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Corruption in the Private Sector: Evolution and Challenges of Criminalization

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Introduction

One of the most important aspects of private corruption is globalization. Everyday we assist to the creation of new ways of crimes more complicated and sophisticated. Besides it is common to find that these crimes have consequences in many countries, which mean different jurisdictions.

Different jurisdictions make more difficult to prosecute crimes. Criminals are aware of it, and take advantage of the situation. To prosecute crimes in different countries always be linked with formal requests and bureaucratic procedures.

It is a common international understanding the necessity to fight corruption on a global scale. On one hand, we observe an enormous extent of international initiatives to combat corruption, but on the other hand, the reduction of trade barriers as well as increasing opportunities for a free flow of goods, information and money appear to ease the occurrence of worldwide corrupt practices.

Many Multinational Companies have been increasingly accused of participating in large scale bribe activities thereby damaging the economies of nations to a meaningful extent.

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It is easy to use or think in Public Officers as scapegoats, but Public Corruption exists because of the private one. Every time that someone collects a bribe there is someone who is paying for it. One is inseparable from the other.

The preamble of the UN Convention Against Corruption stated the situation very clearly: “*Convinced* that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential ... that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively... that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively”

That leaves us with a problem to solve and a question to answer: What could Public and Private Institutions do to stop and criminalize private corruption?

In this article I will try to explain certain measures that could be taken in order to do it.

International Crimes

Money Laundering, Smuggling – of drugs or weapons -, International bribery done by Multinational Enterprises and Traffic of People are among the most common international crimes.

Particularly Argentina faced and faces some resonant cases related with this crimes, the IBM –Banco Nación affair (in which IBM won an international bid, collected the money – US\$ 70 million- but never comply with their obligations); the selling of weapons to Croatia and Ecuador from Argentina in the 90’s (Argentina was at that time part of the UN Peace group at the same time); and nowadays a case of money laundering related with the money collected for the presidential campaign of the current Argentine

President, Mrs. Cristina Kirchner, in which is involved the President of Venezuela and a U.S. Prosecutor.

In this case “Argentina's attempt to extradite a Florida (U.S.A.) businessman who will be a key witness at the Miami trial of a Venezuelan man over an election scandal cover-up has been thwarted by the U.S. government, the defendant's lawyer said. Duran is accused of conspiring to silence Guido Alejandro Antonini Wilson, who was carrying \$800,000 in a suitcase that was seized at an airport in Argentina. U.S. prosecutors say the money was intended for the campaign of Cristina Fernandez de Kirchner, who was elected Argentina's president Oct. 28. The Venezuelan attorney general's office said today that it issued an international arrest warrant for Antonini, who is wanted in that country for questioning in the cash scandal, according to a statement on the Venezuelan justice department's Web site.”¹

Obviously this an international affair in which includes the Venezuelan Petroleum Company (PDVSA) – the money seized supposedly was from that enterprise-, the Argentine government that said that this is a “trash campaign” organized by the US government, an US Prosecutor and Mr. Hugo Chaves – President from Venezuela.²

¹ Suitcase-Plot Extradition Is Obstructed, Lawyer Says, By Carlyn Kolker and Mort Lucoff, Aug. 1, 2008 http://www.bloomberg.com/apps/news?pid=20601086&sid=adfwWJn0DLdU&refer=latin_america

² A court was requested to order the customs service not to return the amount of money seized from Venezuelan businessman Guido Alejandro Antonini Wilson, who tried to enter the country with a suitcase containing almost USD 800,000 in cash. Opposition Unión Cívica Radical (UCR), the second force in the Argentinean Parliament, filed criminal charges against officials with Argentinean state Enarsa and state-run oil holding Petróleos de Venezuela (Pdvs) for money laundering and multinational bribery, in connection with a suitcase filled with USD 790,550 that Venezuelan Guido Alejandro Antonini Wilson tried to take to Argentina. Based on a press release from the opposition party, published in Argentinean daily newspaper La Nación, the move is aimed at "ordering the customs agency or the authority in possession of the money seized to refrain themselves from returning it until proving the subject of the complaint." In the complaint filed at the federal court, petitioners ask multiple questions. "What is the link between the Argentinean officials on board the plane and Mr. Antonini Wilson? Can we believe that two high-ranking Argentinean officials are so naive as to give a ride to an unknown Venezuelan businessman who needs to get to Argentina?" They wondered, and answered, "Not really." The opposition asked also for an explanation by Minister of Planning Julio De Vido. ARI Deputy Adrián Pérez lamented that the scandal affected only "second-line officials. Everything stops when getting at the minister," he said, La Nación quoted. <http://www.eluniversal.com>

U.S. prosecutors allege that the accused men have connections with high officials in the Venezuelan government, and that the money was for finance the presidential campaign of Cristina Fernandez, current President of Argentina.

Furthermore, the Argentinean government has accused Mr. Antonini of working for the CIA.

This is not enough for the Argentine government. A new case, involving the smuggling of ephedrine to Europe and Mexico, to produce ecstasy, is related with some pharmaceutical companies that made significant contributions to the President campaign.

At some point, some seems not be good, because all this crimes and investigations usually crash with the same barrier: international politics.

Anti-Corruption Instruments

We have many international Anti Corruptions Instruments. The most prominent international instruments aiming to establish responsibility in the area of corruption are the *UN Convention against Corruption* (UNCAC) as well as the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Anti-Bribery Convention). It is also interesting to mention the *OECD Guidelines for Multinational Enterprises*.

Many states ratified the UNCAC, compromising them to adopt measures within their national legal system in order to prevent and criminalize corrupt activities of members of the private sector.

Nevertheless it is easy to recognise that many countries, which signed the UNCAC are not really committed in order to effectively fight crime.

In Argentina we have a saying : “*Del dicho al hecho hay mucho trecho*”, that means it is easy to say something but much more difficult is doing it.

No country is an island nowadays. Corrupt practices of one country impacts in others, specially if they are in the same area of influence. Globalisation is the most fashionable word for trade and crimes.

Globalization has helped to expose the extent to which corruption is embedded in international economic exchanges. This has led some to think that globalization inevitably reduces corruption by first revealing it and then subjecting firms and states to bribery-discouraging pressures of the free market. However, for as much as globalization helps to reduce corruption its effects on corruption are not inherently in the presumed positive direction. Globalization creates incentives and new means for corruption.³

Can we put the blame in globalisation for all the new international crimes? I do not think so. There is no doubt that globalisation opens a door for more elaborated and complicated crimes. Criminals take advantage of international treaties that loose international border controls.

But some think in a different way. “Globalisation influences the relative profitability of different activities... in corrupt states, profitability soars in the production of goods and services that are internationally illegal: drugs, sex trafficking, contraband weapons or cigarettes, or counterfeit goods....According to the 2007 UN report, the overall production and use of narcotics have stabilized (about 5 percent of adult world population is estimated to be annual users of opiates) but the unit street-price is down and the global value of the narcotics trade is staggering. Once organized crime and its supporters, they

³ **Warner, Carolyn.** "The Dynamics of Globalization and Corruption" *Paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA, Mar 22, 2006* <http://www.allacademic.com/meta/p99282_index.html>

play the same role that a more conventional business plays in other countries. They try to influence the political process. Moreover, they need to control the political arena - election of presidents and parliaments - even more tightly than "normal" business people because their very existence depends on having a government willing to tolerate violation of international rules as the country's main activity.”⁴

We have the laws and the treaties. In terms of prevention, Article 12 of the UNCAC requires states to prevent corruption involving the private sector. In terms of criminalization and law enforcement, several provisions oblige states to adopt measures that criminalize the intentional bribery of national public officials (art. 15) as well as of foreign public officials and officials of public international organisations (art. 16).

States shall consider adopting such measures that criminalize bribery in the private sector as well as such that criminalize embezzlement of property in the private sector (art. 21, 22). An essential provision is Article 26, establishing the liability of legal persons for participation in the offences established in accordance with the UNCAC since it touches the sensitive issue of legal personality of corporations. However, even though states are required to adopt measures that establish the liability of legal persons, it is up to the state whether liability is established through criminal, civil or administrative measures, which weakens this article to a meaningful extent.⁵ In Argentina, legal persons have not criminal liability.

No doubt the UNCAC is the strongest anti-corruption convention that has been adopted so far. But this is not enough.

If we are looking for a safer and more honest world we have to emphasized the importance of a code of conduct for businessmen, the need for a education, for

⁴ Globalisation and the corrupt states .Legalizing some criminal activities would reduce profits and curb the corruption. Branko Milanovic, *YaleGlobal*, 2 November 2007

⁵ Buscar

transparent public information, and the most important the international political decision of applying the law and the treaties that the countries signed.