The United Nations Convention Against Corruption: How Will It Help Us?*

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Introduction

The United Nations first recognized the necessity for an effective international legal instrument against corruption in its resolution 55/61 of December the 4th 2000[1] General Assembly. Perhaps due to the nature of corruption crimes, that they are becoming increasingly systemized and accepted by the population as a normal way of life, the General Assembly saw fit to establish that this organization be independent from the United Nations Convention Against Transnational Organized Crime. After the text of the UNCAC was negotiated by an ad-hoc committee (which was held during 7 sessions from January the 21st 2002 until October the 1st 2003), the Convention was adopted by the General Assembly in its resolution 58/4 of 31 October 2003; by the 10th of January 2005, the Convention has been signed by 116 States and ratified by 15.[2]

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* Tulisan ini merupakan pendapat pribadi penulis. Tidak mencerminkan pendapat lembaga tempat penulis bernaung.

[1] *Compendium of International Legal Instruments on Corruption, Second Edition,* (United Nations Office on Drugs and Crime Vienna, 2005) pp.1

[2] *Ibid.*

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Caveat Emptor

The topic of the United Nations Convention Against Corruption (UNCAC) 2003 is growing increasingly more relevant in Indonesia. If we take the analogy that the UNCAC– which itself is a proposal for a universal and harmonized legislation – is a form of contract, in the sense that a contract is an agreement between parties to undertake activities and to adhere to certain pre-agreed rules and provisions, then the implementation of the UNCAC may be one of the most important global undertakings in the 20th century.

The United Nations cites various reasons for the initiative that eventually gave rise to the UNCAC, including a growing awareness in the world that corrupt practices are ruining whole nations into poverty and social crisis. The UNCAC offers to help its State Parties to eradicate corruption at their respective homes through the codification of cooperation and assistance.

Before one begins to look at the provisions encoded in the UNCAC, it is important that we recognize a few concerns. Since its formation, the UN's main purpose is to coordinate and facilitate communication between nations, as well as to implement and enforce international laws. In this sense, the UN is a meta-government, because it essentially governs the behavior of its member states. The UN's law-making mechanisms, as can be viewed in the documentation of the UNCAC, are thorough and inclusive, involving various experts from many nations. It is a good sign for the Convention that in this modern era of increasing international tension and suspicion, even the United States Secretary of State lauded the Convention as a positive Code Book to the then US President, when it was first exposed to public scrutiny. Similar to laws in the European Union, the UNCAC's provisions are designed so that state parties are free to implement each provision according to their own laws and customs (subject to negotiation), which is an application of the principle of subsidiarity (this principle basically states that any activity which can be performed by a more decentralized entity, should be). In theory, therefore, each member state is accountable to their constituents for the way they implement (or do not implement) the UNCAC in their home countries, in addition to being beholden to the Convention in the enforcement of its provisions. With these safeguards built in, one cannot feel

anything but confidence that the arrangement will succeed. However, we do have to be careful about such international agreements, if merely for the fact that they are incredibly massive ventures, and therefore very open to certain problems of bureaucracy and accountability. The last point is especially true since the UN also has a Convention Against Transnational Organized Crime, which we can expect to have at least a small degree of overlap with the UNCAC (for example, when proceeds of corruption are used to fund terrorist activities, etc).

It is a black eye to the UN that scandals have plagued this most prestigious institution recently: from allegations that the UN Oil for Food program in Iraq was ripe with corruption[3], involving officials of various member states, and even the son of the present UN Secretary General, to alleged criminal acts of child prostitution by UN peacekeepers in the Congo[4]. It seems that the UN is a living case study of how difficult it is to maintain order and accountability in such a large, diverse and bureaucratic institution. Aside from difficulties posed by the sheer diversity of the UN's activities and the size of its bureaucracy, some more critical member states stated a concern that the UN's products are inherently unaccountable because constituents of a member state are unable to directly select that nation's representatives in the UN[5] (it should be noted that the majority, or at least the most vocal, of the world's anti-UN activists reside in the United States, and that this is a view often not shared by the American media in general, a reflection of the growing ideological schism between the US main-stream media and a significant portion of the population). This is a risk inherent in all governments, since total representation of constituents is simply impossible; it is remedied somewhat by the principle of subsidiarity, as can also be observed in EU member states, where rules and regulations – especially standards in trade and safety

[3] *The United Nations Convention Against Corruption*, Marinka Peschmann, Toronto Free Press, November 19, 2004 - http://www.torontofreepress.com/2004/marinka111904.htm

[4] *UN Sex Crimes in the Congo*, Brian Ross, David Scott, & Rhonda Schwartz, ABC News February 10, 2005- http://abcnews.go.com/2020/UnitedNations/story?id=489306&page=1

[5] *The UN's Unaccountable Inquisitors*, Joe Katzman, December 14, 2004 - http://www.windsofchange.net/archives/006013.php#more.

– are left to each state to implement. The fact remains, though, that the inclusion (and exclusion) of certain policies will always disadvantage certain parties, and there may be perverse incentives for policymakers for this. One scenario is that governments that are not elected into power, i.e. nations with little or no democracy, do join the UN, and it is questionable whether their decisions in the UN truly reflect the wishes of their people. Even more worryingly, economically powerful nations may have been able to exert their influence in installing provisions that benefit them much more than other member states. Because of this, there is a worry that the UN's policy-making itself may be colored by the interests of certain nations. In fact, critics of the UN charge the institution with trying to strip away the sovereignty of nations in a sort of 'tyranny of the majority', and also without doing enough to challenge the decisions of world leaders that have come into power through non-democratic means. In the case of the UNCAC, this concern translates to a suspicion voiced by detractors that the provisions within the Convention (or ones absent from the Convention) may have been included or excluded due to biased incentives within the UN.

There is also risk in the principle of subsidiarity, however, and it is another issue we must focus on. We have discussed the very real issue that UN delegates may not reflect the real interests of a nation's people, and so the citizens of the delegate's country essentially have no sovereignty. The benefits gained from the freedom of countries in implementing the UNCAC's policies can be offset by costs in the form of risks that such implementation may go against the interests of that nation's people. Here we see a problem of balance, and while it can arguably be solved through enforcement by the UN, we must be prepared to face situations where a nation's economic or military powers can easily sublimate protests. The caveats of the UNCAC therefore, are similar to other criticisms of the UN: it either does too much, or not enough. In the field of corruption eradication, problems that are rooted in bureaucratic issues between countries during the implementation of the Convention have the potential to wreck economic and political ties.

Initial Impressions

The UNCAC actually offers quite a comprehensive set of approaches to addressing corruption, the Convention can be divided into discrete meta-provisions that address[6]: (i) prevention policies such as reforming the public service and introducing transparency and good governance; (ii) the criminalization of corrupt conduct; (iii) international cooperation; and (iv) asset recovery. Indonesia as a government, through the formation of the Corruption Eradication Commission (KPK), as well as through the commitment of President Soesilo Bambang Yudhoyono to cleanse Indonesia of corruption, have on paper fulfilled the majority of the UNCAC's provisions on corruption prevention and the criminalization of corrupt conduct. We can already expect to do a lot of work on international cooperation and asset recovery.

In the context of international cooperation and asset recovery, the UNCAC should be perceived as a very fortunate development for Indonesia's corruption eradication efforts. Domestic efforts in reaction to acts of corruption, such as efforts with the purpose of recovering corruption proceeds that have been smuggled out of the country by perpetrators, have been hampered by Indonesia's lack of Mutual Legal Assistance Treaties with other nations, even our regional neighbors. The KPK has recently been co-operating with the anti-corruption agencies of neighboring countries, including Thailand, Brunei, Singapore, Malaysia, South Korea, Hong Kong, and Australia (New South Wales only, as only this state in Australia has an anti-corruption agency). So far, the KPK's cooperation with these institutions are still limited to the training of personnel and holding seminars to highlight each nation's experience in fighting corruption. However, the KPK is moving towards building deeper relationships entailing more concrete cooperation, including extradition and asset recovery. There has even been limited progress in Indonesia's efforts to secure an extradition treaty with Singapore, which has sadly become an increasingly common destination for fleeing corruptors. If the UNCAC can be successfully implemented, the ties already created by

[6] *Compendium of International Legal Instruments on Corruption, Second Edition,* United Nations Office on Drugs and Crime Vienna, 2005 pp.1-2.

institutions such as the KPK, and the Indonesian government as a whole, will be strengthened, while nations that have previously refused to cooperate with Indonesia will be beholden to the Convention to assist our anti-corruption efforts. The flipside of this, of course, is that Indonesia will also be obliged to assist other nations such as the United States, Britain, and Australia in activities we have been reluctant to cooperate in, especially extradition.

Potentials for Friction: Extradition

Extradition[7] will probably become one of the most sensitive aspect in the relationship of state parties within the Convention. The tragedy of September the 11th in 2001 and subsequent events, such as the US' military actions in Afghanistan and Iraq, and especially local tragedies such as the Bali, Marriot, and Australian Embassy bombings have led to the uncovering (or incitement, depending on your perspective) of terror plans the world over. It is inevitable that these plans for terrorist acts would sometimes overlap with issues of transnational organized crime and corruption. It is imperative that we consider the possible circumstances that may arise. As a hypothetical example, suppose that a Malaysian national is found guilty of collaborating with an Indonesian state official to conduct corrupt acts with the purpose of securing funds for terrorist acts, which in turn has resulted in the deaths of civilians in Singapore. Singapore demands that the perpetrator be tried and executed under Singaporean law in that country, while Malaysia also demands that the person be transported to Malaysia to be punished accordingly, and perhaps to be protected from Singaporean judgment; how will the provisions of the Convention allow nations, under their mutual agreements, to decide on the outcome? Which State shall take precedence? Our experience with the Bali Bombing tragedy has shown that Australians are dissatisfied with how Indonesian terrorism laws deal with alleged terrorists – if the UNCAC, or other massively-multinational codes such as the UN Convention Against Transnational Organized Crime, allows effective channels through which future nations similar to Australia communicate their grievances, how will Indonesia reconcile resolu-

[7] *United Nations Convention Against Corruption*, Article 44 (1) – (18).

tions with domestic criticisms and demands? It should be noted here that the UNCAC provisions on extradition are very comprehensive and focused on easing the process of extradition; while the principle of dual-criminality (i.e. extradition necessitates that the act is criminal both in the country asking the extradition request, and in the country receiving it) still helps facilitate smoother extraditions, the UNCAC will allow nations to negotiate in cases where the act is not criminalized in the country receiving the extradition request, and even in cases where normally the country receiving the request holds that a person cannot be extradited for committing that act[8].

On the flip side, we must remember that Indonesia is still a developing nation, and even when negotiations are facilitated for us to attempt the extradition of Indonesian corruptors from their havens, on the global economic arena we are not placed at an advantageous bargaining position. In the worst case scenario, an Indonesian corruptor can attempt to bribe a foreign officer to collapse negotiations for his or her extradition. Aside of these reservations, when the UNCAC comes into force? This will still be our momentous opportunity to test the integrity of ourselves as a nation, and those of our neighbors, with regards to the issue of extradition in the effort to eradicate corruption.

Potentials for Friction: Asset Recovery

We can expect to come across similar difficulties with regards to asset recovery[9]. In fact, extradition (once agreed to) can be very much simpler than asset recovery to undertake, simply because assets can be spread out very thinly across nations, under many pseudonyms and diverse arrangements, so that tracking them all down and recovering them may cost even more than the initial corruption proceeds. Considering that large corruption cases in Indonesia can involve funds in the trillions of rupiah (billions of dollars), it is hard to believe that the act of recovering it may cost more than the initial act. But the UN recognizes that corruptors are often bright and resourceful individu-

[8] *Compendium of International Legal Instruments on Corruption, Second Edition,* United Nations Office on Drugs and Crime Vienna, 2005 – pp. 47, 48, 49.

[9] *United Nations Convention Against Corruption*, Chapter V, Articles 51 – 59.

als who have the means to discreetly transfer proceeds of corruption (and themselves) across borders; some of them may have powerful connections who will facilitate their escape. When assets are dispersed across nations into investments, for example, tracking them down often require more than dedicated auditors and investigators, more often than not luck plays a major part. Another potential problem for Indonesia is that the Convention allows that costs for tracking down corruption proceeds may be taken out of the recovered assets – these sorts of activities do not come cheap, and we will have to do a lot of work on the negotiation tables both before cases emerge (in crafting mutual legal assistance treaties with other nations) and on a case-by case basis.

UNCAC provisions on asset recovery are understandably more focused on preventing the transportation of corruption proceeds, therefore states are required to enhance their financial institutions in anticipation of such activities through more rigorous enforcement of precautionary steps in financial transactions and all activities in the banking sector. This approach is coupled with regional, interregional, and multilateral cooperation targeted at fighting money-laundering, as well as the empowerment of domestic authorities to conduct investigations and information sharing with other relevant authorities. With regards to actual direct recovery of property[10], the UNCAC is helpful in that it requires state parties to provide legal assistance in the form of[11]: (i) permitting another member state to initiate civil action in its courts, (ii) permitting its courts to order corruptors to pay compensation to victims, and (iii) permitting its courts to order confiscations on behalf of another state party's claims. These last abilities of the UNCAC to facilitate legal assistance may lead to frightful eventualities in the minds of observers, in that it will be very probable for investments into Indonesia to be subject to confiscation if an investor is proven guilty of corruption in his or her home country. As in the aforementioned concerns with regards to extradition, on the global arena, due to imbalances in bargaining positions, it will be easier

[10] *United Nations Convention Against Corruption*, Article 53, (1)-(3)

[11] *Compendium of International Legal Instruments on Corruption, Second Edition,* United Nations Office on Drugs and Crime Vienna, 2005 – pp. 59.

for more developed nations to accomplish such confiscations than it is for Indonesia to claim for similar cases from developed nations. Even though the UNCAC is designed to protect weaker nations, in real life many factors come into play (the bad reputation of less developed nations – for example lack of good governance, terrorism, human rights issues, etc). This is a valid cause for concern, and we can only protect Indonesian interests by ensuring that our reform efforts continue successfully, so that Indonesia becomes a civil society that operates under good governance principles. We must be aware that corruptors are actively working against this goal. Their very survival is threatened by each successful anti-corruption activity. It would be too paranoid to refer to a conspiracy by corruptors on a global scale, but we must be vigilant in anticipating resistance to Indonesia's anti-corruption effort on the global arena as well.

The Future of the Convention: Leading Towards More Reforms in Indonesia?

In Indonesia, the formation of the KPK was envisioned as an effort to catalyze a national movement against corruption; the KPK was never designed to dominate the anti-corruption field, and is expected to be obsolete in the long term as law enforcers and the civil society are expected to become sufficiently empowered to cut down corruption. The UNCAC is an altogether different beast; its conception is proof that the world has become tired of tolerating corruption, and it was designed with the very long term in mind. While we can expect the KPK to take a more background approach in corruption eradication efforts in the future (similar to the current approach of the New South Wales Independent Commission Against Corruption in Australia), the UNCAC does not exist as an actual institution, but in the form of the connections of cooperation between nations and in the form of the reformations it has forced to be implemented in each member state.

At the moment, there is still a very solid hope that the UNCAC will be a positive force in Indonesia, if only because since it is necessary for Indonesia to ratify the Convention, some positive changes must first be made in our governance systems. Article 7 (1) of the UNCAC, which focuses on public sector civil servants, provides that

State Parties that haven't already done so essentially must reform their civil servants regime, including recruitment, hiring, and remuneration systems. In Article 9, the Convention provides that a State Party's systems of procurement and public finances management must similarly be addressed. Generally speaking, these provisions of the UNCAC focus on enhancing the transparency and accountability of State Parties, something that designers of the Convention must have felt to be necessary in several corners of the world. With regards to fighting corruption in Indonesia, Articles 10, 32, and 33 are also important as they address the facilitation and protection of witnesses, experts, victims, and whistleblowers; this is vital in our effort in Indonesia because problems are already cropping up in this matter. No clear guidelines or regulations exist today that can satisfactorily comfort potential witnesses, which sometimes lead to witnesses unwittingly putting themselves in danger, or giving up reporting altogether. Furthermore, the KPK is faced with a difficult balancing act of protecting the privacy and safety of whistleblowers and maintaining transparency; this is a problem only because of the awesome efforts of the media in gleaning information, a problem also noted by foreign observers of the Indonesian media's glib coverage of terrorism stories, where sensitive information can sometimes be reported too freely.

Although the Convention's provisions that hinge on bilateral and multilateral cooperation create many potentials for friction, they are also important litmus tests that challenge nations to work together in fighting corruption specifically and global disharmony in general. We can reasonably expect that there will be amendments made to the UNCAC, as well as with the UN Convention Against Transnational Organized Crime, as nations negotiate to install their feedback. Indonesia must anticipate such developments by keeping active in the global as well as local arenas of corruption eradication, and providing inputs that facilitate and defend our efforts. If we succeed in forming favorable relations with our neighbors, as well as other nations such as the US, Japan, or Australia, there will be a degree of transparency that previously we could never have imagined. It is foreseeable that entities within each member state will resist this, sometimes to protect themselves from anti-corruption provisions of the UNCAC, not so much in an attempt to hide corrupt activities, but in defense of

their sense of sovereignty, and perhaps superiority. If we can foresee such movements and design our policies and responses accordingly, we enhance the success of the UNCAC into the future and increase the possibility that our dream of an Indonesia free from corruption will be realized. Considering the amount we lose annually to corruption, that vision of a healthy Indonesia is something citizens of our time simply cannot imagine.

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