

*AMERICAN  
SOCIETY OF  
INTERNATIONAL  
LAW*

*PROCEEDINGS  
of the  
84th ANNUAL MEETING*

WASHINGTON, D.C.  
MARCH 28-31, 1990



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## EDITOR'S NOTE

Upon publication of the 1990 *Proceedings*, the Society will have regularized a production schedule for the *Proceedings* of the Annual Meeting. Subsequent issues should be available by the end of the year in which the meeting takes place.

Producing these annual volumes has become more demanding. A basic reason is that the Annual Meetings themselves have expanded significantly. In 1980, the meeting had fifteen panels; in 1989, twenty-eight; the *Proceedings* grew from 361 to 654 pages, and the number of people participating as contributors or reviewers increased proportionately. Another reason is the thoroughness of the coverage. An assigned reporter produces a draft report of each panel using written papers if supplied by the panelists, a transcription of the tape if no paper is provided, and a transcription of the discussion section. These reports are then read by a substantive editor and a copy-editor and sent to the speakers for review. Once the issue is typeset and proofread, an index is prepared.

This is a time-consuming process, but the Society feels it is necessary in order to produce a true record of the meetings and to provide a useful and enduring reference tool. The Society also realizes, however, the importance of getting these issues published before the material is old news. Our intention is, from now on, to produce an issue that is both timely and enduring. We greatly appreciate the help of the many people whose participation is essential to producing these volumes.

VIRGINIA CORNETT  
*Assistant Editor*  
February 1991

# PROCEEDINGS OF THE EIGHTY-FOURTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

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## INTERNATIONAL DRUG TRAFFIC

The panel was convened by its Moderator, André M. Surena,\* at 2:30 p.m., March 28, 1990, at the Senate Dirksen Office Building, Washington, D.C.

### REMARKS BY ANDRÉ M. SURENA

The subject presented to us, international drug trafficking, is broad and can be approached from many different directions. In order to narrow the focus of this session, we have put forth the following question: Is international law a help or a hindrance in combating international drug trafficking? I anticipate that each panel member will offer a different perspective on this question.

My opinion is that international law is not only a help in combating international drug trafficking, it is a necessary and evolving tool as states rally together to do what they cannot do alone. This movement is an indication of a certain political commitment to take meaningful steps against the drug menace. The depth of this political will, however, remains to be seen.

It is important to note that if there is no political will, no amount of international legal structure will prove effective. With that basic premise, I must state that to the extent that there are legal problems encountered in combating international drug trafficking, they lie not with international law but with the limits of the national laws of states and the creativity and resourcefulness of drug traffickers who exploit these national limits. For example, international drug traffickers may obtain their materials in one country, transport them to a second country for processing with chemicals they have obtained in a third country, transport the processed product to a fourth country for distribution and sale, and then repatriate their proceeds to their home country.

The transnational nature of this activity complicates the detection of crime, makes the proof of the crime difficult to obtain, and shrouds the proceeds of the criminal activity. What is required is effective national laws that criminalize the conduct and make it possible for investigators to obtain evidence of the crime, to trace, seize, and forfeit the proceeds, and to prosecute and punish offenders.

Instruments of international law have not only provided the vehicles for establishing the necessary cooperation between states, they have also provided the stimulus for states to improve the effectiveness of their national legal regimes. I would like to review briefly some of those instruments.

One of the most useful tools is extradition. In many states, including the United States, this practice occurs only pursuant to treaty. However, there are some states that allow extradition on a discretionary basis. The basic process is that, upon a particular showing of evidence by the requesting state, the requested state may approve the transfer of a fugitive located in its territory to the requesting state to stand trial for specified offenses. The process can prove to be fairly complicated in individual cases. One can assume that drug traffickers will use all the resources available to avoid extradition.

One of the central problems in the extradition process is whether the extradition is sought for an extraditable offense. When extradition is governed by treaty, the treaty will indicate what offenses are extraditable offenses. If an offense is not covered by the treaty, extradition is generally not possible.

\*Assistant Legal Adviser, Law Enforcement and Intelligence, Department of State. Mr. Surena spoke in his personal capacity.

The United States has over one hundred extradition treaties in force. Some of these are modern treaties concluded within the last decade. However, quite a few are fairly old, dating from the late-1800s. Some of the earlier extradition treaties contain lists of extraditable offenses, some of which are fairly short. However, even when they are expansive, they do not necessarily cover some of the offenses that have been created within the last decade in the United States. In those cases, we face the risk that extradition will be denied unless we can persuade our treaty partners that the offense is covered by the treaty. We often do this by arguing that while the particular offense is not specifically listed in the treaty, the conduct is covered by some other offense in the treaty even though the name may be different.

In this regard, the 1961 Single Convention on Narcotic Drugs, and the 1972 Amendment to that Convention,<sup>1</sup> require signatory states to criminalize narcotics offenses. This has the effect of expanding the extraditable offenses denominated in bilateral extradition treaties to include those offenses denominated in the 1961 Single Convention, which enhances our ability to obtain extradition under older bilateral treaties.

Another obstacle concerning extradition is the prohibition on the extradition of a state's own nationals. Many states, including the United States, will extradite their nationals. In some states, however, the constitution, statutes or policy prevents the extradition of nationals. This is often the case in civil law countries. These countries typically exercise extraterritorial jurisdiction on the basis of nationality. As such, theoretically they may prosecute their nationals for offenses committed abroad. However, there is a significant gap between theory and practice. There are only a few states that will prosecute their nationals for offenses committed against the interests of a third state. As a result, denial of extradition on the basis of nationality often means that the fugitive escapes trial and punishment. For this reason, the United States strongly urges states in bilateral negotiations to agree to the extradition of their nationals.

There are a number of things that may frustrate extradition. In short, one must look to the terms of the particular treaty and the relevant national laws. As I mentioned earlier, drug traffickers will use any available means to frustrate extradition. Despite the problems, extradition has proven an effective weapon in combating international narcotics trafficking. The major Colombian traffickers have publicly indicated their concern about the prospect of extradition to the United States.

Before a state is in the position to request extradition, it must have sufficient evidence of criminal conduct. Given the transnational character of drug trafficking, relevant evidence is often located abroad. A traditional method of finding and obtaining evidence located abroad is the letters rogatory process. This is where the courts of one state transmit a request through diplomatic channels to the courts of another state.

While there are many positive aspects to the letters rogatory process, it is time-consuming. Furthermore, the laws of foreign states often require that the requests emanate from a court and not a prosecutor. At the preliminary stage of an investigation in civil law countries, a matter is typically submitted to an investigating magistrate who would be able to make a letters rogatory request. In the United States, however, this preliminary investigation is conducted by a public prosecutor. A foreign tribunal may determine that such a prosecutor cannot make a letters rogatory request.

In response to these issues, the United States has concluded a number of treaties that use the concept of a central authority mechanism. This central authority plays a

<sup>1</sup>11 ILM 804 (1972).

substantive role in making, receiving, and executing requests. These treaties contemplate that the respective states will provide each other a range of assistance including taking testimony, serving documents, locating persons, executing requests for search and seizure, freezing criminal assets, and providing evidence admissible under the laws of the requesting state.

There are several other tools used to combat international drug trafficking. These include executive agreements between customs services which, while concerned with the enforcement of customs laws, are of great assistance in exchanging information on the exportation and importation of narcotics. Tax treaties and tax information exchange treaties are other tools that can provide mechanisms by which the government can take effective action against narcotics traffickers.

New instruments are also being developed to enhance international cooperation. Among these are agreements on the enforcement of respective confiscation orders. The British in particular have pursued this kind of initiative in the last several years. It is interesting that their concern with narcotics have motivated the British, given the contrary principles of common law, to establish a principle of cooperation in the enforcement of another government's penal judgments.

The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>2</sup> concluded in December 1988, demonstrates the recognition by states of the need for international cooperation in this area. As a summary of the objectives of this Convention, I would like to quote from the President's letter of transmittal to the Senate:

The principal purpose of the Convention is to ensure that States adopt and implement effective law enforcement measures to combat illicit traffic in narcotic drugs and psychotropic substances at the national level. The Convention acknowledges that the illicit traffic is an international criminal activity and requires States to establish specific drug-related offenses under their domestic laws, to provide appropriately severe sanctions, to cooperate in the extradition of accused offenders, and to provide each other mutual legal assistance in the investigation and prosecution of those offenses. States parties are also obliged to cooperate in a wide range of anti-narcotics activities including law enforcement and training, crop eradication and demand reduction programs, suppression of illicit trade in precursor chemicals, imposition of controls on use of the mails for trafficking purposes, and the seizure and confiscation of the proceeds from and instrumentalities used in illicit trafficking activities. In addition, States parties are required to ensure that commercial carriers are not used for illicit traffic and to suppress illicit traffic in free trade zones in free ports. In many respects, the Convention thus adopts on a multilateral level the same sorts of legal undertakings and cooperative arrangements which the United States and other nations have already developed and implemented on a bilateral basis.

Although the President has signed the Convention and it was ratified upon the consent of the Senate, it has not yet entered into force since only five states have deposited their instruments of ratification. A minimum of twenty states are necessary to give the Convention effect.

This Convention not only provides for international cooperation, its adoption by states will require them to enhance their domestic legal systems to deal more effectively with drug trafficking. This Convention shows that international law can help in combating international drug trafficking.

## REMARKS BY MARGARET A. GROVE\*

The Narcotic and Dangerous Drug Section prosecutes cases involving high-level drug trafficking, drug-related money laundering and other violations of federal law. Section attorneys are responsible for writing and staffing the Section's contribution to implementing policies related to narcotics investigation and prosecution and participate in facilitating the coordination of interagency efforts to implement the national drug strategy with U.S. agencies and agencies abroad. We assist the Department's Office of International Affairs in securing witnesses from foreign jurisdictions and participate in training programs for investigators, prosecutors and judges in the United States and abroad. Section attorneys also provide general support to the U.S. Attorney's Offices, including advice on specialized investigative and prosecutive techniques and drug-related prosecution issues. The Section's cases are nationwide, and extensive travel within and without the United States is required.

The Section hires (1) experienced trial litigators interested in writing and working on domestic and international drug-related policy issues; (2) experienced trial litigators interested in criminal litigation involving violations of federal narcotic laws; or (3) new attorneys who are interested in federal narcotics prosecution experience and who seek the opportunity to participate in the implementation of the national and international strategy against narcotics trafficking.

My discussion will essentially outline the role of my office, and in doing so I hope to identify some of the problems we face in combating international drug trafficking and mention some of the successes we have had. When international drug trafficking involves domestic conduct, our office frequently will be asked to take cases instead of the local U.S. Attorney. As an illustration of the increasing demands on our Section, we are in the process of enlarging our staff to forty-five attorneys. Because of the nature of the illicit narcotics trade, most of our cases have an international dimension.

Our office also works on all legislation related to drugs. Every time a bill that has to do with drugs is proposed, it has to come through our office for review. Congress has enacted a lot of drug laws which in most cases strengthen the penalties. This has created problems in the courts because judges do not like to see a fairly young person incarcerated for twenty years or more because Congress has enacted a mandatory penalty. The problem area is not so much the law, it is educating people so that they can live with the laws.

The laws recently enacted by the United States are not limited to narcotics, although that seems to be the primary focus. They also relate to terrorism and organized crime. Our office does a lot of work in sharing our knowledge with other countries. We are often asked to speak to foreign judges and prosecutors about such issues as electronic surveillance and Title III laws. Many other countries lack such laws. Initially, they may have thought that the drug problem was unique to the United States, but now they are being affected and many are asking us for help in reforming their laws to deal with the drug problem.

While the Racketeer Influenced and Corrupt Organizations statute (RICO) is still very controversial here in the United States, other countries want similar statutes. In many instances, it is not international law that stands as a hindrance, but rather, domestic law. For example, although we have an extradition treaty with Japan, the United States must be represented in the Japanese court by a Japanese attorney. This attorney must present the case against the Japanese national, but he is barred from

\*Acting Associate Chief, Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice. Ms. Grove spoke in her personal capacity.

introducing certain evidence. He cannot use confessions, searches or electronic surveillance. So, if that is the bulk of our case, the judge in Japan probably will not grant extradition. This is an example of the problems we face in dealing with other countries.

Money laundering investigations have become a major focus of our office. In today's economy, money moves very quickly. Within a few hours, a person can deposit the proceeds of a cocaine sale and it can be wired by close of the business day to London, Paris or wherever.

The recent events in Panama have shown that General Manuel Noriega had bank accounts all over the world. These are very hard to trace, but bank secrecy laws have come a very long way in enabling law enforcement investigators to trace these transactions. Our office is involved in negotiating bank secrecy treaties with other countries.

We have had a number of multicountry cases in our office. Operation Greenback, for example, was centered in Miami and involved Colombia and Panama. Millions of dollars were seized through prosecutions of the U.S. Attorney's Office in Miami.

Another investigation with international dimensions is called Operation Cash Web. This started as a computer-fraud investigation. The Internal Revenue Service was involved in this investigation and has provided valuable assistance because its employees are skilled at tracing money and discovering patterns that indicate where the monies came from. Panama was found to be the primary source of narcotics money.

#### REMARKS BY RAPHAEL PERL\*

My remarks will be divided into four parts: (1) the role of the recent Vienna drug trafficking Convention in combating international drug trafficking; (2) obstacles to the implementation of the principles of the Convention; (3) vehicles through which the Convention is likely to be implemented; and (4) what the next steps in combating international drug trafficking might be.

Combating international drug trafficking has been accorded a high priority in the international community. Within the last five years, countries have increasingly recognized that narcotics trafficking presents a threat to the international community, and that the violence, corruption, and social costs associated with drug trafficking and drug abuse may threaten the stability and security of national governments. This realization is reflected on three levels of law: (1) domestic legislation, (2) bilateral agreements, and (3) multilateral agreements.

In the United States we have seen a shift in the focus of our international drug policy away from the activities of individual farmers to the activities of the international network of traffickers. We are also focusing more on international cooperation. The Cartagena Summit serves as an example.

Before discussing the provisions of the UN Convention, it is important to discuss the process leading to its creation. This process may be as important as the Convention itself. Four years of active negotiation has resulted in increased awareness of the problem: it has changed attitudes in the global community about asset forfeiture; money laundering has been recognized as an offense in many countries; there is an international recognition of law enforcement jurisdiction on the high seas; and the international community is beginning to recognize the need to regulate precursor chemicals used in processing drugs. Thus, the Convention represents recognition that

\*Specialist in International Affairs, U.S. Congressional Research Service. Mr. Perl spoke in his personal capacity.

international drug trafficking is a multinational problem and that multinational problems require multinational cooperation and response. The Convention provides a legal framework for such response by establishing broad directives and guidelines for national implementation of these precepts.

What obstacles are there to the implementation of this Convention? No international agreement can be viewed in a vacuum. Agreements operate in the context of often-competing political, economic, and social forces. When we speak of the UN Convention, it is important to keep in mind that the Convention will be implemented in a world where sovereignty and nationalism remain powerful forces. The number of countries involved in drug production and transit appears to be increasing. Some countries are even involved in state-sponsored drug trafficking. There are powerful constituencies in many countries, including the United States, with substantial economic dependence on the drug trade. There is a certain reluctance in consumer countries to deal effectively with the demand side of the problem and an equal reluctance in producing and transit nations to recognize and confront their contribution to the problem. Moreover, there is reluctance in producing nations to implement what they perceive as externally imposed legal regimes or requirements.

Critics of the UN Convention point out that it lacks enforcement mechanisms, that many countries lack political control over producing areas, and that numerous possibilities exist for differing interpretations of the provisions of the Convention, especially regarding the domestic criminalization of certain conduct in accordance with Article 3. Critics point out that the Convention requires extensive changes in the existing laws of many nations. Some of these changes, such as asset seizure, are foreign to some legal systems, and when we speak of changes in national legislation, we cannot forget that powerful domestic interest groups may oppose such changes.

Where, how, and through what legal mechanisms is the impact of international law and the UN Convention most likely to be seen? We can expect to see enhanced levels of bilateral cooperation, more mutual legal assistance agreements, more extradition agreements, and more agreements to regulate money laundering and to restrict precursor chemicals. We may also see implementation of the Convention's principles on the regional level through regional organizations such as the European Community or the Organization of American States.

In conclusion, I would like to address the issue of where we should go now that we have concluded the UN Convention. I feel that there are several important questions the international community should address. How might international law enhance the role of regional organizations in combating drug trafficking? How might international law enhance the UN or regional role in dissemination of educational material and information on how nations are implementing the Convention? How might international law assist in the exchange of medical data on the causes of addiction and methods of rehabilitation? If we want to stop drug trafficking, we need to have an impact on demand. Finally, how might international law provide mechanisms for the study and exchange of information on the role of economic development in combating illicit drug production?



## REMARKS BY BRUCE ZAGARIS\*

I would like to focus on the policy of the international community toward drugs and how international law has assisted in the implementation of this policy. I will also discuss the role of the United States in this process and some prospects for success.

International law has been both a help and a hindrance in combating international drug trafficking. Until now, however, it has often been more a hindrance because international law has not been as flexible and dynamic as the organized criminals. These criminals are not limited by borders, sovereignty, and resource problems. They can quickly change their methods. International law, in contrast, develops over time. Normally it takes two to four years to conclude, ratify, and deposit the instruments of an international agreement. In the case of multilateral agreements, more time is often involved. Most politicians conclude that they cannot afford such patience and they do not have the political courage to await the outcome of such laborious processes.

The inability to fill the lacunae in statutes or treaties, combined with lack of respect by some governments and leaders, results in circumvention of the law and outright violation of the law. For example, in the name of arresting international traffickers, some governments have gone to the extreme of kidnapping nationals of foreign countries and sending troops to arrest leaders at the expense of killing hundreds of civilians. Politically, it is more popular and rewarding to be able to show a dramatic development in combating international drug trafficking. But in the scheme of things, media bytes do not win the war on drugs. The war is won when professionals in local, state, and national governments and international organizations begin to trust one another enough to address the cultural barriers and technological obstacles, and to work together on structures and policies as well as individual cases.

Although there are several documents attempting to set forth the policy of the international community, I would like to focus on the UN Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, drafted in 1988. It sets forth four major areas of work: (1) prevention and reduction of illicit demand for narcotic drugs and psychotropic substances, (2) control of supply, (3) suppression of illicit trafficking, and (4) treatment and rehabilitation.

In my opinion, international law has an important role in these four areas. For purposes of illustration I will highlight a few. Most important, unless the United Nations has enough resources to operate and unless national governments participate fully in these UN activities, the foremost organization on drug policy will not be able to operate effectively.

I would like to look first at the main goal of prevention and reduction of demand. The United Nations has established many targets such as common methods for collection and exchange of data. But unless the international community has common standards and terms, it will be difficult to arrive at a common policy. On the goal of education, the United Nations recommends that regional bodies consider establishing regional training and information centers for individuals disseminating this information. Another example of the role of international law in the area of prevention and reduction of demand has been in raising public awareness. For example, two bilateral memoranda of understanding were concluded at the Cartagena Summit in February, one between the United States and Bolivia and the other between the United States and Peru. These memoranda contain a number of provisions in which the contracting parties promise to raise awareness of the problem.

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In the second area, control of supply, there are major UN efforts to control precursor chemicals and equipment. Another example of international law in the furtherance of this goal is the Essential Chemicals Agreement between the United States and Bolivia. It requires that certain information be collected by the contracting parties and shared; it also requires that the two governments work together and promptly investigate the intended consignee or destination of essential chemicals to confirm that they will be used solely for legitimate purposes; and it requires governments to enact legislation where necessary to implement the agreement.

A third major area is suppression of illicit trafficking. Some of the targets are disruption of major trafficking networks, facilitation of extradition, mutual legal and judicial assistance, and forfeiture of proceeds of illicit drug trafficking. Many discussions of international law and drug trafficking focus exclusively on this third area. But international policy goes far beyond this.

I would like to make a few comments on the UN Convention. The Convention represents a process that took over four years with 106 countries participating. One provision calls for contracting parties to share the proceeds of confiscations of narcotic seizures. The United States has shown leadership in this area by being the first country to share the proceeds from a drug seizure. The UN Convention allows for contracting parties to share proceeds with intergovernmental organizations involved in international drug trafficking work. This is a means of providing these organizations with additional funds.

In a fourth area of international policy, treatment and rehabilitation, there has not been enough discussion. The UN policy calls for international organizations to provide technical assistance in rendering treatment, training personnel that are working with drug addicts and offenders, and providing more resources for programs. International law can play a more substantial role in this area, but it is important that governments provide the resources international organizations need if they are to do that work.

Comparative law can also play an important role. The Netherlands has a very innovative model treatment and education program that much of the world does not know about. There needs to be more emulation of some of the most effective treatment and education programs.

I would like to turn to the role of the United States in combating international drug trafficking. The record of the United States in using and promoting international law is mixed. Overall, U.S. cooperation with international organizations has not been good until the last year. Now, some improvements are being seen. The United States played a leadership role in the UN drug Convention and was the fifth country to deposit its ratification. Another improvement is shown by the allocation of more resources to international organizations dealing with drug trafficking, the number of which has tripled in 1989 and 1990. Nonetheless, the United States is disgracefully in arrears in its contributions to the United Nations and without adequate justification. This must be corrected if international organizations are going to play an effective role in combating international drug trafficking.

Another major problem is what I call the hangover of cold war politics. That is, in some cases the U.S. Government still chooses to apply anachronistic cold war politics over international law. An example concerns the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders that will be held on August 27, 1990. That Congress is going to discuss three subjects that the United States says are its priorities—international cooperation against drug trafficking, money laundering, and terrorism. In particular, that Congress is going to adopt model extradition and legal