

Monitoring the Implementation of the International Cooperation Provisions of International Conventions

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Whether we are trying to combat corruption, economic crime, cyber-crime, money laundering, human trafficking, trafficking in drugs or firearms, or even terrorism, it does not take long before we realize how much we need help from our colleagues in other countries.

The international community now recognizes international cooperation as an urgent necessity. Yet, cooperation mechanisms are not growing as fast as they should. They certainly are not growing fast enough to keep pace with the fast changes in patterns of transnational crime, including terrorism.

The main mechanisms supporting international cooperation between investigators or prosecutors are well known. They include mutual legal assistance, extradition, transfer of proceedings in criminal matters, freezing and confiscation of proceeds of crime, protection of witnesses, exchange of information and intelligence, transfer of prisoners, as well as a number of less formal measures. These mechanisms are based on bilateral or multi-lateral treaties or arrangements and, to a large extent also, on the enabling provisions of national law. All of these mechanisms are evolving rapidly to keep pace with new technologies and new crime patterns.

Many of these cooperation strategies have been in place for some time, while others are relatively new and untested. Nevertheless, a consensus is emerging around some of the most promising cooperation practices and strategies. At the United Nations level, many of these strategies are now captured in and promoted by the *Convention against Transnational Organized Crime* and its protocols on human trafficking, immigrant smuggling and firearms trafficking, the *Convention against Corruption*, and some of the global conventions against terrorism. In fact, the main purpose of these conventions is precisely to facilitate international cooperation in addressing these various international threats.

At the regional level, other initiatives have also been undertaken to promote international cooperation in the field of crime prevention and criminal justice. At least one region, Europe, has made more progress than others in that regard. Professor Nash will be referring to that experience in her presentation.

At all levels, however, the implementation of these international treaties has been difficult, slow, and uneven.

Since the 9/11 events, in particular, our weak international cooperation mechanisms have been put to the test. In some cases, they have produced some noticeable results, contributed significantly to public safety, and countered some significant international threats. In other instances, they are clearly inadequate.

In fact, these international cooperation mechanisms have been under constant stress in the last several years. Some law enforcement cooperation and intelligence exchange practices have emerged which have been very controversial and detrimental to human rights and rule of law principles. Some of them, like the extraordinary rendition of suspects, are almost universally condemned. Some cooperation activities have become the object of greater public scrutiny and some law enforcement agencies are being publicly criticized for their failure to firmly anchor international law enforcement cooperation in sound rule of law and human rights principles.

The conventions that I mentioned were adopted in order to accelerate the process of international cooperation in criminal matters. They were meant to create an **international cooperation regime**. At first, all this was presented as a matter of great urgency, an international priority. Then, progressively, the political discourse was somewhat toned down.

The time has perhaps come to, so to speak, “take the pulse” of that international cooperation regime. The problem, of course, is that there is very little systematic information available on how well this regime is performing its task. The conventions themselves include dispositions concerning reporting and review mechanisms and for monitoring States Parties’ implementation efforts and compliance with their obligations under the treaties. In the cases of both the TOC Convention and the UN Convention against Corruption, Conferences of States Parties, supported by a Secretariat, have been established with a mandate to monitor the implementation of the conventions and to obtain the necessary information from States Parties. Unfortunately, as I may have a chance to explain a little later, these mechanisms have not proven very effective so far and information on the strength and effectiveness of the new international cooperation regime remains very limited.

By most accounts, in most parts of the world, this cooperation regime remains very weak. As was emphasized in the conclusions and recommendations of the *Second World Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, in Doha, Qatar, in November 2005, a lot remains to be done at the national and levels to strengthen that regime.

With the exception perhaps of Europe which has developed its own international cooperation regime (with unique mechanisms such as the European arrest warrant, mutual recognition of court orders, etc.), the results of the adoption and implementation

of the United Nations Conventions against organized crime and corruption remain disappointing.

Some people would argue that this is because of genuine technical and logistical difficulties encountered by States Parties in the implementation of the conventions. Others claim that States parties have more or less lost interest, or confidence in these treaties. One can certainly notice the fact that a lot less resources are being allocated by the big donor countries to support the implementation process. At this point, frankly, it is hard to tell exactly what is happening. I would say that it is probably a mixture of both: technical difficulties and lack of political will. Let me say a few words here about some of the relevant issues:

Intentions behind the ratification: Certainly, I have observed over the last many years that the ratification of conventions is often treated as a “final destination” rather than as a “starting point”. Compliance is often symbolic and a lot of countries do not set in place proper processes for the effective implementation of the conventions they have signed.

Who is ratifying and why? It is not secret that some countries were more or less compelled to ratify the conventions by more powerful or influential countries. This is the case, for example, of developing countries, some small island states, or countries in transition which depend on the assistance of donor countries. They often respond to pressure to ratify such conventions in the hope that they will be helped in implementation them and building their criminal justice capacity. Some conventions, like the convention on corruption can attract a number of countries which do not really have the means to fully implement the international instruments, but are keen to take advantage of some of its specific dispositions. This is the case, for example, of the UNCAC, the great interest of African countries to ratify the instrument because of the prospect of obtaining international cooperation in repatriating the proceeds of corruption.

Also, in recent times, several inter-related international conventions have been adopted within a relatively short time frame, creating what Prof. Nikos Passas has referred to as an international regulatory “Tsunami”. This has made it particularly difficult for smaller states or developing countries to cope with the sheer volume of the criminal law reforms involved.

Capacity: Finally, the conventions usually call for States Parties to put in place various mechanisms to implement the international cooperation measures, forgetting unfortunately that we are obviously not dealing with a “level playing field”. These cooperation mechanisms presuppose that the States Parties involved already have a somewhat efficient justice system. Clearly this is not always the case. Many countries are quite incapable of implementing international cooperation measures, because their own justice system largely lacks a basic capacity to function effectively. (For example, see the review conducted by ICCLR of the Justice and security capacity in eight Caribbean common law countries).

Asymmetric capacity for cooperation: There is often a fundamental asymmetry between countries who face a common threat or must develop their respective capacity to cooperate in the field of criminal justice. Countries like Canada will often conduct their own international threats assessments and determine that a particular country or region poses a particular threat or weaknesses. They may offer some specific and specialized technical assistance, but that usually is totally insufficient to address the need for basic capacity building in that country.

Poor method of TA: A fair amount of technical assistance is being offered to States to help them build the capacity of the justice system and implement the necessary reforms. However, it is becoming abundantly clear that our methods of providing technical assistance are themselves quite weak and ineffective. As was made abundantly clear last year when the United Nations Commission on Crime Prevention and Criminal Justice discussed the issue, international technical assistance is not always effective¹. As Thomas Carothers of the Carnegie Endowment for International Peace has convincingly argued, we have not even developed a good understanding of how significant changes to criminal justice systems can be effected.²

Some tools are being developed to facilitate the process (e.g. the United Nations Criminal Justice Assessment Toolkit³), but we still have much to learn about organizational change and how to promote constructive and effective changes in criminal justice systems and in organizations.

Mechanisms to facilitate implementation:

Three main mechanisms exist to facilitate the implementation of the two conventions in question:

- Technical assistance (provision of service / development of tools such as a legislative Guide developed by ICCLR and UNODC)
- Collaboration among State Parties in the implementation of various provisions
- Conference of States Parties (supported by a secretariat)

Establishing an effective mechanism to review the implementation of international treaties lies at the heart of the effectiveness of the treaties themselves. The United Nations Convention against Transnational Organized Crime (hereinafter, UNTOC) and the United Nations Convention against Corruption (hereinafter, UNCAC) are no exception to this rule. The Conventions have established bodies to review their

¹ See also: Shaw, M. and Y. Dandurand (2006). *Maximizing the Effectiveness of the Technical Assistance Provided in the Fields of Crime Prevention and Criminal Justice*, Helsinki: HEUNI.

² Carothers, T. (Ed.) (2006). *Promoting the Rule of Law Abroad – In Search of Knowledge*. Washington (D.C.): Carnegie Endowment for International Peace.

³ UNODC and OSCE (2006). *Criminal Justice Assessment Toolkit*. New York: United Nations.

implementation, namely the Conference of the Parties to UNTOC (hereinafter, COP) and the Conference of the States Parties to UNCAC (hereinafter, COSP).

The Conferences are called upon to determine a mechanism to acquire the necessary knowledge of measures taken by States parties in implementing the Conventions and the difficulties encountered in doing so. Accordingly, by becoming parties, States have assumed a legal obligation to inform the Conferences of plans, practices and legislative and administrative measures to comply with the Conventions. In this architecture, knowledge and provision of information are placed at the heart of the ability of the Conferences to discharge their mandate in a credible and consistent manner. UNODC, acting as the Secretariat of both Conferences, is mandated to assist the Conferences in discharging those functions.

In its first resolution, res. 1/1, the Conference of State parties for UNCAC which met last December states that:

- That the review of the implementation of the convention is an “ongoing and gradual process”.
- That a mechanism need to set in place to assist in the review of the implementation of the United Nations Convention against Corruption.

Both Conferences of States Parties debated the question of the reporting process. There are a variety of methods to gather information at different stages of any review process. The Conferences could have adopted any of them in order to discharge their functions, based on the relative advantages and disadvantages of each method. While the Conference of the Parties to UNTOC chose a questionnaire-based approach, its unsatisfactory performance as experienced during the first two reporting cycles prompted calls to avoid the same methodology in reviewing the implementation of UNCAC. The Conference of Parties to the UNCAC agreed that a self-assessment checklist should be developed, as a starting point, by an inter-governmental group of experts.

Earlier this year, the International Centre and the UNODC, with the support of the Government of Canada, held an expert meeting in Vancouver to develop a proposal for an effective mechanism to review the implementation of both conventions.

Who should do the review/ monitoring?

As I have mentioned, States parties are jealously preserving their ownership over the review process.

There is a consensus among them that such a review mechanism should abide by the following principles:

- Ensure that implementation and its review remain in the hands of States;

- Maintain the spirit of mutual respect and inclusiveness that permeated and guided the creation of the Convention and ensured its quality;
- Establish as a high priority the support to Governments in their efforts to implement the Convention.

In resolution One of the UNCAC Conference of Parties, States also formulated the following principles to guide the review process. They stated that the review mechanism should:

1. be transparent, efficient, non-intrusive, inclusive and impartial
2. not produce any form of ranking
3. provide opportunities to share good practices and challenges
4. complement existing international and regional review mechanisms (and therefore seek to avoid duplication of reporting efforts)

The experience with the implementation of conventions varies. We have had an opportunity to review the implementation reporting mechanism in place for various conventions both at the UN and in other organizations such as the OAS or OECD. Transparency International recently did so also with respect to a number of conventions relating to corruption.⁴

Reporting on the implementation of an international treaty is clearly a challenging task for many of its States parties. Obtaining valid and useful information in a timely manner from States parties can be hindered by a number of factors, including: (a) lack of financial or technical resources of States parties; (b) administrative and technical difficulties, personnel changes and language barriers in States parties; (c) the complexity of the information required; and (d) a lack of clarity on the nature and relevance of the requested information.

To alleviate some of these difficulties, some of the bodies monitoring the implementation of international treaties have developed and issued guidelines on reporting with a view to ensuring that reports are prepared and presented in a uniform manner so as to support valid comparisons of implementation efforts made by different States parties. Reporting guidelines and instruction manuals, together with clear reporting formats, can greatly facilitate the reporting process.

The ICCLR, with the support of the Department of Justice Canada, developed some draft reporting guidelines for the TOC Convention and is now exploring the possibility of developing similar guidelines for the UNCAC.

Western nations have poured hundreds of millions of dollars into developing an international cooperation regime and providing technical assistance to countries lacking a basic capacity to cooperate, yet, the results have been disappointing in general. I think

⁴ Heimann, F. and G. Dell (2006). *Report on Follow-up Process for UN Convention Against Corruption*. Berlin: Transparency International, 12 September 2006.

that we are all quickly learning that international cooperation remains an empty promise unless we are prepared to seriously address some real obstacles to it and develop a genuine capacity to work together across borders. The primary obstacles to international cooperation are not always technical or financial, but also political and human. This is therefore no substitute for a strong political will to implement such a regime. International cooperation is hard work.

The sharing of practical experience and lessons learned among professionals is therefore more important than ever in order to perfect cooperation strategies and develop a capacity to implement them successfully. Opportunities for discussion and personal networking, such as the one provided today by the International Society are part of the solution.