

# IMPLEMENTATION IN LATIN AMERICA OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: AN OVERVIEW

*Richard S. Werksman*

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## Introduction

On December 15, 2005 the United Nations Convention against Corruption (“UNCAC”) entered into effect upon its ratification by 30 countries in accordance with Article 68. As of September 2009, 140 countries have signed the Convention and 137 have ratified. In principle, the fact that such a number of States decided to signed and ratified the UNCAC, certifies that a highly significant majority of State actors acknowledge the devastating threats brought forth by corruption, and understand the need to act, so as to achieve common strategic initiatives against it. Hence, UNCAC has become a binding normative reference in which countries acknowledge their commitment to a common policy paradigm against corruption.

UNCAC articulates an extraordinary architecture: in the scope of topics it covers, the detail that it enters, and its comprehensive approach. For example, consider Art. 1: it requires States “to promote and strengthen measures to prevent corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery and to promote integrity, accountability and proper management of public affairs and public property”. In this perspective, it can be argued that the UNCAC’s policy outlook builds upon the vision of the InterAmerican Convention against Corruption.

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A comparison between the UN Convention and the InterAmerican Convention against Corruption ("InterAmerican") is a relevant exercise in the process of providing some policy indications for the applicability of the UN Convention in Latin America. This paper is an effort in that direction. First, I would like to point out the similarities between both normative references. Thereafter, I will proceed to identify the differences between them. These are differences without contradictions, and every step that the States Parties take to implement the InterAmerican is a step in the right direction to implement the UN, although the road is considerably longer under the UN Convention. Finally, I proceed to share a few personal opinions about the opportunities and the challenges that the UN Convention poses for Latin America.

The links between the two conventions is reinforced by a number of declarations in both OAS and UN documents. For example, the Preamble to the UN Convention recalls the work carried on by the Organization of American States and takes note of appreciation for the InterAmerican Convention. Specifically, Article 63 of the UN Convention requires the Conference of States Parties to make appropriate use of relevant information produced by other international and regional mechanisms for combating and preventing corruption to avoid unnecessary duplication of work. Accordingly, the General Assembly of the OAS last month in Panama adopted a new InterAmerican Program of Cooperation to Combat Corruption that recommends to the State Parties of the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC), that it consider and adopt a strategy to integrate the implementation of the areas that the two Conventions have in common, including the coordinated monitoring of such areas.

### **Similarities**

Both Conventions contain provisions that are intended to prevent corruption and others that are intended to criminalize and punish it and both place emphasis on the need for cooperation and technical assistance. Thus you will find in both Conventions, for example, provisions covering standards of conduct, financial disclosure, transnational bribery, bank secrecy, public procurement, and participation of civil society in the struggle against corruption, to mention a few.



Both Conventions contain provisions that are mandatory and those that are optional or do not require the States Parties to take any other action except to consider taking action. Certain articles in both Conventions require the States Parties to take specific actions, like enacting legislation to criminalize specific conduct, such as Articles 15 and 16 of the UN which state that "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally: [the bribery of national public officials and the bribery of foreign public officials and officials of public international organizations], respectively. In the InterAmerican, for example, Article VIII states that "each State Party shall prohibit and punish [bribery] of an official of another State..."

Both Conventions contain provisions that are less than mandatory, in the sense of only requiring the States Parties to consider enacting laws or creating other mechanisms. For example, Article III in the InterAmerican (Preventive Measures), requires the States Parties to consider the applicability of measures within their own institutional systems to create, maintain and strengthen" such mechanisms as standards of conduct, financial disclosure statements, and systems of government procurement that assure openness, equity and efficiency. In the case of the UN, Article 5, paragraphs 2 and 3 requires the States Parties to "endeavour to establish effective practices aimed at the prevention of corruption periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

Both Conventions designate as their Secretariat an office that is an integral part of an international organization, the Secretary-General of the UN as the Secretariat for the UN Convention (Article 64) and the Secretariat-General of the Organization of American States, by direction of the General Assembly. This means that the Conventions and the States Parties will be depending upon the crucial support of offices that are continuously competing for resources within their own organizations, which are faced with the implementation of numerous other Conventions and programs. With the OAS, the primary responsibility for the Secretariat services to the Convention and its implementation through MESICIC is the Office of Juridical Cooperation that Mr. García González so capably leads, and at the UN it is the Anti-Corruption Unit and The Global Program against Corruption, in the Human Security Branch, Rule of Law Section, Division of

Operations, United Nations Office on Drugs and Crime. In fact, Stuart Gilman, who served for many years in the US Office of Government Ethics and then as President of the Ethics Resource Center, is the head the Anti-Corruption Unit and The Global Program.

One possibly important practical distinction worth noting here is that unlike the InterAmerican, where most of the activities of MESICIC take place in Washington, and therefore the States Parties can utilize personnel from their Permanent Missions, most of the UN Convention meetings take place in Vienna, so the States Parties will not have their Missions to the UN nearby. This situation can only add to the costs of participation, especially for the poorer States Parties, and argues quite convincingly for the regionalization of UN anticorruption activities.

Other features that the two conventions do share include: Neither convention contains a definition of corruption; both are riddled throughout with the expressions as “in accordance with the fundamental principles of its legal system or domestic law” and “where appropriate”, which, despite the many steps that each States Party must take, it still leaves considerable discretion to each States Party in how extensive its compliance with each convention will be.

There are, of course, significant differences in the texts of these two documents, which as I have indicated, do not per se constitute contradictions or incompatibility.

### **Differences**

The first and most obvious is the matter of sheer magnitude. The UN contains 71 articles, the InterAmerican 28. This difference is attributable to several factors. First, the UN covers specific areas in detail which are not mentioned in the InterAmerican. The fact that the UN is more detailed should come as no surprise since it surely benefited from the experience of the negotiation of the InterAmerican and its implementation through MESICIC, as well as the other international efforts to reduce corruption, such as the Convention on the Fight against Corruption of the Council of the European Union and the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Several examples of very important common areas that are considerably more detailed in the UN are the following:



Participation of Civil Society: The only mention of civil society in the InterAmerican is found in Article III, paragraph 11, which calls upon States Parties "to consider the applicability of Mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption." The UN, on the other hand, devotes Article 13, Participation of society, entirely to the topic. It requires each State Party to take appropriate measures to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community based organizations in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. It then goes into considerable detail about how that participation should be strengthened, including:

Enhancing transparency of and promoting the contribution of the public to decision making to government decision-making processes; ensuring that the public has effective access to information; undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programs, including school and university curriculums. I must digress at this moment to comment on the rhetorical difference between fighting against corruption and fighting for transparency and probity. Until the Summit of the Americas in 1994, it was practically taboo, at least in diplomatic circles to use the word corruption. It was necessary to talk for example about ethics in government, enhancing efficiency in government and modernizing the judiciary. The Summit put the word "corruption" on the table and its ingestion began and continues to today, not just in the title of conventions but in the texts such as the language just referred to in Article 13.

It is time now to consider placing less emphasis on the words "fighting corruption and punishing the corrupt" and more emphasis on transparency, equity, probity and justice. This is particularly important, in my opinion, in those countries where corruption, secrecy, unfairness and injustice have been the rule, not the exception and the fight against corruption can be viewed as a threat to the majority of people in society which have participated, even unwillingly, in the practices that are now being deemed unlawful. In the struggle to win the hearts and minds of the people, so as to generate the political will necessary to implement the laws already on the books and the ones to come, the emphasis must be on the

benefits of transparency and probity, not just on the evils of corruption and secrecy. Thus in my own mind I see the complete title to the UN Convention to add the language: The Opportunity to Bring Access to Justice, Probity and Transparency to All the People of the Earth.

Returning to Article 13, it even goes on to speak of the need to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption. Obviously this requirement deals with the tragic consequences for all too many journalists in Latin America who have paid the ultimate price for their efforts to investigate and expose corruption. This provision reinforces the efforts in MESICIC and elsewhere to eliminate the antiquated laws of “desacato” that for all too long stifled individuals and the media from exposing corruption in Latin America.

Finally, Article 13 requires each State Party to ensure that the relevant anti-corruption bodies referred to in the convention are known to the public and to provide public access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with the Convention.

Absolutely none of these requirements are incompatible with the comparatively anemic but important provision in Article III of the InterAmerican about the participation of civil society or with the recommendations that the Committee of Experts made in its assessment in the first round of how the States Parties to MESICIC were complying with paragraph 11.

Access to Information, Article 10, Public Reporting. While there is no explicit reference to access to information in the InterAmerican, the Committee of Experts adroitly introduced it in its recommendations to each States Party in MESICIC as an essential mechanism to meet the requirement to consider the participation of civil society. In addition, the provision in Article III, paragraph 4, requires the States Parties to consider the applicability of systems of government hiring and procurement of goods and services that are “open”. Implementation of this provision is a major element of scrutiny by the Committee of Experts in the ongoing second round of evaluation by MESICIC. Nor could I omit reference to the terms in Article III, paragraph 4 on financial disclosure. They require States Parties, once again, to consider the applicability of systems for disclosing the income, assets and liabilities of persons who perform public functions in



certain posts as specified by law, and where appropriate, making such disclosures public. I mention this because a provision on financial disclosure was introduced by the United States to the Working Group on Probity and Public Ethics which was negotiating the terms of the InterAmerican Convention at the OAS. The United States had only enacted financial disclosure legislation for the first time as recently as 1978 with the Ethics in Government Act which required that the vast majority of the financial disclosure reports be made public. I was asked by the delegate from Mexico about my experience as a Designated Agency Ethics Official when I told prospective appointees about the requirement for a public financial disclosure report. I replied that the only adverse comment I had received was from a Presidential nominee who lamented that his mother-in-law could now know what his financial status was. The delegate replied, "I am not worried about my mother-in-law, I am worried about my kidnapper." I mention the event for two reasons. It was a wake up call to the differences in the real life in the countries of this hemisphere and it resulted in a compromise, a characteristic of every convention, with the addition of the words, WHERE APPROPRIATE, leaving it to each country to decide on the particulars, but agreeing on the principal that financial disclosure reports are a necessary, useful tool in the struggle for transparency and the prevention of corruption. It is further noted that the UN Convention in Article 8 requires States Parties "to endeavor" to require public officials to make financial declaration to appropriate authorities of assets or other matters from which a conflict of interest may result. Another compromise, evidently, since a number of countries require public disclosure of all the assets, liabilities and outside interests, with certain minimal exclusions.

The UN, on the other hand, meets the subject directly in Article 10: Public Reporting. This article requires each State Party to take such measures as are necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes. This requirement, like many others in both Conventions, is tempered by such language as in accordance with the fundamental principles of its legal system or domestic law.

Another important new area in the UN Convention has to do with corruption in the private sector. While there are a number of areas in the InterAmerican that affect the private sector directly and indirectly, the InterAmerican is focused primarily upon

corruption in the public sector. The UN is direct and unequivocal in the area of private corruption. Article 12, Private Sector, requires each States Party to take measures, again in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, to enhance accounting and auditing standards in the private sector, and where appropriate, to provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. It goes on to list a number of activities in the private sector that must be prohibited, including the establishment of off-the-books accounts. It further makes mandatory a step that the InterAmerican only requires consideration of, that is, the disallowance of the tax deductibility of expenses that constitute bribes. In addition, Article 21 bribery in the private sector, goes on to require each States Party to consider adopting such legislative and other measures to criminalize the promise, solicitation or acceptance of undue advantages in the private sector, and Article 22 calls upon States Parties to consider criminalizing embezzlement of property in the private sector. Even the requirement to consider has the advantage of putting the topic on the table and necessitating the States Party to express its views and intentions in the matter. The implications for the drafting and enforcement of such measures can only be imagined, not just in Latin America but in other regions of the globe where the struggle against corruption in the public sector have just begun.

Finally, among examples of differences, the UN Convention in Article 63 establishes a Conference of States Parties to improve the capacity of and cooperation between States Parties to achieve the objectives of the Convention and to promote and review its implementation. The InterAmerican contains no such provision, and the States Parties had to create a separate mechanism, the MESICIC to accomplish those purposes. The significance here is that when a nation ratifies the UN Convention it is agreeing to participate in a review process and that review process is fortified by its inclusion in the Convention. This is not in any way to deprecate the MESICIC, but five small Caribbean countries that have ratified the InterAmerican have not joined MESICIC, and in the struggle against corruption, the absence of any country, large or small, from a review process is a potential threat to the success of the efforts of the rest of the region, if not of the world, to achieve the goals of the Convention.



I consider it a significant gain in the efforts to reduce corruption when I read in the UN Convention provisions which we could probably never have gotten approval of 12 years ago in the negotiation of the InterAmerican. I include in this group, in addition to the provision on the private sector, the measures specifically directed to: the judiciary and the prosecutorial services; bribery of officials of public international organizations, trading of influence, obstruction of justice, the liability of legal persons, protection of witnesses, experts and victims; compensation for damages; monitoring of political party financing and the evaluation of qualifications of elected officials.

As indicated above, there is, however, no inherent incompatibility between the two Conventions. There is of course the potential for it if, for example, the criteria for implementation require the States Parties to the OAS Convention to undo the steps they have taken to implement that Convention in the same areas covered by the UN Convention. The efforts to implement the UN Convention in Latin America must build on, not replace the efforts made so far to implement the InterAmerican.

It is probably a slight exaggeration to say that without the adoption of the InterAmerican Convention and the work of its follow-up mechanism there would be no UN Convention against Corruption. It is not an exaggeration to say that the experience of the earlier convention contributed extensively to the breadth and depth of the UN Convention.

Steps taken recently by the UN to implement the Convention include the first meeting last December in Jordan of the Conference of States Parties to the Convention, established pursuant to Article 63 to improve the capacity of and cooperation between States Parties to achieve the objectives of the Convention and to promote and review its implementation. As you will note from the materials distributed today, at its meeting in Jordan last December, the Conference created three working groups: The Working Group on Review of Implementation; the Working Group on Asset Recovery; and the Working Group on Technical Assistance. It also called for the issuance of a self-assessment checklist on the implementation of the Convention. That checklist was just disseminated to the States Parties on June 15 and the responses are due August 15. The checklist covers 15 articles and asks some dozen questions about each article ranging from extant legislation and mechanisms for implementing each article to the needs for technical assistance, including site visits. It is not being

skeptical to question how many States Parties will be able to meet the deadline in light of the many agencies within each government that will have to be involved in preparing the response and the coordination necessary to make the response an official one. I am informed that the verbatim responses to the questionnaire will not be made public, but that an analytic summary will be.

At its meeting in Jordan, the Conference also called for a meeting of an Open-ended Intergovernmental Expert Working Group on Review of the Implementation of the Convention, which is now scheduled to open next month on August 29 in Vienna.

Its mandate to the Expert Working Group to make recommendations on the type of review mechanism the Conference should adopt includes that any such suggested mechanism should:

(a) Be transparent, efficient, non-intrusive, inclusive and impartial; (b) not produce any form of ranking; (c) provide opportunities to share good practices and challenges; and most important in terms of not having to reinvent the wheel or the progress that the countries of Latin America have made in the implementation of the InterAmerican (d) complement existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with them and avoid duplication of effort.

These criteria are totally consistent with the rules and procedures of MESICIC. Presumably the Open-ended Expert Group will be equally open minded. It will render its recommendations at the second meeting of the Conference which will take place in Indonesia, January 28 to February 1, 2008. The participation of the Latin American States Parties in the management of the Conference is quite evident. One of the three vice presidents of the Conference is Dr. Eugene María Curia from Argentina who has been active in activities of the InterAmerican.

In fact, from the very initiation of activities and events that have lead to the present state of the UN Convention and its programs, nations from Latin America have made a continuous and invaluable contribution. As a way of example, after the UN General Assembly in December 2000 called for the creation of an ad hoc committee to consider an anticorruption convention, Argentina hosted the first meeting of that committee. Dr. Héctor Charry Samper of Colombia was the first Chairman of the Committee. Unfortunately he died in 2003 before the Committee completed the work to which he made valuable contributions. And



Dr. Javier Paulinich from Perú was a vice-chair of that Committee. Argentina hosted the Informal Preparatory Meeting of the Ad Hoc Committee in December 2001; and Mexico hosted the High-Level Political Signing Conference that was held in Mérida in December 2003. In fact, the UN Convention is also known as the Mérida Convention.

### **Opportunities and Challenges**

So, what do the governments in Latin America have to do as this new anticorruption behemoth starts to roll? Imagine that you are the recently elected president of a country beset by social unrest and poverty. What priority do you give to the new demands of the UN Convention, of the differing anti-corruption requirements or criteria of the international financial organizations and of the civil society that demands action against corruption? Where will the funds come from to train the government personnel who have to deal now with new legislation and the courts that will have to adjudicate the constitutionality of unprecedented anticorruption criminal and civil laws and administrative mechanisms? Do we spend the limited travel money we have to send an expert to MESICIC or to the Working Group on Review of Implementation?

In any event and most importantly, the OAS, MESICIC and the States Parties to the InterAmerican must continue and enhance vigorous efforts to implement that Convention. They must not wait for the finalization of any UN Convention examination mechanism. They must continue to participate actively in the deliberations of the Conference of States Parties and the Working Groups, all of which are important but particularly on the Review of Implementation. They must continue to show that regional compacts in the struggle to enhance transparency and probity can be successful and that peer review of that success is indeed possible and effective. MESICIC itself should not operate in isolation of the UN Convention. While it will not be easy, the Committee of Experts should include on the agenda of each meeting an update on the implementation of the UN Convention; Committee experts should be expected to be in communication with their States Party's representatives on the various UN Work Groups to inform them about MESICIC progress and be informed by them about their country's participation in UN Convention activities. Topics selected for the third round should reflect UN Convention guidance in those areas.

The governments of Latin America will of course face a number of dilemmas as they undertake efforts to implement the UN Convention. One is the choice of investing resources in those efforts, which may not yield results for years to come or in the more immediately pressing needs for social justice and for the essentials demands of the people for education, housing, health and jobs. Just as corruption is costly, so is the struggle against it. Another dilemma is the potential exacerbation of an old one: That is, the choice between enacting laws through intelligent, committed, collaborative and sustainable policies; or to remain entrenched in the status quo. Indeed, the real change is to bring forth practical plans for their implementation and enforcement. Without these new laws it will be impossible to meet the obligations that the States Parties have incurred in ratifying the UN Convention. Obviously there is no simple answer, but priorities must be established, by the Governments themselves with the invaluable input from civil society, from organizations like Transparency International and from the international financial organizations, like the World Bank and the InterAmerican Development Bank, whose attention to the problems of corruption, both internally and in their funded projects, is a fairly recent but most welcome addition to the struggle for the development of transparency and against corruption. Governments must take maximal advantage of the enhanced opportunities for technical assistance, but attention must be paid to avoiding transplants of model laws or mechanisms and legislation from other countries without careful preparation for the adoption

Another dilemma occurs when a new administration comes into office but the legislative power is in another political party. The new administration may have to choose between getting the support of the opposition party for new social programs and even for legislation to implement the anticorruption conventions and undertaking efforts to prosecute leaders of the opposition for corrupt practices. Under such circumstances, regardless of the decision on criminal prosecution, the new administration must take advantage of the opportunities for executive branch decisions and mechanisms that do not need legislative approval, such as enacting standards of conduct, especially for the presidential appointees, involving civil society in the implementation of the Conventions and undertaking the public information programs described therein.



In efforts to implement the Conventions, governments must consider civil society and nongovernmental organizations as more than ever as allies in those efforts and give the definitions of those terms the broadest interpretation feasible, to include the domestic and international anticorruption organizations like Transparency International, the media, the churches, the professional organizations; and the associations of lawyers, accountants, engineers and yes, the psychologists if we are serious about changing attitudes toward corruption. The universities, as well, should be included in the mix, for the purposes of the research and surveys referred to in the UN Convention. Also, in light of Article 12 and other provisions dealing with corruption in the private sector, governments must include the Chambers of Commerce and other organizations of the entrepreneurs whose participation in the perpetuation of corruption cannot be ignored. Executive branch heads of government should assure that the challenge to implement these Conventions is the business, if not the responsibility of all agencies and departments of government, not just the prosecutors and the anticorruption offices. Furthermore, politicians and elected officials must avoid exaggerating what they will accomplish as they undertake implementation of these Conventions. We must not raise expectations unfairly. Accordingly, we have to admit that the struggle will be a long and hard one. Indeed, we are making progress and the UN Convention is a sure sign of commitment and clear evidence that we understand the problem better and that we are designing comprehensive ways to resolve it.

### **Conclusion**

The Washington Post ran an article last week entitled "Does the UN Still Matter"? The article states "Today, the UN is beset by scandal and infighting among its 190 member nations... The big challenges nuclear threats, genocide, peacekeeping..." While fighting corruption is not mentioned, it must now be recognized as one of the major challenges that the UN faces. The UN's efforts to clean up its own house and to lead in the implementation of the Convention have obviously begun and the answer to the question must be that the UN does matter; that corruption is a threat to the success of any government or economic system in the UN membership regardless of whether it is socialist, capitalist, fundamentalist, or any shade of democracy, or in any stage of development, and that the States Parties in the Convention from Latin America can and must play an important role in achieving

the success that this Convention promises as they continue to implement the InterAmerican Convention against Corruption.

#### **ABOUT THE AUTHOR**

*Richard S. Werksman* retired in April, 2006, after a 45 year career with the federal government. At the time, he served as the United States representative on the Committee of Experts of the Follow-up Mechanism of the Inter-American Convention against Corruption. His involvement with the Convention began in 1996 when he was a member of the US delegation that negotiated this pioneer international anticorruption convention. He was a primary author of Article III, Preventive Measures. He was the principal US negotiator for the Follow-up Mechanism, which became effective in 2001 and he participated actively in the first round evaluations of the 28 States Party members which ended in April, 2006. Before joining the State Department in 1999 when the United States Information Agency was merged into that agency, he served as Assistant General Counsel and the Designated Agency Ethics Official at USIA, where he was responsible for that Agency's compliance with the Ethics in Government Act requirements for ethics training, financial disclosure statements and ethics counseling. His previous assignments with the US government included serving as the first Designated Agency Ethics Official at the Department of Education; Legal Advisor to the National Institute of Education and Assistant General Counsel at the Office of Economic Opportunity (The War on Poverty). From 1967-71, he was the OEO Liaison in Puerto Rico. He is a graduate of Columbia University Law School and Columbia College in New York City. He is the co-author of "La Convención Interamericana contra La Corrupción" (Buenos Aires, 1998) and numerous articles in Spanish and English about the Convention.