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Something Is Rotten in the State of Affairs Between Nations: The Difficulties of Establishing the Rule of International Criminal Law Because of Public Corruption

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Charles S. Saphos

Abstract

This Essay is written to outline the difficulties in establishing mechanisms for addressing multi-national criminal activities when those efforts continue to be frustrated by rampant public corruption. This Essay argues that the problems of public corruption are purposefully not addressed in the instruments which are intended to combat criminal activity. The Essay concludes that international efforts will continue to be frustrated until nations determine that they will not permit public corruption to void their efforts to better the lives of their populations and establish within the four corners of their agreements mechanisms for identifying, investigating, and sanctioning the corruption that undermines the goals of the agreements.

SOMETHING IS ROTTEN IN THE STATE OF AFFAIRS BETWEEN NATIONS: THE DIFFICULTIES OF ESTABLISHING THE RULE OF INTERNATIONAL CRIMINAL LAW BECAUSE OF PUBLIC CORRUPTION

*Charles S. Saphos**

PREVIEW

This Essay is written to outline the difficulties in establishing mechanisms for addressing multi-national criminal activities when those efforts continue to be frustrated by rampant public corruption. This Essay argues that the problems of public corruption are purposefully not addressed in the instruments which are intended to combat criminal activity. The Essay concludes that international efforts will continue to be frustrated until nations determine that they will not permit public corruption to void their efforts to better the lives of their populations and establish within the four corners of their agreements mechanisms for identifying, investigating, and sanctioning the corruption that undermines the goals of the agreements.

A. Great Expectations for International Cooperation

President Clinton of the United States observed in his speech before the General Assembly of the United Nations on October 22, 1995, that:

All over the world, people yearn to live in peace. And that dream is becoming a reality. But our time is not free of peril. As the cold war gives way to the global village, too many people remain vulnerable to poverty, disease and underdevelopment. And all of us who are exposed to ethnic and religious hatred, the reckless aggression of rogue states, terrorism, organized crime, drug trafficking and the proliferation of weapons of mass destruction.¹

President Clinton continued by noting that: "Nowhere is cooperation more vital than in fighting the increasingly intercon-

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1. Remarks to the United Nations General Assembly in New York City, 31 WKLY COMP. PRES. DOC. 43 (Oct. 22, 1995).

nected groups that traffic in terror, organized crime, drug smuggling and the spread of weapons of mass destruction."²

Recognition of the need for multinational cooperation to address organized crime, particularly the organized crime of drug trafficking, is not a post-Cold War creature. The United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances³ ("1988 U.N. Convention") states in an introductory paragraph that the convention was drafted: "Recognizing that eradication of illicit traffic is a collective responsibility of all states and that, to that end, coordinated action within the framework of international cooperation is necessary"⁴ It would seem reasonable that the end of political fragmentation caused by the end of the Cold War would serve to increase means of cooperation and further support the rule of law in combating organized crime. However, there is little evidence to support a belief that the "good guys" are winning.

When nations are enlisted in international efforts to combat organized crime, there is an expectation that every nation and every participating organization is participating in good faith. This is also a tacit agreement between parties that each will comport itself lawfully in obtaining the goals of the agreement. This tacit agreement and expectation of good faith includes a belief that the participants will work for the good of all of the participants rather than to benefit a corrupting minority. Therefore, agreements are entered into wherein a banking center, such as Luxembourg,⁵ agrees to trace, freeze, and seize the proceeds of foreign narcotics violations, without regard to domestic bank secrecy laws.⁶ This tacit agreement includes the expectation that participants will, in good faith, address and punish public corruption when that corruption impedes the cooperation called for in the agreement. Indeed, the expectation that the parties to the agreement will be free of corruption and will, on their own, police themselves is so intrinsic that the instruments creating the agreements are silent on the topic.

2. *Id.*

3. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 493 (1989) [hereinafter U.N. Convention].

4. *Id.*

5. DEPARTMENT OF STATE, TREATIES IN FORCE, PUB. 9433, 392 (July 1995).

6. *Id.*

B. *Corruption is Pervasive*

Unfortunately, the expectation that members to agreements and the public institutions of members will be free from corruption is misplaced. Although the existence of public corruption is an unfortunate fact in all societies, including the United States, it would appear that cooperative law enforcement agreements are drafted in ignorance of this reality.

The Foreign Assistance Act of 1961,⁷ as amended, requires Presidential certification of major drug producing and transit countries.⁸ According to the report delivered to Congress in 1995, there were thirty-one countries requiring certification.⁹ On March 1, 1996, President Clinton certified three countries, Lebanon, Pakistan, and Paraguay despite their not being in full compliance, noting that certification was necessary in the national interest. In the same memorandum, President Clinton denied certification to Afghanistan, Burma, Colombia, Iran, Nigeria, and Syria.¹⁰ In the President's explanatory statement regarding his determination concerning seven of these nine countries, reference is made either to the existence of corruption or the lack of adequate steps to counter official corruption. Of these nine countries, eight are members with the United States in the 1988 U.N. Convention.¹¹ The ninth country, Lebanon, is "in the process of acceding to the 1988 U.N. Convention."¹² All the nine countries are members of the International Criminal Police Organization ("Interpol").

Another member of the 1988 U.N. Convention is the Republic of Seychelles. That country published on December 4, 1995, the "Economic Development Bill,"¹³ which appears strikingly inconsistent with the expectations of the Convention in which the Seychelles is a partner. The Convention asserts that all parties will do all in their power to address drug trafficking by forbidding money laundering, tracing and seizing drug assets,

7. 22 U.S.C. § 2291(h) (1994).

8. *Id.*

9. *Memorandum on Narcotics Producing and Transit Countries*, 32 WKLY COMP. PRES. DOC. 9 (Mar. 1, 1996).

10. *Id.*

11. DEPARTMENT OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, PUB. 10324, at xiv-iv (Mar. 1996) [hereinafter *INCSR*].

12. *Id.* at xxxviii.

13. *Economic Development Bill*, 1995 Supp. to Official Gazette § 3(2) (Nov. 6, 1995).

and extraditing and prosecuting traffickers.¹⁴ The bill which was approved by the President of the Seychelles on November 27, 1995, creates a board chaired by the President. In addition to the President, the Board will consist of the Minister for Finance and four other persons selected by the President.¹⁵ The bill authorizes the Board to grant certain concession to "investors."¹⁶ The Board on its own or through its chairman, the President, may grant an "investor" immunity from prosecution for offenses outside the Seychelles,¹⁷ as well as for acts of violence or drug trafficking in Seychelles.¹⁸ In addition, the "investor" is granted "immunity from compulsory acquisition or sequestration of the assets belonging to the investor" except assets derived from acts of violence or drug trafficking in the Seychelles.¹⁹ In return for this immunity, the investor is required only to invest a minimum of US\$10 million in an investment scheme approved by the President and his five colleagues on the Board.²⁰

On the other side of the globe, Colombia is also a partner in the 1988 U.N. Convention,²¹ as well as party to several bilateral arrangements with the United States. The International Narcotics Strategy Report for 1995, which is prepared by the U.S. State Department for Congress,²² reports:

Corruption remains a serious impediment to progress on counternarcotics in Colombia. High-level government officials, members of Congress, judicial officials and government functionaries are under investigation for corrupt activities. Through corruption, narcotics interests, with their vast sums of illegally-acquired funds, are influencing the political, judicial, and legislative processes The Prosecutor General's office, under the direction of Alfonso Valdiceso, has pursued major investigations of government corruption, initiating the now-famous "Case 8,000," which has implicated over 100 political figures in drug-related corruption. Nine senators are under criminal investigation, as well as the Samper Adminis-

14. U.N. Convention, *supra* note 3, arts. 3, 5, 6, 28 I.L.M. at 502, 504-07.

15. *Economic Development Bill*, 1995 Supp. to Official Gazette § 3(2) (Nov. 6, 1995).

16. *Id.* § 5(1).

17. *Id.* § 7(a).

18. *Id.*

19. *Id.* § 7(b).

20. *Id.* § 5(1).

21. TREATIES IN FORCE, *supra* note 5.

22. 22 U.S.C. § 2291(h) (1994).

tration's Comptroller General, the Attorney General, and former senior Samper presidential campaign officials for accepting money or favors from the Cali syndicate or its front organizations.

In August, Fernando Botero, the manager of President Samper's 1994 election campaign and formerly his Defense Minister, was arrested in connection with charges that the campaign was financed by contributions from narco-traffickers Botero later alleged that President Samper knew and approved of the narco-contributions There remain unanswered questions as to whether senior officials of the GOC engage, encourage, or facilitate the illicit production or distribution of such drugs or substances, or the laundering of proceeds from illegal drug transactions.²³

Corruption is a lamentable problem in all countries, but it is more than lamentable when unchecked or officially condoned corruption operates to check international efforts to address crime. Indeed, high level or unchecked corruption harms all nations, not just the country in which the corruption occurs. For example, one hundred and seventy-six nations are members of Interpol. Each of these nations accepts the Interpol Constitution and believes that their energy will be rewarded by the availability of multinational cooperative investigative assistance in criminal cases. No member expects that its police or the police of another member will utilize the system for corrupt purposes. However, the Interpol Constitution has no mechanism in which members are obligated to deal with each other and the organization honestly. The Constitution has no mechanism to report or investigate suspected corruption in the system, nor does it provide sanctions for any of the members for any conduct other than the failure to pay dues. Similarly, the new Europol Convention²⁴ has little regard to the control of official corruption. The Europol Convention requires each member nation to establish a "national unit." National units, in turn, are required to "ensure compliance with the law in every exchange of information between themselves and Europol."²⁵ However, the Convention has

23. *INCSR*, *supra* note 11, at 84.

24. Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), July 20, 1995, Europol 54, Rev. 5, Annex (1995), *opened for signature* July 26, 1995 (on file with the *Fordham International Law Journal*).

25. *Id.* art. 4(1).

no mechanism for reporting and investigating corruption among its participants.

Organized crime, and particularly drug trafficking, has demonstrated the capacity to amass gigantic sums of money. That money can and has been used to corrupt entire countries and economies by buying legitimate, necessary industries and thus, holding the economy hostage or by the more expedient method of buying the political structure. There continue to be many examples of this capability to corrupt particularly in the developing democracies of Eastern Europe²⁶ wherein organized criminals appear to be the first persons to embrace capitalism. Therefore, no one with any experience in current affairs should be surprised to encounter corruption while undertaking law enforcement efforts among countries. It follows then that the expectation of success in multinational endeavors will continue to be frustrated without aggressive actions to address corruption.

C. *Multilateral Agreements Must be Reassessed*

Traditionally, during the Cold War era, the topic of public corruption was not addressed among allied nations. Certainly, the concept of non-interference with domestic affairs of another sovereign was relied upon to justify this silence. Most importantly, decisions concerning diplomatic issues were clouded by the alignment of allies and a strong interest in not driving allied nations into the arms of one's adversary. In the First International Narcotic Control Strategy Report ("INCSR"), which was reported to Congress in 1987, countries not certified as being within the national interest included: Afghanistan, Iran, and Syria. Laos and Lebanon, however, were certified as being within the national interest. The remaining nineteen countries cited were all within the U.S. sphere of influence and all were certified.

It would appear that the time has passed when considerations concerning the reference to corruption problems can be avoided on the basis of diplomatic niceties nor extrinsic considerations. It is reassuring to see that Congress requires and the State Department is becoming more candid concerning issues of public integrity in their report. The Foreign Assistance Act requires the 1995 INCSR to contain a report on the extent a coun-

26. Sterling, *THIEVES WORLD* (1994).

try has "taken legal and law enforcement measures to prevent and punish corruption, especially by senior government officials that facilitates the production processing on shipment of narcotic and psychotropic drugs and other controlled substances or discourages the investigation on prosecution of such acts."²⁷ It is certainly true that the "public diplomacy" of publishing matters of corruption for world consideration is one way to draw attention to the issue and perhaps cause the offending sovereign to address the issue domestically. However, where organized crime is firmly entrenched and where corruption reaches the highest levels of government, it is doubtful that mere public exposure of this conduct will be enough to cause it to be cured. The Foreign Assistance Act provides sanctions that include the withholding of some bilateral assistance to a country not certified by the President and the United States voting against multilateral development bank extension of credit to such countries.²⁸ Ironically, the assistance withheld is usually assistance in addressing law enforcement shortcomings like human rights and public integrity. The efforts to address corruption by the Foreign Assistance Act are commendable and take us beyond the earlier prohibitions of mentioning corruption as being intervention in the domestic affairs of a fellow sovereign. However, these efforts do not address all of the shortfalls in cooperation.

The United States, as a participant in multilateral efforts to combat organized crime, needs to recognize that the criminal conduct being addressed individually and personally harms persons in the United States. Corruption on the part of participants in these crime-fighting enterprises, which frustrates the purposes of the enterprises, also personally harms persons in the United States. Given that recognition, it would appear that addressing corruption should enjoy a higher priority in the process of dealing with other nations. If the need to combat corruption that harms multilateral efforts comes to enjoy a higher priority, then it would appear that the instruments which call for multilateral cooperation should be reexamined in this light.

A reexamination of multilateral instruments might determine that those instruments creating multinational law enforcement organizations need reformation. In those organizations,

27. 22 U.S.C. § 2291(h)(a)(1)(c) (1994).

28. 22 U.S.C. § 2291(j)(a) (1994).

we must give to the participating sovereigns the ability to report, investigate, and sanction public corruption which influences that organization. Thus, in the instance of Interpol, the Constitution should give to the organization the authority to examine criminal conduct by one of the members when that conduct uses the instruments of the organization to further a corrupt aim. Therefore, for instance, if a police department in return for a bribe sends a fictitious message through Interpol to another police department for the purpose of locating the assets of an innocent person so that that person might be victimized by criminals, then that conduct should be sanctioned. The organization should have the authority to supervise its system to ensure that the international system set up by the organization is not used for furtherance of a criminal purpose. The organization should have the power to impose a range of sanctions, including terminating communications with countries that use its communicating facilities for criminal purposes.

In the instance of multilateral conventions and bilateral treaties, the authority to address and sanction criminal conduct which frustrate the goals of the treaties should be addressed within the treaties. The sanctions thus developed should be consistent with the purpose of the treaty. An example might be a treaty which regulates the trade in essential and precursor chemicals, that is those chemicals necessary or desirable in the manufacture of controlled substances. The sanction for corruptly frustrating the goals of the treaty could be as severe as the barring of the corrupted nations from world trade in those chemicals.

CONCLUSION

The initiative being set out is not to invite nations to interfere in the domestic affairs of other nations nor for nations to set themselves up to judge all political and public conduct of their neighbors. This initiative would, however, invite nations to examine whether or not criminal conduct on the part of one of their partners can frustrate a common goal that they have established with their partners. Nations are invited at the inception of agreements to agree on vehicles for investigating corruption which frustrates the agreement and appropriate sanctions for purposely violating the requirements of honesty.