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I. Notion of Legal Assistance

When carrying out their juridical functions, the responsible bodies of one state frequently must seek assistance from the competent bodies of another state. In the literature of the Socialist States, this form of cooperation is referred to as legal assistance. Its main purpose is to facilitate attachment of criminal sanctions through the vehicle of interstate cooperation. As a rule, rendering legal assistance in criminal cases is regulated by international agreements. For instance, the U.S.S.R. has bilateral legal assistance agreements with Bulgaria, Hungary, the German Democratic Republic, Democratic Korea, Mongolia, Afghanistan, Poland, Romania, Yugoslavia and Czechosloviakia, as well as with Iraq and Finland.[1] These agreements include provisions that address subjects such as, the extradition of offenders; transfer of evidence; permission to question witnesses taken into custody in the state in which the person has been detained; and return of articles acquired by criminal means or reimbursement of their value.

The concept of legal assistance in criminal cases is not defined in the texts of the agreements. One must turn, instead, to the literature for its definition. F. Markus, a Hungarian lawyer, defines the concept of legal assistance as assistance rendered by bodies of one state in the prosecution of a criminal case to bodies of another state. This assistance may involve participation in the prosecution of the case, or merely the transfer of documents.[2]

The wording of this definition correctly reflects the essence of the

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[1] The texts of the agreements are published in Ministervo Iustitsii SSSR, Dogovory ob Okazannii Pravovoy Pomoschi po Grazh Danskim, Semeinym I Ugolovnym Delam, Zakliuchennye SSSR I Drugimi Sotsialististicheskimi Gosudarstvami (2d ed. 1973) (Agreements on legal assistance in civil, family, and criminal cases concluded by the U.S.S.R. and the Socialist States. In Russian).

[2] F. Markus, *L'entraide Judiciaire en Matières Pênale Comme Institution du Droit Pênal International*, 13 Acta Juridica No. 1-2 at 60 (1971) (Budapest).

concept. It should also be noted, however, that legal assistance in criminal cases should include extradition of an escaped criminal. Consequently, the rendering of legal assistance may aim to further the enforcement of a criminal sentence as well as to aide in the prosecution of a criminal case. Therefore, legal assistance should encompass actions calculated to cover all stages of the criminal procedure.

Actions pertaining to legal assistance, as they are referred to in this article, are also analyzed in Western juridical literature: German works define such acts in a manner similar to the Soviet literature, as "Rechtshilfe in Strafsachen" (legal assistance in criminal cases); French sources refer to these actions as "L'entraide judicaire en matière pénale" (mutual judicial assistance in criminal cases); and English writers use the term "mutual assistance in criminal matters" in reference to international cooperation in criminal cases. Scholars of international criminal law have determined that in addition to creating difficulty in translation, the substantial terminological diversity in defining legal assistance may cause misunderstandings. Accordingly, the Soviet position, which is in accordance with Swiss Professor Curt Markus, is that the elaboration of a uniform terminology is the most urgent problem for specialists dealing with legal assistance.[3]

The French scholar, C. Lombois, defines legal assistance in criminal cases as "a complex of measures through which one state renders to another the concurrence (le concours) of its public services or its judicial bodies for use in the investigation, the court examination or the enforcement of court decisions pertaining to the crime committed."[4] However, it does not appear to be expedient to define assistance by use of the term concurrence, since both terms (assistance and concurrence) must be defined.

In the Federal Republic of Germany, legal assistance in criminal cases is given the following definition: "Any assistance which the requested state affords in connection with criminal proceedings conducted by a foreign authority, no matter whether the proceedings are conducted by a tribunal or any other authority and [or] whether the requested measure of assistance must be taken by a tribunal or any other authority."[5] This definition refers to any assistance which can be rendered in connection with criminal prosecution. It is obvious that the phrase "any assis-

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[3] Markus, *The Difference in Concept between Civil and Common Law Countries to Judicial Assistance and Cooperation in Criminal Matters*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 171, 175 (M.C. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as TREATISE].

[4] C. LOMBOIS, DRAFT PENAL INTERNATIONAL 447 (1971).

[5] Directives to German Authorities Concerning the Relations with Foreign Countries in Criminal Matters of January 15, 1959, Item 7, *reprinted in* Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in 2 TREATISE 189, 193.

tance" is too inclusive, for it permits a variety of interpretations. Thus, this definition lacks the specificity that is desired for the concept of legal assistance.

It seems more expedient to define legal assistance in criminal cases as the recognition of jurisdiction by a court of competent jurisdiction in a state that is a party to the agreement for assistance. This recognition is necessary for the investigation, the court's examination or the execution of punishment for the crime committed within the geographical boundaries of the other party to the agreement. In other words, legal assistance is the composite of actions necessary for the enforcement of criminal responsibility in a particular case.

The last circumstance seems to be rather important. It helps to differentiate between two similar but not identical notions: legal assistance in criminal cases and cooperation in the field of crime combatting, which is a less inclusive term.

An opposing viewpoint is that cooperation in crime combatting should be included as a part of legal assistance in criminal cases. Some authors believe that "international cooperation in crime combatting is effected within the general framework of legal assistance in criminal cases, and that the necessity of such assistance has long been acknowledged and is part of the wider cooperation between states in social matters."[6]

Legal assistance in criminal cases is by no means the predominant format of cooperation among states in crime combatting, nor is it the prevelant form of cooperation among states on social matters in general. However, this does not necessitate a denial of the long acknowledged importance of the concept of legal assistance. Forms of cooperation such as exchanges of experience (frequently practiced among bodies with jurisdiction over crime combatting in the Socialist States), coordination of training efforts of personnel, mutual scientific research on problems of general interest, as well as other forms of cooperation, simply do not fit within the framework of legal assistance in criminal cases.

R.M. Stanoiu, a Romanian lawyer, has advanced some interesting considerations concerning the nature of legal assistance in criminal cases.[7] Stanoiu divides the various types of legal assistance in criminal cases into two groups. The first group includes assistance in the form of information-sharing which is directed against criminality as a whole, and thus contributes to crime combatting by making relevant information available.[8] The information received in one state from another state can, as the

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[6] R. VALEEV, VYDACHA PRESTUPNIKOV V SOVREMENNON MEZITDUNARODMON PRAVE (OSNOVNYE PROBLEMY) 4 (1974) (Extradition of Offenders in Modern International Law (Fundamental Problems) (In Russian).

[7] R.M. STANOIU, ASISTENTA JURIDICE INTERNATIONALE IN MATERIE PENALO 83 (1975).

[8] *Id.*

monograph specifies, "help to expose, investigate and pronounce a judgment in a definite case, to reach a fuller understanding of the past record of the offender."[9] This information may facilitate the selection of an appropriate form of punishment for the individual in question.[10]

The second group includes types of legal assistance connected with criminal procedure, which directly promote the process of justice with respect to the particular offender.[11] Stanoiu includes in this group "transfers of copies or extracts from court judgments, transfers of past criminal records, and finally, international exchanges of information on problems of interest in the common cause of crime combatting."[12] It is unwise, however, to use the same term in describing very different notions such as the transfer of copies or extracts from the court's judgment in a particular case vis-a-vis the international exchange of information on problems of crime combatting. This is a much wider notion than that of legal assistance in criminal cases. This distinction does not exclude, of course, the contribution of legal assistance to the international exchange of information on problems of crime combatting.

A general assessment of R.M. Stanoiu's approach to the notion of legal assistance in criminal cases clearly reveals that the author's concepts are well-founded. By emphasizing the fact that all forms of legal assistance should promote the administration of justice in connection with a particular offender, Stanoiu accurately expresses the content of the notion of legal assistance. Thus, a characteristic feature of legal assistance in criminal cases, which sets it apart from other forms of cooperation in crime combatting, is the fact that the rendering of such assistance is directed toward a concurrence in the enforcement of criminal responsibility in a particular criminal case.

II. Legal Assistance in Criminal Cases and Other Kinds of Cooperation in Criminal Justice

Specialists in criminal law are well aware of the fact that the number of criminal cases involving foreign citizens has increased in many countries during the past several years. These cases pose unique problems. For example, even a "hard core" recidivist, who has numerous convictions in his own country, may not be considered in light of his previous criminal record if he is brought to trial in a foreign state;[13] this assumes the prior judgment of his home state is not recognized as valid in the foreign state.

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[9] *Id.*
[10] *Id.*
[11] *Id.* at 86.
[12] *Id.* at 83.
[13] Generally, this requires the treaty process due to sovereignty considerations.

To deal with this problematic situation, in 1963 the International Association of Penal Law organized a special colloquium, which discusses the possibility of international recognition of judgments in criminal cases as pronounced by national courts. The colloquium found that the solution to this problem is intertwined in differences in political and historical perspectives which are formed by traditions of jurisprudence. Accordingly, the colloquium recognized that even those countries with similar political systems and close cultural conditions would be best advised to resolve their problems gradually. The recommended first step was the recognition of sentences of another state, thus providing for punishment without deprivation of liberty.[14]

Accordingly, in 1964 the Juridical Committee of the Council of Europe worked on the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders,[15] and this was followed in 1970 by the European Convention on the International Validity of Criminal Judgments.[16] In 1971, the text of the European Convention on Transfer of Proceedings in Criminal Matters was published.[17] New concepts in international criminal law were developed as a result of those Conventions. Undoubtedly, these new concepts such as the transfer of proceedings in criminal matters between states, the recognition and acceptance of a criminal judgment pronounced in another state or the supervision of conditionally released offenders remain considerably important to an understanding of the progressive trend in international criminal law. A correlation of the concept of legal assistance with the current trend is illustrative of this point.

When the state extradites an offender, it facilitates prosecution of another country. Without such acts of legal assistance, criminal justice cannot be fully administered in the state which makes the request.[18] If it is necessary for a country to refuse to extradite an offender, the country refusing the request may, in certain circumstances, prosecute and convict the offender on the charges put forward by the other state.[19]

If such a situation arises, the state which has convicted the offender should be considered as having rendered assistance in crime combatting

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[14] Schultz, *Les Effets Internationaux de la Sentance Pénale*, 34 REVUE INTERNATIONALE DE DROIT PÉNAL [R.I.D.P.], No. 1-2 at 8-9 (1963).

[15] Europ. T.S. No. 51-1964.

[16] Europ. T.S. No. 70-1970, *reprinted in* 2 TREATISE at 292.

[17] Europ. T.S. No. 73-1972.

[18] *See, e.g.*, European Convention on Extradition art. 1, Europ. T.S. No. 24-1957.

[19] This typically may happen where the offender is a national of the requested state, which, because of this fact, will not allow him to be extradited, but may instead proceed to prosecute him under local laws which regulate the conduct of nationals abroad. *See* European Convention on Extradition, arts. 6-8, Europ. T.S. No. 24-1956; Grutzner, *supra* note 5, at 218.

because the offender is punished, although in a state different than where the crime was committed. This type of assistance is subject to the consideration that the punishment may not be less strict than that which would have been administered in the State where the crime was committed.[20] Nevertheless, the conviction of the offender in a foreign state cannot be regarded as an action of legal assistance since the very essence of this concept is that it consists of actions which allow for the administration of justice within the state which requests the aid.[21] Likewise, actions such as the transfer of criminal proceedings between countries, the recognition of penal judgments pronounced by other states, and the supervision of offenders that have not been convicted or conditionally released are considered to be forms of cooperation that lie outside the scope of legal assistance because these actions do not result in the prosecution of a criminal case in the state where the offense was committed.

The notion of legal assistance is similar to these three new forms of cooperation in that all aid the prosecution of a criminal case and the execution of the assigned punishment. In other words, these state actions provide for the administration of justice, and they may be referred to as cooperation in the administration of criminal justice.

Cooperation in the administration of justice is currently attracting the attention of scholars, lawyers, and practitioners who are concerned with crime combatting in the Socialist States. The Convention on the Extradition of Offenders Sentenced to Deprivation of Liberty to Serve Punishment in the State of their Citizenship of August 29, 1979,[22] is regarded by some as a new step in the development of the multilateral cooperation of the Socialist States in the administration of criminal justice.

III. Some Crucial Questions on Extradition

The most important concept covered by the notion of legal assistance is the extradition of criminal offenders. The extradition concept has recently attracted the attention of international criminal law specialists. Primarily, there is a continuing discussion concerning problems associated with the definite restriction of the principle of "political offense ex-

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[20] European Convention on the Transfer of Proceedings in Criminal Matters, art. 25; *see also* Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in 2 Treatise 261, 280.

[21] *See supra* note 18 and accompanying text.

[22] Vedomostii SSSR (1979), No. 33, item 539. The Convention was adopted by representatives of Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, and the USSR. It is self renewing for five year periods. The terms for implementing the convention may be found in Vedomostii SSSR (1979), No. 33, item 540, *reprinted in* IV Collected Legislation of the USSR and Constituent Republics VII-8 (W. Butler trans. 1979).

ception." This discussion has generated debate, and ultimately a decision by the European States, which adopted the European Convention on the Suppression of Terrorism of January 27, 1977,[23] to consider all acts of terrorism an extraditable crime.

The literature reveals a divided reaction among lawyers to the European decision: some pronounced the decision as constituting "an erroneous step back,"[24] while others stressed the incompatibility of the decision with the right to asylum.[25] More moderate views were also expressed on the problem of extradition.[26]

Criticisms expressed by some Western legal commentators of the Socialist States' rejection of the "political offense exception" reflect a lack of understanding of the essence of socialist criminal law and the fundamentals of Socialist States' cooperation in crime combatting. Socialist States, and particularly the U.S.S.R., follow the principle that commission of a dangerous state crime against another state is a criminal act committed against the state prosecuting the case.[27] Clearly, the validity of the principle of "political offense exception" is accepted among the Socialist States in their interrelations.

The question of how much the extradition of terrorists contradicts the right to asylum is a more theoretically complex issue. Arguably, there is no contradiction between the right to asylum and the extradition of terrorists. Accordingly, the principle of asylum should be applied to the compulsory extradition of offenders guilty of hijacking and the following standard should be adopted: a person who applies for asylum, regardless of the motive, should not be granted asylum when doing so may place him in a position where he may again commit actions endangering the lives of people. Activities such as acts of terrorism and hijacking of commercial airlines are good examples where asylum should be refused. Such

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[23] Europ. T.S. No. 90-1977.

[24] DeShutter, *La Convention Europeenne pour la Repression du Terrorisme*, JOURNAL DES TRIBUNAUX (March 26, 1977); Salmon, *La Convention Europeenne pour la Repression du Terrorisme*, JOURNAL DES TRIBUNAUX (September 24, 1977).

[25] Rodregues, *Le complexe de Procuste sur la Convention Europeenne pour la Repression du Terrorisme*, INSTITITUTO SUPERIORE INTERNATIONALE DI SCIENZA CRIMINALI, QUADERNS: PROSPECTTIVE SUL TERRISMO 318 (1977) (Proceedings of the international seminar organized by the International Institute of High Studies in Criminal Sciences in Siracusa, Italy, from December 11-17, 1977).

[26] Wijnaat, *La Definition du "Delit Politique" dans la Theorie et la Pratique du Droit de L'extradition*, A PERDONE, MELANGES EN L'HONNEUR DU DROIT DOYEN PIERRE BOUZAT 39 (1980).

[27] *See* Law on Criminal Responsibility for Crimes Against the State, Vedmosti SSSR (1959), No. 1, item 8, art. 10, which says "By virtue of the international solidarity of the working people, especially dangerous crimes against the state committed against another working peoples' state, shall be punished respectively according to Articles 1-9 of the present law."

actions are incompatible with the principles underlying the right to asylum,[28] and consequently, the right itself should not serve as an obstacle to the extradition of offenders who have been found guilty of such actions. This result is fully consistent with humanistic ideas and does not injure the concept of political asylum.

The second concern arises regarding the extradition of war criminals of the Second World War. It should be noted with satisfaction that in the United States and Canada, where many Nazi criminals reside, the national press discusses quite seriously the possibility of their extradition to states where the crimes were committed.[29] Furthermore, no specialist in international criminal law has spoken in favor of providing relief to offenders found guilty of crimes against peace and humanity.[30] To do otherwise would be to contradict the very concept of justice and the fundamental principles to which all lawyers are dedicated irrespective of their ideology.

A symposium of experts in the field of international criminal law from Europe, America and Africa was held by the International Institute of Higher Studies in Criminal Sciences, at Siracusa, Italy in May 1981.[31] There the Draft International Penal Code edited by Professor Bassiouni was discussed. The symposium raised some questions that have not yet been answered.[32] However, as far as the responsibility of offenders guilty of crimes against peace and humanity is concerned, the attitude of the representatives of all states was one of consensus. First, crimes of this kind are absolutely regarded as political crimes. This concern explains the first Article of the Draft International Penal Code (D.I.P.C.) which regulates the extradition of offenders. The Draft International Penal Code also denies classification of a crime against peace and humanity as a political crime and it requires the nonapplication of the "political offense exception" to such crimes.[33]

Second, terms of statutory limitations are not applicable to these crimes. One should recall the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted on November 26, 1968, by the 23rd U.N. General Assembly Ses-

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[28] *See supra* notes 24-26 and accompanying text. For an overview of the historical principles underlying the right to asylum, *see generally* Barbero-Santos, *General Introduction and Definition of "Asylum"* in 2 TREATISE 335.

[29] *See, e.g.*, article in Globe and Mail, June 19, 1982.

[30] These will soon be published.

[31] M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter cited as DRAFT CODE].

[32] Author's position is presented in Shupilov, *General Comments on the Draft International Criminal Code*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL [R.I.D.P.] 373-382 (1981).

[33] DRAFT CODE article 1.

sion.[34] It stipulates that in accordance with international law, war crimes and crimes against humanity are categorically the most serious crimes. Further expressed was the conviction that effective punishment for war crimes and crimes against humanity is an important factor in the prevention of such crimes, the protection of human rights and liberties, the strengthening of confidence among nations and the promotion of cooperation among nations to assure peace and security.[35] The Convention also stipulates that no statutory limitations are applicable to war crimes against peace and humanity, regardless of when they were committed.[36]

Third, it is important to note that the Draft International Penal Code provides that offenders guilty of crimes against peace and humanity should be extradited even in the absence of a special agreement with the state which applied for the extradition.[37] This provision is just, since crimes of this nature are directed against society at large. Further, in accordance with the principles of international criminal law, offenders guilty of crimes against peace and humanity should be extradited even if there is no extradition agreement. This provision of the D.I.P.C. is discussed in the U.N. General Assembly Resolution on Extradition and Punishment of War Criminals of 1946,[38] which recommended the U.N. member states to adopt all the necessary measures to ensure that all war criminals, who are either responsible for the above mentioned crimes or who have participated in their commission, be arrested and extradited to the states where their transgressions occurred. This was recommended in order to ensure that these criminals would stand trial and serve punishment in accordance with national laws.[39]

In October of 1947, the U.N. General Assembly turned again to the question of extradition of war criminals, and adopted the Resolution On Extradition of War Criminals and Traitors.[40] The U.N. General Assembly confirmed its resolution of February 13, 1946, and recommended that U.N. member states continue their vigorous efforts to fulfill their duties of extradition.[41] One regret remains, however; the suggestions made in these important and well-founded U.N. resolutions have not been imple-

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[34] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. GOAR Supp. (No. 18), U.N. Doc. A/7218 (1968).

[35] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted* Nov. 26, 1968, *entered into force* Nov. 11, 1970, 754 U.N.T.S. 73.

[36] *Id.* at Preamble.

[37] *Id.* at article 1.

[38] DRAFT CODE, *supra* note 31, at art. 2.

[39] G.A. Res. 3(I), U.N. Doc. A/64, at 9 (1946).

[40] *Id.* at para. 5.

[41] *Id.* at paras. 2 & 4.

mented and a number of those thought to be responsible for blood-chilling crimes still enjoy freedom.

IV. Conclusion

Can the world really forget the bonfires of living people, the gas chambers, the death camps? Regardless of the passage of time, the millions of men and women, especially old people and children, who were burned in the crematoriums of Oswiecim, killed in the gas chambers of Majdanek or tortured to death in Mauthausen will not be forgotten. The bells of Buchenwald are still heard and tear at the hearts of people. These feelings revive a deep contempt for fascism and racism, and demand punishment for those responsible for these crimes against humanity. Specialists in the area of international criminal law have much to contribute to the case for restoration of justice for the war crimes perpetrated during World War Two; those responsible must be held accountable for their actions.