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The Challenges of Fighting Global Organized Crime in Latin America

Luz Estella Nagle*

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Abstract

This Article examines organized crime in Iberoamerica. It also examines the international mechanisms implemented to combat it, specifically the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1996 Organization of American States Inter-American Convention against Corruption of 1996, and the United Nations Convention on Transnational Organized Crime of 2000. It then examines whether these efforts have been successful or unsuccessful, and whether multilateral instruments are a formidable tool in the war against international organized crime or merely toothless tigers.

THE CHALLENGES OF FIGHTING GLOBAL ORGANIZED CRIME IN LATIN AMERICA

*Luz Estella Nagle**

SUMMARY

As national borders have opened and trade barriers have fallen, transnational crime has grown at unprecedented levels. This is particularly true throughout Latin America where the nexus between drug trafficking, money laundering, and trafficking of weapons, humans, and false documents such as passports, identities, and business records, and other contraband, has found fertile ground among both corrupt government officials and guerrilla groups who use the proceeds of international criminal enterprise to maintain ill-gotten wealth, fuel insurgency, and destabilize the economic resources of the region.

This Article examines organized crime in Iberoamerica; the international mechanisms implemented to combat it, specifically the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1996 Organization of American States Inter-American Convention against Corruption of 1996, and the United Nations Convention on Transnational Organized Crime of 2000; whether these efforts have been successful or unsuccessful; and whether multilateral instruments are a formidable tool in the war against international organized crime or merely toothless tigers.

* Luz Estella Nagle is an Associate Professor of Law at Stetson University College of Law in Gulfport, Florida, where she teaches international law, international criminal law, Latin American business law, and seminars in comparative law. Professor Nagle served as a judge in Medellín, Colombia, in the mid-1980s until assassination attempts by drug traffickers compelled her to emigrate from Colombia to the United States. Her writings and presentations on national security law, mutual legal assistance, international organized crime, terrorism, and guerrilla insurgency probe the realities of foreign policy and the rule of law in the Americas from a perspective that reflects her training and experience in both the Anglo-American and continental law systems. Professor Nagle holds an LL.D. from the Universidad Pontificia Bolivariana, a J.D. from the College of William and Mary, an LL.M. from UCLA Law School, and an M.A. in Latin American studies from the University of California at Los Angeles.

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INTRODUCTION

Latin America has entered the age of advanced technology, increased speeds of information transmission, and rapid globalization.¹ Trade barriers have fallen, national borders have become less isolating, State control has diminished, and ideas have transcended geographic limitations with the stroke of a key-

1. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS IX* (2002) (on file with author). According to Stiglitz, globalization is “the removal of barriers to free trade and the closer integration of national economies” which is assumed to “be a force for good [and] has the potential to enrich everyone in the world, particularly the poor.” *Id.*

board. Such advances have made Iberoamerica part of the “global village”,² one in which Nations of the region share knowledge and goods, overcome great distances, and undergo increased migration and societal transformation. These developments, however, have also unleashed a sinister “assembly” that threatens regional and national security and international stability — global organized crime.³

These new players have established transnational criminal networks that are growing at unprecedented levels,⁴ and the immense fortunes to be made from activities such as money laundering, illegal arms transactions, and trafficking in human beings and drugs have encouraged alliances between organized crime, government officials, politicians and/or corporate individuals.⁵ Moreover, so much profit from illegal enterprise has in turn discouraged serious commitment from Latin American leaders and politicians at the national and international level from implementing meaningful legislation and prosecution of responsible actors.

Corruption, violence, and political, social, and economic instability have plagued Latin American Nations for generations. The fragility of the rule of law in such a volatile landscape has allowed organized criminal enterprises of many forms to take root in fertile ground. The problem has grown so severe that organized crime in the region has spilled beyond the western hemisphere, embracing alliances and associations with criminal organizations as far flung as the former Soviet bloc, the Middle East, and China.⁶ More alarming still is that organized criminal

2. For an excellent discussion on the meaning and effects of globalization, see HERNANDO GOMEZ BUENDIA, *THE LIMITS OF THE GLOBAL VILLAGE: GLOBALIZATION, NATIONS AND THE STATE* (1995) (on file with author).

3. See Fletcher N. Baldwin, Jr., *Organized Crime and Money Laundering in The Americas*, 14 FLA. J. INT'L L. 41, 42 (2001). Baldwin called global organized crime “the new citizen” and states that the title “global organized crime” is given by the United Nations (“U.N.”), the financial action task force, and the Basel Declarations. *Id.* at 42.

4. See John Lloyd, *The Godfathers Go Global*, NEW STATESMAN, Dec. 20, 1999, available at http://www.findarticles.com/cf_0/m0FQP/4467_128/59134979/p1/article.jhtml.

5. See Baldwin, *supra* n.3. According to a 1999 U.N. Development Program, organized crime controls “in the neighborhood of 600 billion dollars to well over 1.7 trillion dollars.” *Id.* at 44.

6. See LIBRARY OF CONGRESS, *A GLOBAL OVERVIEW OF NARCOTICS-FUNDED TERRORIST AND OTHER EXTREMIST GROUPS, A REPORT PREPARED BY THE FEDERAL RESEARCH DIVISION 26* (May 2002), available at <http://www.iacdf.org/eng/Documents/NarcoticsFundedTerroristExtremists.htm>. The report states: “Brazilian security agencies claimed that

groups in the Americas have linked up with terrorist organizations that depend on the proceeds of organized crime to fuel their campaigns of regional destabilization and global terrorism, particularly the Colombian guerrilla group the *Fuerzas Armadas Revolucionarias de Colombia* ("FARC"). In Buenos Aires, Argentina, the Hezbollah has been blamed for the bombings of Israeli targets in the 1990s (the Israel embassy in 1992, and the Mutual Aid Society building in 1994). The support for the operations having originated in the tri-border region between Argentina, Brazil, and Paraguay.⁷ While the reasons may be many, organized crime in Latin America has flourished primarily due to the rigidity and excessive formalism of certain national laws, and differences in the laws from one jurisdiction to another, which together pose a daunting obstacle to fighting international criminal organizations. Combined with a lack of cooperation in the investigation, prosecution and/or extradition of such groups, the current situation in Iberoamerica is one in which organized crime overwhelms the rule of law in the Americas, despite many efforts and the promulgation of multilateral mechanisms.

In 2000, the United Nations ("U.N.") implemented the Convention against Transnational Organized Crime ("UNTOC")⁸ in an attempt to bring relief to Nations struggling to fight international organized criminalism within their borders. It was intended that regions of the world such as Latin America would benefit from a clearly articulated international agenda in which global cooperation and a protocol for developing uniformity in the domestic criminal laws of signatory Nations would eventually break the back of international organized

the financial aid offered in 2000 by groups in the Triborder Region to Islamic and Middle Eastern terrorist organizations, such as [Hezbollah], Hamas, and the Islamic Jihad, totaled \$261 million." *Id.* The report notes the strengthening influence of organized crime networks in the triangle comprising various nationalities—Colombians, Brazilians, Chinese, Lebanese, Nigerians, Russians, Ghanaians, and individuals from the Ivory Coast. These groups are active in Paraguay and along the drug trafficking route from Colombia to the United States and Europe. The report notes that most of these clandestine operations take place in Ciudad del Este, considered a regional center for drug trafficking and arms smuggling. The transactions mostly involve bartering drugs for weapons from Colombian armed rebel groups. *Id.*

7. STEFAN LEADER, *Hezbollah: A Multidimensional Threat to the Security of Israel*, 14(4) JANE'S INTELLIGENCE, 28 (Apr. 2002) (on file with author).

8. United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex I, at XXX, U.N. Doc. A/55/25 (2001) [hereinafter UNTOC].

crime syndicates. Other conventions, however, had already addressed conduct included in the UNCTOC, and one wonders what went wrong with predecessor conventions and their implementation, or lack thereof, for the Nations of the world to be addressing similar behaviors under yet another convention.

The purpose of this Article is to examine this conundrum, and address the prospects and obstacles Iberoamerican Nations face in implementing UNCTOC, and whether it and other multilateral instruments to combat global organized crime are “paper tigers”. The Article looks at two prior conventions already concluded and ratified by many Latin American countries: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“ITND”),⁹ and the 1996 Inter-American Convention against Corruption (“IACAC”)¹⁰ promulgated by the Organization of American States (“OAS”). Along the way, this Article examines specific organized crime activities running rampant in the region, their characteristics, causes, and some of the individuals and groups responsible, and considers how the multilateral mechanisms may or may not be able to curtail this modern day plague.

Part I of this Article, takes a look at organized crime *per se*, its formation, and its effect on the world community. Part II explores the role of the U.N. in leading the global fight against transnational organized crime, the UNCTOC, and its commitments and hope. Part III covers those Latin American countries that are signatories to the UNCTOC, and explores the challenges of enforcing the UNCTOC throughout the region. Part IV addresses the IACAC, its implementation, barriers to effective enforcement, and current anti-corruption efforts. Part V is an overview of the bilateral and multilateral cooperation in the region and how effective the effort has been in the prosecution and punishment of criminals.

9. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 14, Dec. 19, 1988, 28 I.L.M. 493 (1989), available at <http://www.incb.org/e/conv/1988/index.htm> [hereinafter ITND].

10. Inter-American Convention Against Corruption, opened for signature Mar. 29, 1996, reprinted in 35 I.L.M. 724 (1996) [hereinafter IACAC]

I. *TRANSNATIONAL ORGANIZED CRIME: NO
CLEAR DEFINITIONS*

The international community recognizes that organized crime and its attendant activities (drug trafficking, money laundering, extortion, fraud) pose a dire threat to global stability.¹¹ “[T]hose involved in it have no respect for, or loyalty to Nations, boundaries, or sovereignty.”¹² Even though organized crime is a global problem, there is no uniformly agreed upon definition of what constitutes organized crime or transnational organized crime.¹³ Definitions vary from State to State,¹⁴ and of even more concern, may vary within a State.¹⁵ Some concepts are too vague while other concepts center on a single activity. Still, other definitions combine various characteristics into a one-dimensional concept.¹⁶

11. See *Southeast European States Declare Organized Crime Top Enemy*, DEUTSCHE PRESSE-AGENTUR, June 19, 2002. In June 2002, for instance, nine European Nations — Yugoslavia, Albania, Bosnia, Bulgaria, Greece, Macedonia, Romania, Turkey and Croatia — declared organized crime as “enemy number one” and stated in a joint declaration that organized crime is the “most serious threat to international peace and stability, but also an obstacle to democratic and reform processes . . .” *Id.*

12. Paula Dobriansky, *The Explosive Growth of Globalized Crime 2* (Aug. 2001), available at <http://usinfo.state.gov/journals/itgic/0801/ijge/gj01.htm>.

13. See Bojan Dobovšek, *Organized Crime — Can We Unify the Definition?* (1996), available at <http://www.ncjrs.org/policing/org323.htm>. See also Gerhard O.W. Mueller, *Transnational Crime Definitions and Concepts*, available at http://www.frankcass.com/jnls/toc_4-3&4.htm.

14. As for evidence of multiple definitions, see Klaus von Lampe, *Defining Organized Crime*, available at <http://people.freenet.de/kvlampe/OCDEF1.htm>.

15. See Klaus von Lampe, *The Concept of Organized Crime in Historical Perspective*, available at <http://people.freenet.de/kvlampe/1auhtm01.htm>. Von Lampe describes the conceptual debate of organized crime within Germany. Finding a definition was crucial to revising law enforcement strategies. During the 1970s, even though a definition was agreed upon, the opposition won over the fear of losing jurisdiction over criminals. Today, the German police works with a 1990 definition contained in the guidelines for criminal investigations, but which is a “very vague and broad concept.” *Id.*

16. See von Lampe, *Defining Organized Crime*, *supra* n.14. Von Lampe offers various categories for assessing statements on organized crime. He presents a one-dimensional concept with three approaches: activity, organization and system.

The activity-approach equates organized crime with certain types of criminal activity, for example with the provision of illegal goods and services, regardless of the degree of organization of those involved in these activities and regardless of their socio-political position. The organization-approach focuses on organizational entities, regardless of the type of criminal activity in which they are involved and regardless of their socio-political position. The system-approach perceives organized crime in essence as a social condition in which legitimate and criminal structures are integral parts of one corrupt socio-politi-

A clear conceptualization of this phenomenon is crucial to the enactment of proper legislation, and for appropriate allotment of resources, building strategies, designing of law enforcement training, and search for relevant international cooperation. Lack of clarity and uncertainty creates obstacles to the fight against these organizations because law enforcement cannot determine when and if what is being confronted is common criminalism or crime syndicates.¹⁷ Moreover, misunderstanding and misinterpretation of the reality of syndicate organizations cause wrong legislative responses that limit the effectiveness of crime control measures with the result that scarce resources then risk being misallocated, stereotypes continue to be perpetuated, and civil liberties become endangered.¹⁸

What agreement does exist between those studying and attempting to define transnational organized crime centers on recognition of common attributes that delineate organized crime from other criminal activity. These attributes are:

1. involvement in criminal operations that cross [S]tate boundaries, often in response to a demand for goods that are illegal;
2. the promotion of corruption of government officials (often exploiting economically weakened [S]tates) with the goal of influencing or neutralizing the instruments of the [S]tate;
3. the possession of considerable resources;
4. a hierarchical, rigid, or compartmentalized organizational structure that uses internal discipline and thereby protects

ical system, regardless of either the types of crime promoted or the degree of organization of those supporting the system.

Id. Von Lampe notes that multi-dimensional approach is based on:

an organization-centered understanding of organized crime but includes other criteria as well. The various criteria of multi-dimensional conceptions can be distinguished by using a classification of four levels of complexity:

- 1) the individual characteristics of "organized criminals";
- 2) the structures, for example networks or groups which connect these individuals;
- 3) the over-arching power structures that subordinate these structural entities; and finally
- 4) the relation between these illegal structures and the legal structures of society.

Id.

17. For Germany's definition of organized crime, see von Lampe, *Defining Organized Crime*, *supra* n.14, *Germany: Standards for Criminal and Summary Offense Proceedings*.

18. See *Transnational Organized Crime: Abstracts of Articles in Issue 3.3*, at http://www.frankcass.com/jnls/toc_3-3.htm.

- the leadership, who carry out organizational, administrative and ideological functions, from detection or implication in commission of crimes;
5. the laundering of proceeds and the use of legitimate "front" businesses to hide criminal activities;
 6. the use of violence;
 7. the capacity to "engage in a range of activities," and the "professionalism of its participants";
 8. the aim of the realization of large financial profits as quickly as possible;
 9. operation on a sustained, long-term basis; and
 10. the tendency to organize international operations together with other groups of different nationalities.¹⁹

The problems of the lack of a definition of organized crime are articulated along contrasting lines, ranging from historical quantifications to categorization of the activities in which syndicate organizations are involved. The historical approach may be described thus:

Today's concept of organized crime is heterogeneous and contradictory when we take into account the entire range of pertinent statements in the criminal-policy debate. But when we focus on the imagery that dominates the general perception of organized crime we can ascertain a tendency towards equating organized crime with ethnically homogeneous, formally structured, multi-functional, monopolistic criminal organizations which strive to undermine and subdue the legal institutions of society.²⁰

Others affirm that the lack of a generally accepted definition of organized crime is:

due mostly to the quick development and changing of the forms in which organized crime manifests. Since high professionalism, organization and nearly unlimited financial means are characteristic for organized crime, the situation in this field is constantly aggravating.²¹

The methods used to target common criminals differ widely from those used to target organized crime, and not knowing if a

19. CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 *BERKELEY J. INT'L L.* 53, 56 (2000).

20. See von Lampe, *Defining Organized Crime*, *supra* n.14.

21. Dobovšek, *supra* n.13.

target is a common criminal or part of an organized group impedes a successful fight. The inability to distinguish between the two is often the result of contradictions or differences in the legislative language from State to State, and demonstrates a failure to streamline complex evidentiary procedures and dissimilar “methods and means”.²²

As the importance of reaching a uniform definition continues to be ignored, organized crime becomes more global, thereby influencing and further negatively affecting international economies while gaining control of more countries. Transnational syndicates are involved in many activities: money laundering; trafficking in humans and body parts; smuggling of illegal weapons; biological, chemical, and nuclear materials; drug trafficking; trafficking in wildlife; and a growing illegal trade in intellectual property,²³ just to mention a few. International crime has expanded beyond the traditional understanding, as indicated as follows:

Certain types of international crime — terrorism, human trafficking, drug trafficking, and contraband smuggling — involve serious violence and physical harm. Other forms— fraud, extortion, money laundering, bribery, economic espionage, intellectual property theft, and counterfeiting — don’t require guns to cause major damage. Moreover, the spread of information technology has created new categories of cyber crime.²⁴

At the same time countries can be producers/exporters of organized crime and recipients/actors of organized crime. For instance:

North America is a major producer and the largest import market, while Western Europe produces, exports and imports organized crime. Latin America, Africa and Asia, albeit with many local variations, are producers and exporters of organized crime products (for example, drugs), services (for exam-

22. *Id.*

23. See COPYRIGHT PIRACY AND LINKS TO CRIME AND TERRORISM, TESTIMONY OF JOHN G. MALCOLM, DEPUTY ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE BEFORE THE HOUSE SUB-COMMITTEE COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (Mar. 13, 2003), available at <http://www.house.gov/judiciary/malcolm031303.htm> [hereinafter COPYRIGHT PIRACY].

24. Dobriansky, *supra* n.12.

ple, Nigerian couriers) and proceeds of crime.²⁵

My own definition would follow closely that articulated by the U.N. in 1975:

“Organized crime” is understood to be the large-scale and complex criminal activity carried on by groups of persons, however loosely or tightly organized, for the enrichment of those participating and at the expense of the community and its members. It is frequently accomplished through ruthless disregard of any law, including offences against the person, and frequently in connection with political corruption.²⁶

While this definition is expansive in scope, there is one important word missing that articulates what I believe is a cornerstone of successful organized criminal enterprises — the ability to instill fear in those either falling prey to organized crime or working to combat it. Criminal organizations “do not hesitate to threaten or injure those who attempt to interfere with their illegal operations.”²⁷ There are widespread reports in the software industry, for instance, where industry executives, particularly in Asia, “have been threatened and their property has been vandalized by members of these syndicates when their anti-piracy efforts strike too near the illegal operation. Government officials have also been threatened.”²⁸ The definition provided by Interpol recognizes fear as an intrinsic component of organized crime: “Any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption.”²⁹

Regardless of today’s inconsistencies and contradictions as to the meaning given to organized crime, it remains peremptory to construct a uniform definition if the world community is to seriously confront and triumph over the globalization of organized crime. Regardless, law enforcement cannot wait on seman-

25. Ugljesa Zvekic, American Society of International Law Proceedings, *International Cooperation and Transnational Organized Crime*, 90 AM. SOC’Y INT’L L. PROC. 533, 534 (1996).

26. United Nations, *Changes in Forms and Dimensions of Criminality — Transnational and National* (Working paper prepared by the Secretariat for the Fifth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Toronto, Canada, Sept. 1-12, 1975).

27. See COPYRIGHT PIRACY, *supra* n.23.

28. *Id.*

29. von Lampe, *Defining Organized Crime*, *supra* n.14. Definition of Paul Nesbitt, Head of Organized Crime Group, cited in FENTON BRESLER, INTERPOL 319 (1993).

tics to deal with international criminal organizations, and in the absence of a guiding definition, three approaches have proven successful in the fight against organized crime: controlling contraband markets, controlling the exchange of money and the proceeds of crime, and imposing international cooperation.³⁰ Of the three, international cooperation is the highest priority for confronting transborder organized criminal enterprises.³¹

II. ORGANIZED CRIME IN LATIN AMERICA

Organized crime is present in Latin America wherever corruption has opened the door to international criminal syndicalism. Organized crime was part of the fabric of Latin American governments for most of the twentieth century, and despite efforts to combat it via multi-lateral cooperative efforts, transnational criminal activities are thriving in the hemisphere. To some extent, it is even the mainstay of many local economies in the region.

A. *Origins*

We tend to think of organized crime in Latin America as centering on the drug trade and weapons smuggling, and we tend to point fingers at drug producing Nations of the Andean region and Mexico. The origins of organized crime, however, can be traced not to Colombia, but to Latin American Nations where antidemocratic strongmen throughout the last century were able to consolidate power and enrich themselves and their circle of oligarchs over the course of a number of years. "Consider Paraguay under General Alfredo Stroessner, Panama under General Manuel Antonio Noriega, Nicaragua under General Anastasio Somoza, Haiti under the Duvaliers, the Dominican Republic under Rafael Leónida Trujillo, Cuba under Fulgencio Batista, and a host of others."³²

Organized crime found fertile soil in Cuba during the 1930s when American mobsters such as Meyer Lansky, Charles "Lucky"

30. See Dobovšek, *supra* n.13.

31. See Zvekić, *supra* n.25, at 534.

32. See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 271 (1993) (on file with author) (*citing to* Laurence Whitehead, *On Presidential Graft: The Latin American Evidence*, in MICHAEL CLARKE, ED., CORRUPTION: CAUSES, CONSEQUENCES, AND CONTROL (1983)).

Luciano, Frank Costello, and Santo Trafficante, a noted mobster from Tampa, Florida, formed a business and development alliance with Batista. "In return for cash payments to the Cuban dictator, the American criminals were provided with lucrative casino concessions as well as substantial freedom in the conduct of their other criminal activities."³³ Under Batista's patronage, the American gangsters turned Cuba into the "Latin Las Vegas". The syndicates began developing a hotel and casino empire on the island after Batista announced that he would match "dollar for dollar, any hotel investment over \$1 million, which would include a casino license."³⁴ Under this arrangement Meyer Lansky "became the center of the entire Cuban gambling operation."³⁵ When the Batista regime fell to Fidel Castro's "revolution" in January 1959, organized crime on the island moved on to other islands throughout the Caribbean. In Haiti:

Francois ("Papa Doc") Duvalier entertained Joseph Stassi, a member of the Carlo Gambino family of Costra Nostra, at the Presidential Palace. Later, a gambling concession was issued to Vito Filippone, a Bonnano family man. In 1964 and 1965, Cosa Nostra men pushed two series of Haitian lottery tickets in this country.³⁶

At the same time the Dominican Republic was also replacing Cuba as a mafia stronghold:

[Rafael Trujillo] bought machine guns and other small arms from Joseph ("Bayonne Joe") Zicarellia, a Capo in the Bonnano family, after the U.S. had shut him off from military aid. Later, Zicarelli arranged for the assassination of Andres Requena, an anti-Trujillo exile living in New York, and for the kidnapping and delivery to Santo Domingo of Jesús de Galindez, another political enemy of the dictator.³⁷

Over time, island Nations such as Haiti, St. Lucia, and the Dominican Republic became targets of opportunity for organized criminal groups to develop a steady flow of income from gambling and tourism, the sex trade tied to tourism, and money

33. See NADELMANN, *supra* n.32, at 272.

34. See Jerry A. Sierra, *Batista*, available at <http://www.historyofcuba.com/history/batista.htm>.

35. *Id.*

36. See NADELMANN, *supra* n.32, at 272 (quoting from RALPH SALERNO & JOHN S. TOMPKINS, *THE CRIME CONFEDERATION* 386-7 (1969)).

37. *Id.*

laundering through front businesses and formal financial institutions catering to offshore banking from the United States and Europe. In 2000, for example, it was estimated that somewhere on the order of US \$60 billion of drug money was laundered in the Caribbean region.³⁸

As for Cuba, it has long been believed that the Castro regime during the late 1980s came to view drug trafficking from Latin America, specifically Colombia, into the United States as a political mechanism for destabilizing the U.S. government, while at the same time enriching corrupt players within the Castro government and providing hard currency to support the Cuban military presence in Africa.³⁹ Cuba became an important transshipment point across the Caribbean corridor into South Florida. Following the collapse of the Soviet bloc and the suspension of foreign aid to Cuba, drug trafficking became a more important means of providing hard currency to maintain the government infrastructure and provide a source of personal enrichment for corruption officials.

B. Growth Throughout the Region

During the last decade, Russian gangsters began moving into the rest of the Caribbean and established a network of associations with small Cuban gangs and criminal groups on other Caribbean islands, such as Haiti, the Dominican Republic, and Jamaica, and established a thriving arms-for-drugs trade as well as drug and prostitution operations to serve the burgeoning tourist industry in the Caribbean Basin.⁴⁰ By the end of the 1990s, international criminal organizations, as well as terrorist organizations such as the Irish Republican Army, were firmly established in the Caribbean and elsewhere in Latin America and engaged in money laundering, drugs and weapons trafficking, prostitution, and commercial land development.

The growth throughout Iberoamerica of organized criminal

38. Anthony T. Bryan, *Transnational Organized Crime: The Caribbean Context*, in THE DANTE B. FASCELL NORTH-SOUTH CENTER WORK PAPER SERIES (Working paper No. 1 Oct. 2000).

39. Bruce Bagley, *Globalization and Transnational Organized Crime: The Russian Mafia in Latin America and the Caribbean* 13, Oct. 31, 2001, at http://www.mamacoca.org/feb2002/art_bagley_globalization_organized_crime_en.html.

40. *Id.* at 9-13.

groups from the former Soviet bloc is, by most accounts, downplayed by governments in the region, and not thought to

constitute a direct security threat to either the individual [S]tates of the region or to the United States. It does, however, contribute indirectly to the entire region's growing economic, social and political turmoil and insecurity and thus poses a major challenge to economic growth, effective democratic governance and long-run regime stability throughout the hemisphere.⁴¹

Nonetheless, the Russian mobs are active in most Latin Nations, and their operational methods of bribery and intimidation cannot help but contribute to destabilizing the region. The activities of these groups also contribute to sustaining and prolonging the guerrilla conflict in Colombia and political violence in Nations such as Venezuela and Argentina.⁴²

The quandary that Latin American countries have in dealing with criminal syndicates is due, in large part, to a misunderstanding of organized crime, its characteristics, and operational schemes. Lawmakers and law enforcement agents have compartmentalized criminal activity to their detriment. They have focused on the manifestations of organized crime at the street level instead of emphasizing the syndicates' all-inclusive and menacing influence on the entirety of society. Such compartmentalization hinders the ability of the affected governments to successfully respond to the problem, because the focal point are the symptoms and not the root, and the emphasis is on the individual parts and not on the whole.

The approach taken by Latin American law enforcement is one of policing regular criminal activity, while policing criminal syndicates requires special police training and resources often not available. Crime prevention activities are directed toward and end at the street level, while more harmful activity existing beyond the street is largely discounted. Good record keeping is a crucial tool in the identification of criminal syndicates and few Latin American countries keep accurate records or properly analyze statistical data. Compartmentalization exacerbates the failing approach taken when data is recorded and sought, and crucial information is often disregarded. Often, when investigating

41. *Id.*

42. *Id.*

criminal activity, the information is only sought from the law enforcement agencies, ignoring that monetary data is also obtainable from the country's treasury, central bank, or tax collector, and that even trade statistics from legitimate corporations and industry also afford an indication of the worth and scale of organized criminal activity.

In some instances, law enforcement may fail to connect the dots with crimes that are actually related and committed by the same criminal enterprise. Law enforcement lacks proper training to recognize that an organized criminal syndicate is behind the illegal activities. For instance, stolen cars or stolen and forged documents may not be independent crimes; they can be part of a bigger scheme involving transnational criminalism. Such seemingly unrelated crimes are assigned to different agencies that do not work together or have no established protocol for sharing intelligence or cooperating in an investigation. Moreover, given the level of institutional corruption, criminal organizations are even run under the noses of law enforcement, as has occurred in Brazil, where jailed organized crime members continue their enterprises from behind prison walls:

Using mobile phones, they supervise cocaine trafficking, order kidnappings and executions, and negotiate the purchase of weapons, including powerful anti-aircraft missiles, on the international black market.

Earlier this year, prosecutors investigating organized crime in Rio de Janeiro recorded telephone calls made by inmates at the maximum security *Bangú 1* prison. The tapes provided information about the operations of drug trafficking rings, their contacts abroad, their high technology equipment and the large amounts of money that flows through the prison with the assistance of corrupt guards.

Among the hundreds of hours of taped conversations was one in which Luiz Fernando da Costa, better known as *Fernandinho Beira-Mar*, was apparently arranging the purchase of weapons, including a *Stinger* missile, although authorities are not sure whether he planned to resell them or use them in Brazil.

Da Costa, who was captured in January in Colombia while negotiating to provide the Revolutionary Armed Forces of Colombia (FARC) with weapons in exchange for cocaine, heads a criminal gang called the *Red Command* and controls more than 60 percent of the Rio de Janeiro drug trade from

prison. On Sept. 11, he led a prison riot in which Red Command members killed four leaders of the rival Third Command gang in what authorities said was an attempt to gain control of drug sales in at least 35 Rio de Janeiro *favelas* . . . Da Costa was placed in solitary confinement after the uprising.⁴³

Criminal syndicalism has a long tradition in Latin America where weak and unstable States throughout the region provide the fertile soil for criminal organizations to establish safe havens and thriving transnational corridors for conducting operations.⁴⁴ Such corridors include the border regions of Colombia encompassing Ecuador, Brazil, and Venezuela, and the tri-border region of Paraguay, Brazil and Argentina.⁴⁵ Smuggling of contraband throughout the region has been the mainstay of informal and formal local economies and to many, the sole means of staying barely above absolute poverty. This has been particularly true in Colombia, where the Nation's geographic proximity has made the Andean Nation a crossroads for consumer goods and other contraband moving between North and South America.

Smuggling predated drug trafficking in Colombia and is often blamed for having fostered the tradition of unrestrained illegal trading that enabled drugs to become the country's largest export. Today, the National Federation of Merchants, a private group, estimates that contraband accounts for almost half of imports, which last year totaled more than \$11 billion.

Indeed, contraband is imbedded in the culture of small business. Note one small vendor in the capital of Bogotá, "I do not have the money to buy from big distributors or to get good Referrals" from bigger businesses, Mr. Yepes said. "So I have to sell contraband." Such informal businesses are called *sanandrecitos*, "after the Colombian free-port island of San Andres in the Caribbean . . . the 60,000 businesses like Mr.

43. Ricardo Soca, *Brazilian Drug and Arms Traffickers Run Their Crime Enterprises From Prison*, *LATINAMERICA PRESS*, Jan. 2, 2003, at <http://www.lapress.org/article.asp?lanCode=1&artCode=3179>.

44. For a concise and well-informed analysis of the relationship between drug producing and transshipment Nations in South America, see Jeremy McDermott, *Instability in the Andean Region*, 14(4) *JANE'S INTELLIGENCE* 13 (Apr. 2002) (on file with author).

45. Tamara Makarenko, *Colombia's New Crime Structure Takes Shape*, 14(4) *JANE'S INTELLIGENCE* 19 (Apr. 2002) (on file with author).

Yepes's generate about half a million jobs all over the country," according to spokesmen for Fesacol, the *sanandrecitos'* association. That is a significant source of employment in a country where the formal, legal economy employs five million people.⁴⁶

III. UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME⁴⁷

The challenge of drafting and embracing a multilateral instrument to address the international dimensions of organized crime is dependent upon the inclusion of mechanisms that combat the individual components of activities, which constitute organized crime. Any international convention or protocol, it has been argued, must include key elements. Some elements for combating global organized crime are:

1. Recognition of the threat and need for cooperation;
2. A description and/or definition of the features and activities of international organized crime;
3. Required harmonization of national legislation in prohibiting the defined activities of organized crime;
4. Regulation of commercial and banking sectors that increases transparency, guards against money laundering, and eliminates tax havens;
5. Required adoption of the U.N. Model Treaties on Extradition, and Mutual Assistance in Criminal Matters;
6. Establishment of improved centralized information gathering and sharing;
7. Measures aimed at the upper echelons of criminal organizations, including required domestic criminalization of participation, conspiracy, etc.; and
8. Freezing and forfeiture of the proceeds of organized crime.⁴⁸

A response to international calls to attack global organized crime is the UNCTOC, a new convention that, if ratified by enough countries, could close major loopholes that have hampered international enforcement efforts and have allowed organized crime to flourish. Proclaimed as the first multilateral

46. *All Colombia Is a Smuggler's Cove (It's an Old, Old Custom)*, N.Y. TIMES, Nov. 21, 1996, at A7.

47. UNCTOC, *supra* n.8.

48. Guymon, *supra* n.19, at 89-90.

and legally binding U.N. instrument attacking organized crime,⁴⁹ a committee representing 127 Member States drafted the UNCTOC in eighteen months, concluding the process in Palermo, Italy, in December 2000. 147 Nations have signed the UNCTOC, but to date, only thirty-two Nations have ratified the UNCTOC, with forty needed for the UNCTOC to enter into force.⁵⁰

The UNCTOC has a number of ambitious and far-reaching goals. Its purpose is "to promote cooperation to prevent and combat transnational organized crime more effectively."⁵¹ Under the UNCTOC, Party States are required to criminalize in their domestic legislation the offenses of participation in an organized criminal group, money laundering, corruption, and obstruction of justice.⁵² Because extradition is crucial to the efficacy of the UNCTOC, States are also constrained to make crimes under the UNCTOC extraditable offenses,⁵³ thereby rendering the UNCTOC a legal basis for extradition when there is no extradition treaty between countries.⁵⁴

The UNCTOC attempts to eliminate differences among national legal systems that have in the past blocked mutual assistance efforts between countries, and to set standards to render domestic laws more effective for combating international organized crime. The UNCTOC also provides that a State should apply the law to the widest range of predicate offenses allowed by its domestic law.⁵⁵ Specifically, the UNCTOC targets the profit motive, considered to be the root cause of transnational crime, by requiring strong measures to criminalize offenses committed by organized crime groups, including corruption and corporate offenses.⁵⁶ Under the UNCTOC, signatories commit to cracking down on money-laundering and seizing the proceeds of crime;

49. Mavis M. Gyamfi, *International Legal Developments in Review: 2000, IV. Crime Control Treaties*, 35 *INT'L L.*, 637, 637 (2001). See also the UNCTOC website, available at http://www.undcp.org/odccp/crime_cicp_convention.html.

50. Under Article 36, the Convention is open for signature by all States and by regional economic integration organizations until December 12, 2002. For a current list of signatories, see the U.N. Office of Drugs and Crime webpage, available at http://www.undcp.org/odccp/crime_cicp_signatures_convention.html.

51. UNCTOC, *supra* n.8, art. 1.

52. See *id.* arts. 5, 6, 8, 23.

53. *Id.* art. 16.

54. *Id.* art. 4.

55. *Id.*

56. Available at <http://www.odccp.org/palermo/sum1.html>.

fast-tracking and broadening the reach of extradition provisions; protecting witnesses testifying against criminal groups; strengthening and reinforcing investigative and prosecutorial cooperation; boosting prevention of organized crime at the national and international levels; and developing a series of protocols containing measures to combat specific acts of transnational organized crime.⁵⁷

The UNCTOC also addresses obstruction of justice and corruption, though, in effect, the former is simply an extension and manifestation of the latter.⁵⁸ As for the criminalization of obstruction of justice, Article 23 of the UNCTOC requires parties “to establish as criminal offenses” the intentional use of physical force, threats, intimidation, or bribes to induce false testimony, interfere with testimony, the production of evidence⁵⁹ or “to interfere with the discharge of official duties by a justice or law enforcement official.”⁶⁰ In addition, this provision requires States to ensure that adequate laws are in place. In the case of Latin America, the primary obstacle to the suppression of corruption is not so much a shortage of applicable laws, but a shortage of the political will to enforce them.

This reality brings into sharp relief the requirements of the UNCTOC that relate to corruption. Under Article 8, each party commits to adopt laws and “other measures as may be necessary” to criminalize bribery in connection with the exercise of the duties of government officials (both the offer and the acceptance).⁶¹ This provision refers to the enactment of laws rather than to their enforcement.

Section 2 of Article 9, however, provides that:

each State Party shall take measures to ensure effective action by its authorities in the prevention, detection, and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.⁶²

The critical feature of this provision is that it focuses on success-

57. Available at <http://www.odccp.org/palermo/convensumm.htm>.

58. *Id.* One of Schloss' descriptions of corruption included the influencing of judicial decisions.

59. See UNCTOC, *supra* n.8, art. 23(a).

60. *Id.* art. 23(b).

61. *Id.* art. 8(1).

62. *Id.* art. 9(2).

ful law enforcement rather than simple law enactment. A serious, good faith effort to implement this provision will require States to focus substantial efforts on the enforcement of laws against corruption. The efficacy of the domestic legal framework, therefore, is crucial to determining if a State's laws have fulfilled the purpose of the UNCTOC by establishing appropriate and sufficient measures.

Unfortunately, if countries lack political will or good faith, they can easily evade responsibility under Article 9. While section 2 is refreshingly free of vague, aspiring language, section 1 of Article 9, on the other hand, includes a caveat that opens an ample crack in whatever "teeth" UNCTOC might otherwise have, by providing that the Parties shall take measures against corruption that are "appropriate and consistent with its legal system."⁶³ States can claim no ratification on constitutional grounds, or on the domestic conflict presented by the implementation, or on the lack of devices for a successful implementation. Unfortunately, as it pertains to Latin American Nations, Article 9 justifies and may even perpetuate the lack of will to implement the required domestic changes so vital to seriously combating international organized crime.

Article 7 of the UNCTOC specifically lists the types of measures necessary for combating money laundering. These measures include comprehensive banking laws, proper funding for regulatory agencies, measures to monitor cash flow, and regional/global cooperation.⁶⁴

63. *Id.* art. 9(1). Article 9, section 1 states in full:

In addition to the measures set forth in [A]rticle 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

Id.

64. *Id.* art. 7. Article 7 of the UNCTOC states:

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to [A]rticles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and ex-

The UNCTOC is only a partial response, however, to international organized crime. Other mechanisms must be developed and implemented to reinforce at-risk countries, where weaknesses in the political and financial systems provide a fertile environment for organized crime to take root and penetrate troubled banking and commercial sectors. Unscrupulous politicians and political parties are also targeted and recruited to the enterprise, and organized crime groups may also promote their own political agenda as the price of support.

A. UNCTOC and Latin America

The application and enforcement of UNCTOC's norms are challenging, due to the Convention's innovation and subject matter, and this challenge will be more prominent in those regions where the rule of law is not well established and democracy is threatened by corruption permeating both the public and private sectors. Countries in Iberoamerica comprise just such a region and may be justifiably characterized as at-risk Nations. Indeed, most, if not all, of the countries in the region have been infected by organized crime, albeit to varying degrees.

As indicated in the following table, twenty-seven Latin American Nations signed the UNCTOC since its inception in

change information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this [A]rticle, and without prejudice to any other [A]rticle of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavor to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Id.

Antigua and Barbuda	26 September 2001	Haiti	13 December 2000
Argentina	12 December 2000	Honduras	14 December 2000
Bahamas	09 April 2001	Jamaica	26 September 2001
Barbados	26 September 2001	Mexico	13 December 2000
Bolivia	12 December 2000	Nicaragua	14 December 2000
Brazil	12 December 2000	Panama	13 December 2000
Chile	13 December 2000	Paraguay	12 December 2000
Colombia	12 December 2000	Peru	14 December 2000
Costa Rica	16 March 2001	Saint Kitts & Nevis	20 November 2001
Cuba	13 December 2000	Saint Lucia	26 September 2001
Dominican Republic	13 December 2000	Trinidad and Tobago	26 September 2001
Ecuador	13 December 2000	Uruguay	13 December 2000
El Salvador	14 December 2000	Venezuela	14 December 2000
Guatemala	12 December 2000		

December 2000.⁶⁵

As of this writing, however, the following Iberoamerican States have ratified the Convention: Antigua and Barbuda (July 24, 2002), Argentina (November 19, 2002), Ecuador (September 17, 2002), Nicaragua (September 9, 2002), Peru (January 23, 2002), and Venezuela (May 13, 2002).⁶⁶ Some commentators speculate that the Latin American legislatures have been slow to act on ratification because they fear doing so may come back to haunt individual legislators with murky pasts. However, one might take note that only thirty Nations of the original 147 have ratified the Convention to date, and that six Latin American ratifications out of twenty-seven in the region is a respectable representation for any region in the world community. The apparent lack of enthusiasm for UNCTOC by Latin American Nations may be due in part to the fact that the UNCTOC is somewhat redundant of predecessor multilateral instruments, various protocols, and model laws and regulations authored by the Organization of American States ("OAS").⁶⁷

65. See Convention on International Crime Prevention, available at http://www.undcp.org/odccp/crime_cicp_signatures_convention.html.

66. *Id.*

67. The OAS has drafted important model laws and regulations for member Nations to implement in the fight against organized crimes. These model laws are: *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses*, *infra* n.68; OAS, *Model Regulations to Control Chemical Precursors and Chemi-*

B. *Efforts by the OAS to Combat Regional Organized Crime*

Over the last several years, in addition to embracing important U.N. conventions to combat organized crime, the OAS has drafted a number of important model laws and regulations for Member Nations to implement in the fight against organized crime. These instruments include: the Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses (1992 and amended in 2002);⁶⁸ the IACAC (1996),⁶⁹ the Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials (1999);⁷⁰ the Model Legislation on Illicit Enrichment and Transnational Bribery (1997);⁷¹ the Model Regulations for the Control of the International Movement of Firearms, their Parts and Components (1998),⁷² and most recently, the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials ("CIFTA") (2000).⁷³

But the most significant and far reaching effort undertaken by the OAS to date is the IACAC, adopted by Member States in March 1996.⁷⁴

IV. THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

At nearly the same time the U.N. was drafting the Declaration, the OAS was working on a similar effort for the region. The result was the IACAC.⁷⁵ With the IACAC, the Latin Ameri-

cal Substances, Machines and Material, *infra* n.70; *Model Legislation on Illicit Enrichment and Transnational Bribery*, available at <http://www.oas.org/juridico/english/Modelegi.htm>; and *Model Regulations for the Control of the International Movement of Firearms, Their Parts and Components*, *infra*, n.72.

68. See OAS, *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses* (1992 and amended in 2002), available at http://www.cicad.oas.org/en/?/Lavado_Activos/eng/MODEL_REGULATIONS.htm.

69. IACAC, *supra* n.10.

70. See OAS, *Comision Interamericana para el Control del Abuso de Drogas*, available at <http://www.cicad.oas.org/en/?CICAD%20-%20New.htm> [hereinafter CICAD].

71. See *supra* n.67.

72. See CICAD, *supra* n.70.

73. See OAS, *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA)* (2000), available at http://www.oas.org/juridico/english/agres_1750_xxxo00.htm.

74. IACAC, *supra* n.10.

75. *Id.* Adopted Mar. 29, 1996, entered into force on Mar. 6, 1997.

can countries took a leadership position in the international fight against corruption in the public sector.⁷⁶ This was “the first instrument to establish an international legal framework aimed at eliminating bribery and corruption of government officials.”⁷⁷ The fundamental tenet of the IACAC is that Latin American Nations acknowledge that “fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration, and damage to a society’s moral fiber.”⁷⁸ At the time of its drafting in the mid-1990s, the IACAC was considered the only international instrument of its kind, with a hemispheric approach to acts of corruption that was considered “the most far-reaching international accord in the field because it reaches both transnational bribery and domestic corruption by promoting a uniform approach through the criminal law.”⁷⁹ As recently as June 2001, the U.S. Department of State characterized the IACAC as “the most comprehensive anti-corruption instrument in the world.”⁸⁰

The purpose of the IACAC was “to promote and strengthen the mechanisms needed to prevent, detect, punish and eradicate corruption by the State Parties.”⁸¹ Like the UNCTOC, Parties are required to criminalize acts of corruption under their domestic laws⁸² and to pass laws against transnational bribery.⁸³ The IACAC sought not only to make “bribery of foreign officials

76. See *The Experts Roundtable: A Hemispheric Approach to Combating Corruption*, 15 AM. U. INT’L L. REV. 759, 768 (2000) [hereinafter *Experts Roundtable*].

77. See *id.*

78. U.S. Dep’t of State, *Inter-American Convention against Corruption: Adoption of Evaluation Mechanism* (June 4, 2001), available at <http://usinfo.state.gov/topical/econ/mlc/oas0329.htm>. See also *Experts Roundtable*, *supra* n.76, at 763-64. Claudio Grossman stated that official corruption is a violation of human rights as “[i]t perpetuates discrimination by providing greater public benefits to those who have the money to offer bribes or ‘grease money.’ It prevents the full realization of economic, social, and cultural rights because resources are not distributed fairly and effectively. By distorting the free will of the people, it often leads to the infringement of civil and political rights—such as the right to a fair trial and the right to vote.” *Id.*

79. Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT’L & COMP. L. 793, 807 (2001).

80. Results of 31st OAS General Assembly, Press Statement from the U.S. Dep’t of State, June 7, 2001, available at <http://www.state.gov/r/pa/prs/ps/2001/3375.htm>.

81. IACAC, *supra* n.10, at 728, art. II(1).

82. *Id.* art. 7. See also UNCTOC, *supra* n.8, art. 8(1). Article 8(1) of the UNCTOC provides that each State Party shall adopt such legislative and other measures to criminalized corruption as one of the offenses covered by the Convention. *Id.*

83. IACAC, *supra* n.10, at 728, art. VIII.

a crime in the country of the exporting firm or individuals, but also in encouraging local governments to deal more effectively with the problem of domestic corruption.”⁸⁴

All OAS Member States have signed the IACAC, and as this Article is being written, the following countries have ratified it: Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent & Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

Some Nations have filed reservations to the IACAC. Brazil made a reservation to Article XI(1)(c), establishing it as an offense under Brazilian law, stating:

any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State property.⁸⁵

Panama declared that the country was not bound by Article XV of the IACAC to extend the actions of seizure or forfeiture of property, claiming that the seizure of property as a penalty was prohibited by Article 30 of the Panama Constitution. Uruguay made a reservation to “resorting to law and order when the cooperation requested specifically, seriously, and patently contravenes the rules and principles that underlie Uruguay’s distinctive legal character.” Guyana made a reservation to Article XV of the IACAC because it violates the provisions of Article 142(1) of its constitution on the protection from deprivation of property.⁸⁶

The only countries yet to ratify the IACAC are Barbados and Haiti.⁸⁷ Initial reservations were given by some Nations for waiting to ratify including:

the complexity of national procedures; concern about the constitutionality of certain provisions; difficulty in defining

84. See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of an International Legal Consensus*, 18 NW. J. INT’L L. & BUS. 457, 478 (1998).

85. For reservations filed by Nations to the Convention, see OAS, *Specialized Conference on the Draft Inter-American Convention Against Corruption*, available at <http://www.oas.org/juridico/English/Sigs/b-58.html>.

86. *Id.*

87. For the full list of signatories and dates of ratifications see *id.*

specific conduct or in incorporating certain articles such as the removal of bank secrecy, or preoccupation with the lack of an institutional mechanism for its effective implementation.⁸⁸

The IACAC demonstrates a unique predicate in the politics of intentions — that States can be willing to condemn and criminalize corrupt practices without actually being eager to commit to take steps to prevent them. Article III, for instance, provides that the Parties “agree to consider the applicability of measures within their own institutional systems to create, maintain, and strengthen . . . mechanisms to enforce these standards of conduct.”⁸⁹ Obviously, this sets a less than stringent standard against which to judge the measures a State takes pursuant to the IACAC. Only a handful of countries have even established a code of conduct for public officials in keeping with the spirit of Article III.⁹⁰

In addition to the implementation of the IACAC, a Plan of Action was adopted in April 2002 during the Third Summit of the Americas, held in Quebec City, Canada.⁹¹ The purpose of the Plan of Action was to establish a follow-up mechanism for implementing the IACAC. Following drafting of the Plan, the Conference of States Parties to the IACAC met in Buenos Aires in May 2002 and issued a report on follow-up mechanisms for implementation and monitoring of the IACAC.⁹² The primary mechanism established by the Plan of Action was the creation of a Conference of States Parties (Convention) and a Committee of Experts appointed by the consensus of the States Parties, which through a series of reporting protocols would monitor the progress of States Parties in implementing and enforcing the IACAC.⁹³

88. See Enrique Lagos, *The Future of the Inter-American Convention against Corruption 2* (May 2000), available at <http://www.iadb.org/leg>.

89. IACAC, *supra* n.10, art. III.

90. Nancy Zucker Boswell, *A Hemispheric Approach to Combating Corruption: The Role of Civil Society in The Experts Roundtable: A Hemispheric Approach to Combating Corruption*, 15 *AM. U. INT'L L. REV.* 759, 788 (2000). For additional information on the status of implementation of the IACAC, see OAS, *Anti-Corruption National Legal Instruments*, available at http://www.oas.org/juridico/english/cor_nat_leg.htm.

91. Lisa M. Landmeier *et al.*, *Anti-Corruption International Legal Developments*, 36 *INT'L L.* 589, 592 (2002).

92. *Id.*

93. *Id.*

On May 24, 2002, at the OAS Headquarters, the Committee of Experts of the Follow-up Mechanism for the Implementation of the IACAC adopted a methodology for reviewing implementation within the framework of the first round.⁹⁴ The Committee of Experts also established rules of procedure prescribing its structure and operation.⁹⁵ According to the Report of Buenos Aires, the Committee of Experts is responsible for the technical analysis of the implementation of the IACAC by the States Parties. Accordingly, some of the responsibilities of the Committee of Experts are: to adopt its annual working plan;⁹⁶ to select Convention provisions, implementation of which by all of the States Parties will be reviewed; to determine the length of time devoted to this task; to adopt the methodology for the review of the implementation;⁹⁷ and to adopt a questionnaire on the provisions selected for review in each round.⁹⁸

The principal monitoring would be through a round of "country reports." The country reports would be issued through the following process: (1) the Committee would prepare questionnaires on selected provisions of the OAS Convention; (2) the States Parties would each complete the questionnaire; (3) a subgroup of the Committee would review each completed questionnaire and prepare a confidential preliminary report to be made available to the State Party concerned for its observations; (4) the subgroup would then prepare a revised version of the preliminary report taking into account the observations provided by the State Party concerned, and present it to a plenary meeting of the Committee; (5) the Committee would prepare the conclusions and make recommendations; and (6) the committee would con-

94. OAS, *Methodology for the Review of the Implementation of the Provisions of the IACAC Selected Within the Framework of the First Round* (May 24, 2002) available at http://www.oas.org/juridico/english/followup_method.htm#_ftn1 [hereinafter *Methodology*].

95. OAS, *Rules of Procedure and Other Provisions*, available at http://www.oas.org/juridico/english/followup_rules.htm#Article%2021 [hereinafter *Rules of Procedure*].

96. OAS, *Propuesta de Programa de Trabajo para el Año 2002*, available at http://www.oas.org/juridico/spanish/mec_plan_trabajo2002.doc. The working plan for the year 2002 includes, among other things, the initiation of analysis by the first three States Parties of which information is going to be analyzed, and the topic related to the Preventive Measures, Article III(5) (systems of government hiring and procurement of goods and services that assure the oneness, equity and efficiency of such systems).

97. See *Methodology*, *supra* n.94.

98. See also *Rules of Procedure supra* n.95. See *Questionnaire on Provisions by the Committee of Experts for Analysis Within the Framework of the First Round*, May 24, 2002, available at <http://www.oas.org/juridico/english/questionnaire.doc> [hereinafter *Questionnaire*].

currently publish final reports for each State Party, after forwarding the reports to the Conference.⁹⁹

At its first meeting, the Committee of Experts decided that during the first round it would review States' implementation of Article III, paragraphs 1, 2, 4, 9 and 11, respectively; Article XIV; and Article XVIII of the IACAC.¹⁰⁰ The Committee of Experts established the following specific criteria to follow in accordance with the methodology: existence of a legal framework and/or of other measures, adequacy of the legal framework and/or of other measures, and results of the legal framework and/or of other measures.¹⁰¹

At the second meeting, the Committee of Experts determined that the first round review would take place between June 2002 and 2004, that the first round was to have six meetings and that four States Parties were to be reviewed in each meeting. The order of the States Parties to be reviewed was the following: 1) Voluntary States Parties, in "the following order: Argentina, Paraguay, Colombia, Nicaragua, Uruguay, Panama, Ecuador and Chile; 2) State[s] Parties in accordance with the chronological order of ratification of the [IACAC]."¹⁰² A composition of the review sub-groups was determined by a prescribed procedure.¹⁰³ The countries submitted their replies to the Questionnaire of the Committee of Experts.¹⁰⁴

Upon examination, the responses to the Questionnaire demonstrate a lack of uniformity as to how Member Nations are implementing the IACAC. For instance, with regard to the standards of conduct and mechanisms to enforce them, under Article III(1-2) of the IACAC, the standards of conduct for the performance of public functions are scattered in various regulatory provisions. Many provisions are general standards rather than specific regulations.¹⁰⁵ On February 10-13, 2003, the Committee

99. Landmeier et al., *supra* n.91, at 592.

100. OAS, *Format for the Country Reports That Will be Prepared in the Framework of the First Round* (May 24, 2002), available at http://www.respondanet.com/english/anti_corruption/publications/documents/OAS/structure.doc.

101. *Id.*

102. OAS, *Second Meeting of the Committee of Experts of the Follow-up Mechanism for the Implementation of the IACAC* (May 20-24, 2002), available at <http://www.oas.org/juridico/english/correspen.htm> [hereinafter *Second Meeting*].

103. *Id.*

104. See *Questionnaire*, *supra* n.98.

105. See *Second Meeting*, *supra* n.102.

of Experts approved the first country report, that of Argentina.¹⁰⁶ In July 2003, the Committee of Experts will consider the draft preliminary country reports for Paraguay, Colombia and Nicaragua.¹⁰⁷ “No country in the Western hemisphere has fully complied with the OAS convention’s main requirements, and progress has been slow.”¹⁰⁸

The participation of the civil society in the evaluation mechanisms is another significant step in the right direction.¹⁰⁹ Citizen participation is crucial in the effective fight against corruption. In order to create meaningful controls for corruption and promote ethical standards, governments cannot work alone; they need to work with the private sector, labor associations, the press and non-governmental organizations (“NGOs”). Access to information in the region is important and essential to citizen participation. Some countries have launched websites to provide online information on government expenses, procurement, contracts, programs, and services. Yet, dissemination of important information is often suppressed because freedom of the press is severely restricted. In 2002, “[b]etween January and March . . . , the NGO Journalists against Corruption documented 36 separate cases of journalists being threatened because of their reports about corruption.”¹¹⁰ Even though the region has moved in the right direction in including some of these groups, full, meaningful participation has yet to occur,¹¹¹ if for no other reason than that often citizens do not understand the intricacies of multilateral conventions and their own legal systems. All they see is that “despite a plethora of laws, corruption persists be-

106. OAS, REPORT OF THE IMPLEMENTATION IN ARGENTINA OF THE CONVENTION OF THE PROVISIONS SELECTED FOR REVIEW IN THE FRAMEWORK OF THE FIRST ROUND, available at http://www.oas.org/juridico/english/mec_rep_arg.htm.

107. See OAS, *Country Reports*, available at http://www.oas.org/juridico/english/mec_ron1_rep.htm.

108. TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2003 104 (2003), available at <http://www.globalcorruptionreport.org/download.shtml> [hereinafter GCR 2003].

109. See OAS, *Civil Society Participation*, for the procedures and modalities of participation, available at http://www.oas.org/juridico/english/follow_civ.htm.

110. GCR 2003, *supra* n.108, at 112.

111. See *The Experts Roundtable*, *supra* n.76, at 786. Transparency International has established national chapters to voice the demands of the civil society. The role of Transparency International has been to raise awareness of the damage corruption causes and to secure consensus on “common standards of governance and accountability that can enhance economic, social, and political development.” *Id.*

cause of inadequate enforcement and impunity.”¹¹²

One must consider that while it may be useful to gauge the impact of the IACAC on signatory Nations through a reporting and monitoring protocol that is accomplished through the solicitation and evaluation of questionnaires, such a mechanism, in the end, will have little bearing or weight of force on whether the States Parties actually benefit from or adhere to the intent of the IACAC. The success of the IACAC and any other anti-corruption instrument can only be successful if the officials responsible for implementation are themselves held accountable for their own conduct. It is one thing to tell the world that one's Nation is participating in an international convention, and another matter altogether to actually live up to the convention itself. This is the fundamental challenge for Latin American governments where institutional corruption is the hallmark of, rather than the exception to, the “way things are done.”

While some progress has been made among Latin American States in combating corruption in recent years, the continuous and systematic nature of ongoing corruption throughout the region suggests that the experience of the IACAC is best viewed as a cautionary tale.¹¹³ Nevertheless, the IACAC has become a fundamental multilateral foundation upon which Latin American Nations have endeavored to attack organized crime in the hemisphere. If corruption within the borders of Member Nations can be curtailed, then it should be possible, in practice, to greatly reduce the global reach of transnational criminalism, particularly that which draws its power from the primary enterprises endemic to Latin America, namely, drug trafficking, money laundering, weapons smuggling, and the recent insidious growth in trafficking in humans and human organs throughout the hemisphere.

112. *Id.*

113. *Corruption: How American Countries Rank in Corruption*, *LATIN BUSINESS CHRONICLE*, available at <http://www.latinbusinesschronicle.com/topics/corruption/ranking.htm>. The 2002 report by Transparency International shows that Latin American countries are still perceived as very corrupt. Most of them rank very low on a scale of 1-10 with 10 being the best. Paraguay and Haiti score the worst at 1.7 and 2.2, respectively, and Chile ranked as the least corrupt State at 7.5. *Id.*

V. *BARRIERS TO THE IACAC AND UNCTOC IN SOUTH AMERICA: PERVASIVE CORRUPTION*

Organized crime would not be nearly as lucrative an enterprise were it not for the culpability and willingness of government officials and corporate executives to participate in organized criminal activities for personal gain. Government officials and high ranking executives of the leading financial institutions from Mexico to Argentina have long been involved with organized criminal activities, often cooperating with criminal groups through the acceptance of bribes or falling prey to extortion.¹¹⁴ Some officials have even been in charge of criminal organizations, as was the case during the long career of former Paraguayan President, General Andres Rodriguez, who developed a sophisticated and highly successful smuggling operation in the early 1960s after President Stroessner put Rodriguez, then an ambitious young army officer, in charge of a cavalry unit tasked with guarding the national border. As was noted in a 1989 news story:

In a country where smuggling to neighboring Argentina and Brazil is worth an estimated [one billion dollars] a year, or double the country's GNP, command of the cavalry is a potentially enriching experience. By the same token, possession of estates with their own airstrips in the almost deserted Chaco region, west of the capital, could also be handy for bringing in Scotch whisky, US cigarettes, jeans and electronic equipment of all kinds, which find a ready market in Buenos Aires and Sao Paulo. According to sources in Washington, an ancient Lockheed Constellation aircraft, formerly belonging to the Paraguayan armed forces, makes a weekly flight to New York. It returns loaded with cigarettes, cars, video recorders and refrigerators, which are legally exported from the US to Paraguay and then illegally re-exported, at enormous profit, to Argentina and Brazil.¹¹⁵

Corruption finds its way into the formal economy and into the fabric of civil society and government institutions. As it spreads and deepens, its harmful economic effects increase the

114. For an extensive and highly documented study on corruption in Iberoamerica, see generally, ANDRÉS OPPENHEIMER, *OJOS VENDADOS: ESTADOS UNIDOS Y EL NEGOCIO DE LA CORRUPCIÓN EN AMERICA LATINA* (3d ed. 2001).

115. Colin Harding & John Lichfield, *The Enriching Experience of General Rodriguez*, *INDEPENDENT*, Feb. 6, 1989, at 12.

incentives for governmental officials to abandon the covenants attendant to public office and sell their services to the highest bidder.¹¹⁶ This situation is particularly dangerous given the increasing inter-relatedness of the economies of modern States, and the ever-increasing importance of international trade.¹¹⁷

Yet, as there is no precise definition of international organized crime, there is also no particular or precise definition of corruption.¹¹⁸ One of the more widespread definitions of corruption is “the use of public office for private gain.”¹¹⁹ The term describes many different behaviors of governmental misconduct from bribery and extortion to influencing judicial decisions and the improper use of political power.¹²⁰ But corruption is not limited only to public office and government service. Corruption in the private sector is prevalent wherever unscrupulous businessmen see the opportunity for gaining advantage for themselves or their enterprises through illegal undertakings.

116. *See id.* at 72.

117. *See* Michele Fratianni & John Pattison, *International Financial Architecture and International Financial Standards*, 579 *ANNALS AM. ACAD. POL. & SOC. SCI.* 183, 197 (2002).

118. *See* John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory*, 72 *AM. POL. SCI. REV.* 974, 976 (1978).

119. *See* Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Progress in Judicial Reform*, 18 *WIS. INT'L L.J.* 353, 355 (2000).

120. *See* Miguel Schloss, *Symposium Fighting International Corruption and Bribery in the 21st Century, Luncheon Address*, 33 *CORNELL INT'L L.J.* 469, 471 (2000). Miguel Schloss, Executive Director of Transparency International, gave one of the broadest interpretations of corruption. According to Schloss:

[B]ribery encompasses payoffs for a wide variety of illicit activities:

- (i) getting around licenses, permits, and signatures;
- (ii) acquiring monopolistic power through entry barriers to competitors;
- (iii) access to public goods, including legal or uneconomic awards of public procurement contracts;
- (iv) access to the use of public physical assets or their outright stripping and appropriation;
- (v) access to preferential financial assets, such as credit;
- (vi) illegal trade in goods banned for security or health considerations, such as drugs and nuclear materials;
- (vii) illicit financial transactions, such as money laundering and insider trading;
- (viii) influencing administrative or legislative actions; and
- (ix) influencing judicial decisions.

Id.

VI. OTHER INTERNATIONAL INSTRUMENTS TO FIGHT CORRUPTION

Recognizing, too, that "corruption respects no national boundaries,"¹²¹ in 1996, the U.N. spearheaded efforts to curb government and institutional corruption when it produced the Declaration Against Corruption and Bribery in International Commercial Transactions, in which Member States were called upon to criminalize those acts in transnational settings.¹²² The Declaration, however, did little if anything to change the behavior of corrupt officials and business executives, and as one commentator noted: "differences around the world are a matter of magnitude; beyond these differences, corruption is pandemic."¹²³ A number of other international anti-corruption instruments have been drafted and signed by international bodies over the last several years. The following represents a partial list:¹²⁴

- 1) International Code of Conduct for Public Officials;¹²⁵
- 2) General Assembly Resolution 54/128, in which the Assembly subscribed to the conclusions and recommendations of the Expert Group Meeting on Corruption and its Financial Channels, held in Paris from March 30 to April 1, 1999;¹²⁶
- 3) Report of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;¹²⁷
- 4) Recommendation 32 of the Senior Experts Group on Transnational Organized Crime endorsed by the Politi-

121. TRANSPARENCY INTERNATIONAL, *GLOBAL CORRUPTION REPORT 2001 1* (2001), available at <http://www.gcr.netscript.kunde.sserv.de/download/gcr2001> [hereinafter GCR 2001].

122. United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex, Agenda Item 12, U.N. Doc. A/RES/51/191 (1996) [hereinafter Declaration Against Corruption].

123. Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 38 HARV. J. ON LEGIS. 67, 70 (2001).

124. An Effective International Legal Instrument Against Corruption, G.A. Res. 55/61, U.N. GAOR, 55th Sess., Annex, at 2-4, U.N. Doc. A/RES/55/61 (2001).

125. International Code of Conduct for Public Officials, Adopted by G.A. Res. 51/59, U.N. GAOR, 51st Sess. Annex, U.N. Doc. A/RES/51/59 (1996).

126. G.A. Res. 54/128, U.N. GAOR, 54th Sess. Paras. 1-14, U.N. Doc. A/RES/54/128 (2000).

127. See Report prepared by the Secretariat, *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (Vienna, Apr. 10-17, 2000).

- cal Group of Eight in Lyon, France, on June 29, 1996;¹²⁸
- 5) The Twenty Guiding Principles for the Fight against Corruption adopted by the Committee of Ministers of the Council of Europe on November 6, 1997;¹²⁹
 - 6) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development ("OECD Convention"), opened for signature December 18, 1997;¹³⁰

128. *Follow-up to the Naples Political Declaration and Global Action Plan Against Organized Transnational Organized Crime*, ESCOR, 36th Plenary Mtg., U.N. Doc. 1997/22, Annex I (1997).

129. See Council of Europe, *Texts Adopted by the Committee of Ministers of the Council of Europe*, 1997, Strasbourg, France, 1998, Resolution (97)24 (2000).

130. See *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18). Some OAS Member States have ratified the OECD Convention and have implemented legislation. These are: Canada (ratified December 17, 1998), Mexico (ratified May 27, 1999), the United States (ratified December 8, 1998), Brazil (signed August 24, 2000), and Chile (April 18, 2001). See *Steps Taken And Planned Future Actions by Participating Countries to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Feb. 26, 2003), available at <http://www.oecd.org>.

In Mexico, the two Chambers in Congress approved the implementing legislation as part of a complete package of reforms to the Criminal Code. On May 17, 1999, the *Diario Oficial Federal* ("DOF") promulgated the respective decree. The government is currently preparing a draft bill to implement the Convention fully. In 2002, Mexico adopted several provisions in related fields intended to increase transparency and thus restrict opportunities for corruption. On June 11, 2002, the DOF published the Access to Information Act approved by Congress.

The public procurement and public works laws are in the process of being amended to include, among other things, provisions allowing public consultations to review bidding guidelines of relevant bidding processes and to promote and recognize transparent companies. On 13 March 2002, amendments to the Civil Servants Federal Administrative Responsibility Act were approved. These reforms prevent illicit conducts of domestic officials and provide the Ministry of the Comptrollership with the necessary legal tools to guarantee a more efficient application of the law. This law regulates conflict of interests and reduces the authority's discretion to impose sanctions. It establishes provisions to verify and examine the evolution of domestic public officials' patrimony, enabling the Ministry of the Comptrollership to request the Mexican Banking and Securities Commission to disclose banking information as well as to freeze the assets of public officials under investigation (as well as of their spouses & economic dependants) in order to guarantee the payment of sanctions.

Id. In Brazil, in June 2002, the Senate approved the draft implementation bill. On June 11, 2002, the President sanctioned the bill into Law no. 10.467/2002. Even though under Brazilian law the Convention had force of law when it was ratified, there was a need to respond to some Constitutional requirements related to the Brazilian criminal law.

Law no. 10.467/2002 provides for a definition of corruption in international

- 7) Agreement Establishing the Group of States against Corruption, adopted by the Committee of Ministers of the Council of Europe on May 1, 1999;¹³¹
- 8) Criminal Law Convention on Corruption adopted by the Committee of Ministers of the Council of Europe on November 4, 1998;¹³²
- 9) Joint Action on corruption in the private sector adopted by the Council of the European Union on December 22, 1998;¹³³
- 10) Declarations made by the first Global Forum on Fighting Corruption, held in Washington, D.C., from February 24-

business transactions; a definition of foreign public official, which includes officials of enterprises controlled, totally or partially, by a foreign government and officials of intergovernmental organizations; punishment of corruption of foreign public officials with prison terms of one to eight years and fines, and increase by one third in imprisonment if the purpose of the corrupt act is achieved; punishment of illicit lobbying or conspiracy to corrupt foreign public officials in international transactions; and bribery and corruption of foreign public officials as predicate offences for the money laundering legislation. A number of other legal texts are also relevant to the Convention, in particular the Criminal Code (Title 11), Law no. 1069/1969 (obligation of declaring money and assets existent in foreign countries), Law no. 7492/1986 (crimes against the financial system), Law no. 8027/1990 (Code of Conduct for public officials and employees), Law no. 8137/1990 (crimes against the tax system), Law no. 8429/1992 (illicit enrichment of public officials or employees), Law no. 8730/1993 (obligation for public officials of declaring their assets and incomes), Law no. 9034/1995 (criminal organizations), Law no. 9613/1998 (money laundering) and Law no. 9840/1999 (corruption of elected officials and fraud in elections).

Id. In Chile, a "bill to implement the Convention was submitted to Parliament in December 2001, it passed the Chamber of Deputies in July 2002 and the Senate in September 2002. The amendment to the Chilean Penal Code was published in the Official Gazette as an Act of the Republic in full effect in the first week of October 2002. The implementing legislation establishes the offence of bribery of foreign public official, provides for a definition of "foreign public official," it introduces criminal liability of legal persons as well as penalties for omissions and falsifications by companies of their books and records." *See id.*

Argentina ratified but has not yet implemented legislation (Argentina signed February 8, 2001). The Argentine Republic approved the Convention by Law no. 25.319 on October 18, 2000. To implement the OECD Convention and bring the Argentinean legislation to the standards of the OECD Convention, a draft bill has been prepared to amend Article 258 *bis* of the Penal Code adapting the offence of bribery of a foreign public official. The draft bill was approved by the Parliamentary House of Representatives in 2002 and is now being considered by the Commission of Criminal Law and Penitentiary Affairs at the Senate. *See id.*

131. *See Official Gazette of the Council of Europe: Committee of Ministers*, part-volume No. V – May 1999, Resolution (99)5.

132. *See Council of Europe, European Treaty Series*, No. 173.

133. *See Joint Action on Corruption in the Private Sector*, 1998 O.J. (L 358).

- 26,1999, and the second Global Forum held in the Hague in 2001;¹³⁴
- 11) Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on September 9, 1999;¹³⁵
 - 12) Model Code of Conduct for Public Officials, adopted by the Committee of Ministers of the Council of Europe on May 11, 2000;¹³⁶ and
 - 13) Principles to Combat Corruption in African Countries of the Global Coalition for Africa.¹³⁷

More promising is the United Nations Convention Against Corruption (“Convention Against Corruption”), currently in the process of being developed following approval of a resolution passed on December 4, 2000. The drafting of the Convention got underway in December 2001 when fifty-eight Nations assembled in Buenos Aires for a preparatory meeting in which countries were to submit proposals “into a single text that will be used as a basis for negotiations.”¹³⁸ According to a report on the proceedings of the meeting:

Country proposals ranged from text on a single issue—the United States, for example, submitted text regarding asset recovery only—to text on almost all matters covered in the Terms of Reference (the proposal submitted by Austria and the Netherlands is thirty pages and comprehensive). The major issues, reflected in discussions at the meeting, appear to be preventive measures, criminal liability, and international cooperation.¹³⁹

An ad hoc committee was formed from this meeting and convened in January 2002 in Vienna to negotiate “a broad and effective convention” with the core elements being: “preventive measures; preventing and combating the transfer of funds of il-

134. For the Declaration of the First Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials, see <http://usinfo.state.gov/topical/econ/integrity/document/declare.htm>. For the Final Declaration of the Global Forum on Fighting Corruption and Safeguarding Integrity II, see <http://usinfo.state.gov/topical/econ/bribes/gf2declaration.htm>.

135. See Council of Europe, *European Treaty Series*, No. 174.

136. See *Official Gazette of the Council of Europe: Committee of Ministers*, part-volume No. V – May 1999, recommendation R (2000) 10.

137. See *Principles to Combat Corruption in African Countries* (Feb. 23, 1999), available at www.gca-cma.org/ecorrupt.htm#prin.

138. See Landmeier et al., *supra* n.91, at 590.

139. *Id.*

licit origin derived from acts of corruption, including the laundering of funds and returning such funds; criminalization; confiscation and seizure; promoting and strengthening international cooperation; and mechanisms for monitoring implementation.”¹⁴⁰

While international organizations such as the U.N. and the OAS attempt to create a compass for Latin Nations to steer by, Latin America’s burdens hinder forward progress. Institutionalized corruption and persistent underdevelopment are strident impediments to change.¹⁴¹ Corruption runs deep in the fabric of Latin America’s civil societies, and persists due to “inadequate laws, irreverence for the law even when it is adequate, and the impunity of those who are corrupt.”¹⁴² These realities have led to the widespread loss of trust in public institutions and officials.¹⁴³ Such conditions can have negative repercussions well beyond the borders of the affected State.¹⁴⁴

This loss of trust is compounded by persistent political instability, as can be seen in the last year’s aborted coup against the Chavez regime in Venezuela,¹⁴⁵ and by ongoing political and economic crises in Argentina.¹⁴⁶ This dynamic can result in serious damage to the perceived legitimacy and effectiveness of the rule of law. Peru is another glaring example of a State where “[g]iven various conditions of its enactment, the citizens never expected the Constitution to be binding on the public or the government,”¹⁴⁷ and consequently, “both leaders and citizens treat the Constitution as a dead letter.”¹⁴⁸

140. *See id.* at 590-91.

141. *See generally* Luz E. Nagle, *E-Commerce in Latin America: Legal and Business Challenges for Developing Enterprise*, 50 AM. U. L. REV. 859 (2001).

142. GCR 2001, *supra* n.121, at 168 (South America).

143. Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179, 184 (1996).

144. For example, when the ability of affected judicial systems to conduct fair and impartial trials can reasonably be questioned, U.S. courts may be reluctant to order *forum non conveniens* dismissals in favor of South American courts. *See* Christopher M. Marlowe, *Forum Non Conveniens Dismissals and the Adequate Alternate Forum Question: Latin America*, 32 U. MIAMI INTER-AM. L. REV. 295, 310-19 (2001).

145. Larry Rohter, *Venezuela’s 2 Fateful Days: Leader Is Out, and In Again*, N.Y. TIMES, Apr. 20, 2002, at A1.

146. Larry Rohter, *Argentina’s President Suffers Double Blow*, N.Y. TIMES, Apr. 24, 2002, at A1.

147. Maria McFarland Sanchez-Moreno, *When A “Constitution” Is A Constitution: Focus On Peru*, 33 N.Y.U. J. INT’L L. & POL. 561, 563 (2001).

148. *Id.*

In the region, corruption is present in the private and public sectors. The private sector suffers when privatizations are non-transparent and surrounded by corruption. Government officials have been accused of receiving kickbacks in connection with the purchase of State-owned companies.¹⁴⁹

The cost of corruption in such environments is high. “[T]he region continues to be preyed upon by networks of elites who abuse their positions for illicit gain. The very institutions charged with preventing and fighting corruption are too weak to do so, or compromised by the influence of the transgressors themselves.”¹⁵⁰ Estimates place the yearly cost of corrupt transactions, per capita, at US \$6,100 in Colombia and at US \$6,000 in Brazil.¹⁵¹ In Brazil, a single series of corrupt transactions led to the diversion of more than US \$1 billion from regional development programs into politicians’ campaign finance accounts.¹⁵² Similarly, in Bolivia, millions of dollars in aid, originally intended for homeless victims of the recent flooding there, cannot be accounted for.¹⁵³ “Colombia has suffered the tragic consequences of endemic theft by politicians and public officials for decades.”¹⁵⁴ According to World Bank: “bribes are paid in 50 percent of all [S]tate contracts” and the estimated cost of corruption in Colombia “is US \$2.6 billion annually, the equivalent of 60 per cent of the country’s debt.”¹⁵⁵ Last May, reports surfaced that more than US \$2 million of Plan Colombia funds were discovered missing and believed taken by more than twenty corrupt officers of the elite counterdrug forces trained by the United States. The officers were charged with using the money for personal expenses such as buying gas for their personal automobiles.¹⁵⁶ In Venezuela, a single anti-poverty program suffered approximately US \$44 million in losses due to fraud.¹⁵⁷ In Ecuador, “[n]inety-five percent of reports approved by the Comptrol-

149. For a series of privatizations that went sour, see GCR 2003, *supra* n.108, at 110.

150. *Id.* at 103.

151. See GCR 2001, *supra* n.121, at 168.

152. *Id.* at 169.

153. *Id.* at 170.

154. GCR 2003, *supra* n.108, at 108.

155. *Id.*

156. Luz E. Nagle, *Plan Colombia: Reality of the Colombian Crisis and Implications for Hemispheric Security*, in *SHAPING THE REGIONAL SECURITY ENVIRONMENT IN LATIN AMERICA* 16 (2002).

157. See GCR 2001 *supra* n.121, at 171.

ler General showed signs of severe irregularities in the handling of public funds.”¹⁵⁸ In Paraguay, President Luis Gonzales Macchi was charged with illegally investing State funds, and former President Wasmosy was convicted for transferring US \$6 million of government money to a private bank where he was a secret shareholder.¹⁵⁹

In Brazil, Paulo Maluf, a major political figure, was accused of receiving illegal payments from contractors hired to execute public works projects. It is claimed “that contractors responsible for public works cooperated with Maluf via a system of subcontractors, kickbacks and black market money exchange.”¹⁶⁰

In recent years, scandals in government have led to the ouster of Peruvian president Alberto Fujimori for “arms acquisitions, real estate fraud and misappropriation of military and police budgets.”¹⁶¹ In Argentina, former Argentine President Carlos Menem was arrested on charges of illicit arms smuggling and money laundering.¹⁶² These problems are present all throughout South America. Even in Chile, a Nation generally viewed as the least corrupt Latin American State, an estimated US \$86 million in overpayments were made to officials of the administration of former president Eduardo Frei.¹⁶³

In December 2002, prosecutors in Nicaragua were ordered to proceed to trial against former President Arnoldo Aleman on charges that he, Vice President Jose Rizo, and twenty-two members of their Constitutionalist Liberal Party stole nearly US \$96.6 million in public funds.¹⁶⁴ According to prosecutors, Aleman transferred the money to family-controlled accounts in Panamanian banks, and then used more than US \$4 million from the accounts to fund the presidential campaigns of current Presi-

158. *See id.* *See also* Edgardo Buscaglia, *An Analysis of Judicial Corruption and its Causes: An Objective Governing-Based Approach*, 21 INT'L REV. L. & ECON. 233, 235 (2001). (discussing empirical indices of administrative and judicial corruption throughout Argentina, Ecuador, and Venezuela).

159. GCR 2003, *supra* n.108, at 106.

160. *Id.* at 107.

161. *Id.* at 105-06.

162. *Id.* at 108.

163. *See* GCR 2001, *supra* n. 121, at 171.

164. Isidro Lopez, *Nicaragua to Use Evidence Against Ex-president to Build Fraud Case Against Current President*, ASSOC. PRESS, Dec. 23, 2002. *See also* Juan O. Tamayo, *As Latin America Economies Modernize, Intolerance For Corruption Is Spreading*, MIAMI HERALD, Oct. 13, 2002, at HW 9.

dent Enrique Bolanos and Vice President Rizo, as well as funneling money to the campaigns of at least twenty-two Constitutionalist Liberal lawmakers and elected officials.¹⁶⁵ Bolanos accused Aleman of taking “pensions from retirees, medicines from the sick, [and] salaries from teachers.”¹⁶⁶

Problems of this kind are notoriously difficult to address in environments replete with political instability and economic privation.¹⁶⁷ In these settings, the personal benefits to officials engaging in corruption are obvious and immediate, whereas the societal benefits of refraining seem remote and speculative.¹⁶⁸ Moreover, corrupt practices tend to spread. “[S]ociety’s tolerance of illegality and respect for the laws of the country tend to deteriorate as [it is] increasingly exposed to others’ disrespect for the laws . . . [O]ver time an honest individual working in a dishonest environment will adapt and behave in a more dishonest fashion.”¹⁶⁹

The reform of government is inherently problematic when reforms must be carried out by corrupt government officials who, not surprisingly, have the fewest incentives to initiate such changes.¹⁷⁰ The record of Iberoamerican States in carrying out their obligations regarding the protection of human rights suggests that most governments are far better at expressing high ideals than at living up to them.¹⁷¹ Some commentators suggest that this dynamic may be why Latin American legislators have been so slow to act on ratification of the UNCTOC — for fear that doing so may come back to haunt them. Nonetheless, efforts toward establishing anti-corruption mechanisms are ongoing in Latin America.

A. *The Role of Mutual Legal Assistance Agreements*

Territorial boundaries, dissimilar cultures and differences

165. *Id.*

166. Tamayo, *supra* n.164.

167. For a theoretical exposition of the difficulties involved, see Buscaglia, *supra* n.158, at 248.

168. *See id.*

169. Dakolias & Thachuk, *supra* n.119, at 356.

170. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 *YALE J. INT’L L.* 257, 282 (1999).

171. *See* U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES — 2001 (Mar. 4, 2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/> (discussing the Western Hemisphere, particularly Colombia).

in language have no effect on global organized criminals. They continue to communicate and cooperate with one another and conduct their criminal activities efficiently.¹⁷² Nevertheless, maintaining closed national boundaries is detrimental to combating these criminals. When sovereign States protect their borders from organized crime and cooperate with others, they are protecting the global community. That is when sovereignty complements a Nation's duty to collaborate.

A number of other bilateral and multilateral cooperation and mutual assistance agreements between American Nations have been drafted since the late 1940s.¹⁷³ Recent mutual assistance and cooperation arrangements that address the sophistication of international criminalism and bridge both the intricacies of navigating through the procedural and evidence gathering complexities of foreign jurisdictions have been negotiated. A number of countries including Brazil, Argentina, Chile, and Colombia have mutual legal assistance treaties with the United States and members of the European Union,¹⁷⁴ which is something that Article 18 of the UNCTOC has attempted to reinforce.

A mutual cooperation agreement concerning the fight against organized crime was signed between the United States and Brazil on April 12, 1995,¹⁷⁵ and among other matters, required both Nations to update their laws concerning money-laundering.¹⁷⁶ Ancillary to this, the OAS embarked on efforts to draft model laws and regulations to fight corruption. Brazil responded to this challenge in 1997 by passing a money laundering law based on the OAS' Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other

172. The *Dover* case in England, involving human smuggling from Asia to Europe, proves how although organized crime involves individuals from many countries with different languages and cultures, the movement of large group of immigrants is still well coordinated. See <http://www.cbsnews.com/stories/2000/06/19/world/main207078.shtml>.

173. See Luz E. Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 *FORDHAM INT'L L.J.*, 1235, 1240 (2000).

174. See *U.S. Mutual Legal Assistance In Criminal Matters Treaties (MLATs) And Other Agreements*, available at <http://travel.state.gov/mlat.html>; *Report On The Implementation Of The European Commission's External Assistance*, available at <http://europa.eu.int>.

175. Paulina L. Jerez, *Proposed Brazilian Money Laundering Legislation: Analysis and Recommendations*, 12 *AM. U.J. INT'L L. & POL'Y* 329, 350 (1997) (on file with author).

176. *Id.* at 345.

Serious Offenses,¹⁷⁷ the first chapter of which criminalizes money-laundering and the concealment of goods, titles, and assets¹⁷⁸ resulting directly or indirectly from the illegal traffic of narcotics-related crimes, organized crime, terrorism, or weapons smuggling.¹⁷⁹

The fight against global organized crime can be greatly strengthened through Mutual Legal Assistance agreements.¹⁸⁰ These agreements simplify convoluted procedures and serve to quickly pass information between law enforcement agencies of various countries. These arrangements do not work, however, when the cooperative law enforcement agencies lack trust in each other.

B. *Trafficking in Contraband and Related Criminal Activities*

By far the greatest ongoing organized criminal enterprises in Latin America are drug trafficking, and the related crimes of money laundering, trafficking of firearms, trafficking in and counterfeiting of personal and financial documents, and the smuggling of humans. Drug trafficking is tied to criminal cartels operating throughout the Americas, particularly in the Bolivarian countries¹⁸¹ and in the neighboring States of the Northern Andean region. Organized crime groups have well-established networks for the production and shipment of drugs that cross national boundaries within the Americas and reach into all hemispheres worldwide. Drugs produced in Colombia are shipped to Brazil, Uruguay, and Argentina for transshipment to Europe and elsewhere. According to a police official from Brazil, “[i]n Suriname, we also have Russian organized crime. From Ukraine and Kosovo, Russian arms are being traded for cocaine. This is East-West integration in a way. So we have North-South and East-West integration.”¹⁸²

Profits earned from drug trafficking and money laundering

177. *See supra* n.68.

178. OAS, *Anteproyecto de ley de Brasil, Reunion del Grupo de Expertos Sobre lavado de dinero*, OEA/ser.L/XIV.4.4, CICAD/LAVEX/doc.11/96, corr. 1, art. 16 (1997).

179. *Id.* art. 5.

180. *See* Nagle, *supra* n.173, at 1235.

181. Bolivarian countries include: Venezuela, Colombia, Ecuador, Peru, and Bolivia.

182. PROCEEDINGS OF THE SECOND ANNUAL LEGAL & POLICY ISSUES IN THE AMERICAS, 2001, 14 FLA. J. INT'L L. 56, 60 (2001) (transcript of remarks by George Millard, in chapter C: Brazil and Organized Crime in South America, of part III). *See also El primero*

total in the many billions of US dollars annually. While much of the earnings are pocketed by powerful drug cartels, an increasing percentage of the earnings are used by quasi-guerrilla groups (read criminal gangs) to fuel anti-government campaigns in Bolivia, Colombia, Ecuador, Mexico, and Peru.

This is especially true in Colombia, where the drug trade partially finances the hemisphere's oldest and largest terrorist group, the FARC.¹⁸³ Until the Colombian government took steps in early 2002 to retake territory ceded to it during a failed peace process with the administration of former President Andres Pastrana, the FARC had become a major source of the world's cocaine and heroin supply. In addition to the FARC's involvement in drug trafficking, a Colombian paramilitary organization known as the United Self Defense Forces of Colombia ("AUC")¹⁸⁴ has also claimed a significant stake in the drug trade, expanding its influence from its traditional base in northern Colombia into regions throughout the national territory formerly controlled by the FARC.

Rebel movements with origins in the indigenous groups such as the People's Revolutionary Militia ("MRP") in Ecuador¹⁸⁵ have also resorted to drug production and trafficking to finance insurgency campaigns in rural areas.¹⁸⁶ Recently, drug-backed insurgency movements have begun reforming in Peru a decade after the Peruvian government waged a bloody campaign

de la lista, SEMANA, June 24, 2002, at 34, 36 (reporting on the Suriname-Brazil connection).

183. For a detailed study of history of FARC see Ricardo Vargas Meza, *The Revolutionary Armed Forces of Colombia (FARC) and the Illicit Drug Trade* (June 1999), available at <http://www.tni.org/drugs/pubs/farc.htm>.

184. U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM (May 2002), available at <http://web.nps.navy.mil/~library/tgp/auc.htm>. The AUC – commonly referred to as *autodefensas* or paramilitaries – is an umbrella organization formed in April 1997 in Colombia to consolidate most local and regional paramilitary groups, each with the mission to protect economic interests and combat insurgents locally. The AUC, supported by economic elites, drug traffickers, and local communities lacking effective government security, claims its primary objective is to protect its sponsors from insurgents. *Id.*

185. See *Ecuador: Police Unsure of People's Revolutionary Militia Political Affiliations*, BBC MONITORING INTERNATIONAL REPORTS, Jan. 31, 2003.

186. For an in-depth report on the relationship between drug trafficking and guerrilla insurgents, see ANGEL RABASA & PETER CHALK, COLOMBIAN LABYRINTH: THE SYNERGY OF DRUGS AND INSURGENCY AND ITS IMPLICATIONS FOR REGIONAL STABILITY, Report prepared for Project Air Force's Strategy and Doctrine Program, Rand Corp. (2001) (on file with the author).

to “de-claw” the notorious Shining Path and Tupac Amaru guerrillas.¹⁸⁷

Peru’s continuing struggle against drug trafficking and its related crimes is due, in large part, to the Nation’s inability to curtail corruption within government institutions, to relieve economic desperation by remote indigenous groups who adhere to coca production as the primary cash crop, and to respond to indigenous dissident movements who depend on the cocaine and heroin trade to acquire political influence.

VII. *CURRENT ANTI-CORRUPTION EFFORTS*

In Latin America, the rubric that corruption begets more corruption¹⁸⁸ has pervaded political ambition for many generations. Corruption among the ruling elite developed into the rule rather than the exception, as the need to “grease the wheels” over government was accepted as the only means of getting anything accomplished, as well as the only mechanism to establish political alliances against potential rivals.

Traditionally, one’s reputation and success in politics [was] measured by one’s success in adhering to the principle that no one general law applies to all and at all times. Each individual [was] regulated by whatever law one can secure from one’s leaders. In this way . . . a protracted patron/client relationship [was] consummated.¹⁸⁹

The individual who excelled in such political conduct was esteemed as a *verraco*.¹⁹⁰ Historically, such conduct has remained free from criticism. Newspapers and other media are often reluctant to go after corruption, fearing withdrawal of government advertising, or have political biases that undermine the credibility of their reports. Moreover, many public officials see the proceeds of corrupt practices as the only means to get ahead and as a way to gain leverage over political rivals to whom the spoils of corruption would otherwise go. Given this political tension among the ruling elite, there is little incentive to blow the

187. See Drew Benson, *Peru’s Government Says Rebel Call to Boycott Vote Will Fall Flat*, ASSOC. PRESS WORLDSTREAM, Nov. 15, 2002.

188. Tamayo, *supra* n.164.

189. Nagle, *supra* n.156, at 14.

190. See *id.* at 54, n.38. A “*verraco*” literally means a wild male boar, but connotes a person who will not let anything stand in the way of getting what that person wants.

whistle on one's own political allies. Foreign entities also fuel the culture of political corruption, as bribes are routinely offered to win government contracts or to influence the regulatory climate.¹⁹¹

Corruption has robbed already struggling economies of badly needed revenues. In a 2002 speech, the U.S. Assistant Secretary of State of Hemispheric Affairs, Otto Reich, noted that studies estimated the cost of corruption in Iberoamerican countries at "\$6000 per man, woman, and child" in a region in the world where "one third of Latin Americans live on \$2 a day."¹⁹² As corrupt governments fell into greater debt, organized crime found new opportunities to gain access to financial institutions held by members of the ruling elites and smuggling corridors readily available under the watch of government regulators and landowners if the price for cooperation was right.

The United States in particular has had to balance geopolitical agendas regarding its southern neighbors against a reality that some institutional corruption must be tolerated in order to meet foreign policy objectives. This is particularly true with regard to the U.S. drug control policy in the region.

From the perspective of interstate relations, epitomized by dealings between the U.S. ambassador and high-level officials in the host government, diplomatic efforts aimed at reducing corruption can be particularly frustrating because they involve a form of transgovernmental penetration that traditional diplomacy is ill-suited to accomplish. In many respects, reforming drug-related corruption in foreign governments poses problems that are little different from those involved in trying to reduce human rights abuses. The U.S. government must contend with different criminal justice traditions and *modi operandi*, conflicting political interests, and insufficient power at the top of government to challenge vested interests at lower levels. In some cases, foreign heads of government would like to oblige U.S. demands but lack the capacity to do so. For instance, just as the civilian presidents of El Salvador and Guatemala typically lack the political power to punish senior military officials responsible for severe human rights abuses, so the president of Peru, Colombia, and Bolivia are not powerful enough to order the prosecution of every offi-

191. See Tamayo, *supra* n.164.

192. *Id.*

cial known to have been corrupted by drug traffickers. Alternatively, foreign heads of government may have sufficient power to accommodate U.S. demands but lack the desire to do so.¹⁹³

Into this resistant political landscape a couple of external forces began to exert influence for changing the traditional "greasing-the-wheels" form of government, by bribery and kick-backs. First, global economic recessions over the last thirty years forced Latin American governments to seek relief from fiscal crises in the form of loans from international lending institutions such as the World Bank and the Inter-American Development Bank ("IADB"), and in the form of direct aid from first world countries. Numerous disastrous episodes of government corruption involving the siphoning off of foreign aid at the outset of unprecedented foreign aid packages in the 1980s and early 1990s compelled the lending institutions to demand that Latin American recipient Nations initiate some semblance of mechanisms for monitoring and holding accountable government officials who got out of line.¹⁹⁴

Second, organized crime was going more global. Following the collapse of the Soviet bloc, organized criminal gangs from that part of the world cast about for new territories to conquer, and found Latin America to be rich with opportunities. Indeed, Latin America was like the promised land for organized crime from Europe, processing everything criminal syndicates could hope for: long established smuggling corridors, weak governments with long traditions of bribery and corruption, topographic features throughout the hemisphere perfect for trafficking and smuggling (jungle cover, river systems, remote open plains with little population around, convenient air corridors, vast stretches of unpatrolled coastline on three large ocean bodies),¹⁹⁵ and many anti-government insurgency movements long

193. See NADELMANN, *supra* n.32, at 253.

194. In 1999, for instance, the World Bank pledged to increase funding to forty-eight countries to fight institutional corruption, targeting judiciaries in need of judicial reform, Latin American countries targeted for funding were Argentina, Bolivia, Colombia, Ecuador, Guatemala, Nicaragua, and Paraguay. See *World Bank Joins 48 Countries in Corruption Fight*, AG. FR. PRESSE, Oct. 22, 1999. For an in-depth discussion of judicial corruption in Latin America see Luz E. Nagle, *The Cinderella Of Government: Judicial Reform In Latin America*, 30 CAL. W. INT'L L.J. 345, 360-66 (2000).

195. See Lia Osório Machado, *Financial Flows and Drug Trafficking in the Amazon Basin*, Discussion Paper Series, No. 22, UNESCO Management of Social Transforma-

festering in parts of Latin America with which to form alliances of drugs-for-weapons and military hardware trade arrangements.¹⁹⁶ One Russian mobster, Ludwig "Tarzan" Fainberg, the owner of a Miami strip club, was particularly busy in Colombia with drug traffickers. Among his accomplishments, Fainberg "brokered the sale of two Soviet military helicopters to the Cali drug cartel, then tried to buy a Soviet navy submarine for the cartel." His activities accounted for part of an estimated forty-six Eastern bloc aircraft in Colombia that has been employed by drug traffickers.¹⁹⁷ Moreover, from various marshalling points in Latin America, Russian syndicates have aided Colombian and Spanish drug trafficking groups in establishing transshipment networks throughout Europe, via Spain.¹⁹⁸ While the Russian mob has assumed a significant portion of drug trafficking out of Colombia, the longest alliance between Colombian and European-based traffickers has been with the Italian mafia. Other

tions ("MOST"), available at <http://www.unesco.org/most/ds22eng.htm>. The Amazon drainage basin, which covers a significant portion of South America and contains the border regions of major drug producing Nations is a unique area in the world for drug trafficking and other forms of contraband smuggling.

The incorporation of Brazil and of its Amazonian portion into international drug trading is effected through the intermediary of the coca-cocaine complex. The main coca-producing areas are located on the western side of the major drainage basin of the Amazon River in the upper and middle valleys of its headwaters and tributaries (Huallaga, Ucayali and Apurimac in Peru; Beni and San Miguel in Bolivia; Putamayo, Caqueta and Uaupés in Colombia). Thus, for the cartography (location of the coca-cocaine complex and its links with Brazil, we have taken the Amazon River drainage basin as a spatial reference unit, which is a larger sector than that of South American Amazonia, normally demarcated on phytogeographical (area covered by rain forests) or topographical-climatological (low-altitude hot areas) criteria. From the angle of drug-trafficking logistics, the great South American hydrographic basins, both the Amazonian and that of Paraguay-Parana, are becoming a major alternative for the setting up of an inter-modal transport system for the transit of drugs. It is interesting to note that, despite the difficulties of river navigation, these basins provided the principal communication route within the South American continent for centuries.

Id.

196. Russian mafias have been supplying Colombian guerrillas with weapons in exchange for drugs since the early 1990s, and such an alliance was strengthened with the additional involvement of Mexican drug traffickers and Mexican rebel groups. See Tamara Makarenko, *Colombia's New Crime Structure Takes Shape*, 14(4) JANE'S INTELLIGENCE 19 (Apr. 2002) (on file with author).

197. Mike Williams, *Colombia: Drug "Taxes" Fund Arsenals; Trafficking Fuels Rebel Expansion*, ATLANTA J. AND CONST., July 9, 2001, at 6A.

198. TAMARA MAKARENKO, *Colombia's New Crime Structure Takes Shape*, 14(4) JANE'S INTELLIGENCE 18 (April 2002).

criminal organizations working with Colombian syndicates include those from Japan, Nigeria, South Africa, Poland, and Romania.¹⁹⁹

Upon such a bleak landscape, it became incumbent upon Latin American governments to make reforms — at least a convincing show of reforms — to prevent foreign aid from being shut off. The best way to do this would be to pass anti-corruption legislation, and to create a few agencies tasked with policing government activities and regulating the activities of private corporations. Some of the most vigorous efforts currently underway to fight corruption have taken place in Colombia, where in August 1999, the Colombian government established a Unit for Investigation and Sanctions,²⁰⁰ which has investigated hundreds of cases in a short time, including one that led to the arrest of thirty senators.²⁰¹

Colombia also implemented an Elite Division Against Corruption under the Office of the Attorney General for the investigation of allegations of corruption in the civil service,²⁰² and cooperated with the U.N. in setting up a National System of Integrity in conjunction with the latter's Global Programme Against Corruption.²⁰³ Despite these *de jure* changes, however, and despite some encouraging successes in the realm of actual enforcement, even the government admits that corruption is still thriving in Colombia.²⁰⁴ Unfortunately, as exposed in a series of books published in the last three years in Colombia about scandals involving Colombian banks, construction projects, and government officials throughout the Nation, corruption still outpaces control.²⁰⁵

199. *Id.*

200. GCR 2001, *supra* n. 121, at 177.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Institutional corruption has not gone without notice by the press or by government agencies. In 2001, the Colombian Controller General's Office (Contraloría General de la República) published investigative reports on institutional corruption in a series entitled CRÓNICA DE LA CORRUPCIÓN (Bogotá: Alfaomega, 2001). Some of the volumes in the series are: FELIPE LOZANO PUCHE, CONSPIRACIÓN EN LOS PUERTOS about corruption in the Nations' commercial ports, GLORIA CONGOTE, EL SEÑOR DE LAS DRAGAS, about illegal government contracts, ÓSCAR COLLAZOS, CARTAGENA EN LA OLLA PODRIA, about fraud and corruption in the construction industry, ROLANDO LÓPEZ, LA RUINA DE LA BANCA ESTATAL, a report on corruption in the banking sector, and HÉCTOR

Argentina's President, Fernando De La Rúa, recently established the Bureau Against Corruption to investigate the outgoing administration, which had been notoriously corrupt.²⁰⁶ Despite apparently vigorous efforts on the part of that bureau, including efforts at international cooperation via the OAS, Mercosur, and the Free Trade Area of the Americas, only one official was arrested in the course of an investigation that encompassed over one thousand allegations of corruption.²⁰⁷ Once again, the gap between ostensible efforts and actual enforcement is quite wide.

The situation in Peru is somewhat more encouraging. There, a special prosecutor against corruption is investigating members of the former Fujimori administration under laws that encourage confessions in exchange for reduced sentences.²⁰⁸ This investigation has resulted in the freezing of some US \$153 million in suspect funds, and the arrest of many public officials and senior military officers.²⁰⁹ However, as impressive as this achievement is, the true test of anti-corruption enforcement efforts is how well they work against corrupt actors in incumbent administrations, rather than former ones.

Peru maintains an open policy with regard to international cooperation in the fight against drugs and welcomes the suggestions and support of other countries. Peru is also convinced that only through a regional approach can long-lasting success be achieved. Peru considers the fight against drug production and trafficking one of its main priorities and is, therefore, devoting significant effort and national resources to reduce Peru's coca cultivation.²¹⁰

Many barriers to real reform persist in the Iberoamerican world; social, cultural and political legacies exert a shadowy influence over the business of States and impede meaningful progress. One must ask then if the States will implement the UNCTOC in good faith, or if the Convention will represent little more than a pro-forma gesture extended to the international

MARIO RODRIGUEZ, LA CAJA DE LOS AMIGOS, about the collapse due to corruption of the agricultural savings and loan institutions.

206. GCR 2001, *supra* n.121, at 177-78.

207. *See id.* at 178-79.

208. *See id.*

209. *See id.*

210. *See id.*

community by an omnipresent elite, which still wields tremendous power within Latin America's democratic institutions.²¹¹

In response to Colombia's thriving drug and money laundering trade, steady progress has been reported as a result of new cooperation with the United States and an infusion of unprecedented increases in funding under Plan Colombia. In 2001, the number of extraditions skyrocketed, with twenty-six fugitives, including twenty-three Colombian nationals, extradited to the United States, together with pending extraditions representing an increase of nearly 700 percent over the prior three-year period. Asset seizures and forfeitures are also on the rise due to increased training and cooperation between Colombian asset forfeiture units and their U.S. counterparts.

While not known for being a large-scale producer of cocaine and other controlled substances, Brazil is a noted producer of precursor chemicals and a major transit country for illicit drugs shipped to the United States and Europe. Brazil continues to cooperate with its neighbors on controlling the remote border regions where illicit drugs are transported. In fact, seizures of cocaine doubled in Brazil from 2000 to 2001, reaching an interdiction total of some eight metric tons.²¹²

Although Brazil has not ratified the IACAC, the government has undertaken various bilateral and multilateral efforts to meet all objectives of the 1988 U.N. Drug Convention²¹³ and has implemented a number of law enforcement measures that have achieved some measurable progress in the fight against illegal drugs. An example of this progress was the capture in April of major narcotics trafficker, Luiz Fernando Da Costa, an operation in which Brazil worked closely with Colombia and the DEA.

211. See Nagle, *supra* n.194, at 348.

As a result of the legacy of its colonial past, Latin America has been burdened more than many developing regions of the globe by its past in which the autocratic caprices of Iberian monarchies pillaged a fertile and abundant land for the sake of religious zealotry and strategic hegemony over other Old World rivals. Five hundred years after Europeans began the conquest of the New World, Latin America continues to struggle with its demons, namely, rule by white and criollo oligarchies intent on preserving a status quo characterized by a rigid class consciousness.

Id. For additional historical background on impediments to action against corruption in the Americas, see Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 *FORDHAM INT'L L.J.* 1888-1902 (1996).

212. *Id.*

213. ITND, *supra* n.9.

A. *Combating Money Laundering and the Financing of Terrorism in Latin America*

Laundering the proceeds from organized crimes is an ancient practice, and

[i]t goes back at least to the Roman Empire. Roman soldiers stationed in France used to hide and “launder” their money. During the crusades, the Knights Templar were masters at hiding and laundering their money. Several of them paid the price in 1300, by being burned at the stake, but their money was safe.²¹⁴

Money laundering has emerged as a serious threat to the economic and social vitality of the global community. As such, the U.N. has identified seven reasons why money laundering poses such a problem:

1. When that money is placed in banks it causes that banking system and that money to become less productive within a community.
2. It contributes minimally to the optimization of economic growth.
3. It results in changes in money demand.
4. It is a greater risk to bank stability.
5. It creates greater volatility in the international community.
6. It enlarges political dimensions through corruption and crime.
7. It weakens the social fabric.²¹⁵

A number of Latin American Nations have undertaken measures to fight money laundering and the financing of terrorism (AML/CFT) as part of a global effort to curtail the negative impact such criminalism has on the formal regional economy. The primary thrust was to go after money laundering operations directly related to international drug trafficking operations in the hemisphere by legislating laws to hold financial institutions accountable if found to be engaged in the practice of laundering drug profits. The process has typically been based on anti-drug laws legislated before the 1990s, and usually began with the central banks issuing directives regarding detection and prevention

214. PROCEEDINGS OF THE SECOND ANNUAL LEGAL & POLICY ISSUES IN THE AMERICAS, 2001, 14 FLA. J. INT'L L. 3, 42 (2001) (transcript of remarks by Fletcher Baldwin, in chapter A: Introduction, of part III).

215. *Id.* at 44.

of suspicious transactions. In general, the directives would mandate that banking institutions must:

identify customers making large deposits, discontinue accounts with parties using obvious fictitious names, prohibit the payment by tellers of checks issued to third parties above a certain amount (i.e. 50,000 Argentine pesos, equivalent to 10,000 dollars in Bolivia), report to the Central Bank personal data on account-holders where cash over a certain amount is deposited monthly or annually, and report suspicious transactions.²¹⁶

Over the last several years, Latin American Nations have implemented new laws to fight money laundering and the financing of terrorism. In a few countries, new investigative agencies were created to spearhead anti-money laundering efforts (in some countries this agency is called the Financial Information Unit ("FIU")) in support of the new laws. In Argentina the agency is called the Financial Intelligence Unit,²¹⁷ while in Colombia the unit is called the Asset Forfeiture Unit.²¹⁸ These agencies are in charge of the analysis, treatment, and transmission of information with a view to preventing and impeding the laundering of funds.

The main features of laws to combat money laundering, as well as combating the financing of terrorism, may be summarized according to the results of a survey conducted by the IMF in early 2002 among Nations selected on the basis of achieving "a representation distribution by geographical location and stage of economic development."²¹⁹ The following Latin American and Caribbean Nations responded to the survey: Barbados, Belize, Brazil, Chile, Colombia, El Salvador, Grenada, Guatemala, Haiti, Jamaica, Mexico, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Venezuela. The following generalizations were formulated based on the results of the surveys:

216. See FATF SECRETARIAT, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 1999-2000 (June 22, 2000), available at <http://www.fatf-gafi.org>.

217. CRIMINAL CODE [CRIM. C.], Act No. 25,246, Ch. II, art. 6 (Arg.).

218. For a description of this and other anti-corruption and counter-narcotics agencies see *Washington Office on Latin America*, available at <http://www.wola.org>.

219. See IMF, INTENSIFIED WORK ON ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (AML/CFT) PROGRESS REPORT ON RESPONSES TO THE AML/CFT QUESTIONNAIRE (Sept. 10, 2002), available at <http://www.imf.org/external/np/mae/aml/2002/eng/091002.htm>.

- The respondents can be divided into three groups: the first, about half the sample, who appear to have in place most of the legislative and regulatory elements of an AML/CFT system; a group of about thirty percent of the sample that have established system, but with some significant material weaknesses; and the remaining group where the AML/CFT system is minimal or is just being established.
- A large majority of countries (about three quarters) have adopted AML laws of varying degrees of comprehensiveness, but CFT provisions are generally weaker (under thirty percent of respondents had dedicated CFT provisions in place, and another thirty percent had provisions relevant to CFT).
- Many of the countries that have responded to the questionnaire have taken steps in the last two years to strengthen their AML/CFT systems. As many as two thirds of the sample have passed AML/CFT laws or amendments since 2000, and about forty percent reported that they had prepared such legislation and expected passage at the time the response was prepared. Almost twenty percent of the total sample had established a FIU in the recent past, or stated that they were planning to establish an FIU.
- Most AML laws contain a wide definition of predicate crimes, that is, the criminal activity that gives rise to the funds to be laundered. However, in about one third of cases the predicate crimes are limited to those on a list of specified crimes, which is often dominated by narcotics trafficking, rather than covering a defined set of offenses, such as “felonies” or “all offenses in the criminal code.” Except in a handful of instances, the questionnaire responses did not provide information on the treatment of crimes committed in other jurisdiction, which is an important issue, given the international nature of money laundering and terrorist financing.
- The maximum penalty for money laundering is usually between five and ten years of imprisonment; in two cases the maximum penalty is less than five years imprisonment, and in five cases the maximum penalty in aggravated circumstances is more than ten years imprisonment. The forfeiture of the proceeds of crimes is mandated in the available laws.
- AML legislation from the sample of responding countries al-

ways applies to commercial banks. About ninety percent of such AML legislation covers also some or all major non-bank financial institutions (“NBFIs”). Slightly over half the available responses provided information that non-financial institutions (“NFIs”) are directly addressed in their AML legislation, which in most cases comprise gambling establishments and the like.

- In responding countries with AML legislation, the covered financial institutions are required to report unusual transactions. However, only a small number of responses indicate explicitly that the authorities of those countries have provided financial institutions with detailed and updated guidelines on recognizing unusual transactions. Almost all available AML laws expressly prohibit “tipping off” clients whose transactions have been reported as unusual. Only about two-thirds of available AML laws or guidelines on reporting include a provision stipulating automatic reporting of cash transactions above some threshold.
- Almost all AML legislation on which information is available requires covered financial institutions to establish internal procedures to identify and report unusual transactions. In about ninety percent of such cases, the institutions are required to appoint a compliance officer and implement training for their staff.
- About eighty-five percent of available responses reported requirements on commercial banks (and most often also NBFIs) to verify the identity of potential clients, for example, by checking identity documents for individuals or by examining registration records for companies. These requirements usually applied even when the client wished to make a one-time transaction (above a threshold). Most customer identification rules also included special requirements to identify the ultimate beneficiary when a client is acting on behalf of a third party. However, except for about fifteen percent of responses, little information was provided on the conditions under which financial institutions have to go beyond mere identity checks and perform more thorough “due diligence.”
- In reporting countries, covered financial institutions are required to retain records on the identity of clients and transac-

tions for five years or more, except in two cases (five percent of the sample).

- Either the AML law or the commercial bank law in almost all reporting countries include clauses stipulating that major shareholders and senior management must meet certain criteria to be deemed “fit and proper.” Such requirements on controlling interests of NBFIs were reported by three-quarters of respondents, and about two-thirds of respondents mentioned such requirements for some NBFIs.
- About fifty-five percent of respondents had in place an FIU, although it is not clear how many are fully operational. Of the FIUs in reporting countries, eighty-five percent (eighteen instances) were members of the Egmont Group of FIUs, which is a forum promoting FIU development and cooperation.
- About sixty percent of responses indicated that the respective country was a signatory or had ratified important international treaties or conventions on AML or CFT issues, such as the United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, and the International Convention for the Suppression of the Financing of Terrorism. Very few responses provided significant information on the scope for sharing information on unusual transactions and the prosecution of money laundering or terrorist financing. Just two responses indicated explicitly that the reporting country was interested in receiving additional technical assistance to improve one or more aspects of its AML/CFT system. A few other responses mentioned that the country was already receiving technical assistance in this area.²²⁰

220. *Id.* The questions asked were as follows:

1. Please name and describe the laws that address money laundering and the financing of terrorism. Is money laundering an offense? Is the financing of terrorism an offense? Copies of these laws would be appreciated.
2. How, if at all, is money laundering defined in your laws or regulations? How, if at all, is the financing of terrorism defined? What crimes (the so-called predicate offenses) do the relevant laws cover?
3. To what multilateral or bilateral conventions, treaties and agreements relating to money laundering and terrorist financing are you a party? What do the bilateral arrangements cover?
4. What institutions are involved in setting anti-money laundering and anti-terrorist financing laws, regulations, guidelines and codes of conduct? What institutions are involved in monitoring compliance, and in collect-

From the responses to the IMF questionnaire, a number of

- ing and using financial information related to suspected or actual criminal activities, and what are their respective responsibilities?
5. What financial institutions and other intermediaries are covered by to your anti-money laundering and anti-terrorist financing laws and regulations?
 6. What laws, regulations, guidelines or codes of conduct set standards for financial institutions with regard to knowing the identity of all customers (due diligence)? Copies of these documents would be appreciated.
 7. What regulations or guidelines have been issued to financial institutions regarding the recognition of unusual or suspicious transactions, including those related to the financing of terrorism? What legislation, regulations or guidelines specify when financial institutions must report unusual or suspicious transactions to the supervisor or other authorities (for example, a Financial Intelligence Unit)? Copies of these documents would be appreciated.
 8. What laws or regulations help ensure that financial institutions and other intermediaries are not controlled by criminals? Copies of these documents would be appreciated.

Supplementary Questions

Legal framework

9. What legislation provides the supervisory and other financial sector authorities with powers to supervise compliance with AML/CFT requirements? What legal powers do the financial sector supervisor(s) have to verify and enforce adherence to your AML/CFT laws, rules and guidance, or to sanction non-compliance?
10. Do laws allow for the freezing and confiscation of proceeds of crime or terrorist assets?
11. Are there specific provisions in the legislation in this area to protect the rights of innocent persons or businesses, such as privacy rights and the protection of bona fide third parties?

Institutional arrangements

12. How does the financial sector supervisor(s), directly or indirectly, share with the relevant enforcement and judicial authorities, and with other domestic and foreign financial sector supervisory authorities, information related to suspected or actual criminal activities? Under what conditions? Is court authorization necessary?
13. What in-house resources and specialist expertise in financial fraud and anti-money laundering are available to the financial sector supervisor(s) and other agencies?
14. Are industry groups or associations involved in setting AML/CFT standards and codes of conduct? Do they provide training in this area for their members?

Requirements on financial institutions

15. How must financial institutions establish the identity and bona fides of all customers (due diligence)? Under what circumstances can a financial institution take business referred to it without verifying the identity of the ultimate beneficial owner?
16. What requirement or guidance has been issued to financial institutions

observations emerge pertaining to the ability of Latin American Nations to combat money laundering and the financing of terrorism. These points mirror those emphasized by the U.S. Department of the Treasury's 2001 Money Laundering Strategy: aggressive enforcement, measured accountability, preventative efforts, and enhanced coordination at the international level.²²¹

To this could be added the idea that public awareness of the problems of money laundering and the financing of terrorism must be increased in order to bring public pressure on government and financial institutions to enforce the laws in place.

The implementation of free trade agreements such as the North American Free Trade Agreement ("NAFTA") and the delineation of regional economic zones have become mechanisms for the international laundering of the proceeds of criminal organizations.²²² Such liberalization of international trade mechanisms raises some important concerns with regard to fighting transborder money laundering operations. Among such concerns is the impact on small, dependent rural and local economies in emerging countries within the economic trade zones.

regarding records that must be kept on customer identification and individual transactions? What is the retention period for such records?

17. When a financial institution reports an unusual or suspicious transaction to the supervisor or other authorities, what information must be provided, and how?
18. Are financial institutions required to report all cash transactions over a certain amount, and if so, what is this amount?
19. Are financial institutions prohibited from warning their customers when information relating to them is being reported to the competent authority?
20. What standards of integrity are expected of major shareholders, Board members, and senior managers of financial institutions? To which institutions are these standards applied? Are these standards incorporated into licensing requirements? How does the relevant supervisor monitor maintenance of these standards?
21. Does the relevant supervisor require financial institutions to appoint a senior officer with explicit responsibility for ensuring that the financial institution's policies and procedures are in accordance with local AML/CFT requirements? Are financial institutions required to have an AML/CFT staff-training program?

Id.

221. For an in-depth discussion of each of these points *see* Statement of Jimmy Gurule, Undersecretary for Enforcement, U.S. Department of the Treasury for the Senate Committee on Banking, Housing, and Urban Affairs, *available at* http://www.fas.org/irp/congress/2001_hr/092601_gurule.html.

222. John L. Evans, *International Money Laundering: Enforcement Challenges And Opportunities*, 3 SW. J. OF L. & TRADE AM. 195, 196 (1999).

Such local formal and even informal economies may likely be the most exposed and the least able to resist money laundering activities or overcome the aftermath/impact of enforcement operations. For example, the economy of the tri-border region of Brazil, Paraguay, and Argentina, would suffer significantly were money laundering and organized criminal enterprises removed from the local money circulation equation.²²³ For instance, what would happen to local merchants renting space in a mall that is seized because the owners of the mall are using the property to launder money?²²⁴ Likewise, the increased cost imposed on a small rural financial institution to comply with reporting requirements could have an unintended debilitating impact on the local economy.

Every criminal needs to “launder” the proceeds of crime, but where organized crime and corruption are involved, the consequences of money laundering are bad for legitimate business, a hindrance to development, and an impediment to good government and the rule of law. Banks rely on a good name to build business and attract clients, knowing that a financial institution with a reputation for shady dealing will be shunned by legitimate enterprises. Likewise, governments in Latin America known to be engaging in institutional money laundering face international criticism and the potential loss of aid and investment from the United States and other first world governments.

The unchecked inflow of illegal currency erodes the reputation of financial markets and destroys a Nation’s economy because investors will prefer to spend elsewhere. Interest and exchange rates become more volatile and can trigger inflation in countries where criminal elements do business. Moreover, the siphoning off of billions of US dollars a year from the formal economy poses a real danger to the global market.

While it was not the first international initiative against international narcotics trafficking, the ITND was the first to address the complexities of the modern drug trade.²²⁵ Before 1988, international agreements emphasized controlling the pro-

223. See Jerry Seper, *Terror Cell on Rise in South America*, WASH. TIMES, Dec. 18, 2002, at A06.

224. *Id.*

225. Ronald K. Noble & Court E. Golumbic, *A New Anti-Crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering*, 30 N.Y.U. J. INT’L L. & POL. 79, 85 (1997-8); see also ITND, *supra* n.9.

duction of drugs and preventing their flow into the marketplace.²²⁶ However, the ITND shifted focus to legal tools and law enforcement strategies available to combat drug trafficking.²²⁷ One such strategy was to deny drug traffickers the proceeds of their illegal enterprise. The language of the ITND reads: “[i]llicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate, and corrupt the structures of government, legitimate commercial and financial business, and society at all levels.”²²⁸

Despite the numerous treaties, conventions and statutes enacted in the last ten years, estimates indicate that between \$500 billion and US \$1 trillion is laundered each year world wide.²²⁹ To put the cost in perspective, US \$500 billion would have covered almost one-third of the U.S. total annual budget for the year 2002.²³⁰ As of February 1, 2003, 166 States comprise the Parties to the ITND.²³¹ Of these Nations, many that fall within

226. See Noble, *supra* n.225, at 110.

227. *Id.* at 111.

228. See ITND, *supra* n.9, Pmbl.

229. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2001-2002 32 (Feb. 1, 2002), available at <http://www.oecd.org/pdf/M00025000/M00025449.pdf>.

230. U.S. GOVERNMENT EXECUTIVE BRANCH, FISCAL YEAR BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES 2003 23, available at <http://www.whitehouse.gov/omb/budget/fy2003/pdf/hist.pdf>.

231. These States are: Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Syrian Arab Republic, Tajikistan, Thailand, the former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania,

the category of "major drug-producing and major drug-transit countries"²³² have been slow to legislate the necessary laws and/or to implement the extra-territorial instruments such as mutual legal assistance treaties with other Member Nations to combat international organized criminal enterprises and, thereby, comply with the obligations imposed by the ITND. Some signatory Nations, such as Guatemala, Haiti, and Uruguay, have been slow to draft anti-money laundering legislation, while others, such as Colombia, Costa Rica, the Dominican Republic, Jamaica, Mexico, and Paraguay, have not adequately enforced anti-money laundering laws already on the books.²³³

The conventions and model regulations established by international consensus are intended to provide methodologies for signatory Nations to address criminal enterprise. Over time, methodologies for detecting money laundering activity and parties involved in the activity have evolved. One method of detecting large sums of money moving through banking institutions is the creation of reporting requirements. Banks in a number of countries are now required to report business transactions surpassing a set dollar amount. The efforts have met with marginal success in Latin America, but bear a brief review. At least twelve Latin American countries have bank reporting requirements in effect. However, there are definite differences among the types of requirements. For example, Argentina and Brazil have monetary regulations that transactions over a certain amount must be reported to the regulatory body.²³⁴ However, in Chile and Bolivia, banks must monitor all accounts and then report any suspicious activity.²³⁵ This standard of review is differ-

United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe. On Dec. 31, 1990, the European Community deposited its instrument of formal confirmation to the 1988 Convention (extent of competence: article 12). See *Monthly Status of Treaty Adherence*, available at http://www.odccp.org/odccp/treaty_adherence.html#1988.

232. Jimmy Gurule, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances — A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 *FORDHAM INT'L L.J.* 74, 86-87 (1998).

233. *Id.* at 86.

234. See *supra* n.217. See also LAW NO. 9613 (1998) (Braz.). LAW NO. 9613 sets values for reporting requirements on the crimes of laundering or concealment of assets, rights, and securities, discusses prevention of the use of the financial system for illicit actions as described, and creates the Financial Activities Control Council ("COAF"), and other matters.

235. Chile Inter-Institutional Covenant 1994 (investigation of the conversion and

ent from bank to bank, but the penalty for failing to report can carry criminal sanctions.²³⁶

In Uruguay, bank reporting requirements cover wire transfers, traveler's checks, money orders, and currency exchange houses.²³⁷ The drawback of expanding such requirements, however, is that it runs contrary to the need for anonymity, which also exists in legal business endeavors.²³⁸ Businesses and individuals often want complete confidentiality to ward off "the erosion of asset values through unwanted disclosure."²³⁹ Expanding such reporting requirements may do more harm to legitimate businesses than it would to curb illegal money laundering activities.

Another way to combat international money laundering is the use of an informant and reward system, such as that used in Colombia where citizens can be rewarded for providing information leading to the recovery of drug related proceeds.²⁴⁰

B. Freezing of Assets and Forfeiture of Proceeds of Crime

Asset forfeiture is one of the most important components of money laundering laws.²⁴¹ By insuring that proceeds do not re-enter the market and fund further criminal activity, States can make significant in-roads to ending organized crime and neutralizing institutional corruption.²⁴² "The term forfeiture covers situations in which the government takes away property illegally

transferal of money in the financial systems) (on file with author); SUPREME DECREE NO. 24771 (1997) (Bol.) entitled "Regulation of the Unit of Investigations of Financial Institutions," created by means of Law no. 1768 of Modifications of Penal Code of 1997. *Id.*

236. SUPREME DECREE NO. 24771 (1997) (Bol.).

237. CIRCULAR NO. 1.713 (2000) (Uru.), entitled "Businesses of Intermediation Financial Agency, Houses of Change and Administrative Businesses of Credit." This law sets norms to prevent the legitimization of assets originating from criminal activities. *Id.*

238. *Id.*

239. PAOLO BERNASCONI, INTERNATIONAL CONGRESS OF COMPARATIVE LAW: MONEY LAUNDERING AND BANKING SECRECY 14TH 318 (1996).

240. M. LEVI & L. OSOFSKY, *Investigating, Seizing and Confiscating the Proceeds of Crime*, POLICE RESEARCH GROUP REPORT 61 (1995). Because there is great risk, a small reward may not be enough of an incentive to report the illegal activity to law enforcement. If the reward were substantially raised however, to perhaps fifty percent of the total amount recovered, informants would be much more likely to turn in organized criminals, especially if the reward were coupled with enrollment in the witness protection program.

241. Michael J. Hershman, *Asset Recovery*, 1317 PLI/Corp 587, 589 (2002).

242. *Id.*

used or acquired, without compensating the owner.”²⁴³ Asset freezing and forfeiture is sometimes “achieved through an *in rem* proceeding against the property itself.”²⁴⁴ “The *in rem* proceeding is based on the legal fiction that the property is guilty of the offense of being used illegally.”²⁴⁵ Before “proceeds of crime” legislation was enacted, “the courts throughout the Americas would not allow the seizure of realty and intangibles.”²⁴⁶ Historically, this required a special writ from the judge after the criminal was convicted. As international and bilateral agreements have been enacted between governments to share in the spoils from seizure of property from proceeds of crime legislation, Latin American Nations have drafted procedural amendments for issuing warrants and restraint orders when targeted property needs to be secured to ensure its availability should forfeiture be ordered.²⁴⁷ A restraint order may then be obtained on application to a superior court to prevent the dissipation, concealment, or removal of the real property or intangibles.²⁴⁸

In response to potential conflicts with civil law traditions that protect an individual’s right to privacy, a balance must be struck between drug prevention and individual rights. Colombian Decree 1461 of 2000 addresses such concerns and is a comprehensive set of rules regarding the custody, care, administration, and destination of goods and property that are proceeds from a crime or tools utilized in the execution of the crime.²⁴⁹ Once taken into custody, the burden stays with the prosecution to show why the property needs to be held and what result is required if forfeiture is deemed necessary.²⁵⁰

243. Evans, *supra* n.222, at 197.

244. *Id.*

245. *Id.*

246. *Id.* at 203.

247. *See, e.g.*, DECREE NO. 1461 (2000) (Colom.). Decree 1461 establishes rules for the seizure, custody, care, administration and destination of property considered to have been the product of crimes or to have been utilized in the execution of crimes. Decree 1461 also regulates the administration and sale of goods administered by the National Management of Narcotics.

248. *Id.*

249. DECREE NO. 1461 (2000) (Colom.).

250. *Id.*

VIII. PROSPECTS FOR OVERCOMING TRANSNATIONAL
CRIMES IN THE AMERICAS

There is considerable basis for skepticism regarding whether anti-corruption and anti-organized crime efforts in Latin America will take hold and bring about reform and institutional reconstitution. Latin America's struggling governments have historically been hampered by ineffective justice systems that allow white collar criminals, corrupt government officials, and others with political connections to get away with their criminal conduct. Some of those who are convicted have been able to claim political persecution, thereby "casting doubt on the honesty of some anti-corruption campaigners."²⁵¹ Moreover, the implementation of new criminal judicial mechanisms, and care of international rule of law development projects has stumbled. This is of particular concern in Latin American Nations where a new code of criminal procedure modeled on the adversarial system of the Anglo-American justice system has been adopted. As noted in the U.S. Department of State's International Narcotics Control Strategy Report for 2001:

The Code of Criminal Procedures (CCP) was implemented fully in June with the first oral trials beginning in September. The introduction of oral trials has reduced trial lengths from years to less than one week, but getting cases to trial is difficult. Congress has delayed naming district attorneys, there is a lack of mid-level leadership within the Public Ministry which has paralyzed prosecution, and the cooperation between police and prosecutors (as both adjust to new roles under the new system) has often broken down.

Most narcotics cases are resolved through plea-bargaining to avoid penalizing informants and revealing their identities (where the informant is a participant). Changes in the substantive Criminal Code will be needed to avoid prosecuting informants. Bail provisions and restrictions are not always applied correctly and the CCP limits the use of preventive detention. In spite of considerable training, prosecutors and judges (unaccustomed to the discretion under the CCP) often fail to apply preventive detention when it is called for. In early 2001, the GOB enacted a new Public Ministry Law, which professionalizes the prosecutorial function and adapts the office to the requirements of the CCP. The judicial

251. Tamayo, *supra* n.164.

branch introduced a more rigorous merit selection process for junior judges. However, disorganization within the Judicial Council and conflicts within the judiciary may lead to further weakening of the Council.²⁵²

Chile has been undergoing similar reforms to its criminal justice program, but its strict bank secrecy laws continue to expose Chile as an attractive international weigh station for the laundering of drug money.²⁵³ What can be learned from the U.S. Department of State Report is that throughout Latin America, governments are confronting similar problems with transnational organized crime and struggling with endemic and historically persistent problems in the law enforcement, legislative, and judicial infrastructures.

That said, several positive trends are under way that may change the institutional incentives that have long favored corruption in Latin America. First, “a generation of public officials, many educated in the United States, has entered public life in Latin America with first-hand knowledge of free markets and democracy.”²⁵⁴ Many of these officials believe in free trade, and know that effective competition demands fair and transparent regulations.²⁵⁵ It remains to be seen if the new generation of technocrats embraces the ethics and codes of conduct required to confront the corrupting influences of past practices and the potential of illicit riches.

Second, democracies are beginning to stabilize throughout Iberoamerica, and with increased freedom of the press and government watchdog organizations, citizens are beginning to be less tolerant of corruption and the abuses by organized crime that negatively and directly impact the societal good.²⁵⁶

Third, and perhaps most encouragingly, changes in information technology are increasingly providing citizens with the means to lift the veil of secrecy from the activities of government

252. U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT (2001), available at <http://www.state.gov/g/inl/rls/nrcrpt/2001/rpt/8477.htm>.

253. *Id.*

254. Boswell, *supra* n.143, at 180.

255. *Id.* at 180-1; see also Mark B. Baker, *Integration Of The Americas: A Latin Renaissance Or A Prescription For Disaster?*, 11 TEMP. INT'L & COMP. L.J. 309, 337, n.201 (1997) (arguing that the increasing tempo of international trade is beginning to decrease tolerance for corruption among businessmen).

256. Boswell, *supra* n.143, at 180.

officials.²⁵⁷ With the advent of the Internet, the darkness surrounding governmental operations is in retreat in South America.²⁵⁸ "The more freely information becomes available, the harder it is for wrongdoers to hide their infractions."²⁵⁹

Access to the Internet is increasing sharply throughout the more developed areas of the continent,²⁶⁰ and the resulting ease of access to information is already allowing citizen watchdog groups to impose pressure on governmental officials to remain honest.²⁶¹ Moreover, NGOs in Colombia and Venezuela, and Transparency International chapters in Argentina, Brazil, Ecuador, and Paraguay are becoming increasingly active and effective at educating the civil society and putting pressure on politicians to behave themselves.

Brazil has accelerated this trend by means of its new fiscal responsibility law, which requires government administrators to publish detailed fiscal reports on the Internet at prescribed intervals.²⁶² In Peru, the Office of the Ombudsman, an independent agency "to represent the interests of citizens, no matter how poor they might be," was developed by the private, non-profit organization *Instituto Libertad y Democracia* and incorporated in the 1993 Constitution.²⁶³ Such developments increase the probability "that both bribe-payers and bribe-seekers will be exposed. This danger enhances formal control mechanisms of the law by increasing the risk of prosecution; it enhances informal control mechanisms by increasing the risk of reputational harm and potential ostracism."²⁶⁴

The best hope for overcoming transnational organized crime in the region rests with the engagement between law enforcement agencies and foreign aid institutions in the United States that offer the technical know-how and the financial re-

257. See generally Dakolias & Thachuk, *supra* n.119, at 355-56.

258. Julia Scheeres, *The Net as Corruption Disruption*, WIRED NEWS, Mar. 26, 2001, available at <http://www.wired.com/news/politics/0,1283,42608,00.html>.

259. Salbu, *supra* n.123, at 91.

260. Nagle, *supra* n.141, at 863-64.

261. Julia Scheeres, *Argentina's Anti-Corruption Net*, WIRED NEWS, Jan. 11, 2001 available at <http://www.wired.com/news/politics/0,1283,41132,00.html>.

262. GCR 2001, *supra* n.121, at 174.

263. Institute for Liberty and Democracy, *Major Legal Reforms Designed by the ILD: Activating Peru's First Ombudsman*, available at <http://www.ild.org.pe/history-major-activating.htm>.

264. Salbu, *supra* n.123, at 94.

sources to retool the law enforcement and criminal justice apparatus in struggling Latin American Nations. This assistance generally falls under rule of law initiatives for judicial and law enforcement reform sponsored by the U.S. Department of State, and training programs administered by branches within the U.S. Department of Justice.²⁶⁵ The other method of strengthening law enforcement efforts to combat transnational organized crime, and to meet commitments to international conventions and protocols, such as the ITND, is by the implementation of bilateral mutual legal assistance treaties (“MLAT”) among Nations.²⁶⁶ Such MLATs allow enforcement agencies to expand greatly their reach in the investigation, detention, and extradition of international criminals wanted in requesting countries. According to a leading expert on MLAT protocols, MLATs offer particular advantages over traditional methods of international cooperation in the prosecution of organized crimes:

MLATs are designed to enable law enforcement authorities to obtain foreign evidence in a form admissible in the requesting party’s courts. In contrast, letters rogatory, the traditional requesting procedure, are generally slow and relatively inefficient because the requests must clear many bureaucratic steps, including courts in both countries, foreign ministries, justice ministries, and in some instances, embassies. The procedure is time-consuming, cumbersome, inefficient, and often results in information that cannot be introduced in court. Moreover, execution of letters rogatory is only a matter of comity. In contrast, MLATs are made directly from one competent authority or Justice Ministry to the other. MLATs provide an obligation for contracting parties to assist upon request, with certain exceptions, such as when the request relates to a political or military offense.²⁶⁷

The United States has MLATs with most countries, and they act as an extension mechanism for Latin American Nations to comply with their commitments to international conventions in

265. For an in-depth, critical analysis of one such judicial reform program, see generally Luz E. Nagle, *Colombia’s Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition*, 61 U. PITT. L. REV. 881 (2000).

266. For an in-depth discussion of the MLAT between the United States and Colombia, see Nagle *supra* n.170, at 1240-66.

267. Bruce A. Zagaris, *International Criminal And Enforcement Cooperation In The Americas In The Wake Of Integration: A Post-Nafta Transition Period Analysis With Special Attention To Investing In Mexico*, 3 SW. J. OF L. & TRADE AM. 1, 10 (1996).

which they are signatories. Yet, the mechanisms and protocols, and the implementation of international agreements to combat transnational organized crime only work if the individual actors in the agencies involved in cooperative efforts are relatively free of internal corruption and/or direct involvement in organized criminal enterprises.

CONCLUSION

It will be crucial over the next several years to monitor not only the manner in which Iberoamerican Nations ratify the UNCTOC and other regional conventions and protocols, but how these countries implement and, more importantly, enforce the multilateral instruments to combat transnational crime.

If UNCTOC is to be more effective in Latin America than predecessor conventions have been, political will must reinforce the written word. Fortunately, the increasing mobilization of popular sentiment against corruption gives reason for hope that adequate political will can be brought to the task in the not-too-distant future.

It remains incumbent for the OAS to provide leadership to the member Nations in consolidating and encouraging efforts in the hemisphere to curtail corruption in member governments and fight drug trafficking and the criminal organizations that sustain the drug trade and all attendant criminal activities.

Despite all the initiatives and new legislations, the progress in the fight against corruption has been very limited. As seen, corruption pollutes the highest levels of government and society in many countries in Latin America. Corruption spreads to the public and private sectors and the majority of the countries are ill-equipped to confront it. The difficulty of consolidating democratic institutions and the lack of an efficient, strong and accessible judicial system only continue to exacerbate this problem.