

ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

COMPARATIVE ANALYSIS OF THE UNCAC AND THE OAS CONVENTION

QUERY

In relation to possible EU support to the Latin American and Caribbean (LAC) region, what are the respective features and advantages of the UN Convention against Corruption (UNCAC) and the Organization of American States (OAS) Inter-American Convention against Corruption?

PURPOSE

This query will serve to inform future EU activities and support to the LAC region.

CONTENT

1. Overview of the main characteristics of the UN and OAS conventions
2. A detailed assessment of common features and differences
3. References



Author(s)

Sofia Wickberg, Transparency International,
tihelpdesk@transparency.org

Reviewer(s)

Marie Chêne, Transparency International, Gillian Dell,
Transparency International, Adam Foldes, Transparency
International

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CAVEAT

Given the timeframe and the scope of Helpdesk services, this answer should not be considered as a comprehensive comparison of the two conventions.

SUMMARY

The UNCAC and the Inter-American Convention against Corruption (OAS Convention) are respectively the most far-reaching and the first international legal instruments to combat corruption. They are equally strategic and are largely similar in their purpose and thematic coverage.

The UNCAC is a more detailed and more comprehensive document. It covers some topics not contained in the OAS Convention, such as prevention of money laundering and a number of the offences described, and establishes extensive standards regarding asset recovery.

Both conventions are equipped with a respective implementation review mechanism. Both of these start with a self-assessment which is then reviewed by government-nominated experts. The OAS Convention review mechanism is, however, more open, transparent and participatory.

1 OVERVIEW OF THE MAIN CHARACTERISTICS OF THE UNCAC AND OAS CONVENTION

The United Nations Convention against Corruption (UNCAC) and the Inter-American Convention against Corruption (OAS Convention) are largely similar with regards to their aim and purpose. Both conventions strive to promote and strengthen measures to prevent and combat corruption, to promote integrity and accountability in public affairs, and to promote and facilitate cooperation between states parties in the fight against corruption.

Both conventions are equally important and strategic for the LAC region, in different ways, and essentially cover the same areas (prevention, criminalisation, international cooperation and asset recovery). The OAS Convention entered into force in 1997, eight years before the UNCAC. The anti-corruption discourse significantly gained importance and influence in the meantime and knowledge about the topic deepened, which could partly explain why the UNCAC is more comprehensive than the OAS Convention. The main differences can be found in the scope, sector coverage and implementation mechanisms put in place.

Scope and jurisdiction

Definitions

Given its relative length and comprehensiveness, the UNCAC contains more definitions than the OAS Convention. Besides the definition of “Public official” and of “Property” that they share, the UNCAC defines “Foreign public official”, “Official of a public international organisation”, “Proceeds of crime”, “Freezing and seizure”, “Confiscation”, “Predicate offence” and “Controlled delivery”. The OAS Convention, on the other hand, defines “Public function”.

Both conventions provide a broad and inclusive definition of “Public official”, covering all selected, appointed, or elected officials of the state or its agencies, at all levels of the hierarchy. The UNCAC completed this definition by adding “any person holding a legislative, executive, administrative or judicial office of a State Party” and indicating that the convention also applies to every person considered a “public official” under domestic law.

Regarding the definition of “Property”, both conventions define it as “assets of any kind, whether movable or immovable, tangible or intangible, and any document or legal instrument demonstrating, purporting to demonstrate, or relating to ownership or other rights pertaining to such assets”. The UNCAC adds the precision “whether corporeal or incorporeal”.

Geographical coverage

One obvious difference between the UNCAC and the OAS Convention is the geographical scope of the legal instruments. Interestingly, they tend to complement each other since some states have only ratified one of the conventions, such as Suriname which is only a party to the OAS Convention, or Cuba which has only ratified the UNCAC.

The OAS Convention was the first international agreement committing states parties to fight corruption but its scope remains within the boundaries of the American continent. The OAS Convention currently counts 33 states parties out of the 35 OAS member states. Countries in the region that have not ratified the OAS are Cuba and Barbados.

The UNCAC is a universal instrument to fight corruption and is thus more far-reaching than the OAS Convention in terms of geographical coverage. It currently has 168 states parties, including all the OAS member states except Suriname, Barbados and Belize.

Jurisdiction

The jurisdiction is the legal authority over a certain area and/or certain persons. In this context, the jurisdiction signifies the situations in which the states parties can invoke the conventions and exercise their authority.

Both the OAS Convention and the UNCAC provide for each state party to establish its jurisdiction over the offences:

- committed in its territory
- committed by one of its nationals or a person usually residing in its territory
- when the alleged offender is present on its

territory and the state does not extradite him/her

The UNCAC contains a number of additional provisions regarding the state's jurisdiction, such as:

- situations when the offence is committed on a vessel or aircraft registered in the state
- offences committed against a national of that state party
- offences committed against the state party

Provisions

In terms of provisions, these two conventions broadly cover the same areas: prevention, criminalisation, international cooperation and asset recovery. However, some UNCAC provisions are more comprehensive and detailed, in particular with regard to mechanisms for asset recovery. In addition, and unlike the OAS, it includes the judiciary and the private sector as important stakeholders in the fight against corruption (GTZ, 2007).

More specifically:

Judiciary

The judiciary is an important pillar of a country's integrity system, as outlined in the [National Integrity System Assessment methodology](#), and a sector where corruption can be rampant and particularly damaging, as shown by Transparency International's *Global Corruption Barometer 2013*.

Contrary to the OAS Convention – which also covers the judiciary as its members are considered “public officials” – Article 11 of the UNCAC outlines preventive measures relating specifically to the judiciary and prosecution services. It call on states parties to “take measures to strengthen judicial integrity and to prevent opportunities for corruption among members of the judiciary” and within the prosecution service where relevant.

Private sector

The private sector is increasingly recognised by anti-corruption practitioners as a key element of the fight against corruption, to address corruption

challenges from the “supply-side”.

The OAS Convention focuses on the public sector and includes only two preventive provisions that touch upon the private sector, looking at deterrents to the bribery of domestic and foreign government officials.

While the main emphasis of the prevention section of the UNCAC is also the public sector, this convention contains an article specific to prevention in the private sector and calls on states parties to take measures “to prevent corruption involving the private sector”. It offers a list of possible measures that states can adopt to promote integrity in private entities and to prevent abuses and corruption, such as codes of conduct, transparency of ownership, auditing and accounting requirements, etc.

Regarding criminalisation, the UNCAC includes commercial (or private-to-private) bribery in the list of criminal offences, which is not mentioned in the OAS Convention.

Technical assistance

Technical assistance is featured in both conventions, but the UNCAC goes into further detail regarding measures that states parties should take.

Mutual assistance as described in the OAS Convention concerns mainly the investigation and prosecution of acts of corruption, and cooperation in the ways and means of preventing, detecting, investigating and punishing acts of corruption (including meetings and exchange of experiences). Besides legal cooperation, the UNCAC focuses on the need for states parties (“especially for the benefit of developing countries”) to develop and share training programmes, to mutually build capacity, to assist each other in conducting evaluations and research, to share expertise, and to enhance financial and material assistance. Article 62 of the UNCAC encourages states parties to make voluntary contributions to provide technical assistance to developing countries and states with economies in transition.

The disparity in geographical coverage makes a difference when it comes to technical assistance, as the UNCAC is a near-to-global instrument that includes a wider range of partners able to provide

technical assistance.

Asset recovery

Both conventions cover the issue of asset recovery, but while the OAS Convention makes only a light reference to it, the UNCAC dedicates a whole chapter to it. The latter provides states parties with a tool to enable transnational restitution of stolen assets and financial losses (GTZ, 2007).

Recognising the complexity of the matter and stressing that asset recovery is one of the main objectives of the UNCAC, the Conference of States Parties (CoSP) to the UNCAC established an intergovernmental working group on asset recovery during its very first session in 2006 (UNODC).

Implementation review

Follow-up mechanisms

Besides their respective CoSPs, both the UNCAC and the OAS Convention have established follow-up mechanisms to monitor effective implementation: the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption.

The implementation review mechanisms are largely similar in methodology and purpose. They aim to assist an effective implementation of the convention and to identify gaps and best practices, stressing that the objective of the exercise is not to establish a ranking of the countries under study. Both mechanisms follow a cyclical execution, composed of a self-assessment, on-site visits or direct dialogue and a peer-review process.

The main difference lies in the level of transparency of the process and accessibility of the data. The UNCAC review mechanism only requires the publication of the executive summaries of the country reports, leaving the publication of the full report to the discretion of the state party, whereas the OAS Convention review mechanism provides for the publication of the full country reports.

Civil society participation

Besides the accessibility of the information collected in the implementation review process, the other

most significant difference between the two review mechanisms is the role played by civil society.

The UNCAC implementation review mechanism is an intergovernmental procedure and civil society participation has been highly controversial. Although the rules of procedure of the CoSP allow civil society to attend its plenary sessions and state that these rules should apply to any body that the CoSP creates, a number of governments have refused to allow civil society to take part in the review process (UNCAC Coalition, 2013).

The MESICIC, on the other hand, offers the space for civil society to play a significant role in the review process. The [Report of Buenos Aires](#), establishing the review mechanism of the OAS Convention, states that “in order to obtain better input for its review, the Committee shall include in the provisions governing its operation an appropriate role for civil society organizations”. Civil society groups have many ways to participate: they can respond to the same questionnaire as their governments; participate in on-site visits; and present their findings at meetings bringing together all the MESICIC states parties (Erquicia, 2013).

2 COMMON FEATURES AND DIFFERENCES: A DETAILED ASSESSMENT

This table offers a comparison of the main provisions contained in the United Nations Convention against Corruption and the Inter-American Convention against Corruption. For the sake of concision, it does not transcribe the whole article and provides a summary of the relevant articles.

COMPARATIVE ASSESSMENT OF THE PROVISIONS OF THE UNCAC AND THE OAS CONVENTION		
Prevention		
Issue	UNCAC	OAS Convention
Anti-corruption policies	<ul style="list-style-type: none"> Article 5: Development of effective anti-corruption policies, practices (mandatory) 	<ul style="list-style-type: none"> N/A
Preventive anti-corruption body	<ul style="list-style-type: none"> Article 6: Existence of a body or bodies responsible for preventing corruption having necessary independence and resources (mandatory) 	<ul style="list-style-type: none"> Article III: Existence of oversight bodies responsible for implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts (not mandatory)
Codes of conduct	<ul style="list-style-type: none"> Article 8: Promotion of integrity, honesty and responsibility among public officials (mandatory) through, inter alia, codes or standards of conduct that prevent conflicts of interests accompanied by sanctions for non-compliance (not mandatory) Article 12: Promotion of the development of standards to safeguard integrity in the private sector, including through codes of conduct (not mandatory) 	<ul style="list-style-type: none"> Article III: Provision to create, maintain and strengthen standards of conduct for the correct (...) fulfilment of public functions and the prevention of conflicts of interest and of mechanisms to enforce these standards (not mandatory)
Recruitment and treatment of public officials	<ul style="list-style-type: none"> Article 7: Provision to adopt systems for the transparent and efficient recruitment of public officials on the basis of the objective criteria of merit, equity and aptitude; to provide sufficient training and remuneration to public officials (not mandatory) 	<ul style="list-style-type: none"> Article III: Provision to instruct government personnel on responsibility and ethical rules and to establish systems to hire public officials assuring openness, equity and efficiency as well as to study further measures that take into account the relationship between equitable compensation and probity (not mandatory)
Political party financing	<ul style="list-style-type: none"> Article 7: Provision to take measures to enhance transparency in the funding of candidatures and in the funding of political parties (not mandatory) 	<ul style="list-style-type: none"> N/A

<p>Public procurement and management of public finances</p>	<ul style="list-style-type: none"> Article 9: Establishment of appropriate systems of procurement based on transparency, competition and objective criteria and measures to promote accountability and transparency in the management of public finances (mandatory) 	<ul style="list-style-type: none"> Article III: Provision to ensure a system of government procurement that assures openness, equity and efficiency and to establish government revenue collection and control systems that deter corruption (not mandatory)
<p>Access to information and public participation</p>	<ul style="list-style-type: none"> Article 10: Provision to adopt measures to facilitate access to information (mandatory) Article 13: Provision to take measures to promote the active participation of individuals and groups outside the public sector in the fight against corruption (mixed) 	<ul style="list-style-type: none"> Article III: Provision to adopt mechanisms to encourage participation by civil society and NGOs in efforts to prevent corruption (not mandatory)
<p>Asset declaration</p>	<ul style="list-style-type: none"> Article 7: Provision to adopt systems to prevent conflicts of interests (not mandatory) Article 8: Provision to adopt measures requiring public officials to make declarations regarding outside activities, employment, assets, gifts and benefits for which a conflict of interest might arise (not mandatory) Article 52: Provision to establish effective financial disclosure systems for appropriate public officials and to require public officials having an authority over a financial account abroad to report it to the authorities (not mandatory) 	<ul style="list-style-type: none"> Article III: Provision to adopt systems for disclosing the income, assets and liabilities of certain public officials and make these declaration public (not mandatory)
<p>Revolving doors</p>	<ul style="list-style-type: none"> Article 12: Provision to impose restrictions on professional activities of former public officials or on the employment of public officials by the private sector after resignation or retirement (not mandatory) 	<ul style="list-style-type: none"> Article III: Provision to establish standards of conduct and interest declarations (not mandatory) (note from author: such standards of conduct usually contain provisions regarding past and future employment)
<p>Maintenance of books and accounts</p>	<ul style="list-style-type: none"> Article 12: Provision to adopt measures regarding the maintenance of books and accounts, financial statement disclosures and accounting and auditing standards in the private sector (mandatory) 	<ul style="list-style-type: none"> Article III: Provision to adopt mechanisms to ensure that publicly help companies and other associations maintain books and records (not mandatory)

Criminalisation		
Offense	UNCAC	OAS Convention
Bribery of national public official	<ul style="list-style-type: none"> Article 15: Criminalisation of active and passive bribery (mandatory) 	<ul style="list-style-type: none"> Article VI: Criminalisation of active and passive bribery (mandatory)
Bribery of foreign official	<ul style="list-style-type: none"> Article 16: Criminalisation of active and passive bribery of foreign public officials and official of public international organisations (mandatory) 	<ul style="list-style-type: none"> Article VIII: Establishment of the criminal offence of transnational bribery (not fully mandatory)
Embezzlement	<ul style="list-style-type: none"> Article 17: Establishment of the criminal offence of embezzlement, misappropriation and other diversion (mandatory) 	<ul style="list-style-type: none"> Article VI: Criminalisation of any act or omission in the discharge of his duties by a public official for the purpose of illicitly obtaining benefits for himself or for a third party (mandatory) Article XI: Criminalisation of diversion of state property (not mandatory)
Trading in influence	<ul style="list-style-type: none"> Article 18: Criminalisation of active and passive trading in influence (not mandatory) 	<ul style="list-style-type: none"> Article VI: Criminalisation of active bribery could in some cases cover situations active trading in influence (mandatory)
Abuse of functions	<ul style="list-style-type: none"> Article 19: Criminalisation of the intentional abuse of function or position (not mandatory) 	<ul style="list-style-type: none"> Article VI: Criminalisation of the abuse of functions (mandatory) Article XI: Criminalisation of specific abuses (not mandatory)
Illicit enrichment	<ul style="list-style-type: none"> Article 20: Criminalisation of intentional illicit enrichment (not mandatory) 	<ul style="list-style-type: none"> Article IX : Criminalisation of illicit enrichment (not fully mandatory)
Bribery and embezzlement in the private sector	<ul style="list-style-type: none"> Article 21: Criminalisation of active and passive commercial bribery (not mandatory) Article 22: Criminalisation of embezzlement in the private sector (not mandatory) 	<ul style="list-style-type: none"> N/A
Money laundering and concealment	<ul style="list-style-type: none"> Article 23: Criminalisation of the laundering of the proceeds of crime (mandatory) Article 24: Criminalisation of the concealment of retention of property resulting from any offence listed in this convention (not mandatory) 	<ul style="list-style-type: none"> Article VI: Criminalisation of the use or concealment of property derived from any of the offences listed in the convention (mandatory)

Law enforcement		
Offense	UNCAC	OAS Convention
Obstruction of justice	<ul style="list-style-type: none"> Article 25: Criminalisation of the obstruction of justice (to interfere in the giving of testimony or production of evidence, to induce false testimony, to interfere in the exercise of law enforcement) in relation to the commission of any offence listed in this convention (mandatory) 	<ul style="list-style-type: none"> N/A
Liability of legal persons	<ul style="list-style-type: none"> Article 26: Establishment of the criminal, civil or administrative liability of legal persons for the participation in the offenses listed in this convention (mandatory) 	<ul style="list-style-type: none"> N/A
Statute of limitations	<ul style="list-style-type: none"> Article 29: Establishment of a long statute of limitations period in which to commence proceedings for any offence listed in this convention and establishment of a longer period or suspension of the statute of limitations in case of evasion (mandatory, where appropriate) 	<ul style="list-style-type: none"> N/A
Prosecution and sanctions	<ul style="list-style-type: none"> Article 30: Establishment of appropriate sanctions with consideration to the gravity of the offense, the right of the defence, immunities etc. (mandatory) 	<ul style="list-style-type: none"> Article VII: Provision to adopt the necessary legislative or other measures to establish as criminal offenses under domestic law the acts of corruption described in this convention (mandatory) Article XVII: Provision regarding the nature of the acts Article XIX: Provision regarding temporal application
Freezing and confiscation	<ul style="list-style-type: none"> Article 31: Establishment of measures to enable the identification, tracing, freezing, seizure or confiscation of the proceeds of crime and of the property and equipment used in offenses established in this convention (mandatory) 	<ul style="list-style-type: none"> Article XV: State parties shall provide each other with the means to identify, trace, freeze, seize or forfeit property or proceeds obtained, derived from or used in the commission of offenses listed in this convention (mandatory)

Bank secrecy	<ul style="list-style-type: none"> Article 40: Establishment of appropriate mechanisms to overcome obstacles that arise from the application of bank secrecy laws (mandatory) Article 46: Provision for States not to decline to render mutual legal assistance on the ground of bank secrecy (mandatory) 	<ul style="list-style-type: none"> Article XVI: Provision against the use of bank secrecy to refuse to provide assistance to requesting states (mandatory)
Specialised authority	<ul style="list-style-type: none"> Article 36: Establishment of a state body specialised combating corruption through law enforcement (mandatory) Article 46: Designation of a central authority in charge of receiving and executing requests for mutual legal assistance (mandatory) 	<ul style="list-style-type: none"> Article XVII: Establishment of a central authority responsible for making and receiving requests for assistance and cooperation (mandatory)
Cooperation with national authorities	<ul style="list-style-type: none"> Article 37: Provision to encourage persons who committed an offense listed in this convention to cooperate with the authorities in charge of the investigation, such as potential mitigation of punishment or immunity (mandatory) Article 38: Provision to encourage cooperation between national authorities (mandatory) Article 39: Provision to encourage cooperation between national authorities and the private sector (mandatory) 	<ul style="list-style-type: none"> N/A
Protection of victims, whistleblowers and witnesses		
Issue	UNCAC	OAS Convention
Witnesses and victims	<ul style="list-style-type: none"> Article 32: Protection of witnesses, victims and experts, that testify concerning offenses listed in this convention, against retaliation and intimidation (mandatory) 	<ul style="list-style-type: none"> N/A
Whistleblowers	<ul style="list-style-type: none"> Article 8: Provision to facilitate the reporting by public officials of acts of corruption to appropriate authorities (not mandatory) Article 33: Provision to protect any person who reports in good faith and on reasonable grounds to competent authorities any facts related to offenses listed in this convention (not mandatory) 	<ul style="list-style-type: none"> Article III: Provision to establish systems for protecting civil servants and citizens who report in good faith acts of corruption establish measures and systems requiring government officials to report to appropriate authorities acts of corruption (not mandatory)

International cooperation		
Issue	UNCAC	OAS Convention
Extradition	<ul style="list-style-type: none"> Article 44: Provision to grant extradition of a person for the offenses listed in this convention; to establish the offenses listed in this convention as extraditable offenses; in the case of an impossibility to extradite, to take a person into custody and prosecute the case. This article contains provisions to guarantee fair treatment and to protect individuals against discrimination of sex, race, religion, nationality, ethnicity or political opinion (mandatory) 	<ul style="list-style-type: none"> Article XIII: Establishment of the offenses listed in this convention as extraditable offenses. If extradition is refused the Requested State shall prosecute the case and report on the final outcome to the Requesting State (mandatory)
Mutual legal assistance and law enforcement cooperation	<ul style="list-style-type: none"> Article 46: Provision to afford other member States the widest measure of mutual legal assistance in judicial actions in relation to the offenses covered by this convention. This article contains provisions acknowledging the potential need for confidentiality, dual criminality requirements, the transfer of detained persons, situations where mutual legal assistance may be refused and the responsibility for the costs (mandatory) Article 48: Provision to closely cooperate to enhance the effectiveness of law enforcement (mandatory) Article 49: Provision to establish joint investigations (not mandatory) 	<ul style="list-style-type: none"> Article XIV: Provision to afford other State parties the widest measure of mutual legal and technical assistance (mandatory)
Technical assistance	<ul style="list-style-type: none"> Article 60: Provision to develop training programmes and afford each other the widest measure of technical assistance, training (not mandatory) 	<ul style="list-style-type: none"> Article XIV: Provision to afford other State parties the widest measure of mutual legal and technical assistance (mandatory)

Asset recovery		
Issue	UNCAC	OAS Convention
Detection of proceeds	<ul style="list-style-type: none"> • Article 52: <ul style="list-style-type: none"> ○ Provision to require financial institutions to conduct due diligence on their customers, to maintain records (mandatory) ○ Provision to require financial disclosure for relevant public officials (not mandatory) 	<ul style="list-style-type: none"> • Article XV: Provision to afford other State parties the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property and proceeds obtained, derived from or used in the commission of offenses listed in this convention (mandatory)
Mechanisms for recovery	<ul style="list-style-type: none"> • Article 53: Measures for direct recovery of property through civil actions establishing title to or ownership of property acquired through the commission of an offense listed in this convention, or through court orders to pay compensation or damages (mandatory) • Article 54: Measures for recovery through international cooperation in confiscation (mandatory) • Article 55: International cooperation for the purposes of confiscation through measures to identify, trace and freeze or seize proceeds of crime (mandatory) • Article 57: Measures for the return and disposal of assets (mandatory) 	<ul style="list-style-type: none"> • Article XV: <ul style="list-style-type: none"> ○ Provision to afford other State parties the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property and proceeds obtained, derived from or used in the commission of offenses listed in this convention (mandatory) ○ Provision for a State that enforces a forfeiture judgement to dispose of the property or proceeds as described above (mandatory) and to transfer all or part to another State Party (not mandatory)

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