

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A Primer for Development Practitioners

You can **stop**

CORRUPTION



The United Nations Convention against Corruption (UNCAC), adopted in Merida, Mexico in 2003, represents a remarkable achievement for international anti-corruption efforts. With endorsements from more than 140 state signatories representing every region of the world, the UNCAC offers a comprehensive, global framework for combating corruption.

The Convention's 71 articles provide common standards for national policies and practices, and require enhanced international cooperation to address cross-border crime. States parties (countries that have ratified the Convention) are also obliged to help each other prevent and combat corruption through technical assistance. Such assistance is defined broadly to include financial and human resources, training, and research.

This Brief outlines the UNCAC's requirements and proposes concrete ways donors can increase its impact on public integrity both at home and abroad. As the Convention's standards were negotiated by 129 countries, its norms are universally persuasive. The UNCAC can be used as a common reference for donor/partner dialogue concerning corruption, and also catalyze better coordination of analytic work and technical assistance among donors in a given country. Benefits include reduced transaction costs, more consistent priority setting, and greater credibility with cooperation partners.

One of the most critical issues currently at stake is the status of the Convention's review (monitoring) mechanism. In the short term, donors can contribute inputs into the mechanism's design, and ensure it receives the resources and political support required to motivate states parties' compliance with the Convention.

BACKGROUND TO THE CONVENTION

The fact that the Convention was developed at all, much less endorsed by countries from all over the world, is a considerable achievement. The negotiation process, led by the United Nations Office on Drugs and Crime (UNODC), revealed the diverse and often competing interests of those involved. The Group of 77 and China were particularly keen to strengthen international cooperation in the field of asset recovery. Given the enormous amount of money siphoned off by corrupt officials in developing countries, this concern is not surprising. Northern diplomats, on the other hand, emphasized preventive measures such as the need for transparent public procurement, a merit-based civil service and an independent judiciary. The Convention addresses all of these concerns, although the need for compromise is reflected in the varying levels of obligation required by individual articles. While many are mandatory, a number of provisions are either 'strongly encouraged' or optional.

Another interesting development was the decision not to define corruption in the text. Because corruption is a constantly evolving



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The development of international standards to combat corruption

- 1977: The United States Congress passes the Foreign Corrupt Practices Act, which criminalizes the bribery of foreign public officials by American firms.
- 1980s: Cold War security concerns bury efforts to promote an international anti-corruption convention.
- 1996: The first regional convention, the Inter-American Convention against Corruption, is adopted.
- 1997: The OECD Convention against Bribery of Foreign Public Officials is adopted.
- 1998-1999: The Council of Europe produces two anti-corruption treaties, the Criminal Law and the Civil Law Conventions on Corruption.
- 2000: The UN Convention against Transnational Organized Crime is adopted.
- 2000: recognizing the need for a global convention focused only on corruption, the UN General Assembly authorizes an ad-hoc group to negotiate a “broad and effective” treaty that takes a “comprehensive and multidisciplinary” approach to the problem.
- 2003: The African Union Convention on Preventing and Combating Corruption is adopted.
- 2003: The UN Convention against Corruption is adopted.
- 2005: The UN Convention against Corruption comes into force after its 30th ratification in December.

concept, and understandings of what it covers differ, it was agreed to focus instead on specific acts that should be considered corrupt everywhere, including bribery and embezzlement. More boldly, the negotiators agreed on a functional approach to the term ‘public servant’. The title covers anyone who holds a legislative, administrative, or executive office, or provides a public service – even employees of private companies under government contract.

WHAT DOES THE UNCAC REQUIRE? THE CONVENTION IN A NUTSHELL

The UNCAC covers five main areas: prevention, criminalisation, international cooperation, asset recovery, and technical assistance. States parties are obliged to adopt comprehensive anti-corruption policies and designate a ‘body or bodies’ to coordinate their implementation. Contrary to what many people claim, the Convention does not require an independent anti-corruption commission.

Prevention

States parties are required to implement corruption prevention measures in both the public and private sectors. These include, among others, transparent procurement systems, a merit-based civil service, an effective access to information regime, active involvement of civil society in the fight against corruption, an independent judiciary, elimination of bank secrecy laws, and public auditing procedures.

Criminalization

Specific acts that states parties must criminalize include active bribery (the offer or giving of an undue advantage) of

a national, international or foreign public official, passive bribery of a national public official and embezzlement of public funds. Other mandatory crimes include obstruction of justice, and the concealment, conversion or transfer of criminal proceeds (money laundering). Sanctions extend to those who participate in or attempt to commit corruption offences.

Acts that states are encouraged – but not required – to criminalize include passive bribery of foreign and international public officials, trading in influence, abuse of function, illicit enrichment, private sector bribery and embezzlement, money laundering and the concealment of illicit assets. Article 20 on illicit enrichment is the most controversial, because it imputes criminal behaviour to individuals whose assets cannot be explained in relation to their lawful income (for example a district official who lives in a mansion and drives a Mercedes). This has raised the alarm of some lawyers and human rights advocates, who maintain that such requirements reverse the presumption of innocence protected by many legal systems. Defenders of the principle argue that the prosecutor still shoulders the burden of proof, as he or she must demonstrate, beyond reasonable doubt, the lack of legal avenues for the accumulation of excess wealth.

International cooperation

States parties are obliged to assist each other in cross-border criminal matters. This includes, for example, gathering and transferring evidence of corruption for use in court. The requirement of dual criminality, which has traditionally hindered cooperation, is loosened. Dual criminality stipulates that the alleged crime for which mutual legal assistance is sought must be criminal in both the demanding

and requested countries. According to the Convention, it can only be insisted on where the assistance would require coercive action such as arrest or search and seizure. Also, where dual criminality is required, it is sufficient that the conduct at issue constitutes a crime in both jurisdictions; the language of the laws need not coincide exactly. Cooperation in criminal matters is mandatory. In civil and administrative matters, it must be considered.

Asset recovery

A ‘fundamental principle’ of the Convention, and one of its main innovations, is the right to recovery of stolen state assets. As demonstrated by the long-running case in Swiss courts against former Nigerian leader Sani Abacha, who allegedly pocketed \$5 billion in public funds while in power, it is extremely difficult for countries to recover even a fraction of their loss. The dramatic drain of funds can seriously affect a country’s economic development.

According to most observers, Chapter V on asset recovery is the main selling point of the Convention, and the reason why so many developing countries have signed. Chapter V’s provisions lay a framework, in both civil and criminal law, for tracing, freezing, forfeiting, and returning funds obtained through corrupt activities. The requesting state will in most cases receive the recovered funds as long as it can prove ownership. In some cases the funds may be returned directly to individual victims.

Measures relevant to asset recovery are also covered in other parts of the Convention. For example, the transparent accounting requirements facilitate the investigation and prosecution of illicit transfers. The chapter on technical assistance recommends that states share expertise in this complex area with developing countries.

Technical assistance and information exchange

In the Convention, technical assistance refers generally to support aimed at helping countries comply with the UNCAC’s requirements. Chapter VI includes provisions on training, material and human resources, research, and information sharing. Training could be considered for topics such as investigative methods, the planning and development of strategic anti-corruption policies, preparing requests for mutual legal assistance, public financial management, and methods used to protect victims and witness in criminal cases. States parties should also consider helping each other conduct evaluations and studies on the forms, causes and costs of corruption in specific contexts, with a view to developing better policies for combating the problem.

What isn't covered by the Convention?

The Convention addresses a broader array of crimes than other international agreements, and is unique in its focus on cross-border cooperation. However, there are several weak areas as well. For example, there is no obligation to make bribery and embezzlement in the private sector a criminal offence. The Convention also fails to forcefully tackle political corruption. TI's Global Corruption Barometer 2006, which surveyed 60,000 people in 62 countries, found that respondents were most concerned about corruption in political parties and parliaments. However, at the insistence of some negotiators, notably the United States, transparency in political party financing was downgraded to a mere recommendation. Finally, the decision about how to monitor state compliance with the Convention was delayed until the First Conference of States Parties.

The First Conference of States Parties, December 10-14, 2006

At the first Conference of States Parties, held at the Dead Sea in Jordan, participants agreed on the following:

- The UNCAC should have a formal monitoring mechanism. Concerns centred on the cost and administrative burden for individual countries. An inter-governmental working group will meet during 2007 to consider different models and draft a terms of reference for the monitoring procedure. Meanwhile, states parties were asked to complete an implementation survey to assess current levels of compliance.
- Two other working groups will promote coordination of activities related to technical assistance and asset recovery, respectively.
- States parties should criminalize the intentional solicitation or acceptance of an undue advantage by an official of a public international organisation. The UNODC will dialogue with international governmental organisations, including its UN counterparts, to resolve obstacles such as the practice of providing criminal immunity while in office.
- State parties will review progress on these issues at the next Conference of States Parties, to be held in Indonesia in late November 2007.

HOW DONORS CAN USE THE UNCAC TO PROMOTE PUBLIC INTEGRITY

The UNCAC reinforces existing donor initiatives in the field of anti-corruption. The OECD DAC Principles on Anti-Corruption, for example, echo UNCAC's holistic approach, calling for attention to both the supply and demand sides of the problem. The UNCAC implicitly promotes the Paris Agenda by providing an agreed framework for support, based on common, international standards. The preventive measures of the Convention reflect generally-accepted principles of the good governance agenda.

For all of the Convention's strengths and innovations, it is also important to appreciate the danger that the UNCAC may pose to genuine anti-corruption reform. Some states may ratify just to deflect criticism from donors or political opponents. Or, governments may create an overambitious implementation agenda that quickly deflates after its first failures. Even the term 'technical assistance' implies that corruption problems can be solved by simply plugging gaps. It is critical that donors don't feed this presumption by promoting a one-size-fits-all approach to compliance. Reforms will differ depending on context and available capacities.

The following section describes concrete ways donors can maximize the positive impact of the UNCAC:

Advocate for effective implementation of the UNCAC at home

The UNCAC can be used to catalyze more coherent anti-corruption policies among the development aid, law enforcement, and foreign policy branches of government. It is impossible for donors to engage in a credible dialogue with partners on corruption when their own governments are complicit in the problem. Development actors should liaise with colleagues from relevant ministries to ensure that Convention compliance is pursued in all branches. It is particularly important that donor countries address international drivers of corruption by prosecuting cross-border bribery cases, lifting bank secrecy laws, and providing technical support to asset recovery claims.

Development agencies should advocate for their own governments to undertake a self-assessment of UNCAC compliance to identify and address any gaps. The implementation survey, circulated by the UNCAC Secretariat, is an easy place to start. Donors could also consider funding a compliance review together with key partner countries. The German Technical Cooperation (GTZ), for example, conducted a study comparing Germany, Colombia, Indonesia and Cameroon. Such exercises provide the basis for a richer

discussion about the challenges of public integrity reform, as well as for the exchange of experience.

Donors should also ensure that their agency practices are consistent with Convention standards. Information on the decision-making processes and on decisions that concern members of the public should be published (Article 10). Other relevant provisions address the need for a code of conduct, a transparent, merit-based hiring and promotion process, transparency in the administration and auditing of funds, whistleblower protection for people who report cases of corruption, and the encouragement of civil society participation in policy making.

Use UNCAC as an organising framework for technical assistance

The Convention obliges states parties to "enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption". Conveniently, the UNCAC itself provides an internationally-agreed framework for organizing such efforts. A framework, however, should not be confused with a blueprint. There is no single model of reform; instead, leadership in each country must determine priorities and the appropriate sequencing of steps towards implementation.

The biggest challenge for donors may well be to mainstream the Convention into political and technical dialogue with cooperation partners, and pursue reforms on the basis of country-owned plans and priorities. As a first step in this process, donors should consider mapping the relevance of existing aid-funded programmes for UNCAC implementation. By profiling the interface of current activities with the Convention, donors may strengthen the position of all reform advocates – not just themselves- in discussions vis-à-vis the state.

Short-term technical assistance may include:

- Support to UNCAC self-assessment exercises

As a first step, donors can assist their partners to complete the UNCAC implementation survey circulated by the UNCAC Secretariat to states parties in early 2007. Alternative exercises could also be considered. In Indonesia, for example, a team of Indonesian officials together with international experts compared existing policies with international standards embodied by the UNCAC. The findings from this study are informing efforts to refine the country's comprehensive anti-corruption plan. Whatever methodology is chosen, lessons learned

- from the process of self-evaluation should be organized and shared with the working group on monitoring.
- Funding for civil society groups to produce alternative ('shadow') reports on their country's compliance with the UNCAC. This will encourage more active engagement in the forthcoming monitoring process and promote dialogue at the national level.
- Support to the UNCAC Secretariat, housed at the UNODC, to organize and respond to technical assistance requests by states parties. Donors can consider contributing on a case-by-case basis, or to a centralized fund administered by UNODC. It is critical that such technical assistance is provided in a way that is responsive to each country's unique context.
- Research and analysis of corruption in partner countries. Such information provides the foundation for sound policy making, as well as a benchmark for implementation of reforms.
- The secondment of international and regional legal specialists to help states bring domestic law and institutional arrangements into compliance with UNCAC requirements.
- Support to training programmes for public officials involved in implementation activities. The UNCAC itself provides a list of possible topics in Article 60.

Longer-term activities:

- Funding for long-term advisors and mentors to provide hands-on technical support to government institutions involved in corruption prevention and control.
- Support to civil society and the media to systematically monitor UNCAC implementation and the distribution of any recovered assets.
- Support for knowledge management efforts in relevant areas of reform. Donors can help harvest and communicate lessons learned from past experience. Understanding of what works, in which contexts, is still very weak in most areas.

Support for standard-setting: preparations for the Second Conference of State Parties

The Conference of State Parties (CoSP) provides a unique opportunity for donors to promote international standards of public integrity. Areas of involvement range from pre-Conference planning to post-Conference follow-up activities. They include:

- Strategic and issue-based support: for example, donors can fund targeted research to enable advocacy on particular policy viewpoints. However, as the Jordan experience demonstrates, background materials alone are inadequate. Political footwork is also required to develop broad coalitions around common positions.
- Logistical support for non-state stakeholders: donors can promote the physical presence of civil society and media. At the first Conference of State Parties, participation by civil society groups was made possible through donations from several European governments.

- Infrastructure and capacity-building support to civil society: this can include planning, training, and networking activities. The newly-established Coalition of the Friends of the UNCAC held a one-day meeting before the official Jordan conference to organize their advocacy strategy. In the future, more time and funds should be invested in preparation, including interim meetings and the development of a communications infrastructure (i.e. a website and newsletter). Government delegations may find it useful to engage with domestic civil society coalitions when developing advocacy positions.
- Media support: donors should consider funding public relations staff at the UNCAC secretariat, along with pre- and post-conference briefings for journalists.

As noted earlier, monitoring will be a major topic for discussion at the next CoSP. From experience with other anti-corruption conventions, we know that review procedures are an important catalyst for genuine reform. In addition, they promote documentation and sharing of good practice. Donors can support an effective, flexible monitoring mechanism through bilateral and international advocacy, funding for pilot reviews, and the promotion of civil society inputs into working group debates.

As a description of common international standards, the UNCAC is potentially a valuable tool for anti-corruption advocates at the domestic and international levels. It will be tempting to treat the UNCAC as a recipe for anti-corruption reform. Ultimately, however, the treaty and its supporting structures may best be used to promote the alignment of donor activities with national priorities, and facilitate the documentation and dissemination among states parties of knowledge derived from each others' reform experiences.

LINKS AND RESOURCES

U4 Anti-Corruption Resource Centre's UNCAC webpage [www.u4.no/themes/uncac/main.cfm]

Transparency International's UNCAC webpage [http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac]

United Nations Office on Drugs and Crime (UNODC) corruption webpage [<http://www.unodc.org/unodc/en/corruption.html>]

U4 Brief (2007), The Recovery of Assets: A Fundamental Principle of the UN Convention against Corruption: [<http://www.u4.no/themes/uncac/asset-recovery.cfm>]

Transparency International (2006), Report on Follow-up Process for UN Convention against Corruption [http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac/uncac_monitoring_report]

UNODC (2006), Legislative Guide for the Implementation of the United Nations Convention against Corruption [<http://www.u4.no/document/literature.cfm?id=318&key=>]

UNODC (forthcoming), Technical Assistance Guide for the Implementation of the United Nations Convention against Corruption