律法规，严厉打击跨国有组织犯罪，取得了显著成绩。本文结合我国打击跨国有组织犯罪的相关法律规定及司法实践，以《联合国打击跨国有组织犯罪公约》为参照，试就加强国际合作联手打击跨国有组织犯罪提出一些粗浅的看法和建议。

一、中国打击跨国有组织犯罪的实践和做法

中国政府历来高度重视打击跨国有组织犯罪活动，经过多年的努力已取得了有目共睹的显著成效，有效地遏制了跨国有组织犯罪的蔓延之势。

第一、全方位、多层次的打击和预防跨国有组织犯罪执法网络，多部门齐抓共管，综合治理。中国在打击跨国有组织犯罪方面与其它国家不同的是我们的执法网络是全方位、多层次的，执法部门既各司其职又相互配合，形成打击合力剑指跨国有组织犯罪。打击和预防跨国有组织犯罪的法律规定方面我们有完备的法律体系，既有《刑法》和《刑事诉讼法》，也有特别法如《反洗钱法》、《金融机构反洗钱规定》等，打击跨国有组织犯罪的执法部门既有司法机关如：中国公安机关负责普通跨国有组织犯罪的侦查工作，边防、海警部门负责走私、非法移民等跨国有组织犯罪的侦查工作，海关负责走私犯罪的侦查工作，检察机关负责跨国有组织犯罪的公诉工作和腐败犯罪的侦查工作，法院负责跨国有组织犯罪的审判工作。也有行政执法部门如工商行政管理部门、金融管理部门等根据职责在执法中查办的涉嫌经济犯罪和洗钱犯罪等，但根据中国刑法规定，行政执法部门在执法过程中查办的刑事案件要移交司法部门处理。据不完全统计，从 2000 年至 2006 年，通过国际刑警组织和双边警务合作渠道，我国警方先后从国外押解、遣返犯罪嫌疑人２００多名，每年公安机

关、检察机关及其它执法部门办理刑事司法协助案件达几百起，以中国最高人民检察院为例，每年办理的各类刑事司法协助案件均达 80 多起。

第二、采取灵活多样的打击跨国有组织犯罪的途径和措施。一是积极举办国际大会探讨国际合作打击跨国有组织犯罪的有效机制。中国政府一直重视开展国际合作打击跨国有组织犯罪，并积极建立打击跨国有组织犯罪的会议机制。从 2001 年开始的上海合作组织会议，２００２开始的东盟与中日韩（１０＋３）打击跨国犯罪部长级会议、2004 年开始的中国与东盟成员国总检察长会议、２００５年开始的东盟与中国（１０＋１）打击跨国犯罪部长级会议、亚欧会议总检察长会议等一系列以国际合作打击跨国有组织犯罪为主题的国际会议便是中国政府积极探索区域合作打击跨国犯罪合作的主要体现，中国司法部门还创建了上海合作组织警务合作机制、总检察院合作机制、中国与东盟边境检察机关直接司法协助机制、亚欧总检察院合作机制等一系列行之有效的打击跨国有组织犯罪机制。尤其值得一提的是，自 1998 年以来，中国检察机关坚持每年召开一次国际性大会，研究、探索打击跨国有组织犯罪的途径和措施。先后创建了上海合作组织成员国总检察长会议、中国与东盟成员国总检察长会议机制、国际反贪局联合会机制等机制，并积极利用已建立的会议机制积极开展国际合作打击跨国有组织犯罪。据不完全统计，98 年以来，经最高人民检察院办理的司法协助案件达 500 余件，其中大部份集中在东盟和上海合作组织成员国之间。二是建立警务联络官和检务联络官制度。中国根据打击跨国有组织犯罪的客观需要，从 2001 年起已先后向美国、加拿大、澳大利亚、日本等十几个国家分别派驻了 20 多名警务联络官，以加强国际警务合作、及时联络、沟通打击跨国犯罪信息。2004 年中国最高人民检察院与东盟十国总检察院联手创建中国与东盟成员国总检察院合作机制后中国和东盟十国总检察院均设立了

检务联络官及时通报跨国犯罪特别是腐败犯罪信息。三是积极开展快捷、便利的边境执法合作。近年来我们利用与越南、老挝、俄罗斯等国的边境合作关系，设立的边境检察机关合作机制及中国和越南边境警方开展的“绿色通道”机制均取得良好的效果。如中国广西东兴市公安局与越南芒街市公安局及时将双方开展警务合作和交流过程中遇到的实际问题和困难向海关、边检、检验检疫等口岸联检部门反馈，请求支持并开通了警务合作绿色通道。绿色通道的开通，为双方的警务合作和交流提供了快速便捷服务，进一步缩短了办案时间和提高了工作效率，双方的警务合作和交流每天 24 小时畅通无阻。双方还成立两个专门合作联络办公室，加强情报信息交流。中国东兴市打击跨国拐卖妇女儿童执法合作联络办公室和东兴市打击跨边境禁毒执法合作联络官办公室先后于2000、2001 年成立。几年来，该办公室根据公安部和联合国儿基会的项目要求，先后举办中越两国警方参加的边境地区打击跨国拐卖妇女儿童执法培训班、研讨会 12 次，召开 8 次联席会议，组织中越警务会晤 48 次，交流打拐信息190 多条。在严厉打击边境地区的毒品犯罪，东兴市打击跨边境禁毒执法合作联络办公室发挥了积极的作用，加强了同越南警方的信息交流和禁毒执法合作。同时，成立了东兴市公安局被拐卖外国妇女儿童中转中心。该中心 2004 年成立以来，共接收和遣返解救出来的被拐越南妇女儿童 100 余名，有效维护了被拐越南妇女儿童的合法权益。现在每年中国东兴警方与越南芒街警方协作破重大案件都在 10 起以上，对杀人等重大案件嫌疑人逃过对方境内，双方都不遣余力积极配合抓获并及时移交。2001 年－2006 年，双方合作共破获毒品案件 390 起（含毒品治安案件），抓获违法犯罪嫌疑人 500 多名。解救被拐卖的妇女儿童 500 多人，移交拐卖妇女儿童犯罪嫌疑人 90 多名。三是积极支持、参与打击跨国有组织犯罪专门国际组织的行动。2004 年 10 月，中国作为创始

成员国之一成立了“欧亚反洗钱与反恐融资小组”(EAG)。2005 年 1 月，中国成为“金融行动特别工作组”(FATF)的观察员，在国际反洗钱领域迈出了重要一步。

第三、积极参与制定、签署国际公约，全面参与打击跨国有组织犯罪国际合作网络。据有关资料表明，目前，中国政府已经参加了联合国《公职人员国际行为守则》、《联合国反对国际商业交易中的贪污贿赂行为宣言》、《联合国打击跨国有组织犯罪公约》、《联合国反腐败公约》等有关惩治跨国犯罪的多边国际公约 300 多部中的近 100 部，成为《联合国打击跨国有组织犯罪公约》、《联合国反腐败公约》等多部国际公约的缔约国。2002 年 11 月，中国与东盟各国共同发表了《关于非传统安全领域合作联合宣言》联合打击贩毒、非法移民、海盗、恐怖主义、武器走私、洗钱、国际经济犯罪和网络犯罪等跨国有组织犯罪。作为联合国的常任理事国和一个负责任的大国，中国政府自始至终一直参与了《联合国打击跨国有组织犯罪公约》的起草和谈判的整个过程，并且在公约开放供签署的第一天即签署了公约。此外，据统计，中国政府至今已与 23 个国家签订了引渡条约。已和世界上 47 个国家签署了 71 项刑事、民事司法协助条约，中国公安机关和检察机关已与 100 余个国家的警察机关、检察机关和其它司法机关签订合作协议。

第四是加大立法力度，不断修改完善国内相关法律。2003 年中国通过《联合国打击跨国有组织犯罪公约》以来，为认真贯彻落实该公约，中国加大立法力度，不断修改和完善国内相关法律，2003 年中国人民银行发布的《金融机构反洗钱规定》、《人民币大额和可疑支付交易报告管理办法》和《金融机构大额和可疑外汇资金交易报告管理办法》，2006 年中国通过了《中华人民共和国反洗钱法》，2006 年中国全国人民代表大会常务委员会通过《中华人民共和国刑

法》修正案（六）扩大了洗钱罪的上游犯罪范围，规定明知是毒品犯罪、黑社会性质的组织犯罪、恐怖活动犯罪、走私犯罪、贪污贿赂犯罪、破坏金融管理秩序犯罪、金融诈骗犯罪的所得及其产生的收益，为掩饰、隐蔽其来源和性质的均构成犯罪。

二、中国刑法与《联合国打击跨国有组织犯罪公约》的衔接与冲突

（一）中国刑法与《联合国打击跨国有组织犯罪》的衔接

根据《联合国打击跨国有组织犯罪公约》第三条之规定，跨国有组织犯罪是指：1、在一个以上国家实施的犯罪；2、虽在一国实施，但其准备、筹划、指挥或控制的实质性部分发生在另一国的犯罪；3、犯罪在一国实施，但涉及在一个以上国家从事犯罪活动的有组织犯罪集团；4、犯罪在一国实施，但对于另一国有重大影响。中国刑法对跨国有组织犯罪并没有单独做出定义，对于跨国有组织犯罪的规定只是广泛规定于《中华人民共和国刑法》和其它法规中，如走私罪、洗钱罪、拐卖妇女、儿童罪、走私、贩卖、运输、制造毒品罪和贪污贿赂罪等。比较中国刑法与《联合国打击跨国有组织犯罪公约》，应当说，公约大量条款与我国的有关方针、政策和法律基本是吻合的，二者总体是一致的。

第一，刑事政策的价值取向是一致的。中国刑法与《联合国打击跨国有组织犯罪公约》以相同的刑事政策为指导，即严密法网、宽严相济。中国刑法依主体性质不同规定了大量与跨国有组织犯罪有关的罪名，基本涵盖了《联合国打击跨国有组织犯罪公约》规定所有罪名；这与公约从不同领域出发规定内容严谨的跨国有组织犯罪，从严密法网的政策取向上看是相同的；在确保犯罪均

能受到严厉处罚的同时，中国刑法与《公约》都有配合侦查活动可以减轻处罚等给犯罪人以自新机会的相关规定，体现了宽严相济的刑事政策。

第二，跨国有组织犯罪的类型是相近的。《联合国打击跨国有组织犯罪公约》规定的跨国有组织犯罪类型与中国刑法犯罪类型大体一致，只是对腐败犯罪方面规定的与中国刑法有些差异，但对于腐败犯罪中的多数情形可以依照中国刑法中的贪污贿赂罪予以认定。

第三，对法人犯罪的处罚原则是一样的。《联合国打击跨国有组织犯罪公约》规定的法人犯罪与中国刑法规定的单位犯罪的定罪原则一致。根据中国刑法的规定，对单位追究刑事责任的同时，不影响追究具体实施犯罪的直接责任人的刑事责任。这种“双罚制”处罚原则与公约规定精神是一致的。

（二）中国刑法与《联合国打击跨国有组织犯罪》的冲突

第一、关于洗钱行为的刑事定罪。在此问题上，公约与我国刑法有两点冲突：一是，根据公约第 6 条的规定，洗钱的上游犯罪涉及所有牟利性犯罪。而根据我国刑法第一百九十一条及其修正案的规定，洗钱的上游犯罪只限于毒品犯罪、黑社会性质的组织犯罪、走私犯罪和恐怖活动犯罪四种。应当如何看待这种冲突呢？从近年包括我国在内的全球犯罪的形势来看，洗钱的上游犯罪本是多种多样，而且洗钱行为呈现为一种不断发展的态势，妨碍对一些重大经济犯罪或财产犯罪活动的追查和惩治，妨碍对国家和公民合法权益的保护。从全面、积极、有效打击犯罪的角度考虑，在今后修订刑法时，扩大我国洗钱犯罪之上游犯罪的范围，可以说符合刑法的目的和任务，对我国并无害处。二是，根据公约本条第 1 款天b天项（一）的规定，明知财产为犯罪所得，而对之获取、占有或使用的，可规定为犯罪。而根据我国刑法第三百一十二条的规定，上述行为并不构成犯罪。只有明知是犯罪所得的赃物而予以窝藏、转移、收购

或代为销售的，才构成犯罪。但是，应当注意的是，由于公约的此项规定系保护性条款（所谓保护性条款，即缔约国采取相关措施，不是无条件的和绝对的，而是只能在一定的前提下进行，如应“根据本国法律规定”或必须限定在“本国法律制度许可的范围内”或必须“在不违反本国法律原则或本国法律制度基本概念的情况下”，等等），即便缔约国不把某些行为规定为犯罪，也不见得必然构成对公约的违反。在此问题上，缔约国是可以自主决定如何定规立制的。

第二是关于腐败行为的刑事定罪。公约的有关规定与我国刑法有两点冲突：一是关于贿赂罪的构成。根据公约第 8 条第 1 款的规定，贿赂犯罪因行贿人给人以“不应有的好处（undue advantage）”或受贿人索取或接受的外来的“不应有的好处”而构成。这里所谓“不应有的好处”是一个比较宽泛的概念，不能仅仅理解为“财物”。而在此问题上，我国刑法第三百八十五条、第三百八十七条、第三百八十八条和第三百八十九条关于贿赂犯罪构成的规定，恰恰要求限定于财物。从贿赂行为的本质特征和刑法规定贿赂犯罪的宗旨来看，把贿赂犯罪的行为对象或媒介仅仅限定为财物，未免失之片面。应当承认，公约的宽泛规定对于惩治此类犯罪更为有益。在今后修订我国刑法时，不妨可以参照公约的规定，扩大贿赂犯罪客观方面的范围。二是关于外国公职人员或国际公务员受贿行为的刑事定罪问题。公约第 8 条第 2 款规定，各缔约国均应考虑采取必要的立法和其他措施，将外国公职人员或国际公务员的受贿行为规定为犯罪。而根据我国刑法的有关规定，受贿犯罪的主体只限于中国国家工作人员，而且，从理论上来讲，将外国公职人员或国际公务员的受贿行为规定为犯罪，涉及管辖权、尤其是有关人员享有的外交特权与豁免等复杂的法律问题，因此，在此问题上，似应慎重为宜。应当看到的是，公约与我国刑法在此问题

上的冲突并不具有紧迫的现实意义，因为公约只是要求缔约国“考虑”将外国公职人员或国际公务员的受贿行为规定为犯罪，本款显属弹性条款，不会对我国刑法构成即时的困难。

第三是关于法人犯罪的问题。公约第 10 条采用的是“法人犯罪”的概念，而我国刑法规定的则是“单位犯罪”的概念。比较而言，从犯罪主体的角度来讲，我国“单位犯罪”的外延比公约所讲的“法人犯罪”要广，因为除法人外，我国刑法中的单位犯罪还包括非法人团体、组织以及其他合法实体。但就犯罪的客观方面而言，我国“单位犯罪”的范围则要小于公约所讲的“法人犯罪”，因为公约所讲的“法人犯罪”可以是公约所规定的参加有组织犯罪集团罪、洗钱犯罪、腐败犯罪或妨碍司法犯罪，而我国刑法中的“单位犯罪”只有在刑法分则有特别规定的情况下才可以构成，主要是涉及商业欺诈的贪利性犯罪，至于盗窃、抢劫、杀人等犯罪行为，在概念上与“单位犯罪”并不沾边儿。尽管存在这样的区别，我国的“单位犯罪”与公约所讲的“法人犯罪”毕竟存在着交叉，作为一种概念，二者的相似性是矛盾的主要方面，在此问题上，应当说这是我国可以批准公约的基础。至于在我国“单位犯罪”的概念下，可以把犯罪的客观方面扩大到多大的范围，这是一个可以根据实际情况而适时进行改革和调整的问题。重要的是，公约第 10 条恰恰为这种自主性的改革和调整提供了可能，因为该条属于保护性条款，规定有关措施应在符合缔约国法律原则的情况下才可以采取。因此，该条对我国不会构成困难。

第四是关于举证责任的倒置问题。在我国的刑事诉讼中，有一条基本的原则，即举证责任由追诉方承担，被追诉人不承担证明自己无罪的责任（这里仅指公诉案件）。作为一种例外，我国刑法第三百九十五条第 1 款就“巨额财产来源不明罪”规定了举证责任倒置概念。根据本款规定，被告人如果不能就自

已涉嫌与犯罪有关的财产，证明其合法来源，则有可能被判有罪。也就是说，我国例外情况下举证责任倒置的概念，只适用于“巨额财产来源不明罪”一种。而根据公约第 12 条第 7 款的规定，在涉及参加有组织犯罪集团罪、洗钱犯罪、腐败犯罪或妨碍司法犯罪的没收事宜上，均可考虑适用举证责任倒置概念。因此，公约规定的举证责任倒置概念比我国刑法中的相关概念在外延上要广。但需注意的是，公约本款规定不仅使用了“考虑”二字，而且规定此种要求应符合缔约国“本国法律原则和司法及其他程序的性质”，因此是一个典型的保护性的弹性条款，对我国刑事法律并不必然构成压力。

第五是关于证人和被害人的保护问题。公约第 24 条和第 25 条分别就证人和被害人的保护、尤其是其安全保护问题，作出了规定。该两条的规定与我国刑诉法主要有两点冲突：一是，虽然我国刑诉法第四十九条对证人的安全保护问题作出了原则规定，但对于被害人的帮助和保护、尤其是其安全保护问题并未作出规定。但从长远看，对某些特定犯罪的被害人提供帮助和保护，是刑事法发展的趋势。另需注意的是，在对本公约所涉犯罪被害人的帮助和保护问题上，公约附加有一个前提条件，即限定在缔约国“力所能及的范围内”。因此，这又是一个保护性条款，对缔约国不必构成现实的压力。二是公约第 24 条第 4 款的规定与我国刑诉法上的概念存在冲突。该款把被害人视为证人。而根据我国刑诉法，被害人是当事人，与证人有别。但这种冲突并非重大的原则性冲突，因为公约第 24 条第 4 款是从证据来源的角度来提及被害人的。事实上，根据我国刑诉法第四十二条的规定，被害人陈述是刑事证据的一种。因此，从证据来源的特定意义上来讲，被害人也可以被视为一种证人。关于这一冲突，采取司法解释的方式，大体可以解决。

三、打击跨国有组织犯罪的建议

跨国有组织犯罪的严峻态势，已迫切需要各国之间加强合作联手打击跨国有组织犯罪。除了各国尽快修改、完善国内法使其尽最大可能和《公约》衔接，如笔者第二部分关于中国刑法修改和完善的建议，在此笔者还建议国际社会：

第一、增强紧迫感和使命感，把打击跨国有组织犯罪国际合作摆到重议事日程。跨国有组织犯罪已对我们提出了严峻挑战。为维护各国的自身利益和安全，乃至全人类共享的国际利益和秩序，我们应当大力加强协作配合，将打击、预防和控制跨国有组织犯罪问题列入维护和平与安全的重要议题中去研究和思考，制定有针对性的行动计划，采取相应措施，从不同层面致力于推动打击跨国有组织犯罪的国际合作工作的发展，共同携手打击、预防和控制跨国有组织犯罪。

第二、建立犯罪信息和情报交换机制，及时掌握犯罪动向。及时交换犯罪信息和情报对防止犯罪分子的外逃起着至关重要的作用。各国政府应当从打击和预防犯罪的全球视野，重视加强涉及犯罪的信息和情报建设，建立犯罪信息和情报交换机制，定期或不定期互相交换信息和情报。

第三、增强互信度，构建可靠、畅通、互信的合作渠道。国际合作的实践表明，如果合作伙伴之间互不信任，这种伙伴关系及其合作机制就不可能发挥有效的作用，无论是经济合作还是打击跨国有组织犯罪合作，都是如此。建议各国执法部门建立互信机制，根据合作双方的司法制度等国情实际，积极采取定期联络、高层互访，共同研讨等形式，共同构建畅通、可靠、互信的合作渠道。

第四、进一步探索建立多渠道、多形式的国际合作机制，提高打击和预防跨国有组织犯罪的实效。打击跨国有组织犯罪活动，常规的途径，因程序复杂、时效较长，实效并不高。从国际合作的实践看，各国政府应当积极探索和创新合作方式、建立符合新形势下打击和预防跨国有组织犯罪实际的合作机制，如在周边国家执法机关之间积极探索建立边境地区快捷、简便的直接协作机制，适当运用边境地区民间的非官方合作途径等。

第五、认真落实《联合国打击跨国有组织犯罪公约》。虽然《联合国打击跨国有组织犯罪公约》为国际社会共同打击跨国有组织犯罪提供了一个法律框架，但其效能的切实发挥最终还有待于有关缔约国之间通过双边条约或在国内法中对公约规定的内容加以具体落实。各国政府当务之急是要进一步落实《联合国打击跨国有组织犯罪公约》，加紧提出适应该公约要求的可行性方案，以期更早、更好地发挥这个《公约》在打击、预防和控制跨国有组织犯罪中的积极效用。

贩卖人口犯罪中的国际刑事合作探讨

International Cooperation in Combating Transnational Organized Crime

杨正万 Yang Zhengwan*

Abstract
摘 要

贩卖人口跨国性，国际化倾向日益明显，不仅损害了国家经济和社会秩序，也侵犯了受害者的基本人权，打击贩卖人口犯罪不仅仅只是一个国家的问题，作为国际社会共同的问题需要加强国际刑事合作。本文以贩卖人口犯罪为视点来探讨国际间的刑事合作。

Population Trade becomes more international and obvious, which is not only harmful to our economy and society, but also violates the basic human rights of the casualty. So striking the crime of population trade is not only the task of one country, but also the task of the international society which needs the international criminal cooperation. The paper is to discuss the cooperation on the basis of the crime.

*北京师范大学刑事法律科学研究院教授
Professor, Research College for Criminal Jurisprudence, Beijing Normal University

贩卖人口犯罪中的国际刑事合作探讨

International Cooperation in Combating Human Trafficking

杨正万 Yang Zhengwan*

贩卖人口是指为剥削目的而通过暴力威胁或使用暴力手段，通过其它形式的胁迫，通过诱拐、欺诈、欺骗、滥用权力或者利用脆弱镜框、或通过授受酬金或者利益取得对另一人有控制权的某人的同意等手段招募、运送、转移、窝藏或接受人员。[1] 贩买人口的受害者主要是妇女和儿童，但又不仅限于妇女、儿童。历史上贩卖人口的对象主要针对两种人，一种是指非洲的奴隶, 另一种是指欧洲妇女，前者是 17、18 世纪, 利用诱骗或暴力手段, 把非洲人偷运到北美，作为奴隶进行贩卖；后者是在 19 世纪末, 中东欧和中南美洲国家的白种妇女被贩卖到西欧及其殖民地和美国从事色情业的活动，“白奴贸易”在当时猖獗一时。二战后, 国际公约中贩卖人口的对象扩展到全球的妇女和儿童。

*北京师范大学刑事法律科学研究院教授
Professor, Research College for Criminal Jurisprudence, Beijing Normal University
[1] 蔡巍：“惩治跨国贩运妇女儿童犯罪的现状、困境与对策”[J],载《政法学刊》，2005 年第 2 期，第 28 页。

一、当前跨国贩卖人口犯罪的现状与特点

跨国贩卖人口犯罪通常是指以招募家佣、收养儿童、组织工人等名义将妇女、儿童运送到目的地国后，卖给当地的犯罪组织,被贩运来的人到生存条件极其恶劣的。在地方充当劳工或从事家庭服务,妇女往往被强迫卖淫,儿童则受到残酷的奴役,而犯罪分子从中牟取暴利。目前全球跨国贩卖人口的现状与特点主要表现在以下几个方面：

1、跨国贩卖人口具有全球性、跨国化。近几年来,随着国际贸易交往的增加与各国人民交流的增多，跨国拐卖妇女儿童犯罪活动发展迅速,据统计,全球有 900 万人被实力强大的贩卖人口跨国犯罪集团迫使去做性奴隶或在极为恶劣的环境中做苦工，各种各样的人口走私,使得犯罪集团在一定程度上控制或影响着全球近 2 亿人口。[2]据美国国务院 2005 年贩卖人口犯罪的报告：“每年有 60—80 万的男人、妇女和孩子被跨越国境贩运，其中 80%的是妇女与女孩,至少 50%是未成年人，这个数据也说明了大多数受害者将遭受到商业性的性剥削。”[3] 贩卖人口犯罪的组织者即“蛇头”,已在国家间形成多渠道、多方面的勾结,有的甚至与黑社会组织联手、形成庞大的跨国性偷渡集团和贩卖人口集团，其体现在不同国家跨国贩卖人口犯罪的组织者共同组织、策划和实施贩卖活动、跨国贩卖人口犯罪最大的益处是可以得到高利润,且作案隐蔽性较强,

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[2] Annuska Derks.Combating trafficking in South——East Asia：a Review of Policy and Programme Responses [M]. Internationa Organization for Migration Publisher， 2000.

[3] Departmen of state .trafficking In Persons Report [DB/OL] http:PPwww.state.govP.June 2005.

[4]转引徐岱：“偷渡犯罪问题新透视”[J]，载《社会科学战线》2006 年第 1 期，第 221 页。

[5]同 4。

而对多个主权国家而言则是社会危害性极其严重,国家司法投入增大,侦破工作难度增大，因此，打击跨国贩卖人口犯罪已不再是一个国家的国内法律适用的问题，而是整个国际社会都应该共同承担的责任和义务,并由此形成强大的合力来遏制这种全球性、跨国性、有组织性的跨国贩卖人口犯罪。

2、跨国贩卖人口犯罪的组织性、集团化 。随着贩卖人口犯罪的愈演愈烈,跨国贩卖人口犯罪的组织形式也在发生着变化，贩卖人口犯罪已经演变成为跨国有组织犯罪的一种，贩卖人口犯罪很多的时候外在形式上表现为一种偷渡活动犯罪，这种犯罪也是有组织的犯罪，对于有组织的犯罪尽管学者对其的界定没有达成完全的共识,联合国于 1991 年 10 月在莫斯科举行的“反对有组织犯罪研讨会”上对其定义为：指由故意犯罪者操纵和控制的，组织结构相对稳定，具有逃避社会控制的防护力,恐吓、腐蚀和大量盗窃等非法手段所实施的集团性的犯罪活动。这一定义重在突出有组织犯罪的集团性,即组织性。[4]所以有组织犯罪最大的特点就是犯罪形态的有组织化,即犯罪形态的外在组织结构、内在的组织特征及其具备的组织功能。在跨国贩卖人口犯罪中很多时候涉及刑法中的偷渡犯罪中，偷渡者被称为“人蛇”,偷渡犯罪的组织者被称为“蛇头”，根据《应用汉语词典》的解释,“人蛇”是指“偷渡者”，通常表现为被贩卖的人。“蛇头”是指进行贩卖人口、组织偷渡等非法活动的犯罪集团的首领。一个有组织的贩卖人口集团（或者称偷渡集团）分别由大蛇头、小蛇头、打手、援助人员、收债人和接应员等组成，形成金字塔式的组织体系、各行为人有明确的分工，所以，跨国贩卖人口犯罪一是由多个环节如组织、运

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[6] 祝燕涛、孙劲峰：“国际拐买犯罪的新动向”[J]，载《人民公安》2000 年第 12 期，第 33 页。

[7]同 6。

输、中转、制证、接收、藏匿、收款构成，这些复杂的犯罪过程决定了跨国贩卖人口犯罪的有组织性和集团化的必然性，同时因跨国贩卖人口犯罪而得到的高额利润使犯罪集团已把贩卖人口变成了全球性的生意，据统计,20 世纪 80 年代以来,国际贩卖集团每年可获得高达 30——95 亿美元的犯罪利润,比许多毒品走私犯罪的利润还高。高风险高利润的收入也促使跨国贩卖人口犯罪的有组织犯罪形式的形成[5]。

3、跨国贩卖人口地区性、差异化[1]。其主要表现在跨国贩卖人口大多是由发展中国家向发达国家输出的妇女与儿童,近年来，发展中国家内部互流现象也日益突出，传统上、被贩卖妇女儿童主要由东亚、东南亚、南亚、南美洲、中美洲、非洲、东欧等国家流向北美、西欧国家。去年,美国移民归化局调查全美 26 个城市的 250 家妓院,发现有大量外国妇女儿童，主要来自菲律宾、泰国等东南亚国家及俄罗斯、乌克兰、阿尔巴尼亚、墨西哥、尼日利亚等国、其中来自东欧的妇女多被强迫做脱衣舞女,来自泰国的被迫成为性奴隶,来自中国和韩国的妇女被迫当契约仆役，一些来自墨西哥的少女则被卖到偏远的妓院为流动工人提供性服务。在欧洲的性奴隶交易中,大批来自前苏联和东欧地区,特别是动荡中的巴尔干地区的妇女儿童,被贩卖到欧盟国家，或为明妓，或为暗娼。进入 90 年代后,一些新兴发达区域,如东亚、东南亚、南亚国家间出现互

[8][英]玛丽．巴克利“邪恶交易：欧洲的人口贩卖”，朱美荣译，载《国外社会科学文摘》，2004 年 12 期，第 50 页。

[1]跨国贩卖妇女的犯罪行为一般在三种国家实施：来源国，就是被贩卖妇女的原居住国或是国籍国；途经国，就是被贩卖的妇女从来源国出发前往最终目的地国所要经过的国家；目的地国，就是被贩卖的妇女最终要被送往的国家。

流，日本、泰国、越南、老挝、尼泊尔、印度、柬埔寨、菲律宾、中国等国家和港澳台地区均出现程度不等的跨国(境)贩卖妇女儿童活动。[6]

4、贩卖人口的暴力性、市场化。如今的贩卖人口利润高、风险低，已成为世界上增长最快和最有利可图的犯罪行业之一，所以，人口走私犯罪团伙获取高额利润是其贩卖人口活动的根本动因，据估计,每年贩运偷渡客的全球贸易额高达 40 亿美元，在南亚,每一被贩卖者的价格是 5000 至 1 万美元,在欧洲的价格则是 1.5 万至 3 万美元，贩卖人口利润巨大,风险较低,诱得跨国有组织犯罪活动更加疯狂。据专家分析,世界上每年因拐卖人口犯罪牟取高达 200 亿英镑的非法收入,贩卖妇女儿童已成为有组织犯罪中获利仅次于贩毒和走私武器的第三大行当。并有可能取代贩毒成为跨国犯罪组织的主要财源，据悉,目前,一些亚洲国家贩毒集团已放弃偷运毒品，改为贩卖妇女儿童。近年来,国际贩卖妇女儿童犯罪愈演愈烈,其根本原因是或明或暗的色情行业在世界范围内广泛存在，并不断蔓延发展,客观上为妇女儿童被贩卖提供了一个巨大的“需求”市场，而国家间、地区间经济发展的不平衡，使贫穷地区的人口向富裕地区自然流动，客观上形成一种潜在“供给”，犯罪分子充分利用此供需关系，并借助现代化交通通信和国家边界开放，人口自由流动的便利,贩卖穷困地区妇女儿童出境,逼(诱)良为娼,攫取高额利润，许多国家政府认识不清，重视不够，打拐资源投入不足，国际间合作缺乏有效手段,造成打击不力,客观上也纵容了此类犯罪的发展。

5，跨国贩卖手法多样性、隐蔽化。贩卖人口接触受害人的方式多种多样，主要有非法劳务输出、非法出入境、非法收养、跨国婚姻、组织旅游、传

[9]同 8。

教和留学教育等手段，并出现利用互联网络进行贩卖妇女儿童犯罪和其他色情犯罪(制作传播儿童色情图片)，其中人贩子利用穷国的妇女指望富国能给她们提供更好的工作机会,以招聘女服务员、售货员、文秘等工作为名,进行拐卖动尤为突出。[7]这些手段一方面具有极大的诱惑性，容易使受害人放松警惕，同时，这些手段大都存在以合法形式掩盖犯罪的目的，具有隐蔽性，也为政府打击贩卖人口的犯罪活动增加了难度。

二、跨国贩卖人口犯罪的原因分析

纵观跨国贩卖人口犯罪产生、发展到泛滥的历程,可将其主要原因概括为以下几点：

1、经济全球化，经济全球化势必加速各国人员、商品、服务、资本和信息的全球大流动。但它在促进全球经济繁荣的同时,也使犯罪分子能有更大的活动范围和更多的犯罪机会以追求更大的非法利益，从而也就加剧了犯罪的跨国发展趋势。现在的跨国犯罪组织已不再仅仅是原先的跨越两三个国家，而是在众多国家乃至全球范围内频频实施犯罪,妄图窃取全球化带来的好处。这就势必导致跨国贩卖人口犯罪问题更加突出和复杂，在经济全球化的进程中,由于国际人口的频繁流动，人口的流动频繁一方面为跨国贩卖人口提供了合法的外在形式和条件，另一方面，也为政府的监管带来了极大的不便，容易使贩卖人口的组织者能够方便顺利的实施犯罪。

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[10]同 8。

2、各国经济发展的不平衡，世界各国经济发展的不平衡是一个不争的事实，这既有政治、经济的原因,又有历史、地理和文化的因素，当今世界既有经济高度发达的国家,又有一些经济快速发展的发展中国家，还有一些贫穷落后、自然灾害频发、国内纷争不断、经济停滞不前的国家。这种全球发展的不均衡状态必然带来诸多领域的犯罪问题。正如前面提到的，目前跨国贩卖人口犯罪主要集中于大多是由发展中国家向发达国家输出的妇女与儿童，据统计，在发展中国家，国民年人均收入最贫穷的国家只有 200 美元，与先进国家中的 35000——40000 美元相比无疑有着巨大差别，收入的差别成为发展中国家人群希望到发达国家就业的一个充足的理由,但是发展中国家愿意到国外充当劳务的人员中,多数没有受过良好的教育,却想到异国寻求得到一个好的工作，很容易成为跨国贩卖人口犯罪集团的“猎物”，一些犯罪分子利用招工之名,拐卖妇女儿童,几年来的情况表明,在被拐的妇女儿童中,有一半以上是在劳务市场被人贩子以招工、用工为由拐卖的。所以，第一，如前所述,追求更大的经济利益是跨国贩卖人口犯罪分子的最终目标,而迅速发展的发展中国家和发达国家则集中了世界上大量的财富，于是,跨国贩卖人口犯罪分子就将不富裕的发展中国家的妇女和儿童向发达国家输入，迫使其从事色情服务行业，赚取高额利润。同时，较为贫困的发展中国家的人们为了寻找更加美好的前途和更高水平的生活，客观上促使了贩卖人口的组织者更方便的实施贩卖活动。

3、各国制度、法律和政策的差异性刺激了跨国贩买人口犯罪的国际化和严重性，各国法律、政策的差异为贩买人口犯罪提供了国际犯罪的生存空间。首先，各国的法律规范不同，一是罪与非罪的差异，即对同一种行为有的国家将其定为犯罪，应受刑罚处罚，有的国家则不视为犯罪；二是此罪与彼罪的差异，即对同一种行为，不同国家刑法规定的罪名不同；三是罪轻罪重的差异，

即对同一种行为，不同国家刑法规定的刑罚轻重不同。其次，有些国家的法律制度不完善，发展中国家法制建设滞后于经济发展。例如，对于色情业有些国家的政客主张卖淫合法化，认为卖淫合法化能够解决人口贩卖问题并且确保健康检查，从而避免爱滋病和性病的传播；而大部分国家还是认为卖淫合法化只会扩大对妓女的需求，从而进一步助长人口贩卖。[8]再如，对于打击贩卖人口问题，俄罗斯一直兴趣不大，非政府组织和妇女组织尽管一直在向俄罗斯政府施加压力，以求制定反贩卖人口法和救援方案，但在俄罗斯推定立法的努力得到了拒绝，因为，它否认存在人口贩卖问题。[9]还有移民政策，由于美国和西欧一些国家自 20 世纪 80 年代后多次推行非法移民合法化政策，这使不少已在国外的非法移民最终获得居留权，从而导致发展中国家非法移民近年来不断增长，也变相的刺激了人口贩卖活动。4、世界各国腐败现象广泛存在促使贩卖人口犯罪得不到政府的有效打击。腐败可以超越国界，世界范围内普遍存在的腐败行为在很大程度上助长了跨国贩买人口犯罪的滋生和蔓延,扮演着帮凶的角色，主要表现在,跨国贩买人口犯罪集团为了实施犯罪,要多方面牢固地与国家和地方政权中的某些腐败官员相互勾结、互惠共生、结为一体。跨国犯罪分子还时常利用非法获得的巨款通过政治捐款或直接行贿,收买腐蚀政府和司法官员,这就使得对他们的打击往往效果不大，使得跨国贩买人口的犯罪分子的势力范围和活动能力愈来愈大。例如，据英国《今日世界》的新闻报道写道：“在《贩卖为妓：俄罗斯联邦的情形》一文中，唐娜．休斯引用一个妇女的话：‘如果我回到俄罗斯，俄罗斯黑手党会杀死我，我们非常害怕如果报警

[11]转引自李贤华：“世界贩卖妇女、儿童犯罪趋势与对策”[J]，载《青少年犯罪问题》2001 年第 1 期，第 29——30 页。
[12]同 11，第 30 页。

的话，他们会把我们重新交给皮条客。警察和政府的腐败使很多被贩卖者害怕口哨声，从而限制了执法的力度”。[10]

三、国际合作惩治跨国贩卖人口的立法与司法实践与完善

实际上，自上个世纪以来，国际社会面对日益猖獗的贩卖人口活动开始采取了很多的措施，逐渐成效。

（一）国际社会对跨国贩卖人口问题采取的措施

1、反对贩卖妇女联合会的呼吁。 反对贩卖妇女联合会聚集了亚太、 北美 、拉美和加勒比海地区的 50 个妇女组织 ，1988 年成立以来 ，它一直在呼吁加强政府干预以结束这种局面。1999 年在达卡召开的会议 300 名与会者制定了一项行动计划来制止贩卖妇女和儿童 ，反对贩卖妇女联合会主席奥罗拉·哈瓦特 德迪奥斯说：“卖淫涉及成千上万名妇女和少女，而且全世界有组织的犯罪团伙也从中获得了巨额利润。她说：性剥削特别是卖淫和贩卖人口侵害了妇女的人权，它是一种严重的歧视形式”。2、十国女外长论坛的声音。1999 年包括美国在内的 10 个国家的女外长呼吁尽早制订一项打击跨国犯罪团伙的联合国协议，同时另外起草一份文件专门讨论对付贩卖人口的问题，她们在致联合国秘书长安南的信中说在：“21 世纪即将到来之际，世界上买卖人口从事卖淫、当家仆 、抵偿债务的现象令人无法接受，它们与奴隶制没有多少区别”。3、欧盟及其相关组织的活动。欧洲联盟近几年来几乎每年都在讨论打击人口贩子问题。去年在维也纳召开了关于反对贩卖妇女问题的会议，

[13]贾宇：《国际刑法学》[M],中国政法大学出版社 2004 年版，第 220 页。

欧盟专员阿尼塔．格拉丁女士发表讲话时要求欧洲采取共同行动，反对贩卖妇女这种侵犯人权和有组织的犯罪活动。欧盟及有关国际组织代表曾建议受害人在当地成立一个组织，对受害妇女提供包括返国就业等援助。在海牙召开的欧盟部长会议上 成员国签署了一项声明，要保护被强迫卖淫的妇女，他们一致同意允许受害者起诉犯罪团伙，从他们那里得到赔偿。4、亚太区域性国家会议的决定。2000 年 6 月 5 日来自亚太地区 20 个国家的代表在马尼拉开会，以制定一项与奴隶制度的当代表现形式——日益猖獗的贩卖人口行为——作斗争。各国政府代表、国际组织和非政府组织为制定一项同亚太地区内部和国际上的贩卖人口行为作斗争的行动计划而聚集在一起，会议认识到现在还没有哪一个国家能够消除这一灾害，人口走私的跨国性质要求所有国家联合起来，为结束这种粗暴践踏人权和人的尊严的行为作出不懈的努力。5、 联合国的报告。1989 年联合国关于儿童权利大会提出：禁止以任何原因或任何形式绑架、贩卖儿童。但是，联合国人权委员会最新调查证实，各国的法律和各种国际协议不仅没有消除贩卖儿童的现象，而且贫困现象还在助长着国际贩卖儿童市场的发育。该报告说：“贩卖儿童的现象在所有国家都有发生，日益增多的跨国贩卖儿童的问题已经引起人们极大的不安”。 联合国报告认为，应该开展一场国际性运动消灭强迫卖淫和贩卖妇女活动。2000 年 6 月 1 日联合国秘书长安南要求：“全世界联合起来协调一致地结束人口贸易，批准《联合国禁止有组织跨国犯罪公约》及《防止和惩罚贩卖人口、特别是妇女儿童行动协定》。该条约目前仍在谈判中将帮助有关各国追捕并严厉惩处人口贩子，帮助受害者恢复正常生活，并教育妇女和儿童提防人口贩子。[11]以上只反映了国际社会开始

[14]张云筝、刘永成：“全球进程中的贩卖人口问题”[J]，载《中华女子学院学报》2006 年第 1 期，第 54

重视贩卖人口问题并通过政治手段开始从各方面解决贩卖人口问题，但要真正解决问题还有考各国的法律手段，通过加强各国国际刑事合作形成国际社会合力才能更好的解决问题，而前面国际社会采取的政治措施为当前国际刑事合作提供了良好的平台和机制。6、国际刑警组织在行动。本着《世界人权宣言》的精神，为了维护妇女的人身权利和政治权利不受非法侵犯，国际刑事警察组织对拐卖妇女的犯罪活动进行坚决的打击。1965 年，在巴西里约热内卢召开第 34 届年会时讨论了有关以劳动合同为掩护从事国际贩卖妇女、强迫妇女卖淫的行为。会议报告强调各会员国应采取有效措施同这种犯罪行为作斗争，打击这类犯罪活动。为了对付日益猖獗的国际拐卖人口犯罪活动国际刑警组织还召开了一系列的专题讨论会，这些会议强调国际刑警组织的首要目标是摧毁国际拐卖妇女、儿童的黑社会组织。国际刑警组织建议所有成员国通过其国家中心局相互提供所需要的犯罪资料、档案 以迅速建立起有效的国际反拐卖情报网络系统。国际刑警组织考虑到各国法律的差异，为了更有效地以公开或隐蔽的形式同拐卖妇女、儿童的犯罪活动作斗争，某些国际惯例和国际法的某条款应当修改和补充。此外还通过决议，要求各成员加强对青少年的教育，以免被犯罪分子利诱误入陷阱。[12]

（二）打击跨国贩卖人口的国际刑事合作立法实践与完善

1、禁止贩卖人口的国际立法实践

页。

[15] 蔡巍：“惩治跨国贩运妇女儿童犯罪的现状、困境与对策”[J],载《政法学刊》，2005 年第 2 期，第 29 页。

[16]同 15。

[17]同 15。

在保护妇女、儿童和有效的打击各国贩卖人口活动，国际社会曾进行了一系列的立法，主要的立法活动由：1904 年 5 月在巴黎签署、1905 年 7 月生效的《禁止贩卖白奴的国际协定》规定，各缔约国应加强检查、互通情报，以破获向海外贩卖妇女为娼的案件。1910 年 5 月在巴黎签署、1912 年 8 月生效的《禁止贩卖白奴的国际公约》明确规定了贩卖妇女为娼即构成犯罪，并把这种犯罪列入了可以引渡的罪行。1921 年 9 月在日内瓦签署《禁止贩卖妇女和儿童的国际公约》。该公约充分肯定了 1904 年和 1910 年协定和公约的基本精神，并由了新发展，全面禁止贩卖妇女儿童，同时规定对 1904 年铁定第 1、2 条罪行的预备犯和未遂犯亦加以惩罚，强调了缔约国的引渡义务。[13]但国际社会最有约束力的是以下两项立法，1949 年联合国大会第 3170 号决议批准的《禁止贩卖人口及取缔意图营利使人卖淫的公约》，由联合国经社理事会和它所设的妇女地位委员会共同起草，联合国大会通过，包括序言、二十八条正文条款以及最后议定书。该公约 20 世纪早期的“四个公约”为基础，是联合国唯一专门针对贩卖人口及对人进行性剥削做出规定的国际公约，在打击跨国贩卖人口的国际立法上有重要意义。这意味着该公约是一种带有全球性的法律规范性文件，对所有缔约国具有法律约束力。它为统一规范、界定贩卖人口的定义和法律特征、制裁权限都提供了有利的法律依据。另外一项立法是 2003 年正式生效的《联合国打击跨国有组织犯罪活动公约》，专门制定了处理人口贩运问题的议定书，即《预防、禁止和惩治贩运人口特别是妇女和儿童行为的补充议定书》，该议定书是一项处理人口贩运问题所有方面的国际文书，宣布采取有效行动预防和打击国际贩运人口特别是妇女和儿童,必须在原住地国，过境国和

[18]同 15，第 31—32 页。

目的地国采取综合性国际做法，提出在充分尊重其人权的情况下保护和帮助此种贩运活动的被害人，特别强调有关国家迅速而有效地交流获取的犯罪情报和犯罪证据，加强司法合作。[14]该议定书有助于国际社会合作和有效地控制犯罪活动,遏制贩卖人口犯罪。

2、禁止贩卖人口的各国内立法实践

在联合国人权委员会、联合国儿童基金会以及其他的人权组织和妇女儿童组织的呼吁和积极努力之下，贩卖人口问题，尤其是贩卖妇女儿童日益受到各国政法的关注，各国也纷纷把贩卖人口犯罪化予以重拳打击。各国政府把贩卖人口犯罪化一般通过三个途径：一是制定专门的惩治贩运妇女儿童的法律，如法国已经批准了关于贩卖人口犯罪的补充议定书，并根据过去 10 年打击贩运人口犯罪的经验，制定了有关新的惩罚贩卖妇女儿童的法律，该法律已经在 2004 年 10 月生效。意大利也制定了反人口贩运法（anit—trafficking law）。泰国在 1977 年颁布了预防和打击贩卖妇女儿童措施法案，将贩卖妇女儿童视为严重的犯罪予以重罚。二是将贩卖妇女儿童作为一个单独的罪名规定在刑法典中，如我国 79 年刑法把拐卖人口罪制定了一个独立的罪名，91 年全国人大常委会通过了《关于严惩拐卖、绑架妇女儿童犯罪分子的决定》，将拐卖妇女儿童行为单独列罪。97 刑法取消了贩卖人口罪，只规定了贩卖妇女儿童罪。三是适应现行法律中的有关条款，作为惩治贩卖人口犯罪行为的法律依据，例如英国虽然没有惩治贩卖人口犯罪的立法，其刑法典也没有关于贩卖人

口罪的规定，但其1956年性犯罪行为法案中的22、23条可以作为惩治贩卖人口犯罪的法律依据。[15]

3，打击跨国贩卖人口中的国际刑事合作立法完善

从以上分析可以看出国际社会和各国政府都普遍重视打击贩卖人口的犯罪行为，都普遍在各国采取不同的立法形式对贩卖人口尤其是贩卖妇女儿童的行为予以犯罪化，但目前国际社会在惩治贩卖人口的法律框架还不充分和完善，为国际刑事合作带来了障碍，尽管已经制定了《禁止贩卖人口及取缔意图营利使人卖淫的公约》和《关于预防、禁止和惩治贩运人口特别是妇女儿童行为的补充协定书》等一些国际公约，但公约的实施需要的是国际社会的各个国家实施，公约的内容和精神在各国国家规定不同，有的缔约国没有根据公约制定专门的法律，也没有再国内刑法中设立关于贩卖人口的罪名。在奉行主权至上的国际法原则的和双重犯罪国际刑法原则的情况下，一定程度上阻碍各国对于犯罪人口的惩治，以及对国际社会刑事合作的开展。所以，有必要要求各国根据公约精神对于贩卖人口作出明确的定义，同时在公约框架内对于贩卖人口予以明确的犯罪化和刑罚化。

（三）打击跨国贩卖人口的国际刑事合作司法实践与完善

1、打击贩卖人口的国际刑事合作司法惩治原则

第一，普通管辖原则 。所谓普通管辖原则，也称世界性原则，是指不论犯罪人的国籍以及犯罪行为发生在何地，也不论犯罪行为的直接受害者是哪一个国家或其公民，只要行为严重侵害了由国际公约、条约所保护的国际社会的共同利益，危害国际和平与安全，破坏国际社会良好秩序,危及人类的生命和

健康,被众多的缔约国公认为构成犯罪,各国在其领土内一旦发现该罪犯,即有权适用本国刑法，对之进行审判和处罚。其目的是使实施了国际犯罪的人，不论在世界上哪个国家出现，都要受到刑事追究。遵循普遍管辖原则才能充分有效的在国际社会上打击贩卖人口的犯罪行为。同时《禁止贩卖人口及取缔意图营利使人卖淫的公约》和《关于预防、禁止和惩治贩运人口特别是妇女儿童行为的补充协定书》等一些国际公约为缔约国创设很多义务，而其中要求各国打击贩卖人口犯罪行为为普遍管辖原则提供了根据。

第二，或起诉或引渡原则。或起诉或引渡原则，是现代引渡中的一项基本原则，也是世界各国惩治国际性犯罪(包括国际犯罪和跨国犯罪)关键实践的重要经验总结。该原则的基本含义是：对于发现被指称的罪犯,有义务予以惩治，要么将罪犯引渡到对其有管辖权且提出了引渡请求的国家，要么在不引渡情况下，将罪犯提交本国主管当局以便起诉均可。随着国际社会不断日益深化的政治、经济、文化领域的合作,贸易旅游和人员往来日益频繁跨国贩卖人口犯罪活动势必还将日益增多，基于此，,坚持实行“或引渡或起诉”原则,无疑是防止犯罪分子后逃避惩罚的一项十分重要的措施。

2、打击贩卖人口的国际刑事合作司法实践

第一，司法专门化，在刑事司法领域，许多国家的执法机构在尝试采用专门化的工作方式，这既是获得被害人合作，发现有组织犯罪的重要途径，也是保护被害人避免再次受害的要求，如法国执法机关以打击犯罪和保护人权并重的司法理念为指导，在警务部门、检法机关建立了针对贩卖妇女儿童的特殊工

作机制，并由具有专业经验的人士负责侦查、起诉和审判工作。[16]意大利也有相关的规定。

第二，救助被害人，在《禁止贩卖人口及取缔意图营利使人卖淫的公约》公约第十六条：“本公约各缔约国同意经由其公私教育、卫生、社会、经济及其他有关机关采取或推进各种措施以防止淫业并对淫业及本公约所指罪行之被害人使之复原并改善其社会地位”。要求缔约国尽可能采取援助措施来救助被贩卖的妇女从而消除该犯罪，而不是通过刑法。这是因为起草者们充分注意到了跨国贩卖妇女犯罪的特殊性质，被贩卖的妇女的来源国，大都是经济欠发达、社会秩序混乱或武装冲突频发的国家，无论贩卖和卖淫是否违背了她们的意愿，她们的目的只是想寻求更好的生活。绝大多数妇女都是在犯罪集团的组织下通过非法途径进入目的地国，被犯罪集团控制、剥削。她们的生命、安全可以说是没有任何保障。所以，如果将她们也作为公约的打击对象，同贩卖者和妓院经营者一样依刑法处罚的话，对她们来说，这也许会比被犯罪组织控制更为糟糕。因为在后者的掌控下“工作”，至少还有收入，不会被强行遣返。因此，对这些妇女应该区别对待，尽量为她们提供社会援助和改善社会地位的机会，从而从根源上打击跨国贩卖人口犯罪。

3、打击贩卖人口的国际刑事合作司法困境与完善

第一，对于打击国际贩卖人口犯罪司法困境：首先，对于国际贩卖人口犯罪还没有一个全面系统的认识，虽然对于贩卖人口的范围、手段有了一定的认识，对被害人的剥削方式有了一定的认识，但随着现代科技的发展和全球化进程的加快，贩卖人口的手段不断翻新，很多具有很强的反侦查能力，同时，我

们至今还不能确定全球到底有多少妇女儿童被贩卖，以及怎么被贩卖的。所以，造成了司法打击的困境。其次，对于惩治贩卖人口在有的国家缺乏社会认同，打击贩卖人口有时会受到被害人的家人，甚至被害人本人的抵制，被害人大多来自贫困的国家和贫困的家庭，受到传统文化的束缚，许多女性希望能够改善自己和家庭的经济状况而心甘情愿被人贩卖，这种现象在非洲比较常见。再次，对于打击贩卖人口活动并没有得到各国政府的有力支持，有的国家对犯罪人打击持消极保留态度，更有的国家不肯承认自己国家存在着贩运人口的现象。在加上有的国家警察和移民机构的腐败更加剧了打击贩卖人口的严重性。

第二，对于打击国际贩卖人口犯罪司法完善：首先，要求缔约国履行国际责任，增加司法力量，消除司法腐败，打击贩卖人口犯罪。其次，各国应加强宣传，提高公众对贩卖人口犯罪的认知度，加强自我防范和保护意识。同时，政府应当灌输文明、现在的社会文化理念，加强法制宣传，剔出愚蒙无知的传统束缚，使司法对于贩卖人口的罪行从社会文化和法律上有正确的认识，如《禁止贩卖人口及取缔意图营利使人卖淫的公约》第十六条的规定，要求缔约国对被贩卖的妇女在遣送回籍前“妥善照料并维持其生活”、确保她们的安全，通过各种必要办法关注“介绍职业之机关”以免有受害者有“被诱卖淫之危险”，这就进一步强化了对被贩卖妇女的保护。最后，严惩贩卖人口犯罪的组织者，此类犯罪组织者的利令智昏和反人性的犯罪行为。鉴于有组织贩卖人口所涉及的人数、赢利规模及贩卖活动的多样性，贩卖人口是增长速度最快的犯罪行当，如果把所有人口偷渡和贩卖人口活动加在一起，这无疑是世界上最大的侵犯人权活动案。所以要扼制贩卖人口犯罪必须从源头抓起，即重处犯罪的组织者。

四、贩卖人口犯罪中的应有国际刑事合作

鉴于目前国际上贩卖人口的现状，在公约框架下应该采用多样性的国际合作措施预防、晋职、打击和惩罚有组织的跨国贩卖人口的犯罪行为。

1、引渡

由于一国不能在另一国行使管辖权，当犯罪人员逃亡他国时，往往需要通过他国的协助,也就是通过引渡这种方式，使罪犯在本国受到惩罚。因此，引渡这种传统的国际刑事司法协助方式，对于控制跨国有组织贩卖人口犯罪仍然具有重要作用，为适应打击跨国贩卖人口犯罪的需要，如《禁止贩卖人口及取缔意图营利使人卖淫的公约》在八到十五条的规定，要求各缔约国一起参加合作管理和共同执行行动，通过缔约国间的合作来打击跨国贩卖妇女。这包括对贩卖者应该引渡或是在当地起诉、联合调查、信息交换以及外国对贩卖者判决的承认和执行等等。

2、联合调查与执法合作

上述公约第八到十五条实际上也规定了联合调查与执法合作，为有效打击跨国贩卖人口犯罪，也应该依据 2000 年《联合国打击跨国有组织犯罪公约》的相关精神和规定，如该公约明确规定了“联合调查”和“执法合作”这些新的国际合作方式。在“联合调查”方面，该公约要求,缔约国应考虑缔约双边或多边协定或安排,以便有关主管当局可据以就涉及一国或多边刑事侦查、起诉或审判程序事由的事宜建立联合调查机构。有关缔约国应确保拟在其境内进行该项调查的缔约国的主权受到充分尊重。在“执法合作”方面，该公约明确

规定,缔约国应在符合本国法律和行政管理制度的情况下[1]相互密切合作,以加强打击公约所涵盖犯罪的执法行动的有效性，公约强调,各缔约国尤其应采取有效措施,以便:加强并在必要时建立各国主管当局!机构和部门之间的联系渠道，以促进安全!迅速地交换有关本公约所涵盖犯罪的各个方面的情报，同其他缔约国合作就涉嫌犯罪人的身份、行踪和活动，犯罪所得或财产的去向，用于实施犯罪的财产、设备或其他工具的去向等事项进行合作调查。所以，打击贩卖人口的国际刑事合作少不了联合调查与执法合作

3、刑事司法协助

在《禁止贩卖人口及取缔意图营利使人卖淫的公约》在八到十五条的规定了国际刑事司法协助，其精神要求缔约国应在对跨国贩卖人口犯罪进行的侦查、起诉和审判程序中相互提供最大程度的司法协助。对于打击贩卖人口的司法协助包括:向个人获取证据或陈述，送达司法文书，执行搜查和扣押并实行冻结;检查物品和场所，提供资料、物证以及鉴定结论，提供有关文件和记录的原件或经核证的副本，其中包括政府、银行、财务、公司或营业记录，为取证目的而辨认或追查犯罪所得、财产、工具或其他物品，为有关人员自愿在请求缔约国出庭提供方便，以及其他不违反被请求缔约国本国法律的任何其他形式的协助。

4、其他方面的国际合作

其他方面的国际合作不仅限于刑事合作，而更多的是国际社会的政治合作。第一，充分发挥联合国的组织协调作用，贩卖人口的跨国性日益增强，而联合国在国际社会统一行动方面发挥不可替代的作用，从现实情况看，联合国

在打击跨国贩运人口犯罪的领域中发挥作用的空间还很大。第二，重视发挥非政府组织的作用，非政府组织是连接受害人和政府之间的桥梁，由于受害人对政府机构的恐惧感，甚至对立情绪等方面，非政府组织对被害人提供的避难所和帮助等容易为被害人所接受，另外，非政府组织可以经常开展宣传活动，告知贩卖人口犯罪的伎俩以及如何预防，以及对想移民的人提供广泛的信息，预防成为贩卖人口犯罪的受害者。第三，进一步加强国家之间的合作，在全球化过程中，经济发展的地区性特征也相当明显，因此，双边合作和地区合作在惩治贩卖人口犯罪中发挥重要作用。[18]

贩卖人口犯罪是国际社会所面临的严峻挑战，也是各国都在普遍关注的全球问题，跨国贩卖人口犯罪对人权造成了严重侵犯各国社会产生了巨大的影响，各国都在采取强有的制裁手段,着手制定法律严惩这些犯罪活动。但是在市场经济下，不可避免地出现欲壑难填的人铤而走险，不择手段地利用各种手段将人作为商品进行买卖以牟取暴利，与跨国贩卖人口犯罪进行斗争的长期性、艰巨性、复杂性、广泛性决定了只靠一国的努力难以奏效。因此、建立各种形式的国际刑事合作已成为刻不容缓的任务，通过国家间的合作,可以突破一些司法上的障碍，共同采取有力的措施打击跨国贩卖人口犯罪活动。

Defining Organized Crime in Canada – Meeting Our Obligations Under the UN Convention Against Transnational Organized Crime and Its Protocols Against Trafficking of Persons and Smuggling of Migrants?

Eileen Skinnider

I. Introduction

During the past two decades, organised crime has become a more complex phenomenon. Criminal organizations have evolved into complex networks, with activities in many countries, combining illegal with legal business and taking advantage of open markets and of government's differing levels of commitment and readiness to combat them.[2] Organised criminal groups have broadened their scope of operations, geographically and by sector. They are not merely transnational and involved in specialized crime; criminal organizations are now transcontinental and diversified, part and parcel of globalization.

At the international level, the transnational character of organised crime where offenders, victims and products of crime are located or pass through several jurisdictions, a traditional

[2] Statement of Antonio Maria Costa, Executive Director, UN Office on Drugs and Crime, at the Third Committee of the General Assembly, 8 October 2004.

law enforcement approach focusing on the local level can be frustrating.[3] The *Convention Against Transnational Organised Crime* (adopted 2000, in force 2003) (hereinafter referred to as the *Convention*) is the international community's response to the need for international cooperation and effective enforcement to combat organised crime.[4] The *Convention* focuses on offences that facilitate the illegal profit making activities of organised criminal groups. More specific acts are dealt with by the three Protocols to the Convention:[5]

- *Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children* (in force 2003) (hereinafter referred to as the *Protocol on Trafficking in Persons*);
- *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (in force 2004) (hereinafter referred to as the *Protocol Against Smuggling of Migrants*);
- *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunitions* (in force July 2005).

Many of the provisions contained in the *Convention* and *Protocols* require States to implement at the domestic level, while recognizing that different States have different legislative and law enforcement regimes. These instruments are intended to make collective international measures both efficient and effective.

In Canada, legislation in the area of organised crime has been passed in recent years in an effort to provide law enforcement with tools to investigate criminal organizations in their overall effort to combat organised crime.[6] Since 1997, the Canadian government has enacted

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[3] The International Centre for Criminal Law Reform and Criminal Justice Policy and the Centre for International Crime Prevention, *"Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime"* (Vancouver, March 2003) at page 6.

[4] The Convention can be found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html. The idea for preparing such a convention was first formally raised at the World Ministerial Conference on Organized Transnational Crime held in Naples in 1994. The emerging political will to address this issue was driven by newspaper headlines and public opinion and added to the momentum of negotiating the Convention in a relatively short period of time.

[5] These Protocols are found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html. Before a State can become a party to the Protocols, it must first ratify the Convention, meaning each Protocol is read in conjunction with the main Convention.

[6] Tomas Gabor, *"Assessing the Effectiveness of Organised Crime Control Strategies: A Review of the Literature"* (Research and

legislation providing for such things as the creation of an agency to combat money laundering[7], the creation of a new criminal organization offence[8], the creation of other offences like the commission of an offence for a criminal organization and broadening the powers of law enforcement to seize property used in crime and to initiate forfeiture proceedings[9]. Canada is a State Party to the United Nations Convention as well as to two protocols on trafficking in persons and smuggling of migrants.[10]

This paper is part of an on-going research project between Canada and China on the implementation of international standards.[11] China has ratified the *Convention Against Transnational Organized Crime* but has not signed the Protocols on trafficking and smuggling. In responding to specific questions posed by our Chinese colleagues, the focus of this paper is on the legislative framework in Canada to combat organised crime and provide some comparisons to the obligations under the Convention and Protocols. Part II will set out the definition of offences under the United Nations Convention and the two Protocols to provide the comparison of the Canadian legislation which is explored in Part III. Part IV will briefly highlight some of the criminal procedural issues that have been introduced by recent Canadian legislation dealing with organised crime. Part V examines issues relating to the protection of witnesses and victims both under the Convention and in Canada. Part VI identifies some of the main institutes in Canada that are involved in combating organised crime.

Statistics Division Department of Justice Canada: 2003).

[7] Bill C-22 – *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 found at http://laws.justice.gc.ca/en/P-24.501/text.html.

[8] Bill C-95 – *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, 1997.

[9] Bill C-24 – *An Act to Amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c.32 found at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-24/C-24-4/C-24TOCE/html.

[10] Canada has not yet ratified the third Protocol Against the Illicit Manufacturing of and Trafficking in Firearms.

[11] This paper is prepared on behalf of the International Centre for Criminal Law Reform and Criminal Justice Policy under the Canada-China Implementation of International Standards in the Criminal Justice Project, funded by CIDA.

II. Crimes under the UN Convention and the two Protocols

The *Convention Against Transnational Organised Crime* and its Protocols set out basic minimum standards for countries which are to contribute to the global effort to control organised crime. In so doing, these instruments define and standardize certain terms which in the past have been interpreted and applied differently by various countries. This is to ensure better clarity and efficient cooperation. Basically, these instruments describe conduct which must be criminalized by domestic law, made punishable by appropriate sanctions and made subject to the various requirements governing extradition, mutual legal assistance and other forms of assistance and cooperation. There are also provisions regarding protection of victims and witnesses; forfeiture of proceeds of crime; international cooperation; training, research and information sharing; and prevention. This paper focuses mainly on the obligation requiring States to establish specific crimes.

The substantial criminal law provisions require criminalization of:

- participation in an organised criminal group (article 5);
- laundering the proceeds of crime (article 6);
- corruption (article 8); and
- obstruction of justice (article 23).

Criminalization allows national authorities to organize the detection, prosecution and deterrence of these offences as well as providing the legal basis for international cooperation. It should be noted that for the *Convention* and the international cooperation provisions to apply, the offences must involved transnationality and organised crime. However, the *Convention* emphasizes that neither of these should be made elements of the domestic offence.[12] The *Protocol on Trafficking in Persons* requires the criminalization of trafficking

[12] Article 34(2) of the *Convention Against Transnational Organised Crime* – "the offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organised criminal group as described in article 3, paragraph 1, of this Convention, except to the

in persons (articles 3 and 5) and the *Protocol against Smuggling of Migrants* requires the criminalization of the smuggling of migrants and smuggling-related conduct (articles 3, 5 and 6).

1. Article 5 – Criminalization of participation in an organised criminal group.

Under article 5 of the Convention, States Parties are required to establish at least two criminal offences relating to the participation in an organised criminal group.[13] The first offence could include either or both of the following:

- the agreement with one or more persons to commit a serious crime for a financial or other material benefit;
- the conduct of a person who, with knowledge of the aim and general criminal activity of an organised criminal group or its intention to commit the crime, takes an active part in the criminal activities of the organised criminal group or other activities of the group in the knowledge that his or her participation will contribute to the achievement of the criminal group's aims.

The reason for this option being available is to address the fact that some countries have conspiracy laws and others do not. The second option does not require the introduction of "conspiracy" in States that do not have this legal concept.[14] This option criminalizes other activities which may themselves not constitute a crime but does perform a supportive function for the groups' criminal activities.

The other offence that State Parties must establish is the organizing, directing, aiding, abetting, facilitating or counseling the commission of a serious crime involving an organised

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extent that article 5 of this Convention would require the involvement of an organised criminal group".

[13] The summary of article 5 requirements in this section is from "*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime", supra* note 2, pages 20-26.

[14] Generally, it is the common law countries that use the offence of conspiracy while civil law jurisdictions use offences which proscribe an involvement in criminal organizations as they generally do not allow criminalization of mere agreements to commit an offence.

criminal group. For all of these offences the required mental element is “intentionally”, meaning general knowledge of the criminal nature of the group or of at least one of its criminal activities or objectives. In the case of taking part in non-criminal but supportive activities, an additional requirement of knowledge is called for: knowing that this involvement will contribute to the achievement of a criminal aim of the group.

The *Convention* defines an “organised criminal group” as a structured group of three or more persons that exist over a period of time, the members of which act in concert aiming at the commission of serious crimes in order to obtain a direct or indirect financial or other material benefit.[15] While a structured group does not need to be a formal type of organization it must be more than randomly formed for the immediate commission of an offence.[16] Serious crime means conduct which would be sanctioned by four years imprisonment or more.[17]

One of the more interesting elements of this offence as defined in this *Convention* is the fact that it covers people who assist and facilitate the serious offence committed by an organised criminal group, even though they may not participate directly in all of its crimes. This is to ensure more effective action can be taken to combat these groups. As one can see, the Convention focuses on criminal groups rather than on individual acts. That may be why States are not required to criminalize membership in a particular organization. A legal person, such as a corporation, can also be charged with the offences and the liability can be criminal, civil or administrative.[18]

[15] Article 2(a) of the *Convention Against Transnational Organised Crime*.
[16] Article 2(c) of the *Convention Against Transnational Organised Crime*.
[17] Article 2(b) of the *Convention Against Transnational Organised Crime*.
[18] Article 10(2) of the *Convention Against Transnational Organised Crime*.

2. Article 6 – Criminalization of the laundering of proceeds of crime

Article 6 requires State Parties to establish four offences relating to money laundering, in accordance with the fundamental principles of its domestic law.[19] The first offence is the conversion or transfer of "proceeds of crime". The mental element required is intentionality, meaning that the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds. The acts must be done for the purpose of concealing or disguising their criminal origins or helping a person evade criminal liability for the crime that generated the proceeds. The second offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of "proceeds of crime". The mental element is again that of intentionality where the accused must have knowledge that the property is proceeds of crime at the time of the act. However this is less stringent than the first offence requirement in that proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or conceal its true origin need not be required.

The third offence is the acquisition, possession or use of "proceeds of crime". The mental element requires intention to acquire, possess or use proceeds of crime as well as knowledge that the property was indeed proceeds of crime. The fourth offence is the participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of any of the previously defined offences. The third and fourth offences need to be criminalized but can be subject to the basic concepts of the State Party's domestic system.

"Proceeds of crime" is defined in the *Convention* as any property derived from or obtained, directly or indirectly, through the commission of an offence.[20] Property means all assets,

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[19] The summary of article 6 requirements in this section is from "*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime", supra* note 2, pages 38 to 54.
[20] Article 2(e) of the *Convention Against Transnational Organised Crime*.

corporeal and incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.[21]

For the purposes of implementing the criminalization of the laundering of proceeds of crime, each State Party should apply the laundering offences to the widest range of predicate offences, but at a minimum needs to include the offences established by the *Convention* and the *Protocols* as well as serious crimes.[22] Predicated offences includes any offence that as a result of which proceeds have been generated that may become the subject of any of the money laundering offences.[23] State Parties must provide for offences committed in another jurisdictions to be included as long as that conduct is a crime where it was committed as well as the State applying the *Convention*. However the *Convention* recognizes that in some countries, prosecution is not permitted for both the predicate offence and the laundering of proceeds from that offence.

Article 7 sets out some mandatory and some optional measures for prevention of money laundering. State Parties must establish a comprehensive domestic regulatory and supervisory regime to deter money laundering and ensure that any agencies involved in combating money laundering have the ability to cooperate and exchange information at the national and international levels. The details and the precise nature of the schemes are left up to the State Party. States should consider implementing measures to monitor cash movements across their borders. The *Convention* mentions that States should consider establishing financial intelligence units to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

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[21] Article 2(d) of the *Convention Against Transnational Organised Crime*.
[22] Some States limit the predicate offences to drug trafficking. Other States have an exhaustive list of predicate offences. Others define predicate offences generically as including all crimes or all serious crimes or all crimes subject to a defined penalty threshold.
[23] Article 2(h) of the *Convention Against Transnational Organised Crime*.

3. Article 8 – criminalization of corruption

Article 8 requires States Parties to establish three types of offence relating to corruption.[24] The first one covers "active" corruption, meaning the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Undue advantage can include something tangible or intangible and does not have to be immediate or directly given to the public official. The mental element requirement is that the conduct must be intentional. The State must show the link between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her officials duties. The second offence is "passive" corruption, the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. The mental element is that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties. The third offence is the participation in corruption, such as an accomplice in either active or passive corruption.

In addition to the three mandatory offences, the *Convention* also requires States "to consider" establishing additional offences which would deal with foreign officials or officials of international organizations as well as other forms of corruption. The definition of "public official" is left to the State Party. The *Convention* only deals with mandatory offences relating to corruption by domestic officials. It does not cover issues relating to private-sector corruption.

Article 9 contains general measures regarding anti-corruption policies. This provision was drafted with the knowledge that a more comprehensive United Nations *Convention Against*

[24] The summary of article 8 requirements in this section is from *"Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime", supra* note 2, pages 73 to 80.

Corruption was being negotiated.[25] These measures are to promote integrity and to prevent, detect and punish corruption of public officials, to the extent consistent with its legal system. One way to ensure effective action by officials is to provide anti-corruption authorities with sufficient independence to deter undue influence.

4. Article 23 – Criminalization of obstruction of justice

Article 23 requires State Parties to establish two criminal offences.[26] First is the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to either induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings, in relation to offences covered by the *Convention*. Both negative (intimidation) and positive (corruption) inducements are covered by this offence. The term "proceeding" should be interpreted broadly to include the use of force, threats or inducement before the commencement of the trial. The mental element is that of intentionality.

The second offence is the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by this *Convention*. In this offence the corruption element is not included here as it is covered by the offences of corruption as defined in article 8.

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[25] The UN *Convention Against Corruption* (A/58/422) was adopted in October 2003 and entered into force 14 December 2005. To date (February 14, 2006) there are 46 ratifications and 140 Signatory States. Canada has signed but not yet ratified the *Convention Against Corruption* while China became a State Party on 13 January 2006.

[26] The summary of article 23 requirements in this section is from *"Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime", supra* note 2, pages 85 to 88.

States that have more general offences, such as those for interference with criminal investigations or proceedings of any kind and those covering bribery of public officials may already be in compliance with this article.

5. Article 3 and 5 of the Protocol on Trafficking in Persons

For those States that are Parties to the *Protocol on Trafficking in Persons*, article 5 requires them to establish the offence of trafficking in persons.[27] Trafficking in persons is defined, and for the first time internationally, in article 3 of this Protocol. Any legislation that criminalizes trafficking in persons must consist of three basic elements:

- The action of: recruitment, transportation, transfer, harboring or receipt of persons;
- By means of: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;
- The purpose of exploitation, which include, at a minimum: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

This can be done as a single offence or a combination of offences that cover the full range of conduct. It should be remembered that trafficking is the combination of constituent elements and not separate elements themselves.

State Parties must also criminalize participating as an accomplice and organizing or directing other persons to commit the offence. Attempting to commit the offence should also be

[27] This summary of the criminalization obligations under the *Protocol on Trafficking in Persons* is taken from UNODC, *"Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime"* (2003).

criminalized but only "subject to the basic concepts" of the legal system of each State Party. It was recognized that in some jurisdictions, the concept of attempt does not apply.

Liability should extend to both natural and legal persons, although for legal persons it can be criminal, civil or administrative liability. Once it has been established that the means of threat or use of force or other forms of coercion has been used, consent will not be a valid defence. If the victim is a child, then the means of threat, force or coercion need not be established as the issue of consent is irrelevant. In the case where the victim is a minor, the prosecutor must only prove action such as recruitment or transportation of the minor for the purpose of exploitation.

6. Article 3, 5 and 6 of the Protocol Against Smuggling of Migrants

Article 6 of the *Protocol Against Smuggling of Migrants* requires State Parties to criminalize a number of offences.[28] All of these offences must have the mental element of intentionality and in order to obtain a financial or other material benefit. The main offence is conduct constituting the smuggling of migrants which is defined in article 3 as the procurement for material gain of the illegal entry of a person into a State Party of which the person is not a national or permanent resident. Reading these articles in conjunction with article 5 which provides that migrants should not become liable to criminal prosecution, it is clear that State Parties need to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain.

[28] This summary of the criminalization obligations under the *Protocol against Smuggling of Migrants* is taken from UNODC, *"Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime"* (2003).

State Parties are also required to criminalize:

- Producing, procuring, providing or possessing fraudulent travel or identity documents when done for the purpose of enabling smuggling of migrants;
- Enabling a person to remain in a county where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means.

In addition, criminalization of organizing or directing any of the above crimes and attempting or participating as an accomplice in any of the above crimes must be established by State Parties but can be subject to the basic concepts of the State Party's legal system. Furthermore, State Parties must establish as aggravating circumstances conduct that is likely to endanger or does endanger the migrants concerned or that subjects them to inhumane or degrading treatment.

III. Crimes under Canadian Law

In 1997, the Criminal Code was amended to include a wide variety of anti-organised crime measures.[29] The immediate context was the eve of a federal election and the perceived need to respond to a plea by the Quebec Attorney General for measures to address a violent and protracted fight between two biker gangs in Quebec: the Hells Angels and the Rock Machine.[30] In introducing the new legislation, the Minister of Justice and the Solicitor General described Bill C-95 as "tough new measures to target criminal gang activity" which were developed through "extensive consultations with police across Canada" and a two day national forum which examined the problem of organized crime in Canada.[31] Also in 1997, Bill C-22 created an agency to combat money laundering.[32]

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[29] Bill C-95 – *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, S.C. 1997, c.23.
[30] Don Stuart *"Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution"* (2002) 112 Manitoba Law Journal 89.
[31] Department of Justice Canada *"Fact Sheet Bill C-95 – National Anti-Gang Measures"* (1997).
[32] Bill C-22, which was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 established FINTRAC (Financial Transactions and Reports Analysis Centre of Canada).

On the eve of another federal election in 2000, Parliament looked again at the issue of organised crime as calls for tougher measures against organised crime were increasing, in part instigated by the murder of a reporter who had recently published an expose on organised crime.[33] Bill C-24 (2001) contained 70 pages of complicated amendments to the Criminal Code and other federal statutes.[34] The Bills established three criminal organization offences and also provide for targeted use of new investigative tools to be directed against criminal organizations. These include special peace bonds, new powers to seize proceeds of crime including access to income tax information, greater powers to resort to electronic surveillance and a new reverse onus bail provisions for those charged with the new offences.

1. Participation in activities of a criminal organization

a. Criminal Code offences

When the first Bill on organised crime, C-95, was introduced in 1997, the centerpiece of the legislation was a new offence of "participation in a criminal organization" which criminalized membership in a criminal organization. Back in 1997, "criminal organization" meant any group, association or other body consisting of five or more persons, whether formally or informally organised and met two requirements: (1) have as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for 5 years or more; and (2) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences.

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[33] Don Stuart, *supra* note 29.
[34] Bill C-24 – *An Act to Amend the Criminal Code (Organised Crime and Law Enforcement) and to make Consequential Amendments to Other Acts*, S.C. 2001, c. 32.

In 2001, the definition of criminal organization was amended in Bill C-24. The government explained that a new definition of criminal organization was drafted to respond to concerns expressed by police and prosecutors that the current definition was "too complex and too narrow in scope".[35] The existing definition was broadened in three ways by:

1. reducing the number of people required to constitute a criminal organization from five to three;
2. removing the requirement that at least one of the members be involved in committing crimes for the organization within the past five years; and
3. extending the scope of offence which defines criminal organizations, previously limited to indictable offences punishable by five years or more, to all serious crimes.

Therefore the definition now requires that a group, however organised, meet two requirements: (1) be composed of three or more persons in or outside Canada; and (2) have as one of its main purposes or main activities the facilitation or commission of one or more serious offence that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.[36] The Criminal Code expressly provides that criminal organization will not mean a group of persons that forms randomly for the immediate commission of a single offence. A "serious offence" is defined to mean an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more or another offence that is prescribed by regulation. Facilitation of an offence does not require actual knowledge of a particular offence or that an offence actually has been committed. Committing an offence means being a party to it or counseling any person to be a party to it.

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[35] The Department of Justice Backgrounder *"Highlights of the Organized Crime Bill"* released April 2001.
[36] Section 467.1(1) of the *Criminal Code*.

The centerpiece of Bill C-24 is the definition of the three offences of participation in a criminal organization. Section 467.11 creates the least serious of the criminal organization offences, making it an offence to participate in or contribute to any activity of the criminal organization for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence. The section provides for a list of things the prosecution need not prove in order to make out the offence:

- the criminal organization actually facilitated or committed an indictable offence;
- the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
- the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
- the accused knew the identity of any person who constitute the criminal organization.

The section also sets out certain types of evidence that the court may consider in determining whether the offence has been proved, such as using the name, word or symbol that is associated with the criminal organization or frequently associates with other persons from the organization.

Section 467.12 creates another of the three special criminal organization offences; that of committing an indictable offence for the benefit of, at the direction of, or in association with a criminal organization. The section also provides a list of things that the prosecutor need not prove in order to make out the offence, for instance, it is not necessary to show that the accused knew the identity of any persons constituting the criminal organization.

Section 467.13 creates the most serious of the three offences, apparently aimed at the leaders of the criminal organizations. This section makes it an offence for a member of the organization to knowingly instruct any person to commit an offence for the benefit of, at the direction of, or in association with a criminal organization. The Prosecutor does not have to prove that the offence was actually committed, or that the accused instructed a particular

person or that the accused knew the identity of all the persons constituting the criminal organization.

Under section 467.14 there must be a mandatory consecutive sentence and double criminality for a participant in a criminal organization who is party to an offence committed in association with that organization.

It is noteworthy that membership in a criminal organization is not an offence. When the 1997 and 2001 Bills were introduced in Parliament, the then Ministers of Justice made particular note of this and explained that such an offence would be difficult to prove and would be vulnerable to a constitutional challenge.[37] During the Standing Committee on Justice and Human Rights consideration of the 2001 Bill, the Minister of Justice explained that in reviewing other countries around the world, it appeared that only one country had taken the approach to criminalize simple membership in criminal organizations.[38] The Minister cited the concern that criminalization of simple membership could lead to possible abuse and overly wide application.

b. Case Law

Following the creation of the 1997 offence making it illegal to participate in a criminal organization, the first convictions were not until February 2001.[39] Four men were all found guilty of operating a drug ring for the Rock Machine motorcycle gang. Four others were acquitted of gangsterism charges but were found guilty of lesser crimes, including drug-related offences. The judge considered whether the 1997 definition violated the principle of

[37] Minister of Justice The Honourable Allan Rock during the House of Commons Debates (21 April 1997) at 10009 and Minister of Justice The Honourable Anne McLellan during the House of Commons Debates (23 April 2001) at 2955.
[38] Minister of Justice The Honourable Anne McLellan during the Standing Committee on Justice and Human Rights (8 May 2001).
[39] *R v Leclerc* [2001] Q.J. No. 426 (February 15, 2001).

legality, which provides that a criminal statute cannot generally apply retroactively. The accused argued a violation of this principle because it permits the leading of evidence showing that some members of the criminal organization committed a series of indictable offences over the proceeding five years, which in this case covers a period of time prior to the 1997 legislation. The Court did not accept this argument based on the fact that it was not the commission of this series of indictable offences that is the alleged offence in this case. The Judge then held that convictions under this section and for the underlying offences did not violate the Kienapple rule against multiple convictions.[40] On the contrary, he held, in noting the decision of the Quebec Superior court in *R v Carrier*, that convictions for trafficking in illegal substances and participation in the activities of a criminal organization when trafficking the same substance, can coexist in compliance with the law.[41]

The constitutionality of section 467.1 of the Criminal Code was considered by a Quebec Superior Court judge in the case of *R v Carrier*.[42] The accused along with other members of a biker group argued that the section was overbroad and vague, that it violated an accused's right to a fair trial because of its reliance on bad character evidence, and that an accused could be punished twice for one offence. The concern was that the new crime of participation in a criminal organization extended criminal responsibility beyond the already wide net for accessories or conspirators. It would not only apply to those structured groups such as the Mafia and Hell's Angels, but also potentially allow for guilt by association for those acting in loose groups of three or more and to those who have never used violence. The Court held that the provision does not sanction a person for being a member of a gang. Instead, it is aimed at a person's participation in gang activities. In order to be found guilty, two criteria must be established: membership in the group and furtherance of criminal activity. The judge held that the expressions "participate in the activities of a criminal organization"; "substantially

[40] The Kienapple rule is that a person may not be punished twice for a single offence. See *Kienapple v The Queen* [1975] 1 S.C.R. 729.
[41] R v LeClerc, *supra* note 38.
[42] *R v Carrier et al* [2001] J.Q. no. 224, R.J.Q. 628 (C.S.Q.).

contribute to the activities of a criminal organization" and "a series of indictable offences" were not vague or overbroad.[43] The requirements for such findings were clearly set out in the legislation. The 1997 provisions survived two other constitutional challenges.[44]

On June 30, 2005, *Lindsay and Bonner v The Queen* was the first case to test the federal government's 2001 anti-gang legislation, namely making it a crime to commit a serious offence for the benefit of a criminal organization.[45] The Ontario Supreme Court judge held that the Hells Angels motorcycle gang is a criminal organization. More specifically, Judge Fuerst was satisfied beyond a reasonable doubt that Hells Angels has as one of its main purpose or activities the facilitation of one or more serious offences that would likely result in the receipt of a financial benefit by its members, in particular drug trafficking.[46] She further stated that the concept of "facilitation" in section 467.1(1) is broader than the actual commission of an offence.[47] Like the concept of conspiracy, it does not require that a substantive offence actually be committed. This is the first time that a judge declared the group, as opposed to individuals, to be criminal.

Lindsay and Bonner were two members from Hells Angels accused of trying to extort $75,000 from a businessman and of acting in association with an identifiable criminal group, namely the Hells Angels.[48] The judge found that the accused persons had the requisite *mens rea* for the offence of extortion and that they acted in association with a criminal organization. The "in association with" element was established by the evidence of the manner in which the accused chose to portray themselves, wearing jackets bearing the primary symbols of the Hells Angels and referring to others "guys" who were "the same kind of mother f--- as I

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[43] *ibid*.
[44] *R v Beauchamp* (11 February 2002), Montreal 500-01-003088-017, Boilard J. (C.S.Q.); [2002] R.J.Q. 3086, Beliveau J. (C.S.Q.) and *R v Doucet* (2003), 18 C.R. (6th) 103 (C.S.Q.).
[45] *Re Lindsay and Bonner v The Queen* [2005] O.J. No. 2870 (June 30, 2005).
[46] *ibid* at para 1079.
[47] *ibid* at para 947 and 948.
[48] See http://www.yorku.ca/nathanson/CurrentEvents/Oct-Dec04.htm and follow links to Outlaw Motorcycle Gangs.

am".[49] They presented themselves not as individuals, but as members of a group with a reputation for violence and intimidation. A date for sentencing was to be set on July 15, 2005 but has been postponed.[50] It should be noted that those convicted under the new anti-gang law could face an additional 14 years in prison. This ruling will likely be appealed all the way to the Supreme Court of Canada.

In a February 2004 decision, the same judge in the same case addressed the accused persons' challenge to the validity of the criminal organization provisions.[51] The accused challenged the constitutional validity of sections 467.1, 467.12 and 467.14 of the Criminal Code. The judge dismissed the accused's application.

The accused argued that these provisions violate section 7 of the Charter of Rights and Freedoms in 3 ways[52]:

> 1. The definition of "criminal organization" is overbroad. Although there is a legitimate state objective behind the legislation, the means used to accomplish that objective are broader than is necessary. The definition of a criminal organization does not include any requirement of a pattern of activity, nor is it limited to enterprise organizations. As a result, the legislation captures too much in its net.
>
> 2. Section 467.1 and the portion of section 467.12 that renders it an offence to commit an indictable offence "in association with" a criminal organization are vague. It is unclear when a person commits an offence on this basis. Further, the definition does not indicate when a person is in or out of the group and it does not require active participation in an offence by those in the group.

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[49] *Re Lindsay and Bonner v The Queen. supra* note 44 at para 1082-1087.
[50] Charles Smith *"Biker arrests followed Ontario convictions"* (July 21, 2005: The Georgia Straight) found at www.straight.com/content.cfm?id=11731.
[51] *Re Lindsay and Bonner v The Queen* (2004) 182 C.C.C. (3d) 301 (Ont SC)(Feb 2004).
[52] Section 7 of the Charter: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

3. The lack of necessity for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization, or had an intention to commit the predicate offence would further the interests of the criminal organization, creates a criminal offence without the minimum constitutionally required *mens rea*.

The accused also argued that section 467.14 which allowed for a sentence imposed to be served consecutively to any other punishment for offences arising out of the same event or series of events was cruel and unusual punishment. The judge held that it was premature to discuss this issue at that time as in 2004 the accused had not yet been found guilty.[53]

The Court found that the legislation was not overbroad.[54] The question is whether a State, in pursuing legitimate objective, uses means which are broader than is necessary to accomplish that objective. If so, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.[55] One of the principles in interpreting legislation by the courts is that statutes should be construed to comply with Canada's international treaty commitments. The objective of Bill C-24 was not just to combat groups alleged to be responsible for crimes of violence, such as so-called outlaw motorcycle gangs, but also to deal with groups involved in the perpetration of economic crime, and to stem the organised criminal pursuit of profit.[56] Furthermore, the legislation is not aimed at legitimate "non-regulated" or "non-criminal" conduct. The definition of a criminal organization requires that one of the group's main purposes or main activities is the facilitation or commission of a "serious offence". It is not merely a prohibition against group activity. The phrase "serious crime" is defined to generally accord with the use of that term in the United Nations *Convention Against Transnational Organised Crime*. The fact that the definition incorporates offences under federal statutes other than the Criminal Code is justifiable.

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[53] *Re Lindsay and Bonner v The Queen, supra* note 50.
[54] *ibid* at para 37 to 50.
[55] This principle was discussed in *R v Heywood* (1994) 3. S.C.R. 761 (S.C.C.).
[56] The objective of Bill C-24 had been discussed in *R v Beauchamp* (2002)(Que SC), see *supra* note 43.

The Court further found that the term "criminal organization" is not vague.[57] The components of that term are specified in the legislation. They include a minimum number of persons and a common objective, that is, a main purpose or activity. The other terms used in the legislation such as "commission", "facilitates" and "serious offence" had settled meanings and were not impermissibly vague. Regarding vagueness, a legislative provision will be unconstitutionally vague where it "does not provide an adequate basis for legal debate", in that a conclusion cannot be reached as to its meaning "by reasoned analysis applying legal criteria". Conversely, a law is sufficiently precise if it "delineates a risk zone for criminal sanction". A vague law violates the principles of fundamental justice in two ways. It prevents citizens from knowing that they are at risk for criminal sanction and so makes compliance with the law difficult, and it puts too much discretion in the hands of law enforcement officials. The standard to be met for a finding of unconstitutional vagueness is high. The Supreme Court of Canada has recognized that there is a need for flexibility in legislative enactments, and a role for judicial interpretation of legislative provisions. When a legislative provision is enacted, legislators cannot possibly foresee all the situations that may arise for its application. It is impossible for Parliament to achieve absolute certainty.

The Court also found that section 467.12 does not fail to meet the constitutional *mens rea* requirement.[58] The Supreme Court of Canada has emphasized the principle that moral blameworthiness is an essential component of criminal liability, and that such principle falls under section 7 of the Charter as a principle of fundamental justice.[59] In the case of *Lindsay and Bonner*, there is substantive *mens rea*. In order to convict an accused under this provision, the Crown must prove that he or she had the requisite *mens rea* for the particular predicate offence involved, and that the accused acted for the benefit of, at the direction of, or in

[57] *Re Lindsay and Bonner v The Queen, supra* note 50 at para 51-60.
[58] *Ibid* at para 61 to 65.
[59] *R v Ruzic* (2001) 1 S.C.R. 687.

association with a criminal organization. The Court held that there is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or in association with a group he or she knew had the composition of a criminal organization, although the accused need not have known the identities of those in the group.

In a recent case, on December 8, 2005 a British Columbia Supreme Court judge struck down section 467.13 which makes it illegal for a member of a criminal organization to instruct someone else to commit an offence.[60] In *R v Accused No. 1*, the judge concluded that the law was too broad and vague and therefore violated the Charter. Judge Holmes stated that the definition of a member of a criminal organization was too vague for an offence that carried a maximum penalty of life in prison.[61] She concluded that "Parliament had a constitutional duty to make clear the legal basis" on which a person is deemed to be a member of a criminal organization, and that section 467.13 failed to do that by making it clear who is or who is not a member of a criminal organization.[62] While the vagueness in the offence contained in section 467.13 relates back to the definition of criminal organization found in section 467.1(1), the judge held that there was no reason to strike down the definition section since it underlies also the offences contained in sections 467.11 and 467.12.[63] These offences do not require that the accused be a member of a criminal organization and therefore the constitutional flaw does not related to them. While this ruling does not strike down the law in other provinces, the decision could be cited by other judges across Canada and will likely be appealed all the way to the Supreme Court of Canada.

The main concern raised by this case is that the definition of "criminal organization" does not require a nexus between the characteristics of the group which causes it to be a group and the

[60] *R v Accused No. 1* [2005] B.C.J. No. 2702; 2005 BCSC 1727; 2005 B.C.C. LEXIS 3414 (BCSC).
[61] *ibid* at para 152.
[62] *ibid* at para 148.
[63] *ibid* at para 151-152.

serious offence activity in which it engages in. The judge suggested that hypothetically, a martial arts teacher who gives lessons to members of a gang might be considered a gang member according to the way the law is currently written.[64] The judge refers to the differences between the Canadian legislation and the United Nations *Convention Against Transnational Organised Crime* noting that the UN Convention requires that the group acts in concert with "the aim of committing one or more serious crimes".[65] In other words, the UN Convention requires that the purpose of the group is to commit serious crimes whereas the Canadian legislation does not require this specific or common purpose to be shared by members of this group.

c. Comparisons to the UN Convention

First examining the definition of criminal organization, both the UN and the Canadian definitions seek to avoid the inclusion of crimes committed by groups on an *ad hoc* basis. The 2001 definition of criminal organization contained in Bill C-24 conforms more to the UN Convention definition than the 1997 definition. It reduces the number requirement in a group from five to three, which is the number set out in the UN Convention. However, as discussed in the recent case of *R v Accused No. 1*, the UN Convention expressly requires a nexus between the creation of the group and the purpose or aim of the group of committing one or more serious crimes. Such nexus is not required in the Canadian definition of "criminal organization". The Canadian definition is also broader than the UN definition in that it allows for the aim of the group to be not only the commission of a serious offence but also the facilitation of a serious offence. Both have the requirement that the offence be committed in order to obtain, directly or indirect, a material benefit. The new Canadian definition also adds the limit of excluding a group formed "randomly for the immediate commission of a single offence".

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[64] *ibid* at para 111.
[65] Article 2 of the United Nations *Convention Against Transnational Organised Crime*.

In accordance with the common law criminal justice system found in most of Canada, the Criminal Code provides for the crimes of conspiracy (section 465) and similar offences, such as forming an intention in common to carry out an unlawful purpose (section 21), aiding and abetting (section 21) and counseling (section 22) a person to commit a crime. These criminal code provisions are to be read in combination with the provisions that define the three new criminal organization offences.

The Canadian definition of participating or contributing in any activity for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence covers the situation of taking part in non-criminal but supportive activities, as set out in the UN Convention. The mental element required by the Convention is also meet in the definitions in sections 467.11 and 467.13, by ensuring every person must knowingly, by act or omission, contribute to these criminal activities. While section 467.12 remains silent on the required intent, the Court in the recent case of *Lindsay and Bonner v The Queen* held that there is an implicit requirement of intent. This means that the prosecution must prove that there was intent not only when committing the predicate offence but also intent of benefiting the criminal organization.

2. Laundering of proceeds of crime

a. Criminal Code offences

For some time now Canada has had strong legislative measures in place to address money laundering and proceeds of crime. Part XII.2 of the Criminal Code includes the provisions that relate to the proceeds of crime. Section 462.31 broadly defines the offence of money laundering. The offence is committed when a person deals with any property, or any proceeds of property, in any manner and by any means, with the intent to conceal or convert it, knowing or believing that the property or proceeds were, in whole or in part, obtained or

derived directly or indirectly as a result of the conduct described in the definition of the term "proceeds of crime". Proceeds of crime is defined to mean any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of the commission in Canada of a designated offence or an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.[66] A designated offence is an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counseling in relation to, such offences.[67]

These provisions also expressly provides that no offence is committed by a peace officer or a person acting under the direction of a peace officer if the acts are done for the purpose of an investigation or otherwise in the execution of the officer's duties.[68] Additional measures in the Criminal Code deal with search, seizure, restraint and forfeiture of these proceeds of crime. These will be briefly discussed in the criminal procedure section of this paper.

The most recent development has been the passing of Bill C-53 at the end of 2005 which reforms provisions that target the illicit proceeds of organised crime.[69] The main reform introduces the "reverse onus" provision which means that once an offender has been convicted of either a criminal organization offence, or certain offences under the Controlled Drugs and Substances Act, the Court has the power to order the forfeiture of property of the offender, unless the offender proves on a balance of probabilities that the property is not the proceeds of crime. The prosecution must first prove, on a balance of probabilities, either that the offender engaged in a pattern of criminal activity for the purpose of receiving material

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[66] Section 462.3(1) *Criminal Code*.
[67] Section 462.3(1) *Criminal Code*.
[68] Section 462.31(3) *Criminal Code*.
[69] Bill C-53, *An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act*, S.C. 2005 c. 44 (royal assent 25 November 2005).

benefit or that the legitimate income of the offender cannot reasonably account for all of the offender's property.[70]

b. Case Law

The Supreme Court of Canada examined the issue of *mens rea* and the meaning of "transfer of possession" in *R v Daoust*.[71] As part of a larger investigation into selling stolen property, the police used an undercover officer to sell goods to a second-hand store owner in which he hinted that they were stolen. The owner and employee were charged with section 462.31 with having transferred the possession of property with intent to conceal or convert that property, knowing that the property was obtained as a result of the commission of an enterprise crime offence. They were originally convicted at trial but the convictions were set aside on appeal and this was upheld by the Supreme Court of Canada.

The Supreme Court of Canada found that the activities criminalized by s. 462.31 all concern the same person, that is, the person who originally has the object in his or her possession and seeks to dispose of it.[72] Buying or receiving property or similar acts involving the person who accepts or acquires the property do not constitute elements of the offence of laundering proceeds of crime. Basically the "transfer of possession" of property in the context of laundering proceeds of crime does not include one who buys the property with the intention of converting it.

The *mens rea* of the offence of laundering proceeds of crime has two elements: (1) intent to conceal or convert property or proceeds of property, and (2) knowledge or belief that the property or proceeds were derived from an enterprise crime offence or a designated substance

[70] Similar legislation already exists in a number of provinces, such as Saskatchewan *Seizure of Criminal Property Act*, as well as in Ontario and Manitoba.
[71] *R v Daoust* (2004) 180 C.C.C. (3d) 449 (S.C.C.).
[72] *ibid*.

offence. The term “convert” does not require an intent to conceal. The words “convert” and “conceal” are distinct terms with distinct meanings and they should not be read together. Conceal does mean to hide but convert has a broader meaning, to change or transform.

This case clarifies the different variations of this definition as found in the English and French versions of the Criminal Code. The French version is much narrower and does not include the English equivalent of “or otherwise deals with, in any manner and by any means, any property or proceeds”. Under the rules of contextual interpretation, the Court must adopt the common meaning of the two versions which in this case is the narrower French version.

c. Comparisons to the UN Convention

The definition of proceeds in crime in the Canadian Criminal Code broadly encompasses property, benefit and advantage, which easily covers the definition of property in the UN Convention: assets, corporeal and incorporeal, movable or immovable, tangible or intangible and legal documents or instruments evidencing title to, or interest in, such assets. The offence of money laundering, which is synonymous with the term laundering of proceeds of crime, is broadly defined in the Criminal Code. Dealing with any property or proceeds of property “in any manner and by any means” appears to encompasses the four offences as defined in the UN Convention which include individuals who are the providers of illicit proceeds and those who are recipients who acquire, possess or use the property. However due to the inconsistency between the English and French version of this definition in the Criminal Code, a narrow meaning has been given to the definition and appears to only include providers of illicit proceeds as opposed to those who acquire and posses the property.

The Canadian definition requires the mental element of intent to conceal or covert as well as knowing or believing that the property or proceeds were derived as a result of criminal

conduct. This lines up with the mental element requirement of intentionality required by the UN Convention definition.

The Canadian legislation uses the idea of predicate offence as including all crimes that are serious enough to be indictable (which includes the offences associated with organised criminal groups) and uses the term of "designated offence" as opposed to predicate offence. This meets the requirement of the UN Convention that the money laundering offences be applicable to the "widest range of predicate offences". Furthermore, the Canadian legislation defines designated offence to include any act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence. This meets the requirement under the Convention where States provide for offences committed in other jurisdictions to be included, provided that the conduct is a crime where it was committed as well as in the State applying the Convention (dual criminality).

3. Corruption

a. Criminal Code offences

Canada ratified the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on December 17, 1998.[73] The *Corruption of Foreign Public Officials Act*, Bill C-21, seeks to implement in law those obligations Canada has undertaken by signing the OECD convention.[74] The Act has the flexibility to develop and evolve in the future if Canada wishes to sign additional international criminal law conventions against corruption, which it has in 2003 – the United Nations *Convention against*

[73] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* adopted by the Negotiating Conference 21 November 1997 and found at www.oecd.org.
[74] *Corruption of Foreign Public Officials Act*, Bill C-21, S.C. 1998, c. 34.

Corruption. The Canadian government is in the process of reviewing and revising its laws prior to ratification of the UN Convention.

Bill C-21 amended the Criminal Code, creating the offence of bribing a foreign public official.[75] There is no particular mental element expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability. The Courts will be expected to read in *mens rea* of intent and knowledge. The conduct element (*actus reus*), however, is more complicated. It does not have to involve the physical crossing of national borders. The Act also makes it an offence to give bribes directly or through third parties or agents, including family members and political party affiliates. This offence applies to every person, whether Canadian or not, and also includes corporations as long as the offence occurs in whole or in part in Canada. To be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. There is a sufficient basis for jurisdiction where there is a real and substantial link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence.

The Act provides for three exceptions or defenses to this new offence of bribery. Under section 3(3) if the accused can show that the loan, reward, advantage or benefit was lawful in

[75] Bill C-21 created three new offences: (i) bribing a foreign public official; (ii) laundering property and proceeds; and (iii) possession of property and proceeds. It also covers conspiracy, aiding and abetting, attempt, and counseling.[75] However the Act to Amend the Criminal Code (Organized Crime and Law Enforcement) of 2001 amends certain sections of the Corruption of Foreign Public Officials Act, repealing ss. 4-7 including the two sections establishing the second and third offence. Basically, while the Corruption Act no longer deals with laundering and possession of property and proceeds, the 2001 Act establishes a new subsection to s. 462.3 of the Criminal Code which provides that the Attorney General of Canada may exercise all the powers and perform all the duties and functions assigned to the Attorney General by or under the Criminal Code in respect of a designated offence where the alleged offence arises out of conduct that in whole or in part is in relation to an alleged contravention of an act of parliament. Section 12(6) of the 2001 Act amends s 462.3(1) of Criminal Code by defining a "designated offence" to mean an indictable offence other than those relating to conspiracy, etc. These amendments have reorganized the statutory provisions in a consolidated way. The end result means that the Attorney General of Canada and the provincial Attorney Generals would continue to be able to prosecute possession and laundering offences in respect of the offence of bribing foreign public officials.

the foreign state then they have a defense to bribery. Also another exception is if the payment is a reasonable expense, incurred in good faith, made by or on behalf of the public official, directly related to the promotion demonstration or explanation of the person's products and services or to the execution or performance of a contract between the person and the foreign State for which the official performs duties or functions. Under sections 3(4) and (5), not all payments would amount to bribing a foreign public official. The Act allows for "facilitation payments" which are made to expedite or secure the performance by a foreign public official of any "act of a routine nature" that is part of the foreign public official's duties or functions. Examples are given in this section but the list is not exhaustive.

Prior to the enactment of this Act, domestic corruption has been prohibited through a combination of federal statutes, parliamentary rules and administrative provisions since the 1960s. The Criminal Code includes offences which prohibit bribery of judges or members of Parliament or Provincial Legislative Assemblies (s. 119); police officers or other law enforcement officers (s. 120) and of influence peddling of government officials (s. 121). Fraud or breach of trust by a public official is an offence under section 122 of the Criminal Code. Other offences include municipal corruption (s. 123), selling or purchasing office (s. 124), influence or negotiating appointments or dealing in offices (s. 125).[76] The Canadian Income Tax Act, s. 67.5(1) prohibits the deductibility of bribes or other illegal payments as a business expense.

b. Comparisons to the UN Convention

Both the UN Convention and the Canadian legislation against organised crime recognize that an effective fight against organised crimes cannot be conducted unless it tackles the corrosive

[76] For more details on corruption offences in Canada, see Gerry Ferguson *"Legislative Framework for Corruption and Bribery Offences in Canada"* A Paper prepared for the Canada – China Procuratorate Reform Cooperation Programme, November 29, 2004, Vancouver, British Columbia.

effects of corruption. The numerous Canadian offences cover both “active” corruption, for example the giving of bribes, and “passive” corruption, for example the acceptance of bribes. Offences also include “participation in corruption”. The Canadian Criminal Code also addresses the suggestion in the UN Convention to include other forms of corruption, such as corruption involving foreign officials.

In the UN Convention, the definition of public official is left to the State Parties. Section 118 of the Criminal Code defines “official” to mean a person who holds an office or is appointed to discharge a public duty. Certain of the corruption offences specifically identifies the type of official being targeted, such as judicial officers, member of Parliament or of the provincial legislature, police commissioner, peace officer or officer of juvenile court.

The required mental element in the Canadian legislation is that the offer, acceptance or solicitation must be done corruptly and there must be an attempt to influence the office-holder in his or her official capacity. This is similar to the language used in the UN Convention that requires that the conduct be intentional as well as establishing some link between the offer or advantage and inducing the official to acting or refrain from acting in the course of his or her official duties.

4. Obstruction of justice

a. Criminal Code offences

Section 139 of the Criminal Code sets out the elements of the offence of willfully attempting to obstruct justice. The first group of offences deals with sureties and prohibits anyone from indemnifying a surety or agreeing to do so for any loss arising from acting as a surety and

also prohibits a surety from accepting or agreeing to accept an offer of a fee for so acting.[77] The prosecutor must show that the accused willfully attempted to obstruct, pervert or defeat the course of justice in a judicial proceeding. The second group deals with obstructing, perverting or defeating the course of justice in any other manner not described by the first group of offences. The provision provides a list which is not exhaustive, but include: dissuading or attempting to dissuade a person by threats, bribes or other corrupt means from giving evidence; influences or attempts to influence by threats, bribes or other corrupt means a person in his or her conduct as a juror; or accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror. The course of justice includes the investigatory stage as well as judicial proceedings existing or proposed but is not limited to such proceedings.[78]

Section 423 deals with the offence of intimidation. The offence is committed where a person, intending to compel someone to abstain from doing something he or she has a right to do, or to do something that he or she has the right to abstain from doing, wrongfully and without authority does one or more of the following acts:

- uses violence or threats of violence against that person or his or her spouse or children, or injures his or her property,
- intimidates or attempts to intimidate the person or a relative by threats of violence or injury to property,
- persistently follows the person,
- hides or deprives the person of the use of his or her property,
- with another or others follows the person in a disorderly manner on a highway,
- watches or besets the residence, work place or other place where the person happens to be; or

[77] A surety is a person who agrees to be responsible for the debt or obligation of another, from the Free Dictionary found at http://legal-dictionary.thefreedictionary.com/surety.
[78] *R v Spezzano* (1977), 34 C.C.C. (2d) 87 (Ont C.A.).

- blocks a highway.

In 2001, Bill C-24 introduced a new offence of intimidation. Section 423.1 makes it an offence to intimidate a justice system participant or a journalist who is investigating criminal organizations. The provision lists a number of prohibited conduct, such as using violence or causing injury to their property or threatening to engage in such conduct; persistently or repeatedly following them or anyone known to them, including following them in a disorderly manner on a highway; repeatedly communicating with, either directly or indirectly, those people or anyone known by them; or besting or watching their place of residence, business or schools.

b. Comparisons to the UN Convention

With the amendment to the Criminal Code in 2001, the Canadian legislation clearly recognized that justice cannot be done if judges, jurors, witnesses or lawyers are intimidated, threatened or corrupted. The Criminal Code defines "justice system participant" to include members of Parliament and provincial legislatures as well as prosecutors, lawyers, judge and justices, jurors, informant, prospective witnesses, witnesses under subpoena and law enforcement officers.[79]

Similar to the UN Convention, the Canadian offences cover both situations, one dealing with potential witnesses and the giving of testimony or production of evidence and the other dealing with justice or law enforcement officials in the exercise of their official duties. The offences described in sections 139, 423 and 423.1 of the Canadian Criminal Code covers the situations as required by the UN Convention, namely prohibiting the use of physical force, threats or intimidation. Regarding the other situation where there has been positive

[79] Section 2 of the *Criminal Code*.

inducement, as opposed to negative inducement, section 139 of the Criminal Code covers corrupting or bribing witnesses. The section creating an offence of intimidating public officials does not explicitly deal with corruption as this is covered by the domestic corruption of public officials offences. The Canadian legislation is broader in respect of covering journalists who are investigating organised crimes.

5. Trafficking in persons

a. Criminal Code offences

The Criminal Code was recently amended to strengthen Canada's legal framework by building upon the existing domestic and international responses to human trafficking.[80] Bill C-49, An Act to Amend the Criminal Code (Trafficking in Persons) establishes three new offences:

1. Section 279.01 - Prohibit the trafficking in persons, which is defined as the movement or holding of persons for the exploitation of those persons: this includes recruitment and physical transportation of persons. This offence would carry a maximum penalty of life imprisonment where it involved kidnapping, aggravated assault or sexual assault, or death.
2. Section 279.02 - Prohibit persons from receiving financial or other material benefit from trafficking in persons. It would be punishable by a maximum penalty of ten years.
3. Section 279.03 - Prohibit the withholding or destroying documents, such as identification, immigration or travel documents, for the purpose of committing or

[80] Bill C-49, *An Act to Amend the Criminal Code (Trafficking in Persons)* received royal assent 25 November 2005, S.C. 2005 c. 43 and statement from Honourable Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada), Sponsors Speech at Second reading, House of Commons at www.parl.gc.ca/legisinfo.

facilitating the commission of a trafficking offence. This would carry a maximum penalty of five years of imprisonment.

Under these new offences, exploitation is defined as causing a person to provide labor or services, such as sexual services, by engaging in conduct that leads the victim to reasonably fear for their safety or that of someone known to them, if they fail to comply.[81] It would also apply to the use of force, coercion, deception causing the removal of a human organ or tissue. No consent to these activities is valid.[82]

The Bill also ensures the protection of child victims and witnesses or a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability.[83] The court may order and allow the witness to testify outside the courtroom or behind a screen or other device. The judge can also make a restitution order to cover the victims' pecuniary damages as a result of the harm, including loss of income or support.

Even prior to these recent amendments to the criminal Code, human trafficking-related conduct was covered by a wide range of Criminal Code offences including kidnapping, forcible confinement, extortion, assault, sexual assault, prostitution-related offences and organized crime offences.[84] Furthermore, on June 28, 2002, a specific offence against human

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[81] Section 279.04 *Criminal Code*.
[82] Section 279.01(2) *Criminal Code*.
[83] Sections 486(1.1) and 486(2.1) *Criminal Code*.
[84] Keeping a common bawdy house (s. 210(1)); transporting a person to a bawdy-house (ss. 211, 212(1)(f) & (g)); controlling or living off the avails of prostitution of another (a. 212); administering stupefying thing for the purpose of illicit sex (s. 212(1)(i)); living off the avails of the prostitution of a person under 18 years if age (s 212(2) & (2.1)); obtaining or attempting to obtain the sexual services of a person under 18 years of age (s 212(4)).
Causing bodily harm or death by criminal negligence (ss 220&221)
Homicide (ss. 222, 224, 226, 229-236); Uttering threats (s 264.1); Assault (ss 265-268); Sexual assault (ss 271-273)
Kidnapping (ss 279(1)&(1.1)); Forcible confinement (s 279(2); Child abduction (non-parental) (ss 280-281)
Theft, robbery, extortion (s322&334, 343-344, 346(1)); Criminal interest rate (s 347)
Forgery and uttering forged documents (ss 366-368); Fraud (s. 380); Criminal breach of contract (s 422)
Intimidation (s 423); Proceeds of crime (ss 462); Conspiracy (s 465)
Participation in criminal organization activities (s 467.11); Commission of offence for criminal organization (s. 467.12); Instructing commission of offence for criminal organization (s 467.13)

trafficking came into force in the Immigration and Refugee Protection Act. The trafficking offence, section 118, provides for:

> 118(1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use of threat of force or coercion.
>
> (2) For the purpose of subs (1), "organize", with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harboring of those persons.

This offence attracts very severe penalties, fines of up to $1 million and imprisonment for up to life.

Other relevant Criminal Code offences deal with the creation of forged passports and their subsequent use or possession[85] and fraudulently using a certificate of naturalization or citizenship. It also prohibits parting with a certificate of citizenship or naturalization, knowingly and intending that it will be used fraudulently.[86] The Immigration and Refugee Protection Act further creates an offence to knowingly organize, induce, aid or abet the coming into Canada individuals that do not possess a visa, passport or other such document;[87] disembarking persons at sea for the purpose of inducing, aiding or abetting them to come into Canada;[88] and counseling misrepresentation[89]. Section 121 establishes aggravating factors which the court should consider when imposing a penalty. These include participation in a criminal organization and submitting a person to "humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence".

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[85] Section 57 of the *Criminal Code.*
[86] Section 58 of the *Criminal Code*.
[87] Section 117 *Immigration and Refugee Protection Act*.
[88] Section 119 *Immigration and Refugee Protection Act*.
[89] Section 126 *Immigration and Refugee Protection Act.*

b. Case law

According to the United States Department of State's report, the Canadian Department of Justice reported that at least 40 traffickers were prosecuted in the year 2003, with 16 defendants being convicted.[90] In 2004 there have been 19 convictions.[91] It is unclear which provisions of the Criminal Code were used for these prosecutions.

In April 2005, Michael Ng became the first person charged under section 118 of the Immigration and Refugee Protection Act arising from a search of a common bawdy house in Richmond, British Columbia in October 2004.[92] His trial is set for March 2006. However the defence has begun a pre-trial constitutional challenge of section 118 of the Immigration and Refugee protection Act arguing that the provision is vague and therefore unconstitutional.[93] The main argument by the defence is that the reference to fraud and deception when knowingly organizing the entry of persons into Canada is too vague since it could be used "to prosecute a travel agent who organised an excursion to Vancouver, after lying to vacationers about hw sunny the city is in winter".[94] The defence argues that what is missing from the provision is an explicit reference to people being exploited as a result of deception. This language of exploitation is used in the newly created Criminal Code offences as well as in the UN Protocol.

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[90] The U.S. Department of State, *"Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report"* (June 2004: U.S. Department of State) found at www.state.gov/g/tip/rls/tiprpt/2004.
[91] The U.S. Department of State, *"Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report"* (June 2005: U.S. Department of State).
[92] RCMP Backgrounder, *"Keeping Common Bawdy House in Richmond Neighborhood"* (October 15, 2004) found at www.rcmp-bcmedia.ca and discussion with the RCMP during consultation for the *"Human Trafficking Reference Guide for Canadian Law Enforcement"*.
[93] CBC *"BC man challenges human trafficking charge"* (3 February 2006) found at www.cbc.ca/bc/story/bc_ng20060203.html.
[94] *ibid*.

c. Comparisons to the UN Protocol

Unlike the *Protocol Against Smuggling of Migrants*, the *Protocol on Trafficking in Persons* only requires the criminalization of trafficking in persons and does not encompass other related conduct, such as enabling illegal residence or forging travel or identity documents. The obligation is to criminalize trafficking as a combination of the elements (action, means and purpose of exploitation) and not the elements themselves. For example while the action of kidnapping and abduction by means of assault or sexual assault cover some of the elements in the definition of trafficking in persons this likely does not meet the obligations of criminalization under the Protocol.

The trafficking offence created by the Immigration and Refugee Protection Act in 2002 was not broad enough to cover trafficking in persons as defined by the UN Protocol. It was restricted to those persons involved in organised, illegal cross-border entry of persons into Canada and did not define or use the term “exploitation”. The newly created offences in the Criminal Code ensures that no matter what form human trafficking takes or for what purpose human trafficking occurs in Canada, the laws now cover the movement of people across or within borders. This means that the new laws will affect trafficking internationally and crossing Canadian borders both as a receiving country, hosting country or transit country and will also deal with trafficking within Canada.

These offences, particularly the one prohibiting persons from receiving financial or other material benefit from trafficking in persons, broadly cover the full range of trafficking in persons and organizing, directing and participating as an accomplice. The third offence dealing with destruction of certain documents recognize the reality experienced by victims and the difficulty they have in coming forward without any identification documents. As the Legislative Guide comments: “generally simple incorporation of the definition and criminalization elements into national law will not be sufficient; given the nature and

complexity of trafficking and other forms of transnational organised crime".[95] The provisions dealing with protection and facilitation of evidence of victims and witnesses in the Canadian Bill responds to the complexity of investigating and prosecuting trafficking in person cases.

The Canadian Bill C-49 is similar to the UN Protocol in respect to ensuring that once exploitation is established, consent is irrelevant and cannot be used as a defence. However what is not clearly set out in Bill C-49 is the situation where children are victims of recruitment or transportation for the purpose of exploitation. In this case, the Protocol expressly provides that there is no need to establish improper means to prove trafficking of a minor.

7. Smuggling of migrants

a. Criminal Code offences

In Canada, smuggling-related conduct, such as producing, procuring, providing or possessing fraudulent travel or identity documents and enabling a person to remain in Canada by illegal means, is prohibited by a number of provisions in the Criminal Code and the Immigration and Refugee Protection Act. Section 57 of the Criminal Code creates offences relating to the creation of forged passports and their subsequent use or possession. Section 58 creates the indictable offence of fraudulently using a certificate of naturalization or citizenship. It also prohibits parting with a certificate of citizenship or naturalization, knowingly and intending that it will be used fraudulently.

Part III of the Immigration and Refugee Protection Act deals with trafficking and smuggling of persons and establishes such offences as to knowingly organize, induce, aid or abet the

[95] Legislative Guide, *supra* note 26.

coming into Canada individuals that do not possess a visa, passport or other such document;[96] disembarking persons at sea for the purpose of inducing, aiding or abetting them to come into Canada;[97] and counseling misrepresentation[98].

b. Comparisons to the UN Convention

The Canadian legislative framework appears to comply with the requirements for criminalization of smuggling-related conduct. It covers conduct that amounts to enabling illegal residence, where the residents lack the necessary legal status or authorization and smuggling (which means procuring illegal entry). To support the basic offences of smuggling and enabling illegal residence, Canadian provisions also criminalizes conduct relating to fraudulent travel or identity documents (section 57 and 58 of the Criminal Code) which is required by the Protocol. The Immigration and Refugee Protection Act further establishes as aggravating circumstances conduct that is likely to endanger or does endanger the migrants to inhumane or degrading treatment.[99]

The Protocol remains neutral as to whether those who migrate illegally should be the subject of criminal offences. It does not require State Parties to criminalize migrants who are entering their territory illegally nor does it limit State's ability to establish offences under domestic laws to deal with illegal migrants. The Canadian scheme allows for a deferral of prosecution for any person coming into Canada who is making a refugee claim from prosecution of certain offences, such as possessing travel document for the purposes of contravening the Immigration and Refugee Protection Act, or forging a travel document or destroying documents.[100]

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[96] Section 117 *Immigration and Refugee Protection Act*.
[97] Section 119 *Immigration and Refugee Protection Act*.
[98] Section 126 *Immigration and Refugee Protection Act*.
[99] Section 121 *Immigration and Refugee Protection Act*.
[100] Section 133 *Immigration and Refugee Protection Act*.

IV. Issues of Canadian criminal procedure in these cases

The *Convention Against Transnational Organised Crime* provides in article 20 that where permitted by the basic principles of its domestic legal system, State Parties shall take necessary measures to allow for special investigative techniques, such as electronic surveillance and undercover operations.

Generally speaking, there are no real differences between the criminal procedure used in organised crime cases and other criminal cases regarding investigation, prosecution and evidentiary measures. The two organised crime bills (C-95 and C-24) introduce new provisions that confer wider police powers to assist them in investigating and combating organised crime. However these new provisions and powers are not generally limited to organised crime offences but apply to the whole Criminal Code and to all kinds of investigations, whatever the nature of the crime.

1. Scheme of police immunity

The Criminal Code now has a complex and wide immunity system allowing police officers, generally those "undercover", the power to commit certain offences as part of their investigation of crimes. While these immunity provisions apply to a broad range of offences, whether or not the offences are related to organised crime, the provisions were introduced in organised crime legislation (Bill C-24). The Canadian government recognized that police officers investigating crimes such as trafficking and smuggling of persons and drugs need to use a variety of investigative techniques including committing offences to infiltrate, destabilize and dismantle criminal operations.[101] Even the courts acknowledged that one of the most effective ways to investigate a criminal organization is to use an undercover officer

[101] Department of Justice Backgrounder, *"Royal Assent on Bill C-24 Organised Crime Legislation"* (December 2001).

or to engage someone who is already a member of that organization as a covert agent.[102] In the process, it may be necessary for the officer or agent to commit criminal offences, such as trafficking in drugs to play along with their criminal targets to maintain their cover. As remarked by Chief Justice Lamer, the investigation of crime and the detection of "shrewd and often sophisticated" criminals "is not a game to be governed by the Marques of Queensbury rules".[103]

Sections 25.1 to 25.2 of the Criminal Code provides law enforcement officers and other persons acting at their direction with circumscribed protection from criminal liability for certain otherwise illegal acts committed in the course of an investigation or enforcement of an Act of Parliament. The scheme starts by declaring that the authorization power is to be exercised by the Solicitor General or provincial Attorney General. However that power is to designate police officers or groups of officers on consideration of their general duties rather than any particular investigation and the power can be delegated to a senior official. A designated officer can commit an offence if the officer reasonably believes the offence is reasonable and proportional to the criminal activity being investigated. The only real limit on this authorization is that it is not to include the intentional or criminally negligent causing of bodily harm, willful obstruction of justice or conduct that would violate sexual integrity. There are also requirements for after the fact annual reports and notice to victims to provide for some accountability in this process.

The immunity scheme provided for in Bill C-24 was in response to the 1999 Supreme Court of Canada case of *R v Campbell and Shirose*.[104] In that case, the Court held that the police had to abide by the rule of law. They were not immune from criminal liability for committing acts during an investigation which, in ordinary circumstances would be illegal, unless

[102] *R v Campbell and Shirose* [1999] 1 S.C.R. 565 (SCC).
[103] *Rothman v R* [1981] 1 S.C.R. 640 (SCC).
[104] *R v Campbell and Shirose, supra* note 101.

authorized by Parliament through legislation.[105] The police had engaged in a reverse sting operation where they had offered to sell drugs, which at the time was not authorized by the Narcotic Control Act. The Court ordered a new trial to consider whether there should be a stay of proceedings because of an abuse of process. The Court noted the new Controlled Drugs and Substances Act would legalize reverse sting operations in the future and that Parliament could establish public interest immunities for police operations if these were clearly set out.

Some have criticized these provisions saying it is hard to imagine a scheme of police immunity more inimical to the rule of law.[106] The police cannot be above the law. They argue that this scheme's structure for authorization is for the most part devoid of government control as it is essentially left up to the administrative policies of various police forces, constrained only by questionable balancing tests.[107] The scheme also permits the commission of some offences without obtaining an authorization. For any provision which essentially allows some citizens to break a law which is binding on all others, it must be specifically justified and narrowly defined.[108] Other concerns raised include weakening of the defence of entrapment and the authorization of the use of force or violence.

However others respond that these provisions do not provide for blanket immunity for any criminal conduct by police.[109] They also point to the number of safeguards contained in the provisions, such as the role of ministers responsible for policing who will designate the eligible officers; exclusion of certain types of conduct; and the annual reporting requirements.

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[105] *ibid*, Justice Binnie speaking for the SCC.
[106] The statements made by the Barreau du Quebec and the Canadian Civil Liberties Association during the Standing Committee on Justice and Human Rights (May 8, 2001) found at www.parl.gc.ca/infoComDocs/3//1/JUST/Meetings/Evidence/justevi2-ehtm.
[107] Kenneth Swan *"A Response to Government of Canada White Paper on Law Enforcement and Criminal Liability"* (November 2000: Canadian Civil Liberties Association).
[108] The McDonald Commission, back in 1981, rebuked the police for burning down a burn, committing burglary, theft and mail-opening and counseled against creation of any general law-breaking power for the police, as discussed in Alan Borovoy *"Don't Give the Police Carte Blanche"* (May 8, 2001: Globe and Mail).
[109] Department of Justice *"Law Enforcement and Criminal Liability: White Paper"* (June 2000).

The provisions in sections 25.1 to 25.2 have not been judicially considered or constitutionally challenged as yet.

2. Special peace bond

Bill C-95 creates a special peace bond designed to target gang leadership and make it difficult for criminal organizations to carry out their criminal activities. A peace bond is seen as a preventive measure, a promise, enforceable under the Criminal Code, to keep the peace and be of good behaviour and to obey all other terms and conditions. Section 810.01 allows anyone, with the consent of the Attorney General, to lay an information before a provincial court judge for the purpose of having a person enter into a recognizance to keep the peace and be of good behaviour. The judge must be satisfied that there are reasonable grounds to fear that an individual will commit some of these crimes. This peace bond can include conditions such as prohibiting the person from being in possession of firearms, ammunition, explosives and associating with certain people. The government argues that police have informed them that organized crime works because people talk to each other, plan with each other and commit crimes together. This measure is to break that cycle by ensuring that these people cannot talk or plan together.[110] In other words, the purpose is preventive.

While it originally appeared that the intent was to establish a preventive power against gang leaders, as well as suspected terrorists, section 810.01 goes much further to include any person who it is feared may commit a criminal organized offence. Any person can be forced to enter a peace bond with conditions for up to 12 months if the justice is satisfied than an informant has reasonable grounds to fear that the person will commit a “criminal organized

[110] Statement by Mr. Yvan Roy, General Counsel, Criminal Law Policy Section, Policy Sector, Department of Justice Canada to the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs (Second Session, Thirty-fifth Parliament, 1996-97 Senate of Canada: 24 April 1997, Issue No 63).

offence". If the person refuses or fails the conditions, he can be imprisoned for up to twelve months.

The notion of peace bonds have been around for hundreds of years in common law and has been codified under section 810 of the Criminal Code back in the 1892. Prior to amendments establishing section 810.01, there had been a previous amendment dealing with pedophiles.[111] That section has been ruled to be constitutional by the Ontario Court of Appeal in the *Boudreo* case.[112]

Peace bonds that existed before these last two amendments were a much more narrowly focused kind of instrument. They arose when a particular person believed they were in danger from someone, and they went to court for such an order to keep that person away from them. The intrusion on the defendant's freedom was limited. Section 810.01 allows the courts to impose more significant restrictions to a person's liberty and their ability to associate with others, even when they have not been convicted or charged with the offence at issue. One commentator calls this "punishment by clairvoyance".[113]

Other commentators have said that this provision with its binding over powers prior to proof of the commission of an offence raises important Charter issues.[114] This particular power, again bearing in mind the loose definition of criminal association, could be "a tool for State harassment based around peace bonds with non-association clauses".[115] It could stifle political dissent, just as the American legislation on organize crime has been used against abortion protestors. This would effectively outlaw criminal associations without even the

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[111] Section 810.1 of the *Criminal Code*.
[112] *R v Budreo* (1996) 104 C.C.C. (3d) 245 (Ont. Ct. (Gen. Div.), affld 142 C.C.C. (3d) 225 (Ont. C.A.), leave to appeal to S.C.C. refused 153 C.C.C. (3d) vi.
[113] Alan Borovoy, General Counsel, Canadian Civil Liberties Association making this statement at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 107.
[114] These comments are discussed in Alan Borovoy's article, *ibid*.
[115] *ibid*.

necessity of proving an offence. It is qualitatively different from peace bonds used, for example, to try and protect victims of domestic violence from further harm. Substantial data points to the probability of danger to an identified victim such as victims of domestic violence. Responding to some of these concerns, the government added a requirement that the Attorney General must consent to such applications.

There has not as yet been a constitutional challenge or judicial consideration of section 810.01. From the *Budreo* case, one can imagine the same Charter concerns being raised. In that case, the argument was that the peace bond violated section 7 of the Charter, guaranteeing the right not to be deprived of liberty except in accordance with the principles of fundamental justice. The three reasons the defence raised included: section 810.1 creates an offence based on status, it is overbroad and it is void for vagueness. However, the Court did not find a violation, and stated that peace bonds are preventive provisions, stop short of detention or incarceration and that the restrictions to the defendant's liberty is proportional to important social interests.[116] They further held that the procedural safeguards are sufficient.

3. Reverse bail onus

The cardinal principle established by the Bail Reform Act of 1971 is that the State must show cause for pre-trial detention. Basically, prior to conviction all those persons who do not constitute a danger to the public and who will show up for trial ought not to be detained in custody. There are certain situations enumerated in the Criminal Code where the onus is on the accused to show cause as to why he or she should be released pending trial. Bill C-95 introduced an additional situation in which the accused is under a reverse onus. Section 515(6)(a) of the Criminal Code adds to the list of reverse onus exceptions those charged with criminal organization offences.

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[116] *R v Budreo, supra* note 111.

One commentator argues that the new reverse onus exceptions in Bill C-95 could be challenged based on the guarantee in section 11(e) of the Charter against denial of reasonable bail without just cause. However case law from the Supreme Court of Canada prior to the amendments in 1997, have held that the scope of other reverse onus exceptions were sufficiently narrow to constitute just cause under section 11 (e) and therefore are constitutional.[117] The Court has held that the onus imposed on accused charged with serious offences under the Controlled Drugs and Substance Act is reasonable in the sense that it requires the accused to provide information which he is most capable of providing. It also noted that these special rules combat the pre-trial recidivism and absconding problems which are characteristic of systematic drug trafficking which usually occurs in a highly sophisticated and lucrative commercial setting.[118]

4. Search warrants and wiretaps

Bill C-95 provided for a new general provision for sealing orders by a justice to deny access to information to obtain a search warrant (subsequently amended in 2004). Section 487.3 of the Criminal Code provides that the order may be made only where the ends of justices would be subverted by disclosure or the information might be used for an improper purpose and the judge is satisfied that these grounds outweigh the importance of access to the information. The Criminal Code provision further lists the grounds that the ends of justice would be subverted by the disclosure. If disclosure would (1) compromise the identity of a confidential informant; (2) compromise the nature and extent of an ongoing investigation; (3) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or (4) prejudice the interests of an innocent person. The judge can also look at any other sufficient reason.

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[117] *R v Morales* [1992]3 S.C.R. 711.
[118] *R v Pearson* [1992] 3. S.C.R. 665.

It has been argued that the wide power in section 487.3 to prevent access by an accused to the information leading to a search warrant after the execution of the search appears to violate the accused's right to discovery under section 7 of the Charter. Those provisions relating to protecting the identity of informers should, however, survive the Charter review given the Supreme Court of Canada ruling in *R v Leipert* that the only exception to police informer privilege is where innocence is at stake.[119] One commentator notes that "it is hard to think of a provision that would have been more favorable to law enforcement interests".[120] This is a most controversial and difficult area in which the public's right to know, privacy and the accused's right to discovery, need to be carefully balanced against law enforcement interests, including the need to protect undercover agents.

Regarding wiretap and electronic surveillance, Bill C-95 and revised by Bill C-24 removes the last resort requirement for electronic surveillance. Sections 185(1.1) and 186(1.1) does not require a judge to be satisfied that other investigative procedures have been tried and have failed and that other investigative procedures are unlikely to success or the urgency of the matter is such that it would be impractical to carry out the investigation using other procedures. This applies to criminal organization offences as well as terrorism offences. Section 186.1 extends the period of an authorization from 60 days up to one year in cases dealing with criminal organizations and terrorism offences.

One commentator argued that he had never heard a serious claim that the police have any difficulty getting permission to use electronic bugs against criminal gangs.[121] Regarding the

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[119] *R v Leipert* [1997] 1 S.C.R. 281. Police investigation following crime stopper tip that drugs were being grown in the accused house. Tip mentioned in information to obtain a search warrant of accused's house. Crown refused to produce tip sheet on ground of informer privilege.

[120] Don Stuart *"Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution"* (2002) 112 Manitoba Law Journal 89 and Don Stuart, *"Politically Expedient But Potentially Unjust Criminal Legislation against Gangs"* (1997), Paper presented at the Law Society of Upper Canada Session on Criminal Law and the Charter on September 27, 1997.

[121] Alan Borovoy, General Counsel, Canadian Civil Liberties Association making this statement at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 107.

extension of the period of an authorization from 60 days up to one year, he argues that this provision will accomplish nothing more than to reduce the accountability of the police. He further insists that these safeguards have been put into our wiretap legislation for an important reason. It was recognized a long time ago that electronic bugs perpetrate pervasive intrusions invariably on the privacy of innocent people. Even though the targets are suspected criminals, the technology results in intercepting much more than just their conversations. That is why it was originally to be used as a last resort. He calls for constant judicial scrutiny.

5. Disclosure

There are a number of challenges with prosecuting organized crime mega trials, such as high costs, burdens on judges and juries, and the burden of disclosure and management of evidence. The collapse of a number of mega trials due to slow disclosure by prosecutors of massive volumes of information has resulted in a February 2004 announcement by the Minister of Justice that Justice officials will be developing draft amendments to more efficiently and effectively implement the Charter mandated obligation of the prosecution to disclose all relevant materials.[122]

The Department of Justice produced a consultation paper on disclosure reform that seeks to address the disclosure problems encountered in the prosecution of complex criminal trials.[123] This would not be restricted to organised crime trials. Issues that they will be looking into include:

- facilitating the electronic disclosure of material to defence;

[122] One such trial was *R v Chan* (February 2004) where the trial judge ordered the stays of proceedings saying that there had been unreasonable delay contrary to section 11(b) of the Charter.
[123] Department of Justice *"Disclosure Reform: Consultation Paper"* (Department of Justice Canada: November 2004).

- reducing administrative burdens in disclosure by clarifying the core materials to be given to the defence while ensuring the defence's right of access to all relevant information;
- setting up specialized court proceedings to provide a way for disclosure, including relevance;
- establishing disclosure management procedures that would clearly set out obligations relating to disclosure, including timelines; and
- address any improper use of disclosed materials.

The Department of Justice has proposed some legislative amendments to tackle the difficult issue of disclosure.[124] One would be that where the Crown transmits disclosure materials in electronic format, complying with specified standards, this is presumed to be a proper form of disclosure with respect to those materials unless a court, in the interests of justice, decides otherwise. It has been noted that while electronic disclosure has not been firmly accepted within the criminal justice system, neither has it been rejected. It is further suggested that, without reducing the obligation to provide disclosure, legislative amendments could permit this obligation to be fulfilled by providing the defence with reasonable access to disclosure materials and the opportunity to obtain copies. This would be restricted to "in appropriate circumstances", which would likely be in large and complex cases, which frequently generate enormous volumes of materials that are subject to the disclosure obligation.

The Department of Justice argues that amendments providing for specialized court proceedings could allow disclosure motions to be heard in an expedited manner through quick access to a court and flexible proceedings before the court.[125] Specifically mentioned manners of proceedings could include proceedings by written submissions only, proceedings by oral submissions without supporting material or motion record, proceedings relying on

[124] These proposals and discussions is summarized from the Department of Justice consultation paper, *ibid*.
[125] *ibid*.

affidavit or *viva voce* evidence, proceedings by telephone or video conference, proceedings in chambers, and *in camera* and *ex parte* proceedings. Lastly, in responding to the problem where disclosed material has been misused, these proposals suggest that it be explicitly provided for in the Criminal Code that all persons who receive disclosure information, including third parties, have a legal responsibility not to use it for improper or collateral purposes. Furthermore the judge would have power to make any order with respect to disclosure materials that it deems fit. Such an order could be made in the interests of justice or to protect the privacy of those affected by the proceedings, but subject to the right of an accused to make full answer and defence. The proposals include a suggestion for a targeted offence for misuse of disclosure material.

6. New powers to seize proceeds of crime and obtain forfeiture

In order to assist law enforcement agencies in their fight against organised crime, mechanisms of seizure of proceeds of crime and forfeiture provisions have been seen to be extremely effective and desirable tools. With this in mind, Bill C-95 first amended existing Criminal Code provisions to apply seizure of proceeds of crime powers to the new offence of participation in criminal organizations and to federal offences with penalties of five years or more. Then Bill C-24 extended the application of its proceeds of crime provisions to indictable offences under the Criminal Code and other Acts of Parliament, with a few exceptions.[126] It also extended the application of its provisions relating to offence-related property to indictable offences under the Criminal Code and provided for the management, by judicial order, of proceeds of crime and offence-related property, whether seized or restrained.

[126] Part XII.2 *Criminal Code*.

The Proceed of Crime (Money Laundering) Act (2000) has been substantially widened to embrace the seizure, freezing and confiscation of proceeds of most indictable offences rather than the 40 previously listed as "enterprise crimes". Bill C-24 also amends the Mutual Legal Assistance In Criminal Matters Act to allow the enforcement in Canada of search warrants, restraining orders and orders of forfeiture from foreign jurisdictions. While proceeds of crime applications are not limited to organised crime situations, they are especially relevant to combating this form of crime.

The Proceeds of Crime (Money Laundering) Act replaced existing legislation of the same name that had been first enacted in 1988. The object of the Act is, in part, to implement specific anti-money laundering detection and deterrence measures to facilitate the investigation and prosecution of money laundering offences. The Act and regulations expand the scope of the reporting and record-keeping requirements for certain transactions and reporting requirements for importation and exportation of currency or monetary instruments of a prescribed value. It requires financial institutions and their intermediaries to report suspicious transactions, as well as impose requirements for client identification and record keeping. The Act also established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), a new independent agency which collects, analyze and disclose information to assist in the prevention and deterrence of money laundering. The Act was expanded in December 2001, pursuant to the Anti-Terrorism Act and renamed the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

The Criminal Code has recently amended provisions that allow for the forfeiture of proceeds of crime.[127] Prior to this amendment, the prosecution would make an application to obtain an order of forfeiture after a conviction for an indictable offence under federal legislation. The prosecutor had to prove on a balance of probabilities that the property was the proceeds of

[127] Bill C-53, *An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act*, S.C. 2005 c. 44 (royal assent 25 November 2005).

crime and that the property was connected to the crime for which the person was convicted. If there was no connection between the offence and the property, the court could order forfeiture if it was satisfied beyond a reasonable doubt that the property was proceeds of crime. Experience showed that convictions involving organised criminal activities may not have associated proceeds, such as murder, so that the prosecutors often had to rely on the test of beyond a reasonable doubt. With this in mind, Parliament's recently enacted legislation, Bill 53, will make it easier for the Prosecutor to seize the proceeds of crime for offences related to organized crimes or drug trafficking. Bill C-53 imposes a reverse onus on those convicted of offences related to organized crime or drug trafficking to prove, on a balance of probabilities, that their assets are not proceeds of crime. In order for the reverse onus to apply, the prosecutor would first be required to prove, on a balance of probabilities, either that the offender engaged in a pattern of criminal activity for the purpose of receiving material benefit or that the legitimate income of the offender cannot reasonably account for all of the offender's property.[128]

Provincial legislation has also been enacted in Ontario, Manitoba and Alberta allowing courts to make a civil order for the forfeiture of property associated with criminal activity.[129] A recent case in Ontario considered whether a person from whom money is seized has any onus in establishing the legitimacy of the origin of the money or of its use in an application by the Prosecutor, under Ontario's Act, for forfeiture of proceeds of crime. The Court held that the onus is on the Prosecutor to prove that the money "is the product of or instrumentally of unlawful activity".[130]

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[128] Department of Justice Backgrounder *"Key Highlights of the Proceeds of Crime Bill"* (May 2005).
[129] In December 2001, the Ontario legislation enacted the Remedies for Organised Crime and Other Unlawful Activities Act, 2001 (S.O. 2001, c.28 [Organised Crime Act]) and in Alberta, the government passed its own civil forfeiture legislation in November 2001 entitled the Victims Restitution and Compensation Payment Act (S.A. 2001, c.V-3.5 [Victims Restitution Act]).
[130] See *Ontario (Attorney General) v Wheeler* [2005] O.J. No. 97.

Some have observed that although the entire notion of controlling crime by taking away the capital and the motivation is superficially appealing, there is no proof in logic or in practice that it actually works.[131] There is however ample proof that it can pose a threat to civil liberties and civilian control over police forces. The proceeds approach also involves the police intruding on territory that has historically been the preserve of the revenue authorities and raises serious possibilities of compromising the integrity of a tax system based on confidentiality and self-assessment. This is an area requiring more study.

V. Protection of witnesses and victims

States Parties of the UN *Convention Against Transnational Organized Crime* are required to provide effective protection for witnesses, within available means, including physical protection; domestic or foreign relocation; and special arrangements for giving evidence.[132] States should also assist, subject to resources, with procedures for victims to claim compensation and restitution. Victims should be given the opportunities to present views and concerns at appropriate stages of the criminal proceedings, subject to domestic law.

In order to enhance investigations of organised crimes, the *Convention* requires State Parties to take appropriate measures to encourage persons, who participate in organised criminal groups to supply information for investigative and evidentiary purposes.[133] It suggests that States should consider mitigating punishment of an accused person who provides substantial cooperation and perhaps grant them immunity from prosecution.

The Protocols also contain provisions to ensure assistance to and protection for victims. Under the *Protocol on Trafficking in Persons*, trafficked victims are entitled to some degree

[131] Beare, M and Naylor, R.T "*Major Issues Relating to Organized Crime: Within the Context of Economic Relationships"* (Nathanson Centre for the Study of Organized Crime and Corruption: 1999).
[132] Article 24 and 25 of the UN *Convention Against Transnational Organised Crime*.
[133] Article 26 of the UN *Convention Against Transnational Organised Crime.*

of confidentiality. Article 6 obliges State Parties to protect the privacy and identity of victims to the extent possible under domestic law.[134] Victims are also entitled to information about legal proceedings involving traffickers and should be given the opportunity to have their views presented and considered.[135] States must endeavor to provide for the basic safety and security of victims and ensure measures are established to allow for the possibility of obtaining compensation for damage suffered.[136] Some of the optional provisions to assist and support victims include supportive measures intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation. The Protocol explicitly provides that the special needs of children should be taken into account when considering such measures.[137]

In Canada there is a structure which recognizes the needs of victims and witnesses and their protection in the criminal justice system. Both federal and provincial laws address the concerns of victims of crime. Current provisions in the Criminal Code deal with publication bans, exclusion orders and facilitation of testimony. This is not limited to cases dealing with organised crime. The provinces and territories have also enacted victim legislation governing services and assistance and, in some jurisdictions, compensation to victims of crime.

The focus of this paper is on the federal framework and the Criminal Code. The Criminal Code has long recognised that testifying at a criminal proceeding may be even more stressful than usual for some particularly vulnerable witnesses. There are a number of sections that are available to assist victims and witnesses testifying in court which goes some way to ensuring that the court will have access to the fullest and best possible account of the evidence. Recent amendments to the Criminal Code revise the procedural sections to accommodate the needs

[134] Article 6(1) *Protocol on Trafficking in Persons*.
[135] Article 6(2) *Protocol on Trafficking in Persons*.
[136] Article 6(5) and (6) *Protocol on Trafficking in Persons*.
[137] Article 6(4) *Protocol on Trafficking in Persons*.

of vulnerable complainants and witnesses, particularly in the prosecution of sexual offences.[138]

- Exclusion of the public. Section 486(1) allows judges to exclude all or any member of the public where they are of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice, or necessary to prevent injury to international relations or national defence or national security. The proper administration of justice includes ensuring that the interests of witnesses under the age of 18 years are safeguarded in all proceedings. Prior to Bill C-2, this provision was restricted to certain proceedings which involved sexual offences or an offence in which violence was used, threatened or attempted. Now the definition of "proper administration of justice" has been broadened to include safeguarding the interests of witnesses under 18 in all proceedings.
- Support person. Section 486.1 provides for the role of a support person for certain vulnerable witnesses. The judge is required to make an order for a support person where requested for those witnesses under 18 years in any proceeding, unless the judge is of the opinion that the order would interfere with the proper administration of justice.[139] The court's authority is now extended even further by allowing such an order for the benefit of a witness of any age in any proceeding, if the judge is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.[140] In making that determination, the court is to take into account the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant. No

[138] Bill C-2 – *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canadian Evidence Act*, royal assent 21 July 2005.
[139] Section 486.1(1) *Criminal Code.*
[140] Section 486.1(2) *Criminal Code.*

adverse inference is to be drawn from the fact that an order is, or is not, made under this provision.[141]

- Remote or screened testimony. Section 486.2(1) provides that the court must make an order that any witness under 18 or who may have difficulty communicating evidence by reason of a mental or physical disability, may testify outside the courtroom or behind a screen or device that would prevent a view of the accused, where there has been a request in any proceeding unless the judge is of the opinion that the order would interfere in the proper administration of justice. New section 486(2) allows such an order for the benefit of any witness if the judge considers it necessary to obtain a full and candid account from the witness. Prior to the Bill C-2 amendments, this provision was restricted to witnesses under the age of 18 or those who may have difficulty communicating the evidence by reason of a mental or physical disability and to only limited number of offences.
- Cross-examination by the accused. Section 486.3(1) prohibits an accused from personally cross-examining a witness under 18 years in any proceedings, unless the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The judge can also make such an order in any proceedings for any age witness if the judge is of the opinion that in order to obtain a full and candid account from the witness the accused should not personally conduct the cross-examination. No adverse inference is to be drawn from the fact that counsel is, or is not, appointed under this section.
- Publication of identifying information. Section 486.4(1) allows the court to prohibit the publication of identifying information about a witness in certain proceedings. Bill C-2 adds to the list of offences for which such an order can be made.
- Videotaped evidence. Sections 715.1 and 715.2 provides for victims and witnesses under the age of eighteen to give evidence by way of video recording, if it is made

[141] Section 486.1(6) *Criminal Code*.

within a reasonable time after the alleged offence and the victim or witness adopts the contents of the recording, while testifying. The judge has the discretion to allow videotaped evidence by any witness in any proceeding where the judge is of the opinion it is necessary.

Section 738 authorizes the making of an order requiring the offender to make restitution in the case of damage to property and bodily harm. Restitution is limited to pecuniary damages incurred as a result of the harm, including loss of income or support. Bill C-49 which amended the Criminal Code dealing with trafficking in persons amends the provision by adding physical harm as well as bodily harm.[142]

The Witness Protection Program Act 1996 establishes a formal, national program to protect those who risk their lives to assist police investigations. This program is administered by the Commissioner of the Royal Canadian Mounted Police (RCMP).[143] The Act has no bearing upon witness protection programs run by provincial and municipal law enforcement agencies; however the RCMP can enter into agreements with other law enforcement agencies to protect witnesses. Witnesses are defined as someone who gives or agrees to give information or evidence or who participates or agrees to participate in a matter relating to an investigation or the prosecution of an offence ands may require protection because of the risk to their security.[144] Protection under the Act may include relocation, accommodation, change of identity, counseling and financial support or any others to ensure the witness's security or to facilitate the witness's re-establishment or ability to become self-sufficient.[145] Witnesses who enter this program usually do so for life.

[142] Bill C-49, *supra* note 79.
[143] Section 4 of the Witness Protection Program Act 1996.
[144] Section 2 Witness Protection Program Act 1996.
[145] Section 2 Witness Protection Program Act 1996.

The Act sets out the criteria for admission into the Witness Protection Program. It is necessary for a law enforcement agency to recommend the candidate for the program.[146] Section 7 provides a list of factors that will be considered by the RCMP, including the nature of the risk to the security of the witness; the danger to the community if the witness is admitted into the program; the nature of the investigation or prosecution and the importance of the witness in this matter; the value of the information or evidence; the likelihood of the witness being able to adjust to the program; the cost; and alternative protection methods. If the candidate is deemed suitable, he or she must enter into a protection agreement with the RCMP. The RCMP can terminate this agreement if the witness does not comply with an important obligation of the agreement, such as providing evidence in court. For transparency purposes, the RCMP submits an annual report to Parliament, through the Solicitor General, however, this report provides only statistics to maintain confidentiality of the individuals under the program.

More recently, relating to capital market frauds, Bill C-13 was enacted in 2004 which contained some whistle blowing provisions.[147] The new section 425.1 to the Criminal Code makes it a criminal offence for an employer, anyone acting on behalf of an employer or a person in a position of authority over an employee to take or to threaten the employee with disciplinary action, demotion, termination of employment or to adversely affect the employee's employment in order to force the employee to refrain from providing information to law enforcement officials about the commission of an offence by his or her employer or by an officer, employee or director of the employer.

In Quebec, Alberta and Manitoba, special courtrooms and courthouses have been constructed to house mega-trials, including the trials of multiple members of organised criminal groups.

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[146] Section 6 Witness Protection Program Act 1996.
[147] Bill C-13, *An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence Gathering)* S.C. 2004 c. 3.

These courtrooms and courthouses are equipped with special security measures to prevent intimidation.[148]

VI. Organisations involved in combating organised crime

The Royal Canadian Mounted Police (RCMP) is the lead agency in Canada in combating organised crime.[149] There are different units such as commercial crime, immigration, smuggling, proceeds of crime, criminal intelligence, international policing and human trafficking unit.

Other federal departments involved in combating organised crime include:

- Criminal Intelligence Service Canada (CISC) which coordinates criminal intelligence among Canadian law enforcement agencies in the fight against organised crime;[150]
- Public Safety and Emergency Preparedness Canada which includes a list of policing publications funded by the Government of Canada and a 2004 Public Report on Actions Under the National Act to Combat Organised Crime;[151]
- Cross-Border Crime and Security: Canada-US States Cooperation which provides information on how Canada and the US jointly target cross-border crime;
- Canada Customs Enforcement;
- Department of Justice;
- Auditor General of Canada which has done assessments of the Federal Government's drug control policies and enforcement. She has also reported on the federal government's strategy on money laundering and terrorist financing. She says that while the new measures are designed to catch up with international standards, they

[148] Public Safety and Emergency Preparedness Canada *"Working Together to Combat Organised Crime: A Public Report on Actions Under the National Agenda to Combat Organized Crime"* (2004).
[149] For more information, see the web cite www.rcmp.ca.
[150] CISC annual reports on organized crime in Canada are found at www.cisc.gc.ca.
[151] PSEPC's information on organized crime can be found at www.psepc-sppcc.gc.ca/policing/organized_crime/index_e.asp.

must be balanced with rights of privacy. Some critics have complained that Canada puts too much emphasis on privacy rights, making it harder to track criminals who try to launder their profits from crime for re-use.[152]

In 2000, the Proceeds of Crime (Money Laundering) Act established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). FINTRAC is a federal financial intelligence agency responsible for deterring and detecting money laundering.[153] Its mandate is to collect, analyze, assess and, where appropriate, disclose information to law enforcement and intelligence agencies to assist in the detection, prevention and deterrence of money laundering and the financing of terrorist activities. FINTRAC became operational in Fall of 2001. Under the Proceeds of Crime and Terrorist Financing Act, financial institutions including banks, insurance companies, security dealers and foreign exchange businesses are required to report large or suspicious transactions to FINTRAC. Since then, FINTRAC has disclosed almost $2 billion is suspected money laundering and terrorism financing. An annual report from FINTRAC is tabled in Parliament.[154] Despite the figures in these annual reports, the federal Auditor General reports that FINTARC rarely provides information leading to new investigations. In her report on the implementation of the National Initiative to Combat Money Laundering to Parliament, the Auditor General said information disclosure by FINTRAC has never led to a new prosecution. FINTRAC's effectiveness is hampered by strict information-sharing legislation and growing pains.

There are also integrated police force response units across the country. For example:

- IMETs – Integrated Market Enforcement Teams established in 2003 to detect, prosecute and deter serious capital markets fraud. These teams are made up of RCMP

[152] Summary of her report is found at www.yorku.ca/nathanson/
[153] For more information, see www.fintrac.gc.ca.
[154] Financial Transaction and Reports Analysis Centre of Canada. 2005 FINTRAC Annual Report 2005. Ottawa: FINTRAC.

investigators, forensic accountants and lawyers in key financial centers across the country. IMET in Vancouver was launched in December 2003.

- IPOCs are RCMP led Integrated Proceeds of Crime. The units include RCMP and other police services, Crown Counsel, customs officers, forensic accountants, tax investigators and asset managers. An internal review of the program (June 2003) say uncertain funding, poor training and weak direction have undermined the elite national units set up to zero in on illicit profits of organised crime and terrorist groups.
- IROC – each province has different integrated response to organised crime units. For example in Alberta, there is an Integrated Response to Organised Crime Unit (IROC) established in June 2003, made up of RCMP and Calgary and Edmonton police services with experience in major crime investigations, wiretaps and undercover work.[155] The focus of the unit is the criminal organization and all the criminal activities they are involved in, including drugs, market manipulation, money laundering, counterfeit credit cards, auto theft, shipment of contraband such as cigarettes, prostitution, extortion, weapons and illegal gaming. This unit is modeled after similar units in Toronto, BC and Quebec. The idea is that a special police unit backed up by forensic accountants and other experts can without worrying about police jurisdiction and administrative wrangling.

IBETS or Integrated Border Enforcement Teams, fulfill a key commitment of the 2001 Canada-US Smart Border Declaration.[156] The IBET is a multi-agency law enforcement team that emphasizes a harmonized approach to Canadian and US efforts to target cross-border criminal activity. Originally developed in 1996 as an innovative method to address cross-border crimes along international land and marine borders between BC and Washington State,

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[155] Nathanson Centre for the Study of Organized Crime and Corruption *"Organized Crime in Canada: A Quarterly Summary, January to March 2005"* found at www.yorku.ca/nathanson/CurrentEvents/Jan-March05.htm.
[156] Nathanson Centre for the Study of Organized Crime and Corruption *"Organized Crime in Canada: A Quarterly Summary, October to December 2003"* found at www.yorku.ca/nathanson/CurrentEvents/Oct-Dec03.htm.

the IBETs have disrupted smuggling rings, confiscated illegal drugs, weapons, liquor, tobacco, vehicles and made numerous arrests. IBETs have also intercepted criminal networks attempting to smuggle illegal migrants across the border. There are 6 core partner agencies involved with IBETs: RCMP, Canada Customs and Revenue Agency, Citizenship and Immigration Canada, US Customs and Border Patrol, US Immigration and Customs Enforcement and US Coast Guards. Additional partners include municipal, provincial and state law enforcement agencies.

Provincial and municipal police agencies also have specialized units. For example, the Greater Toronto Area Combined Forces Special Enforcement Unit is a special multi-agency enforcement task force dedicated to combating high-risk organised crime groups in the Greater Toronto area.[157]

There are also organizations like the Organised Crime Agency of British Columbia whose mandate is to facilitate the disruption and suppression of organised crime which affects British Columbians.[158] This agency became operational in February 2000.

VII. Conclusion

The title of this paper asks a question – is Canada meeting its obligations in defining organised crime offences as required as a State Party to the UN *Convention Against Transnational Organised Crime* and its two Protocols on trafficking of persons and smuggling of migrants. The simple answer is yes. Generally speaking the legislative framework ensures that state authorities can investigate and prosecute the offences of: (1) participation in a criminal organization; (2) laundering the proceeds of crime; (3) corruption;

[157] For more details see www.cfseu.org.
[158] The Organized Crime Agency of British Columbia *"One Year Operational Review"* (January 25, 2001) found at www.ocabc.org/publications/2000review1.html.

(4) obstruction of justice; (5) trafficking in persons; and (6) smuggling in migrants and smuggling related conduct. There have been a few constitutional challenges as to how broadly some of these offences have been defined in the Canadian Criminal Code. While some of the offence provisions have been upheld by provincial courts (such as section 467.11) and others have not (section 467.13), and others remain to be challenged (section 118 Immigration and Refugee Protection Act), it will take time before the Supreme Court of Canada has the opportunity to review the constitutionality of these provisions.

The UN Convention also calls on States Parties to take necessary measures to allow for special investigative techniques to tackle organised crime, as well as ensuring effective protection for witnesses and victims of these crimes. Over the past few years, Canada has introduced a number of reforms to the Criminal Code that revises investigatory measures to expand police powers of investigation (Bill C-95 and C-24). More recently, with Bill C-2, the structure which recognizes the needs of victims and witnesses and their protection in the criminal justice system has been reformed to ensure broader protection to all victims and witnesses.

Annex

I. Definition of Crimes under the UN Convention Against Transnational Organized Crime

Article 2 – use of terms

(a) "organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

(b) "serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least 4 years or a more serious penalty;

(c) "structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Article 5 – Criminalization of Participation in an organised criminal group

(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;

(ii) conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:

a. criminal activities of the organised criminal group;

b. other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. State Parties whose domestic law requires involvement of an organised criminal group for the purposes of the offences established in accordance with paragraph 1(a)(i) of this article shall ensure that their domestic laws cover all serious crimes involving organised criminal groups. Such State Party, as well as State Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offence established in accordance with paragraph 1(a)(i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 6 – Criminalization of the Laundering of Proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
(b) subject to the basic concepts of its legal system:
(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.
2. For purposes of implementing or applying paragraph 1 of this article:
(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 and the offences established in accordance with articles 5, 8 and 23. In the case of State Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such a list a comprehensive range of offences associated with organised criminal groups;
(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;
(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;
(e) If required by fundamental principles of domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;
(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7 – Measures to combat money laundering
1. Each State Party
(a) shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;
(b) shall, without prejudice to article 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national

centre for the collection, analysis and dissemination of information regarding potential money-laundering.
2. State Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and business report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.
3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, State Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money laundering.
4. State Parties shall endeavor to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.

Article 8 – criminalization of corruption
1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
(b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.
3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.
4. For the purpose of para 1 of this article and article 9 of this Convention “public official’ shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

Article 9 – measures against corruption
1. In addition to the measures set forth in article 8, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.
2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

Article 23 – criminalization of obstruction of justice
Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;
(b) the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of State Parties to have legislation that protects other categories of public officials.

II. Definition of Crimes under the Protocols

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

Article 3 – use of terms
(a) trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.
(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.

Article 5 – criminalization
1. Each State Party shall adopt legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offense:
(a) subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
(c) organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

Protocol Against the Smuggling of Migrants by Land, Sea and Air

Article 3 – use of terms
(a) "smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident

Article 5 – criminal liability of migrants
Migrants shall not become liable to criminal prosecutions under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol

Article 6 – criminalization
1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
(a) The smuggling of migrants;
(b) When committed for the purpose of enabling the smuggling of migrants:
(i) Producing a fraudulent travel or identity document;
(ii) Procuring, providing or possessing such a document;
(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
(b) Participating as an accomplice in an offence established in accordance with paragraph 1(a), (b)(i) or (c) of this article, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1(b)(ii) of this article;
(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.
3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1(a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2(b) and (c) of this article, circumstances:
(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or
(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.
4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

III. Relevant Provisions in Canada

Criminal Code

Definitions
s. 467.1(1) The following definitions apply in this Act.
“criminal organization” means a group, however organized, that
(a) is composed of three or more persons in or outside Canada; and
(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.
It does not include a group of persons that forms randomly for the immediate commission of a single offence.

“serious offence” means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.
(2) For the purpose of this section and s. 467.11, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.
(3) In this section and in ss. 467.11 to 467.13, committing an offence means being a party to it or counseling any person to be a party to it.
(4) The Governor in Council may make regulations prescribing offences that are included in the definition “serious offence” in subs (1).

Participation in Activities of Criminal Organization
s. 467.11 (1) Every person, who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 5 years.
(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that
a) the criminal organization actually facilitated or committed an indictable offence;
b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
d) the accused knew the identity of any persons who constitute the criminal organization.
(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused
a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
b) frequently associates with any of the persons who constitute the criminal organization;
c) receives any benefit from the criminal organization; or
d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

Commission of Offence for Criminal Organization
s. 467.12(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.
(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

Instructing Commission of Offence for Criminal Organization
S 467.13 (1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.
(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that:
a) an offence other than the offence under subs (1) was actually committed;
b) the accused instructed a particular person to commit an offence; or

c) the accused knew the identity of all the persons who constitute the criminal organization.

Laundering Proceeds of Crime
s. 462.31(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
(a) the commission in Canada of a designated offence; or
(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.
(2) Everyone who commits an offence under subsection (1)
(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
(b) is guilty of an offence punishable on summary conviction.
(3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under subsection (1) if the peace officer or person does any of the things mentioned in that subsection for the purposes of an investigation or otherwise in the execution of the peace officer's duties.

Intimidation of a Justice System Participant
s. 423.1 (1) No person shall, without lawful authority, engage in conduct referred to in subs (2) with the intent to provoke a state of fear in
(a) a group of persons or the general public in order to impede the administration of criminal justice;
(b) a justice system participant in order to impede him or her in the performance of his or her duties; or
(c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.
(2) The conduct referred to in subs(1) consists of
(a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;
(b) threatening to engage in conduct described in para (a) in Canada or elsewhere;
(c) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;
(d) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and
(e) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.
(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.

Order denying access to information used to obtain any warrant or production order
s 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or 487.013, or of granting an authorization to enter a dwelling-house under s 529 or an authorization under s 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the grounds that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subs (2) or the information might be used for an improper purpose; and
(b) the ground referred to in paragraph (a) outweighs in importance the access to the information.
(2) For the purposes of paragraph 1(a), an order may be made under subs (1) on the ground that the ends of justice would be subverted by the disclosure
(a) if disclosure of the information would
(i) compromise the identity of a confidential informant,
(ii) compromise the nature and extent of an ongoing investigation,
(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudge future investigations in which similar techniques would be used, or
(iv) prejudice the interests of an innocent person; and
(b) for any other sufficient reasons.
…..

Protection of Persons Administering and Enforcing the Law

s. 25.1(1) The following definitions apply in this section and sections 25.2 to 25.4.
"competent authority" means, with respect to a public officer or a senior official,
(a) in the case of a member of the RCMP, the Solicitor General of Canada, personally;
(b) in the case of a member of a police service constituted under the laws of a province, the Minister responsible for policing in the province, personally; and
(c) in the case of any other public officer or senior official, the Minister who has responsibility for the Act of Parliament that the officer or official has the power to enforce, personally.
"public officer" means a peace officer, or a public officer who has the power of a peace officer under an Act of Parliament.
"senior official" means a senior official who is responsible for law enforcement and who is designated under subs (5).
(2) It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and, to that end, to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.
(3) A competent authority may designate public officers for the purposes of this section and ss. 25.2 to 25.4.
(3.1) A competent authority referred to in paragraph (a) or (b) of the definition of that term in subs (1) may not designate any public officer under subs (3) unless there is a public authority composed of persons who are not peace officers that may review the public officer's conduct.
(3.2) The Governor in Council or the lieutenant governor in council of a province, as the case may be, may designate a person or body as a public authority for the purposes of subs (3.1) and that designation is conclusive evidence that the person or body is a public authority described in that subs.
(4) The competent authority shall make designations under subs (3) on the advice of a senior official and shall consider the nature of the duties performed by the public officer in relation to law enforcement generally, rather than in relation to any particular investigation or enforcement activity.
(5) A competent authority may designate senior officials for the purposes of this section and ss. 25.2 to 25.4.
(6) A senior official may designate a public officer for the purposes of this section and ss. 25.2 to 25.4 for a period of not more than 48 hours if the senior official is of the opinion that

(a) by reason of exigent circumstances, it is not feasible for the competent authority to designate a public officer under subs (3); and
(b) in the circumstances of the case, the public officer would be justified in committing an act or omission that would otherwise constitute an offence.
The senior official shall without delay notify the competent authority of the designation.
(7) A designation under subs (3) or (6) may be made subject to conditions, including conditions limiting
(a) the duration of the designation;
(b) the nature of the conduct in the investigation of which a public officer may be justified in committing, or directing another person to commit, acts or omissions that would otherwise constitute an offence; and
(c) the acts or omissions that would otherwise constitute an offence and that a public officer may be justified in committing or directing another person to commit.
(8) A public officer is justified in committing an act or omission – or in directing the commission of an act or omission under subs (10) – that would otherwise constitute an offence if the public officer
(a) is engaged in the investigation of an offence under, or the enforcement of, an Act of Parliament or in the investigation of criminal activity;
(b) is designated under subs (3) or (6); and
(c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties.
(9) No public officer is justified in committing an act or omission that would otherwise constitute an offence and that would be likely to result in loss of or serious damage to property, or in directing the commission of an act or omission under subs (10), unless, in addition to meeting the conditions set out in paragraphs (8) (a) to (c), he or she
(a) is personally authorized in writing to commit the act or omission – or directs its commission – by a senior official who believes on reasonable grounds that committing the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties; or
(b) believes on reasonable grounds that the grounds for obtaining an authorization under paragraph (a) exist but it is not feasible in the circumstances to obtain the authorization and that the act or omission is necessary to
(i) preserve the life or safety of any person,
(ii) prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer, or
(iii) prevent the imminent loss or destruction of evidence of an indictable offence.
(10) A person who commits an act or omission that would otherwise constitute an offence is justified in committing it if
(a) a public officer directs him or her to commit that act or omission and the person believes on reasonable grounds that the public officer has the authority to give that direction; and

(b) he or she believes on reasonable grounds that the commission of that act or omission is for the purpose of assisting the public officer in the public officer's law enforcement duties.
(11) Nothing in this section justifies
(a) the intentional or criminally negligent causing of death or bodily harm to another person;
(b) the willful attempt in any manner to obstruct, pervert or defeat the course of justice; or
(c) conduct that would violate the sexual integrity of an individual.
(12) Nothing in this section affects the protection, defenses and immunities of peace officers and other persons recognized under the law of Canada.
(13) Nothing in this section relieves a public officer of criminal liability for failing to comply with any other requirements that govern the collection of evidence.
(14) Nothing in this section justifies a public officer or a person acting at his or her direction in committing an act or omission – or a public officer in directing the commission of an act or omission – that constitutes an offence under a provision of Part I of the Controlled Drugs and Substances Act or the regulations made under it.

Sureties to Keep the Peace

s. 810.01(1) A person who fears on reasonable grounds that another person will commit an offence under s. 423.1 or a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge….
(3) The provincial court judge before whom the parties appear may, if satisfied by the evidence adduced that the information has reasonable grounds for the fear, order that the defendant enter into a recognizance to keep the peace and be of good behavior for any period that does not exceed 12 months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subs (5), that the provincial court judge considers desirable for preventing the commission of an offence referred to in subs (1).
(4) The... judge may commit the defendant to prison for a term not exceeding 12 months if the defendant fails or refuses to enter into the recognizance.
(5) Before making an order under subs (3), the…judge shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearms, cross-bow, prohibited weapon…
(5.2) Where the… judge does not add a condition described in subs (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Threats and retaliation against employees

s. 425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take disciplinary measures against, demote, terminate or otherwise adversely affect the employment of such an employee, or threatened to do so,
(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referral to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.
(2) Any one who contravenes subsection (1) is guilty of
(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
(b) an offence punishable on summary conviction.

Bill C-49 –Trafficking in Persons

s. 279.01(1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable
(a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offences;
or
(b) to imprisonment for a term of not more than 14 years in any other case.
(2) No consent to the activity that forms the subject-matter of a charge under subs (1) is valid.

s. 279.02 Every person who receives a financial or other material benefit, knowing that it results from the commission of an offence under subs 279.01(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

s. 279.03 Every person who, for the purpose of committing or facilitating an offence under subsection 279.01(1), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person's identity or immigration status is guilty of an indictable offence and liable to imprisonment for a term of not more than 5 years, whether or not the document is of Canadian origin or is authentic.

s. 279.04 For the purposes of sections 279.01 to 279.03, a person exploits another person if they
(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or
(b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

Immigration and Refugee Protection Act

s. 118(1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use of threat of force or coercion.
(2) For the purpose of subsection (1), "organize", with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harboring of those persons.

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable
(*a*) on conviction on indictment
(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or
(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and
(*b*) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.
(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.
(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

119. A person shall not disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether
(*a*) bodily harm or death occurred during the commission of the offence;
(*b*) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
(*c*) the commission of the offence was for profit, whether or not any profit was realized; and
(*d*) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.
(2) For the purposes of paragraph (1)(*b*), "criminal organization" means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

122. (1) No person shall, in order to contravene this Act,
(*a*) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;
(*b*) use such a document, including for the purpose of entering or remaining in Canada; or
(*c*) import, export or deal in such a document.
(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

123. (1) Every person who contravenes

(*a*) paragraph 122(1)(*a*) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and
(*b*) paragraph 122(1)(*b*) or (*c*) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.
(2) The court, in determining the penalty to be imposed, shall take into account whether
(*a*) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121(2); and
(*b*) the commission of the offence was for profit, whether or not any profit was realized.

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

131. Every person who knowingly induces, aids or abets or attempts to induce, aid or abet any person to contravene section 117, 118, 119, 122, 124 or 129, or who counsels a person to do so, commits an offence and is liable to the same penalty as that person.

133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(*a*) or section 127 of this Act or under section 57, paragraph 340(*c*) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

SECTION 4:

OTHER SUBJECTS

Undercover Police Activities, Police Immunity and Entrapment: International and Canadian Standards

Gerry Ferguson, Greg Allen

1. Introduction

Criminals have become increasingly sophisticated in their commission of certain crimes, and some crimes are by their very nature more difficult to detect, investigate and prosecute than other crimes. Police need to use a variety of investigative techniques to combat crime. One such technique is the use of undercover police officers or agents who engage in a variety of activities. In this paper, we will look at (1) types of undercover police activities, and (2) international and Canadian legal standards for the use and control of these activities, including the defence of entrapment and police immunity provisions.

By way of summary, there are only a few general provisions dealing with these topics in international instruments. In Canada, the law authorizes many forms of undercover police activities. If those activities involve police officers or police agents "committing a crime to catch a criminal", the officer or agent will be granted immunity for that crime provided his or her actions fall within the general immunity provisions in the *Criminal Code*, or immunity provisions in other specific statutes, such as the *Controlled Drug and Substances Act*.[1] However, if the police activities

[1] Statutes of Canada, 1996, ch. 19, as amended. In this paper we will not examine the powers of Canadian

go beyond the realm of what is authorized, the police officer or agent will receive no immunity from criminal liability. If the police activities constitute "entrapment", their conduct will be considered an "abuse of process" and Canadian courts will order that the prosecution of the accused be "stayed" (i.e. permanently stopped).

2. Types of Undercover Police Practices

Undercover police operations are carried out by either police officers or police agents. Police agents are citizens who have been recruited by the police to assist in police-controlled undercover activities. Undercover police operations serve at least two valuable purposes: (1) apprehension of persons who are committing or are inclined to commit criminal offences, and (2) deterrence of other individuals from engaging in criminal activity out of fear that they may get caught in an undercover police operation.[2]

Undercover police activities involve deception of some kind. A vast majority of undercover operations involve the buying or selling of illegal substances, illegal property or unlawful services. Undercover buying operations are often referred to as "stings". Undercover selling operations are often referred to as "reverse stings". Other undercover activities include baiting, infiltration and surveillance.

(a) Stings

In Canada, police engage in a wide variety of sting operations. A traditional sting involves undercover officers providing opportunities for suspects to sell illegal drugs or stolen property to them, and then arresting the suspect if he/she attempts to do so.[3] This is a well recognized and long-standing investigative technique which, as

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Intelligence Service officers to investigate terrorist plots and offences.

[2] B. Hay, "Sting Operations, Undercover Agents and Entrapment" (2005), 70 Missouri Law Review.

[3] P.M. Bolton, *Defending Drug Cases* (Scarborough: Carswell, 1999) at 93.

we will discuss below, does not usually constitute impermissible "entrapment". A drug sting can be either complicated and lengthy, or it can be as simple as walking up to an individual under suspicion and asking that person whether he or she has any drugs for sale.[4] The latter is also known as a "buy and bust" operation, where an undercover officer attempts to buy drugs from anyone who appears (in the opinion of the officer) to be the type of person who may be inclined to sell drugs.[5] Police often rely on untested informant tips[6] to identify individuals under suspicion, and then attempt to procure drugs or stolen property from these individuals.[7] In addition to drugs and stolen property, police can and do use stings to combat a number of other offences. For example, undercover police officers or agents may attempt to buy illicit arms or forged documents from criminals. Likewise, undercover officers or agents may attempt to buy illegal services from suspected criminals, including a request to purchase the suspect's services for an assault or a contract killing, or to purchase the suspect's services in regard to money laundering, corruption or other vice crimes. Police stings have been successful at finding and punishing sexual offenders who use the Internet to prey on vulnerable youth or to traffic in child pornography.[8]

Many stings involve private citizens who have been requested or coerced to act as police agents. For example, police hire under-aged persons to visit local businesses and attempt to purchase alcohol or cigarettes.[9] If the minor is successful

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[4] See *R. v. S.(J.)* (2001), 152 C.C.C. (2d) 317 (Ont. C.A.).
[5] As discussed in the Entrapment section below, some forms of buy and bust operations may cross over the line into impermissible entrapment if they constitute random and arbitrary "virtue testing". See *R. v. Barnes*, [1991] 1 S.C.R. 449.
[6] Many of these tips come from "Crime Stoppers", a well-publicized telephone number that the public can call to report information relating to criminal activity, or from criminals who are prepared to provide information to the police for money or in order to avoid prosecution or to gain leniency for their own crimes.
[7] See *R. v. B.(S.)* (2005), 196 C.C.C. (3d) 333 (Ont. C.J.).
[8] See H. Fraughton, "N.S. Man Arrested in Child Porn Sting", The Chronicle Herald, August 25, 2006.
[9] *R. v. Myers* (2000), 193 Sask. R. 289 (Q.B.); *R. v. Cho*, 2000 CarswellOnt 5234 (Ont. C.J.).

in procuring alcohol or cigarettes, the seller will be prosecuted for selling alcohol or tobacco to a minor. For more serious offences, police often hire individuals with a connection to the criminal activity in question to act as police agents.[10] The agent is occasionally a personal friend or business acquaintance of the accused.[11] These agents may be paid large sums of money in exchange for their assistance in the sting operation. In some cases, police agents have been released early from prison in order to aid in an undercover investigation.[12]

(b) Reverse Stings

In recent years, the tactic of a "reverse sting" (sometimes referred to as a controlled delivery or a controlled operation) has become more common.[13] In a reverse sting, police may set up a mock criminal organization or drug ring, and attempt to catch suspects in the act of purchasing, or importing illegal substances, rather than just selling such illegal substances. Reverse stings often involve large amounts of drugs or stolen goods and are therefore very valuable in putting police officers in contact with more senior persons in large criminal organizations.[14] This tactic was originally used solely in the realm of illegal drugs, but has expanded to include other offences such as handling and receiving stolen goods,[15] forged

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[10] See *R. v. Perfect* (2001), 190 N.S.R. (2d) 37 (Prov. Ct.); *R. v. Costain*, [1999] N.S.J. No. 433 (Prov. Ct.); *R. v. Vanderyt* (1995), 81 O.A.C. 83 (C.A.); *R. v. Kereluk*, [1992] S.J. No. 244 (Q.B.).

[11] See *Perfect*, note 10 above.; *Kereluk*, note 10 above; *R. v. Maxwell* (1990), 3 C.R. (4th) 31 (Ont. C.A.); *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Showman* (1988), 67 C.R. (3d) 61 (S.C.C.).

[12] The police agent in *Perfect* was released after serving just 23 months of a seven year prison sentence. He was paid $140,000 in fees to obtain information on his former criminal associates.

[13] S. Bronitt, "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe", 33 Common Law World Rev. 35 (2004) at 38. For examples of reverse stings, see *R. v. Bridges* (2005), 200 Man. R. (2d) 298 (Q.B.); *R. v. Schacher* (2003), 179 C.C.C. (3d) 561, 27 Alta. L.R. (4th) 67 (C.A.); *R. v. Shirose* and *Campbell*, [1999] 1 S.C.R. 565.

[14] *Shirose*, note 13 above at para. 15.

[15] See note 14 above.

documents, illegal arms, etc. The recent arrest of seventeen individuals in an alleged "homegrown" terrorist plot in Canada was the direct result of this type of sting.[16]

(c) Baiting

Another police activity is sometimes referred to as "baiting". In these operations, the police will leave an automobile or bicycle unattended in a high crime area, and then wait for a suspect to attempt to steal the bike or the car, or the contents of the car. In more sophisticated operations, the bait car will be equipped with a small, hidden video recorder, to provide evidence of the identity and any conversations of the thieves, and a GPS device to track the movement of the car, which may help to locate other persons involved in the dismantling, resale or export of the stolen vehicles. Another version of baiting is for the police to set up a fictitious child pornography site and then wait to see what suspects access that site.

(d) Infiltration

Police officers or police agents will often befriend a person or infiltrate a criminal organization in order to collect incriminating information in regard to previous offences, or planned offences by that person or that organization. The infiltration may be as simple as putting a hidden recording device on the agent who will then attempt to illicit a confession or other incriminating evidence from that suspect. On the other hand, some infiltration activities into organized crime are very sophisticated and are conducted over a long period of time.

One popular infiltration technique used in recent years is known as a "Mr. Big" operation. The police believe that a particular suspect has committed a major crime such as murder, robbery or sexual assault. However, the police lack sufficient

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[16] See "Muslim Went Undercover to Save Lives", The Hamilton Spectator, July 14, 2006.

evidence to make an arrest. In these circumstances, a "Mr. Big" operation is designed to get the suspect to confess to that crime. The suspect is befriended by an undercover police officer or agent, who poses as a member of a criminal organization.[17] The undercover officer or agent invites the suspect to join the criminal organization. The officer or agent convinces the suspect that the head of the organization, Mr. Big, has only one condition for entry, namely, that the suspect be totally honest about his or her involvement in previous crimes.[18] Once the suspect agrees to meet this requirement, he is introduced to Mr. Big and his incriminating admissions are surreptitiously videotaped and used against the suspect in subsequent proceedings. It has been suggested that the information obtained from these confessions has important "guarantees of reliability",[19] since the accused desperately wants to join the criminal organization and therefore has a compelling reason to be completely honest. On the other hand, some suspects may falsely claim to have been involved in some serious offences in order to try to impress "Mr. Big". However, where the reliability of the confession is corroborated by other independent evidence, the confession becomes a very valuable piece of evidence for the prosecution.

While the collection of incriminating statements and evidence by undercover officers or agents through infiltration is generally lawful, Canadian law treats infiltration differently when a suspect is in police custody. Such persons have a constitutional right to remain silent. Canadian law does not permit this right to be circumvented by the use of undercover officers or agents who pretend to be prison

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[17] *Bridges*, note 13 above. See also "Kelowna RCMP Used 'Mr. Big' Sting to Nab Murder Suspect", The Canadian Press, September 12, 2006.
[18] *Bridges*, note 13 above, at para. 5.
[19] *Bridges*, note 13 above, at para. 19.

inmates and who actively elicit a confession from an accused person in police custody.[20]

(e) Surveillance

Undercover or covert surveillance of suspected criminals may occur in a variety of ways, including actual visual surveillance, the use of electronic tracking devices, and electronic interception of private communications (i.e. eavesdropping) and audio and video recording of suspects' activities. While we will not be discussing these techniques in this paper, suffice it to say that these techniques are authorized in Canada provided the police obtain, in advance, a warrant from a judge for the tracking or electronic eavesdropping and recording.[21] In order to obtain such a warrant, the police must establish reasonable and probable grounds that evidence of a criminal offence is likely to be obtained from such tracking and surveillance activities.

3. International Norms

(a) Introduction

A number of international instruments recognize the need for undercover police operations, including controlled deliveries. However, the lawful scope and limits on those undercover police operations, including legislative immunity for police officers or agents who commit crimes as part of an undercover operation, are left to domestic law. The defence of entrapment is not specifically mentioned in these international instruments, although the defence of entrapment may be included

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[20] *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.). Such undercover deception violates an accused's right to remain silent while in police custody which is protected under s. 7 of the *Canadian Charter of Rights and Freedoms*. This right even applies where the detained accused has not advised the police that he does not wish to speak to the police: *R. v. Liew*, [1999] 3 S.C.R. 227, at para. 44. The meaning of "actively elicit" is further defined in *R. v. Broyles*, [1991] 3 S.C.R. 595.

[21] See Canadian *Criminal Code*, ss. 186, 487.01 and 492.01.

as an international norm under the "fair trial guarantees" set out in international instruments.

(b) Controlled Delivery and Other Undercover Police Activities

As part of the international war against drugs, the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* was promulgated in 1988. Article 11(1) of that *Convention* provides that, "if permitted by the basic principles of their respective domestic legal systems", State Parties "shall take the necessary measures to allow for appropriate use of controlled delivery at the international level" in order to identify and prosecute those involved in drug offences. Article 11(2) indicates that controlled delivery shall be made on a case-by-case basis. Article 11(3) indicates that illicit consignments may be intercepted and allowed to continue with the illicit drugs intact or removed or replaced in whole or in part.

Controlled deliveries involve the identification or interception in transit of contraband, such as illicit drugs, and then the delivery in whole or in part of that contraband, or a substitute substance, in order to identify the intended recipients or to monitor its subsequent distribution.[22] Controlled deliveries are a relatively mild form of undercover police activity, but may still involve police officers or agents as principals or accomplices in the offences of possession, transportation, storage, delivery or sale of the contraband. For that reason, domestic legislation is normally required to authorize police officers or agents to engage in such activities without incurring criminal liability.

More recent international conventions have expanded upon the above provisions. Article 20 of the *U.N. Convention Against Transnational Organized*

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[22] United Nations Office on Drugs and Crime, *Legislative Guides for Implementation of the U.N. Convention Against Transnational Organized Crime* at 183.

Crime and Article 50 of the *U.N. Convention Against Corruption* use almost identical language in providing for controlled delivery and for other special investigative techniques such as electronic surveillance and undercover operations.[23] For example, Articles 50(1) and 50(4) of the *U.N. Convention Against Corruption* state:

> 1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
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> 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Article 50(2) encourages State Parties to enter into bilateral or multilateral agreements for using such special investigative techniques at the international level. Article 50(3) provides that in the absence of such agreements decisions to use special investigative techniques at the international level shall be made on a case-by-case basis.

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[23] The *U.N. Convention Against Transnational Organized Crime* was adopted in 2000 and came into force in 2003. Its three protocols (Trafficking in Persons, Smuggling Migrants, and Illicit Manufacturing and Trafficking in Firearms) came into force in 2003, 2004 and 2005 respectively. Canada is a State Party to the *Convention* and the first two protocols. China has ratified the *Convention* but not signed the protocols on trafficking and smuggling. The *U.N. Convention Against Corruption* was adopted in 2003 and came into force in 2005. China has ratified the Convention. Canada has signed the *Convention* but is waiting to amend some domestic legislation before acceding to it. Both *Conventions* are available on the UNODC website: www.unodc.org. Canada has also ratified the *International Convention on Civil and Political Rights*, while China has signed it (in 1998), but not yet ratified it.

As noted above, Article 50(1) of the *Convention Against Corruption* (and Article 20(1) of the *Convention Against Transnational Organized Crime*) require each State Party to establish measures "that allow for the appropriate use by its competent authorities of controlled delivery." But this mandatory obligation for controlled delivery measures only applies "to the extent permitted by the basic principles of its domestic legal system". Secondly, these same Articles encourage, but do not require, each State Party to establish measures "where it deems appropriate" for the use of other special investigative techniques such as electronic surveillance and undercover operations. More importantly, if a State chooses to establish measures authorizing the use of undercover operations, these Articles provide no specific indication of the nature, extent or limits that should be placed on such undercover operations.

(c) Entrapment and Fair Trial Rights

Although international instruments do not refer to the defence of entrapment, it has been suggested that police entrapment violates an accused's fair trial rights. A number of international instruments guarantee accused persons the right to a fair trial. Primary amongst these guarantees is Article 14 of the *International Covenant on Civil and Political Rights*. Article 14 specifies a number of minimum requirements to guarantee a fair trial, including the presumption of innocence in Article 14(2) and the right in Article 14(3)(g) not to be compelled to testify against oneself or to confess guilt. However, the fair trial protections that are specifically listed in Article 14 are not exhaustive. Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides for very similar fair trial rights. The

European Court of Human Rights in the 1998 case of *Teixeira de Castro v Portugal*[24] held that fair trial rights include limits on the methods used to obtain evidence. In *Teixeira de Castro*, the European Court held that the police had actively incited the accused into committing a drug offence and that the use of such techniques to obtain evidence to convict an accused violates an accused's right to a fair trial and must not be permitted. This case is more fully summarized by Bronitt and McSherry in the following words:

> (T)wo Portuguese undercover police officers pressured a cannabis user to introduce his supplier to them. Unable to locate his normal supplier the cannabis user identified the accused as a potential supplier of heroin. The informer arranged a meeting with the accused during which the undercover police indicated that they wished to buy 20 grams of heroin. The accused procured the heroin and was arrested and subsequently convicted of a drug offence. Having exhausted domestic remedies, the accused appealed to the European Court alleging that he had been deprived of a fair trial guaranteed by Art. 6 of the *European Convention on Human Rights* (ECHR).
>
> The court held (at para 34) that the guarantee of fairness under international human rights law is not limited to the trial, but underpins the proceedings as a whole including "the way in which evidence was taken". In its view, police incitement posed a clear threat to the right to fair administration of justice (at para 36):
>
> > The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organized crime undoubtedly requires that appropriate measure be taken, the right to a fair administration of justice nevertheless holds such a prominent place… that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Art 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most

[24] European Court of Human Rights, June 9, 1998, *Reports of Judgments and Decisions* 1998-IV. This case is cited in S. Bronitt and B. McSherry, *Principles of Criminal Law* (Australia: Law Book Co. 2005) at 846.

complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.

The right to a fair trial under the ECHR is breached where law enforcement officials do not confine themselves to investigating criminal activity in a passive manner, but actively engage in incitement. On these facts, the police had actively instigated the offence and there was no evidence that the accused was predisposed to commit the offence. Indeed, the accused had to obtain the drug from a third party and was found in possession of no more drugs than were being solicited by the police. The investigative techniques caused unfairness in the administration of justice because the police officers had acted on their own initiative without judicial supervision or good reasons to suspect that the accused was a drug trafficker: at para 39. The test developed by the European Court has been incorporated, with some modification, into the common law approach to entrapment by the House of Lords in *R v Looseley* [2001] 4 All ER 897; A. Ashworth, "Re-Drawing the Boundaries of Entrapment" [2002] Crim LR 161; S Bronitt, "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33(1) *Common Law World Review* 35.

4. Police Immunity in Canada

(a) Introduction

Immunity from criminal liability for police officers or agents who commit offences as part of an undercover criminal investigation or operation is a relatively recent development. The traditional view in Canada and other common law countries has been that all citizens, including the police, must obey the law. It is a fundamental principle of the rule of law that there is one law for all; that those in positions of power (such as Presidents, Prime Ministers, Cabinet Ministers and senior government officials) must obey the law like all other citizens. Immunity for police officers or government officials exists only where the law specifically exempts those persons for reasons of necessity or overriding public policy concerns. Canadian law on police immunity has gone through three stages. The common law had very limited

exemptions. In 1997, those exemptions were extended by statute to the commission of drug offences committed as part of an undercover police operation. In 2002, the *Criminal Code* was amended to create immunity for police officers who commit a broad range of other offences. These three stages will be examined in this section of the paper.

(b) Traditional Common Law Approach

The common law has traditionally taken a strict approach to police powers. In short, the police have no authority or immunity to interfere with a citizen's liberty or property, or to do something that would otherwise constitute a crime, unless the police have been given an *express* power to do so in a statute or by a well-established common law principle. There is one limited exception to this rule, which is articulated in the 1963 English Court of Appeal case of *R. v. Waterfield*.[25] This exception is now commonly referred to as the "ancillary police powers doctrine."[26] Even if the police do not have an explicit statutory or common law power to do something that would otherwise violate the law, they may have an implicit power to do so as an ancillary power to their general duty to investigate crime.[27] In other words, *Waterfield* suggests that the police may be able to do something that is not expressly authorized and is otherwise unlawful if that conduct falls within the scope of their general police duties and is not an unjustifiable use of power associated with that duty.[28]

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[25] *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.).
[26] See *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) and M.S. Gobet, "Bill C-24's Police Immunity Provisions: Parliament's Unnecessary Legislative Response to Police Illegality in Undercover Operations", 9 Canadian Criminal Law Review 35 (2004) at 48.
[27] *Waterfield*, note 25 above at 661.
[28] In *Simpson*, note 26 above, at 499, the Court noted that in Canada "the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to

For example, in *R. v. Dedman* (1985),[29] a majority of the Supreme Court of Canada held that the police could randomly stop motor vehicles to check for impaired drivers even though there was no law specifically authorizing random stops in such cases. But even this decision was controversial. The dissenting judges adhered to a more traditional view that the general duties of police officers to uphold the law, including motor vehicle laws, did not extend to a common law authority to stop motor vehicles randomly with no reasonable suspicion of a motor vehicle violation.[30] The dissenting judges in *Dedman* stated: "It has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the State, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law…."[31] Although the ancillary police powers doctrine has been used on a few occasions in Canada,[32] it has never been used to authorize the police to commit crimes as part of an undercover police investigation.

In the late 1970s, the Canadian government began to examine whether or not Parliament should amend the Canadian *Criminal Code* to include a broad police immunity provision. This question was addressed by the McDonald Commission which produced three reports between 1979 and 1981. In its second report, the Commission stated that Parliament must stay committed to the rule of law. The Commission argued that providing police officers with immunity from criminal liability threatened the fundamental concepts of legality and legal equality upon

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the public good, the liberty interfered with, and the nature and extent of the interference."

[29] (1985), 20 C.C.C. (3d) 97 (S.C.C.)

[30] See note 29 above.

[31] See note 29 above.

[32] See most recently the creation of a new common law police power of investigative detention in *R. v. Simpson*, note 26 above, and *R. v. Mann*, 2004 SCC 52. See also P. Healy, "Investigative Detention in Canada", 2005 *Criminal Law Review* 98.

which the rule of law is based. Specifically, the Commission recommended that "premeditated criminal offences by security intelligence undercover operatives must not be permitted under any circumstances."[33] To this end, the Commission's only recommendation relating to police immunity was a recommendation that federal and provincial legislation be amended to facilitate the procurement of false documents such as a driver's license and birth certificate for undercover officers.[34]

The case of *R. v. Shirose and Campbell*[35] is a good illustration of the strictness of the traditional common law approach to police immunity. The police were engaged in a reverse sting operation in 1991 whereby they posed as large-scale hashish dealers and sold 50 kilograms of cannabis resin to purchasers from a large drug trafficking organization.[36] However, the Canadian drug statute at the time, *The Narcotic Control Act*, did not authorize police officers to sell drugs to suspected drug dealers. At their trial, the accused argued that the police acted illegally and therefore a stay of proceedings should be entered. While the trial judge and Ontario Court of Appeal rejected the claim for a stay of proceedings, the Supreme Court of Canada held that the police had acted unlawfully and sent the matter back to the trial judge to consider whether a stay of proceedings should be granted in light of the special circumstances in this case.[37] In a unanimous judgment, the Supreme Court made important observations on the interaction between the judiciary and the legislature in

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[33] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report – Volume 1, Freedom and Security Under the Law*, (Minister of Supply and Services Canada: August, 1981 at 542).
[34] Gobet, note 26 above, at 40.
[35] *Shirose*, note 13 above.
[36] *Shirose*, note 13 above, at para. 4.
[37] The test for a stay of proceedings is whether the conduct of police officers "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention": *Shirose*, note 13 above, at para. 1, quoting *R. v. Power*, [1994] 1 S.C.R. 601 at 615. The special issue in *Shirose* was whether or not the police acted in a good faith belief that their conduct was not illegal based upon advice that they received from lawyers in the Department of Justice.

the area of police immunity. The Supreme Court also took judicial notice of continuing public concern about the drug trade and the difficulties of successfully employing traditional police tactics against large and sophisticated criminal organizations.[38] Nevertheless, the Supreme Court held that the police action in question ran afoul of the parameters of acceptable police conduct set down by Parliament at that time. The Supreme Court stated:

> Parliament has made it clear in s.37 of the *Royal Canadian Mounted Police Act*, that the RCMP must act "in accordance with the law". Parliament has made it clear that illegality by the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available….[39]

(c) Immunity Protection Under the *Controlled Drugs and Substances Act*

While the *Shirose and Campbell* case was working its way through the court process, Parliament decided to authorize undercover police officers, in defined circumstances, to commit drug offences without incurring criminal liability. This Parliamentary decision was made despite the strong recommendations 15 years earlier in the MacDonald Commission that Parliament should not authorize police officers to commit criminal offences as part of an undercover operation, even in cases of terrorist investigations. In 1996, Parliament enacted a new drug statute, the

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[38] *Shirose*, note 13 above, at para. 44.

[39] *Shirose*, note 13 above, at para. 39. Justice Binnie cited the immunity provisions contained in the *Controlled Drugs and Substances Act* (discussed in the next section) as an example of the proper approach to legally authorizing police officers to engage in what would otherwise be criminal conduct. Interestingly Justice Binnie further stated (at para. 41) that a general "law enforcement justification" would run counter to the fundamental constitutional principle of legal equality. Arguably, this is what happened with the 2002 *Criminal Code* immunity provisions (discussed below). It can be inferred from Justice Binnie's analysis that targeted exemptions from criminal liability are consistent with constitutional principles, but open-ended or general grants of police immunity would violate the rule of law. G.C.N. Webber, "Legal Lawlessness and the Rule of Law: A Critique of Section 25.1 of the Criminal Code", 31 Queen's Law Journal. 121 (2005-2006) at 126.

Controlled Drugs and Substances Act[40] which came into effect in 1997. Section 52(2) of this *Act* authorizes the "Governor in Council" (i.e. the Government Cabinet) to enact regulations for carrying out the provisions of the *Act* including regulations setting out the terms and conditions for exempting designated police officers from criminal liability for committing offences under this *Act*.

The *Controlled Drugs and Substances Act (Police Enforcement) Regulations*[41] were enacted in 1997. The *Regulations* provide police officers with immunity from offences under section 5 (trafficking and possession for the purposes of trafficking), section 6 (importing, exporting and possession for the purposes of importing or exporting), section 7 (production of banned drugs and substances), and section 4(2) (double-doctoring)[42] of the *Controlled Drugs and Substances Act*. The *Regulations* also exempt police officers from the offences of conspiracy to commit, being accessory after the fact, or counselling any of the above offences. In order to receive protection under the immunity provisions in the *Regulations*, an officer must be an active member of the police force, and must be acting in the course of a member's responsibilities for the purposes of a particular investigation.[43] The *Regulations* also provide immunity to non-police officers who are acting under the direction and control of a police officer engaged in a legitimate drug investigation.

(d) The 2002 *Criminal Code* Immunity Provisions

(i) Substance and Form

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[40] Statutes of Canada, 1996, c. 19.
[41] *Controlled Drugs and Substances Act (Police Enforcement) Regulations*, Statutory Orders and Regulations of Canada, 1997, number 234.
[42] Double-doctoring is the obtaining of prescription drugs from more than one doctor without disclosing the existence of the first doctor to the second doctor.
[43] *Police Enforcement Regulations*, note 41 above, at ss. 3(a), 3(b), 5.1(a), 5.1(b), 6(a), 6(b), 7.1(a), 7.1(b).

In 2001, Parliament amended the *Criminal Code* to add sections 25.1 to 25.4.[44] These provisions came into force on February 1, 2002. These provisions authorize and define the limits of state-sanctioned criminal activity used to achieve the goals of law enforcement. In many ways, section 25.1 is a response to Justice Binnie's request in *Shirose and Campbell* that Parliament define the nature and scope of police immunity, as well as the circumstances in which it is available. Whether the new provisions are too wide and sweeping, or violate provisions of the Canadian *Charter of Rights and Freedoms,* has not yet been considered by Canadian courts. The underlying principle behind this new legislation is set out in section 25.1(2):

> It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and, to that end, to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.

Under section 25.1, designations are made by the appropriate "competent authority" (i.e. the Minister in charge of policing),[45] acting on the advice of a senior official. Upon making a designation, the competent authority must consider the nature of the duties performed by the officer in relation to law enforcement generally, rather than in relation to any specific investigation.[46] This is a markedly different approach than the police immunity provisions contained in the *Controlled Drugs and Substances Act (Police Enforcement) Regulations,* which authorize police to commit certain infractions within the context of a specific investigation.

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[44] Statutes of Canada, 2001, c. 32.
[45] The phrase "competent authority" is defined exhaustively in s. 25.1(1) to mean the Minister of Public Safety and Emergency Preparedness, the Minister responsible for policing in the province in question, or (in the case of an Act of Parliament) the Minister responsible for the Act of Parliament that the officer or official has the power to enforce.
[46] *Criminal Code* at s.25.1(4).

Section 25.1 provides for civilian oversight of the actions of designated public officers.[47] A competent authority may not designate any public officer unless there is a public authority in place that may review the public officer's conduct.[48] This public authority may not have any members who are peace officers.[49] The Governor in Council or the lieutenant governor in council of a province may designate a person or a body as the public authority for the purposes of civilian oversight.[50]

There is a provision within section 25.1 for emergency designations, which are put in place for not more than 48 hours. A senior official[51] may make an emergency designation if he or she is of the opinion that:

i) by reason of exigent circumstances, it is not feasible for the competent authority to designate a public officer; and

ii) in the circumstances of the case, the public officer would be justified in committing an act or omission that would otherwise constitute an offence.[52]

If a senior official does make an emergency designation under this section, he or she must inform the competent authority without delay.

Designations under section 25.1 can be restricted or made subject to conditions. Section 25.1(7) outlines a non-exhaustive list of available conditions that can be imposed on a designation. These conditions include possible restrictions on the duration of the designation, restrictions on the nature of the conduct in the

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[47] Public officer is defined in s. 25.1(1) as a peace officer (i.e. a police officer) or a public officer who has the powers of a peace officer under an Act of Parliament.
[48] *Criminal Code* at s. 25.1(3.1).
[49] *Criminal Code* at s. 25.1(3.1).
[50] *Criminal Code* at s. 25.1(3.2).
[51] By s. 25.1(5) of the *Criminal Code*, a competent authority may designate senior officials for the purposes of ss. 25.1 to 25.4.
[52] *Criminal Code* at s. 25.1(6).

investigation, and restrictions on the scope of specific acts or omissions that a public officer is justified in committing pursuant to the designation.[53] The availability of restrictions and conditions allow the competent authority to tailor the scope of any particular designation to the circumstances of the investigation in question.

The extent of the justification afforded to public officers under section 25.1 is outlined in section 25.1(8). A public officer is justified in committing an act or omission that would otherwise constitute an offence if three conditions are met. The officer must be engaged in the investigation of general criminal activity, or in the investigation of an offence under an Act of Parliament. The officer must be properly designated under the designation procedure outlined by section 25.1. Finally, the officer must believe on reasonable grounds that the commission of the act or omission is reasonable and proportional in the circumstances, when compared to the nature of the offence or criminal activity being investigated. In arriving at this reasonable belief, the officer must consider the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out his or her law enforcement duties.[54] This section ensures that all offences committed by public officers pursuant to section 25.1 are reasonable and proportional in the circumstances of the investigation.

For acts or omissions that are likely to result in loss or serious damage to property, there are further requirements in addition to those listed above. The officer must have specific authorization from a senior official who reasonably believes that the act or omission in question is reasonable and proportional to the nature of the criminal activity under investigation.[55] If the officer does not obtain this

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[53] *Criminal Code* at s.25.1(7).
[54] *Criminal Code* at s.25.1(8).
[55] *Criminal Code* at s. 25.1(9).

authorization, he or she must have a reasonable belief that the grounds for obtaining this authorization exist, but it is not feasible to obtain the authorization. Furthermore, the officer must believe that the act or omission is necessary to:

i) preserve the life or safety of any person;

ii) prevent the disclosure of the identity of a public officer, agent, or informant acting in an undercover capacity; or

iii) prevent the imminent loss or destruction of evidence of an indictable offence.[56]

If the officer believes that the act or omission is necessary for at least one of these purposes, he or she may proceed without direct authorization from a senior officer. It should be noted that, to date, no officers have made use of this provision and committed acts or omissions that are likely to result in loss or serious damage to property in the absence of direct authorization from a senior officer.[57]

There are a number of exceptions to the justification available to public officers under section 25.1. These exceptions are listed in sections 25.1(11) to (14). The immunity available under section 25.1 does not extend to intentional or criminally negligent causing of death or grievous bodily harm to anyone, wilful attempts to obstruct, pervert or defeat the course of justice, or conduct that would violate anyone's sexual integrity.[58] The provisions of section 25.1 do not affect the protection, defences and immunities already available to peace officers and other persons under the law of Canada.[59] The immunity does not protect public officers

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[56] *Criminal Code.*
[57] See Annual Reports on the Law Enforcement Justification Provisions Pursuant to s. 25.3 of the *Criminal Code*, from Solicitor General (2002-2003), and from Public Safety and Emergency Preparedness Canada (2003-2004 and 2004-2005).
[58] *Criminal Code* at s. 25.1(11).
[59] *Criminal Code* at s. 25.1(12).

from criminal liability that arises from a failure to comply with existing requirements that govern the collection of evidence.[60] Finally, offences under the *Controlled Drugs and Substances Act* and its associated regulations (discussed above) are excluded from the ambit of section 25.1 because they are already governed by the immunity provisions of the *Controlled Drugs and Substances Act*.[61]

(ii) Use of Section 25.1

The use of s. 25.1 can be tracked through annual reports from Public Safety and Emergency Preparedness Canada. Section 25.3(1) of the *Criminal Code* requires every competent authority to produce an annual report detailing the number of authorizations made pursuant to section 25.1 and the circumstances surrounding these authorizations.[62] This report must disclosure the following information:

i) the number of times a senior official made emergency designations;
ii) the number of times a senior official authorized a public official to commit an act or omission that would otherwise constitute an offence and was likely to result in loss of or serious damage to property;
iii) the number of times a public officer proceeded without such authorization from a senior official;
iv) the nature of the conduct being investigated in these instances;
v) the types of justified acts or omissions that were committed in these instances.[63]

Disclosure of any information that would compromise or hinder an ongoing investigation, compromise the identity of an officer acting covertly, endanger the life or safety of a person, prejudice legal proceedings or otherwise be contrary to the public interest is expressly excluded from the report.[64]

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[60] *Criminal Code* at s. 25.1(13).
[61] *Criminal Code* at s. 25.1(14).
[62] *Criminal Code* at s. 25.3(1).
[63] Webber, note 39 above, at 129.
[64] *Criminal Code* at s. 25.4(2).

Since the enactment of section 25.1, three annual reports have been produced by the competent federal authority in charge of authorizations.[65] These three annual reports reveal that authorizations pursuant to section 25.1 are only used on rare occasions. Over the three years of reporting, twenty four authorizations were made directing individuals to commit an act or omission that would otherwise constitute an offence. These authorizations were made within the context of numerous different investigations, and justified officers to commit acts or omissions that would normally constitute offences under such statutory authorities as the *Criminal Code*, the *Immigration and Refugee Protection Act*,[66] the *Customs Act*[67] and the *Excise Act*.[68] None of these authorizations were made to allow public officers to commit offences that were likely to result in loss or serious damage to property. Furthermore, as mentioned above, no officers committed acts or omissions likely to cause loss or serious damage to property without a senior officer's authorization during these three years.

During the same time period, two temporary public officer designations were made by senior officials.[69] These temporary designations both related to an investigation into alleged offences of assault, aggravated assault, theft, obstruction and mischief. These temporary designations justified acts or omissions that otherwise constituted offences under the *Radiocommunications Act*[70] and the *Radiocommunications Regulations*.[71]

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[65] The competent federal authority was originally the Solicitor General of Canada, and has now changed to the Ministry of Public Safety and Emergency Preparedness. See the three Annual Reports in note 57.
[66] *Immigration and Refugee Protection Act*, 2001, Statutes of Canada, c. 27.
[67] *Customs Act*, Revised Statutes of Canada 1985, c.1 (2nd Supp.).
[68] *Excise Act*, Revised Statutes of Canada 1985, c. E-14.
[69] See Annual Report on the Law Enforcement Justification Provisions Pursuant to s. 25.3 of the *Criminal Code*, Solicitor General of Canada, 2002.
[70] *Radiocommunications Act*, Revised Statutes of Canada, 1985, c. R-2, s. 4.
[71] *Radiocommunications Regulations*, Statutory Orders and Regulations of Canada, 1996, number 484, ss. 44, 46,

(iii) Critiques of Section 25.1

The passing of broad police immunity provisions in section 25.1 was controversial, and has been subject to criticism in academic circles. Criticism of section 25.1 can be grouped into two main categories. First, some argue that section 25.1 was unnecessary, and the issues surrounding police illegality and immunity were properly addressed by existing mechanisms. These scholars argue that through the common law, statutory immunities in the *Controlled Drugs and Substances Act* and the use of certain investigative techniques, the issues and problems associated with police immunity can be properly addressed without section 25.1.[72] Second, some scholars have critiqued section 25.1 on the basis that it is inconsistent with the rule of law, noting that broad statutory immunities for police officers violate the concepts of legality and legal equality, which are of fundamental importance to the rule of law.[73] The rule of law is a foundational and organizing principle of the Canadian Constitution,[74] which gives this particular critique a constitutional dimension. This critique arises largely from Justice Binnie's statement in *Shirose* that a general police immunity provision would run counter to constitutional principles. It is still unclear whether or not section 25.1 will completely survive a constitutional challenge if and when such a challenge is brought in the Supreme Court of Canada .

5. Entrapment

(a) Introduction

Entrapment is not a rigid legal concept with one precise definition. The definition of entrapment and the remedies for entrapment can vary from country to

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[72] Gobet, note 26 above, at 35.
[73] Webber, note 39 above, at 121.
[74] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 240.

country. There are two main models for the defence of entrapment. The model which is chosen will affect the test for entrapment, the remedy and other procedural matters. Although police officers are justified in committing specified offences in the circumstances set out in section 25.1 of the *Criminal Code* and under the *Controlled Drugs and Substances Act Regulations*, the police can only do so in a way that does not constitute entrapment. Police immunity and entrapment are two separate concepts. Police immunity provisions do not deprive the accused of the right to rely on entrapment as a defence.

(b) Two Models of the Entrapment Defence

The first model treats entrapment as a substantive law defence which entitles an accused person to an acquittal. Under the first model, an accused who has been "induced" by the State to commit an offence is considered not blameworthy for committing that offence and is therefore acquitted. The second model treats entrapment as an abuse of process (i.e. an unacceptable form of police conduct) rather than an issue of the accused's culpability. In order to protect the integrity of the administration of justice from the taint of improper police conduct, Courts either stay the prosecution of persons who have been entrapped or exclude any evidence obtained by the entrapment. The first model is followed in the United States and the second model is followed in Canada, England,[75] Australia[76] and under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[77]

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[75] A. Ashworth, "Re-drawing the Boundaries of Entrapment", [2002] Criminal Law Review 161, discussing the House of Lords decision in *R. v. Looseley*, [2001] All England Reports 897.
[76] See Bronitt, note 13 above, and Bronitt and McSherry, note 24 above.
[77] See *Teixeira de Castro v. Portugal*, discussed at note 24 above.

(i) Entrapment as a Substantive Law Defence

The predominant approach to entrapment in the United States has been to treat it as a substantive law defence.[78] When police officials encourage or induce a person to commit a crime in the United States, the test for entrapment is mainly a subjective test: "Would the accused have committed the offence without such inducement?" The emphasis in this subjective test is whether or not the accused was predisposed (i.e. "ready and willing") to commit such crimes without police inducement. If the accused did have such a predisposition, then the claim of entrapment fails. However, if the accused had no predisposition to commit such an offence and only did so because of police inducements, then the accused is considered to be lacking in criminal culpability and is acquitted. Like other substantive defences, once some evidence of police entrapment is introduced at trial, it is up to the prosecutor to disprove entrapment beyond a reasonable doubt. And if the accused is tried by a jury, the existence or non-existence of entrapment is a question of fact for the jury to decide.[79]

(ii) Entrapment as an Abuse of Process

Entrapment is now treated as an abuse of process rather than a substantive law defence in Canada, England, Australia and under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. In the 1970s and 1980s in

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[78] The defence of entrapment in the United States is particularly complicated, as it is not grounded in the values of the American Constitution, and individual states are free to follow whatever approach they want. In contrast to Canadian jurisprudence, the majority of the U.S. Supreme Court has favoured a subjective approach to entrapment. The inquiry does not focus on whether a reasonable person would have been induced to commit a criminal act, but whether this particular accused was in fact induced. *Sherman v. United States*, 356 U.S. 369 (1958) at 373; *Sorrells v. United States*, 287 U.S. 435 (1932) at 451; S. Sharpe, "Covert Policing: A Comparative View" (1996) 25 Anglo-Am. L. Rev. 163 at 175. The U.S. Supreme Court has refused invitations to give the defence of entrapment a constitutional dimension. See *United States v. Russell*, 411 U.S. 423 (1973) at 431.

[79] See Hay, note 2 above; Sharpe, note 78 above.

Canada, it was not clear whether entrapment was to be treated as a substantive defence or as an issue of abuse of process.[80] However, in 1988, in the case of *R. v. Mack*,[81] the Supreme Court of Canada rejected entrapment as a substantive law defence and accepted entrapment as an abuse of process. The Supreme Court was of the opinion that the substantive law approach was fundamentally flawed and was inconsistent with the proper rationale for the defence -- protection of the integrity of the criminal justice system.

(c) Entrapment Defence in Canada

In *Mack*, the accused was charged with the unlawful possession of a narcotic for the purposes of trafficking. He agreed to purchase several thousand dollars worth of cocaine from a criminal associate who was acting as an undercover agent for the police. He applied for a stay of proceedings on the basis of entrapment. This application was rejected at trial and by the British Columbia Court of Appeal.[82] However, the Supreme Court of Canada held that the accused was entrapped and that a stay of proceedings should be ordered. The Supreme Court held that the Canadian defence of entrapment is based on the inherent jurisdiction of the court to prevent an abuse of its own process.[83] The rationale behind the defence of entrapment is to prevent police and prosecutors from using the court system to obtain a conviction based upon entrapment. In other words, the entrapment defence is designed to safeguard the purity of the administration of justice.[84] The Supreme Court stated that

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[80] *R. v. Amato*, [1982] 2 S.C.R. 418.
[81] [1988] 2 S.C.R. 903; (1988), 67 C.R. (3d) 1 (S.C.C.).
[82] *R. v. Mack* (1985), 49 C.R. (3d) 169 (B.C.C.A.).
[83] *Mack*, note 81 above, at para. 83; Don Stuart, *Canadian Criminal Law* (Carswell: Scarborough, 2001) at 583.
[84] *Mack*, note 81 above, at para. 81; Stuart, note 83 above, at 583.

the Court's sense of justice would be offended "by the spectacle of an accused being convicted of an offence which is the work of the state."[85]

In *Mack*, the Supreme Court held that there are two situations in which entrapment will exist:

> (a) the police authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or without acting in the course of a *bona fide* inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity to commit an offence and actually induce the commission of an offence.[86]

The first category is "random virtue testing" and the second category is "actively inducing" an accused to commit an offence. These two categories are independent of one another. Entrapment can be established on the basis of either.

(i) Entrapment by Random Virtue Testing

In *R. v. Barnes*,[87] the Supreme Court of Canada looked at entrapment in the context of "random virtue testing". Police were conducting a "buy and bust" operation in a pedestrian mall which was well known for drug-related activity. The police were approaching individuals who appeared to the police officers to fit the mold of persons who sell drugs. At trial, the undercover officer stated: "I look for males hanging around, dressed scruffy and in jeans, wearing a jean jacket or leather jacket, runners or black boots, that tend to look at people a lot."[88] At the request of the undercover police officer, the accused sold the officer a small amount of cannabis

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[85] *Mack*, note 81 above, at para. 81.
[86] *Mack*, note 81 above, at para. 130.
[87] [1991] 1 S.C.R. 449.
[88] *Barnes*, note 87 above, at para. 4.

resin. At trial, the accused applied for a stay of proceedings on the basis of entrapment. The accused argued that the police operation amounted to "random virtue testing". The trial judge agreed that the police tactics were "random virtue testing" and concluded that such behaviour was unacceptable according to the test in *Mack*. However, on appeal, the Supreme Court of Canada disagreed.

The Supreme Court did agree with the trial judge that "the appearance factors" listed by the undercover officer for selecting which persons to approach were not sufficient to give rise to a reasonable suspicion of criminal activity. Thus, approaching people on the street and asking them if they wanted to buy illegal drugs, without any reasonable suspicion that they were drug users, would normally constitute random virtue testing and would therefore constitute entrapment. The Supreme Court in *Mack* explained the rationale for including random virtue testing as entrapment in the following words:

> The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis.[89]

However, a majority of the Supreme Court held that there is an exception to the basic rule that the police may only present an opportunity to commit a crime to an individual who arouses a reasonable suspicion that he/she is already engaged in the particular criminal activity. This exception arises when the police undertake a *bona fide* investigation directed at a particular area where criminal activity is reasonably suspected to occur.[90] The majority of the Supreme Court of Canada stated that

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[89] See *Mack*, note 81 above, at para. 133.
[90] *Barnes*, note 87 above, at para. 23.

"[w]hen such a location is defined with sufficient precision, the police may present *any* person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry."[91] Since the police investigation in *Barnes* was restricted to approaching persons on "a well-known street for drug dealing", the majority of the Supreme Court held that the police conduct was not entrapment.

(ii) Entrapment by Active Inducement

If the police have a reasonable suspicion that a person is already engaged in criminal activity, or the police are otherwise engaged in a *bona fide* inquiry as described above, undercover police officers can provide the suspect with opportunities to commit such crimes. However there is a line which they cannot cross. That line is described as actively inducing the commission of an offence. If they do that, their conduct will constitute entrapment. Drawing the line between "opportunity" and "inducement" is not always easy. In examining whether an individual has been actively induced, a court must determine whether an average person in the position of the accused (i.e., a person with both strengths and weaknesses) would have been induced into committing the crime.[92] The Supreme Court in *Mack* set out a non-exhaustive list of factors that may be considered in determining whether police conduct goes beyond mere opportunities to buy or sell drugs and instead constitutes an inducement. These factors are:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission

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[91] *Barnes*, note 87 above, (emphasis in original)
[92] *Mack*, note 81 above, at para. 120.

- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime
- the persistence and number of attempts made by the police before the accused agreed to committing the offence
- the type of inducement used by the police, including deceit, fraud, trickery or reward;
- the timing of the police conduct, in particular whether the police have investigated the offence or became involved in ongoing criminal activity
- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship
- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction
- the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
- the existence of any threats, implied or express, made to the accused by the police or their agents
- whether the police conduct is directed at undermining other constitutional values[93]

As already noted, the test for entrapment is an objective examination of police conduct. The issue is not whether this accused was, in fact, induced to commit a criminal act by the actions of police officers or agents. Instead, the inquiry is focused

[93] *Mack*, note 81 above, at para. 133.

on whether a reasonable person in the position of the accused would have been induced to commit a criminal act. This objective focus reflects the fact that the entrapment defence in Canada is based on respect for the integrity of the justice system rather than the culpability of the accused in a given case. The test for "inducement" is a fairly stringent one -- Canadian courts will not easily or readily conclude that police action constitutes inducements sufficient to warrant a defence of entrapment.

(iii) Procedural Issues Concerning the Entrapment Defence

Since entrapment is not an exculpatory defence, but rather a matter of abuse of process, the Supreme Court in *Mack* held that there are a number of procedural differences between entrapment and other exculpatory defences such as self-defence, necessity or duress. First, entrapment results in a stay of proceedings, rather than a verdict of not guilty. Second, the determination of whether the accused was entrapped is a matter for the trial judge, not for a jury.[94] This is because entrapment is solely a question of law, rather than a question of fact. Third, entrapment will only be considered by the judge if the prosecutor has proven each essential element of the offence charged beyond a reasonable doubt.[95] In jury trials, the guilt or innocence of the accused for the offence charged will be determined without reference to evidence that is only relevant to the issue of entrapment.[96] If the jury finds that the accused did commit the offence charged, the trial judge will then decide if the offence was committed by reason of entrapment. If it was, the judge will "stay" the conviction. A guilty verdict to the offence charged does not bar the accused from applying for a stay

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[94] *Mack*, note 81 above, at para. 137.
[95] *Mack*, note 81 above, at para. 137.
[96] *Mack*, note 81 above, at para. 55.

of proceedings on the basis of entrapment.[97] Fourth, if entrapment is raised, the onus is on the accused to prove that he or she was entrapped on the balance of probabilities. This is consistent with the burden of proof required to establish other abuses of process (for example, failure to provide a trial within a reasonable time, police destruction of evidence, breaking of plea bargains etc.).

(iv) Examples of the Application of the Law of Entrapment in Canada

There are several hundred reported cases in Canada where courts have considered the defence of entrapment. A few of these cases are summarized below.

In *R. v. B.(S.)*,[98] police received an anonymous tip that the accused (a minor) had 9 handguns in his possession and was selling stolen subway transit passes at a local school. An undercover detective phoned the accused, identified himself as a drug dealer, and asked to purchase a handgun from the accused. They spoke numerous times over a period of weeks to set up the sale. In most of the phone conversations, the accused would contact the officer, rather than vice versa. At trial, the accused's application for a stay of proceedings on the basis of entrapment was rejected. The court's decision is interesting for a number of reasons. First, the court rejected the accused's argument that he had a "particular vulnerability" to entrapment simply because he was a youth.[99] Second, the court affirmed existing jurisprudence that police are entitled to rely on untested informants as the basis for the first step in making a *bona fide* inquiry.[100] Finally, the number of phone calls from the accused to

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[97] *R. v. Meuckon* (1990), 78 C.R. (3d) 196 (B.C.C.A.); *R. v. Maxwell* (1990), 3 C.R. (4th) 31 (Ont. C.A.).
[98] *R. v. B.(S.)* (2005), 196 C.C.C. (3d) 333 (Ont. C.J.).
[99] *B.(S.)*, note 98 above, at para. 25.
[100] *B.(S.)*, note 98 above, at para. 35; *R. v. Bogle*, [1996] O.J. No. 1768 (Ont. Gen. Div.) at para. 17.

the undercover officer (rather than the other way around) indicate that the accused was not induced to commit an offence he would not otherwise have done.[101]

In *R. v. Schacher*,[102] police received information that the accused was purchasing large amounts of ephedrine, which is used in the production of methamphetamine. The undercover officer assigned to the case determined that befriending the accused would not work, so he took proactive steps to sell the accused ephedrine at a bargain price. The officer also offered to sell the accused heroin and cocaine. Prior to doing so, the officer received a legal opinion discussing the legality of the operation. The accused sought to have this legal opinion disclosed at trial on the basis of entrapment. He argued that if material in the possession of the Crown could aid the accused in establishing either route to entrapment, it is relevant and therefore must be disclosed. The report was relevant because it played a role in the police officer's decision on how to proceed with the operation, and it discussed the legality of the operation. In rejecting the accused's application for disclosure, the Alberta Court of Appeal noted that the officer's conduct was permitted by the *Controlled Drugs and Substances Act (Police Enforcement) Regulations*.[103] As such, the actions of the officer were legal, and an opinion on the legality of the operation was irrelevant.

In *R. v. Perfect*,[104] police engaged an individual serving a seven year sentence to act as a police agent and obtain information against various targeted individuals. The agent (Lee) received $140,000 in fees, and was released after serving just 23 months of his seven year sentence. Lee was a former criminal associate of the

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[101] *B.(S.)*, note 98 above, at para. 48.
[102] *R. v. Schacher* (2003), 179 C.C.C. (3d) 561, 27 Alta. L.R. (4th) 67 (C.A.).
[103] *Police Enforcement Regulations*, note 41 above.
[104] *R. v. Perfect* (2001), 190 N.S.R. (2d) 37 (Prov. Ct.).

accused, and contacted him in an attempt to purchase narcotics soon after being engaged by police. The accused sold narcotics to Lee and was arrested. At trial, the accused argued that police had exploited the friendship between himself and Lee,[105] in a matter that could "offend the value society places on maintaining the dignity and privacy of interpersonal relationships."[106] The court rejected this argument, noting that the relationship in question was not one of particular value to society. In refusing the application for a stay of proceedings, Ross Prov. J. wrote:

> Exploitation is possible if the failure to procure drugs for Mr. Lee would have serious consequences for their relationship. However, if this is so, then the friendship has its underpinnings in the drug culture, and such is not a relationship nor behaviour which society wishes to encourage and protect.[107]

In *R. v. S.(J.),*[108] the accused and friends attended a rock concert. The accused brought with him $30 worth of marijuana that he intended to smoke with his friends. Two undercover police officers, dressed as concert attendees themselves, approached the accused and asked to purchase marijuana. The accused sold the officers $10 of marijuana, and was subsequently arrested. The trial judge refused to grant a stay of proceedings on the basis of entrapment, but this was reversed by the Ontario Court of Appeal, which granted a stay. The Court of Appeal found that the officers had gone beyond providing an opportunity to the accused, and had induced the commission of the offence. In particular, the court found that the officers' conduct had exploited the accused's desire to be friendly to fellow concert attendees.

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[105] *Perfect*, note 104 above, at para. 29.
[106] *Mack*, note 81 above, at para. 122.
[107] *Perfect*, note 104 above, at para. 37.
[108] *R. v. S.(J.)* (2001), 152 C.C.C. (2d) 317 (Ont. C.A.).

6. Conclusion

Police forces in Canada and other Western states have enhanced their investigative sophistication to keep pace with increasingly sophisticated criminals. This has led to an escalation in the frequency and scope of undercover policing operations. The necessity and legitimacy of undercover policing operations are now recognized by international instruments such as the *U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, the *U.N. Convention Against Transnational Organized Crime* and the *U.N. Convention Against Corruption*. The Canadian government recently introduced s.25.1 of the *Criminal Code*, which broadens the power of police officers to commit certain offences in the context of undercover investigations. However, the protections in s.25.1 do not apply to police officers who exceed the authorization granted to them in s.25.1, or who have entrapped an accused. Entrapment is still an important and often used defence under Canadian law, which protects individuals from being convicted of an offence which is the work of the State. It has also been recently suggested that the entrapment defence engages fair trial rights, which are protected by many domestic constitutions and international agreements such as the *International Covenant on Civil and Political Rights*.

Canada's Anti-Terrorism Act:
An Exception To The Right To Silence

Nicola Mahaffy*[*]

> "Canada's anti-terrorism bill was an extraordinary piece of legislation……drafted under extraordinary circumstances, …the subject of an extraordinary debate within and without Parliament… complex, cross jurisdictional, and unprecedented… tabled in the wake of one of the most calamitous events in North American history… . [D]rafted and studied under considerable time constraints and political pressures … it proposed changes that touched on some of our deepest societal values and most profound philosophical ideas – individual human rights, racial and religious inclusion, national security, and liberty of the person." [1]

The aim of this paper is to discuss the right to silence as it is enshrined in Canada's Charter of Rights and Freedoms, to trace its history and purposes, and to define those instances where the right to silence does not apply. With the passing of anti-terrorism laws in 2001, individuals suspected of acts of terrorism may be required to answer

* Nicola Mahaffy is a Prosecutor in the Office of the Attorney General of British Columbia and regularly prosecutes cases where a key issue is admissibility of evidence. She is qualified as a Barrister and Solicitor is British Columbia and as a Solicitor in England and Wales. She has worked internationally for the United Nations in the International Prosecutor's Office in Kosovo.

[1] Mazer, A., "Debating Canada's Anti-Terrorism Legislation: What have we learned?" ISYP Conference, Halifax, Nova Scotia, July 15 – 17, 2003

questions put to them by the authorities. Does this exception contravene the Charter and what are its implications?

The Right to Silence

The right to silence is enshrined in Canadian common law and applies at two stages of the legal process: a) upon arrest or detention and prior to trial, a person cannot be coerced to respond to interrogation, and b) during trial, a person is free to testify or not[2]. In Canadian law, the accused is presumed innocent until proven otherwise and the burden of proof is on the prosecution. The accused is not required to prove innocence. On the contrary, he or she has the right to remain silent while the prosecution attempts to establish guilt beyond a reasonable doubt. Should the prosecution fail to provide evidence of culpability, the accused is acquitted. This places responsibility for proving guilt on the police and on the State.

> *"It's much easier to pick somebody up and conscript them and require them to answer questions."*[3]

Individuals may have many reasons (other than guilt) for choosing to remain silent during investigation and during trial. These reasons include: wanting to protect family or friends, feeling too confused to speak or too anxious, embarrassed or angry. Some innocent people, for reasons such as these, are not capable of offering a cogent explanation of their behaviour when interrogated by the police. In fact, it is often a

[2] *R v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.)
[3] Magnet, J. "Evidence: Standing Committee On Justice and Human Rights". Canadian Parliament Hansard, October 31, 2001

wise decision on their part to wait until the allegations against them have been specified and they have had the benefit of considered legal advice[4]. Inferences of guilt should never be drawn from silence. Few people can be persuasive on the witness stand when they are on the defensive and are often persuaded by counsel to remain silent.

The right to silence is not specifically enumerated in The Canadian Charter of Rights and Freedoms (the "Charter") but it is recognized as part of the section 7 rights: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Charter rights can be overridden only if justified by the magnitude of necessity[5]. What rights does the Charter confer on the accused?

A suspect may be legally detained against his will for questioning. On arrest or detention, however, section 10 of the Charter is triggered, which requires the police to inform the suspect of the reason for his detention or arrest, and to inform the suspect of their right to retain and instruct counsel. It is recognized that detention infringes not only on freedom of movement but that it can also infringe on mental freedom[6]. The detainee is psychologically at the mercy of investigators who may potentially take advantage of his/her situation[7]. Detained suspects may think that they

[4] O'Reilly, Gregory W., "England limits the right to silence and moves towards an inquisitorial system of justice", Journal of Criminal Law & Criminology, Chicago: Fall 1994. Vol 85, Iss 2; pg 402

[5] *R v. Oakes*, [1986] 1 S.C.R. 103

[6] See *R v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.) at 504 where the Court held that detention occurs either through the physical constraint of a suspect or, "when a peace officer or agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel"[6].

[7] *R v. Hebert*, Supra 1 at 37, 38

face legal liability if they refuse to comply with police directives; they may believe compliance is mandatory[8]. That is why the Charter addresses the rights of the accused.

Once informed of the right to retain and instruct counsel, if a suspect does not request counsel, the police are free to question him. If at any time, however, the suspect asks to talk to a lawyer, the police must provide a "reasonable opportunity" for him to do so, and must delay questioning until the suspect has had this opportunity[9]. If a statement is obtained in violation of the suspect's rights, the courts can, and usually do, exclude these statements from evidence pursuant to section 24(2) of the Charter[10].

"Self-incriminating" evidence gathered through the use of electronic surveillance is viewed somewhat differently than statements made to police before suspects have been informed of their right to counsel. The admissibility of covertly obtained evidence is governed by the law of search and seizure11 and will not be discussed in this paper.

History of Anti-Terrorism Act

> *"England has reversed three-hundred years of progress towards the accusatorial system, with its reliance on independent witnesses and extrinsic evidence, and reverted back to the inquisitorial system, with its reliance on obtaining suspects' confessions through interrogation."* [12]

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[8] Penney, S., "What's Wrong With Self-Incrimination?: The Wayward Path of Self-Incrimination Law In The Post-Charter Era". Faculty of Law University of New Brunswick, January 2003

[9] Penny, S, Supra at 5; See also *R. v. Trembly*, [1987] 2 S.C.R. 435, where the Court held that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so. If the accused is not diligent in this matter, the duties on the police to refrain from questioning the suspect are suspended.

[10] *R v. Elshaw*, [1991] 3 S.C.R. 24

[11] Penney, S., Supra

[12] O'Reilly, Gregory W, Supra

In 1988, in response to terrorist attacks, the British government adopted legislation (Northern Ireland Order) that included a measure to limit the right to silence of suspects and defendants, both with respect to their interrogation by the police and with respect to their silence in court during trial. The government's argument for the proposed deviation from a well-established principle of non self-incrimination under duress was the following: a large network of individuals allegedly involved in terrorist activities in Northern Ireland were critically hampering investigations by not co-operating with police. The new measures were widely supported by the public on the assumption that they would target an easily definable group. Not only were they to be limited in their geographic application to Northern Ireland but, even within this territorial boundary, they were to be aimed only at "terrorists". In the end, however, the Northern Ireland Order's jurisdiction and the restrictions it set on the right to silence were not limited to terrorists, but were expanded and interpreted as relating to every criminal suspect or defendant in Northern Ireland.[13]

Six years later, the British government extended the precedent to the rest of the United Kingdom. In 1994, Parliament approved the Criminal Justice and Public Order Act (CJPOA), reproducing the provisions of the 1988 Northern Ireland Order. These new limitations on the right to silence were incorporated into criminal legislation and were expanded to apply to every suspected offender, not only those accused of terrorist activities.[14]

This law allows the trier of fact to consider as evidence of guilt, both a suspect's failure to answer police questions during interrogation and a defendant's

[13] Gross, O., "Chaos and Rules: Should Responses to Violent Crime Always be Constitutional?", 112 Yale L.J. 1011

[14] Gross, O., Ibid

refusal to testify during trial. The law curtails the right to silence by allowing judges and jurors to draw adverse inferences from a suspect's silence.[15]

The British law states that the evidence may "call for an explanation". Judges and jurors may draw adverse inferences from (1) failure to bring up relevant material at interrogation, (2) failure to testify in court, (3) failure to explain suspicious objects, substances, or marks found on their persons or clothing or in the place where they were arrested, and (4) failure to explain presence at a suspicious place or time. Judges and prosecutors may invite the jury to make any inference which to them appears proper – including the "common sense" inference that there is no explanation for the evidence produced against the accused and that the accused is, therefore, guilty.

Imposing a burden on suspects to present their explanation, and sanctioning them for failure to do so, is similar, some argue, to the confession "pro confesso" by which silent suspects were once treated "as if" they had confessed. Supporters of the new law claimed that the innocent have nothing to hide, and that only the guilty would refuse to answer[16].

It is interesting to note that the United States has long permitted the compulsion of witnesses prior to the laying of a charge through their grand jury system[17].

Canada's Anti-Terrorism Act

Canada's Anti-Terrorism Act (the "Act") is nowhere near as broad in scope as the British Legislation. Adverse inferences may not be drawn from a failure of the

[15] O'Reilly, Gregory W., Supra
[16] O'Reilly, Gregory W, Supra at
[17] Millard, J, "Investigative Hearings under the anti-terrorism Act" (2002), 60(1) U.T. Fac. L. Rev. 79 – 87

accused to testify or provide an explanation to the police. The impact of the Act on the right to silence is, by comparison, negligible.

The Act, passed in 2001, establishes a new practice in Canada, an investigative hearing in the course of a terrorism investigation.

Investigative hearings allow judges to compel individuals to appear before courts as material witnesses and to prosecute them should they refuse to do so. Do such hearings compromise a person's constitutionally protected right to silence?

Under the Act, a police officer may, for the purposes of investigating a terrorism offence, apply through the office of the Attorney General for an order to gather information. A judge may issue such an order if satisfied that a terrorism offence has or will be committed and that the person named is in possession of material information about the offence or about individuals connected to the offence. The order requires the person named to attend at a place fixed by the judge and be examined, sometimes under oath (sometimes not). The person may also be ordered to bring and produce specific evidence in their possession. If a person disobeys such an order, a warrant may be issued for their arrest.

At investigative hearings, persons being interrogated are entitled to counsel. They may not, however, refuse to answer questions on the usual grounds that the answers may incriminate them. In investigative hearings, they have lost their right to silence. The investigative hearing provisions of the Act (which expires after five years unless renewed by Parliament) are set out in section 83.28 of the Criminal Code of Canada:

> s. 83.28 (8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or

> producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.
> (9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.
> (10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but
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> > a. No answer given or thing produces under subsection (8) shall be used or received against the person in any criminal proceedings against that person other than a prosecution under section 132 or 135; and
> > b. No evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person other than a prosecution under section 132 or 136.
>
> (11) A person has the right to retain and instruct counsel at any stage of the proceedings.

In other words, no answer a person gives, nor any material evidence they produce can be used as evidence against them in a subsequent criminal proceeding (other than for perjury).

This is consistent with Canadian jurisprudence on quasi-criminal matters where the Supreme Court of Canada has held that compelled testimony in the context of investigations under the Fisheries Act, Competition Act and securities legislation, does not violate the right to silence (these cases will be discussed later in this paper). Further, the Act is also consistent with section 13 of the Charter which prevents the use of compelled testimony in any related investigation other than for perjury[18].

[18] *Canada Evidence Act*, s. 5

It has been argued that the Act contradicts a number of Charter rights, including the right to silence[19]. In a recent decision of the Supreme Court of Canada[20], however, the Court held that the investigative hearing does not violate the right to silence, nor does it infringe on the principle against self-incrimination. In upholding the legislation, the Court made a number of important findings.

1. In situations of testimonial compulsion, the jurisprudence of the Court has developed such that three procedural safeguards have emerged: use immunity, derivative use immunity, and constitutional exemption.
2. The use and derivative use immunity provided for in s.83.28(10) is equal to or greater than the immunity provided for in the jurisprudence. The protection afforded in s.83.28(10) for derivative use immunity is absolute. "Discoverable" derivative evidence is not so protected in the jurisprudence.
3. Testimonial compulsion would be precluded where the predominant purpose of the hearing is the determination of penal liability (constitutional compulsion)[21].
4. While the legislation states that use and derivative use immunity will apply in the context of "criminal proceedings", the legislation does not address protection in the context of other proceedings such as extradition hearings and deportation hearings. In order to meet the

[19] "Bite of Canada's new terrorist bill," Globe & Mail (Toronto, Canada) Nov 21, 2001 p 1
[20] *Application under s.83.28 of the Criminal Code (Re)*, [2004] S.C.J. No. 40 (QL)
[21] *Application under s.83.28 of the Criminal Code (R*e), Ibid at 20

> requirements of s.7 of the Charter (right to silence and right against self-incrimination), the procedural safeguards provided for in s.83.28 must be extended to include extraction and deportation hearings[22].

Because s.83.28 provides for use and derivative use immunity, the Court found that there was no violation of the right to silence and the right against self-incrimination. The legislation was consequently found to be valid as it did not violate section 7 of the *Charter* (right to silence and right against self incrimination).

Rationale for Act

The rationale for the Act is well summed up by Irwin Cotler, now the Canadian Minister of Justice. He stated in 2002 that, "The Act's novel procedural and investigative mechanisms are intended to pre-empt and prevent transnational terrorist activity rather than just to punish after the fact."[23]

Alexander Budlovsky, a lawyer representing the B.C. government in the Air India case, told the Supreme Court of Canada: "Charges might have been laid more quickly after the deadly Air India bombing in 1985 if the federal government's anti-terrorism legislation of 2001 had been in place sooner." He argued that the investigation into the explosion aboard Air India, which killed 329 people, would have gone "much, much faster" if police had been able to force people with possible knowledge to answer questions at closed hearings before a judge[24].

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[22] *Application under s.83.28 of the Criminal Code (Re)*, Ibid at 20 and 21
[23] Cotler, I. "Two Cheers for Anti-Terror Laws", Ottawa Citizen, September 14, 2002
[24] Greenaway, N, "Secret hearings ''would have sped Air India case", CanWest News Service, December 12, 2003

The Government's position on the Act's relative lack of impact on the right to silence is summarized by Stephen Owen, Minister of Public Works and Government Services, who wrote in 2002 that, "Investigative hearings are no different than public inquiries, for example when Ontario Premier Mike Harris was required to give evidence at the Walkerton inquiry."[25]

The History of the Right to Silence

> "The right to remain silent in the face of one's accusers is – or, at least, was – a cherished principle of English criminal law. It developed as an antidote to the medieval concept that the truth could be tortured from suspects. As it became understood that people under torture are more likely to say what their tormentors want to hear than to tell the truth, and that individuals need protection from the overwhelming power of the state, ideas such as the privilege against self-incrimination took hold. The right not to be forced to become a witness against oneself inherently implies the right to say nothing at all, as does the burden of proof that lies on the prosecution to prove its case beyond reasonable doubt.[26]"

The right to silence may go back even earlier, to the ancient Hebrews. St. Paul's Epistle to the Hebrews: "I don't tell you to display [your sin] before the public like a decoration, nor to accuse yourself in front of others."[27]. In Britain in the middle ages, Chapter 28 of *Magna Carta* provided that: "No Bailiff from henceforth shall put any man to his open Law, nor to an Oath, upon his own bare faying, without faithful Witnesses brought in for the fame."[28]

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[25] Owen, S. "Anti-Terrorism Laws", http://www.stephenowen.ca/, Jan 3, 2002
[26] Winter, J., "Creeping injustice: The effect of emergency laws on civil liberties in Britain", The Month. London: Sep/Oct 1998, Vol. 31, Iss 9/10; pg. 360
[27] McCormick on Evidence, (John W. Strong ed., Practitioner Treatise Series, 4th ed. 1992) at 421 n.2
[28] "The Statutes At Large, From Magna Carta To The End of The Eleventh Parliament of Great Britain, Anno

By contrast, the inquisitorial system in England in the 1600s administered by ecclesiastical courts and by the Crown's High Commission and Star Chamber, relied on forcing suspects to confess. The proceedings did not require accusers and relied heavily on secret informers. Suspects who refused to admit their crimes were tortured or imprisoned[29].

The evolution of the right to silence in Great Britain was linked to the struggle between rival systems of criminal procedure - the accusatorial common law courts and the inquisitorial ecclesiastical courts. These two systems were divided on the key issue of whether the accused should or should not testify as to his/her own guilt. The common law courts relied primarily upon independent evidence. Confession, on the other hand, was essential to the inquisitorial system of the ecclesiastical courts. Inquisitorial procedures did not limit a judge from imprisoning and interrogating any person of "infamia"– infamy or bad reputation. Infamy attached to a person by somebody's say so (fama), by general suspicion (clamosa insinuatio), or by the judge's personal suspicion. In practice, judges did not even require "infamy". They were not deterred by lack of evidence against a suspect since they had confidence that the inquisitorial process would, in the end, "extract the evidence from the mouth of the accused".[30]

The proceedings began with the accused taking an oath "de veritate dicenda" (to answer all questions truthfully). The accused was not told of the charges against him, who his accusers were, nor what, if any, was the evidence against him. This increased the chance that any statement could be twisted into something incriminating which would then serve as a "true confession" of guilt. If the accused's statement did not

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1761", 10 (1762)
[29] O'Reilly, Gregory W., Supra at 2
[30] O'Reilly, Ibid

convict him of a crime, it could still subject him to punishment for perjury. If suspects refused to take the oath, they were considered guilty "pro confesso" (as if they had confessed) or they were imprisoned for contempt."[31]

But, in English common law, the right to silence gradually developed until, in1898, the accused was guaranteed the right to remain silent at trial if he so desired. Interestingly, shortly before that date, the accused was not permitted to testify at all. The accused's testimony was considered unreliable because it came from an interested party. When Parliament finally granted the accused the right to testify, it ruled against pressuring the accused to do so if he chose otherwise.

Current Rationale for the Right to Silence

> "The freedom of the individual, as we have known it since the beginning of this nation, will be at an end if the time ever comes when the state can confront a suspected person with conviction if he confesses his guilt, with perjury if he denies it, and with contempt if he remains silent." [32]

The right to silence serves two important purposes: "to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice"[33]. The State maintains the power to intrude on an individual's physical freedom by detaining him in accordance with the law. The Charter, and, in particular the Right to Silence, however, affords the detained person protection against the unfair use by the State of its power; "the detained person, although placed in the

[31] O'Reilly, Ibid
[32] Gervais, F., "Evidence: Standing Committee On Justice And Human Rights" Canadian Parliament Hansard, October 31, 2001
[33] *R v. Hebert*, Supra at 37

superior power of the state upon detention, retains the right to choose whether or not he will make a statement to the police"[34]. The balancing of these two purposes is critical; if too much emphasis is placed on either purpose, the administration of justice may be brought into disrepute[35].

Exceptions to the Right to Silence

I. Exceptions to the Right to Silence in quasi-criminal cases:

There are many examples of Federal and Provincial Laws in Canada which require citizens to make statements to persons in authority. These include motor vehicle legislation, the Fisheries Act, the Competition Act, and securities legislation. Whether or not these provisions violate the right to silence depends very much on the facts of the case, and the particular purpose of the legislation in question.

In British Columbia, a person involved in a motor vehicle accident is required, when requested, to answer questions put by the police pertaining to the accident; and further, a driver is always required by law to report an accident where the accident has caused death or personal injury or property damage beyond a certain monetary value. The admissibility of these statements in subsequent criminal trials, however, was challenged on the basis that their admission would violate the right to silence. The issue was considered by the Supreme Court of Canada [36] [37] who held that statements made under compulsion of the Motor Vehicle Act are inadmissible in criminal proceedings against the declarant because their admission violates the

[34] *R v. Hebert,* Supra at 37
[35] *R v. Hebert,* Supra at 38
[36]
[37] *R. White*, [1999] 2 S.C.R. 417

principle against self incrimination. The Court also made a number of important statements with respect to the scope of the right to silence:

> "That the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise…The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue"[38]

And at page 446:

> "Under the MVA [Motor Vehicle Act], the prospect of unreliable confessions is very real. In particular, accident reports under the Act are frequently given directly to a police officer, i.e., to a person in authority whose authority and physical presence might cause the driver to produce a statement in circumstances where he or she is not truly willing to speak…The driver who reasonably believes that he or she has a statutory duty to provide an accident report under the MVA will likely experience a significant "fear of prejudice" if he or she does not speak. At the same time, there may be a strong incentive to provide a false statement, given the serious consequences which the driver may feel will flow from telling the truth, even if the truth does not in fact support a finding that a criminal offence was committed. It is reasonable to expect that this fear of prejudice and incentive to lie would be dissipated if the driver could be confident that the contents of the accident report could never be used to incriminate him or her in criminal proceedings".

The reliability of the confession was therefore an important consideration for the court in finding that the compelled statement, in this case, would be inadmissible in a criminal trial.

[38] *R v. White*, Ibid at 439

Not all statements, however, given to persons in authority pursuant to quasi-criminal legislation will be inadmissible at trial. Under the Fisheries Act, for example, there is a requirement to submit "hail reports" and fishing logs, stating the size and location of a catch. On the basis of such reports, a person was charged with over fishing. The Supreme Court of Canada ruled that this was not a violation of the right against self-incrimination since the information provided by the accused was given in a nonadversarial setting[39]. Participation in the fishery was voluntary and licensees were presumed to know and accept the regulations and conditions. There was no coerced confession; there was little likelihood of the information being false; there were no abusive tactics on the part of the state.

Another example of a case where compelled statements did not violate the accused's right to silence is the case of *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3. In that case, the British Colombia Securities Commission, during a securities investigation, issued summonses to the company's officers compelling their attendance for examination and requiring them to produce all company information and records in their possession. The officers claimed a right against self incrimination and a right to remain silent. The ruling on appeal was that no violation had occurred since the predominant purpose of the summons was not to incriminate the officers but, rather, to obtain relevant evidence for the securities proceedings. The goal of obtaining evidence to regulate the securities industry was considered to be of substantial public importance. The officers were judged to be compellable as witnesses, although they were entitled to claim derivative use immunity in relation to possible subsequent proceedings in so far as they might be personally implicated by their own evidence.

[39] *R v. Fitzpatick*, [1995] 4 S.C.R. 154

Likewise, compelled testimony under the Combines Investigation Act (now the Competition Act), does not violate the right to silence[40]. Persons can be compelled to testify under the Act; an extension of the Right to Silence to cover these situations would seriously complicate the ability to investigate activities regulated by the Act, and would represent a dangerous and unnecessary imbalance between the rights of the individual and the community's legitimate interest in have anti-competitive practices investigated. While this compelled evidence may not be used at subsequent criminal hearings, no such protection is given to evidence derived from that testimony; the admissibility of this derivative evidence at subsequent criminal trials is a matter for the trial judge to decide upon, and where the admission of the evidence would affect the fairness of the trial, the trial judge has the power to exclude it.

Finally, there is no right to silence in a civil action where the action is commenced by an individual as opposed to someone acting on behalf of the State. As a result, a defendant in a sexual assault trial, for example, may not be granted a stay of civil proceedings until the completion of the criminal trial, because "the anticipated infringement of the defendants' right to silence said to result from the discovery process in the civil action was not a consequence of an action or an investigatory procedure initiated by the state. The proceedings were initiated and controlled by the plaintiff and had a purpose separate and apart from the criminal process."[41]

2. Exceptions to the Right to Silence in Criminal Cases:

[40] *Thomson Newspapers Ltd. et al. v. Director of Investigation & Research et al.* (1990), 54 C.C.C. (3d) 417
[41] *C.B. v. Caughell* (1995), 22 O.R. (3d) 741 (Ont. Ct. Gen. Div.)

The purpose of the right to silence is not to prevent individuals from incriminating themselves but, rather, to limit the use of the coercive power of the state to force suspects to incriminate themselves[42]. As a result, the right to silence is not an absolute right[43].

The Court in *R v. Hebert*, the leading Canadian authority on the right to silence, set out four specific limits on that right[44]:

> 1. The right to silence does not imply freedom from questioning. The police may question an accused even in the absence of counsel once the accused has been informed of his rights and has had an opportunity to consult counsel.
> 2. The right to silence applies only after detention. When an individual is not under control of the state, there is no necessity to protect him from the power of the state.
> 3. While coerced self-incriminatory statements are not admissible in court, voluntary statements, even though self-incriminatory, are.
> 4. Statements made to undercover agents who merely observe and record (i.e. do not actively elicit information) are admissible.

In every case where the right to silence is raised, the following questions should be asked: Was the person who allegedly subverted the right to silence an agent of the state? Did the state agent actively seek out information (i.e. was this, for all intents and purposes, an interrogation) or did the agent adopt an essentially passive listening attitude? Did the agent exploit any special characteristics of the relationship in order to extract the statement (-i.e. had a special relationship of trust been established between the agent and the accused; was the accused obligated or vulnerable to the agent; did the agent induce a mental state that made the accused more likely than normal to unburden himself)?[45]

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[42] *R v. Broyles* (1991), 68 C.C.C. (3d) 308 at 318
[43] *R v. Hebert*, Supra at 40
[44] *R v. Hebert*, Supra at 41 - 42
[45] *R v. Broyles* (1991), 68 C.C.C. (3d) 308 at 318

In *Hebert*, the accused was arrested for robbery and was informed of his right to counsel. After consulting with counsel, the accused refused to make a statement. The accused was then placed in a jail cell with an undercover police officer who engaged the accused in conversation during which the accused made statements that implicated him in the robbery. The Court found that these statements were inadmissible as evidence at trial because the state used its superior power (i.e. ability to mask the identity of the cell mate (trickery)) to override the suspect's decision to remain silent. By doing so, it effectively deprived the suspect of a free choice about making or not making a statement. In reaching this conclusion, the Court stated[46]:

> "The right to choose whether or not to speak to authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective element. But this established, the focus under the Charter shifts to the conduct of the authorities vis-à-vis the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and unfairly deprived the suspect of the right to choose whether to peak to the authorities or not?"

An important distinction is made between passive undercover agents versus those who actively try to elicit information in violation of the suspect's choice to remain silent. When a police officer, working in an undercover capacity and posing as a cell mate, interrogates an accused after he has advised the authorities that he does not wish to speak to them, the police are eliciting information improperly. If the suspect were to freely speak to an undercover agent posing as a cellmate without that agent having actively elicited a statement, the situation would be different. In the absence of eliciting behaviour, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by choice, and the

[46] *R v. Hebert*, Supra at 39

suspect must be taken to have accepted the risk that any recipient of his statement may choose to inform the police[47].

Had the undercover agent in *Hebert*, therefore, simply observed and recorded the evidence without actively eliciting the information, it is unlikely the Court would have found a breach of the accused's right to silence. It was the active elicitation of information against the accused's stated will that was problematic.

Similarly, where the police, after giving a suspect the right to consult counsel and, pursuant to a court order, conduct electronic surveillance on a jail cell in which suspects are lodged, no violation of the right to silence will occur when the police do not actively illicit statements from the suspects. Such was the case in *R. v. Pangman*, [2000] M.J. No. 300, Man. Q.B..

In *Pangman*, the police arrested a number of accused almost simultaneously on gang related charges. Each accused was advised of their rights and given an opportunity to consult with counsel. Following that, each accused was interviewed by the police and made aware that one gang member was cooperating with the police. The accused were then all placed in a jail cell together which contained hidden audio and video surveillance equipment (the police had previously obtained a court order which permitted this surveillance). Over the next several hours, the accused discussed the case and made a number of incriminating statements which were recorded by the police. The accused sought to have these statements excluded at trial arguing that their right to silence had been violated. In admitting the statements, the Court held that although the police put the accused in a situation where they expected the accused would speak to one another about the crime, the police did not actively elicit

[47] *R v. Hebert*, Supra at 41 - 42

or direct the conversation. The accused chose to speak to one another. As a result, there was no violation of their right to silence.

Undercover operations prior to detention do not raise the same issues. The jurisprudence relating to the right to silence has never extended protection to the pre-detention period. The Charter does not provide the right to counsel to pre-detention investigations. This is because, in any operation (undercover or not) preceding detention, the individual from whom information is sought is not in the control of the state. Persons in the pre-detention period are free to walk away.

The defence of alibi:

The defence of alibi is an exception to the right to silence. An accused who wishes to advance such a defence must disclose his alibi to the State in a sufficiently particularized form and at a sufficiently early time so as to allow the police adequate time to properly investigate the alibi prior to trial. If the accused does not provide this notice, the Court may draw an adverse inference from the accused's pre-trial silence. The Supreme Court of Canada has held that three pieces of information are necessary for "sufficient disclosure of an alibi defence":

1. a statement that the accused was not present at the location of the crime when the offence was committed,
2. the whereabouts of the accused at that time, and
3. the names of any witnesses to the alibi[48].

This disclosure may be given to the authorities by the accused or by a third party who is a witness to the alibi[49].

[48] *R v. Cleghorn*, [1995] S.C.J. No. 73 at 11
[49] R v. Cleghorn, Ibid at 10

While the courts have recognized that requiring the accused to disclose his defence of alibi to the Crown intrudes on his right to silence, the Courts have held that such an intrusion is necessary because alibi evidence can be easily fabricated[50].

> "The potential for the fabrication of alibi evidence requires that a negative inference may be drawn against such evidence where the alibi defence is not disclosed in sufficient time to permit investigation. Nevertheless, it must be remembered that the requirement that an alibi defence be disclosed to the Crown prior to trial is an exception to the accused's right of silence.[51]"

It is important to emphasis that an alibi defence need not be disclosed at the earliest opportunity, just sufficiently early and with sufficient detail, so as to permit investigation by the State. It is therefore, improper for the Crown to cross-examine an accused at trial on his failure to disclose his alibi immediately upon arrest[52].

The defence of alibi also impacts on the accused's right to remain silence at trial. While there is never an onus on the accused to testify in his own defence and the failure of the accused to testify in his defence may not be used as evidence of guilt[53], where the defence is one of alibi, the trier of fact may draw an adverse inference from the failure of the accused to testify and subject himself to cross-examination[54].

Summary

The right to silence involves two common law concepts. Confessions improperly obtained from a detained person are inadmissible in evidence.

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[50] *R v. Cleghorn*, [1995] S.C.J. No. 73 at 9
[51] *R v. Cleghorn*, Ibid at 9
[52] *R v. Cleghorn*, Ibid at 9
[53] *R v. Noble* (1997), 114 C.C.C. (3d) 385 (S.C.C.)
[54] *R v. Noble*, Ibid at 432; see also *Vezeau v. The Queen*, [1977] 2 S.C.R. 277

Furthermore, a person is not required to testify against himself at trial. The right to silence applies to both the pre-trial or investigative stage and during trial.

The accused are presumed innocent and carry no burden of proof. If the prosecution fails to prove the case against the accused, the accused may be acquitted without needing to produce exculpatory evidence. The suspect's right to silence places the onus on the State to prove its case; the accused has no responsibility to assist the prosecution.

Adverse inferences drawn from silence may be incorrect

The right to remain silent in the face of one's accusers is – or, at least, was – a cherished principle of English criminal law. It developed as an antidote to the medieval concept that the truth could be extorted from suspects using torture. As it became understood that people under torture are more likely to say what their tormentors want to hear than to tell the truth, and that individuals need protection from the overwhelming power of the state, ideas such as the privilege against self-incrimination took hold. The right not to be forced to become a witness against oneself inherently implies the right to say nothing at all and to place the burden of proof wholly on the prosecution.[55]

The purpose of the right to silence is not to prevent individuals from incriminating themselves but to limit the use of the coercive power of the state to force individuals into self-incrimination.

[55] Winter, J., "Creeping injustice: The effect of emergency law on civil liberties in Britain", The Month. London: Sep/Oct 1998. Vol. 31, Iss 9/10: pg.360

The right to silence is not absolute. In criminal cases, the specific limits on that right include:

1. The right to silence does not imply freedom from questioning. The police may question an accused even in the absence of counsel once the accused has been informed of his rights and has had an opportunity to consult counsel.
2. The right to silence applies only after detention. When an individual is not under control of the state, there is no necessity to protect him from the power of the state.
3. While coerced self-incriminatory statements are not admissible in court, voluntary statements, even though self-incriminatory, are.
4. Statements made to undercover agents who merely observe and record (i.e. do not actively elicit information) are admissible.

International Human Rights Law and Standards for Prosecutors

Daniel Prefontaine, Q.C.

INTRODUCTION

Public prosecutors play a key role in national criminal justice systems. Their specific responsibilities are laid down in national criminal justice legislation. As public authorities they on behalf of society an in the public interest, act in accordance with the law to protect the rights of the individual and ensure the necessary effectiveness of the criminal justice system. Of course, there are many differences in the institutional position of the public prosecutor from one country to another. These include their relationship with the executive power of the state (which can range from subordination to independence) and with judges. In some countries prosecutors and judges are part of the same professional organizations while in others they function separately.

In some countries the police service operates independently of the prosecution service, and enjoys considerable discretion not only in the conduct of investigations but also often in deciding whether a case should be prosecuted. In other systems the police activities are closely supervised, and directed, by the public prosecutor. For example,

sometimes the prosecutor acts in investigations only when his or her attention has been drawn to violations of criminal law by investigating police authorities, and in others systems the prosecutor will be responsible in identifying breaches of law as well as commencing prosecution. In some jurisdictions, the public prosecutor also ensures that the court decision is executed and supervises its implementation.

In any event, despite all the differences in a prosecutor's responsibilities, the prosecutor plays a critical role not only in the enforcement of laws but more importantly in giving full effect to rights, including, of course, human rights of citizens.

HUMAN RIGHTS IN CHINA

Since the signing of the International Covenant on Civil and Political Rights by China in 1997, major efforts by the Chinese Government are being made for its ratification and implementation. Guaranteeing that human rights become a reality was the subject of the deliberations of the 10th session of the NPC. As reported in the March 14, 2004 edition of the China Daily,

> "A human rights expert told the China News Agency, 'An amendment to the Constitution protecting human rights will exert a huge influence over the country's social and economic development'"

This excerpt followed:

> "Adding 'the State respects and safeguards human rights' to the Constitution will greatly impact the nations administrating philosophy, economy, and culture, according to Lin Bocheng, vice-chairman of the China Human Rights Development Foundation.

> The Consitutional change which was approved last weekend during the annual session of the 10 National People's Congress (NPC), China's top legislative body, will entail the legislation or revision of a series of laws.
>
> The legislative efforts need to pay attention to laws on such issues as property rights, liability for the infringement of rights, social insurance, social relief and labour contracts.
>
> As the amendment expands "human rights" from a political concept to a legal one, the government, the Party and the judicial departments are now obliged to respect and protect human rights.
>
> Given there is no special State organ to handle human rights issues, organizations focusing on the development and protection of the human rights are expected to be set up within the NPC, the Chinese People's Political Consultative Conference – the country's top advisory body – and the government."

These amendments will require specific obligations on all judicial organs in China. As a result the SPP is in the process of planning what their specific obligations will be and designing a judicial reform plan to implement the legislative changes needed.

INTERNATIONAL HUMAM RIGHTS STANDARDS

For the United Nations, the first major statement after the *United Nations Charter* on the international legal protection of human rights was the *Universal Declaration of Human Rights* adopted by the General Assembly on 10 November 1948. The *Universal Declaration of* Human *Rights* has in fact become the genesis for later international human rights instruments.

The provisions in the *Universal Declaration* enunciating civil and political rights, although regarded as a statement of a relatively distant ideal which involved few legal obligations, have been closely followed by other international instruments which do contain binding and detailed rules of law.

The first treaty open to all U.N. nations to translate the civil and political rights principles of the *Universal Declaration* into legally binding rights was the *International Covenant on Civil and Political Rights* (ICCPR) adopted by the United Nations in 1966. The ICCPR provides for a monitoring system and established a Human Rights Committee, which comments on articles, and State reports under the ICCPR. The ICCPR is accompanied by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), also adopted in 1966, which imposes reporting requirements for States in this area, but does not provide an individual complaint mechanism.

Besides the ICCPR and the ICESCR, there is a vast array of international human rights treaties and other instruments adopted by the United Nations. These instruments protect specific rights or a series of rights relating to a specific matter such as the U.N. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* and The *Convention on the Rights of the Child*.

INTERNATIONAL STANDARDS FOR JUDGES AND PROSECUTORS

The Judiciary

The 1985 U.N. *Basic Principles on the Independence of the Judiciary* state:

1) “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4) There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5) Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6) The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

Prosecutors

UN Guidelines

Further, the 1990 U.N. *Guidelines on the Role of Prosecutors* contain safeguards to guarantee the independence of prosecutors in the practice of their profession. Some provisions are aimed at the state to secure independence for the prosecutor. What is

important is a prosecutor's freedom from improper interference or influence upon his or her work. The relevant provisions read:

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of their prosecutorial functions.

The *Guidelines* are quite clear about the profession of the public prosecutor in relation to judicial functions as principle 10 states:

"The office of prosecutors shall be strictly separated from judicial functions."

Further, it should be noted that the 2000 Council of Europe Recommendation *On the Role of Public Prosecution in the Criminal Justice System* provides:

11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole, and, in particular, the way in which its priorities were carried out.
12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.
13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
    a) The nature and the scope of the powers of the government with respect to the public prosecution are established by law;

b) Government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution are established by law.
15. Public prosecutors should, in any case, be in a position to prosecute without obstruction by public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law.
16. States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.
17. However, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.
18. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.
19. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.

INTERNATIONAL ASSOCIATION OF PROSECUTORS STANDARDS

There are, in addition to these inter-governmental standards aimed at the profession of public prosecution, the standards adopted by the International Association of

Prosecutors. The adoption of the *Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors (IAP Standards)* in 1999 was unique since the IAP is neither a governmental, nor a political organization, but is the first and only world association of prosecutors.

The *IAP Standards* contain paragraphs both on independence and on impartiality. Since the profession itself adopted the provisions set forth in this document, they are important to take into account.

The paragraph on independence reads:

2.1. The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2. If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
- transparent
- consistent with lawful authority
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

The paragraph 3 on impartiality reads:

> "Prosecutors shall perform their duties without fear, favor or prejudice. In particular they shall:
>
> a) Carry out their functions impartially;

b) Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
c) Act with objectivity;
d) Have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
e) In accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt of the innocent of the suspect;
f) Always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness."

The prosecutor by demonstrating proper conduct must set a good example to his fellow members of society. This is important not only for the profession itself but also for the reliability and credibility of the government as a whole.

In order to properly carry out his duties of respecting the rights of individuals, the prosecutor must be especially aware of the requirements of international human rights law. It is essential that the prosecutor understand the many aspects of international law and international human rights treaties, particularly, the United Nations 1966 *International Covenant on Civil and Political Rights*.

Other international texts in the field of human rights also exist at the UN and regional levels. It is clear that they are not legally binding as such, nor do they establish rights enforceable in international fora or national courts. Some of them are directed specifically to the profession of prosecutors, such as the UN *Guidelines on the Role of the Prosecutor* and the text of the recommendation of the Council of Europe *On*

the role of public prosecution in criminal justice systems. Others lay down principles, guidelines, safeguards and standard minimum rules on more specific fields in the criminal procedure.

The *IAP Standards* do not reflect an international agreement by governments about how the profession of prosecution should act, but are a statement by the profession itself proclaiming a set of (minimum) norms and values for which it stands. The more or less vague norms in international human rights treaties that prosecution should be fair have now been described in detail in the *IAP Standards*.

HUMAN RIGHTS AND THE RIGHT TO LIFE

According to an old Chinese saying, “A case involving human life matters to the heavens”. In recognition of the inherent dignity of human life, the right to life is the most supreme of all fundamental human rights. In almost all international human rights texts the right to life is the starting point. The right to life has, of course, a strained relationship with the issue of capital punishment. Therefore, the relevant international provisions on the right to life sometimes contain paragraphs regarding capital punishment, conditions for a capital punishment or recommendations on its abolition, while several treaties have addition protocols prohibiting execution.

The *Universal Declaration on Human Rights* contains the right to life in article 3:

> ‘Everyone has the right to life, liberty and security of person’.

In the *International Covenant on Civil and Political Rights* this principle has been translated into a right. Article 6 paragraph I state:

> Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life'.

Regarding capital punishment paragraph. 2 states:

> 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court'.

I note the report in March 13, 2004 edition of the China Daily stating that during The recent National People's Congress legislative session some NPC deputies,

"Have moved for legal revisions to recall the review of death sentences back to the Supreme People's Court."

Paragraph 4 states:

> 'Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases'.

Paragraph 5 makes it very clear that capital punishment shall not be imposed for crimes committed by minors or carries out on pregnant women:

> ‘Sentence of death shall not be imposed for crimes committed by person below eighteen years of age and shall not be carried out on pregnant women’.

Finally, paragraph. 6 strongly suggests the abolition of capital punishment by stating:

> ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant’.

It is especially noted that in 1989 the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty, entered into force. The Preamble reads:

> ‘The States Parties to the present Protocol.
> Believing that abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights, (…)
> Noting that article 6 if the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,
> Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right of life,
> Desirous to undertake hereby an international commitment to abolish to death penalty, (…)’

Article I of the *Protocol* then simply states:

1. ‘No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

According to article 2, a reservation to the *Protocol* is only allowed for war crimes:

1. ‘No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for the most serious crime of a military nature committed during wartime’.

The 1990 *Convention on the Rights of the Child* prohibits the imposition of capital punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’.

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* contains the rights to life in article 2. This article leaves some space for imposing the death penalty when it states:

1. ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in a contravention of this article when it results form the use of force which is no more than absolutely necessary:
    a. In defence of any person from unlawful violence;
    b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained
    c. In action lawfully taken for the purpose of quelling a riot or insurrection’.

INVESTIGATION OF OFFENCES: ISSUES ON PRIVACY AND INTERROGATION

General Duty

In playing a key role in criminal proceedings, the prosecutor is dependant on local law and tradition. This includes that part of proceedings constituting the investigation of offences. Thus, in carrying out the investigation function the prosecutor has to respect the human rights of his fellow citizens and as well ensure that they do not violate human rights of others

Principles 11 and 12 of the 1990 U.N. *Guidelines on the Role of Prosecutors:*

11. "Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest."
12. "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system"

The investigation of offences contains both that stage of procedures in which the privacy of a suspect can be at issue (for instance during a house search) and the stage in which a suspect is investigated through interrogations. In both stages human rights come into play. First, infringement of a person's privacy can only be justified under

specific conditions. Second, torture and inhuman or degrading treatment during interrogations are strictly prohibited.

The Issue of Privacy

The *Universal Declaration of Human Rights* mentions privacy in article 12:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The *International Covenant on Civil and Political Rights* reiterates this provision in its article 17:

1. "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation
2. "Everyone has the right to the protection of the law against such interference or attacks."

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* mentions the right to respect for private and family life in article 8:

1. "Everyone has the right to respect for his private and family life, his home and his correspondence."

The 1990 U.N. *Guidelines on the Role of Prosecutors* state in paragraph. 13 under (c) with respect to privacy"

"In the performance of their duties, prosecutors shall (…): Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;"

The Council of Europe Recommendation Rec 2000 (19) *On the role of public prosecution* contains relevant provisions on how a public prosecutor should fulfill his or her duty during the investigation of offences. Paragraph 3 says:

"In certain criminal justice systems, public prosecutors also: (…) conduct, direct or supervise investigations."

In the context of the supervisory role of the prosecutor in China, paragraphs 21 to 23 provides some useful guidance on the relationship between prosecutors and the police during investigations:

21. "In general, public prosecutors should scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police."
22. "In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:
    a. Give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, Notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.
    b. Where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it

c. Carry out evaluations and controls in so far as these are necessary in order to monitory compliance with its instructions and the law
d. Sanction or promote sanctioning, if appropriate, of eventual violations.

23. States where the police are independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional cooperation between the Public Prosecution and the police.

Interrogations: Obtaining Confessions And The Use of Torture

The *Universal Declaration of Human Rights* states very clearly in article 5:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment."

The *International Covenant on Civil and Political Rights* more or less repeats this provision in article 7:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Furthermore the ICCPR states in article 14 paragraphs. 3:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality (…):

"Not to be compelled to testify against one or to confess guilt".

The Convention Against Torture

Article 1 paragraph. 1 of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* defines torture:

"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or at third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only form, inherent in or incidental to lawful sanctions."

Article 11 states specifically on interrogation:

"Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."

Several relevant provisions on interrogation can be found in the 1988 U.N. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

Principle 21 states:

1. "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to

confess, to incriminate himself otherwise or to testify against any other person."

2. No detained person while being interrogated shall be subject to violence, threats, or methods of interrogation which impair his capacity of decision or his judgment."

Then Principle 23 specifies on interrogation:

1. "The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law."
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle."

Principle 27 explains the consequence for non-compliance in these terms:

"Non-compliance with these principles in obtaining evidence shall be taken in to account in determining the admissibility of such evidence against a detained or imprisoned person."

The 1990 U.N. *Guidelines on the Role of Prosecutors* contain a more general provision"

12. "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."

Regarding the provision on "nemo tenetur" (the right not to be compelled to testify against oneself) as set forth in article 14 of the International Covenant on Civil and

Political rights (ICCPR), the Human Rights Committee has commented in the 1984 General Comment 13 paragraph. 14:

> "Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilty. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods, which violate these provisions, are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable."

The *IAP Standards* provide for some relevant general provisions on the role a prosecutor should play in guaranteeing a person's rights during the investigation of offences. These provisions are the same as mentioned above with regard to Privacy.

ARREST AND DETENTION PRIOR TO TRIAL

This subject is of great relevance in China today. In the March 13, 2004 edition of the China Daily it is reported as follows:

"The legislator's efforts have also been reflected in its supervision over the public security forces, procurators and courts in dealing with unlawfully extended custody, a major source of violations of the rights of criminal suspects.
"It is a common practice for criminal suspects to be held at detention centers until the court makes its final judgment. This means that the police, procurators and judges could all illegally hold a suspect in custody for longer than is allowed.
"However, some criminal suspects are sometimes held in custody for longer than the legal time limit due to either a dereliction of duty or corruption among the police, procurators or judges.
"Constant supervision by the NPC Standing Committee and the NPC Committee for Internal and Judicial Affairs have led to a joint regulation by the police, procurators and court to ban such practices, according to an official with the General Office of the NPC Standing Committee who declined to be identified."

It is timely in light of this report for Prosecutors in China to pay close attention to the provisions of The *Universal Declaration on Human Rights,* which contains several principles dealing with arrest and pre-trial detention. Thus, Article 3 of the *Universal Declaration* states:

> 'Everyone has the right to life, liberty and security of person'.

The prohibition of torture and other inhuman or degrading treatment is mentioned in article 5:

> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

Article 9 states on arrest and detention:

> 'No one shall be subjected to arbitrary arrest, detention or exile.'

The same attitude towards human rights during arrest and pre-trial detention can be seen in the *International Covenant on Civil and Political Rights.* Article 7 prohibits torture and other inhuman or degrading treatment:

> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'.

With respect to the treatment of persons in pre-trial detention article *ICCPR* states:

> ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity for the human person’.

Article 10 paragraph 2 (a) declares:

> ‘Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons’.

Article 14 paragraphs. 3 (g) of the *ICCPR* describes the rule of ‘nemo tenetur’ (the right not to be compelled to testify against oneself) as follows:

> ‘Everyone charged with a criminal offence shall have the right (…) not to be compelled to testify against himself or to confess to guilt’.

As people deprived of their liberty are in a vulnerable position, the absence of torture and ill-treatment is the guiding principle behind the standards on the treatment of detainees. Detainees are sometimes subjected to torture and ill-treatment in order to compel them to confess and to divulge information. Therefore, evidence obtained in such a manner should be excluded and allegations of torture must be vigorously investigated.

On this point, the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* contains important provisions for the public prosecutor to take into account. The most relevant is article 2 states:

1. ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.
3. An order from a superior officer or a public authority may not be invoked as a justification for torture'.

Article 4 elaborates on this:

1. 'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to act by any person who constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature'.

Article 15 requires the exclusion of evidence obtained by torture:

> 'Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in the proceedings, except against a person accused of torture as evidence that the statement was made.

Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* prohibits torture and other inhuman or degrading treatment:

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

It is not surprising that at the level of the European Union the same attitude towards torture can be found. Article 4 of the *Charter of Fundamental Rights of the European Union* states very clearly:

'No one shall be subjected to torture or to inhuman or degrading punishment'.

HUMAN RIGHTS AND PRE-TRIAL PROCEDURES

Arrest begins the process of detention and should only occur when authorized by law. Arrest must always be subject to judicial control and supervision to ensure that it is legal. A court has to assess whether detention until trial is necessary. At the U.N. level there are several provisions, which guarantee a persons rights in pre-trial procedures.

The *Universal Declaration of Human Rights* states in article 9:

> "No one shall be subjected to arbitrary arrest, detention or exile."

It then continues on pre-trial procedures in article II:

> "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."
>
> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 9 of the *International Covenant on Civil and Political Rights* contains similar provisions and states in paragraphs. 1 and 2:

1. "Everyone has the right to liberty and security of person. 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."
2. "Anyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him."

It further requires states to let a judge or officer authorized by law exercise judicial power on the lawfulness of the arrest and a court on the necessity of the detention. Paragraphs 3, 4 and 5 of article 9 read:

3. "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."
4. "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
9. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

The same attitude towards pre-trial procedures can be found within the Council of Europe. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* states very clearly that a judicial authority should decide on the lawfulness and necessity for a detention.

In the 1990 U.N. *Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)* on the pre-trial stage reads:

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated U.N. rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

The requirement to bring a detained person promptly before a judicial authority can also be found in the 1992 U.N. *Declaration on the Protection of All persons from Enforced Disappearance,* when it states in article 10:

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.
2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary ahs been manifested by the persons concerned.
3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent

and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.

The right to the assistance of legal counsel after arrest and during pre-trial detention is an important means of ensuring that the rights of a detained person are respected.

The 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* contains the following relevant principles:

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice require and without payment by him if he odes not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exception circumstances, to be specified by law or lawful

regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime,

The 1990 *Basic Principles on the Role of Lawyers* state very clearly how soon a detained person should have access to counsel. Principle 7 reads:

"Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention."

Principle 8 then provides additional rights for the detainee in relation to access to counsel. It sets out very clearly the confidentially of the consultations between a detainee and his counsel:

"All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

The following provision on judicial control over measures taken by a public prosecutor can be found in the Council of Europe Recommendation *On the Role of a public prosecution in the criminal justice system:*

"Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible."

Some provisions of the 1999 *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,* adopted by the International Association of Prosecutors, are relevant during pre-trial procedures. In paragraph 4 on the role of prosecutors during pre-trial procedures the *IAP Standards* state under sub. 3:

Prosecutors shall (…)

a) (…) and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court where that is possible;

TRIAL PROCEDURES

When it comes to human rights and trial procedures the *Universal Declaration of Human Rights* sets out principles relevant for the public prosecutor in articles 10 and 11 of the Declaration. Article 10 states:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 11 paragraph h 1 further states:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The principles of the *Universal Declaration of Human Rights* have been further developed in the *International Covenant on Civil and Political Rights.* Article 14 ICCPR, on trial proceedings, is of utmost importance for public prosecutors. It reads as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concerned matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

    a. To be informed promptly and in detail and in a language which he understands of the nature and cause of the charge against him
    b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing
    c. To be tried without undue delay
    d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it

e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court
g. Not to be compelled to testify against himself or to confess guilt

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The European Convention for the Protection if Human Rights and Fundamental Freedoms sets out in article 6 (Right to a fair trial) important provisions concerning trial procedures that are relevant for prosecutors. The same attitude towards human rights in trial procedures exists at the level of the European Union. Provisions relevant for the public prosecutor have been reiterated in the European Charter of Fundamental Rights

HUMAN RIGHTS AND SENTENCING

The *Universal Declaration of Human Rights* states in article 5:

> ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

This means that the punishment of a convicted person must not be cruel, inhuman or degrading. A similar provision can be found in article 7 of the *International Covenant on Civil and Political Rights*:

> ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’.

Europe

In the *European Convention for the Protection of Human Rights and Fundamental Freedoms* a provision on punishment can be found in article 3 that prohibits torture:

> ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

DISCRIMINATION AND THE PROSECUTOR

Article I of the *Universal Declaration on Human Rights* states very clearly on discrimination:

> ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards on another in a spirit of brotherhood’.

Article 2 then elaborates on this:

> ‘Everyone is entitled to the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’.

A similar provision to article 2 of the *Universal Declaration* can be found in Article 2 paragraph. 1 of the *International Covenant on Civil and Political Rights:*

> ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race color, sex language, religion, political or other opinion, national or social origin, property, birth or other status’.

The 1969 *International Convention on the Elimination of All forms of Racial Discrimination* contains relevant provisions when it comes to discrimination in the justice system and the elimination thereof. First, article 2 requires states to take positive steps on the elimination of discrimination. The provisions laid down in article 5 are more specifically aimed at discrimination in the administration of justice:

> ‘In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

a) The right to equal treatment before the tribunals and all other organs administering justice;
b) The rights to security of person and protection by the State against violence or bodily harm, where inflicted by government officials or by any individual group or institution; (…)

Finally, article 6 of this *Convention* is mentioned here:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights.

The 1981 UN *Convention on the Elimination of All Forms of Discrimination against Women* contain provisions promoting equal rights for women through all facets of life. Articles 1 and 2 are relevant to equality of women in the administration of justice, although not specifically aimed at them. These articles require states to take positive steps to accomplish equality for women:

> Article I
>
> > For the purposes of the present Convention, the term "discriminating against women" shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.

Guideline 13 (a) of the 1990 UN *Guidelines on the Role if the Prosecutors* states very clearly:

‘In the performance of their duties, prosecutors shall:

a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, and sexual or any other kind of discrimination.
b)

This applies unambiguously to women, minorities and the disabled.

CONCLUSION

There is no question that China’s declaration and commitment to ratify the ICCPR and the amendment to the Constitution will require Prosecutors to deal with all of the above issues. This is and will continue to be a major challenge for many years to come involving not only changing the laws, but the attitudes and prosecution practices of the SPP at all levels. The International Standards and Guidelines that have been cited extensively will hopefully provide a major guide in supporting all prosecutors in carrying out their duties in a fair, effective and equitable manner in the quest to protect the human rights of all Chinese citizens in accordance with the recent amendments to the Chinese Constitution and laws.

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Women and Canadian Criminal Justice Reform – A Gender Analysis

妇女与加拿大刑事司法改革－性别分析

Maureen Maloney, Q.C. 莫琳•麦乐莲*

Abstract
摘要

本文着重提出《国际人权公约和宣言》在确保刑事法律和程序对不论男女都公平运作的作用。加拿大刑法体系最近依据国际性的人权条约纳入了保护措施，旨在从新平衡权利，给予妇女相对于男人的同样权利，此举是基于之前的性别分析研究显示，加国刑事司法运作规则和实际实施中存在不公平状况。

所以当在制定和修改刑事证据和程序的相关法律及规则的过程中，对此等法律和程序进行性别分析十分必要，以保证此等法律和程序对不论男女均公平和恰当，本文将以相关案例加以说明。性别分析是一种详细的智力审查以保

* Professor of Law, University of Victoria; Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy 资深大律师、加拿大维多利亚大学法学教授、加拿大刑法改革与刑事政策国际中心高级顾问

泛法律系统、法律和程序在实施中对不论男女都有益处。由于世界每个角落在历史中和现存男女之间权力的失衡，自有其需要运用性别分析来审视法律和程序。

为此，本文审视了国际性人权条约在刑事司法系统中对性别平等的要求。最后援引了性别分析对加拿大刑法程序改革产生影响的两个重要例证：配偶对妇女的暴力犯罪处理方式以及性侵犯案件的信息披露规则。

The paper highlights the relevance of International Human Rights Conventions and Declarations in ensuring the criminal law and procedures operate fairly for both men and women. Recent safeguards have been incorporated into the Canadian Criminal Justice system in accordance with International Human Rights Treaties and Declarations which attempt to rebalance the rights of the women with those of men after a gender analysis had revealed inequities in the operation and practical implementation of the rules.

Accordingly, this paper presents the case for ensuring that when laws and rules of evidence and procedure are being devised or revised, that it is important to carry out a gender analysis of those laws and procedures to ensure that they are fair and appropriate for both men and women. Gender Analysis is a method of intellectual scrutiny for ensuring the justice system, laws and procedures work for the benefit of both men and women. The need to apply a gender analysis arises from the historic and existing imbalance of power between men and women around the world.

In order to do this, International human rights treaties that require gender equity in the criminal justice system are examined. Finally, two important illustrations of the impact that a gender analysis has had on criminal procedural reform in the Canadian Context are analysed: violence against women in relationships and the rules of disclosure in cases of sexual assault

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Introduction

Criminal law and procedure are important indicators of what a society holds to be of value and how a society perceives itself. By outlawing certain activities, society is attempting to control or regulate its citizens' behaviour by restricting the activities that a person may engage in for the protection and betterment of individuals specifically and society more generally. Moreover, the penalties placed on a person for transgressions of those prohibitions are intended to be proportionate to the harm done to society by his[695] illegal activities.

[*] Professor of Law, University of Victoria; Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy 资深大律师、加拿大维多利亚大学法学教授、加拿大刑法改革与刑事政策国际中心高级顾问

[695] For the purposes of this paper, the masculine pronoun will be used for offender and the feminine pronoun for victim to reflect the reality that although women do commit crimes and men are also victims, in the vast majority of cases, crimes are committed by men and women are the victims of crime.

Rules of evidence and procedure are important process safeguards put into law to protect both the person accused of illicit behaviour from the power and resources of the state, and to a much lesser extent, to assist the victims of crimes.

This paper presents the case for ensuring that when laws and rules of evidence and procedure are being devised or revised it is important to carry out a gender analysis of those laws and procedures to ensure that they are fair and appropriate for both men and women. First the paper will discuss what is meant by a gender analysis and mainstreaming. Next, the international human rights treaties that require gender equity in the criminal justice system will be reviewed. And finally, two important illustrations of the impact of a gender analysis on criminal procedure in the Canadian Context will be analysed. The two areas covered will be: violence against women in relationships and the rules of disclosure in cases of sexual assault. In particular, the paper will highlight recent safeguards that have been incorporated into the Canadian Criminal Justice system to rebalance the rights of women with those of men after a gender analysis had revealed inequities in the operation and practical implementation of the law.

What is Gender Analysis?

Gender Analysis, and following from this, gender mainstreaming are methods of intellectual scrutiny for ensuring that the justice system, laws and procedures in a country work for both men and women. The need to apply a gender analysis arises from the historic and existing imbalance of power between men and women around the world and in all countries.

As Steiner and Alston state:

"According to virtually every indicator of social well-being and status – political participation, legal capacity, access to economic resources and employment, wage differentials, levels of education and health-women fare significantly and sometimes dramatically worse than men."[696]

In the vast majority, if not all, countries men hold by a considerable margin the most senior positions in the political, governmental and economic spheres. This holds equally true for the organizations within these spheres, and holds true for the justice system. There are many reasons for the large disparity in roles, influence and power that is wielded by men. Historically at least, women were confined to the role of homemaker, mother and helpmate while men were seen as the providers, the hunters and gatherers. This led to societies everywhere defining separate, and usually, unequal roles as between men and women both socially and legally. Men led their lives primarily in the "public" sphere, working outside of the home, whilst women were primarily confined to the "private" sphere of home, family and domesticity. Indeed so deeply rooted were these ideas in English and Canadian Societies that a British Court ruled in 1876 that "Women are persons in matters of pains and penalties, but are not persons in matters of rights and privileges."[697]

This ruling was compounded in Canada in 1927, in the so-called Persons Case[698], where the Supreme Court of Canada ruled that women were not "persons' and

[696] See Henry Steiner and Philip Alston, International Human Rights in Context: Law, Politics, Morals, (Oxford University Press, (2nd Edition, 2002)

[697] Quoted in Monique Benoit, Are Women Persons? The "Persons" Case, No. 119, The Archivist, Library and Archives Canada, accessed at http://www.collectionscanada.ca/015/002/015002-2100-e.html on February 21, 2006.

[698] *Edwards* v. *Canada (Attorney General)* [1928] S.C.R. 276, subsequently overruled by the Pivy Council rev'd [1929] 1 D.L.R. 98

therefore could not run for office as senators. From this distance in time, these legal rulings appear absurd and laughable. Yet many inequities in the treatment of women as opposed to men persist although they may take on more subtle forms.

The ensuing decades have brought many changes in the roles of women and men and in the relationships between them. Certainly the social context has changed dramatically in many countries like Canada. However it is a long process. Centuries of male domination and seniority will not, and have not, disappeared overnight. Every society constructs, both consciously and unconsciously, the roles and responsibilities that are assigned to, and must be played out by, men and women. In this assignment, or "social construction", there are often inequities that continue to persist.

This pattern of inequity holds true of the justice system like many other important institutions in society. However given the central role that the justice system plays in defining the norms of society it is crucial that the justice system continually analyze and scrutinize its laws, procedures and practices to ensure that they are not creating, reinforcing or maintaining inequalities between men and women in society nor in the relationships between men and women. Increasingly, governments and judges are applying a "gender lens" or "gender analysis" as an important part of any process when dealing with the creation and retention of laws and particularly when creating and/or revising laws. Gender analysis, simply put, is the recognition that the roles of men and women are socially constructed and that the differences in the lives and experiences of women from men should be recognized, and to the extent that this construction is deleterious to women's functioning and place in society, then such laws and procedures should be remedied or repealed.

This type of analysis is particularly important with respect to the legal and judicial system. Most legal systems are systems that have been designed by men and not surprisingly, the system is predicated on men's lived experiences and has, for the most part, ignored or discounted the lived experiences of women. Societies are increasingly recognizing the existing deficiencies in laws and procedures when regarded from gendered perspective and changes are being made, albeit slowly.

These changes have been assisted, indeed perhaps legally mandated, by International Human Rights Treaties, commencing with the United Nations Charter in 1945[699]:

> "In 1945, the U.N. Charter reaffirmed a faith in fundamental human rights…in the equal rights of men and women, as well as promoted and encouraged respect for human rights and for fundamental freedoms without distinction as to …sex. The Universal Declaration of Human Rights similarly promoted the dignity and worth of the human person in the equal rights of men and women. It specified sex as being among the impermissible grounds of differentiation and provided an equal protection clause. Despite the fact that the Universal Declaration does not in and of itself have legal effect on all states, it is morally persuasive and considered part of customary international law. Provisions for the equality of the sexes in the enjoyment of rights are provided for both in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights."[700]

More recently, in 1993, *The Convention on the Elimination of All Forms of Discrimination Against Women* [701](CEDAW) clearly sets out the responsibility of states, once they have signed on, to adopt legislation and to refrain from

[699] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7
[700] Rangita de Silva de Alwis, *A Guide to Impmlementing CEDAW in China*, prepared for the Ford Foundation (2003?)
[701] This Declaration was adopted without a vote in General Assembly Resolution 48/104, 20 December 1993.

discrimination against women and taking "all appropriate" measures to eliminate discrimination. This is a sweeping positive obligation which includes:

> "Not only eliminating those measure and laws which are clearly discriminatory between men and women but also eliminating and/or enforcing practices. Moreover they are intended to cover those practices and areas of law which not only intend to discriminate but have the effect of discriminating against women. These measures include, but are not limited to, "legal, administrative and other measures, which include temporary special measures of affirmative action, modification of social and cultural patterns of conduct…_[702]

Indeed it can be argued that the norms, legal principles and human rights values enshrined in a number of international human rights declarations and treaties, like the Universal Declaration of Human Rights[703], the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[704] are all elements of customary international law that would therefore even bind states parties who have not signed and ratified them.[705]

Having set out both the legal and moral imperatives to ensuring equality as between men and women generally and in the justice system in particular, the paper will use two illustrations where a gender analysis has been applied in areas of criminal law and procedure to rebalance inequities in the criminal justice system that existed between men and women in Canada. The two areas discussed below are: Violence Against Women in Relationships and the Rules of Disclosure in Sexual Assault Cases.

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[702] See Rangita de Silva de Alwis, *A Guide to Impmlementing CEDAW in China, supra*, p.5

[703] *Universal Declaration of Human Rights* GA Res. 217 (III), UN GAOR, 3d Sess. Supp. No. 13 UN Doc. A/810 (1948) 71.

[704] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976)

[705] Indeed the argument has been extended further to state that these declarations and treaties are such that they are covered by the rule of *jus cogens* at international law whereby the principles they espouse are so fundamental that they are non-derogable, See generally Hilary Charlesworth, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, 85 A.J.I.L 613 (1991)

Illustration Number 1: The Laws, Proceedures and Practices regarding Violence against Women in Relationships: the Case of British Columbia, Canada

One area of law and procedure which has undergone substantial revision because of the application of gender analysis concerns the crimes of domestic violence or, as it is more commonly referred to now in Canada, violence against women in relationships. The terminology was changed based on a gender analysis. "Domestic" violence appears to modify the seriousness of the violence, and clearly delineates the public/private distinction which has been made in society and in legal structures to the detriment of women in a number of spheres graphically illustrated in the case of violence against women in the home.

Violence by men against women with whom they live or are having, or have had, an intimate relationship is one of the most common crimes in Canada and indeed throughout the world.[706] Article 16 of CEDAW specifically requires State Parties to remove discriminatory laws and practices against women. Moreover General Recommendation No. 12 specifically obligates States Parties to protect women against violence of any kind occurring within the family or at the workplace or any other area of social life. To assist in monitoring this recommendation, periodic reports are requested that set out information on the legislation in force to protect women against violence in everyday life including sexual violence, abuses in the home, and sexual harassment at the workplace.

[706] In recognition of the widespread use of violence against women in the world community, in 1993, the General Assembly of the United Nations issued *the Declaration on the Elimination of Violence against Women*, expressing concern that violence against women is an obstacle to the achievement of equality. This Declaration was adopted without a vote in General Assembly Resolution 48/104, 20 December 1993.

A number of other recommendations also deal with the States Parties obligations to deal with violence against women[707]:

> Recommendation 12 also requires states to adopt measures to eradicate violence against women and compile data on the existence of support services for women who are the victims of abuse and statistical data on the incidence of violence.
> In 1993, the Committee on the CEDAW adopted General Recommendation 19, entitled Violence against Women, which explicitly states that CEDAW prohibits gender-based violence.
>
> General Recommendation No. 19 reaffirms that State Parties are also responsible for private behaviour if they do not act with due diligence to prevent violence against women or punish acts of violence against women
> General Recommendation No. 19 addresses violence against women and emphasizes among others that discrimination under the CEDAW is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and (5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.
> …
> The Recommendation also suggests that states parties establish support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refugees, specially trained health workers, rehabilitation and counseling. Further, recommendations are made to conduct gender-sensitive training of judicial and law enforcement officers and other public officials for the implementation of the CEDAW. Also, it is recommended that measures to overcome family violence should include criminal

[707] This summary is taken from the excellent outline provided by Rangita de Silva de Alwis, supra, at p.21

penalties where necessary and civil remedies in cases of domestic violence.

Women in Canada, like the vast majority of countries in the world, are significantly more likely to be the victim of violence at the hands of an existing or former husband or lover than from strangers on the street.[708] Like most countries, the Canadian Criminal Code[709] makes the use of force against a spouse or intimate partner[710], a crime in exactly the same way as the use of force would be against any other individual. There are a variety of offences in the Canadian Criminal Code that can be applied in this area: sections 265 (assault), 269 (unlawfully causing bodily harm), and 267 (Assault with a weapon or causing bodily harm) and 268 (Aggravated assault which is a strictly indictable offence which would be laid in very serious circumstances)

Legally, these provisions apply to all people who commit violent acts in Canadian Society, including violent acts against people with whom the offender is having an intimate relationship. On a strict interpretation of the law, there is equality between both men and women who are the victims of violence. However the practical reality of women's lived experience is that these laws are applied and proceeded with in an unequal manner depending upon whether the violence is committed by a stranger male or a male with whom the women is having, or has had, an intimate relationship.

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[708] Based on a survey of approximately 26,000 Canadians, an estimated 7% of people who were married or living in a common-law relationship experienced some form of violence in the five years prior to the survery. See Data from the 1999 General Social Survey, as reported in : Canada, Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile (Ottawa: Statistics Canada; Cat. No. 85-224-XPE, 2000): 5 cited in Canada, Department of Justice, Family Violence: A Fact Sheet, accessed at http://canada.justice.gc.ca/en/ps/fm/familyvfs.html on February 18, 2006.

[709] *Criminal Code*, R.S.C. 1985, c. C-46

[710] The emphasis in the text will be the violence that men perpetrate against women although clearly there are instances of where a woman has exercised force against a man with who she is having/had a relationship. The emphasis here is when the male commits the violent act because that is the subject of this paper but also because the male is far more likely to commit acts of violence.

The difference between a man committing an act of violence against a male stranger walking along the street and committing the very same act of violence against his spouse was that in the latter case the man was rarely charged with an offence. Clearly, the gender analysis reveals unequal treatment of crimes of violence against women in relationships. Having identified that there was gender inequity, not in the laws but in the procedures and implementation of them, the Province of British Columbia, and many other provinces in Canada, changed the procedures for dealing with cases of violence against women in relationships.

Research revealed that part of the challenge arose with respect to how prosecutors and police officers both conceived of, and implemented laws against, violence by men towards another male in the street as opposed to male violence against women with whom they were having a relationship. Most police officers and prosecutors (again the vast majority of whom are men, although this gender imbalance is gradually changing.) was that the former crime was seen as a public crime disturbing notions of non-violence on the street and therefore the offender should be arrested; whereas in the latter case, the violence was viewed as a personal or private dispute with which the police officer or prosecutor should not concern themselves.

The idea that a violent crime towards an intimate partner was not a crime and as such should not engage the apparatus of the state went to the very root of inequality and social construction of roles in society. Indeed this is further evidence by Australian empirical research[711] on how police officers viewed the crime and the women victim.

[711] See Jennie Abell and Elizabeth Sheehy, *Criminal Law and Procedure: Proof Defences and Beyond* (Captus Press, 2004)

Police officers felt that the women may have deserved to be hit, provoked the attack and therefore legitimized the crime. There was also the sense that men are violent creatures by nature and therefore these biological imperatives should not be held against them when they beat their wives. In light of this and other evidence it was clear that if women were to be protected from the social construction placed upon them by society, and empowered to take appropriate measures against the violence they were enduring, the justice system and its procedures needed to change.

Accordingly the roles and procedures of the police officers investigating and of the prosecutors prosecuting these cases had to change. Accordingly regulations and policies were implemented to guide police officers and prosecutors in their responsibilities when called to the scene of the crime, investigating the commission of a crime and collecting evidence and deciding when to lay a charge[712].

In The Province of British Columbia, Canada, investigations of crimes are conducted by the police agencies in the region (the various Municipal Police and the RCMP). In cases of violence against women in relationships, the police will usually be called to the scene of violence by the women who is being assaulted, her children or a concerned neighbour. At this time the police are require to take down any evidence of a crime having been committed: bruises, smashed items, overturned furniture. In addition they solicit and must take down the names of any witnesses: neighbours or shopkeepers, passers-by etc who may have heard shouting and/or the sounds of

[712] See Province of British Columbia, Ministry of Attorney General, Policy on the Criminal Justice System Response to Violence Against Women And Children, Part 1, Violence Against Women in Relationships Policy, AG 04097 (Updated: March 2004) and See Province of British Columbia, Crown Counsel Policy Manual, Spousal Assault, No. 56680-00 (Updated May 2003)

violence. The latter is particularly important as in many cases the spouse may refuse to testify against a spouse for a variety of reasons (for example fear of retribution, misplaced loyalty, economic dependency, social status or embarrassment)

The Canadian Criminal Code requires that police officers must have "reasonable grounds" to make an arrest[713], which means that mere suspicion of a crime is not sufficient. In addition officers have to consider that an arrest is "in the public interest". However in cases of violence against women in relationships, police officers exercised their discretion not to charge even where there were "reasonable grounds" based on erroneous notions of the "public/private distinction" on the grounds that "private violence" did not warrant arrest "in the public interest".
Clearly the impacts of this use of discretion not to charge was inequitable and dangerous to women and in effect, provided impunity for men to use violence against women with whom they are in relationships. Accordingly, policies and procedures were changed to state that whenever a police officer has reasonable grounds that a crime has been committed, they must make an arrest as to do so is always in the public interest. This is a "no tolerance" policy for violence against women in relationships.

When an accused is arrested, the police do have the authority to release him but will usually detain the accused to allow a prosecutor to decide whether he should be detained or not. In all cases, whether the accused is in custody or not, the police officer has an obligation to type up a Report to Crown Counsel (RCC). Once the prosecutor has received the RCC, s/he is under an obligation to review that RCC on

[713] *Criminal Code*, R.S.C. 1985, c. C-46, s. 529.

an urgent basis because the accused must be brought before a judge within 24 hours of arrest.

When the prosecutor reviews the report, s/he must apply charge approval guidelines which require the assessment of two factors in determining whether to charge an accused:

1. That there is a substantial likelihood of conviction AND
2. That it is in the public interest to lay a charge

The Attorney-General of British Columbia has decided that in the vast majority[714] of cases of violence against women that it is always in the public interest to lay a charge when the first criterion is met. In their consideration of whether there is a "substantial likelihood of conviction", the prosecutor will consider a number of factors:

- what material evidence is available and admissible
- weight likely to be given by the court to the evidence
- what defences, is any, are likely to succeed

At all times, the prosecutor must carry out a risk assessment of the likelihood of the violence recurring and is given a number of recognized risk factors to investigate, including, a history of violence, previous breach of court orders, escalating violence, recent threats of suicide, substance abuse, recent relationship or employment problems, use of threatened use of weapons and extreme minimization or denial of violent behaviour. Where two or more of these factors are present, the prosecutor

[714] Where the level of violence is small and the prosecutor considers reoffending unlikely, the prosecutor may use her discretion to divert the offender to an "alternative measure" program, an alternative process outside of the court process that will not result in a criminal charge being laid. See *Crown Counsel Policy*, *supr*a.

should seriously consider laying charges and/or imposing conditions on the release of the offender.

If a decision to arrest is made crown must:

- address the issue of bail
- if the charge is approved, the crown must ask a justice of the peace to lay an information (the charge)
- After the information is sworn, decide whether to argue for detention, or more likely, to seek conditions on release of accused.

Very often in these cases the prosecutor will seek conditions of release including:

- not attend the residence of the complainant
- no contact order
- Occasionally, depending upon the circumstance, children may also be included in these orders although this is more difficult as they may conflict with access orders.

Occasionally, in more serious cases, the prosecutor may also seek a bail supervision order in order to require a supervisor to monitor the accused and to check up on compliance with this order. Prior to making these decisions, the prosecutor will have interviewed the complainant to understand her concerns and wishes and, if deemed appropriate, take these into account when making their decision. Canadian law makes it very clear that it is the decision of the prosecutor not the complainant as to whether the case will go to trial. This may be particularly important in these types of cases as the complainant may be unwilling, or at best, reluctant to be a witness. In these cases, it is essential that the prosecutor build a rapport with the complainant and explain to her the importance of proceeding publicly with a prosecution. It may also be necessary to attempt to find other witnesses or evidence.

In certain circumstances, the prosecutor may apply for a material witness warrant, which would require an unwilling victim to attend the court as a witness. However care has to be taken that to do so does not revictimise the complainant further, for example exposing her to contempt of court charges and potential jail sentence for refusing to testify. At all time, safety considerations should be at the forefront.

These procedures, together with enhanced training for police and prosecutors, have increased significantly the number of charges laid against men for violence against women with whom they are living. Accordingly, applying a gender analysis of the differential impact of police and prosecutors procedures and exercise of discretion in these specific cases has led to many procedural and educational reforms which have promoted more equality in the way violent offences against women are treated.

Illustration Two: Rules for Disclosure of Evidence in Sexual Assault Cases

The second illustration of where gender analysis has contributed to the reform of the law to more equally balance rules as between men and women is in the area of the rules for disclosure in cases of sexual assault[715].

An important part of any trial preparation is the gathering of evidence on which the charge rests. In many cases, the police and through them, the crown prosecutor

[715] This section draws heavily on the analysis of, and materials cited, and in some cases reproduced in:, Jennie Abell and Elizabeth Sheehy, *Criminal Law and Procedure: Proof Defences and Beyond* (Captus Press, 2004) at pp 128-135.

gathers a large amount of information concerning both the accused and victim. The common law rules of evidence disclosure in Canada were laid down in *R v. Stinchcombe.*[716] In *Stinchcombe,* the Supreme Court of Canada held that the prosecution must hand over to the defence evidence that they had gathered (in this case a witness statement) that was favourable to the defence even though the prosecution did not intend to call the witness at trial. This ruling was predicated on s.7 of the Canadian Charter of Rights and Freedoms, the right to a fair trial, which encompasses within it, *inter alia,* the right of the accused to make full answer and defence. Therefore the court held that this non-disclosure of evidence was a serious breach of the accused rights, which warranted ordering a new trial. The court's decision is succinctly set out in this extract from Sheehy and Abel:

> "The court stated that the crown has a general duty to disclose all material it proposes to use at trial and evidence that may assist the defence even if the accused does not intend to use it. The following additional directions were given in the case: the Crown can refuse to disclose on the grounds of privilege; the Crown can exercise discretion in the timing and manner of disclosure; initial disclosure should take place before the accused has to elect the mode of trial or to plead; and the Crown's discretion is reviewable before the trial judge in a voir dire."[717]

This ruling makes a great deal of sense when viewed from the perspective of the accused and for a society's interest in ensuring fair trial processes. However when viewed from the perspective of the victim or victims it has been shown to be too all-encompassing. This is particularly true in cases of sexual assault cases. The *Stinchcombe*[718] ruling had a very deleterious impact on the victims and potential victims of sexual assault. As a result of the ruling in *Stinchcombe,* courts

[716] [1991] 3 S.C.R. 326
[717] Abel and Sheehy, Criminal Law and Procedure: Proof Defences and Beyond (Captus Press, 2004) at p.129
[718] *supra,*

subsequently quashed convictions or stayed proceedings where rape crisis centres had lost or mislaid records of alleged victims. Moreover, the Stinchcombe rule became a weapon with which the defence could further victimize an alleged rape victim by requesting counseling and other personal health information. Again a gender analysis of this issue reveals the disadvantage of this ruling to women, and the advantage of it for men. Viewed from perspective of a sexual assault victim , predominantly women, this rule had the effect of making it more difficult for women to report a sexual assault to the police without disclosing personal medical and mental health records that may have little, if anything, to do with the trial.

The clash of ideals between defending the rights of the accused (predominantly men) to a fair trial process and the right to privacy for the victim of sexual assault (predominantly women) came to a head in the renowned case of *R. v O'Connor*[719]. The issue in this case was whether a prosecutor, who had refused to disclose the medical records of an Aboriginal woman, an alleged rape victim, had a right to do so. The Aboriginal Women's Council (AWC), a non-governmental advocacy group for Aboriginal Women in Canada, was granted intervener status at the Supreme Court of Canada. The AWC argued before the supreme court that requiring such records to be handed over to the defence, resulted in a re-victimising of the victim and failed to take into account the racialised and gendered social context in which these cases occur, failing in effect to apply a gender and race lens to the operation and practical effect of the rules regarding disclosure. Mandating such broad disclosure would permit the defence to demand any personal and intimate records regarding the life of his victim, which could have the effect of intimidating and potentially humiliating her.

[719] [1995] 4 S.C.R. 411

The Supreme Court, in a split 5-4 decision, rejected the powerful intervention of the AWC and instead actually widened the application of Stinchcombe to cover all therapeutic records but provided a new more deliberative process for the disclosure of such evidence.

In essence, the majority ruling in the case, laid out the following rules for disclosure of medical and other records of the alleged victim of sexual assault:[720]

1. All evidence and records in the possession of the prosecution (and their agents the police) must be disclosed to the defence unless they are "clearly irrelevant". The disclosure rule in *Stinchcombe* in effect, was held to override any claim to privacy or equality that the alleged victim might claim under sections 7 and 15 of the Charter.
2. If the records are held by a third party, for example a doctor, therapist or rape crisis or women's shelter, the accused must apply for these records by swearing an affidavit and requesting production. Notice of the requirement for production must be given to the third party. The third party will then be subpoenaed to bring the records to court. At this point, the presiding judge will decide whether the records are "likely relevant". Likely relevant has been interpreted to mean, "may assist the defence".

Despite the insertion of providing judicial scrutiny, these criteria had the effect of enabling defence counsel to go on fishing expeditions. Furthermore, although the court allowed the third party, who had created and held the records, standing to contest the disclosure, up to and including the Supreme Court of Canada, the court

[720] This is paraphrased from the excellent discussion of *R v. O'Connor*, supra, in Abell and Sheehy, *supra* at p.129

clearly laid out that there is no privilege attached to such counseling records. In the United States, the Supreme Court of that nation has taken a different view and ruled that psychiatrists and social workers have the absolute right to refuse to disclose confidential counseling information to any court.[721]

The *O'Conno*r decision was severely criticized by academics and others concerned about the potential chill this ruling would bring about for women who have been sexually assaulted. Critics recognized that the ruling would make it even more difficult for women to bring forward allegations of sexual assault if they were aware that defence counsel could simply go on a fishing expedition for sensitive, personal, private information about them even though it was not of substantial relevance to the case. And the critics concerns were borne out in practice.

Defence counsel subsequently asked for production of records, inter alia, regarding a women's divorce, birth control, school records and even their diaries.[722] More disturbingly perhaps was the effect that the request for such disclosure had on the alleged victims. Many women were unwilling and/or emotionally unable to expose every detail of their personal lives. As a consequence, women were documented as refusing to be witnesses after disclosure applications were made, while others withdrew from valuable and much-needed therapy to protect themselves from future disclosure of the records that would be created. In some cases where there were no clinical notes or records to be disclosed, defence counsel attempted to have them created by requesting psychiatric and medical evaluations.

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[721] See *Jaffe v. Redmond*, 116 S.CT. 1923 (1990) discussed in Abel and Sheehy, *supra*, at p. 132.
[722] Karen Busby, "Discriminatory Uses of Personal Records I Sexual Violence Cases' (1997) 9 C.J.W.L. 178 cited in Abell and Sheehy, supra, at p.133

The impact of *O'Connor* was exacerbated by the Supreme Court of Canada decision in *R. v. Carosella*[723], where the court in another 5:4 split decision held that the appropriate action to take where records had been mislaid or shredded by third parties, was to stay (or dismiss) the action. In *Carosella*, the Sexual Assault Crisis Centre of Windsor had, as a matter of policy shredded its records months before the records were subpoenaed. The policy to shred the documents was implemented to protect client privacy. The majority held that the accused was entitled to the records in order to provide full answer and defence. Given that they could not be reproduced the only available remedy was to stay the action. This decision was reached even though the accused did not prove that he was actually prejudiced by the lack of disclosure.

The majority decision relied on:

> *The presence of either one of the following two factors justifies the exercise of discretion in favour of a stay: no alternative remedy would cure the prejudice to the accused's ability to make full answer and defence, and irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. The presence of the first factor cannot be denied. With respect to the second, the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice. Confidence in the system would be undermined if the court condoned conduct designed to defeat the processes of the court by an agency that receives public money and whose actions are scrutinized by the provincial government.*[724]

It is interesting to contrast the strong dissent of four Supreme Court justices (including the only two women justices on the court at that time) based in part on:

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[723] [1997] 1 S.C.R. 80.
[724] Ibid, majority, headnote,

> *While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial. Where evidence is unavailable, the accused must demonstrate that a fair trial, and not a perfect one, cannot be had as a result of the loss. He must establish a real likelihood of prejudice to his defence; it is not enough to speculate that there is the potential for harm*[725].

The net effect of these majority decisions was to increase the number of disclosure orders, lengthen the time of trials, increase delays and provide more grounds for stays of actions.

Clearly taking a gendered look at these cases and the disclosure procedures that evolved is warranted. The vast majority of victims of sexual assault are women and the vast majority of offenders committing sexual assault are men. Looking at the differential impact that these rules have on men and women is informative. The rules are justified as being essential to ensuring a fair trial process for an accused in accordance with the *Canadian Charter and Rights and Freedoms*. However, allowing the defence to go on sweeping expeditions for personal information, that may have little relevance to the case, is extremely prejudicial to women and specifically to those women who have been sexually assaulted. These decisions affect all women because any records that are developed by therapists, doctors, psychiatrists and others at any time during a women's life may be required to be produced if that women is subsequently the victim of a sexual assault. And to the extent that the documents are mislaid or cannot be produced, the lack of disclosure may result in the case being stayed.

[725] Per the minority dissent, headnote, p.1.

Moreover, the societal impacts of further dissuading already reluctant women to disclose that they have been the victim of a sexually assault could be grave. Men who sexually assault women may continue to do so if they are not apprehended and convicted. Women will feel less safe and society will suffer as a consequence but the disproportionate burden of that suffering will be borne by women.

Clearly the justice system must ensure that an accused is given a fair trial. However those procedures developed to ensure this must also take into account the fundamental objective of having a justice system which has substantive and procedural rules that also enshrine effective implementation of international human rights obligations; effective judicial protection; and prompt, effective and safe access to justice for victims of crime.

It has also been noted that the vast majority of broad disclosure orders sought are primarily, indeed nearly exclusively, with respect to the alleged victims of sexual assault. Defence counsel has not requested disclosure orders for other important witnesses to trials to impugn their credibility or stability. For example, police officers are often critical witnesses; but defence counsel has not sought disclosure of their personal medical records[726].

As a consequence of academic critiques, activists lobbying and general public concern about whether the courts had found the appropriate balance for disclosure rules in cases of sexual assault, the Canadian Government held legislative committee

[726] This insight is gained from Michelle Landsberg, "Two Cases Stark Proof of Gender Bias" (The Toronto Star, (23 February, 1997, at 2) cited in Abell and Sheehy, supra.

hearings and broad consultations for two years. Following these consultation the Canadian Government enacted laws to more clearly balance the rights and interests of the accused and the privacy, safety and personal concerns of the alleged victim.

In 1997, An Act to amend the Criminal Code (production of records in criminal proceedings)[727] was passed into law. The law enacted ss. 278.1-278.91, the substance of which is set out in s.278.3 (1) set out below:

PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION

Assaults

Application for production	278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.
No application in other proceedings	(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.
Form and content of application	(3) An application must be made in writing and set out (*a*) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and (*b*) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.
Insufficient grounds	(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify: (*a*) that the record exists; (*b*) that the record relates to medical or psychiatric treatment, therapy or

[727] S.C.1997, c.30

counselling that the complainant or witness has received or is receiving;

(*c*) that the record relates to the incident that is the subject-matter of the proceedings;

(*d*) that the record may disclose a prior inconsistent statement of the complainant or witness;

(*e*) that the record may relate to the credibility of the complainant or witness;

(*f*) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(*g*) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(*h*) that the record relates to the sexual activity of the complainant with any person, including the accused;

(*i*) that the record relates to the presence or absence of a recent complaint;

(*j*) that the record relates to the complainant's sexual reputation; or

(*k*) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Service of application and subpoena

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

Service on other persons

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

1997, c. 30, s. 1.

This legislative scheme, which covers disclosure rules exclusively in cases of sexual assault were challenge as being unconstitutional but withstood that challenge in *R v. Mills*[728].

In reaching its very lengthy decision in *Mills*, the court made the following reasoning:

> Per L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.: To challenge the constitutionality of the impugned legislation, the accused need not prove that the legislation would probably violate his right to make full answer and defence. It is sufficient that he establish that the legislation is unconstitutional in its general effect
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> …
>
> In adopting Bill C-46, Parliament sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused. Parliament may also be understood to be recognizing "horizontal" equality concerns, where women's inequality results from the acts of other individuals and groups rather than the state.
>
> At issue in the present case is whether the procedure established in Bill C-46 violates the principles of fundamental justice. Two principles of fundamental justice seem to conflict: the right to full answer and defence and the right to privacy. Neither right may be defined in such a way as to negate the other and both sets of rights are informed by the equality rights at play in this context. No single principle is absolute and capable of trumping the others; they must all be defined in light of competing claims. A contextual approach to the interpretation of rights should be adopted as they often inform, and are informed by, other rights at issue in the circumstances. It is important, however, to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the

[728] **, *R v. Mills*, [1999] 3 S.C.R, 668.**

> *Charter*. The issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. In this context, the right to make full answer and defence, the right to privacy, and the right to equality must be defined.

Conclusion

This paper has set out the importance of applying a gender analysis to the criminal justice system, its laws, procedures and its practical application. Utilising the example of two important areas in criminal law, Violence against Women in relationships and Sexual Assault, this paper has demonstrated the impact and effect that carrying out a gender analysis had in Canada on the lives of all citizens, male and female.

Indeed International Human Rights Treaties may well legally mandate such a gender analysis by State Parties, and perhaps even by those States that have not signed due to the application of customary law.

The systemic and systematic gender bias of the justice system will not disappear overnight but careful scrutiny and application of a gender analysis to all aspects of the legal system, its laws and procedures will have an important impact and ensure that all rights of citizens are protected and that substantive equality is achieved.

The conclusion taken from this paper should not be that the laws, proceedures and Policies relating to violent and sexual offences against women are perfected either in form or execution. There is undoubtedly a long road to travel before the scourge of violence against women in relationships and sexual assault becomes a rarity in our

society. However a gender analysis is assisting in moving towards that destination, and as a famous proverb in China states, a journey of a thousand miles starts by taking the first step.

以改造人为中心
全面推动北京监狱工作的改革与发展

Focusing on Offender Rehabilitation in Advancing Prison Reforms in Beijing

龚景顺 Gong Jingshun*

Abstract
摘要

In order to realize its goal and to meet the social demand of prison work, the Beijing prison system has defined the following as the basic theme of thought for the existing and short-term future prison work in the capital city of Beijing, namely, to "adhere to 'one focus', to correctly understand and properly handle the 'two types of contradictions', and to implement the 'seven major measures' at work", which is in accordance with a scientific development approach and the building of a harmonious socialist society. This theme of thought is fundamental for prison reforms in Beijing in the new era and is an important assurance for prison administrations in Beijing to properly fulfill their functions of criminal punishment. This paper systemically

* 北京市监狱管理局狱政管理处处长 Division Director, Division of Prison Administration, Beijing Prison Bureau

elaborates on the details of the theme of thought, i.e.: adhering to “one focus” means adopting the “focus on offender rehabilitation and improvement in the quality of rehabilitation work” as the central task and overall goal for prisons in Beijing.

The proper understanding and handling of the “two major contradictions” means the basic contradiction that is inherent with the nature of prison work, i.e.: “the contradiction of “police officers rehabilitating offenders vs. offenders being rehabilitated”, and the other major contradiction that is affecting current prison work in Beijing, i.e.: the need to improve the quality of rehabilitation work vs. prison police’s capabilities lagging-behind in conducting rehabilitation”. The implementation of “seven major measures at work” means:

（1） To constantly improve and operate a full system of monitoring mechanism that is secure and effective in the long term in order to solidify the foundation for prison safety and stability,

（2） To construct a scientific system for categorizing criminals and develop a workflow to rehabilitate offenders,

（3） To build special-task prisons and special sections of the prisons with special rehabilitation functions,

（4） To set up evaluation systems for the quality of rehabilitation work,

（5） To coordinate functional roles of the three major rehabilitation means,

（6） To build prison police workforce of “experts”, and

（7） To establish a harmonious rehabilitation relationship between the police and offenders.

为了实现监狱工作目的，满足社会对监狱工作需要，北京市监狱系统按照科学发展观和构建社会主义和谐社会的要求，提出了把“坚持‘一个中心’，正确认识和妥善处理好‘两大矛盾’，推动落实‘七项主要工作措施’”作为当前乃至今后一个时期首都监狱工作的基本思路。这一思路是新时期北京监狱事业改革和发展的根本所在，是北京监狱系统正确履行刑罚职能的重要保证。本文系统地阐述了这一思路的具体内容即：坚持“一个中心”，就是坚持把“以改造人为中心，全面提高罪犯改造质量”作为北京监狱工作的中心任务和总体目标。正确认识和妥善处理好“两大矛盾”，一个是伴随监狱工作始终的基本矛盾，即“干警对罪犯进行改造与罪犯被改造之间的矛盾”；另一个是影响当前北京监狱工作的主要矛盾，即“提高罪犯改造质量的客观要求与监狱警察改造能力相对滞后之间的矛盾”。推动落实“七项主要工作措施”，就是不断完善和运行一整套监管安全长效工作机制打牢监狱安全稳定基础、构建罪犯科学分类体系与罪犯改造工作流程、建设特色监狱与特色改造功能区、建立罪犯改造工作质量评估体系、协调发挥三大改造手段的功能作用、建设“专家型”监狱警察队伍、在警察工作与罪犯改造之间建立和谐的改造关系。

以改造人为中心
全面推动北京监狱工作的改革与发展

Focusing on Offender Rehabilitation in Advancing Prison Reforms in Beijing

龚景顺 Gong Jingshun*

现代监狱的功能不再限于惩罚罪犯，而更重要地被赋予了改造罪犯，使他们能够重返社会的使命，也即国际社会通常所说的矫正罪犯，使罪犯早日复归社会的职责和义务。中华人民共和国成立自 1949 年以来，就始终把“坚持惩罚与改造相结合，以改造人为宗旨”作为中国监狱执行刑罚的基本指导思想。

经济基础决定上层建筑的观点告诉我们，监狱作为上层建筑的组成部分，必然受到同时期经济社会发展水平的影响和制约。为了使监狱与社会整体发展水平相适应，以更好满足监狱履行刑罚职能、改造罪犯的需要，在中国经济社会快速发展的推动下，中国刑罚执行机关的最高主管部门司法部在全国开展了监狱体制改革、监狱布局调整等多项大的改革措施，以改变过去主要由于

* 北京市监狱管理局狱政管理处处长 Division Director, Division of Prison Administration, Beijing Prison Bureau

经济不发达所带来的监狱经费保障不足、地理位置偏僻、监狱办企业办社会等问题。

北京是首都，经济社会发展始终走在全国前列，这也直接惠及于北京市监狱系统。当前，北京市监狱系统经费保障到位，监狱布局基本合理，狱政设施不断完善，技术装备逐步改进，监所持续安全稳定（截止到 2006 年 12 月 31 日，已连续十年实现了无罪犯脱逃、无暴狱、无重大事故的工作目标），罪犯改造质量不断提升，正处在轻装前进、专心致志做好改造罪犯工作的新阶段。在认真分析首都监狱工作的现实状况、所处的历史发展阶段以及首都经济社会发展大局对首都监狱工作提出要求的基础上，北京市监狱管理局按照科学发展观和构建社会主义和谐社会的要求，提出了把“坚持‘一个中心’，正确认识和妥善处理好‘两大矛盾’，推动落实‘七项主要工作措施’”作为当前乃至今后一个时期首都监狱工作的基本思路。这是当前北京市监狱系统监狱改革的重点，目的就是要在保证监狱安全稳定的基础上，将全部工作重心转移到提高罪犯改造质量上来，尽最大努力将罪犯由不和谐因素转化为和谐因素，将不稳定力量转化为稳定力量，将破坏力量转化为建设力量，实现监狱工作的社会价值和宗旨任务。

这一基本思路，具体地讲：

坚持“一个中心”，就是坚持把“以改造人为中心，全面提高罪犯改造质量”作为北京监狱工作的中心任务和总体目标。

正确认识和妥善处理好“两大矛盾”，一个是伴随监狱工作始终的基本矛盾，即“干警对罪犯进行改造与罪犯被改造之间的矛盾”；另一个是影响当前北京监狱工作的主要矛盾，即“提高罪犯改造质量的客观要求与监狱警察改造能力相对滞后之间的矛盾”。

推动落实“七项主要工作措施”，就是不断完善和运行一整套监管安全长效工作机制打牢监狱安全稳定基础、构建罪犯科学分类体系与罪犯改造工作流程、建设特色监狱与特色改造功能区、建立罪犯改造工作质量评估体系、协调发挥三大改造手段的功能作用、建设“专家型”监狱警察队伍、在警察工作与罪犯改造之间建立和谐的改造关系。

从工作思路的三个组成部分上看，“一个中心”解决的是北京监狱工作的目标和方向；“两大矛盾”解决的是对监狱工作规律的探索和把握；“七项主要工作措施”解决的是改革管理教育罪犯的传统模式，建立现代、科学、文明的模式来教育管理罪犯，以保证监狱工作中心任务的完成。具体说来，由“七项主要工作措施”构成的管理教育罪犯新模式包括以下内容：

一是完善和运行维护安全稳定的长效工作机制，实现监狱安全与稳定，确保中心任务的顺利完成。

监管安全是监狱顺利开展各项工作的根本基础。要提高罪犯改造质量，确保监狱的安全、稳定是基本前提。在新的形势下，必须把维护监狱的安全稳定建立在依靠长效机制建设上，这套长效机制主要包括安全教育机制、安全责任机制、检查评比机制、狱内侦查机制、现场控制机制、信息分析机制、教育转化机制、突发事件应急处理机制与防逃、制逃和追逃联动机制等方面。

二是积极探索罪犯科学分类，构建“罪犯科学分类体系”。

构建“罪犯科学分类体系”是北京监狱工作贯彻落实科学发展观、保持可持续发展的一项重要的基础性工作。对罪犯进行科学分类，主要是改革传统的分类方式，为对罪犯实施针对性改造、需求性教育打下基础。目前，对罪犯的分类，基本上是从直观的表征上进行，如：根据性别、年龄、犯罪性质、身

体特征、户籍、刑期等。这一分类，比较简单、粗略，仅仅是初级分类，不能够实现对罪犯的科学改造。对罪犯进行科学分类，我们设想在罪犯入监教育阶段，对罪犯按照危险性和改造需求的初步诊断进行初次分类，将罪犯分押到具有高、中、低度戒备等级的不同类型的特色监狱中；在常规教育阶段进行二次或多次分类，根据罪犯的改造难度和改造需求等情况进行动态分类，使罪犯在不同类型的特色监狱之间实现合理流动。对罪犯实行科学分类，一是可以比较科学地解决罪犯的分押、分管和分教问题；二是为科学地制定罪犯改造个案、实施个别化教育创造条件，解决教育内容的针对性和教育方式方法的适应性，实现教育效果的最大化；三是符合建设“节约型社会”的要求，将不同类型的罪犯放在不同戒备等级的监狱或监区之中，合理配备警戒设施与相应的警力，从而降低行刑成本。

三是加强特色监狱与特色改造功能区的研究与建设，为实现中心任务提供载体。

为实现对科学分类后罪犯的有效改造，我们提出了特色监狱与特色改造功能区的建设，特色监狱、特色改造功能区是在对罪犯进行科学分类后能够进行针对性改造、需求性教育的有效载体。建设特色监狱、特色改造功能区实质上就是要建设功能性监狱、专业性监狱，改革传统上的罪犯综合关押、混合改造的监狱管理模式。

“特色监狱”指的是能够对科学分类之后的罪犯进行针对性改造的监狱，并且在改造过程中，体现出各具特色的改造罪犯的监狱文化。特色监狱不是那种简单依靠性别、年龄、刑期长短等自然状态进行分类而形成的传统监狱，它主要强调的是，是否形成了独特的改造模式和特色的监狱文化。“特色改造功能区”是“特色监狱”的细化，是“特色监狱”的具体表现形式。“特色改造

功能区”指的是能够对科学分类之后的某种特定类型的罪犯，进行针对性改造、需求性教育的监区或者分监区。“特色改造功能区”体现的是监区或者分监区对一定类型的罪犯所显示出的改造功能，在改造手段、内容与方法上所显示出的独特风格。

四是研究罪犯改造工作质量评估方式，探索建立罪犯改造工作质量评估体系。

我们建立罪犯改造工作质量评估体系的主要目的是规范工作流程、检验工作质量。评估体系主要包括五个方面：即罪犯分类的科学性评估、个案制定的针对性评估、个案教育实施的有效性评估、罪犯的社会适应性评估和罪犯重新犯罪的预测性评估。在探索建立这样一个体系的过程中，我们将始终注重把握两个方面的问题：一是研究制定《罪犯改造工作流程》。为改造工作设定一个相对科学、合理和完善的程序，不仅为提高改造工作的科学性和规范性打下基础，而且为建立罪犯改造工作质量评估体系明确方向、提供依据，确保高质量的改造效果。二是对罪犯改造质量高低的认识问题。我们之所以提出建立罪犯改造工作质量评估体系，而不是建立罪犯个体改造质量评估体系，是因为我们认为，对罪犯个体改造质量进行评估，由于罪犯思想的隐蔽性，致使评估结果难以准确；相反，如果我们对改造罪犯的工作进行评估，相对而言，不仅容易把握，而且会精确的多。只要我们的改造工作过程是科学的，我们最终改造罪犯的质量也应当是高的。

五是注重协调发挥三大改造手段的功能作用，为实现中心任务提供保障。

总结新中国 50 年监狱工作和有效地实施《监狱法》提出的管理、教育、改造罪犯的三大手段，要充分发挥三大改造手段在改造罪犯过程中的功能性作

用，就必须正确地分析和认识目前三大手段功能作用是否得到充分发挥的问题。目前，罪犯的改造质量不高说明，三大改造手段功能的发挥存在着不协调、内容不具有针对性、方式方法不具有适应性的问题。因此，必须要研究三大改造手段在改造罪犯中发挥功能性作用的问题。一方面就是要围绕中心任务，从思想认识、工作部署、协同机制等方面对三大改造手段进行有目的、有组织、有计划地整合，使三大手段能够围绕一个中心，指向一个目标，充分发挥综合效应；另一方面就是要实现警察在改造罪犯的过程中自觉地将不同的教育内容寓于三大改造手段之中，从而为中心任务的完成提供手段上的保障。

六是建设“专家型”监狱警察队伍，为实现中心任务提供能力支持。

为了破解我局当前面临的主要矛盾，为提高罪犯改造质量提供根本保障和能力支持，需要建设一支“专家型”监狱警察队伍。“专家型”警察的标准是在复合型人才基础上达到“一专多能”，能够解决监狱工作中的危、难、急、重问题。要建设这样一支专家型警察队伍，必须要从增强警察的“五种意识”和提高“八种能力”入手。“五种意识”分别是首都意识、监狱警察的身份意识、依法履行职责的意识、创新意识和公正、公平与文明执法的意识。“八种能力”包括对罪犯服刑全过程的掌握和控制能力、教育罪犯的能力、组织管理罪犯的能力、狱内侦查能力、对罪犯进行心理矫治的能力、处置突发事件能力、应用写作能力和人际交往能力。

七是在警察工作与罪犯改造之间建立“和谐的改造关系”，为实现警察对罪犯的改造和罪犯积极地改造创造良好环境，奠定“双赢”基础。

警察对罪犯进行改造与罪犯被改造之间的矛盾构成了监狱的基本矛盾，监狱的工作性质导致了这对矛盾的对抗性，由于主客观原因，使得这对矛盾往往处在对抗性之中，罪犯主动接受改造的内驱力不能有效地得到激发，导致改

造工作的效果不佳。为了解决这一问题，减缓对抗性，创造一个实现对罪犯进行有效改造的基础，提高罪犯改造质量，我们提出，必须革新传统的行刑理念，按照构建和谐社会的要求，在依法严格、公正、文明管理的前提下，在维护罪犯合法权益的基础上，在警察工作与罪犯改造之间建立“和谐的改造关系”。

“和谐的改造关系”是指警察在对罪犯执行刑罚的过程中与罪犯发生的各种有机联系，是警察在依法严格管理和科学改造罪犯过程中相互之间所形成的一种良性互动。“和谐的改造关系”是一种改造理念，真正的目的是让警察能够正确处理好与罪犯之间的关系，避免矛盾激化，从而为警察工作与罪犯改造创造一种工作和改造的基础。

我们认为，以上七项措施是在深入研究罪犯改造工作特点、努力把握改造罪犯工作规律基础上提出的，充分体现了以人为本的罪犯改造理念，符合了依法、科学、文明的现代行刑要求，是推动北京监狱工作改革与发展的根本之所在。

以上是“以改造人为中心，全面推动北京监狱工作的改革与发展”的一些认识和做法，不妥之处，请批评指正。

整合资源 构建和谐
建立社区矫正工作长效机制

Promoting Community Corrections in China: Resource Consolidation and System Development

荣容 Rong Rong*

Abstract
摘要

Promoting Community Corrections in China: Resource Consolidation and System Development is a summary of the work of community correction in Chaoyang District of Beijing, which included the detailed measures and achievements. Since the trial of community correction was started in November 2003, Chaoyang District has actively explored different ways to build an effective mechanism for community correction, implementing the principle of "sticking to people-based ideas and helping criminals to return to the society"; reclaimed criminals with true feeling and built a people-based interactive mechanism to strengthen the sense of responsibility; integrated social resources to build an extension mechanism for management and

* 北京市朝阳区司法局局长
Director of Justice of Chaoyang District Beijing

education; strengthened team building to build “3+N” operation mechanism for community correction teams; increased exchanges and strived to build an interactive mechanism to learn from advanced experiences. The work of community correction has brought good social benefits and attracted attention of the international community. Louise Arbour, United Nations Deputy Secretary-General and High Commissioner for Human Rights, Mr. Rober Brown, a Canadian official in charge of correction, and Ms. Jackson, International Project Director of Human Rights and Equal Opportunity Commission of Australia, went to this district to study community correction, and had acknowledged the district’s achievement.

《整合资源　构建机制 推动社区矫正工作规范发展》一文，主要介绍了北京市朝阳区开展社区矫正工作的总体情况、具体做法及取得的成效。

北京市朝阳区自 2003 年 11 月开展社区矫正试点工作以来，严格按照“以人为本、回归社会”的理念，大胆探索，构建科学有效的矫正方法管理机制；真情感化，构建“以人为本”的互动机制强化责任；整合社会资源，构建管理和教育的延伸机制；加强队伍建设，构建“3+N”的社区矫正队伍运行机制；加强交流，努力构建学习借鉴先进工作经验的互动机制，社区矫正工作取得了良好的社会效果，引起了国际社会的关注。联合国副秘书长、人权事务高级专员路易斯·阿博尔女士、加拿大矫正官员罗伯特·布朗先生、澳大利亚人权与平等委员会国际项目处主管瓦内萨·朱迪恩·杰克逊女士等都曾到朝阳区考察过社区矫正工作，对朝阳区的社区矫正工作给予了充分的肯定。

整合资源 构建和谐
建立社区矫正工作长效机制

Promoting Community Corrections in China: Resource Consolidation and System Development

荣容 Rong Rong*

尊敬的女士们、先生们：

大家好！很高兴能在美丽的加拿大与大家聚会，就社区矫正工作与各位专家、学者进行研究探讨，我们期待着从中得到启示和收获。我们也衷心希望，通过这次交流和研讨，能够进一步加强中国与加拿大之间的交流与合作，共同促进社区矫正工作的发展。下面，我就北京市朝阳区社区矫正工作的概况向大家作简要介绍。

一、朝阳区社区矫正工作的总体情况

社区矫正是与监禁矫正相对应的行刑方式，是中国刑罚执行制度的重大完

* 北京市朝阳区司法局局长
Director of Justice of Chaoyang District Beijing

善，是司法体制改革的重要组成部分。开展社区矫正工作，顺应了国际社区矫正工作的发展趋势和潮流，有利于推动法治文明和社会进步。

朝阳区是北京面积最大、人口最多的城区，面临承办奥运会、建设 CBD 的机遇，国际化程度高、经济发展快、是高发展与高风险并存的大区。自 2003 年 11 月开展社区矫正试点工作以来，我们结合朝阳区的实际，遵循“以人为本、回归社会”的理念，坚持从社区做起、从人做起，以人的全面发展作为矫正工作的整体内涵，着力在提高矫正质量上下功夫，在加强对社区矫正对象监督管理的同时，加大教育改造工作力度，努力实现社区矫正对象的顺利再社会化。截至 2007 年 4 月份，全区累计接收矫正对象 1762 人，已解除 989 人，实有 773 人。其中：缓刑 279 人 、假释 200 人、剥权 271 人、监外执行 23 人，社区矫正工作取得了初步成效。

二、朝阳区社区矫正工作的具体做法

三年来，朝阳区的社区矫正工作经历了积极应对、悉心探索、全面建设和规范管理四个阶段，在每个阶段，我们都始终坚持加强对矫正对象的教育、监督、管理和服务，积极稳妥、依法规范地推进社区矫正试点工作。

（一） 科学管理，构建宽严相济的管理机制

社区矫正是一项促使罪犯顺利回归社会的刑事司法政策，是通过把罪犯置于开放环境即社区中进行教育改造，以实现惩戒罪犯，彰显法律权威的目的，同时使罪犯与社会的发展保持协调一致，实现罪犯从犯罪人向社会人的转变。因此，我们在社区矫正工作中坚持实行科学管理，努力构建宽严相济的管理机制，激励社区矫正对象自觉改造。

在对社区服刑人员的管理和教育中，努力做到“四个结合”，一是严格管束与人性化关怀相结合，在对社区服刑人员进行严格管理、确保社区服刑人员不脱管、不失控的前提下，对社区服刑人员进行人性化的关怀，促使他们尽快回归社会；二是分类管理和分阶段教育相结合，严格按照社区服刑人员的分类，结合其所处的阶段确定管理类别，采取相应的管理措施；三是日常矫正和重点时期的监控相结合，在做好对社区服刑人员日常管理的同时，遇法定节假日和重大政治活动期间，及时对社区服刑人员进行排查分析，准确掌握其不良思想和异常动态，采取相应的监控措施，保证在节日及重大活动期间，社区服刑人员不出现违法违规问题；四是思想教育和心理辅导相结合，在对社区服刑人员搞好日常思想教育工作的同时，对社区服刑人员重新犯罪的风险进行评估 ，开展对社区服刑人员的个案心理辅导，提高管理教育的针对性，切实提高矫正质量，减少重新犯罪。

经过三年的探索与实践，我区社区矫正工作实现了“三个转变”即：由粗放型向精细型转变；由静态型向动态型转变；由阶段型向长效型转变。下一步，我们将认真总结世青赛期间对社区矫正对象的管控经验，加强对奥运场馆所在地区社区矫正对象的摸底、控制、管理和教育，切实做好奥运会的安全保卫工作。

（二） 真情感化，构建“以人为本”的互动机制。

社区矫正的基本原则之一，就是帮助社区矫正对象回归社会。因此，我们在社区矫正工作中，提出“以人为本、回归社会”的工作理念，牢牢把握社区矫正的本质，在对社区矫正对象进行严格管理，确保社区矫正对象不脱管、不

失控的前提下，对社区矫正对象进行科学、文明的管理，促使他们尽快实现从犯罪人向社会人的转变。一是采取集中学习、个别走访辅导等多种形式，在思想上教育他们遵守法律、崇尚道德、崇尚仁爱，矫正他们的心理缺陷；在人权保障上，尊重他们的民族习惯和宗教信仰。二是采取多种形式传授文化知识与劳动技能，积极推荐就业，对家庭生活困难的社区矫正对象，在符合法律规定的条件下，积极为其申请低保。三是以人为本，积极协调有关部门为社区矫正对象解决实际困难，达到使社区矫正对象顺利回归社会的目的。四是在做好社区矫正对象转化工作的同时，还注重做好社区矫正对象家属的工作，为社区矫正对象营造和谐的矫正环境。如矫正对象刘某，曾因抢劫罪被判处有期徒刑 11 年，2004 年 1 月被假释。矫正工作人员及时对其进行帮助和教育，目前，刘某已结婚，有了一个幸福美满的家庭。

（三）　　整合社会资源，构建“3+N”的社区矫正工作队伍模式

社区矫正相对于监禁矫正，一个最大的特点便是罪犯不再完全隔离于社会，而是力图重新融洽于社会。因此，我们在社区矫正工作中，还注意将对社区矫正对象的管理和教育主动向社会延伸，积极动员、组织社会力量参与社区矫正工作。为更好地探索社会力量参与社区矫正工作的机制，我们于 2005 年 3 月 18 日成立了北京市朝阳区阳光社区矫正服务中心。

朝阳区阳光社区矫正服务中心是从事非营利性社会服务活动的民间社会组织，属公益事业社团法人。其宗旨是：本着“以人为本，回归社会”的理念，整合并优化配置社会资源，形成以社会志愿者为依托，以为社区矫正对象提供服务、实现社区矫正对象心灵回归为根本，以提高教育矫正质量为核心的工作体系和工作机制，协助司法行政机关做好社区矫正工作，努力构建社区矫正工作的社会系统工程。

为了使矫正中心各项工作规范有序地发展，我们还成立了朝阳区阳光社区矫正服务中心理事会，邀请全国政协副主席罗豪才担任理事会名誉会长；清华大学公共管理学院副院长、NGO 研究所所长王名、中国社会工作教育协会会长、北京大学社会学系主任王思斌担任名誉副会长。加拿大刑法改革与刑事政策国际中心量刑和矫正项目主任罗伯特•布朗担任国际顾问；司法部、共青团中央、北京市司法局、北京师范大学相关领导和专家担任顾问。

中心下设心理评估与咨询部、志愿者工作部、劳动培训与救助部、理论研究部、综合协调部、人力资源部、对外联络与交流部等 7 个部门，主要负责组织发动社会力量参与我区的社区矫正工作；对社区矫正对象提供回归社会辅导、心理矫正、帮助教育、技能培训、临时救助等各类服务；组织开展社区矫正宣传、培训、理论研究及交流活动；对社区矫正专职社会工作者进行招聘、管理、教育、培训和考核等。中心的工作人员专业性强、理论水平高，具有丰富的实践经验。

社区矫正工作队伍的构建直接关系到社区矫正工作的好坏。三年来我们一直注重社区工作队伍的建设，在加强对司法所工作人员的业务培训、完善干警管理制度的同时，积极依托社区矫正服务中心招聘社会工作者从事社区矫正工作，逐步形成“3+n”的社区矫正工作模式。

目前我区共有三支社区矫正工作队伍：一支是 120 名司法助理员队伍，二是 47 名抽调监狱警察队伍，三是一支 129 人的社区矫正专职社会工作者队伍。司法助理员、监狱警察、专职社会工作者和广大社会志愿者组成的“3+N”组织模式初步建立，社区矫正组织网络不断健全，矫正工作体系基本形成，确保了我区社区矫正工作稳步、深入地开展。

社区矫正专职社会工作者主要为社区矫正对象提供心理咨询、劳动培训、

生活救助、释前辅导、社区教育、家庭支援、法律援助、志愿者工作发展、社区帮扶、理论研究发展等十项服务。我们还将以开拓新服务领域和服务内涵作为未来可持续发展的战略，从更广义的范畴开展对社区矫正对象多元化的服务，协助社区矫正对象建立稳定的生活，预防重新犯罪。

（四）　　加强交流，搭建学习借鉴先进工作经验的平台

在社区矫正工作中，我们十分注重学习、借鉴西方发达国家开展社区矫正工作的先进经验和理念。三年来，先后参加了中美、中澳“社区矫正国际研讨会”。2006 年 6 月在北京召开的中澳社区矫正国际研讨会上，我局作了《对社区矫正对象的风险需求评估》专题发言。2005 年 8 月，联合国副秘书长、人权事务高级专员路易斯·阿博尔女士考察了我区阳光社区矫正服务中心后，对中国的社区矫正工作给予充分肯定。加拿大矫正官员罗伯特·布朗第三次访问阳光矫正中心时表示：中国大量发动社会志愿者、组织社区的力量、聘请专家、教授等参与社区矫正工作，取得了良好的成效，在此方面已经达到世界先进水平。2006 年 6 月，出席中澳社区矫正国际研讨会的澳大利亚人权与平等委员会国际项目处主管瓦内萨·朱迪恩·杰克逊女士等五位澳方专家及所有会议代表参观了朝阳区阳光社区矫正服务中心。澳方代表回国后，代表澳大利亚司法部长及人权与机会平等委员会主席专门向司法部发来感谢信，对朝阳区的社区矫正工作给予了充分地肯定。

为了更好地了解和学习国外开展社区矫正工作的先进经验，我们组织朝阳区的社区矫正工作人员先后赴美国、加拿大、澳大利亚、新西兰、巴西、智利、新西兰、日本、韩国等实地考察社区矫正工作，并与比利时、中国香港的 NGO 组织开展了广泛交流与合作，促进了我区社区矫正工作的深入发展。

三、朝阳区社区矫正工作的效果

经过三年多的试点和实践，我区的社区矫正工作取得了初步的成效：

1、进一步完善了社会治安防控体系，加强了对社区矫正对象的监督管理和教育，促进了社区矫正对象顺利回归社会。

2、绝大多数社区矫正对象消除了抵触心理，认罪悔过意识逐渐增强，能够服从监督管理、接受教育，社会责任感进一步加强，逐渐回归、融入社会，先后出现了一批矫正效果明显的典型。他们中有的主动协助公安机关抓获在逃犯罪嫌疑人；有的奋不顾身，抢救落水儿童；有的拾金不昧；有的利用一技之长，义务为群众服务；有的义务献血、主动为灾区捐款；有的用自身的教训和转变经历教育感化其他社区矫正对象等等，社区矫正重新违法犯罪率为 0.7%，社区矫正的效果已初步显现。2005 年 10 月，北京市朝阳区司法局委托北京零点市场调查与分析公司，针对居民对社区矫正问题的态度进行了相关调查。调查结果显示，97%以上的社区矫正对象对社区矫正工作表示满意。

3、随着社区矫正试点工作的逐步深入，社区矫正已引起社会各界的关注，社区居民和社区矫正对象家属对矫正效果给予了充分的肯定，越来越多的社会公众消除了对社区矫正的疑虑和恐惧感，社会公众对社区矫正的理解和支持程度明显提高。据零点调查结果显示，在听说过社区矫正的朝阳区居民中，近 90%的居民对社区矫正的理解是正确的，86.8%的居民对社区矫正工作表示理解和支持。

尊敬的女士们、先生们，社区矫正目前已成为世界行刑方式发展的趋势，它很好地兼顾了犯罪人、被害人和社会三方面的利益，有助于减少重新犯罪，构建和谐社会。开展社区矫正试点工作以来，我们从本区实际出发，做了一些

有益的尝试和探索，社区矫正工作取得了一定的成效。我们深知，朝阳区的社区矫正工作还有很大的发展空间。我们将继续加强社区矫正工作的探索和实践，学习和借鉴加拿大的先进经验，进一步深化社区矫正工作，不断提高教育矫正的质量和效果，为促进我们共同的矫正事业的发展做出积极的努力！

中国警方国际警务合作机制研究

A Study on the Chinese Mechanisms of International Police Cooperation

周欣[*]　朱显有[**]　Zhou Xin, Zhu Xianyou

Abstract
摘要

Transnational organized crimes and cross-border escapes involving illegal activities such as smuggling, drug trafficking, fraud, embezzlement and bribery are difficult to handle if only with domestic institutional forces in China. Only through legal cooperation and mutual collaboration of countries around the world can we effectively prevent and combat these crimes. However, other than the differences among countries in their political, social and economic systems, their status of rule of law and their cultural values and customs, the independence of national judiciary sovereignty also limits policing staff of a country to conduct lawful investigation, tracing, and trials to only within the domestic scope, which is not favorable to the

[*] 中国人民公安大学法律系副主任，教授，中国法学会刑事诉讼法研究会理事。
Deputy Dean at the Law Department of the People's Public Security University of China
[**] 中国人民公安大学法律系讲师。
Professor at the Law Department of the People's Public Security University of China

prevention and combat of crimes at international and transnational levels. Therefore, under the premises of mutual respect to sovereignty and human rights, and of observing the principle of the rule of law, how to reinforce judicial and police cooperation, and effectively punish crimes of cross-border escapes at international and transnational levels has become a major and urgent issue. This is particularly the case for China, which as one of the developing countries is willing to seek the best possible solution by way of joint discussions with related countries.

So far, the ways of cooperation China has resorted to from what is extensively used within the framework of the Interpol are mainly: direct and indirect cooperation, bilateral and multilateral cooperation, special cases and campaigns cooperation, and cooperation via liaison officers and regular meetings. Meanwhile, China has signed 72 agreements on mutual legal assistance with 48 countries in the world and bilateral extradition treaties with 25 countries, has entered into 25 international treaties or multilateral treaties that contain elements of legal assistance. At the same time, the Chinese police, relying on the platform of Interpol, have issued “red warrants for arrest” or other types of warning to relevant countries by making use of this world level international organization. In some cases, China has successfully brought home suspects on the run with the help of police institutions in other countries. China has been in active discussions with relevant countries to find solutions to issues around extradition, transfer and repatriation. With its networks of police in 183 member countries and state-of-the-art communication and data processing systems, the Interpol has played an important irreplaceable role in helping the Chinese police to investigate and combat international and transnational crimes and to track crime information and trace fugitives.

Nevertheless, because China's legal mechanism for extradition is not well established, the pursuit of fugitives can only rely on the Interpol. Further, Chinese police has a limited mode of operation in their cooperation with international policing. Consequently, overwhelming difficulties have resulted where China is actively pursuing extradition. It is manifested in the low success rate for extradition request initiated by China. Many requests for extradition and expatriation have been delayed, shelved or rejected.

In future for the benefit of cooperative mechanism in international policing, the Chinese government will, with all means and ways, expand its cooperation in international policing with the police force of other countries; have a well diversified cooperative mechanism that is rich in contents, integrative of principles and flexibility; constantly extend bilateral and multilateral treaties on extradition; and seek case-specific "ad hoc agreements" and "substitution measures" for special cases.

跨国的、有组织的和潜逃出境（国）的走私、毒品、诈骗、贪污、受贿等犯罪，仅靠本国追诉机关的力量已经难以应对，只有通过世界各国司法合作，相互配合才能有效防范和打击这类犯罪。但是，由于各国的政治制度、社会制度、经济制度、法治形态、文化价值、风俗习惯等存在差异，国家司法主权的独立性也限定了各国警务人员只能在本国领域内依法进行侦查追捕乃至审判活动，这对于预防和打击国际性、跨国性犯罪非常不利。因此，各国在彼此尊重国家主权，保障人权，遵循法治原则的前提下，如何加强司法、警务合作，有效惩罚国际性、跨国性以及潜逃出境（国）的犯罪行径已经成为各国急需解决的一个重大课题，尤其是发展中国家的中国愿意和有关国家共同磋商，寻求最佳的解决途径。

到目前为止，中国在国际刑警组织框架内广泛应用的合作方式主要有：直接合作和间接合作，双边合作与多边合作，专案合作与战役合作，以及联络官制合作和定期会谈制合作。同时，中国已与世界上 48 个国家签署了 72 个司法协助协定，与 25 个国家签订了双边引渡条约，加入了 25 个含有司法协助内容的国际公约或多边条约，同时，中国警方依靠国际刑警组织这一平台，利用这一世界性国际组织向有关国家发出“红色通缉令”及其他类型的通报，并且在某些案件中，已经成功地借助各国警察机关力量将在逃的犯罪嫌疑人缉拿归案，同时又与有关国家积极协商，解决引渡、让渡、遣返等问题。国际刑警组织依靠其 183 个成员机构的警察网络、先进的通讯设施和数据处理系统，在帮助中国警方侦查和打击国际性、跨国性犯罪，追踪犯罪信息和逃犯踪迹方面，发挥着不可替代的重要作用。

但是，由于中国有关引渡的法律机制尚不健全，追逃工作只能依赖国际刑警组织，而中国警方的国际警务合作模式狭窄，实践中已经造成中国主动引渡的重重困难，具体表现为主动引渡的成功率很低，大量的引渡或遣返请求被拖延、搁置或被拒绝。

在今后的国际警务合作机制中，中国政府想方设法拓展与他国的国际警务合作，开展形式多样，内涵丰富，原则性与灵活性相结合的国际警务合作机制，不断扩展与各国签订引渡合作的双边、多边条约，对特殊案件寻求有针对性的“特定协定”和“替代性措施”方案。

中国警方国际警务合作机制研究

A Study on the Chinese Mechanisms of International Police Cooperation

周欣[*]　朱显有[**]　Zhou Xin, Zhu Xianyou

引 言

杀人、抢劫、强奸、毒品、诈骗、走私、贪污、贿赂等犯罪行为，是世界各国刑法打击的重点。其中，跨国的、有组织的和潜逃出境（国）的走私、毒品、诈骗、贪污、受贿等犯罪，仅靠本国追诉机关的力量已经难以应对，只有通过世界各国司法合作，相互配合才能有效防范和打击这类犯罪。但是，由于各国的政治制度、社会制度、经济制度、法治形态、文化价值、风俗习惯等存在差异，国家司法主权的独立性也限定了各国警务人员只能在本国领域内依法进行侦查追捕乃至审判活动，这对于预防和打击国际性、跨国性犯罪非常不利。因此，各国在彼此尊重国家主权，保障人权，遵循法治原则的前提下，如

[*] 中国人民公安大学法律系副主任，教授，中国法学会刑事诉讼法研究会理事。
Deputy Dean at the Law Department of the People's Public Security University of China
[**] 中国人民公安大学法律系讲师。
Professor at the Law Department of the People's Public Security University of China

何加强司法、警务合作，有效惩罚国际性、跨国性以及潜逃出境（国）的犯罪行径已经成为各国急需解决的一个重大课题，尤其是发展中国家的中国愿意和有关国家共同磋商，寻求最佳的解决途径。

2001 年，新华社向全世界公布一组数字：“根据不完全统计，目前有超过 4000 多名贪污贿赂犯罪嫌疑人携公款 50 多亿元在逃”[729]。试想一下，仅贪污贿赂犯罪就有这么多人，这么多钱流向他国，如果对全部犯罪进行完全统计，那么这种数字的宣告无疑会更加使人震惊。前几年，中国犯罪嫌疑人逃往境外，因为追逃方式受限，只能暂时放弃。现如今，中国加强与各国警方、司法机关的联系，广泛开展国际警务合作，到目前为止，中国已与世界上 48 个国家签署了 72 个司法协助协定，与 25 个国家签订了双边引渡条约，加入了 25 个含有司法协助内容的国际公约或多边条约，同时，中国警方依靠国际刑警组织这一平台，利用这一世界性国际组织向有关国家发出“红色通缉令”及其他类型的通报，并且在某些案件中，已经成功地借助各国警察机关力量将在逃的犯罪嫌疑人缉拿归案，同时又与有关国家积极协商，解决引渡、让渡、遣返等问题。国际刑警组织依靠其 183 个成员机构的警察网络、先进的通讯设施和数据处理系统，在帮助中国警方侦查和打击国际性、跨国性犯罪，追踪犯罪信息和逃犯踪迹方面，发挥着不可替代的重要作用。

一、中国警方在国际刑警组织框架内的合作方式和内容

（一）合作方式

[729]李广森著：《红色通缉令——中国追捕外逃贪官实录》，中国检察出版社 2007 年 1 月，第 1 版，引言。

中国在国际刑警组织框架内广泛应用的合作方式主要有：直接合作和间接合作，双边合作与多边合作，专案合作与战役合作，以及联络官制合作和定期会谈制合作。在具有友好外交关系的国家和地区，一般采取直接联系的方式进行，例如中越、中蒙边境地区的联络。而对于国际贩毒等重大跨国犯罪，尤其是为了将罪犯一网打尽而使用“控制下交付”手段时，中国与涉案国家主要采取双边或多边的合作方式。对于几国交界地带的犯罪行为，例如：对东南亚“金三角”地区的毒品犯罪，通常采取周边国家的联合行动、战役合作，集中打击跨国性集团犯罪。同时，为便于与各国警方开展国际警务合作，例如，定期会谈，分析犯罪，协助调查等，中国警方经与有关国家协商，可以派员作为联络官进驻对外使馆。可见，中国警方的国际合作方式多种多样。

（二）合作内容

中国通过国际刑警组织开展合作的内容主要是传递交换犯罪信息，发布国际通报，协助查找犯罪事实，协助进行证据搜集与送达。同时在实践中努力创造条件，促使引渡罪犯工作顺利。此外，在对具体案件的侦查活动之外，通过与国际刑警组织进行合作，搜集、传递犯罪信息已经成为中方在国际刑警框架平台内进行的众多工作中的主要内容。中方可以通过该组织总秘书处的资料库，查找有关 150 万人的个人识别资料，包括相貌特征、指纹、别名以及其他个人资料，资料库可以在几分钟内获得所通缉罪犯的像片与指纹。当然，除搜集、传递犯罪信息外，中方为了缉捕，查明罪犯或发现犯罪线索，还会通过国际刑警组织要求各成员国警察机关进行协助，发布国际通报。这种通报性质上是一项重要的国际侦查措施，是各国警察机关之间开展刑事案件侦查的有力手段，其中红色通报就是众所周知的“红色通缉令”，用于逮捕并临时羁押犯罪嫌疑人，直至将犯罪嫌疑人引渡或采用其他替代措施抓捕归案。国际警务合作

也包括国与国之间为查明犯罪事实，在搜集犯罪证据方面进行协查及送达工作。为了更好地加强国际警务合作，还需要对有关警务人员进行培训，开展国际研讨及技术合作等侦查以外的合作内容。由于引渡及其他替代性遣返措施的需要，中方还要求警方协同其他相关部门共同促进域外警务国际合作模式的拓展。

二、中国警方参加国际警务合作情况介绍

（一）中国与国际刑警组织成员国之间的侦查合作

1984 年中国加入国际刑警组织后，积极与各成员国对以下五种类型的案件展开协查：一是居留在国外的中国籍人的罪犯，核实其在华期间有无犯罪记录，证实其在华的家属身份；二是在华的外国人有无违法犯罪记录，证实在华期间的确实表现；三是在外国犯罪后，可能逃往中国的中国人或外国人的往址，藏匿地点或可能的下落；四是原居住在中国而已潜逃，在外国犯罪后又逃回中国的犯罪分子（包括中国籍人和外国人）的下落及其在中国期间的表现；五是涉外的国际经济犯罪案件，例如，国际走私、国际贩毒案件等。

（二）中国与国际刑警组织总部之间的警务合作

中国公安部一直支持国际刑警组织的各项活动，贯彻国际刑警组织打击跨国犯罪的策略，落实国际刑警组织总部的各项政策和决议。在长期实践中，中国与国际刑警组织之间建立起密切的合作关系，对于总部的红色通缉令、协调通报，均能认真部署，迅速行动，如发现犯罪信息，立即对有关犯罪嫌疑人采取措施，确保国际刑警组织红色通缉令，协查通报的权威性。据统计，2001 年至 2005 年 5 月，在我国境内抓获国际刑警组织通缉的犯罪分子达 18 人之多

[730]，同样，在国际刑警总部的大力配合和协调下，通过国际刑警组渠道，中国国家中心局在 1984 年—2005 年 5 月 12 日，共发布红色通缉令 800 余份，据不完全统计，2001 年—2004 年，从国外抓捕犯罪嫌疑人 22 名[731]。

三、中国警方对国际警务合作的重新认识

过去中国的司法、行政执法机关及至上决策层部门一直认为，应当依靠国际刑警组织完成境外追逃工作，只要发出“红色通缉令”，国际刑警组织予以配合，境外追逃就万事大吉，甚至为此在实践中改变管辖，将一些外逃贪污贿赂案件改由公安机关侦查，便于通过国际刑警组织进行追逃。但实际情况并非如此，由于中国有关引渡的法律机制尚不健全，追逃工作只能依赖国际刑警组织，而且这种方式也主要适用于同样引渡法律机制不健全且与中国建立友好外交的国家，其他一些发达国家则很难见效。因此，我们必须要重新认识国际刑警组织框架内的警务国际合作机制。

国际刑警组织实际上是各国警察之间一种松散的合作组织，它不是一个超国家的司法机构或执法机构，只能在“各国现行法律限度之内”开展合作[732]。国际刑警组织的主要功能不是引渡，只是采用联络、协调、斡旋方式促成当事国之间引渡的成功。国际刑警组织为追捕逃犯而发布的国际通报即“红色通缉令”，对大部分成员国不具有任何法律约束力，只不过是一种情报交换的方式，具体表现在，一方面为引渡而采取的羁押措施都必须以存在开展引渡作合作的可能性为前提，如果收到“红色通缉令”的国家未与中国缔结双边引渡条

[730]朱恩涛主编：《国际刑警与红色通缉令》，中国人民公安大学出版社 2006 年 1 月第 1 版，第 299 页。
[731]同上。
[732]参见《国际刑警组织章程与规则》第 2 条。

约等原因不能向我国引渡逃犯，或者尚未就个案引渡合作与我国主管机关达成协议，那么，该通缉令我国可以不予理睬；另一方面，根据绝大多数国家的引渡立法，该国的国际刑警中心局只能将因引渡目的而应当被逮捕或临时逮捕的外国人交由本国的司法机关处理决定，而这些决定机关一般为法院或检察院，而警察机关不享有直接拘捕的权力，这意味着这些国家的国际刑警中心局在接到总部“红色通缉令”后不能自主决定是否执行该通缉令，只能将有关拘捕请求转给本国的主管司法机关处理。它唯一能做的事情只是协助协查或监控。因此，请求国如果把缉捕和引渡逃犯的工作全部寄希望于国际刑警组织或被请求国的警察机关上，只会事倍功半，得不偿失，贻误战机。例如，2005 年中国确定的重大境外追逃案件的在逃人员几乎全部隐藏在美国，可到目前为止，美国从没有正式向中国引渡过任何一名逃犯[733]。

毋庸讳言，由于目前中国警方的国际警务合作模式狭窄，已经造成中国主动引渡的重重困难，具体表现为主动引渡的成功率很低，大量的引渡或遣返请求被拖延、搁置或被拒绝。对于一些潜逃犯，我们暂时未能采取有效的追捕手段。特别是在外逃人员主要集中的欧美国家，其中大多数国家尚未与我国签订双边引渡条约关系，而且这些国家在引渡合作问题上又持“条约前置主义”态度。例如，美国与中国未签订引渡条约，又实行“条约前置主义”，而且又对“条约”的解释限制在双边，[734]几乎不包含多边国际公约。[735]再如，荷兰，根

[733]中国银行开平支行特大贪污挪用案主犯余振东、许超犯和许国俊都逃到美国，除余振东辩诉交易且接受自愿遣返外，其他两名仍然无法引渡或采取其他替代性措施被遣返。

[734] 2006 年 3 月止，美国与 110 个国家缔结双边引渡条约，并且与我香港签订了移交逃犯协定。

[735]美国在《联合国打击跨国有组织犯罪公约》和《联合国反腐败条约》的谈判过程中，反对有约束性言辞，将国际约规定为开展引渡合作的法律依据，最终表术为：以订有条约为引渡条件的缔约国如果接到未与之订有引渡条约的另一缔约国的引渡请求，“可以”将有关公约视为引渡的法律依据，实际上，美国只参加一项多边引渡公约《美洲国家间引渡公约》。

本不接受互惠原则，只依据引渡条约进行，而我国又未与之缔结双边引渡条约，据此，浙江建设厅副厅长杨秀珠外逃荷兰被抓捕但至今无法引渡。[736]同时，由于我国《刑法》仍保留死刑，所以在引渡中必然遇到“死刑不予引渡”的法律障碍。

此外，在警务合作实践中，由于我国熟悉引渡法律程序的外事警察比较少，对世界各国三种不同引渡证据标准不了解、不熟悉，如，《澳大利亚引渡法》采用的表面证据标准、[737]《美国和巴西引渡条约》采取的足够证据标准[738]和《中国和莱索托引渡条约》适用的零证据标准[739,] 有时直接影响请求引渡材料和文件的证明能力与质量，加之有些引渡材料的法律形式要件具有特殊要求，如认证或公证证明，而这些材料和文件的提供对他国是否同意引渡至关重要。

一言蔽之，中国的警务合作机制目前只囿于国际刑警组织框架内进行合作，未能紧紧围绕在“引渡、让渡、替代遣返”三项核心合作内容工作进行，这是导致目前中国警务合作机制仍处于初级阶段的重要原因。因此，中国政府和有关部门在努力完善国内立法的基础上，迫切需要更新观念，拓宽思路，大力发展刑事司法协助，公约外交，即通过签订双边、多边引渡条约，在互惠特定协定中加入有关引渡条款等方式，力争在全球建立一个真正天罗地网式的警务国际合作机制。

[736]参加《女巨贪杨秀珠荷兰落网》，载《南方都市报》2005 年 6 月 1 日。
[737]参见 1988 年《澳大利亚引渡法》第 11 要第 5 款第 2 项。
[738]参见《美国和巴西引渡条约》。
[739]参见《中国和莱索托引渡条约》第 7 条第 1 款第 2 项。

四、以中国和加拿大合作为例分析未来警务合作机制

（一）中国和加拿大警务合作模式

从前，加拿大属于奉行“条约前置主义”的国家，1999 年出台的《加拿大引渡法》变通了规定，提出了较为广泛的引渡协作方式[740]，即允许援引多边国际公约作为法律依据，允许“特定协定”个案引渡合作[741]，同时还可以进行替代性引渡措施。现以众所周知的厦门远华案件为例说明中加两国的国际警务合作。

1998 年 8 月厦门远华走私案犯罪嫌疑人主犯赖昌星潜逃到加拿大，虽然加拿大政府是最早与我国缔结双边刑事司法协助条约的西方国家，但是两国却未能进一步协商有关签订引渡条约的事宜。案发当时中国警方对加拿大 99 年变通新的个案“特定协定”引渡制度尚不熟悉，因而中国有关部门未能启动引渡程序，而选择了《加拿大移民法》规定的遣返方式，寄希望通过遣返替代引渡。然而，由于该案选择移民法规定的遣返手段，导致被请求人有可能得到加拿大国内法的更多关照。因而，虽然这种方式可以使中国警方减轻举证责任，但是该程序对遣返对象救济途径太多，尽管中加有关部门经过各种努力，耗时耗力，持续数年，仍未达到中国司法机关追求的目的，至今使犯罪嫌疑人逍遥法外。

（二）中国今后国际警务合作模式探究

[740]参见该第 2 条和第 10 条规定。
[741]加拿大与 49 国家缔结引渡条约，参加 8 项引渡条款多边国际公约。

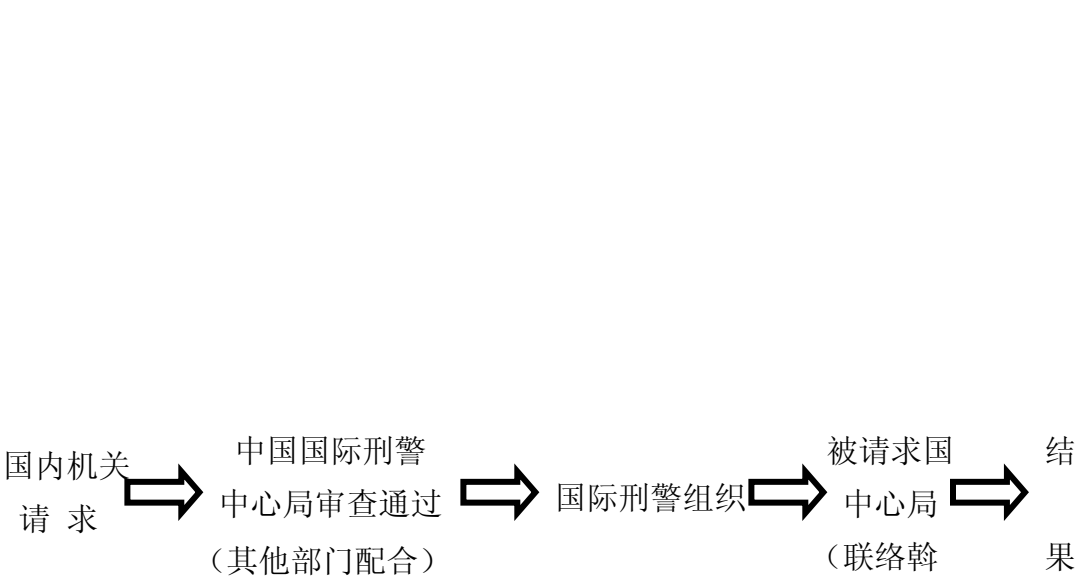
通过展现中加两国警务合作机制的方式可以看出，在今后的国际警务合作机制中，中国政府首先需要不断扩展与各国签订引渡合作的双边、多边条约，特别应争取尽早与美国、加拿大、澳大利亚、欧盟各成员国缔结引渡条约；其次，对于未签订前而一直适用“条约前置主义”的国家，也要尽量开辟以多边引渡国际公约为法律依据的变通、替代引渡的各种解决途径，如澳大利亚，可以尝试依据《联合国打击跨国有组织犯罪公约》、《联合国反腐败公约》或其他可援引的多边公约提出引渡请求，或者通过适当的途径与其协商，要求这样的国家通过本国的法律程序将中国列为依据多边公约开展引渡的合作伙伴[742]，例如，原北京城乡建设集团副总经理李化学，贪污公款 1145 万元，受贿 68 万元，挪用公款 50 万元，逃亡新西兰、澳大利亚，最终就是尝试通过澳大利亚的司法协助等措施将犯罪嫌疑人缉捕，引渡回国的[743]；再次，对于允许个案“特定协定”的国家，中国警方也应通过司法途径开展引渡工作；最后，对于没有变通措施的，可以采用对等原则[744]和替代性措施[745]灵活处理。

此外，应当采取适当和有效的措施，逐步改善死刑对中国引渡造成的阻碍，重视加强对犯罪嫌疑人外逃案件的调查取证工作，为了使请求他国引渡或采取其它措施的证据材料符合被请求国法律所要求的“表面证据”、“足够嫌疑”的标准，要努力提高警务人员的素质，使其熟知有关国家关于引渡的相关法律规定和制度。我们预测，未来中国警方的国际警务合作机制必将朝着多部

①红色通缉令
——双边引渡

[742]黄风著：《引渡问题研究》，中国政法大学出版社 2006 年 11 月第 1 版，第 118 页。
[743] 李广森著：《红色通缉令：中国追捕外逃贪官记实》，中国检察出版社 2007 年 1 月第一版，第 148 页。
[744] 2005 年 6 月 11 日《北子晨报》：未经引渡审查，我国警方将顾义交籍犯罪嫌疑人遣返犯至美国，违犯对等原则，使美方永远不想与我签订引渡双边条约。
[745]包括异地追诉，非法出境遣返；证明非难民身份等等切断逃犯经济条件，逼他遣返。

门、多层次、特定性、丰富多彩、针对性强的实效模式发展。具体模式示意如下：



总之，中国警方面对日益猖獗的跨国犯罪、国际犯罪，正在想方设法拓展与他国的国际警务合作，开展形式多样，内涵丰富，原则性与灵活性相结合的国际警务合作机制，其成效明显，并将继续发挥更大的作用。我们有理由相

信，随着中国与各国在政治、经济、文化、法律等各个领域交往的不断深化，中国警方、司法机关在逐步积累经验的基础上，将会在不久的将来，建立以《引渡法》为核心的合作机制。一方面借助国际刑警组织之平台，沟通犯罪信息，搜集情况证据，准确及时发布红色通缉令，加大对在逃犯之监控和拘捕。另一方面在警务合作机制中，加强与其他部门的联动，努力推动引渡双边、多边条约、公约签订和实施，对特殊案件寻求有针对性的“特定协定”和“替代性措施”方案，并严格遵循程序正义的诉讼原则，依法认真搜集外逃犯罪嫌疑人的犯罪事实和证据，积极准备各种材料。在实践中，坚持原则性与灵活性相结合的原则，妥善处理政治犯不引渡，死刑犯不引渡等引渡原则，切实贯彻互惠、对等、双重犯罪原则，使中国警方的国际警务合作机制弹性和刚性并济，力争作到即使潜逃犯躲到天涯海角，也都让他无法逃出中国警方、司法机关的法网。中国警方愿意与各地区、各国的相关部门在全球布下红色法网。为此，中国政府将根据需要，有计划有目的的培训一批熟悉引渡合作机制范畴内的各种法律，专门从事国际警务合作的专家及执行者。伴随着中国的强大和努力，这一天一定会来到！

Monitoring the Implementation of the International Cooperation Provisions of International Conventions

Yvon Dandurand, Vivienne Chin

Whether we are trying to combat corruption, economic crime, cyber-crime, money laundering, human trafficking, trafficking in drugs or firearms, or even terrorism, it does not take long before we realize how much we need help from our colleagues in other countries.

The international community now recognizes international cooperation as an urgent necessity. Yet, cooperation mechanisms are not growing as fast as they should. They certainly are not growing fast enough to keep pace with the fast changes in patterns of transnational crime, including terrorism.

The main mechanisms supporting international cooperation between investigators or prosecutors are well known. They include mutual legal assistance, extradition, transfer of proceedings in criminal matters, freezing and confiscation of proceeds of crime, protection of witnesses, exchange of information and intelligence, transfer of prisoners, as well as a number of less formal measures. These mechanisms are based on bilateral or multi-lateral treaties or arrangements and, to a large extent also, on the enabling provisions of national law. All of these mechanisms are evolving rapidly to keep pace with new technologies and new crime patterns.

Many of these cooperation strategies have been in place for some time, while others are relatively new and untested. Nevertheless, a consensus is emerging around some of the most promising cooperation practices and strategies. At the United Nations level, many of these strategies are now captured in and promoted by the *Convention against Transnational Organized Crime* and its protocols on human trafficking, immigrant smuggling and firearms trafficking, the *Convention against Corruption*, and some of the global conventions against terrorism. In fact, the main purpose of

these conventions is precisely to facilitate international cooperation in addressing these various international threats.

At the regional level, other initiatives have also been undertaken to promote international cooperation in the field of crime prevention and criminal justice. At least one region, Europe, has made more progress than others in that regard. Professor Nash will be referring to that experience in her presentation.

At all levels, however, the implementation of these international treaties has been difficult, slow, and uneven.

Since the 9/11 events, in particular, our weak international cooperation mechanisms have been put to the test. In some cases, they have produced some noticeable results, contributed significantly to public safety, and countered some significant international threats. In other instances, they are clearly inadequate.

In fact, these international cooperation mechanisms have been under constant stress in the last several years. Some law enforcement cooperation and intelligence exchange practices have emerged which have been very controversial and detrimental to human rights and rule of law principles. Some of them, like the extraordinary rendition of suspects, are almost universally condemned. Some cooperation activities have become the object of greater public scrutiny and some law enforcement agencies are being publicly criticized for their failure to firmly anchor international law enforcement cooperation in sound rule of law and human rights principles.

The conventions that I mentioned were adopted in order to accelerate the process of international cooperation in criminal matters. They were meant to create an **international cooperation regime**. At first, all this was presented as a matter of great urgency, an international priority. Then, progressively, the political discourse was somewhat toned down.

The time has perhaps come to, so to speak, “take the pulse” of that international cooperation regime. The problem, of course, is that there is very little systematic information available on how well this regime is performing its task. The conventions themselves include dispositions concerning reporting and review mechanisms and for monitoring States Parties’ implementation efforts and compliance with their obligations under the treaties. In the cases of both the TOC Convention and the UN Convention against Corruption, Conferences of States Parties,

supported by a Secretariat, have been established with a mandate to monitor the implementation of the conventions and to obtain the necessary information from States Parties. Unfortunately, as I may have a chance to explain a little later, these mechanisms have not proven very effective so far and information on the strength and effectiveness of the new international cooperation regime remains very limited.

By most accounts, in most parts of the world, this cooperation regime remains very weak. As was emphasized in the conclusions and recommendations of the *Second World Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, in Doha, Qatar, in November 2005, a lot remains to be done at the national and levels to strengthen that regime.

With the exception perhaps of Europe which has developed its own international cooperation regime (with unique mechanisms such as the European arrest warrant, mutual recognition of court orders, etc.), the results of the adoption and implementation of the United Nations Conventions against organized crime and corruption remain disappointing**.**

Some people would argue that this is because of genuine technical and logistical difficulties encountered by States Parties in the implementation of the conventions. Others claim that States parties have more or less lost interest, or confidence in these treaties. One can certainly notice the fact that a lot less resources are being allocated by the big donor countries to support the implementation process. At this point, frankly, it is hard to tell exactly what is happening. I would say that it is probably a mixture of both: technical difficulties and lack of political will. Let me say a few words here about some of the relevant issues:

Intentions behind the ratification: Certainly, I have observed over the last many years that the ratification of conventions is often treated as a "final destination" rather than as a "starting point". Compliance is often symbolic and a lot of countries do not set in place proper processes for the effective implementation of the conventions they have signed.

Who is ratifying and why? It is not secret that **s**ome countries were more or less compelled to ratify the conventions by more powerful or influential countries. This is the case, for example, of developing countries, some small island states, or countries in transition which depend on the assistance of donor countries. They often respond to pressure to ratify such conventions in the hope that they will be helped in

implementation them and building their criminal justice capacity. Some conventions, like the convention on corruption can attract a number of countries which do not really have the means to fully implement the international instruments, but are keen to take advantage of some of its specific dispositions. This is the case, for example, of the UNCAC, the great interest of African countries to ratify the instrument because of the prospect of obtaining international cooperation in repatriating the proceeds of corruption.

Also, in recent times, several inter-related international conventions have been adopted within a relatively short time frame, creating what Prof. Nikos Passas has referred to as an international regulatory "Tsunami". This has made it particularly difficult for smaller states or developing countries to cope with the sheer volume of the criminal law reforms involved.

Capacity: Finally, the conventions usually call for States Parties to put in place various mechanisms to implement the international cooperation measures, forgetting unfortunately that we are obviously not dealing with a "level playing field". These cooperation mechanisms presuppose that the States Parties involved already have a somewhat efficient justice system. Clearly this is not always the case. Many countries are quite incapable of implementing international cooperation measures, because their own justice system largely lacks a basic capacity to function effectively. (For example, see the review conducted by ICCLR of the Justice and security capacity in eight Caribbean common law countries).

Asymmetric capacity for cooperation: There is often a fundamental asymmetry between countries who face a common threat or must develop their respective capacity to cooperate in the field of criminal justice. Countries like Canada will often conduct their own international threats assessments and determine that a particular country or region poses a particular threat or weaknesses. They may offer some specific and specialized technical assistance, but that usually is totally insufficient to address the need for basic capacity building in that country.

Poor method of TA: A fair amount of technical assistance is being offered to States to help them build the capacity of the justice system and implement the necessary reforms. However, it is becoming abundantly clear that our methods of providing technical assistance are themselves quite weak and ineffective. As was made abundantly clear last year when the United Nations Commission on Crime Prevention and Criminal Justice discussed the issue, international technical assistance is not

always effective[746]. As Thomas Carothers of the Carnegie Endowment for International Peace has convincingly argued, we have not even developed a good understanding of how significant changes to criminal justice systems can be effected.[747]

Some tools are being developed to facilitate the process (e.g. the United Nations Criminal Justice Assessment Toolkit[748]), but we still have much to learn about organizational change and how to promote constructive and effective changes in criminal justice systems and in organizations.

Mechanisms to facilitate implementation:

Three main mechanisms exist to facilitate the implementation of the two conventions in question:

- Technical assistance (provision of service / development of tools such as a legislative Guide developed by ICCLR and UNODC)
- Collaboration among State Parties in the implementation of various provisions
- Conference of States Parties (supported by a secretariat)

Establishing an effective mechanism to review the implementation of international treaties lies at the heart of the effectiveness of the treaties themselves. The United Nations Convention against Transnational Organized Crime (hereinafter, UNTOC) and the United Nations Convention against Corruption (hereinafter, UNCAC) are no exception to this rule. The Conventions have established bodies to review their implementation, namely the Conference of the Parties to UNTOC (hereinafter, COP) and the Conference of the States Parties to UNCAC (hereinafter, COSP).

The Conferences are called upon to determine a mechanism to acquire the necessary knowledge of measures taken by States parties in implementing the Conventions and the difficulties encountered in doing so. Accordingly, by becoming parties, States

[746] See also: Shaw, M. and Y. Dandurand (2006). *Maximizing the Effectiveness of the Technical Assistance Provided in the Fields of Crime Prevention and Criminal Justice*, Helsinki: HEUNI.
[747] Carothers, T. (Ed.) (2006). *Promoting the Rule of Law Abroad – In Search of Knowledge*. Washingto (D.C.): Carnegie Endowment for International Peace.
[748] UNODC and OSCE (2006). *Criminal Justice Assessment Toolkit*. New York: United Nations.

have assumed a legal obligation to inform the Conferences of plans, practices and legislative and administrative measures to comply with the Conventions. In this architecture, knowledge and provision of information are placed at the heart of the ability of the Conferences to discharge their mandate in a credible and consistent manner. UNODC, acting as the Secretariat of both Conferences, is mandated to assist the Conferences in discharging those functions.

In its first resolution, res. 1/1, the Conference of State parties for UNCAC which met last December states that:

- That the review of the implementation of the convention is an "ongoing and gradual process".
- That a mechanism need to set in place to assist in the review of the implementation of the United Nations Convention against Corruption.

Both Conferences of States Parties debated the question of the reporting process. There are a variety of methods to gather information at different stages of any review process. The Conferences could have adopted any of them in order to discharge their functions, based on the relative advantages and disadvantages of each method. While the Conference of the Parties to UNTOC chose a questionnaire-based approach, its unsatisfactory performance as experienced during the first two reporting cycles prompted calls to avoid the same methodology in reviewing the implementation of UNCAC. The Conference of Parties to the UNCAC agreed that a self-assessment checklist should be developed, as a starting point, by an inter-governmental group of experts.

Earlier this year, the International Centre and the UNODC, with the support of the Government of Canada, held an expert meeting in Vancouver to develop a proposal for an effective mechanism to review the implementation of both conventions.

Who should do the review/ monitoring?

As I have mentioned, States parties are jealously preserving their ownership over the review process.

There is a consensus among them that such a review mechanism should abide by the following principles:

- Ensure that implementation and its review remain in the hands of States;
- Maintain the spirit of mutual respect and inclusiveness that permeated and guided the creation of the Convention and ensured its quality;
- Establish as a high priority the support to Governments in their efforts to implement the Convention.

In resolution One of the UNCAC Conference of Parties, States also formulated the following principles to guide the review process. They stated that the review mechanism should:

1. be transparent, efficient, non-intrusive, inclusive and impartial
2. not produce any form of ranking
3. provide opportunities to chare good practices and challenges
4. complement existing international and regional review mechanisms (and therefore seek to avoid duplication of reporting efforts)

The experience with the implementation of conventions varies. We have had an opportunity to review the implementation reporting mechanism in place for various conventions both at the UN and in other organizations such as the OAS or OECD. Transparency International recently did so also with respect to a number of conventions relating to corruption.[749]

Reporting on the implementation of an international treaty is clearly a challenging task for many of its States parties. Obtaining valid and useful information in a timely manner from States parties can be hindered by a number of factors, including: (a) lack of financial or technical resources of States parties; (b) administrative and technical difficulties, personnel changes and language barriers in States parties; (c) the complexity of the information required; and (d) a lack of clarity on the nature and relevance of the requested information.

[749] Heimann, F. and G. Dell (2006). *Report on Follow-up Process for UN Convention Against Corruption.* Berlin: Transparency International, 12 September 2006.

To alleviate some of these difficulties, some of the bodies monitoring the implementation of international treaties have developed and issued guidelines on reporting with a view to ensuring that reports are prepared and presented in a uniform manner so as to support valid comparisons of implementation efforts made by different States parties. Reporting guidelines and instruction manuals, together with clear reporting formats, can greatly facilitate the reporting process.

The ICCLR, with the support of the Department of Justice Canada, developed some draft reporting guidelines for the TOC Convention and is now exploring the possibility of developing similar guidelines for the UNCAC.

Western nations have poured hundreds of millions of dollars into developing an international cooperation regime and providing technical assistance to countries lacking a basic capacity to cooperate, yet, the results have been disappointing in general. I think that we are all quickly learning that international cooperation remains an empty promise unless we are prepared to seriously address some real obstacles to it and develop a genuine capacity to work together across borders. The primary obstacles to international cooperation are not always technical or financial, but also political and human. This is therefore no substitute for a strong political will to implement such a regime. International cooperation is hard work.

The sharing of practical experience and lessons learned among professionals is therefore more important than ever in order to perfect cooperation strategies and develop a capacity to implement them successfully. Opportunities for discussion and personal networking, such as the one provided today by the International Society are part of the solution.