

7-1-2006

Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere

Bruce Zagaris

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. Miami Inter-Am. L. Rev. 421 (2015)

Available at: <http://repository.law.miami.edu/umialr/vol37/iss3/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere

Bruce Zagaris*

I.	INTRODUCTION	423
II.	EFFORTS TO HARMONIZE CRIMINAL JUSTICE SYSTEMS IN THE AMERICAS IN THE CONTEXT OF INCREASING INTEGRATION	425
	A. <i>Cooperation in Procedural and Substantive Criminal Law</i>	425
	B. <i>Foreign Police Assistance</i>	427
	C. <i>Administration of Justice Programs</i>	432
III.	NATIONAL, BILATERAL AND REGIONAL SECURITY ISSUES	439
IV.	REGIONAL SECURITY ISSUES AND CONFIDENCE BUILDING MEASURES	443
V.	ORGANIZATION OF AMERICAN STATES	454
	A. <i>Historical and Current Roles</i>	454
	B. <i>Inter-American Drug Abuse Control Commission</i>	455
	C. <i>Codification of International Law</i>	457
	D. <i>Inter-American Human Rights System</i>	457
	E. <i>Future Roles</i>	462
VI.	MORE COMPREHENSIVE APPROACHES TO CRIMINAL COOPERATION AND ADMINISTRATION OF JUSTICE	471
	A. <i>Meetings of Ministers of Justice</i>	472
	1. Background	472
	2. Second Summit of the Americas	475
	3. General Assemblies of the OAS Adopts Justice Initiatives	476
	4. Second Meeting of Ministers of Justice	476
	a. <i>Access to Justice</i>	477

* Partner, Berliner Corcoran & Rowe, Washington, D.C.; Editor-in-Chief, INTERNATIONAL ENFORCEMENT LAW REPORTER. This article was written and compiled in conjunction with Mr. Zagaris's presentation made at the University of Miami Inter-American Law Review's Symposium on Current Issues in International Criminal Law, held on April 1, 2005.

b.	<i>Training of Judges, Prosecutors, and Judicial Officers</i>	477
(1)	Justice Studies Center for the Americas	477
(2)	Regional Courses, Workshops, and Seminars	478
c.	<i>Strengthening and Developing Inter- American Cooperation</i>	478
d.	<i>Prison and Penitentiary Policy</i>	480
5.	Analysis	480
B.	<i>Establishment of Justice Study Centers</i>	481
VII.	WORK ON SINGLE CRIME ISSUES	495
A.	<i>Transnational Terrorism</i>	484
1.	Introduction	484
2.	Background	484
3.	Plan of Action	485
a.	<i>Harmonization of Law</i>	485
b.	<i>Strengthening International Criminal Cooperation against Terrorism</i>	486
c.	<i>Cooperation on Intelligence</i>	486
d.	<i>Mutual Assistance and Extradition</i>	488
e.	<i>Sharing Operational Terrorist Information</i>	489
f.	<i>Cooperation in Border Security, Transportation and Travel Documents</i>	490
g.	<i>Cooperation and Technical Assistance in Training</i>	490
h.	<i>Assistance to Victims</i>	490
4.	Post September 11, 2001	491
5.	Analysis	491
B.	<i>Cyber Crime</i>	492
1.	Introduction and Background	492
2.	Diagnosis	493
3.	Identification of National and International Entities with Relevant Experience	494
4.	Identification of Mechanisms of Cooperation within the Inter-American System	494
5.	Recommendations	494
C.	<i>Transnational Corruption</i>	495
1.	Background	495

2.	Required Criminalization of Selected Conduct.....	497
	<i>a. Certain "Acts of Corruption".....</i>	497
	<i>b. Transnational Bribery</i>	497
	<i>c. Illicit Enrichment</i>	498
3.	Conditional Criminalization of Selected Conduct.....	498
	<i>a. Additional "Acts of Corruption"</i>	498
	<i>b. Prevention Measures</i>	499
	(1) Transparency and Accountability in Government.....	499
	(2) Ethical Standards for Government Officials	499
	<i>i. Measures Applicable to Private Concerns, Including Denying Tax Deductibility of Bribes</i>	500
	<i>ii. Oversight and Regulatory Measures.....</i>	500
4.	Jurisdiction	500
5.	Penalties.....	501
6.	International Cooperation.....	501
	<i>a. Mutual and Judicial Assistance</i>	501
	<i>b. Extradition.....</i>	502
	<i>c. Asset Forfeiture</i>	503
7.	Entry into Force, Ratification, and Implementation.....	503
8.	Potential Alliances with IGOs and NGOs	505
9.	Observations.....	506
	<i>D. Narcotics Trafficking</i>	507
VIII.	NEED FOR AN AMERICAS COMMITTEE ON CRIME PROBLEMS	508
IX.	ANALYSIS AND PROSPECTS	511

I. INTRODUCTION

The effects of the new economy, most importantly the explosion of free trade and electronic commerce, increasingly connect the people in the Western Hemisphere to each other. Globalization has facilitated the growth of global capitalism, the information revolution, travel, and the blurring of national and subnational boundaries. Globalization has rendered meaningless the boundaries between domestic and foreign matters. Similarly, the distinctions of such boundaries among criminals, crime, and

criminal justice are also increasingly broken or meaningless.¹ The rise of transnational crime and criminal organizations threaten the expansion of international trade and the new global landscape of the World Trade Organization and regional integration.² Nation-states and international organizations are recognizing that transnational organized crime threatens to destabilize weaker nations. It also threatens global free trade and fair economic competition, while creating great social, economic, and political costs at home and abroad. In addition, the emergence of transnational networks of organized crime reduces the quality of political, civil, and economic interactions across the entire global community of nations.³

International law enforcement cooperation in the Western Hemisphere is a function of several disciplines reflecting historical approaches, comparative contemporary approaches, criminal justice and harmonization of the criminal justice systems, national and regional security policies, foreign police assistance, the roles of major international organizations, such as the Organization of the American States (OAS), and the movement toward democratization and administration of justice. The lack of a coherent approach and the absence of definitive accounts make this discussion necessarily tentative.

This article will review potential approaches to international enforcement cooperation in the Americas. In particular, Part II will discuss efforts to harmonize criminal justice systems in the Americas in the context of increasing integration. Parts III, IV and V will highlight the importance of national, bilateral and regional security issues, confidence building, and the role of the OAS. Part V will consider in greater detail the historical and current role of the OAS; the Inter-American Drug Abuse Control Commission (CICAD); the codification of international law; the Inter-American Human Rights System; as well as potential future roles for those entities. Parts VI and VII will discuss more comprehensive approaches to criminal cooperation and administration of justice, such as meetings of the Ministers of Justices of the Hemisphere (REMJA), the establishment of Justice Study Centers, and hemispheric work on selected single crime issues. The

1. William F. McDonald, *The Globalization of Criminology: The New Frontier Is the Frontier*, 1 *TRANSNATIONAL ORGANIZED CRIME* 1, 6-7 (Spring 1995).

2. Dick Thornburgh, *The Internationalization of Business Crime*, 1 *TRANSNATIONAL ORGANIZED CRIME* 23, 23 (Spring 1995).

3. Peter A. Lupsha, *Transnational Organized Crime Versus the Nation-State*, 2 *TRANSNATIONAL ORGANIZED CRIME*, 21, 24-25 (Spring 1996).

conclusion of Part VIII will provide some general analysis and prospects.

II. EFFORTS TO HARMONIZE CRIMINAL JUSTICE SYSTEMS IN THE AMERICAS IN THE CONTEXT OF INCREASING INTEGRATION

Harmonization of criminal justice systems in the Americas has proceeded much more slowly than in Europe. Significant differences in the environments between Europe and the Americas can explain the slower pace in the Americas. Economic integration, transportation and communication systems have been comparatively less developed in the Americas than in Europe. The United States has dominated and exerted controlling influence over the efforts to evolve the hemisphere's criminal justice towards harmonization and improve international criminal cooperation. Historically, international criminal cooperation and criminal justice harmonization in the Americas has been a function of several currents: unification of the law projects, mainly led by the Organization of American States; foreign police assistance efforts; *ad hoc* initiatives against certain crimes, such as narcotics trafficking; and law, development, and administration of justice program. Most importantly, the elements propelling European harmonization of criminal policies and laws have been the unique institutional mechanisms and legal frameworks.

A. *Cooperation in Procedural and Substantive Criminal Law*

Historically, governments in the Americas have cooperated in matters of procedural and substantive criminal law. The OAS and the United States have played key roles in this regard. Procedural international criminal law refers to those matters of international criminal law that deal mainly with procedural matters, such as: gathering evidence (normally through unilateral measures, rogatory letters, and judicial and mutual assistance in criminal matters); obtaining custody of a person charged with a crime through extradition or alternatives thereto (including deportation, handing over, and forced or fraudulent kidnapping); transfer of proceedings; recognition and enforcement of criminal judgments; and transfer of prisoners. Substantive international criminal law embraces substantive crimes of particular international interest, such as: narcotics trafficking; smuggling of aliens, especially children and women; arms trafficking; terrorism;

money laundering; securities and commodities futures crimes; customs crimes; thefts of airplanes and automobiles; and thefts of cultural property.

Cooperation in the Americas has existed with regard to extradition. For example, in 1889, five Latin American governments signed the Treaty of International Penal Law, which included numerous articles on extradition.⁴

In 1889, five Latin American governments signed a Treaty of International Penal Law, which included numerous articles on extradition.⁵ This, however, was just the first of numerous multilateral extradition treaties signed by Latin American governments during the first third of the twentieth century. In 1902, representatives of seventeen Latin American countries, including the United States, concluded a Treaty for the Extradition of Criminals and for Protection Against Anarchism.⁶ Then, in 1911, five Latin American governments concluded an extradition agreement.⁷ In 1928, sixteen Latin American governments met in Havana and signed the Bustamante Code of Private International Law, which included some three dozen extradition clauses.⁸ In 1933, the U.S. and Latin American governments signed the Montevideo Convention on Extradition, and, in 1934, five Central American governments concluded a multilateral extradition treaty.⁹ Hence, during the first third of the twentieth century, a number of multilateral extradition treaties were in force. In addition, bilateral treaties with countries within and outside the hemisphere supplemented multilateral cooperation.¹⁰

The most controversial issue with respect to extradition has been the tradition and legal prohibition against extraditing nationals in many civil law countries. Gradually, many of these countries have changed the prohibition, and will extradite nationals, at least for certain serious crimes.¹¹

Latin American governments also participated modestly in other international criminal law enforcement matters, attending

4. Ethan Nadelmann, *Harmonization of Criminal Justice Systems, in THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS* 247, 264 (Peter H. Smith ed., 1993).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 77 (1999).

international conferences on various criminal subjects, such as the 1904 convention on the suppression of the white slave trade.¹² In Buenos Aires in 1905, representatives of the police departments of La Plata, Montevideo, Rio de Janeiro, Santiago, and the host city signed a draft "International Police Convention" providing for the exchange of criminal records of dangerous offenders.¹³ Fifteen years later, the governments of Argentina, Bolivia, Brazil, Chile, Peru, Paraguay, and Uruguay signed the convention, although there exists little evidence on its implementation.¹⁴

Cooperative efforts against narcotics trafficking and money laundering became increasingly important in the 1980s. The establishment of a formal program and the institutionalization of counter-drug work in the form of the establishment of the Inter-American Drug Control Commission (CICAD) have catapulted these issues into the forefront. In addition, many other anti-crime initiatives (e.g., arms trafficking) have been linked to CICAD's work. Still other substantive areas of hemispheric cooperation include anti-corruption and counter-terrorism. There are draft OAS conventions on both subjects.¹⁵

B. *Foreign Police Assistance*

Latin American countries generally followed the lead of Europe and the United States in policing.¹⁶ "The U.S. government started providing police assistance during the first decades of the century, when U.S. marines occupied Caribbean and Central American countries to promote internal security and U.S. interests."¹⁷

In addition, in the first third of the twentieth century, the United States established police constabularies in its dependencies in the Greater Antilles and Central America.¹⁸ As a result of these constabularies, the United States established influence over the police forces of Cuba, Puerto Rico, and the Virgin Islands.¹⁹ The U.S. dominance of the Panamanian policy constabulary helped the United States guard U.S. construction and operation of

12. Nadelmann, *supra* note 4, at 265.

13. *Id.*

14. *Id.*

15. *Id.* at 269.

16. *Id.* at 265.

17. *Id.*

18. MARTHA K. HUGGINS, *POLITICAL POLICING: THE UNITED STATES AND LATIN AMERICA* 3 (1998).

19. *Id.*

the Panama Canal.²⁰ Just before and during World War II, U.S. assistance to involvement with Latin American police enabled the United States to obtain information, especially with respect to Communist organizing and fascist espionage activities.²¹ During the post-World War II period, United States training of Latin American police had as its goal the eradication of the threat of left-wing subversion and armed guerrilla insurgency.²²

Since World War II, the United States has exerted significant influence on criminal justice in the hemisphere.²³ In 1940, expansion of U.S. police activities in Latin America began when President Franklin Roosevelt assigned all intelligence responsibilities for the Western Hemisphere to the FBI.²⁴ "Shortly thereafter, J. Edgar Hoover established a Special Intelligence Service (SIS) to [start] countering Axis activities in South and Central America. Within a few years, three hundred sixty agents were stationed throughout the region, especially in Mexico, Argentina, and Brazil."²⁵ While "some operated undercover, others served openly as legal attaches in U.S. embassies and liaison officers with foreign police forces."²⁶ The SIS worked closely with the British Security Coordination (BSC), the U.S.-based British intelligence agency.²⁷ Agents helped foil a planned coup d'état by pro-Axis forces in Bolivia, contributed to the government's shift away from its initial support for Germany in Chile, and helped friendly governments jail or deport pro-Axis individuals.²⁸ "Local police were cultivated with money and invitations to the National Police Academy in Washington. Throughout the war a network of FBI-trained police [developed] that would continue to aid the FBI's more mundane law enforcement efforts in peacetime."²⁹

After World War II, the SIS was disbanded. While many of its agents started working for the new CIA, a few remained with the FBI in Latin America and Ottawa, developing into a modest

20. *Id.*

21. *Id.*

22. *Id.*

23. See Nadelmann, *supra* note 4, at 266 (citing, *inter alia*, STANLEY E. HILTON, HITLER'S SECRET WAR IN SOUTH AMERICA 1939-1945: GERMAN MILITARY ESPIONAGE AND ALLIED COUNTERESPIONAGE IN BRAZIL 196-229 (1981)).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Nadelmann, *supra* note 4, at 266-67.

29. *Id.* at 267.

international network of legal attachés (known as LEGATs).³⁰ More importantly, in 1955, the United States started the Civil Police Administration (CPA) and expanded thereafter with the creation of the Office of Public Safety (OPS) in 1962.³¹ Administered by the U.S. Agency for International Development (USAID), OPS had the mission of centralizing all police assistance to foreign countries.³² The OPS gave aid to police agencies in approximately fifty countries, including virtually all of Latin America, at a cost of more than US\$300 million for training, weaponry, and telecommunications and other equipment.³³ "Hundreds of active and retired American police officers [went abroad], where they trained tens of thousands of police officials in administration, riot and traffic control, interrogation, surveillance, intelligence, and . . . other tasks."³⁴ The OPS brought mid- and high-level police officials from Latin American countries to the Inter-American Police Academy in the Panama Canal Zone and, after it was closed, to Washington to study at the OPS-operated International Police Academy.³⁵

In 1974, the Public Safety program stopped due to human rights scandals. Congress immediately exempted narcotics control.³⁶ Although the Public Safety program had only a modest effect on the development of criminal justice norms and institutions in Latin America, it did facilitate regular interaction between U.S. and Latin American police.³⁷

The U.S. Drug Enforcement Administration (DEA) replaced the Public Safety program after it underwent a dramatic international expansion.³⁸

Between 1969 and 1975, the number of U.S. drug enforcement agents stationed abroad rose from about two dozen to two hundred – approximately half of whom were distributed throughout most major cities in Latin America. Dur-

30. *Id.*

31. *Id.*

32. ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* 113 (1993).

33. *Id.*

34. *Id.*

35. *Id.*

36. HUGGINS, *supra* note 21, at 5; *see also* U.S. GEN. ACCOUNTING OFFICE, *STOPPING U.S. ASSISTANCE TO FOREIGN POLICE AND PRISONS* (1976); MICHAEL T. KLARE & CYNTHIA ARANSON, *SUPPLYING REPRESSION: U.S. SUPPORT FOR AUTHORITARIAN REGIMES ABROAD* 22 (1981); Nadelmann, *supra* note 4, at 267.

37. Nadelmann, *supra* note 4, at 267.

38. *Id.*

ing the same six-year period, the number of foreign police officials trained by the DEA . . . in both U.S. and in-country schools rose from zero to over two thousand per year before declining somewhat in the latter half of the 1970s.³⁹

Within the “overlapping set of U.S. agencies and individuals assisting foreign police, the Justice Department’s International Criminal Investigative Training Assistance Program (ICITAP) has emerged in the 1990s as a primary coordinator of U.S. assistance to foreign police. Established in 1986 under the administration of the [U.S.] Department of Justice, ICITAP operates with policy guidance from the Department of State. ICITAP funding comes from the United States Agency for International Development, channeled through the State Department. ICITAP’s objective is to train foreign police, prosecutors, judges, and other criminal justice personnel to further the “rule of law” in their countries. [In contrast to] its Cold War predecessor, . . . the Agency for International Development’s Office of Public Safety (OPS) (1962-74), ICITAP aims at promoting peaceful respect for the “rule of law.” [The Agency for International Development] had focused on counterinsurgency as a means of blocking the spread of international Communism. [However], both of these foreign police assistance initiatives share a common foreign policy objective: developing, enhancing, and protecting U.S. interests abroad and promoting abroad and [in the United States] images of “national security.”⁴⁰

The U.S. Customs Service has also conducted training. Rather than broad training in police capabilities generally, and counterinsurgency capabilities in particular, the training has focused increasingly on drug enforcement agencies and tasks.

United States drug enforcement officials, whose goal was to internationalize counter-drug efforts, especially interdiction, investigation, and prosecution of drug traffickers, took other steps to promote inter-American police relations. The United States convoked annual International Drug Enforcement Conference (IDEC) meetings of top-level Latin American, U.S. and European police officials.⁴¹ Eventually, European governments started stationing their own police liaisons in Latin American capitals and

39. *Id.* at 268 (citing federal appropriations hearings).

40. HUGGINS, *supra* note 21, at 2 (internal citations omitted).

41. *See generally* U.S. Drug Enforcement Administration, International Drug Enforcement Conference, <http://www.dea.gov/programs/idec.htm> (last visited Aug. 3, 2006).

participating in Latin American drug control efforts.⁴²

By the early 1990s, "more than fifteen years after Congress had eliminated programs to assist foreign policies, the United States had 125 police assistance programs abroad."⁴³ These initiatives "were justified as legitimately exempted from the 1973 and 1974 laws abolishing U.S. assistance to foreign police. The new police assistance programs aim at a range of problems from combating common and organized crime and 'gangsterism' to 'terrorism' and drugs."⁴⁴ Diverse U.S. government and civilian police specialists continue such assistance today.

Through the Department of Defense Program to Assist National Police Forces, the United States has thoroughly reorganized indigenous police forces in a number of foreign countries, including Bolivia, Peru, Ecuador, Colombia, Panama and Mexico.⁴⁵

In the Caribbean, especially the Eastern Caribbean, U.S. military and civilian police specialists have conducted police training on diverse issues, including counter-drug control, customs training, maritime enforcement, counter-terrorism, and assistance directed at various types of police training.⁴⁶

During the 1980s and 1990s, the U.S. proactively urged countries in the Americas bilaterally and multilaterally through the U.N. drug control agencies, Interpol, and the OAS to sign, ratify and implement the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, strengthen counter-drug policy legislation and enforcement efforts.

Some hemispheric efforts in police cooperation in the 1980s were broader than just drug enforcement. The U.N. Institute for Latin America on Crime Prevention and Treatment of Offenders (ILANUD), founded during the 1960s and headquartered in Costa Rica, has been active in promoting the strengthening of criminal

42. *See id.*

43. HUGGINS, *supra* note 21, at 1.

44. *Id.*

45. *Id.*; *see also* U.S. GEN. ACCOUNTING OFFICE, FOREIGN AID: POLICE TRAINING AND ASSISTANCE, GAO/NSIAD-92-118 (1992).

46. For a view of the Caribbean in the context of U.S. security, especially U.S. prioritization of counter-drug assistance, *see* Ivelaw Griffith, *The Caribbean in a New Strategic Environment*, in STRATEGIC BALANCE AND CONFIDENCE BUILDING MEASURES IN THE AMERICAS 76-91 (Francisco Rojas Aravena, Ralph H. Espach & Joseph J. Tulchin eds., 1998). *See also* Michael J. Kryzaneck, *The Grenada Invasion: Approaches to Understanding*, in UNITED STATES POLICY IN LATIN AMERICA 58-79 (John D. Martz ed., 1995) (discussing U.S. low intensity warfare and cooperation with the region in the Grenada invasion).

justice systems in the region.⁴⁷ During the 1980s, Interpol's efforts to strengthen regional operations helped to establish liaison offices and regional telecommunications center outside Europe, including one in Buenos Aires.⁴⁸ During this time, U.S. efforts to suppress and prosecute terrorist activities in Central America led to the revival of OPS-type training programs during the Reagan administration.⁴⁹

The State Department's Administration of Justice projects encouraged judicial reform projects, which included modernization and reform of laws, including criminal justice laws. "[A]s a foreign policy instrument, police assistance has the advantage of appearing to be a relatively benign and low-key form of U.S. intervention."⁵⁰ A popular argument in favor of foreign police assistance is that such aid "will make recipient police forces more democratic, less violent, less corrupt and more professional."⁵¹ Additionally, proponents argue that:

[T]he U.S. image abroad and at home can be (at least initially) bolstered by such relatively invisible intervention. In contrast, military incursions . . . are highly visible forms of U.S. intervention, often very unpopular at home and abroad, with potentially serious consequences for U.S. politics and the U.S.' image in the world. Police assistance can accomplish many of the same foreign policy objectives as military intervention while appearing less political in the process.⁵²

C. *Administration of Justice Programs*

The U.S. administration of justice (AOJ) programs, which arose out of U.S. democracy assistance programs in the 1980s, overlap and coalesce with the U.S. assistance to foreign police programs. A review of the AOJ programs helps reveal the roots and orientation of the foreign police assistance programs, although the latter predated the AOJ programs.

The largest of the U.S. democracy assistance projects in the Americas in the 1980s was the administration of justice

47. Nadelmann, *supra* note 4, at 269.

48. *Id.*

49. *Id.* (citing Jim Lobe, Anne Manuel & David Holliday, *Police Aid and Political Will: U.S. Policy in El Salvador and Honduras (1962-1987)* (Washington Office on Latin America, Nov. 1987).

50. HUGGINS, *supra* note 21, at 3.

51. *Id.*

52. *Id.* at 3-4.

program, an inter-agency initiative implemented by AID, the State Department, [the United States Information Agency] (USIA), and the Justice Department. The main element of this program was assistance to the judicial systems of Latin America and the Caribbean to help them improve the administration of justice in their respective countries. A related emphasis was training in criminal investigative skills for police forces of the region. Planning for the administration of justice program got underway in 1983. . . . The first project was initiated in 1984. [B]y 1987, the program's annual budget had reached \$20 million. By the end of 1988 over \$60 million had been obligated under the program, approximately \$50 million for judicial systems and \$10 million for police training.⁵³

The idea of U.S. judicial assistance to Latin America and the Caribbean first arose in the 1980s, in connection with Congressional pressure on the State Department to take action on the Salvadoran government's lack of progress on several high-profile murder cases of special interest to the U.S., such as the December 1980 murder of four U.S. nuns, the 1980 murder of Archbishop Romero, and the Sheraton murders (the 1981 murder of the head of the Salvadoran land reform program and two AFL-CIO officials advising on that program).⁵⁴ "U.S. officials [believed] that the civil war in El Salvador had led to a breakdown of the judicial system and that this breakdown was a major cause of the death squad violence wracking the country."⁵⁵

Although the decision to pursue judicial assistance was stimulated by a specific need to address right-wing political violence in El Salvador, from the start the administration of justice program was conceived as a long-term, region-wide democratic development program. The AOJ program was also politically designed to persuade a U.S. Congress controlled by Democrats to appropriate a costly program largely geared to funding military aid to the authoritarian regimes to repress leftist insurgencies raging in Central America. The AOJ program was one of the recommendations of the National Bipartisan Commission on Central America, popularly known as the Kissinger Commission, to formulate a bipartisan policy approach to Central America.⁵⁶ The Mexican

53. THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* 210 (1991) (internal citation omitted).

54. *Id.*

55. *Id.* at 211.

56. 3 INT'L ENFORCEMENT L. REP. 12 (1985) ("The Commission noted that the

Government joined the initiative of the Contadora Group and several European countries in promoting the peace process by averting the spread of armed conflict and opposing the Reagan doctrine, causing tension between the United States and Mexico.⁵⁷

An inter-agency working group headed by the Principal Deputy Assistant Secretary of State for Inter-American Affairs developed operational principles for the administration of justice program to avoid repeating the mistakes of the prior law and development program of the late 1960s and early 1970s to Latin America. These were: (1) assist hemispheric governments strengthen their legal systems using their own goals and values rather than try to export U.S. legal models; (2) support existing institutions rather than create new ones; (3) emphasize practical goals connected with developmental objectives; and (4) limit judicial assistance only to countries that have elected civilian governments.⁵⁸

In 1984, the Salvadoran project was hurriedly devised, using congressional earmarks for its \$9.2 million funding.⁵⁹ Spurred by a desire to achieve progress in high-profile murder cases, "the project foresaw the establishment of an investigative commission, which was to consist of an elite police unit under civilian control (the Special Investigative Unit) and a forensic team to [assist] the Salvadoran government."⁶⁰ The project also called for the formation of a judicial protection unit to protect participants in sensitive trials and provided for the establishment of a law reform commission and a judicial training program.⁶¹ Such programs continued to grow.⁶²

judicial systems in the region operate under 'physical, financial and personnel conditions which range from severely inadequate to virtually neglected.'" It "recommended assistance to the region's legal systems, with emphasis on the criminal justice subsector." It noted the latter "is the most frequent point of contact with the coercive power of the government for the bulk of the disadvantaged population."). For additional background on the integration of the AOJ program into the Reagan doctrine, see generally THOMAS CAROTHERS, *THE REAGAN YEARS: THE 1980S, EXPORTING DEMOCRACY THE UNITED STATES AND LATIN AMERICA: THEMES AND ISSUES* 90-122 (Abraham F. Lowenthal ed., 1991).

57. Jesús Hernández, *Mexican and U.S. Policy Toward Central America*, in *THE DIFFICULT TRIANGLE: MEXICO, CENTRAL AMERICA, AND THE UNITED STATES* 13, 31-33 (H. Rodrigo Jauberth et al. eds., 1992).

58. CAROTHERS, *supra* note 53, at 211.

59. *Id.* at 211-12.

60. *Id.* at 212.

61. *Id.*

62. For a discussion of the Caribbean AOJ project, see Bruce Zagaris, *Law and Development or Comparative Law and Social Change - The Application of Old*

In January 1985, AID created an administration of justice office in its Latin America and Caribbean bureau and folded into it the existing democratic assistance programs, in particular the human rights and democratic participation programs. In March 1985 AID started the Regional Administration of Justice Project, a \$9.6 million, five-year judicial assistance based at a small U.N. institute in Costa Rica (the United Nations Institute for the Prevention of Crime and Treatment of the Offender [ILANUD]). Under this program, ILANUD offers training courses for judges, prosecutors, and other legal personnel as well as a range of technical assistance to courts and justice ministries on such issues as case management, legal data bases, and law libraries.⁶³

The Project also provided support services to strengthen ILANUD as an indigenous regional institution committed to Project goals and the establishment of an extension facility at ILANUD to channel immediate direct funding to national institutions to meet country-specific needs.⁶⁴

Police training constituted a major subcomponent of the administration of justice program. The incapacities of the Salvadoran prosecutors and judges and the Salvadoran police's lack of investigative skills forced the program to include training on police investigative techniques. The decision to include investigative training of foreign police was extended to the administration of justice program, based on the view that police are an integral element of any criminal justice process.⁶⁵

However, implementation of the program had to contend with Congress's reluctance to fund foreign police:

U.S. officials developing the administration of justice program drew a line between assistance to police to improve investigative skills and assistance for operational matters such as crowd control or arrest methods. Maintaining this line was perceived as a way of avoiding the more controversial areas of police assistance, thereby improving the chance of getting past Congress's long-standing opposition to police aid. State and Justice Department officials [were able to obtain] authorization for "programs to enhance

Concepts in the Commonwealth Caribbean, 19 U. MIAMI INTER-AM. L. REV. 549, 549-93 (1988).

63. CAROTHERS, *supra* note 53, at 212.

64. 3 INT'L ENFORCEMENT L. REP., *supra* note 56, at 12, 13.

65. *See, e.g.*, LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNDERWRITING INJUSTICE: AID AND EL SALVADOR'S JUDICIAL REFORM PROGRAM 36-70 (1989).

investigative capabilities, conducted under judicial or prosecutorial control." . . . The phrase "under judicial or prosecutorial control" was compromise language intended to limit U.S. aid to foreign police operating within the rule of law [In fact, t]he administration interpreted the phrase loosely and in practice police aid was given to any country with an elected government, even if, as in Guatemala and El Salvador, the police's adherence to the rule of law was very partial at best.⁶⁶

After its authorization, the International Criminal Investigative Training Assistance Program (ICITAP) was quickly established. The Department of Justice had responsibility for the program because it had more expertise in police matters and because AID eschewed the program. AID did not want to repeat any adverse experiences due to its association with the Public Safety Program in the late 1960s and early 1970s and therefore avoided becoming involved in funding police training.⁶⁷

ICITAP quickly arranged short training courses for police officers in Central America and the Caribbean, which included tutorials in:

[B]asic investigative skills, such as crime scene search, collection and preservation of evidence, fingerprinting, and interviewing. ICITAP also included judges and prosecutors in some of its courses to increase their knowledge of investigative methods[, as well as] understanding and communication between the police and the judicial sector. In addition to these training courses, ICITAP also sponsored a series of regional conferences for the police commissioners of Central America and the Caribbean at which the commissioners discussed with ICITAP trainers and with each other issues of police management, police standards and accreditation, coordination of law enforcement efforts, and sharing of facilities. These conferences were related to ICITAP's longer-term goal of . . . modernizing and professionalizing police forces in Latin America and the Caribbean.⁶⁸

During the 1980s, the U.S. Government operated other police training programs in Latin America.

The State Department's global Anti-Terrorism Assistance Program provided operational training to several Central

66. CAROTHERS, *supra* note 53, at 213-14.

67. *Id.* at 214.

68. *Id.* at 214-15.

American police forces. The Defense Department furnished military equipment and military-related training to the Salvadoran police during the [years when its civil war was at its peak]. The Drug Enforcement Agency trained a number of Latin American police forces in drug enforcement methods. These other training programs differed from ICITAP, . . . [concentrating] on the operational side of police work.⁶⁹

In contrast to Huggins' view of the goals and effects of U.S. police assistance,

ICITAP viewed its larger mission as helping Latin American police separate themselves from the military forces and guiding them toward a more "modern" conception of the role of police in a democratic society. ICITAP was the only police training program that was explicitly part of the democracy assistance programs; the other programs implicitly accepted the police they dealt with as subdivisions of the militaries and simply tried to make them stronger and more effective in their operational capabilities.⁷⁰

As Carothers has noted, the problems with the AOJ strategy focused toward law enforcement institutions and toward governmental institutions generally are very similar to those of the general policy of promoting democracy by transition in Central America.⁷¹ The assistance does not address the overwhelmingly anti-democratic underlying political and economic structures of the societies.⁷² The AOJ programs target modifying institutional forms that are often of peripheral importance in real terms. The training also tends to overemphasize U.S. policy on the elite groups in power and not to include the segments of society that have long been disenfranchised and must be included in a participatory political process if democracy is to succeed.⁷³ The AOJ did not address the essential arrangement of power issue in El Salvador.⁷⁴

Political violence from the right was due to the long-standing existence of a whole sector of Salvadoran society that held almost all of the military, political, and economic power of the country, that was opposed to any change in its

69. *Id.* at 215.

70. *Id.*

71. *Id.* at 224.

72. *Id.*

73. *Id.*

74. *Id.*

privileged position, and that was willing to use violence to stop such change. The law enforcement system failed to bring to justice the perpetrators of the high-profile political murder cases (or any of the more pedestrian political murders) primarily because it was either a captive of that sector or even an active part of it The massive political violence that occurred in the civil war merely underscored the justice system's longstanding inadequacy The notion then that the political violence from the right could be controlled by technical improvements in the justice system rather than by breaking up the Salvadoran's right's traditional position of power was fundamentally flawed. And the El Salvador Judicial Reform Project, which incorporated that notion, predictably failed to help the Salvadoran government bring to justice any perpetrators of right-wing political violence. By the end of the 1980s not a single high-level Salvadoran military officer had yet been convicted in any of the thousands of cases of right-wing violence. After the judicial reform program had been operating several years and this failure became evident, State Department officials began backing away from the program's original justification, arguing that technical improvements in the justice system would at least help clarify where the real roots of the problem of bringing to justice perpetrators of right-wing political violence lay, by giving police the capability of developing cases and identifying suspects even if the cases did not ever lead to conviction.⁷⁵

The United States must aid those countries with widespread criminal problems that are working to change their legal systems. Many countries are striving to modify their legal structures so as to make them more honest, reliable, and trustable. U.S. AOJ programs provide important training, technical assistance, and internal surveillance methods for use on police forces.⁷⁶

However, the current U.S foreign aid program to the Western Hemisphere concentrates on police and especially counter-narcotics programs. The focus ignores and in some ways exacerbates the root problems. Even from a criminal justice perspective, the over-emphasis on narcotics is misplaced, especially because it ignores and complicates the limited capacities of the justice and legal sys-

75. *Id.* at 224-26.

76. James R. Jones, *Western Hemisphere*, in *PREPARING AMERICA'S FOREIGN POLICY FOR THE 21ST CENTURY* 21, 24 (David L. Boren & Edward J. Perkins eds., 1999).

tems to absorb aid in one subsector of justice – narcotics – at the expense of other criminal and legal issues.⁷⁷

III. NATIONAL, BILATERAL AND REGIONAL SECURITY ISSUES

Many of the key policy and strategic decisions behind international enforcement in the Americas and U.S.-Mexico are based on national, bilateral and regional security issues. Hence, this section considers trends in development of these issues.

The conclusion of the Cold War resulted in a worldwide reassessment of tactical and security interests.⁷⁸ “Alliances and rivalries” resulting from approximately forty years of a “bipolar system” are suddenly being scrutinized. For example, the United States and Mexico often put forth different (and even incompatible) “interpretations of their national interests to the formulation of national security policies.”⁷⁹ Each government adopts strategies and rules that can (and often does) become a source of conflict with the other, due in large part to the fact that they are often made without considering the other country’s possible construal of its own national interests.⁸⁰

During the Cold War, U.S. national security policies were guided by “anticommunism and containment, along with the promotion of democracy and market economies”⁸¹ The United States devoted substantial resources to articulating these views and supporting strategies in domestic and foreign policy.⁸² Mexico viewed potential U.S. domination as its only significant state-based security threat.⁸³

However, the Mexican government avoided public dialogue regarding its national security doctrine because of its concern that such action might result in the imposition by the United States of its own security priorities on Mexico.⁸⁴ “Historically, U.S. security

77. For a discussion of the shifting of U.S. policies and resources from narcotics to transnational crime, see Raphael Perl, *United States Foreign Narcopolicy: Shifting Focus to International Crime*, 1 *TRANSNAT'L ORGANIZED CRIME* 33-46 (Spring 1995).

78. John Bailey & Sergio Aguayo Quezada, *Strategy and Security in U.S.-Mexican Relations*, in *STRATEGY AND SECURITY IN U.S.-MEXICAN RELATIONS BEYOND THE COLD WAR* 1, 1 (John Bailey & Sergio Aguayo Quezada eds., 1996).

79. *Id.* at 1-2.

80. *Id.*

81. *Id.* at 2.

82. *Id.*

83. David R. Mares, *Strategic Interests in the U.S.-Mexican Relationship*, in *STRATEGY AND SECURITY IN U.S.-MEXICAN RELATIONS BEYOND THE COLD WAR*, *supra* note 78, at 23.

84. Hernández, *supra* note 57, at 31-33.

policy toward Latin America has tended to stress military defense against conventional external aggression and the neutralization of domestic leftist movements perceived as threats to the internal stability of friendly governments.⁸⁵ Mexico has proactively resisted any U.S. effort to promote such security policy intervention in countries in the hemisphere, which Mexico sees as an attempt to garner support of the U.S. security agenda in the region – for example, with respect to Central America in the 1980s.⁸⁶ The government of Mexico similarly opposed the invasion of Panama to arrest its head of state Manuel Noriega for narcotics offenses.⁸⁷

As a result of recent global and regional developments, both governments have reconsidered national security and the bilateral security agenda.⁸⁸ Since the late 1980s, the government of Mexican has addressed national security matters more openly and in more detail than it had done before.⁸⁹ Its identification of new security threats (such as drug trafficking) has converged with U.S. national security policy and resulted in an increasing number of joint U.S.-Mexican security interests.⁹⁰ The United States has also modified its national security perceptions and applications due to new threats, which include transnational organized crime, terrorism, regional conflicts, failed states, and increased influxes of flows of refugees.⁹¹

Three recent trends [drive the bilateral U.S.-Mexico security relationship.] First, the bilateral relationship has become even more extensive and intensive . . . , reinforced by closer economic and social integration and technological innovation in travel and communications. Second, both societies are experiencing increasing rates of crime and social distress[, such as structural poverty and unemployment, homelessness and personal insecurity, especially in Mexico]. Third, the United States seeks to impose its own legal concepts and policy preferences on other countries generally and on Mexico specifically.⁹²

85. *Id.* at 32.

86. *Id.* at 31-33.

87. Luis Herrera-Lasso, *Mexico in the Sphere of Hemispheric Security*, in STRATEGY AND SECURITY IN U.S.-MEXICAN RELATIONS BEYOND THE COLD WAR, *supra* note 78, at 53.

88. Bailey & Quezada, *supra* note 78, at 2.

89. *Id.*

90. *Id.*

91. *Id.* at 2-3.

92. *Id.*

There may be some “natural convergence” of thinking about strategy and security between the U.S. and Mexico.⁹³ Nevertheless,

The bilateral redefinition of strategic and security interests will likely produce new tensions and conflicts, as well as new opportunities for cooperation. Possible future points of bilateral tension include: heightened control, even militarization, of the border region arising from antidrug and anti-immigration policy; “interventionist” methods of promoting democracy and defense of human rights . . . ; military involvement in the antidrug struggle . . . ; and Mexican perceptions of a persistent U.S. tendency toward unilateralism.⁹⁴

Since September 11, 2001, U.S. counter-terrorism strategy and its invasion of Iraq and the refusal by Mexico to support such strategy, especially in the United Nations, have been sources of tension.

To avoid and/or minimize costly bilateral tensions, Mares recommends that the United States and Mexico “should resist the temptation to define [or exaggerate] nonmilitary core interests as security interests.”⁹⁵ Where they perceive real military threats to national security, they should eschew unilateral extraterritorial measures.⁹⁶

The role of the Mexican armed forces and the bilateral Mexican-U.S. military cooperation is likely to be important. In contrast to other countries in the hemisphere, the “pattern of institutional civil-military relations” has facilitated the continuation of a “demilitarized political system.”⁹⁷ The stability of Mexico’s system has been due mainly to the “effective functioning, until recently, of its institutions for political control, mediation, and cohesion (that is, the hegemonic party [PRI], corporatism, and presidentialism), with use of repression as a last resort.”⁹⁸ However, the Mexican political system’s “traditional mediatory mechanisms, uncertainty regarding the ruling party’s political future,

93. *Id.* at 3.

94. *Id.*

95. Mares, *supra* note 8383, at 19.

96. *See id.*

97. Guadalupe González González, *Challenges of Unfinished Modernization: Stability, Democracy, and National Security in Mexico*, in STRATEGY AND SECURITY IN U.S.-MEXICAN RELATIONS BEYOND THE COLD WAR, *supra* note 78, at 101, 112 (internal citations omitted).

98. *Id.*

ruptures within the political elite, and rising prospects for conflict and organized violence (political, common, and guerrilla)" may affect the Mexican army's political role as stabilizing institution and test its true level of professionalism.⁹⁹

From the early 1980s on, security challenges have increased quite steadily in all aspects within Mexico. Intermittent outbreaks of violence and bloodshed have unfortunately become more and more common.¹⁰⁰ Mexican land has increasingly been used as a transit point for both illegal drug and weapons trafficking.¹⁰¹ All of this, in addition to the fact that Mexican law enforcement agencies, such as the customs service, have become increasingly corrupt and incompetent, has resulted in increased civil reliance on the Mexican army for help with many aspects of governance, such as election monitoring and maintaining peace in violent regions of Mexico.¹⁰²

The Mexican army's increased involvement in preserving public order and engaging in traditional law enforcement activities, such as counter-narcotics, has not yet led to openly repressive actions.¹⁰³ However, sharp domestic criticism of the army's increased activities and its lack of professionalism "has undermined the prestige of military commanders."¹⁰⁴ The army's capacity to carry out both military and law enforcement activities within Mexico has been limited by inadequate "resources, intelligence gathering, and technical capacity."¹⁰⁵

There remains much room for improvement for mutual cooperation between Mexico and its partners in the region, including the United States. As one commentator observed:

The U.S.-Mexican military relationship remains essentially frozen in its late Cold War configuration, in spite of profound changes in global affairs. . . . Although extensive interaction does take place between law enforcement personnel engaged in counter-drug activities, the Joint Mexican-U.S. Defense Commission remains moribund. At present, the bilateral security relationship is largely informal, episodic, lacking in institutionalization, susceptible to politicization, burdened by lingering suspicions, and

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 113.

103. *Id.*

104. *Id.*

105. *Id.*

encumbered by obsolete stereotypes. This is especially true of the military dimension of the relationship, but dealings with the Foreign Ministry are not fundamentally different.¹⁰⁶

One potential mechanism through which to establish and develop national security cooperation is the North America Free Trade Agreement (NAFTA). NAFTA does not explicitly deal with security matters.¹⁰⁷ Still, NAFTA has significant implications for regional security cooperation. Indeed, throughout the negotiations and ratification of NAFTA, national security interests figured prominently.

An important reason for the "NAFTA partners to establish a mechanism to coordinate their actions in the field of national security will be to manage the inevitably disruptive consequences of economic and political change in Mexico."¹⁰⁸ Over time, a more typical pattern of military relations might be established, possibly involving more and longer "personnel exchanges, common training, combined exercises, and coordinated planning."¹⁰⁹ In all likelihood, the emphasis of such relationships would be on such shared security concerns as fighting terrorism, hastening disaster relief, controlling illegal weapons and drug smuggling, supporting law enforcement efforts against organized criminal institutions, alleviating human trafficking, and regulating other perceived transnational threats.¹¹⁰

The agenda must also be on anti-corruption, including adherence to global and regional anti-national and transnational corruption regimes, and accountability in national and international enforcement matters.¹¹¹

IV. REGIONAL SECURITY ISSUES AND CONFIDENCE BUILDING MEASURES

In the post-Cold War period, confusion and lacking confidence have marked strategic relations between states in the Western Hemisphere.¹¹² During the Cold War, the heavy influence of the

106. Michael J. Dziedzic, *Mexico and U.S. Grand Strategy: The Geo-strategic Linchpin to Security and Prosperity*, in STRATEGY AND SECURITY IN U.S.-MEXICAN RELATIONS BEYOND THE COLD WAR, *supra* note 78, at 63, 68-69.

107. *Id.* at 70.

108. *Id.*

109. *Id.*

110. *Id.*

111. Jorge G. Castañeda, *Mexico's Circle of Misery*, 75 FOREIGN AFF. 92, 104 (1996).

112. Joseph S. Tulchin & Ralph H. Espach, *Confidence Building in the Americas: A*

United States characterized what was and was not considered a threat for most Latin American countries.¹¹³ More recently, however, the United States, as well as Latin America, has seemingly become increasingly uncertain in its quest to identify threats to its national security and how best to respond to them.¹¹⁴ During the last decade or so, considerable modification to the security agenda of the Americas has occurred.¹¹⁵ Countries and international organizations have begun considering "transnational, non-state-sponsored threats such as drug trafficking, international crime, and migration."¹¹⁶ As a result, diplomatic relations continue to exhibit signs of distrust and skepticism, which hamper cooperation, and "latent tensions over past conflicts threaten . . . to destabilize the region as a whole."¹¹⁷

Current exigencies impel hemispheric cooperation:

Throughout the Americas, countries face security threats The preoccupation of many military and security officials has shifted from the traditional threats of military invasion or border conflicts to that of more ambiguous and multinational dangers such as armed drug cartels, terrorism, environmental destruction, and political crises. [The new security priorities now involve] the vulnerability of certain countries to threats generated by transnational organizations, or the inability of a country to maintain sovereign control over its entire national territory and resources. The threats are expanded and made more insidious by increasing international factors such as rapid advances in communication technologies and the globalization of economic systems, both legal and illegal. Since these threats are nonstate in nature and usually involve and affect many countries at once, individual nations[, especially in the Caribbean and Central America,] do not have the capacity or resources to address them effectively. The new regional security agenda, therefore, requires international cooperation.¹¹⁸

Conclusion, in STRATEGIC BALANCE AND CONFIDENCE BUILDING MEASURES IN THE AMERICAS, *supra* note 46, at 172, 172. For background on the tumultuous Cold War era conflagrations in the region, especially Central America, see generally CENTRAL AMERICA: ANATOMY OF CONFLICT (Robert S. Leiken ed., 1984).

113. Tulchin & Espach, *supra* note 112, at 172.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. STRATEGIC BALANCE AND CONFIDENCE BUILDING MEASURES IN THE AMERICAS, *supra* note 46, at 1-2.

The more fluid hemispheric situation is unique. Latin American countries can delineate and develop security agendas with “relatively little interference” from countries of other regions.¹¹⁹ The U.S. security agenda is still, in large part, rather undefined. The current Bush administration’s focus appears to be placed elsewhere.¹²⁰ Partially due to this, the United States seems to be more receptive than ever to multinational initiatives emerging from Latin America.¹²¹ Therefore, Latin American countries may be able to exert significant influence on the emerging international security system, both in its design and its actions. These countries must reconsider their definitions of security so as to include issues and concerns that they had previously overlooked as relatively unimportant, such as certain environmental threats, human rights violations, transnational crime, lack of disaster relief, political instability, and other such dangers.¹²² Consequently, Latin American countries should define a collective security agenda that addresses region-wide interests to promote that agenda.¹²³

Looking ahead to the near future, scholars have expressed optimism with regard to the potential for continued cooperation.¹²⁴ The exigencies of globalization require increased confidence among nations, especially regionally.¹²⁵ During the post-Cold War era, there has been a relative accord among Latin American countries concerning the prioritization of democratic governance.¹²⁶ The shared commitment to democratic ideals has allowed for the potential of closer international and regional cooperation and exchange.¹²⁷

In addition, free trade and economic integration have emerged both “[a]t the hemispheric level, [with] the ambitious Free Trade Area of the Americas initiative launched at the Miami Summit in 1994” and at “the subregional level, [with] MERCOSUR, the Andean Pact, the Caribbean Common Market and Community [CARICOM],” as well as the recent establishment of the U.S.-Central America Free Trade Area (CATFA).¹²⁸

119. *Id.* at 2.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 3.

124. *See, e.g.,* Tulchin & Espach, *supra* note 112, at 172-73.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 173.

These developments have not evolved without giving rise to some concern. "Greater integration in commercial and political affairs has not, however, translated automatically into improved cooperation in matters of security. Closer, more dense interstate relations tend to improve stability, but they also bring more frequent episodes of conflict."¹²⁹ Newly considered security concerns include both "traditional areas of conflict — such as border demarcation and military buildup — and newly evolving threats" — such as terrorism, international drug trafficking, human trafficking, arms smuggling, and criminal networks.¹³⁰ All of these obviously pose great threats to security in the region. Differing composition of threats, combined with resource limitations, especially in the smaller and economically challenged countries, results in different security priorities among subregions.¹³¹ "This variety of threats and the changing nature of the international environment within which they must be addressed necessitate new mechanisms of conflict resolution."¹³²

The expansion of the regional security agenda to include economic, social, and environmental concerns, and the increasing diversity of the actors it involves, from state (e.g., Brazil)- or local-level governments to multinational corporations, non-government organizations (e.g., Amnesty International and the International Association of Chiefs of Police),¹³³ and lending institutions, and even families and individuals (e.g., the Rodríguez Orejuela brothers of the Cali cartel¹³⁴ and Jesus and Luis Contreras of the Colima cartel in Mexico),¹³⁵ complicate the creation of cooperative initiatives. The concept of security becomes increasingly ambiguous. The institutions charged with its preservation have difficulty defining their goals and operations, especially when trying to address security at the hemispheric level.

Recent administrations, including Clinton and Bush, have pursued a Eurocentric foreign policy. "Congress and the public

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. For the growing role of philanthropic organizations in the Americas, see Symposium, *Philanthropy in the Americas: New Directions and Partnerships* (Bruce E. Henderson ed., 1992).

134. For background on the Medellín and Cali cartels in Colombia, see PATRICK L. CLAWSON & RENSSLAER W. LEE III, *THE ANDEAN COCAINE INDUSTRY* 37-61 (St. Martin's Press 1996).

135. U.S. Department of State, *INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT* 166 (Mar. 1999).

appeared to pay attention to Latin America as a region [mainly] in terms of trade or economic relations – [a type of] NAFTA-ization of inter-American relations.”¹³⁶ Exceptions occurred with respect to “the crises in dealing with the military dictatorship in Haiti, or the pressure the pressure brought to bear by the Cuban-American Foundation to tighten sanctions on Fidel Castro.”¹³⁷ In other words, issues of U.S. domestic politics drove Inter-American policy during the Clinton Administration. “[A] reemergence in U.S. policy of a Wilsonian urge to [undertake] good works on behalf of democratic capitalism and to teach other nations how to behave and how to enjoy the benefits of the American way of life [occurred].¹³⁸ Another element of influence in U.S. foreign policy counterbalancing the Wilsonian trend was the Vietnam syndrome, whereby the U.S. tried to avoid international adventures (e.g., peacekeeping except for Bosnia, Kosovo and Haiti).¹³⁹ In 1994, the election of the Republic Congress and its “Contract with America” showed a trend to emphasize a domestic agenda at the expense of foreign policy.¹⁴⁰

Reluctance on the part of the United States to become involved, coupled with a lack of governmental or public focus on Latin America, resulted in a tendency toward unilateral action in hemispheric affairs. This reluctance also manifested itself in bilateral dealings with other nations in the hemisphere, despite the fact that the Clinton Administration started with all sorts of encouragement for multilateral peacekeeping.

A unique effect of globalization that complicated the relations of hemispheric countries with the U.S. was the increasing and widespread importance of technology.

In assessing power in the information age, the importance of technology, education, and institutional flexibility has risen. . . . The convergence of key technologies, such as digitization, computers, telephones, televisions, and precise global positioning [will be vital]. . . . The United States [has started to] adjust its defense and foreign policy strategy to reflect its growing comparative advantage in infor-

136. Joseph S. Tulchin, *The United States and Latin America in the World Today*, in *THE CONSOLIDATION OF DEMOCRACY IN LATIN AMERICA* 139, 141 (Joseph S. Tulchin & Bernice Romero eds., 1995).

137. *Id.* at 141-42.

138. *Id.* at 142.

139. *Id.*

140. *Id.* at 141-142.

mation resources.¹⁴¹

"The United States [and many developed countries] insisted on making access to technology and the protection of intellectual property rights one of the central issues of international trade negotiations."¹⁴² Traditionally, countries in the hemisphere did not prioritize these matters¹⁴³ and even opposed giving disproportionate protection and concessions to technology exporters from the metropole. Countries in the region were notorious for their failure to crack down on copyright violations.¹⁴⁴ "Further, countries in the hemisphere outside North America had never been highly successful in the creation of technology. The key to growth in the 1990s and beyond appeared to be the ability to attract technology, to attract qualified people [i.e. 'know how'], and to attract capital."¹⁴⁵

The United States has focused its information technology on transnational crime threats, such as terrorism, narcotics trafficking, proliferation of weapons of mass destruction, and regional environmental issues.¹⁴⁶ The United States is also trying to facilitate better inter-agency cooperation through information technology on international enforcement.¹⁴⁷ Clearly, the United States will increasingly use information technology "to project military [and police] power for limited purposes and at a low cost in materiel and lives."¹⁴⁸ Examples include the extension of economic sanctions to narcotics traffickers to require U.S. financial institutions to stop doing business with, and freeze the assets of, specially designated narcotics traffickers, as well as the listing of countries that do not comply with international counter-drug standards.

The effect of modern criminal activity has had a complex effect upon Hemispheric relations.¹⁴⁹ Such activity constitutes a

141. Joseph S. Nye, Jr. & William A. Owens, *America's Information Edge*, 75 FOREIGN AFF. 20, 22-23 (1996); see generally JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER (Basic Books, Inc. 1990).

142. Tulchin, *supra* note 136, at 145.

143. *Id.*

144. *Id.*

145. *Id.* at 145-46.

146. Nye & Owens, *supra* note 141, at 32.

147. *Id.* at 33.

148. Eliot A. Cohen, *A Revolution in Warfare*, 75 FOREIGN AFF. 37, 53 (1996).

149. See generally CLAWSON & LEE III, *supra* note 134, at 131-238 (discussing, *inter alia*, the rise in tensions between nations); María Celia Toro, *Unilateralism and Bilateralism*, in DRUG POLICY IN THE AMERICAS 314-28 (Peter H. Smith ed., 1982); Donald J. Mabry, *The U.S. Military and the War on Drugs*, in DRUG TRAFFICKING IN

real threat to the national security of nations in the Western Hemisphere and creates tense international relations.¹⁵⁰ For example, narcotics trafficking and the associated rise of powerful organized crime organizations have “undermined the national sovereignty of Colombia and embarrass[ed] both Peru and Bolivia on account of their lack of capacity to control their national territories.”¹⁵¹ Similarly, narcotics trafficking, the rise of organized crime groups and their use of corruption have periodically poisoned the sovereignty and political stability of a number of small countries, such as the Bahamas, Panama, and St. Kitts and Nevis.¹⁵²

In conjunction with this drug trafficking issue is the pressing problem of determining how to stop it. The use of military means to “end production, or reduce traffic, complicated bilateral relations between the United States and a number of countries in the region and created considerable tension between nations of the Amazon basin. The kidnapping of a Mexican national on Mexican soil by the U.S. Drug Enforcement Agency embarrassed Mexico.”¹⁵³

The Salinas government went to great lengths in an attempt to contain illegal narcotics trafficking.¹⁵⁴ These efforts, though, actually became an obstacle for President Salinas in his endeavor to successfully prioritize the government’s free market policies and the NAFTA, which the Bush administration did not anticipate.¹⁵⁵ Similarly, in the United States, members of Congress raised unsuccessfully drug trafficking and other enforcement issues (i.e. problems extraditing persons from Mexico) and the potential that free trade would exacerbate the problem as reasons to oppose NAFTA.¹⁵⁶

“Other global issues that can produce tensions between the United States and Latin America are the defense of human rights, the protection of democracy, the proliferation and export of arms

THE AMERICAS 43, 43-60 (Bruce M. Bagley & William O Walker, III eds., 1995); Bruce Michael Bagley, *After San Antonio*, in *DRUG TRAFFICKING IN THE AMERICAS*, *supra*, at 61-76; Jorge Chabat, *Drug Trafficking in U.S.-Mexican Relations: What You See Is What You Get*, in *DRUG TRAFFICKING IN THE AMERICAS*, *supra*, at 373-94; William O. Walker, *After Camarena*, in *DRUG TRAFFICKING IN THE AMERICAS*, *supra*, at 385-422.

150. Tulchin, *supra* note 136, at 146.

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.*

of mass destruction, migration, and population control."¹⁵⁷ To achieve success for the region in dealing with these issues will require the development of institutional mechanisms.¹⁵⁸ Each nation must concede some of their sovereignty in order to allow international organizations to deal with these issues.¹⁵⁹

There has been a struggle to conceptualize the proper role of the United States (and especially) its military as an element of the total response to particular issues of hemispheric concern. The United States government, in agreement with Latin American countries, initially opposed the use U.S. troops to combat the production and shipment of illegal drugs to the United States from Latin America.¹⁶⁰ However, increasingly in the Clinton and Bush Administrations, the U.S. military has participated in identifying and stopping planes carrying drugs, training and supporting Latin American military, and furnishing equipment for spaying and destroying drug crops.

Further complicating U.S. policy in Latin America since the mid-1980s "has been a . . . resurgence of Wilsoniansim."¹⁶¹ In particular, the United States has made it a priority to preach the benefits of and spread liberal democracy throughout the world, even by force if necessary.¹⁶² Examples of such following the Cold War era are partisan American support of elite groups and the military in Guatemala and Honduras and numerous international alliances whose goals were to spread democracy and international human rights.¹⁶³ However, during the George W. Bush administration the support of a coup attempt against the Chavez administration, the U.S. invasion of Iraq, and its detention and interrogation policies in the war against terrorism have undermined and complicated U.S. leadership on human rights, democracy, and the rule of law.

With the transition to democracy well advanced in the region, the human rights community consciously set out to reinvent itself and to define its new mission now that the United States was apparently not going to engage in clandestine interventions in the hemisphere or in operations supportive of dictatorships or other regimes that blatantly

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 151.

161. *Id.* at 152.

162. *Id.*

163. *Id.* at 152-153.

violated the human rights of their citizens. Organizations such as the Washington Office on Latin America (WOLA), Human Rights Watch, [Amnesty International, Human Rights First,] and various church-related human rights groups sought ways to remain effective in helping the forces of democracy in the hemisphere consolidate their strength and extend more widely into the populations of Latin American countries.¹⁶⁴

For instance, human rights organizations have brought a series of cases against former high-level military and law enforcement officials of Central American governments who now live in the United States for alleged crimes against humanity, such as torture, and other atrocities. Some of these cases have resulted in verdicts against the defendants. Transnational nongovernmental organizations (NGOs) have helped to establish like-minded organizations in Latin America, and have thus influenced both U.S. and Latin American policy.¹⁶⁵

Such groups continue to influence U.S. policies to combat violations of international human rights in the region, support genuine democratic initiatives, and limit U.S. law enforcement policies in the region that violate international human rights laws.¹⁶⁶ They also helped lobby multilateral organizations such as the U.N., the OAS, and the EU to positively influence and support international human rights and democratic initiatives.¹⁶⁷

Historically, the United States has wanted to deal with Latin American countries on an individual basis and has discouraged joint or multilateral efforts.¹⁶⁸ Today, the U.S. needs the hemispheric countries, European and extraregional allies, including international organizations, to help effectively combat drug traffic, terrorism, and other transnational crime.¹⁶⁹

However, since the end of the Cold War, the United States has returned to some of its traditional approaches in dealing with Latin American countries.¹⁷⁰ Though it is not necessarily a premeditated policy, the U.S. approach reflects concurrent attitudes,

164. *Id.*

165. *Id.* at 154.

166. See, e.g., INSTITUTE FOR POLICY STUDIES, CHANGING COURSE: BLUEPRINT FOR PEACE IN CENTRAL AMERICA AND THE CARIBBEAN (1984); ASPEN INSTITUTE OF HUMANISTIC STUDIES, REBUILDING COOPERATION IN THE AMERICAS: 1986 REPORT OF THE INTER-AMERICAN DIALOGUE (1986).

167. See Tulchin, *supra* note 136, at 154.

168. *Id.*

169. *Id.* at 159.

170. *Id.*

such as “an aversion to interference by outsiders, a compulsion to prevent any instability that threatens the United States, and a desire to preserve U.S. autonomy of action so that its global interests are not compromised.”¹⁷¹ This outlook indicates a hemispheric hegemon “whose major preoccupations were elsewhere, a hegemon that preferred not to get involved if at all possible, and a hegemon that would like to reserve the region as a kind of preserve, a safety area that might be redefined as an economic bloc if that proved necessary.”¹⁷² This U.S. policy has primarily been concerned with countries and issues closest to its own territory, particularly those that most likely present any sort of threat.¹⁷³ An example of this can be seen in the fact that Mexico receives more attention than Brazil.¹⁷⁴ Another example is the emphasis since September 11, 2001, on the third border initiative, which prioritizes national security and counter-terrorism policies.

Relative inattention provides a “historically unique opportunity to create a role in international affairs.”¹⁷⁵ As a result of the U.S. preoccupation with Europe, Latin American countries have continuously exercised considerable autonomy in defining their roles in world affairs.¹⁷⁶ The United States may in fact be more than willing to give up leadership to a democratic Latin America as an equitable solution to such problems as drug control, transnational corruption, transnational terrorism, smuggling of arms or aliens (especially women and children), recovery and return of stolen airplanes and automobiles, and other international enforcement issues.¹⁷⁷ “The U.S. military has indicated that it is willing to collaborate with Latin American partners in its expanding ‘non-traditional’ mission in the hemisphere.”¹⁷⁸ Moreover, U.S. uncertainty over its role in world affairs, coupled with a lack of consensus on the value of multilateral organizations and their ability to enforce the international code of behavior and resolve conflicts, should result in even greater autonomy.¹⁷⁹

An important issue will be whether the nations of the hemisphere will define their security in strictly national terms or in

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 159-60.

175. *Id.* at 164.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

terms that take advantage of, or require some measure of, regional cooperation or integration. In the short term, it may prove easier for countries in the hemisphere to operate in ad hoc groups in which the common interest is clear – e.g., the Esquipulas group, the Group of Rio, or the Group of Three – rather than in the OAS itself, which is hampered by its comprehensive membership, its historical baggage, and its institutional clumsiness. Perhaps the most important country is Canada, due to its size, resources, commitment to both international enforcement cooperation and human rights, and its dynamic role in new initiatives in international enforcement cooperation (e.g., the landmine treaty and the proposed Permanent International Criminal Court). By defining their own positions with respect to the merging global agenda, countries in the hemisphere can accommodate or combine their respective positions with those of the United States.¹⁸⁰

One way to overcome the confusion caused by the new regional security threats (and the various agendas to combat such) is to focus on action at the operational level.¹⁸¹ In daily operations, law enforcement officials throughout the hemisphere are constrained by their inability to coordinate and share information and resources with colleagues across borders or on the open seas.¹⁸² “For this reason, confidence building measures at the operational level, aimed at specific objectives and confined to individual institutions or functionally related groups, can be particularly helpful in establishing institutional networks upon which future cooperative projects can be built.”¹⁸³ As a “short term” solution, “small-scale initiatives . . . require fewer resources – an important consideration in a period of fiscal downsizing and budgetary constraints – and are less controversial politically.”¹⁸⁴ Examples of such small-scale international law enforcement cooperation initiatives include the transnational exchanging of information on tax crimes, alien and drug smuggling, and joint maritime operations against smuggling (both of people and of narcotics).¹⁸⁵

180. *Id.* at 165.

181. See Tulchin & Espach, *supra* note 112, at 176.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

V. ORGANIZATION OF AMERICAN STATES

Globalization and economic integration will make multilateralization of international enforcement in the Americas inevitable. Multilateral approaches are already on the increase, though mainly on an *ad hoc* issue basis. This section discusses the traditional and current role of the Organization of American States, the principal international organization for providing support to international enforcement issues.

A. *Historical and Current Roles*

Historically, the OAS has provided advisory legal services and convened meetings and projects to prepare conventions for international criminal cooperation and harmonization of criminal law.¹⁸⁶ The Inter-American Juridical Committee (IAJC) has undertaken much of the advisory legal work. It serves the OAS as an advisory body on juridical matters, helps promote the progressive development and codification of international law, and studies juridical problems related to the integration of the developing countries of the Hemisphere.¹⁸⁷ The IAJC undertakes studies and any work that higher organs assign it. On its own initiative, it can undertake any study it considers advisable and hold specialized juridical conferences. The Committee has eleven members, who the General Assembly elects for terms of four years from panels of three candidates presented by the member states.¹⁸⁸ To facilitate an equitable geographical representation, no two members of the committee can be from the same state.¹⁸⁹

After the revised Charter of the OAS came into force in 1970, several new modifications were introduced in the organization, updating its structure and providing for new mechanisms with important implications for international enforcement cooperation. A new link of the General Assembly was created with a new institution in 1979: the Inter-American Court of Human Rights.¹⁹⁰ In 1986, the Inter-American Drug Abuse Control Commission

186. See About the OAS, <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp> (last visited July 31, 2006).

187. See Inter-American Juridical Committee, http://www.oas.org/cji/eng/inter_american_juridical_committee.htm (last visited July 31, 2006).

188. See Inter-American Juridical Committee: Members, http://www.oas.org/cji/eng/members_iajc.htm (last visited July 31, 2006).

189. *Id.*

190. See Inter-American Court of Human Rights, http://www.corteidh.or.cr/general_ing/index.html (last visited July 31, 2006).

(CICAD) was created.¹⁹¹ The Inter-American Defense Board (IADB) was upgraded and became directly linked to the General Assembly.¹⁹²

B. Inter-American Drug Abuse Control Commission

The OAS has exerted great effort in its attempt to promote counter-drug control in the Western Hemisphere. In 1984, the OAS General Assembly adopted Resolution 699, declaring illicit drug trafficking a crime that affects all humanity, and convened a Specialized Conference on Drug Trafficking.¹⁹³ In April 1986, the conference took place in Rio de Janeiro.¹⁹⁴ At the conference, the Program of Rio was adopted.¹⁹⁵

The Program of Rio sets forth national and regional inter-American measures with the objective of attacking both the demand for and the supply of illegal drugs, through programs that include education, treatment and rehabilitation elements.¹⁹⁶ "It calls for unified national drug control agencies to plan, implement and coordinate comprehensive national policies and programs, and the creation of CICAD at the inter-American regional level."¹⁹⁷ The Program highlights the necessity to synchronize "legislation among member states, authorize the forfeiture of assets derived from illicit drug trafficking, control precursors and other chemicals essential for the manufacture of narcotic drugs and psychotropic substances, support crop substitution and eradication of illicit production, and build effective cooperation among anti-drug agencies in and among member states."¹⁹⁸

In 1990, the meeting of ministers at Ixtapa, Mexico, reaf-

191. See CICAD: Mission Statement, <http://www.cicad.oas.org/EN/AboutCICAD.asp> (last visited July 31, 2006).

192. See Inter-American Defense Board: Overview, <http://www.jid.org/en/about/> (last visited July 31, 2006).

193. See History of CICAD, <http://www.cicad.oas.org/en/Main/AboutCICAD/history.htm> (last visited July 31, 2006).

194. For background to the efforts that led to convening the conference, see generally Michael J. Dziedzic, *The Organization of American States and Drug Control in the Americas*, in *INTERNATIONAL HANDBOOK ON DRUG CONTROL* 397-400 (Scott B. MacDonald & Bruce Zagaris eds., 1992).

195. For the latest revised text of the Program, see OAS, *INTER-AMERICAN PROGRAM OF ACTION OF RIO DE JANEIRO AGAINST THE ILLICIT USE AND PRODUCTION OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES* (July 1992), <http://www.cicad.oas.org/EN/basicdocuments/Rio.asp>.

196. Irving Tragen, *World-Wide and Regional Anti-Drug Programs*, in *DRUGS AND FOREIGN POLICY: A CRITICAL REVIEW* 155, 174 (Raphael F. Perl ed., 1994).

197. *Id.*

198. *Id.*

firmed the goals and content of the Program of Rio, which determined priorities for the inter-American Program in the 1990s.¹⁹⁹ They included early ratification by the OAS members of the 1998 U.N. Convention Against Illicit Traffic.²⁰⁰ CICAD was directed to help member states harmonize "their laws and procedures for effective application of the Convention, especially to control precursors and other chemical products and to effect forfeiture of assets derived from drug trafficking and money laundering."²⁰¹ Additionally, the ministers approved measures on inter-American "cooperation on demand reduction, interdiction and elimination of illicit production, as well as cooperation among the judiciary and enforcement agencies."²⁰²

CICAD has developed five courses of action to execute the Rio and Ixtapa Programs: "legal development, education for prevention, community mobilization, a uniform inter-American statistical system and an inter-American drug information system."²⁰³ In addition, in March 1990, CICAD approved the Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials to implement the provisions of Articles 12 and 13 of the 1988 U.N. Convention.²⁰⁴ Most of the OAS countries have now adopted and are applying the Model Regulations.²⁰⁵ Also, in March 1992, the OAS adopted model anti-money laundering regulations.²⁰⁶

CICAD has assisted OAS members "in promoting cooperation among their judiciaries as well as in improving their enforcement capability, especially in the collection, safekeeping and representation in judicial proceedings of evidence against those engaged in illicit drug trafficking. . . ."²⁰⁷ OAS is cooperating in its efforts with the UNDCP and ILANUD.²⁰⁸ In addition, the government of Canada provides police training through the Royal Canadian Mounted Police.²⁰⁹

CICAD's operations complement UNDCP efforts in helping member states apply the Conventions and the U.N. comprehensive

199. *Id.* at 175.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 175-76.

205. *Id.* at 176. A CICAD expert group has already updated the Model Regulations.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

counter-drug policy. Clearly, the OAS has served as a medium to enable the region to debate and develop a counter-drug policy. However, severe funding limitations have limited CICAD in realizing many of its goals.²¹⁰ The OAS has helped its members overcome issues of sovereignty, autonomy, and national identity to construct a multilateral counter-drug program. It still remains to be determined whether the OAS members will allow it to build on CICAD's experience, competence, and growing reputation and play a more central part in the counter-drug campaign.²¹¹

C. *Codification of International Law*

In the last two decades, the IAJC has elaborated a variety of legal instruments, many of which deal with international criminal and enforcement law cooperation, such as: the draft Convention on Extradition, the Inter-American Convention on Human Rights [Pact of San José de Costa Rica](1973); draft Convention That Defines Torture as an International Crime (1980); draft Additional Protocol to the American Convention on Human Rights [Pact of San José de Costa Rica], and Inter-American Convention to Prevent and Punish Torture (1985); New American Treaty of Pacific Settlement and draft of the Inter-American Convention on Judicial Assistance on Criminal Matters (1986); Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1987); Draft Inter-American Convention on the Forced Disappearance of Persons; the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance (1971).²¹² Other important international criminal cooperation conventions include the Inter-American Convention on Serving Criminal Sentences Abroad, the Inter-American Convention on Terrorism, and the Inter-American Convention on Corruption.

D. *Inter-American Human Rights System*

"The Inter-American human rights system has two distinct legal sources: one has evolved from the Charter of the OAS, [while] the other is based on the American Convention on Human

210. See Dziedzic, *supra* note 194, at 404-13.

211. Abraham F. Lowenthal, *The Organization of American States and Control of Dangerous Drugs*, in *DRUG POLICY IN THE AMERICAS* 305, 311 (Peter H. Smith ed., 1992).

212. O. CARLOS STOETZER, *THE ORGANIZATION OF AMERICAN STATES* 243-44 (1993).

Rights.”²¹³ The Charter-based system applies to all thirty-five OAS members, while the Convention system legally binds only the States Parties.²¹⁴ The two systems overlap and interact in diverse ways.²¹⁵

In 1960, the OAS established the Inter-American Commission on Human Rights (IACHR) to promote human rights in its member states.²¹⁶ In 1965, the IACHR became a permanent branch of the OAS.²¹⁷ Ever since then, the IACHR’s jurisdiction has extended beyond those states that were parties to the American Convention on Human Rights, which went into effect in 1978.²¹⁸

Regarding international criminal and enforcement law, the importance of the IACHR is that it must devote special attention to many of the rights dealing with criminal law and procedure. The rights and protections are contained in both the American Convention and the American Declaration of the Rights and Duties of Man, which is part of the 1948 OAS Charter.²¹⁹ The IACHR binds countries, such as the United States, that have not ratified the American Convention.²²⁰ The basic rights in the American Convention and Declaration include the right to life, the right of equality before the law, freedom of religion, freedom of speech, the right to a fair trial, the right of freedom from arbitrary arrest, and the right to due process of law.²²¹ OAS members must adhere to the American Declaration.

The IACHR is composed of seven members, nominated by governments and selected by the Permanent Council of the OAS as individual citizens.²²² The IACHR meets for no more than eight weeks per year on a part-time basis.²²³ “Members are elected for

213. THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 222 (2002). For a collection of relevant treaties and related texts, reports, judicial opinions and historical documents on the OAS system, see *HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM* (Thomas Buergenthal & Robert E. Norris eds., 1993). For the basic texts, see OAS, *Basic Documents Pertaining to Human Rights in the Inter-American System* (May 21, 2001), <http://www.cidh.oas.org/Basicos/basic.htm>.

214. BUERGENTHAL, *supra* note 213, at 222.

215. *Id.*

216. Bryce Wood, *Human Rights in Latin America*, in *GOVERNANCE IN THE WESTERN HEMISPHERE* 263 (Viron P. Vaky ed., 1983).

217. For related background information, see *id.*

218. *Id.* at 264.

219. *Id.*

220. *Id.*

221. *Id.* For a review of the integration between international human rights and criminal law and procedure, see HURST HANNUM, *MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CRIMINAL LAW AND PROCEDURE* (1989).

222. Wood, *supra* note 216, at 264.

223. *Id.*

four-year terms and may be reelected.²²⁴ The commission has a rather small staff.²²⁵

The IACHR investigates complaints of violations of human rights made by individuals, national and international private associations, such as Amnesty International and government members of the OAS.²²⁶ The IACHR may use a complaint as the basis of both a request for information from a government and a proposal or recommendation to a government.²²⁷ Thus, the Commission serves as an official mediatory body between individuals and their own governments.²²⁸ In addition, the IACHR may base a request to a government to allow IACHR member representatives to investigate a particular issue on a complaint.²²⁹ The Commission has also sponsored conferences and published numerous human rights documents and pamphlets.²³⁰

The IACHR examines situations where individual complaints or other credible evidence – such as reports from human rights organizations – suggest that a government is engaging in large-scale human rights violations such as inhumane prison conditions.²³¹ The IACHR provides a forum where redress would not be afforded by normal procedures requiring the exhaustion of local remedies (e.g., the IACHR visit to Argentina in 1980). The Commission has visited countries, at their request, to assist in the protection of human rights in wartime (e.g., the Dominican Republic in 1965,²³² and Honduras and El Salvador in 1969²³³). On-site

224. *Id.*

225. *Id.*

226. *Id.* at 265.

227. *Id.*

228. *Id.*

229. *Id.* at 264-65.

230. BUERGENTHAL, *supra* note 213, at 233; *see generally* IACHR, 25 YEARS OF STRUGGLE FOR HUMAN RIGHTS IN THE AMERICAS 1959-1984 (1984); INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS, SEMINAR FOR CARIBBEAN JUDICIAL OFFICERS ON INTERNATIONAL HUMAN RIGHTS NORMS AND THE JUDICIAL FUNCTION (PROCEEDINGS OF THE 1993 BARBADOS SEMINAR) (1995).

231. BUERGENTHAL, *supra* note 213, at 234.

232. *See generally* IACHR, *Report On the Activities of the Inter-American Commission on Human Rights in the Dominican Republic (June 1 to August 31, 1965)*, in THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS 1960-67, at 359 (1972); IACHR, *Report on the Activities of the Inter-American Commission on Human Rights on its Activities in the Dominican Republic*, in THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS 1960-67, at 439 (1972).

233. Wood, *supra* note 216, at 265; *see also* BUERGENTHAL, *supra* note 213, at 234; IACHR, *Report of the Inter-American Commission on Human Rights on the Situation Regarding Human Rights in El Salvador and Honduras*, in THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS 1969-1970, at 291 (1976).

investigations are usually carried out by a "Special Commission" of the Commission.²³⁴

The Commission receives and acts on individual petitions charging a violation of any of the rights enumerated in the Declaration of the Rights and Duties of Man.²³⁵ The petition process applicable to states not parties to the Convention concludes with a "final report."²³⁶ If a state does not comply with the Commission's recommendation, the Commission may publish the decision.²³⁷ The Commission's annual report to the OAS General Assembly usually contains a chapter in which these decisions are reproduced.²³⁸ The petition system has two fundamental flaws.²³⁹ First, "since the petitions are directed against states which are not parties to the Convention, the Court has no contentious jurisdiction to deal with them."²⁴⁰ Second, "although the Commission transmits its decisions . . . to the General Assembly," the latter does not deal with individual petitions, thereby allowing states to continue to violate the provisions of the system and depriving the system of its effectiveness.²⁴¹ Hence, the Commission, as opposed to the Court, has no authority to ensure that a state complies with its recommendations.²⁴² Its most important role has been documenting the human rights abuses that NGOs allege have occurred.²⁴³

The IACHR makes five types of reports: (1) a report of proceedings at each session; (2) comprehensive annual reports to the OAS General Assembly; (3) special reports on the human rights situation in individual countries; (4) special studies that are articles or essays by Commission members; and (5) *Inter-American Yearbooks on Human Rights*.²⁴⁴

The Convention authorizes the Commission to deal with indi-

234. BUERGENTHAL, *supra* note 213, at 237.

235. OAS, AMERICAN CONVENTION ON HUMAN RIGHTS, arts. 51-54, available at <http://www.cidh.oas.org/Basicos/basic3.htm> (last visited March 23, 2006); OAS, Form For Filing Petitions Alleging Human Rights Violations, https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E (last visited March 25, 2006).

236. BUERGENTHAL, *supra* note 213, at 240.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 241.

241. *Id.*

242. Dinah L. Shelton, *The Inter-American Human Rights System*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 119, 131 (Hurst Hannum ed., 1992).

243. *Id.*

244. Wood, *supra* note 216, at 266.

vidual petitions and inter-state communications.²⁴⁵ Accession to the Convention is deemed acceptance of the Commission's jurisdiction to examine private complaints lodged against that state.²⁴⁶ The Commission can deal with inter-state complaints, those brought by one State Party against another, only if both states, in addition to ratifying the Convention have recognized the inter-state jurisdiction of the Commission.²⁴⁷ In addition to the victims of violations, any person or group of persons and certain nongovernmental organizations can file a petition.²⁴⁸

The admissibility of a petition is conditional on, among other things, (1) the exhaustion of domestic remedies "in accordance with [the] generally recognized principles of international law," and (2) the requirement that the petition be submitted to the Commission within a period of six months from the date on which the victim of the alleged violation was notified of the final domestic judgment in his case.²⁴⁹

In handling complaints that are admissible, the Commission examines the allegations, seeks information from the government concerned and investigates the facts.²⁵⁰ It may hold hearings in which the government and the petitioners participate.²⁵¹ The Commission also puts itself "at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized" in the Convention.²⁵²

If the parties do not reach a friendly settlement, the Commission issues a report with facts, conclusions, and applicable recommendations, and transmits the report to the states concerned.²⁵³ The latter have three months to comply with or react to the recommendations of the Commission.²⁵⁴ During that period, the case may also be referred to the Inter-American Court of Human Rights by the Commission or the interested states. Once the case has been referred to the Court, it can render a judgment that is

245. OAS, AMERICAN CONVENTION ON HUMAN RIGHTS, arts. 44 – 45, *available at* <http://www.cidh.oas.org/Basicos/basic3.htm>.

246. *Id.* art. 44.

247. *Id.* art. 45.

248. *Id.* art. 44.

249. *Id.* art. 46.

250. *Id.* art. 48(d).

251. *Id.* art. 48(e).

252. *Id.* art. 48(f).

253. *Id.* art. 50.

254. *Id.* art. 51.

“final and not subject to appeal.”²⁵⁵ The Court may award monetary damages²⁵⁶ and render declaratory judgments, and even issue temporary restraining orders.²⁵⁷

Despite some successes to adjudicate individual complaints involving abuses in criminal justice,²⁵⁸ the mediating influence of on-site visits, and the education by the Commission's reports of the need for enhanced compliance with international human rights norms, there is still a large amount of impunity.²⁵⁹ More can be done to enhance compliance with the Americas' international human rights.

E. Future Roles

“The Reagan and Bush years hardened the U.S. position toward all international organizations in general, and the OAS in particular.”²⁶⁰ Several actions undermined U.S.-Latin American relations, including the use of mercenaries in Nicaragua to destabilize that country's government, numerous U.S. interventions in other parts of Central America, U.S. approval and support of the British reoccupation of the Malvinas (the Falklands), and finally, the invasions of Grenada and Panama in defiance of what some see as the most elementary notions of international law and morality.²⁶¹

In response to these reactionary policies, the OAS provided new elaboration on its non-intervention theory.²⁶² Latin Americans also established alternatives to the OAS by forming other organizations.²⁶³ In some cases, OAS was merely bypassed.²⁶⁴ In the 1980s, the Contadora Group (Colombia, Venezuela, Panama,

255. *Id.* art. 67.

256. *Id.* art. 68(2).

257. *Id.* art. 63(2).

258. In the Velásquez-Rodríguez Case, the Commission and then the Court found in favor of a victim of an unresolved disappearance case. See Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. c) No. 4 (July 29, 1988), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf. The principal findings of the Velásquez-Rodríguez Court were reaffirmed in the Godinez Cruz case. See Godinez Cruz v. Honduras, Inter-Am. Ct. H.R. (ser. c) No. 5 (Jan. 20, 1989), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_05_ing.pdf.

259. Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 425, 440-48, 459-61 (Louis Henkin & John Lawrence Hargrove eds., 1994).

260. STOETZER, *supra* note 212, at 297.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

and Mexico) and the Contadora Support Group (Argentina, Brazil, Peru, and Uruguay) were established, both of which strove to achieve a just and lasting peace in Latin America.²⁶⁵ These groups were separate from the OAS and ultimately failed as viable alternatives.²⁶⁶ However, along with Canada's recent decision to join the OAS, there has been great hope for the revitalization of both the inter-American system and the OAS.²⁶⁷

In the 1980s the financial status of the OAS forced it "to make drastic reductions with tremendous decreases in personnel and their corresponding activities."²⁶⁸ In addition, the Reagan administration and its negative position toward all international organizations and especially the OAS triggered the forced additional budgetary constraints.²⁶⁹

Today signs reflect an improved environment: "ideology, statism, protectionism, and social adventurism of doubtful repute are giving way, under the impact of realism, to more positive solutions."²⁷⁰ The OAS will likely profit from these fundamental changes.²⁷¹ If the United States takes the OAS more serious, as it is likely to do, Latin Americans will almost certainly react in a positive fashion.²⁷²

Three elements have "undermined efforts to make the OAS a significant medium for the resolution of hemispheric conflicts."²⁷³ First and foremost is the strong propensity of the United States to act unilaterally in order to avoid being constrained by other states or organizations, a tendency that has been reinforced by Republican control of Congress.²⁷⁴ Second, Mexico, as well as many other countries in the hemisphere, has been reluctant to cede its national sovereignty to an international organization that the United States controls.²⁷⁵ Finally, in the 1990s, the end of the rigid, zero-sum, bipolar framework for national security debates stimulated neonationalist postures in Latin America, just as it did in Europe and the former Soviet Union.²⁷⁶

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 298.

269. *Id.*

270. *Id.* at 300.

271. *Id.*

272. *Id.*

273. Tulchin, *supra* note 136, at 147.

274. *Id.*

275. *Id.*

276. *Id.*

During the first Bush administration, the United States started to successfully engage the OAS to resolve hemispheric problems.²⁷⁷ This success was due in part to the efforts of Luigi Einaudi, a U.S. civil servant and an esteemed Latin American supporter, who became U.S. ambassador to the OAS and provided dynamic leadership.²⁷⁸ However, “[t]he agenda of hemispheric conflict resolution” was incredibly complex and far-reaching, and encompassed such broad issues as “democracy, governance, emigration, civil-military relations, the environment, drug traffic, and poverty.”²⁷⁹ Such complexity prompted relatively “low[] levels of consensus among the membership.”²⁸⁰

The decision of both Bush administrations and the Clinton administration not to take a leadership role for the United States in the OAS were due partly to a “long-standing reluctance to allow the organization to compromise U.S. independence of action, and in part to a widespread disdain within the policy-making bureaucracy for the institutional capacity of the OAS.”²⁸¹ At the same time, the decision also resulted from the genuine confusion of the government regarding U.S. foreign policy.²⁸² Confusion reigned on strategic issues and uncertainty over what constitutes a threat.²⁸³

The United States will continue to play a pivotal role in the OAS.²⁸⁴ The more the United States “respects its neighbors and discontinues its ‘cowboy politics,’ the better it will be for U.S.-Latin American relations in general, and for the OAS in particular.”²⁸⁵ As Latin America becomes a more significant region in the world, the United States will likely alter its agenda and develop appropriate priorities.²⁸⁶ The United States is expected to eventually normalize relations with Cuba, and will likely “avoid military expeditions or covert operations in the name of all kinds of alleged threats and cures.”²⁸⁷

While states can act on collective interests without institutions or formal organizations, institutionalization can strengthen collaboration that is more sustainable and dependable than under

277. *Id.* at 149.

278. *Id.*

279. *Id.* at 150.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. STOETZER, *supra* note 212, at 300.

285. *Id.*

286. *Id.*

287. *Id.*

ad hoc measures, with a view towards consistent cooperation and collaboration.²⁸⁸ Organizations can also improve cooperation by disseminating information that would normally be unavailable or difficult for individual governments to obtain.²⁸⁹ The use of organizations can diminish “duplication and offer economies of scale, resulting in lower costs for providing infrastructure, monitoring, and staffing in comparison with *ad hoc* functional arrangements.”²⁹⁰

“International organizations, *ad hoc* collective ventures, and bilateral relations are not mutually exclusive spheres.”²⁹¹ States use different channels and strategies depending on their interests.²⁹² However, the fundamental dilemma of multilateralism embedded in the heart of collective rules and norms in a world still composed of sovereign states has never been completely resolved.²⁹³ In general, states have come to terms with this problem more easily when cooperative action goals are distinct, technical, and clearly defined.²⁹⁴

The United States has debated its role and purpose in the world and its foreign policy strategies.²⁹⁵ Some Americans reject multilateralism because it obstructs “the pursuit of national interests” and freedom of action, and hinders the “exercise of real power.”²⁹⁶ While such arguments were more convincing during the Cold War struggle, they are not realistic in today’s world.²⁹⁷ As a result of changing circumstances, the first Bush administration, in spite of some exceptions (like the invasion of Panama), deviated from Reagan era unilateralism and adopted cooperative approaches and problem solving strategies.²⁹⁸ The Clinton administration also occasionally utilized a multilateral strategy, but the general bias towards unilateral and bilateral resolutions to global and regional issues continued.²⁹⁹ For instance, the Clinton admin-

288. Viron P. Vaky, *The Organization of American States and Multilateralism in the Americas*, in *THE FUTURE OF THE ORGANIZATION OF AMERICAN STATES: ESSAYS BY VIRON P. VAKY AND HERALDO MUÑOZ* 6, 6 (1993).

289. *Id.*

290. *Id.* at 6-7.

291. *Id.* at 7.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

istration refrained from comprehensive regional initiatives in the Americas and even exercised caution on *ad hoc* initiatives in counter-drug issues where it prioritized unilateral and bilateral initiatives. Similarly, the United States has not joined a number of international initiatives, including the landmine treaty, the United Nations Conventions on the Rights of the Child,³⁰⁰ the Council of Europe Convention on Laundering, Seizure and Forfeiture of Assets, and the Rome Convention on the Permanent International Criminal Court.³⁰¹ The George W. Bush administration amplified the unilateral emphasis of U.S. foreign policy, as exemplified by its support of preemption, its invasion of Iraq despite its inability to secure Security Council authorization, and its hostility toward the ICC.

An important related diplomatic issue is how to reduce the hostility between globalism and regionalism.³⁰² The role and purpose of regional entities like the OAS depends in part on the use of other potential institutions, such as the U.N. or the use of *ad hoc* bilateral measures. "With the removal of the restraints imposed by the cold war's global geopolitical framework, regional organizations and regimes have become more active and more important, discovering that many of the problems of today's world are best dealt with in a regional context."³⁰³ Regional and even subregional organizations can effectively carry out tasks because they often have a better understanding of the way problems present themselves locally and can be solved.³⁰⁴

The U.S. propensity for both covert and overt interference to meet what it believed to be security and ideological threats to the region led to a progressive estrangement in U.S.-Latin American relations. During a time when nonintervention in a country's internal affairs was accorded the status of a near-sacred principle in the region, these actions could only produce suspicions of a U.S. quest for hegemony. The alienation, together with the stagnation and eventual demise of the Alliance for Progress during the Nixon administration, caused the system to start to unwind.

300. See, e.g., Judith Miller & Paul Lewis, *Fighting to Save Children from Battle*, N.Y. TIMES, Aug. 8, 1999, sec. 1, at 8, col. 1.

301. For a discussion of the problem of the global perception of the lack of U.S. cooperation on several of the important conventions on international enforcement agreements, see Barbara Crossette, *The World; Tying Down Gulliver with Those Pesky Treaties*, N.Y. TIMES, Aug. 8, 1999, sec. 4, at 3, col. 1.

302. Vaky, *supra* note 288, at 8.

303. *Id.*

304. *Id.*

“Some elected governments in the region have . . . become very sensitive to IACHR criticism.”³⁰⁵ They have even suggested that the scope of the commission’s activity be limited – “for example, eliminating investigations and reports on individual cases of torture and disappearance in favor of broader studies on generic problems.”³⁰⁶ In 1998, Trinidad & Tobago withdrew from the American Convention (and, in 1999, Peru attempted to withdraw), partly due to the criticisms of their resumption and use of capital punishment.³⁰⁷

CICAD’s achievements have been impressive, such as its preparation of model regulations regarding control of chemical precursors and money laundering.³⁰⁸ However, “[a]lthough suggestions have been made from time to time that the OAS develop an enforcement capacity” or an OAS drug force, these proposals have not received real support, and have encountered some active opposition among member governments.³⁰⁹ An additional complication concerns the region’s difficulty in integrating economic and social aspects into the defense-security-criminal law enforcement agenda.

In June 1991, the OAS General Assembly adopted a resolution that officially defined defense expenditures, acquisition and proliferation of weapons, and confidence-building procedures as justifiable regional security concerns.³¹⁰ The assembly set up a security advisory group to make proposals and suggestions regarding these areas.³¹¹ A year later, the OAS members “approved an extensive statement of principles and goals entitled ‘Cooperation for Security and Development in the Hemisphere – Regional Contributions to Global Security,’ representing in effect a normative framework to guide member governments’ activities in these areas.”³¹² The OAS also formed the Special Committee on Hemispheric Security to develop a security agenda.³¹³

In May 1992, the OAS General Assembly asked the Permanent Council to make recommendations “defining the legal-insti-

305. *Id.* at 20.

306. *Id.*

307. See generally Natasha Parassram Conception, Comment, *The Legal Implications of Trinidad & Tobago’s Withdrawal From the American Convention on Human Rights*, 16 AM. U. INT’L L. REV. 847 (2001).

308. Vaky, *supra* note 288, at 20.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

tutional relationship' between the Inter-American Defense Board (IADB) and the OAS.³¹⁴ The IADB's standing brings up broad questions regarding civil-military relations and democracy.³¹⁵ There is concern that in this post-Cold War era, the IADB's agenda is undefined.³¹⁶ Until now, it has functioned as a separate organization of hemisphere military forces that view the organization as independent of the "political" organs of the OAS.³¹⁷ "The redefinition of the Defense Board's mission and status remains controversial."³¹⁸ While some members support "converting the Defense Board into an advisory and supporting entity for the Permanent Council under its general supervision," others "propose converting [the Board] into a specialized organization" like PAHO.³¹⁹

The OAS's legal structure, its subsidiary policymaking infrastructure, financial makeup, characteristic organization and interaction with member states and the U.N. help determine the range and efficiency of its efforts to create autonomous organs.³²⁰

The considerable disparity in power between the United States and Latin American countries has been simultaneously the greatest encouragement of and the greatest obstacle to successful inter-American relations.³²¹ Indeed, a majority of modern U.S.-inter-American relations history "can be interpreted in terms of the efforts of the United States to legitimate and exercise its power in the region," and of the rest of the region to constrain and cope with it.³²²

The countries in the western hemisphere have perceived the safeguarding of their national independence, particularly vis-à-vis the power of the United States, as a fundamental foreign policy objective.³²³ They have consistently tried to restrain the United States through the use of international fora and juridical obligations and commitments.³²⁴ Thus, it is no surprise that some Latin American countries see the treaties and institutions of the OAS as

314. *Id.* at 22.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 31.

321. *Id.*

322. *Id.*

323. *Id.* at 32.

324. *Id.*

a way to limit the United States.³²⁵ However, a number of governments view the OAS as susceptible to U.S. control.³²⁶ Their fears are “resuscitated by episodes such as the 1989 U.S. invasion of Panama or the assertion of the right to enforce U.S. law extraterritorially, as in the case of the Cuban Democracy Act . . . forbidding foreign subsidiaries of U.S. multinationals from trading with Cuba.”³²⁷ In addition to the resentment generated by asymmetry, cultural differences between the English-speaking Caribbean and the Latin American countries have been exacerbated by clashing views of OAS priorities.³²⁸

Following the 1969 creation of the Special Committee for Latin American Coordination (CECLA), several nations have made periodic attempts, particularly during the last decade, “to coordinate their policies and positions . . . to deal with the United States (and industrialized countries generally), as well as to advance their mutual interests.”³²⁹

Independent, non-governmental organizations (NGOs) have also proliferated and formed networks on issues including police and law enforcement, human rights, trade unions and labor rights, professional and business associations, women’s rights, religious freedoms, and environmentalism.³³⁰ Various law enforcement NGOs, such as the International Association of Chiefs of Police, have played an important role in helping establish “best practices” standards, setting ethical and moral standards and upgrading the overall professionalism of police and related law enforcement officials. NGOs have made great contributions to civil society in the western hemisphere.³³¹ The OAS, NGOs, governments, think tanks, and the policy community should all explore “[t]he potential for constructive cooperation and coordination between the NGOs and the OAS and its specialized agencies.”³³²

In many issues, such as peacekeeping, international drug trafficking, and terrorism, the roles of the U.N. and the OAS are ambiguous, overlapping, complementary, and without proper

325. *Id.*

326. *Id.*

327. *Id.* at 32-33.

328. *Id.* at 33.

329. *Id.* at 34.

330. *Id.*

331. *Id.*

332. *Id.* at 34-35.

funding.³³³ In some cases countries in the hemisphere are ambivalent about the U.N. while others believe that it can help dilute the dominance of the United States.³³⁴

The financial position of the OAS is important. The OAS is in the process of recovering from a severe economic crisis that nearly bankrupted it in the 1980s.³³⁵ The United States actually initiated the crisis when it not only refused "to pay its full assessment on time, allowing large arrearages to accumulate over the decade, but also decided unilaterally to reduce its share (66%) of total assessments."³³⁶ In 1990, the OAS approved a decrease in the U.S. quota to 59.47% of total assessments.³³⁷ Following this move, the United States restarted full payment of its new quota.³³⁸ In addition, the United States started to make payments on a number of its arrearages.³³⁹ Much of the work of the OAS in international enforcement – such as CICAD, the IAHRRC, corruption, and terrorism – is limited by the organization's precarious financial situation.³⁴⁰ The economic constraints and monetary limitations of OAS members increase the difficult trade-offs.³⁴¹ "The OAS financial situation is truly a test of member states' commitment to regional governance."³⁴² Their unwillingness or inability to support it precludes its effectiveness.³⁴³

A case can be made that the best possibility for OAS expansion is "incrementalism: small gains, modest shifts in attitude, and cumulative processes" that slowly realize considerable improvement.³⁴⁴ As nations in the region realize the need to work with the OAS and begin to take advantage of the interlocking relationships that the OAS helps to establish, both their experience and reassurance in the process will increase.³⁴⁵

The fact that diverse specialized organizations provide special services and aid in the region suggests that the OAS has not decided whether or not it should engage in the implementation of

333. *Id.* at 35-39.

334. *Id.*

335. *Id.* at 39.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 40.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 50.

345. *Id.*

programs as distinct from policy guidance, or whether to consolidate procedures under its direct control or disperse power to specialized entities.³⁴⁶ Different bodies have taken different approaches at different times.³⁴⁷ A better use of OAS resources would be a “lynchpin’ concept, that is, decentralizing operational matters (such as technical assistance, narcotics, etc.) to its subsidiary agencies, commissions, or committees (such as CICAD, the [IAHRC, PAHO]), while the central governing bodies concentrate on overall policy control and coordination.”³⁴⁸ Under this approach, the councils and the secretary-general’s office would make up the management hub of a “flexible array of decentralized, associated, and even independent organizations and cooperative ventures.”³⁴⁹ This lynchpin function would comprise a very useful method for member states to “ensure coordination among agencies, including those with a global reach, involved in hemispheric affairs,” while minimizing the bureaucracy and financial cost.³⁵⁰ A “lynchpin” concept can apply to hemispheric criminal justice policy and unilateral criminal cooperation.

In the final analysis, the future prospects of the OAS will be shaped to a substantial degree by the United States. What concerns the hemisphere are the intentions, style, and “hegemonic” proclivities of U.S. involvement.³⁵¹

VI. MORE COMPREHENSIVE APPROACHES TO CRIMINAL COOPERATION AND ADMINISTRATION OF JUSTICE

During the last few years, governments in the western hemisphere have begun to experiment with more comprehensive approaches to criminal cooperation and administration of justice. In particular, five meetings of the ministers of justice or attorneys general in the region have occurred. In November 1999, the OAS adopted a resolution establishing an inter-American justice study center. In addition, under the auspices of the OAS, governments are increasingly establishing working groups to deal with a series of transnational crime and security issues, such as cyber crime, terrorism, transnational corruption, and so forth.

These more comprehensive approaches to criminal coopera-

346. *Id.* at 53.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 54.

tion and the administration of justice indicate the emergence of an international criminal cooperation and enforcement regime in the western hemisphere. Naturally, at the emergence of any international regime, the normal obstacles of sovereignty concerns, distrust of bureaucracies, uncertainty over the issues, trade-offs between private sector roles and governmental roles, and competing power centers manifest themselves.

By selecting some of the criminal issue specific areas and developing some analysis of their interrelationship with international criminal cooperation, we can see the gaps and the tensions that sometimes exist among governments and competing interests.

A. *Meetings of Ministers of Justice*

Since 1997, the Organization of American States has convened regular meetings of ministers of justice or attorneys general in the Americas (hereinafter referred to as Ministers of Justice). The meetings provide a forum for wide-ranging discussions on all aspects of international enforcement cooperation and criminal justice in the region. The meetings presage more dynamic cooperation among the governments of the region on criminal matters.

1. Background

The first meeting of ministers of justice convened in Buenos Aires, Argentina in 1997 from December 1st through 3rd.³⁵² This meeting was held pursuant to a resolution of the foreign ministers and heads of delegation of the OAS member states, meeting in Lima, Peru at the twenty-seventh regular session of the General Assembly.³⁵³ The purpose of this meeting was to consider ways by which to improve legal and judicial cooperation in the Americas.³⁵⁴

At the first meeting of the Ministers of Justice, the following conclusions were reached:

- (1) The existence of a legal system that guarantees the observance of human rights and duties, facilitates access to justice, and offers protection to society[,] is an essential element for consolidating the rule of law and for allowing

352. See OAS, Meeting of Ministers of Justice, Buenos Aires, Arg., Dec. 1-3, 1997, *Final Report of the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas*, OEA/Ser.K/XXXIV.2 REMJA-II/doc.21/99 rev.1, available at <http://www.summit-americas.org/Justice/JusticeII-conc&Recs.htm>.

353. *Id.* ch I.I.

354. *Id.*

social and economic development to proceed as an effective formula for the integration of [the Americas].

(2) Strengthening the legal system requires the adoption of standards that will preserve the independence of the judiciary, the continued improvement of its institutions' abilities to enforce the rule of law, and the training and continuous upgrading of magistrates, judges, prosecutors and public attorneys, and other officials related to the justice system, as well as lawyers.

(3) The threats facing . . . [society], such as organized crime, corruption, drug trafficking, terrorism, money laundering, child exploitation, and the deteriorating natural environment, can only be successfully addressed by upgrading our national systems of justice, and by strengthening international cooperation in these areas, in all its forms.

(4) The valuable inter-American juridical inheritance embodied in the many treaties prepared under the aegis of the Organization of American States needs to be given, effective application, through prompt ratification of the conventions that have been signed, and adequate dissemination of their texts, and of the practice of member states.

(5) International legal cooperation is essential for the development of justice systems . . . [and requires the promotion of] mutual legal assistance in a flexible and effective manner, in particular with respect to extradition, requests for delivery of documents and other forms of evidence, the establishment of secure and prompt channels of communication such as those of Interpol, and strengthening of the role of the Central Authorities.

(6) One of the major challenges facing our societies today is to develop prison and penitentiary systems that offer suitable conditions for rehabilitation and re-integration into society for those who have been sentenced to imprisonment by the courts.³⁵⁵

The ministers of justice endorsed a series of recommendations at the conclusion of their first meeting:

(1) To continue the process of strengthening the legal systems of the Americas, so as to ensure that individuals have full access to justice, to guarantee the independence of the judiciary and the effectiveness of prosecutors and public

355. *Id.* ch. I.I.A.

attorneys, and to encourage the establishment of responsive and transparent systems and modern institutions.

(2) To approach the process of modernizing justice from a multidisciplinary viewpoint that goes beyond strictly legal considerations, and embraces such aspects as organizational analysis, systems management, social costs and benefits, and economic and statistical studies.

(3) To encourage the incorporation of alternative dispute settlement procedures into national justice systems.

(4) To continue efforts to improve inter-American instruments for legal cooperation, to which end every state should evaluate the current application of existing measures, and take steps to disseminate them more broadly, as well as to promote the establishment of other instruments that may be necessary to deal with new contingencies. [In this connection the General Secretariat of the OAS will] prepare a study on the obstacles impeding the effective application of treaties of legal and judicial cooperation. . . .

(5) To promote the exchange of national experience and technical cooperation in prison and penitentiary policy matters, within the framework of the OAS.

(6) To promote the sharing of experience and technical cooperation in matters related to criminal prosecution systems, access to justice, and judicial administration.

(7) To reinforce the fight against corruption, organized crime and transnational criminal activity, and to adopt new legislation, procedures, and mechanisms as necessary to combat these scourges.

(8) To welcome the [then] forthcoming Summit of the Americas, . . . [in April 1998] and to express satisfaction that the timely topic of strengthening the judicial system and the administration of justice has been included on the agenda for that occasion.

(9) To convene a meeting of government experts, with the support of the OAS, . . . [before the Summit of the Americas], to examine basic issues in the Justice Sector, with a view to incorporating their analysis into the work of the Summit of the Americas.

(10) To encourage the holding of regular meetings of ministers of justice . . . within the framework of the OAS and with technical support from the Organization's General Secretariat.

(11) To accept . . . [the Peruvian Government's offer] to

serve as host for the Second Meeting of Ministers of Justice . . . [and] [t]o request the OAS to provide the financial resources necessary for carrying out the various recommendations issuing from this First Meeting of Ministers of Justice.³⁵⁶

2. Second Summit of the Americas

In April 1998, government experts met to incorporate basic justice-sector issues into the agenda for the Second Summit of the Americas, which was held later that month in Santiago, Chile.³⁵⁷ The heads of state and government that met at this summit adopted a Plan of Action, which contained the following decisions concerning the “Strengthening of Justice Systems and Judiciaries:”

Develop mechanisms that permit easy and timely access to justice by all persons, with particular reference to persons with low income, by adopting measures to enhance the transparency, efficiency and effectiveness of the courts . . .

Strengthen . . . systems of criminal justice founded on the independence of the judiciary and the effectiveness of public prosecutors and defense counsels, recognizing the special importance of the introduction of oral proceedings in those countries that consider it necessary to implement this reform.

Step up efforts to combat organized crime, and transnational crime, and, if necessary, foster new laws and international conventions, as well as procedures and mechanisms for continuing to combat these scourges.

Adapt legislation and proceed, as soon as possible, with necessary institutional reforms and measures to guarantee the comprehensive protection of the rights of children and youths to meet the obligations established under the United Nations Convention on the Right of the Child and other international instruments.

Adopt, as appropriate a clear distinction between procedures and consequences of violations of criminal law and measures established to protect children and youths whose rights are threatened or violated, and . . . promote social and educational measures to rehabilitate young offenders.

Foster the establishment and strengthening of specialized

356. *Id.* ch. I.I.B.

357. *See id.* ch. I.I.B(9), ch. I.II.

tribunals or courts for family matters, as appropriate, and in accordance with their respective legal systems.

Expédite the establishment of a justice studies center of the Americas, which will facilitate [the] training of justice sector personnel, the exchange of information and other forms of technical cooperation in the Hemisphere

Promote, in accordance with the legislation of each country, mutual legal and judicial assistance that is effective and responsive, particularly with respect to extraditions, requests for the delivery of documents and other evidentiary materials, and other bilateral or multilateral exchanges in this field, such as witness protection arrangements.

Support the convening of periodic meetings of Ministers of Justice and Attorneys General of the Hemisphere within the framework of the Organization of American States (OAS).³⁵⁸

3. General Assemblies of the OAS Adopts Justice Initiatives

After each of REMJA meeting, the next OAS General Assembly (GA) considers and approves the conclusions and recommendations reached. Subject to the availability of resources, the OAS agrees to undertake many specific tasks.³⁵⁹ For instance, after the first REMJA meeting, the OAS GA agreed to establish a working group to prepare a strategic plan; create an Inter-American Studies Center; evaluate international cooperation instruments; provide on-going support for meetings of Ministers of Justice; exchange information regarding training in the judiciary; and expand the jurisdiction of the Inter-American Court of Human Rights.³⁶⁰

4. Second Meeting of Ministers of Justice

After careful preparation by the Permanent Council and the Committee on Juridical and Political Affairs of the OAS, the Second Meeting of the Ministers of Justice was convened in Lima, Peru on March 1-3, 1999.³⁶¹ After six working sessions, the par-

358. *Id.* ch. I.II.

359. *See id.* ch. I.

360. *Id.*

361. *Id.* ch. I.I.

ticipants reached the conclusions and recommendations discussed below.

a. Access to Justice

The “exchange of experiences regarding measures and initiatives adopted at the domestic level, as well as progress achieved and obstacles encountered by the OAS member states in relation to the problem of access to justice in the respective countries” must be continued.³⁶² Legal and defense services must be improved.³⁶³ The legal protection of minors must be enhanced.³⁶⁴ National justice systems must incorporate alternative dispute resolution methods.³⁶⁵

To achieve these goals, applicable cooperation mechanisms in these areas must be clearly identified.³⁶⁶ The following implementation actions were identified: “compilation of the legislation in force regarding these matters, with a view to creating a database; comparative studies; and preparation of a list of countries and institutions that are in a position to provide international cooperation in these areas.”³⁶⁷

During that session, the OAS General Assembly also adopted a resolution titled “Enhancement of the Administration of Justice in the Americas,” in which “it resolved, *inter alia*, to receive with satisfaction the report of the Permanent Council on the enhancement of the administration of justice in the Americas.”³⁶⁸

b. Training of Judges, Prosecutors, and Judicial Officers

(1) Justice Studies Center for the Americas

In order to establish the Justice Studies Center envisioned in the Plan of Action of the Second Summit of the Americas and considering the different legal systems in Hemisphere, it was decided that the Center’s objectives will be to facilitate “[t]he training of justice sector personnel; [t]he exchange of information and other forms of technical cooperation; [s]upport for the reform and mod-

362. *Id.* ch. IV.I.A.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* ch. IV.I.B.

367. *Id.*

368. *Id.* ch. I.

ernization of justice systems in the region.”³⁶⁹

To achieve the Center’s goals a group of government experts would be formed to “[p]repare draft by-laws; [p]repare a work plan; [i]dentify public and/or private institutions working in this area; [and] [e]stablish appropriate links with international organizations in order to secure the necessary technical support for the Center’s operations.”³⁷⁰

In the initial phase, the Center’s work plan will focus on criminal justice matters.³⁷¹ The OAS was requested to provide the necessary support for the work of the group of experts.³⁷² The Center is actively carrying out its responsibilities under the Plan of Action.

(2) Regional Courses, Workshops, and Seminars

The ministers of justice will continue to cooperate with the OAS General Secretariat in “organizing regional or subregional courses, workshops, and seminars to train and develop the legal skills of officials in charge of the justice system in the OAS member states in collaboration with international or national, governmental or nongovernmental institutions.”³⁷³

c. Strengthening and Developing Inter-American Cooperation

The ministers of justices and their delegates pledged “to strengthen international cooperation, in the framework of the OAS and other institutions, in areas of special concern, such as the struggle against terrorism, combating corruption, money laundering, drug trafficking, forgery, illicit trafficking in firearms, organized crime, and transnational criminal activity.”³⁷⁴

The meeting also recommended the establishment of an inter-governmental expert group, within the framework of the OAS, on cyber crime.³⁷⁵ This group would have a mandate to:

1. complete a diagnosis of criminal activity which targets computers and information, or which uses computers as the means of committing an offense;

369. *Id.* ch. III.IV.

370. *Id.* ch. IV.II.A(2)(d).

371. *See id.* ch. IV.II.

372. *Id.* ch. IV.II.A(5).

373. *Id.* ch. IV.II.B.

374. *Id.* ch. IV.III.A.

375. *See id.* ch. IV.III.B.

2. complete a diagnosis of national legislation, policies and practices regarding such activity;
3. identify national and international entities with relevant expertise; and
4. identify mechanisms of cooperation within the inter-American system to combat cyber crime.³⁷⁶

The expert group would also present a report to the Third Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas.³⁷⁷

The ministers and their delegates also agreed “[t]o continue working in an effective and flexible manner to strengthen mutual legal and judicial assistance among the OAS member states,” especially in areas having to do with “extradition, requests for delivery of documents and other forms of evidence and the establishment of secure and prompt channels of communications between central authorities.”³⁷⁸

Moreover, ministers and their delegates agreed to “evaluate the application of inter-American conventions in force in the area of legal and judicial cooperation, in order to identify measures for their effective implementation or, if appropriate, to determine whether the existing legal framework in the hemisphere should be changed.”³⁷⁹

The OAS member states that are parties to treaties for legal and judicial cooperation were urged to “appoint Central Authorities where they have not yet done so, to ensure the effective implementation of these treaties.”³⁸⁰

The meeting adopted a recommendation that the “OAS convene a meeting of central authorities in due course to strengthen cooperation among those authorities in relation to the various conventions on the subject of legal and judicial cooperation.”³⁸¹

The ministers agreed on measures on extradition, forfeiture of assets, and mutual legal assistance.³⁸² The Third Meeting of Ministers agreed to develop:

1. Extradition ‘checklists,’ glossaries of commonly-used

376. *Id.*

377. *Id.*

378. *Id.* ch. IV.III.C.

379. *Id.* ch. IV.III.D.

380. *Id.* ch. IV.III.E.

381. *Id.* ch. IV.III.F.

382. *See id.* ch. IV.III.G.

legal terms, and similar instruments of simplified guidance and explanation on extradition and related processes;

2. Sample forms for intergovernmental requests for mutual legal assistance; [and]

3. Instructional materials on the best methods for securing bilateral and international assistance in the area of forfeiture of assets.³⁸³

To facilitate this, the ministers pledged to start compiling "a list of contact points for information on extradition, mutual legal assistance, and forfeiture of assets."³⁸⁴

d. Prison and Penitentiary Policy

The ministers and their delegates reemphasized "the need to promote the exchange of national experience and technical cooperation in prison and penitentiary policy matters within the framework of the OAS."³⁸⁵

5. Analysis

The meetings of the ministers of justice represent an important step in identifying the need for regular meetings of the ministers of justice to consider on a comprehensive basis the whole panoply of justice issues. These meetings, especially under the auspices of the OAS, have enormous potential to facilitate and foster international cooperation and progress on a broad range of justice issues.

Two critical variables in the achievement of the lofty goals of the meetings will be the ability of OAS members to allocate sufficient resources to meet the multiple goals and the vision and political dynamics of members to cede enough authority to the framework mechanisms. Inevitably, conventions, model regulations, and lofty rhetoric encounter the realities of national, regional, and international politics, in which transnational crime and international organizations play important roles. OAS members will be challenged to transfer sufficient authority to the OAS or related mechanisms to ensure that effective cooperation on law enforcement and administration of justice takes root. International and regional regime dynamics involve law, policies, politics,

383. *Id.*

384. *Id.*

385. *Id.* ch. IV.IV.

and will have an ebb and flow of their own depending on external variables.

Nongovernmental organizations often play an important role in the development of international regimes. It is too early to know the types of roles NGOs will play in the design, implementation, and evolution of criminal cooperation and administration of justice regimes. To some extent, the OAS and its member states can encourage and foster the involvement of NGOs in the process.

B. Establishment of Justice Study Centers

As part of the implementation on the “Strengthening of Justice Systems and Judiciaries” during the meeting of the heads of state and government at the Second Summit of the Americas, held in Santiago, Chile, in 1998, the Ministers of Justice or Ministers or Attorneys General of the Americas have taken steps to establish “a Justice Studies Center for the Americas, which will facilitate the training of justice sector personnel, [and] the exchange of information and other forms of technical cooperation in the Hemisphere, in response to particular requirements of each country.”³⁸⁶ An additional objective of the Center is to “facilitate support for the reform and modernization of justice systems in the region.”³⁸⁷

Subsequent to the Santiago Summit, during the dialogue of heads of delegation at the twenty-eight regular session of the OAS General Assembly, discussion focused on the creation of an Inter-American Studies Center. The OAS General Assembly resolved to convene the Second Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas. On March 1-3, 1999, the Second Meeting of the Ministers of Justice resolved to entrust the OAS with the task of preparing a draft statute for the Center.

In April 1999, the OAS Permanent Council established a Special Group to Implement the Recommendations of the Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas (hereinafter “REMJAs”), instructing it to convene and hold such meetings of government experts as may be necessary to assist in the implementation of the recommendations made at the above-mentioned Meetings of Ministers of Justice.³⁸⁸

At their second meeting in Lima, Peru, the Ministers or Attor-

386. OAS, Meeting of Ministers of Justice, OEA/Ser.P AG/RES. 1 (XXVI-E/99) (Nov. 15, 1999), available at <http://www.summit-americas.org/Justice/Justice-Center-Statutes.htm>.

387. *Id.* art. 3.

388. *Id.* art. 2.

neys General of the Americas urged the OAS to provide support for meetings of government experts with a view to: preparing a draft statute for the Justice Studies Center for the Americas; preparing a work plan for the Center, which would initially focus on criminal law topics; identifying public and/or private institutions working in this area; and establishing "appropriate links with international organizations in order to secure the necessary technical support for the Center's operations."³⁸⁹ With the Permanent Council's consent, the Special Group on Justice held four meetings of government experts between May and September 1999.

The Center will be an "intergovernmental entity with technical and operational autonomy, established by resolution of the General Assembly of the [OAS]."³⁹⁰ The Center is governed by its Statute and its Rules of Procedure.³⁹¹ Its activities will be executed "in accordance with the policy guidance reflected in the conclusions and recommendations" of the Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas.³⁹² The Center may also "take into account the pertinent mandates of the Summits of the Americas and resolutions of the OAS General Assembly."³⁹³

"All the member states of the OAS [will be] members of the Center."³⁹⁴ Permanent observers to the OAS and any national or international, governmental or nongovernmental, organization may participate under the terms and conditions established in the Rules of Procedure of the Center.³⁹⁵

The organizational structure of the Center will consist of: a Board of Directors, composed of seven members elected in their personal capacity by the OAS General Assembly;³⁹⁶ the Office of the Executive Director, which will be the operational unit of the Center; and such advisory groups as may be established by the Board of Directors in order to attain the Center's objectives.³⁹⁷

The Center's functions are, *inter alia*:

- (a) To serve as a clearinghouse for the collection and distri-

389. OEA/Ser.K/XXXIV.2 REMJA-II/doc.21/99 rev.1, *supra* note 352, IV.II.A(2)(d).

390. OEA/Ser.P AG/RES. 1 (XXVI-E/99), *supra* note 386, art. 1.

391. *Id.* art.2.

392. *Id.*

393. *Id.*

394. *Id.* art. 7.

395. *Id.* art. 8.

396. *Id.* art. 9, 11.

397. *Id.* art. 9.

bution of information on national experiences pertaining to modernization and reforms of justice systems in the region;

(b) To carry out comparative analysis, research, and on justice issues studies, and facilitate their dissemination;

(c) To facilitate the dissemination of research and studies relating to justice in the Americas;

(d) To facilitate the training of justice sector personnel and the improvement of existing mechanisms for that purpose in the countries of the Hemisphere;

(e) To facilitate dissemination of information on teaching methods, model curricula, and training aids for personnel involved in the justice system;

(f) To facilitate the dissemination of relevant information on courses, seminars, fellowships and training programs; and

(g) To support cooperation related to the different systems of justice in the Hemisphere.³⁹⁸

The financing of the Center's activities comes partly from voluntary contributions provided by the OAS member states and from funds from other public and private sources.³⁹⁹ The Board of Directors can authorize the establishment of specific funds in accordance with the General Standards to Govern the Operations of the General Secretariat of the OAS.⁴⁰⁰

The Statute creating the Center entered into force after the OAS General Assembly adopted it.⁴⁰¹ For its initial phase, the Center will "develop topics related to criminal justice, seeking to take advantage of the experience by other organizations in the Hemisphere in this area."⁴⁰² The Center's headquarters in Santiago, Chile was selected at the Third Meeting of Ministers of Justice, based on the recommendations presented by the Board of Directors regarding the proposes made by the member states.

The decision to establish the Center, along with the annual meetings of the ministers of justice in the region, represents a step towards additional enforcement cooperation in the region.

398. *Id.* art. 4.

399. *Id.* art. 17.

400. *Id.*

401. *Id.* art. 18.

402. *Id.* art 7.

VII. WORK ON SINGLE CRIME ISSUES

At present the threats of transnational crime have compelled Western Hemisphere governments to commission the OAS to work on the problems on an issue-by-issue basis.

A. *Transnational Terrorism*⁴⁰³

1. Introduction

On June 7, 1996, at its Twenty-Sixth Regular Session in Panama, the General Assembly of the OAS adopted a resolution approving the "Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism."⁴⁰⁴ Among other measures, it recommends that the OAS follow up the progress made in implementing that Plan of Action and that the OAS General Assembly consider convening a meeting of experts to examine ways to improve the exchange of information among the member states, in order to prevent, combat and eliminate terrorism.⁴⁰⁵

The GA resolution also asks the OAS Permanent Council to consider convening a meeting of government experts to examine ways to improve the exchange of information and other measures for cooperation among the member states to prevent, combat and eliminate terrorism. The Inter-American Juridical Committee was tasked to study the topic of inter-American cooperation to confront terrorism, in light of the documents approved at the OAS Specialized Conference held on that subject.

2. Background

The OAS Plan of Action built on other counter-terrorism

403. OAS, Second Plenary Session, Lima, Peru, April 26, 1996, *Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, OEA/Ser.K/XXXIII.1, CEITE/doc.8/96 rev. 3, available at <http://www.oas.org/juridico/English/Docu7.htm> [hereinafter *Plan of Action on Hemispheric Cooperation*]. This section of this paper is largely adopted from a paper the author prepared, entitled "The OAS' Adoption of a Plan of Action on Hemispheric Antiterrorism Cooperation: Just a Fad or Can It Lead to a New Counter-terrorism Paradigm?," delivered as a speech at the Inter-American Defense College, Fort McNair, Washington, D.C. on Sept. 24, 1996 at the Symposium on International Terrorism and Organized Crime Security Concerns. Bruce Zagaris, Editor-in-Chief, INT'L ENFORCEMENT L. REP., *The OAS' Adoption of a Plan of Action on Hemispheric Antiterrorism Cooperation: Just a Fad or Can It Lead to a New Counter-terrorism Paradigm?* (Sept. 24, 1996) (copy on file with author).

404. OAS, General Assembly Regular Session, AG/RES. 1404 (XXVI-O/96) (June 7, 1996).

405. See generally OAS, General Assembly Resolution, AG/RES. 1377 (XXVI-O/96) (June 6, 1996), available at <http://www.oas.org/juridico/English/ga-res96/Res-1377.htm>.

actions taken by the OAS. In December 1994, as part of the Declaration of Principles of the Summit of the Americas, the governments condemned terrorism and pledged, using all legal means, to combat terrorist acts anywhere in the Americas with unity and vigor.⁴⁰⁶ They decided to convene a special OAS conference on the prevention of terrorism.⁴⁰⁷ In June 1995, the OAS General Assembly convened an Inter-American Specialized Conference on Terrorism,⁴⁰⁸ a positive step forward.

In December 1995, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama signed the Framework Treaty on Democratic Security in Central America, whereby the parties undertake to prevent and combat, without exception, all types of criminal activity with a regional or international impact, such as terrorism.⁴⁰⁹

3. Plan of Action

The Plan of Action, adopted at the April 23-26, 1996 Inter-American Specialized Conference on Terrorism, in Lima, Peru, calls for a series of actions by governments to harmonize law and strengthen international cooperation against terrorism.⁴¹⁰

a. Harmonization of Law

With respect to harmonization of laws, governments must try to “establish terrorist acts as serious common crimes or felonies under their domestic laws, if they have not yet done so.”⁴¹¹ Governments must make “special efforts to adopt, in their territories and in keeping with their domestic laws, measures to prevent the provision of material or financial support for any kind of terrorist activity.”⁴¹² They must take measures to “prevent the production of, trafficking in, and use of weapons, munitions, and explosive materials for terrorist activities.”⁴¹³ They must adopt “measures

406. See OAS, Declaration of Lima to Prevent, Combat, and Eliminate Terrorism (April 26, 1996), available at <http://www.oas.org/juridico/english/Docu6.htm> [hereinafter DECLARATION OF LIMA].

407. For a summary of these provisions, see *Summit of the Americas Calls for International Enforcement Cooperation*, 11 INT'L ENFORCEMENT L. REP. 67, 69 (1995).

408. See Declaration of Lima, *supra* note 406.

409. See U.S. Dep't St., Framework Treaty on Democratic Security in Central America (1995), <http://www.state.gov/t/ac/csbm/rd/4368.htm> (last visited July 31, 2006).

410. *Plan of Action on Hemispheric Cooperation*, *supra* note 403.

411. *Id.*

412. *Id.*

413. *Id.*

to prevent the terrorist use of nuclear, chemical, and biological materials.⁴¹⁴

Harmonization of law projects between countries with varied legal systems, such as the civil and common law systems, and with respect to new, dynamic and controversial subject areas, such as international terrorism, take careful, painstaking, and diligent patient work over many years. A centralized support mechanism in the nature of a secretariat must collect, digest and catalogue laws, monitor terrorist trends, and collect and catalogue legislative responses. The support mechanism must facilitate discussions of the different legislation, statistics, and provide for training in drafting and implementation of these law.

b. Strengthening International Criminal Cooperation against Terrorism

On strengthening international cooperation, the governments must promote the prompt signing and ratification of and/or accession to international conventions related to terrorism, in accordance with their domestic laws. They must periodically share updated information on domestic laws and regulations adopted in the area of terrorism and on the signing and ratification of and/or accession to relevant international conventions (including the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971, and the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft).

In Western Europe the European Committee on Crime Problems (within the Council of Europe) and the European Union have worked to strengthen international cooperation and discussed narrowing the political offense extradition exception to facilitate investigating and prosecuting international terrorism.⁴¹⁵

c. Cooperation on Intelligence

OAS members must provide pertinent legal information and

414. *Id.*

415. For a discussion of a dated treatment of European counter-terrorism policy, see Ekkehart Muller-Rappard, *The European Response to International Terrorism*, in *THE LEGAL RESPONSES TO INTERNATIONAL TERRORISM U.S. PROCEDURAL ASPECTS* 385-436 (M. Cherif Bassiouni ed., 1988).

other background data on terrorism to the OAS General Secretariat, which must be kept organized and up-to-date.

At present, several international conventions obligate signatory countries to collect and transmit data to prevent terrorism. For instance, the United States' Omnibus Diplomatic Security and Antiterrorism Act of 1986 "directs the U.S. president to continue to seek the establishment of an international committee, to be known as the International Antiterrorism Committee."⁴¹⁶ The committee will focus attention and secure the cooperation of other countries on international terrorism.⁴¹⁷

"State Parties to the various multilateral Conventions and bilateral treaties must enact legislation and to implement governmental procedures to carry out the requirements."⁴¹⁸ Notification, assistance, and cooperation in practice mean communications about and transmission of data concerning terrorist activities. "Assistance to States who prosecute offenders requires storing the data until offenders are caught and then transmitting it to the prosecuting State."⁴¹⁹ The best storage and transmission methods involve computer database files.⁴²⁰

Due to the much wider range of threats and dangers from terrorism and the heightened risks to global and national infrastructure, intelligence cooperation is needed to adequately forecast dangers to democracy and economic well-being. Better cooperation on intelligence is required partly because many of the threats of today tend not to be identified with any particular nation state; rather they are amorphous, spilling across national boundaries to connect with ethnic or religious cohorts, shadowy terror groups, or criminal organizations.⁴²¹

At present, countries have exchange and liaison arrangements for a significant portion of their intelligence. Some arrangements are long-standing, highly formalized, and involve the most sensitive forms of intelligence collection. Others are less wide-ranging and reflect limited common interests between the

416. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 701, 100 Stat. 853, 877-78.

417. *Id.*

418. Ellen A. Yearwood, *Data Bank Control*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS, *supra* note 163, at 249, 256.

419. *Id.*

420. *Id.*

421. *See, e.g.*, IN FROM THE COLD: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE FUTURE OF U.S. INTELLIGENCE 56-57 (Allan E. Goodman, Gregory F. Treverton & Philip Zelikow eds., 1996).

United States and particular nations. Hence, countries have shared intelligence on various types of national security problems such as terrorism and drug trafficking. Exchange arrangements may involve different components of the intelligence communities. For instance, some U.S. intelligence arrangements involve links between the CIA and a nation's counterpart agency, whereas others involve cooperation between the Office of Naval Intelligence and one or more foreign naval intelligence organizations.

Intelligence exchanges have been especially valuable in resolving terrorist incidents. For instance, the United States and Israel have exchanged intelligence during crisis situations. In 1976, the United States furnished Israel with both aerial and satellite reconnaissance photographs of Entebbe airport to supplement the information obtained by Israeli agents in preparation for the Israeli hostage rescue mission.⁴²² During the 1985 hijacking of the Achille Lauro, Israel provided the United States with the location of the ship on several occasions, the location of the ship's hijackers when they were in Egypt, and the identification number and call sign of the plane carrying the hijackers seconds after it took off from Egypt.⁴²³ Another example was the extensive intelligence exchange relationship between Japan and the United States. The exchange of signals intelligence included Japanese sharing of Soviet communications intercepted by a unit on Wakkanai on the night the Soviets shot down Korean Air Lines Flight 007.⁴²⁴

Future increased cooperation on counter-terrorism intelligence must take into account limitations imposed by constitutional, international human rights, and national laws. Much can be done to unify the methods, forms, and technologies for intelligence collection, analysis, and transfer.

d. Mutual Assistance and Extradition

Governments in the hemisphere must promote measures for mutual legal assistance and strict and timely compliance with applicable extradition treaties or, if appropriate, must deliver alleged perpetrators of terrorist acts to competent authorities for prosecution, in accordance with domestic laws, if sufficient legal grounds for doing so exist.

The Inter-American Convention on Mutual Assistance is now

422. *Id.* at 288.

423. *Id.*

424. *Id.* at 292.

in effect. Additionally, some OAS members are bound by multilateral conventions – including the Inter-American Convention on Terrorism – to provide mutual assistance in the event of certain crimes such as hijacking. Although some bilateral Mutual Assistance in Criminal Matters Treaties (MLATs) exist, their coverage only applies to a clear minority of the countries.⁴²⁵

Already a significant amount of extradition occurs for terrorist crimes. For instance, on June 3, 1996, the United States announced the provisional arrest of Julian Salazar Calero, a known member of the Peruvian organization Sendero Luminoso.⁴²⁶ The arrest occurred on May 31, 1996 under its extradition treaty with Peru and the U.S. magistrate also denied a defense request for bail.⁴²⁷

e. Sharing Operational Terrorist Information

Governments are to try, in keeping with domestic laws, to exchange information concerning terrorist individuals, groups, and activities. In this connection, when a state learns that sufficient grounds exist to believe that a terrorist act is being planned, it must provide pertinent information to potentially affected states as soon as possible in order to prevent commission of that act. Governments must try to promote and enhance bilateral, subregional, and multilateral cooperation in police and intelligence matters to prevent, combat, and eliminate terrorism.

While various international organizations such as Interpol provide for cooperation against international terrorism, controversies have historically caused major divisions among law enforcement officials about the desirability of cooperation against political crimes.⁴²⁸ Indeed, such controversy contributed to unsatisfactory relations between the United States and Interpol for many years.⁴²⁹

Perhaps a model for regional storage and exchange of terrorism and terrorist information should be a counterpart to Europol, if the hemisphere can ever develop such an organization. Growing

425. See, e.g., NADELMANN, *supra* note 32, at 313-96 (discussing the few MLATs between the United States and other countries in the Americas).

426. U.S. Makes Provisional Arrest of Alleged Peruvian Terrorist, 12 INT'L ENFORCEMENT L. REP. 292, 292 (1996).

427. *Id.*

428. See, e.g., NADELMANN, *supra* note 32, at 351-52 (discussing the inclusion of a "political offense" exception in MLATs and extradition negotiations).

429. See, e.g., MICHAEL FOONER, INTERPOL ISSUES IN WORLD CRIME AND INTERNATIONAL CRIMINAL JUSTICE 40-45 (1989).

tension on ideological matters between the United States and, *inter alia*, Cuba and Venezuela, is likely to inhibit the establishment of a regional system.⁴³⁰

f. Cooperation in Border Security, Transportation and Travel Documents

Governments in the hemisphere must coordinate efforts and examine measures to improve cooperation on border security, transportation, and travel documents in order to prevent terrorist acts. They must also promote the modernization of border control and information systems to prevent the passage of persons involved in terrorist acts as well as the transport of equipment, arms, and other materials that could be used to commit such acts. While the United States government has promoted some of these policies in discussions and agreements with Mexico and Canada and regionally in the third border initiative, the initiatives are limited because they are in reality unilateral, unsupported by legal and financial elements, and without institutional measures.⁴³¹

g. Cooperation and Technical Assistance in Training

Governments must extend, when possible, cooperation and technical assistance for the regular and advanced training of personnel entrusted with counter-terrorism activities and techniques.⁴³² The training must be in accordance with minimum international criminal justice standards and avoid advocacy of executions, torture, blackmail, or other forms of illegal coercion against alleged terrorists.⁴³³

h. Assistance to Victims

Governments need to assist the victims of terrorist acts and

430. For a discussion of the ideological tension between the United States on the one hand and Cuba and Venezuela on the other and their application to regional criminal politics, see Michael Shifter & Vinjay Jawahar, *The Divided States of the Americas*, 105 CURRENT HISTORY 51 (2006).

431. See Dorith Grant-Wisdom, *United States-Caribbean Relations: The Impact of 9/11*, in CARIBBEAN SECURITY IN THE AGE OF TERROR: CHALLENGE AND CHANGE 252, 264-68 (Ivelaw Lloyd Griffith ed., 2004) (discussing the Bush administration's conceptualization of the third border initiative and counter-terrorism and the enormous economic and other challenges for the Caribbean to meet U.S. expectations).

432. Dana Priest, *U.S. Instructed Latins on Executions, Torture; Manuals Used 1982-91*, *Pentagon Reveals*, WASH. POST, Sept. 21, 1996, at A1.

433. *Id.*

cooperate among themselves to that end. Governments must hold meetings and consultations to assist and cooperate in preventing, combating, and eliminating terrorist activities in the Hemisphere and, within the framework of the OAS, to follow up the progress made in implementing the Plan of Action.

4. Post September 11, 2001

Since the terrorist incidents in the United States on September 11, 2001, the OAS has become more proactively involved in counter-terrorism enforcement. In 1999, the OAS established an Inter-American Committee Against Terrorism (CICTE).⁴³⁴ On June 3, 2003, the OAS General Assembly adopted and opened for signature the Inter-American Convention Against Terrorism.⁴³⁵ The Convention builds on the existing international instruments and seeks to promote close cooperation among OAS Member States in implementing the provisions of the Convention.⁴³⁶ In particular, Articles 4-6 of the Convention have measures to prevent, restrict and eliminate the financing of terrorism, including requirements that signatory parties adopt a “comprehensive domestic regulatory and supervisory regime” for all kinds of financial entities.⁴³⁷

5. Analysis

Clearly, the OAS initiatives, particularly the Plan of Action, are preliminary steps and non-binding on governments. Without hard law, such as the conclusion of treaties with binding commitments by states, implementation and enforcement mechanisms that require accountability, transparency, and provide the means to impose sanctions on non-complying states, the undertakings in the Plan of Action will be difficult to translate into hard law that governments practice on a day-to-day basis.

Once governments start to discuss a treaty that has meaningful implementation and enforcement mechanisms, various domestic organizations, such as the gun and explosive lobbies, the manufacturers of affected weapons, and civil liberties groups participate and try to change, defer, or even block any new convention

434. See OAS, General Assembly, AG/RES.1650 (XXIX-O/99) (June 7, 1999).

435. See Konstantinos D. Magliveras, *The Inter-American Convention Against Terrorism: Do Such Instruments Contribute to the Effective Combat of Terrorism?*, 19 INT'L ENFORCEMENT L. REP. 52 (2003).

436. *Id.*

437. *Id.*

or meaningful implementation of the undertakings in the Plan of Action.

In the meantime, the institutions and resources of the OAS are woefully inadequate, especially as it assumes enormous new potential roles in implementing counter-terrorism, corruption, and anti-money laundering activities without any new infusion of resources. Politicians can still beat their chests, blow their bugles and rattle their drums about the need for increased measures for counter-terrorism. Even if there are dissonant sounds, the counter-terrorist music must start while we may still be able to dance.

*B. Cyber Crime*⁴³⁸

On October 28, 1999, the Permanent Council of the Organization of American States received and published the final report on the meetings of government experts on cyber crime that contain a series of recommendations on international enforcement and efforts to harmonize the law on combating and preventing cyber crime.⁴³⁹

1. Introduction and Background

In March 1999, the Ministers of Justice or of Ministers or Attorneys General of the Americas, at its second meeting, recommended the establishment of an intergovernmental experts group on cyber crime to (1) complete a diagnosis of crime targeting computers and information in the member states; (2) complete a diagnosis of national legislation, policies, and practices responsive to such crime; (3) identify national and international entities with relevant expertise; and (4) identify mechanisms of cooperation within the inter-American system to combat cyber crime.

In May 1999, the First Meeting of Government Experts on Cyber Crime met to accomplish the goals set by the ministers of justice or attorneys general. The group of experts developed a sur-

438. This section appeared in 16 INT'L ENFORCEMENT L. REP. 734-736 (2000) and has been reproduced here with the permission of the author, editor, and copyright holder, Bruce Zagaris. All text and citations remain the same as in the original. Note that the subheadings and footnote numbers have been changed to conform to the format of this article.

439. Permanent Council of the Organization of American States, Special Group to Implement the Recommendation of the Meetings of the Ministers of Justice or of the Ministers or Attorneys General of the Americas, Final Report on the Meetings of Government Experts on Cyber Crime, OEA/Ser.G GE/REMJA/doc.51/99, Oct. 28, 1999.

vey requesting information from each member state about (1) its experience with various types of cyber crime; (2) the substantive laws governing cyber crime; (3) the jurisdiction and extradition principles governing cyber crime; (4) the laws governing the preservation and gathering of evidence in such cases; and (5) the existence of specialized training programs or law enforcement entities and/or experts to combat cyber crime.

On October 14-15, 1999, the Special Group on Justice later held the Second Meeting of Government Experts on Cyber Crime. The meeting was held to analyze the replies by the governments of member states to the survey on this topic, to consider mechanisms for cooperation on cyber crime within the inter-American system, and to listen to papers from experts.

2. Diagnosis

For purposes of the diagnosis, "cyber crime" is defined as a criminal activity in which information technology systems (including, inter alia, telecommunications and computer systems) are the *corpus delicti* or means of committing an offense.

At present cyber crime is perceived as rare, and often is not specifically criminalized under the law. Some states punish crimes committed using information technology when such acts are in themselves offenses, such as, for instance, fraud, tax evasion, defamation or distribution of child pornography.

A need exists to develop, adapt, and harmonize the legislation, procedures, and institutions required to combat the increasing abuse and misuse of computers in member states.

In connection with legislation to gather evidence, the authority to trace, collect, preserve, and disclose electronic communications traffic information and computer data is a prerequisite to the investigation of cyber crimes. Since cyber crime is still incipient and difficult to detect, some member states may not have encountered the unique problems associated with gathering evidence for cyber crimes. In some cases investigators might not be allowed to take other pertinent steps to investigate cyber crime, such as obtaining source and destination information about communications simultaneously with the transmission of those communications, which may be necessary to trace a computer intrusion.

The greatest difficulty member states encounter in combating cyber crimes is the dearth of investigative and prosecutorial entities with the expertise to investigate or prosecute cyber crimes.

Training on cyber crime investigation is lacking. Agencies that have not specialized in the field often investigate cyber crimes.

Very few member states have encountered difficulties related to the global nature of cyber crimes or have made or received requests for international assistance in cyber crime cases. Despite the lack of requests so far, cyber crime is commonly traced through computer networks located in a multitude of countries unrelated to the location of the perpetrator or the victim. Hence, the ability to request and to provide international assistance is critical and merits further examination by states. Despite the perceived lack of regional harm from cyber crime to date, indications are that the cyber crime problem is escalating.

3. Identification of National and International Entities with Relevant Experience

The group of experts identified the following entities with expertise regarding cyber crime: the Council of Europe, the Group of Eight, the European Union, the Organization for Economic Cooperation and Development, the United Nations, and Interpol. Various academic and private sector entities have critical expertise, including telecommunications companies and "incident response teams" such as the Computer Emergency Responses Team at Carnegie-Mellon University in the U.S.

4. Identification of Mechanisms of Cooperation within the Inter-American System

Existing arrangements can facilitate cooperation against cyber crime, including bilateral and multilateral mutual legal assistance treaties, Interpol, letters rogatory, and information cooperation mechanisms. A few countries in the Americas have joined or are in the process of joining the 24-Hour/7-Day a Week Point of Contact Group.

5. Recommendations

The meeting of experts made the following recommendations that will be presented during the Third Meeting of Ministers of Justice or of Ministers of Attorneys General of the Americas: (1) that states be urged to identify one or more agencies within their country that will have primary authority and responsibility to investigate and prosecute cyber crime; (2) that states still lacking legislation cover cyber crime act to fill the gap; (3) that member states be requested to harmonize their laws on cyber crime to

facilitate international cooperation in preventing and combating these illicit activities; (4) that member states determine their training needs in the area of cyber crime and explore bilateral, regional, and multilateral cooperation mechanisms to meet those needs; (5) that an effort be made to prepare general guidelines to be used in devising legislation covering cyber crimes; (6) that various measures be considered, including establishing a Voluntary Specific Fund, to support efforts to expand cooperation on this matter in the Hemisphere; (7) that members be encouraged to exchange information on cyber crime; (8) that support be rendered to dissemination of information regarding OAS activities in this field, including its Web page on the subject; (9) that states consider the possibility of joining the 23-Hour/7-Day a Week Point of Contact Group, or participating in other existing mechanisms for cooperation or the exchange of information to initiate or receive information; and (10) that member states act to increase awareness of this issue among the general public, including users in the education system, the legal system, and the justice system regarding the need to prevent and combat cyber crime.

C. *Transnational Corruption*⁴⁴⁰

The principal mechanism in the Western Hemisphere to develop an enforcement regime against transnational corruption is the Inter-American Corruption Convention. Emerging from the Organization of American State's Working Group on Probity and Public Ethics, and connecting with civil society, the initiative focuses on establishing a legal framework, namely a convention, developing model laws, and forming an alliance with interested international governmental organizations and NGOs.

1. Background

On April 7, 1996, twenty-one members of the Organization of American States (OAS) signed the Inter-American Corruption

440. This section appeared in Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53, 54-66 (Supp. 1999) and has been reproduced here with the permission of the co-author and copyright holder, Bruce Zagaris. All text and citations remain the same as in the original. Note that the subheadings and footnote numbers have been changed to conform to the format of this article. Please also note that, as of March 1, 2005, thirty-three countries had acceded to the Inter-American Corruption Convention, discussed below. In addition, the OAS adopted the Mechanism for Follow-Up of the Convention in June 2001.

Convention.⁴⁴¹ The agreement signals an important milestone in fashioning international obligations to punish public corruption and focusing hemispheric attention on uniform laws to regulate and prevent transnational corruption in procurement.⁴⁴² In his 1995 document, *A New Vision of the Organization of American States*, Secretary General Cesar Gavaria stated, "corruption is a problem that seriously affects the legitimacy of democracy, distorts the economic system, and contributes to social disintegration."⁴⁴³

The preamble of the Inter-American Corruption Convention states that the signatories are "convinced that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples."⁴⁴⁴ The preamble provides that it is the signatories' responsibility "to hold corrupt persons accountable in order to combat corruption."⁴⁴⁵

The Inter-American Corruption Convention arose from an initiative to combat corruption through legal, institutional, and educational aspects; relations with civil society; and relations with like-minded international organizations and NGOs.⁴⁴⁶

The Inter-American Corruption Convention has among its purposes the promotion, strengthening, and development by signatories of mechanisms needed to prevent, detect, punish, and end corruption; and the promotion, facilitation, and regulation of cooperation among the signatories to guarantee the effectiveness of anti-corruption measures and actions.⁴⁴⁷

441. Organization of American States (OAS), Inter-American Convention Against Corruption, Specialized Conference on the Draft Inter-American Convention against Corruption, Mar. 27-29, 1996, Caracas, Venezuela, OEC/Ser.K/XXXIV.1 CICOR/doc.14/96 rev. 2, Mar. 29, 1996; 35 I.L.M. 724 (1997) [hereinafter Inter-American Corruption Convention].

442. For background on the signing, see Thomas W. Lippman, *After 20-Year Campaign, U.S. Balks at OAS Pact Against Business Corruption*, WASH. POST, Apr. 7, 1996, at A1.

443. For an incisive analysis of the Convention, see Konstantinos D. Magliveras, *A Critical Analysis of the Inter-American Convention Against Corruption*, 13 INT'L ENFORCEMENT L. REP. 327, 327 (1997).

444. Inter-American Corruption Convention preamble, *supra* note 441, at 727.

445. *Id.*

446. See Working Group on Probity and Public Ethics, Permanent Council of the Organization of American States, *Fundamentals of a Possible Program for Inter-American Cooperation in the Fight Against Corruption*, OEA/Ser.G CP/GT/PEC-29/96, Jan. 22, 1996.

447. See Inter-American Corruption Convention art. II, *supra* note 441, at 728.

2. Required Criminalization of Selected Conduct

The Inter-American Corruption Convention requires signatories to criminalize both domestic and foreign bribery and take measures to combat the illicit enrichment of government officials. The domestic bribery provisions target both the offeror and the recipient of a bribe. The foreign bribery provisions target the offeror alone. The illicit enrichment provisions are directed at the recipient.

a. Certain "Acts of Corruption"

If they have not already done so, signatories are required to criminalize "acts of corruption."⁴⁴⁸ The Inter-American Corruption Convention defines acts of corruption as: (1) the solicitation or acceptance, directly or indirectly, by a government official or a person who does public functions, of a bribe;⁴⁴⁹ (2) offering or granting a bribe; (3) improper acts or omissions by public officials for the purpose of illicitly obtaining benefits for himself or for a third party; (4) fraudulent use or concealment of property derived from any of the acts to which the Article refers; and (5) conspiracy.⁴⁵⁰

b. Transnational Bribery

Subject to its Constitution and the fundamental principles of its legal system, the Inter-American Corruption Convention requires each signatory to prohibit and criminalize the offering or granting, directly or indirectly, by its nationals, residents, and businesses domiciled in such country, to a government official of another country, of any article of monetary value, or other benefit, such as a gift, favor, promise, or advantage, in connection with any economic or commercial transaction, in exchange for any act or omission in the performance of that official's public functions.⁴⁵¹ Signatories that have not criminalized transnational bribery must, insofar as their laws permit, cooperate with other signato-

448. *Id.* art. VI, at 729.

449. One of the open questions is whether this provision includes corporate criminal liability, in the event the offer was made by a company or entity. See Konstantinos Magliveras, *The Implementation of the 1991 EC Directives on Money Laundering in Germany, Italy, and the Netherlands*, 8 INT'L L. PRACTICUM 89, 93 & n.60 (1995).

450. See Inter-American Corruption Convention art. IV(1), *supra* note 1, at 729.

451. See *id.* art. VIII, at 730.

ries in the enforcement of other states' transnational bribery laws.⁴⁵²

c. Illicit Enrichment

Subject to the Constitution and the fundamental principals of its legal system, each signatory must criminalize "illicit enrichment." Hence, each signatory must take measures to establish as an offense under its laws "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."⁴⁵³ In addition, each signatory must, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in the Inter-American Corruption Convention.⁴⁵⁴ The illicit enrichment provision was agreed upon during the last negotiating session. It precipitated controversy because it appears to shift the burden of proof from the government to the suspect, raising the question of the validity of such provisions under the constitutional requirements of some countries such as the United States.⁴⁵⁵

3. Conditional Criminalization of Selected Conduct

In addition to the aforementioned binding obligations, the Inter-American Corruption Convention requires signatories to consider other measures of good governance and other anti-corruption provisions, including the establishment of additional offenses.

a. Additional "Acts of Corruption"

The Signatories agreed to consider criminalizing four other acts of corruption⁴⁵⁶ to promote uniformity among themselves and to accomplish the purposes of the Inter-American Corruption Convention. These additional acts of corruption include: (1) the

452. *See id.*

453. *Id.* art. IX, at 730.

454. *See id.*

455. Initially the United States, much to the surprise and dismay of the other signatories, declined to sign, explaining that it never signs on the spot when the treaty has been changed in last-minute negotiations, as occurred with the insertion of illicit enrichment provisions. The State Department had to persuade the Justice Department that the language added to the agreement is not contrary to constitutional concerns. *See Twenty-one OAS Members Conclude Anti-Corruption Agreement*, 12 INT'L ENFORCEMENT L. REP. 194, 194-95 (1996).

456. The Convention states that these offenses will be considered acts of corruption for purposes of the Convention. *See Inter-American Corruption Convention art. XI(2)*, *supra* note 1, at 730.

improper use of information by government officials for their own benefit; (2) the improper use of public property by a government official; (3) an act or omission by any person, personally or through a third party, to obtain a decision from a public authority whereby he obtains for himself or for another any benefit or gain; and (4) the diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third party, of any property that such official received because of his position, or for purposes of administration, custody, or other reasons.⁴⁵⁷

b. Prevention Measures

The signatories agreed to consider the applicability of twelve measures within their own institutional system to create, maintain and strengthen prevention measures. These measures can be placed into four primary areas for discussion purposes: (1) transparency and accountability in government; (2) ethical standards for government officials; (3) regulations applicable to private concerns; and (4) oversight and regulatory measures.

(1) Transparency and Accountability in Government

Signatories must consider measures relating to transparency and accountability in government functions, especially procurement. These measures include those relating to government procurement and government hiring processes to ensure their “openness, equity, and efficiency,” and similar measures relating to government revenue collection and control systems that deter corruption. Signatories must also consider measures to create, maintain, and strengthen systems to register the income, assets, and liabilities of persons who perform public functions in certain posts and, where appropriate, to make such registrations public.⁴⁵⁸

(2) Ethical Standards for Government Officials

Signatories must consider measures to create, maintain, and strengthen ethical rules applicable to public officials. In particular, these include: standards of conduct for the correct, honorable, and proper fulfillment of public functions; standards to prevent conflicts of interest; standards to require the proper conservation and use of resources entrusted to government officials; and stan-

457. See *id.* art. XI(1), at 730.

458. See *id.* art. III, at 728.

dards to require government officials to report acts of corruption to the appropriate authorities.⁴⁵⁹

i. Measures Applicable to Private Concerns, Including Denying Tax Deductibility of Bribes

Signatories must consider measures to create, maintain, and strengthen safeguards against corrupt activities by private persons. In particular, signatories must consider laws to deny favorable tax treatment for expenses made in violation of the anti-corruption laws of signatories.⁴⁶⁰ They must consider mechanisms to ensure that publicly-held companies and similar organizations maintain books and records that, in reasonable detail, correctly reflect the acquisition and disposition of assets and provide internal accounting controls to enable their officers to detect corrupt acts.⁴⁶¹ Signatories must also consider measures to protect public servants and private citizens who report acts of corruption (i.e., whistleblowers), including protection of their identities, in accordance with the basic principles of signatories' domestic legal systems.⁴⁶²

ii. Oversight and Regulatory Measures

Signatories must consider measures to promote the anti-corruption effort, including the establishment of anti-corruption oversight bodies to implement modern mechanisms for preventing, detecting, punishing and eliminating corrupt acts, programs to encourage broader involvement by civil society and NGOs in the anti-corruption effort, and additional measures to take into account the relationship between equitable compensation and probity in public service.⁴⁶³

4. Jurisdiction

Each signatory must adopt measures to establish jurisdiction over the offenses it has established in accordance with the Inter-American Corruption Convention when the offense in question is committed in its territory.⁴⁶⁴ For instance, each signatory must assume jurisdiction over an offense when the offense is committed

459. *See id.*

460. *See* Inter-American Corruption Convention art. III(7), *supra* note 441, at 728.

461. *See id.* art. III(10), at 728.

462. *See id.* art. III(8), at 728.

463. *See id.* arts. III(9), (11), (12), at 728.

464. *See id.* art. V(1), at 728.

by one of its nationals or by a person who habitually resides in its territory.⁴⁶⁵

In the event a person who has committed an offense under the Inter-American Corruption Convention is present in its territory, and the signatory does not extradite such person to another country on the ground of the defendant's nationality, it must assume jurisdiction over the alleged offense.⁴⁶⁶

5. Penalties

The Inter-American Corruption Convention does not require any measures to harmonize either penalties or approaches to imposing penalties. This contrasts with other multilateral conventions, such as the OECD Anti-Bribery Convention and the United Nations Vienna Drug Convention,⁴⁶⁷ which contains measures to harmonize sentencing approaches.

6. International Cooperation

Following the lead of many other multilateral conventions dealing with transnational crimes, the Inter-American Corruption Convention requires that signatories provide mutual assistance in criminal matters and extradition with respect to the covered offenses. Signatories must not invoke bank secrecy laws as an excuse not to provide assistance sought by the requesting state.⁴⁶⁸

Subject to the constitutional principles and domestic laws of each state and existing treaties between the signatories, the fact that the alleged act of corruption was committed before the Inter-American Corruption Convention entered into force will not preclude procedural cooperation in criminal matters between the signatories. However, the provision does not affect the principle of non-retroactivity in criminal law, nor does it interrupt existing statutes of limitations relating to crimes committed prior to the date of entry into force of the Inter-American Corruption Convention.⁴⁶⁹

a. Mutual and Judicial Assistance

In accordance with their domestic laws and applicable trea-

465. *See id.* art. V(2), at 728.

466. *See id.* art. V(3), at 728.

467. *See, e.g.,* The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(4)-(7).

468. Inter-American Corruption Convention art. XVI, *supra* note 441, at 733.

469. *See id.* art. XIX, at 732.

ties, signatories must afford one another the "widest measure of mutual assistance" by processing requests from authorities to investigate or prosecute the acts of corruption mentioned in the Inter-American Corruption Convention. These measures must be taken to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.⁴⁷⁰

Signatories must also provide each other the widest measure of mutual technical cooperation on the most effective ways of preventing, detecting, investigating, and punishing acts of corruption. They must develop information exchanges through agreements and meetings between competent bodies and institutions, and pay special attention to methods and procedures that afford citizen participation in anticorruption efforts.⁴⁷¹

An investigated state cannot invoke bank secrecy as a basis for refusal to provide assistance sought by the requesting state.⁴⁷² This is found in many recent anti-money laundering conventions and model regulations.⁴⁷³ The requesting state must not use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorized by the investigated state.⁴⁷⁴ Hence, the requesting state, if it requests information protected by bank secrecy for a criminal proceeding, would not be able to use the information in a second proceeding (e.g., civil forfeiture unless arguably it is considered a continuing procedure) or to transmit the information to a third country that is also investigating the same persons and/or transactions.

b. Extradition

Signatories agree to apply extradition provisions in the Inter-American Corruption Convention to the corruption offenses that signatories must criminalize.⁴⁷⁵ The signatories must include such offenses as extraditable offenses in every extradition treaty to be

470. *Id.* art. XIV(1), at 732.

471. *See id.* art. XIV(2), at 732.

472. *See id.* art. XVI(1), at 732.

473. *See, e.g.*, 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 7(5); The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime art. 4(1); Council Directive of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering (91/308/EEC), preamble.

474. *See* Inter-American Corruption Convention art. XVI(2), *supra* note 441, at 732.

475. *See id.* arts. XIII(1)-(2), at 731.

concluded between or among them.⁴⁷⁶ A signatory that makes extradition conditional on the existence of a treaty may consider the Inter-American Corruption Convention as the legal basis for extradition with respect to any offense to which the article applies.⁴⁷⁷ Parties that do not make extradition conditional on the existence of a treaty must recognize offenses to which the Inter-American Corruption Convention's extradition provisions apply as extraditable offenses among themselves.⁴⁷⁸

If a signatory refuses extradition solely on the basis of the nationality of the person sought or because the investigated state believes it has jurisdiction over the offense, it must submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting state.⁴⁷⁹

c. *Asset Forfeiture*

In accordance with applicable domestic laws and relevant treaties or other agreements, signatories must provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure, and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with the Inter-American Corruption Convention.⁴⁸⁰ To the extent it deems appropriate, a signatory that enforces its own or another signatory's forfeiture judgment against property or proceeds must dispose of the property or proceeds in accordance with its laws. To the extent allowed by its laws and on such terms as it deems appropriate, a signatory may transfer all or part of such property or proceeds to another signatory that assisted in the underlying investigation or proceedings.⁴⁸¹

7. Entry into Force, Ratification, and Implementation

The Inter-American Corruption Convention provides that the ratification of only two countries is required for it to enter into force.⁴⁸² In ratifying the Inter-American Corruption Convention, signatories may take reservations, provided such reservations are

476. *See id.* art. XIII(2), at 731.

477. *See id.* art. XIII(3), at 731.

478. *See id.* art. XIII(4), at 731.

479. *See* Inter-American Corruption Convention art. XIII(6), *supra* note 1, at 731.

480. *See id.* art. XV(1), at 732.

481. *See id.* art. XV(2), at 734.

482. *See id.* art. XXV, at 734.

not incompatible with the "object and purpose of the Convention."⁴⁸³ If a signatory finds that the obligations requiring it to enact the transnational bribery and illicit enrichment provisions of the Inter-American Corruption Convention would violate its Constitution and the fundamental principles of its legal system, it may avoid the requirements to criminalize these offenses without making a reservation.

In March 1997, approximately 7 months after its signing, the OAS translated 4 conformed versions into the 4 different official languages. By August 1998, ten countries had ratified the Inter-American Corruption Convention.⁴⁸⁴ Instead of preparing a model implementing law for the OAS, the Inter-American Juridical Committee decided initially to limit itself to drafting clauses that are relevant. The slow progress of the OAS on the implementation of the Inter-American Corruption Convention is due to its lack of resources and the unwillingness of its members to provide resources, or establish institutions to facilitate anti-criminal cooperation in the hemisphere.⁴⁸⁵

The Inter-American Corruption Convention does not contain any oversight or monitoring mechanisms for the OAS. As a result, each signatory has the discretion to implement the Inter-American Corruption Convention. However, because at least six signatories — Argentina, Brazil, Canada, Chile, Mexico, and the United States — are also parties to the OECD Anti-Bribery Convention, which has monitoring provisions, their implementation of many of the provisions will experience harmonization under the OECD. Because of the importance of these six countries politically and economically within the OAS, their implementation efforts may have some influence on the implementation of the Inter-American Corruption Convention.

On August 28, 1998, the Inter-American Juridical Committee, an advisory body of the OAS, concluded its LIII session in Rio de Janeiro, Brazil. During its deliberations, the Committee concluded its preparatory work on model legislation on transnational bribery based on its studies on anti-corruption and effective application of the Inter-American Corruption Convention. The Committee also advanced its work toward the adoption of draft model

483. *Id.* art. XXIV, at 733.

484. See 2 TRANSPARENCY INT'L-USA NEWSL. 2 (2d Quarter 1998).

485. See *Twenty-nine Countries Agree on OECD Anti-Corruption Convention and Other International Initiatives Progress*, 13 INT'L ENFORCEMENT L. REP. 510, 512 (Dec. 1997).

laws on unlawful enrichment as it debated several aspects of the administration of justice in the Americas.⁴⁸⁶

At the Second Summit of the Americas in Santiago, Chile, the leaders of the hemisphere entrusted the OAS with a range of responsibilities. They decided to support the Inter-American Program to Combat Corruption by taking the following actions: (1) developing a strategy for ratification of the Inter-American Corruption Convention; (2) drafting codes of conduct for public employees; (3) studying the problem of the laundering of assets and proceeds derived from corruption; (4) promoting public awareness of ethical values; (5) supporting a *Symposium on Enhancing Probity in the Hemisphere*, (6) holding workshops to heighten awareness of the standards established by the Convention; (7) establishing a mechanism to follow up on progress within the Inter-American Corruption Convention; (8) taking under consideration proposals developed at the OAS Meeting of Government; and (9) sending representatives to a conference on contributions to electoral campaigns, held in February 1998.⁴⁸⁷

Seeking to develop momentum from the Americas Business Forum, Transparency International-USA proposed that the U.S. government make the conclusion of a transparency agreement one of the priorities of the Free Trade Area of the Americas (FTAA) "business facilitation measures" for implementation by the year 2000. The Office of the U.S. Trade Representative has indicated that it will propose that the FTAA Trade Negotiating Committee support the proposal. At present, Mercosur is likely to oppose the idea and insist on strict adherence to the FTAA principle of a "single undertaking" to be implemented in 2005.⁴⁸⁸

8. Potential Alliances with IGOs and NGOs

The preliminary work of the Inter-American Corruption Convention contemplates a possible program that "should encompass the legal, institutional, and educational aspects, relations with civil society, relations with other international organizations working to combat corruption, and with NGOs interested in the subject." Among the institutional goals of the work is to: analyze

486. See OAS, *Weekly Report*, Aug. 31, 1998.

487. See OAS, II Summit of the Americas (Santiago, Chile), *The OAS After the Santiago Summit* (visited Oct. 25, 1999) <<http://www.oas.org/en/pinfo/week/summi2t.htm>>.

488. *FTAA Agreement on Transparency*, 2 TRANSPARENCY INT'L-USA NEWSL. 2 (2d Quarter 1998).

the legal structure of institutions responsible for combating corruption in signatory states; analyze the operational features of such institutions; identify the role that legislatures can take in combating corruption; analyze the role of the judiciary; and promote inter-institutional exchanges of experiences and information through seminars, with a view to establishing a hemispheric network comprising the participating institutions.

The anti-corruption work program of the OAS includes government relations with civil institutions, such as: strengthening freedom of expression and freedom of the press to control corruption; strengthening ethical values; coordination with national and international NGOs involved in anti-corruption activities, including professional associations; and analysis of educational programs to promote behavior that counteracts corruption and affirms ethical values. On June 17, 1998, the OAS signed a Cooperation Agreement with Transparency International-USA, creating a framework for future cooperation.⁴⁸⁹

The OAS work program aims to coordinate its actions with international governmental organizations (IGOs), including the OECD, the European Council, World Bank Group, Inter-American Development Bank (IDB), and the United Nations. A coordinated effort was proposed to exchange experiences and develop joint actions to allow the subject to become a common interest among many regions and become closely related to the objectives of these institutions.⁴⁹⁰ The OAS and IDB already are planning conferences in fifteen countries to promote further ratification and implementation of the Inter-American Corruption Convention.⁴⁹¹

9. Observations

Many members of the international community considered the Inter-American Corruption Convention a personal triumph for Venezuelan President Rafael Caldera,⁴⁹² who had promoted it for many years following the failures of some of the major banks in Venezuela and allegations of corruption that led to those failures. The Inter-American Corruption Convention illustrates the

489. See *Highlights*, 2 TRANSPARENCY INT'L-USA NEWSL. 1 (2d Quarter 1998).

490. See *Fundamentals of a Possible Program for Inter-American Cooperation in the Fight Against Corruption*, Permanent Council of the OAS, Working Group on Probity and Public Ethics, OEA/Ser.G CP/GT/PEC-39/96 (Jan. 22, 1996).

491. See *OAS Anti-Corruption Convention*, 2 TRANSPARENCY INT'L-USA NEWSL. 3 (2d Quarter 1998).

492. See *Caldera Tries to Give Regional Anti-Corruption Effort a Push*, 10 INT'L ENFORCEMENT L. REP. 404 (1994).

momentum that has developed in the effort to combat official corruption. International organizations, such as the OAS, the IDB, and the OECD, are playing a leading role in these efforts. A critical element in the future success of the Inter-American Corruption Convention will be whether the signatories will be willing and able to provide mechanisms to facilitate and/or require enforcement.

On March 9, 1998, the Leadership Council for Inter-American Summitry issued a report, *From Talk to Action: How Summits Can Forge a Western Hemisphere Community of Prosperous Democracy*, urging the formation of an Inter-American Commission on Corruption to promote implementation of the 1996 Inter-American Corruption Convention. The Commission would monitor implementation of priority goals, circulate model legislation and examples of best practices, and help coordinate technical aid.⁴⁹³

The recommendation points to the absence of meaningful institutions and mechanisms to implement the Inter-American Corruption Convention. Although establishing mechanisms are desirable, the effort to create such mechanisms on an ad hoc basis means that increasingly the hemisphere has laws, regulations, and guidelines on issues including narcotics control, anti-money laundering, anti-terrorism, and transnational corruption. However, the absence of substantial mechanisms and institutions preclude the harmonious design and integration of the laws and policies, effective implementation and enforcement of such policies, and the ability to meet the daily needs to adjust, interpret, and educate law enforcement officials and policy makers about their application.

D. Narcotics Trafficking

As mentioned in the earlier discussion of the OAS, the treatment of international narcotics trafficking represents the boldest experiment in devoting resources and institutional mechanisms to combat one transnational crime problem.⁴⁹⁴ The transnational crime of narcotics trafficking remains an issue that will continue to receive the focus, resources, and most creative efforts for institutional reform and experiment in the transnational crime area, in part because it has been the recipient of so many resources and

493. See Marc Selinger, *Speed Up FTAA Negotiations, Advisory Group's Report Says*, DAILY REP. FOR EXEC., Mar. 10, 1998, at A6.

494. See Tragen, *supra* note 196, at 162.

diplomatic efforts through the CICAD meetings. CICAD is both the source of important experiments in its own right, such as the adoption of the multi-evaluation system, and of important experiments in related criminal cooperation that will develop on their own, regardless of the outcome of counter-drug policy. For instance, efforts to combat arms trafficking and anti-money laundering policies, while they arose out of CICAD, are becoming important on their own and may even eclipse counter-drug policy in terms of the importance and resource allocation.

VIII. NEED FOR AN AMERICAS COMMITTEE ON CRIME PROBLEMS

Meaningful enforcement initiatives against transnational crime should be based on a comprehensive criminal justice policy and permanent, ongoing work by dedicated civil servants under high level political leaders and criminal justice professionals. For illustration purposes, on a hemispheric level, the United States and other governments should consider the creation of an Americas Committee on Crime Problems.⁴⁹⁵

The Americas Committee would be tasked with solving hemispheric criminal problems.⁴⁹⁶ Americas Committee membership should be open to member nations of the OAS.⁴⁹⁷ In addition, other countries and entities in the hemisphere should be considered for membership, such as "Canada, Cuba, and the important international organizations, including non-governmental organizations, which have been active in international criminal cooperation and criminal justice planning."⁴⁹⁸

A good format for the Americas Committee to follow would be that of the European Committee on Crime Problems.⁴⁹⁹ "The European Committee is composed primarily of senior officials of the Ministries of Justice in the member European states who have worked on exchanging experiences and coordinating research

495. See generally B. Zagaris & C. Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 119-32 (1986) (suggesting an organization like CICAD as a first step towards an Americas Committee on Crime Problems).

496. *Id.* at 124.

497. *Id.*

498. *Id.* An example of such an organization is the United Nations Institute for NUD. *Id.*

499. *Id.* The European Committee of Crime Problems was established by decision of Committee of Ministers of the Council of Europe in June, 1958. *Id.*

relating to the prevention of crime and treatment of offenders."⁵⁰⁰

The European Committee has five fundamental tasks.⁵⁰¹ First, the European Committee must meet once every year and establish policy and strategies for "related bodies such as the Criminological Scientific Council."⁵⁰² Second, it creates specialized expert subcommittees, whose duties include creating draft resolution and conference proposals for the European Committee.⁵⁰³ Any draft proposals that the European Committee accepts are then sent on to the Council of Europe, and then to member governments.⁵⁰⁴ Third, the European Committee supports criminological research.⁵⁰⁵ Fourth, the European Committee organizes "specialized [crime-related] topical conferences such as the Conference of Directors of Prison Administrations."⁵⁰⁶ Fifth and finally, the European Committee is "instrumental in the regular convening of a Conference of European Ministers of Justice," which has met every two years since 1961.⁵⁰⁷

Assuming that the Americas Committee would be established under the auspices of the OAS, the Committee could be created by the agreement of the Ministers of Justice of respective OAS members.⁵⁰⁸ "Since matters of international criminal cooperation concern policy matters as well as technical matters," the Americas Committee on Crime Problems would greatly benefit from at least initial (if not sustained) assistance from the Ministries of Justice and foreign ministries.⁵⁰⁹ The Americas Committee's efforts would probably have to be regulated by regular meetings (preferably annual) and eventually by an administrative body staffed by senior Ministries of Justice officials.⁵¹⁰ The Americas Committee would also probably have to establish and expand "its own specialized resources on international criminal conventions and criminal justice planning."⁵¹¹ Initially, assistance with technical issues

500. *Id.*

501. *Id.* at 125.

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* Such support is often given through organizations created by the European Committee, such as the Criminological Scientific Council. *Id.*

506. *Id.*

507. *Id.*

508. *Id.* A similar process was used to establish the European Committee on Crime Problems. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

could be provided by well-informed and experienced nations, international organizations, and non-governmental organizations.⁵¹²

An important initial duty of the Americas Committee would be to evaluate current international criminal cooperation mechanisms in an effort to assure large-scale coordination.⁵¹³ The scope of the charter of the Americas Committee should include all criminal law and justice matters facing the hemisphere, including crime prevention, crime detection, and criminal justice development planning.⁵¹⁴

In addition, the Americas Committee could evaluate "legal, administrative, and judicial measures taken in the member states in fighting specific crime areas for innovation worthy of emulation."⁵¹⁵ Thus, it would be the Americas Committee's duty to make recommendations for new regulations and policies and for establishing new domestic or international organizations.⁵¹⁶ This could be done, for instance, in the form of drafting uniform rules, which would be presented to member nations for adoption.⁵¹⁷ All this would be done to facilitate improved hemispheric and international cooperation.⁵¹⁸

At present, governments in the region are liberalizing their rules regarding trade and investment as well as the movement of people. Examples are the U.S.-Canada Free Trade Agreement and the North America Free Trade Agreement. While these agreements have several provisions on criminal cooperation, these provisions are limited to intellectual property protection and customs enforcement, and it is clear that criminal justice and criminal cooperation are neglected issues. As a result, governments are facilitating the easy movement of illegitimate, as well as legitimate, goods, people, and capital. Criminal syndicates are doing well. Rather than an after-the-fact reaction to individual problems, such as drugs, corruption, arms trafficking, and money laundering, governments must create mechanisms to enable themselves to view crime just as it is viewed by criminals - as a business with vast opportunities and networking possibilities. Indeed, free trade and

512. *Id.*

513. *Id.*

514. *Id.* at 125-126.

515. *Id.* at 126.

516. *Id.*

517. *Id.*

518. *Id.*

globalization compel innovative approaches to criminal cooperation. . . . [Therefore, t]he Americas Committee on Crime Problems is an idea worth exploring.⁵¹⁹

IX. ANALYSIS AND PROSPECTS⁵²⁰

As transnational criminals and criminal groups inevitably take advantage of opportunities flowing from globalization, the traditional actors in international relations — the nation-states and international organizations — will be challenged to maintain their power. Either they will be able to adapt their conception of international organizational theory to account for and counter new international criminal actors, or they will eventually find themselves unable to effectively counter corrupt practices. In a worst case scenario the international system will become infected by the poison of criminal groups.

International lawyers, foreign relations experts, and criminologists must become multidisciplinary in their vision and strategic planning, flexible in their ability to form alliances, and able to construct methods of interaction between each other and to develop their own networks, while deflating those of criminal groups.⁵²¹ Until national governments establish effective regional organizations, the mandate and resources to intensively and regularly work on criminal justice planning at the international level, individual states will react in a disorganized and inefficient manner to crime. Regional organizations, through uniform laws, treaties, agreements, memoranda of understanding, institutions, and other ways of cooperating in the battle against crime, may succeed. To effectively battle crime in this high-tech era requires a pro-active, comprehensive, and visionary approach to criminal justice.⁵²²

519. Bruce Zagaris, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Constructing a Hemispheric Initiative Against Transnational Crime*, 19 *FORDHAM INT'L L.J.* 1888, 1900-1902 (1996) (internal citations omitted).

520. This section appeared in Zagaris & Ohri, *supra* note 440, at 89-93 and has been reproduced here with the permission of the co-author and copyright holder, Bruce Zagaris. All text and citations remain the same as in the original. Note that the footnote numbers have been changed to conform to the format of this article.

521. For a discussion of the need for alliance-building in international criminal and regulatory areas, see Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFFS.* 183, 183-97 (1997).

522. For a discussion of more comprehensive anti-crime regime development applied to the Americas, see Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 *FORDHAM INT'L L.J.* 1888-1902 (1996); Bruce Zagaris

The global community, in developing and implementing international regimes on transnational corruption, is searching for more effective mechanisms to implement their goals and strategies. The challenges are many. Transnational corruption involves efforts to overcome decades and even centuries of embedded patterns of conduct, power, and economics. New concepts of behavior and laws will not overcome the longstanding barriers overnight. Indeed, unless the effort to construct an anti-corruption enforcement regime has popular support and overcomes the disparity of economic and political power nationally and transnationally, the corruption that arose under the Castilian institutions of the *residencia* and the *visita*,⁵²³ whereby the Spanish Crown tried to impose its will on the actions of distant officials in the New World, will continue evolving and manifesting itself in different forms. Without substantial popular support, the development of a broad alliance, and effective mechanisms, many national and local governments may be inspired to devise ways to defeat the anti-corruption regime through passive resistance and other means so that observers may characterize the conduct with the famous Spanish dictum, *Obedezco pero no cumpro* (I obey but do not carry out).⁵²⁴

One mechanism is to develop self- and mutual evaluations, emulating the efforts of the Financial Action Task Force to develop an anti-money laundering regime.⁵²⁵ The lack of authority and implementation mechanisms for comprehensive crime and international criminal cooperation policy — not just to combat transnational corruption — are repeated on regional and subregional levels with the exception of the EU. For instance, in the Western Hemisphere an important gap exists between the number of formal mechanisms and regimes that facilitate free trade and compensating mechanisms to regulate the potential criminal threats from the unfettered movement of goods, capital, informa-

& Constantine Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 119-33 (1986).

523. The *residencia* was a judicial review of the Spanish American's officials in the New World conduct at the end of his term of office, and *visita* could occur without warning at any time during the period of an official's incumbency because of a serious emergency or a general condition of mismanagement. See C.H. HARING, *THE SPANISH EMPIRE IN AMERICA* 138-46 (1952).

524. For background on the dictum, see John Edwin Fagg, *LATIN AMERICA: A GENERAL HISTORY* 227 (1967).

525. See WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER-MEASURES* 108-11 (1995).

tion, and people that free trade facilitates.⁵²⁶

While the countries in the Americas have undertaken various new commitments to the new criminal areas that involve transnational organized crime, they have not provided for new resources within or outside the OAS to undertake the responsibilities. Although the Inter-American Corruption Convention was concluded almost two years before its counterpart in the OECD, the Americas are further behind in implementing the OAS Convention.

Part of the problem is that the group charged with providing most of the work on the convention's implementation, the Inter-American Juridical Committee, is composed of expert volunteers who meet only twice a year. Established by Chapter XII, the Inter-American Juridical Committee acts as the advisory body to the OAS on juridical matters and is responsible for promoting the development and codification of international law. The Committee is headquartered in Rio de Janeiro. It is composed of eleven jurists (nationals of the member states) elected by the General Assembly from panels of candidates presented by the members.⁵²⁷ Their work is only *ad referendum*, that is, the OAS requests them to undertake certain tasks. The Committee does not have its own resources.⁵²⁸

At the Santiago Summit, the heads of government, in recognition of the importance of, and positive role played by hemispheric institutions, especially the OAS, instructed the Ministers to examine the strengthening and modernizing of these institutions.⁵²⁹ This recognition complements the Santiago Commitment to Democracy and the Renewal of the Inter-American System, approved by the OAS General Assembly on June 4, 1991, in which the OAS members noted that the depolarization and lessening of world tensions had led the way to "concerted action by all countries through global and regional organizations" and they declared "their firm resolve to stimulate the renewal of the Organization of American States, to make it more effective and useful in the appli-

526. For a comparison between criminal justice cooperation in Europe and the Western Hemisphere in the wake of free trade, see Ethan Nadelmann, *Harmonization of Criminal Justice Systems*, in *THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS* 247-78 (Peter H. Smith ed., 1993).

527. See VIRON L. VAKY & HERALDO MUNOZ, *THE FUTURE OF THE ORGANIZATION OF AMERICAN STATES* 117 (1993).

528. Phone Interview on May 7, 1998, with Keith Highet, member of the Inter-American Juridical Committee.

529. See Santiago Summit Declaration, at 4.

cation of its guiding principles and for the attainment of its objectives."⁵³⁰

Clearly, the new architecture of the Americas in the wake of globalization and the explosion of regional free trade groups is murky. Regionalism in the Americas in the next century will not reflect the traditional patterns of regionalism of the 1970s or 1980s. It will be a function of the national policies of the countries of the hemisphere and the various strategies toward regionalism and sub-regionalism that they represent. In turn, these strategies will be related to their positions in the larger hierarchy of power and trade in the Americas.⁵³¹ In the short run, free trade and globalization will increase opportunities for transnational criminals, especially organized crime groups, to move money, goods, people, and technology for their own ends. Eventually, governments will react, first to individual crimes and eventually on a more comprehensive basis.

The sophisticated transformations of law and culture mandated by the development of an anti-corruption enforcement regime require know-how, significant resources, substantial political commitment, training, and economic benefits. To the extent extra-regional players facilitate governments and regional organizations to control and evolve the new regime of international anti-corruption enforcement, the regime will be able to successfully combat transnational criminals. Strategic planners should not regard transnational corruption and related crime as static. Many of the perpetrators are clever. They have significant and even enormous resources. They are willing to make alliances with other criminal groups and even with governments and political leaders when such alliances are beneficial. Unless regional organizations representing diverse countries in the hemisphere and extraregional forces in support of the anti-corruption regime become equally as dynamic as their opponents in devising new mechanisms, cooperative activities, and overcoming traditional barriers, they will see their power eroded and the international system will become increasingly infected.

Small governments and extraregional players must facilitate global governance that encourages a shift of power and functions

530. Viron L. Vaky, *The Organization of American States and Multilateralism in the Americas*, in VAKY & MUNOZ, *supra* note 527, at 1, 12-13 (text of the Santiago Commitment in app. 1).

531. See W. Andrew Axline, *Conclusion: External Forces, State Strategies and Regionalism in the Americas*, FOREIGN POLICY & REGIONALISM IN THE AMERICAS 199, 214 (Gordon Mace & Jean-Philippe Therier eds., 1996).

that occur away from the state — up, down, and sideways — to supra-state, sub-state, and non-state actors.⁵³² This power shift must occur partly through networking and voluntary associations. Global governance and a new world order are slowly replacing the state, which is disaggregating into its separate, functionally distinct parts. These parts — courts, regulatory agencies (including new ones such as financial investigative units), executives, and even legislatures — are networking with their counterparts regionally and extraregionally, creating a dense web of relations that comprises a new, transgovernmental order. Current international criminal and related problems — transnational corruption, international drug trafficking, money laundering, transnational organized crime, terrorism, bank fraud, cyber-crimes, and securities fraud — created and sustain these relations. Government institutions have formed networks of their own, ranging from the OECD Working Group on Bribery, the Basle Committee of Central Bankers, to the Financial Action Task Force (FATF) on a universal level, and on a regional level, the European Committee on Crime Problems, OAS Working Group on Probity and Public Ethics, the Inter-American Drug Abuse Control Committee's (CICAD) group of money laundering experts, and the Caribbean FATF.

International organizations, governments, and NGOs must facilitate networking among judges and other relevant officials, so that they can start a global community of laws.⁵³³ They share values and interests based on their belief in the law as distinct but not divorced from politics and their view of themselves as professionals who must be insulated from direct political influence. This global community reminds each participant that his or her professional performance is being monitored or supported by a larger audience.⁵³⁴

Our hemisphere needs leadership to achieve the goals of its international anti-corruption enforcement regime. The people of the hemisphere must roll up their sleeves and work together to

532. See Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFFS. 50, 50-66 (1997) (discussing how the nation-state is becoming obsolete as the resources and threats that matter disregard governments and borders and states are sharing powers that defined their sovereignty with corporations, international bodies, and a proliferating universe of citizens groups).

533. For a discussion of integration within the intra-Caribbean system and transnational functional relations, e.g., in anti-narcotics action, justice and human rights, currencies, finance and banks, see CHRISTOPH MULLER, CARICOM INTEGRATION PROGRESS AND HURDLES: A EUROPEAN VIEW 84-135 (1996).

534. See Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFS. 183, 183-87 (1997).

develop effective mechanisms, institutions and civil society, in which honest procurement, business, and good governance are essential elements.