

**Critically Evaluate the United Nations Convention Against Corruption (UNCAC) and
Discuss the Factors That Hinder Effective Implementation of the Convention**

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Introduction

The UNCAC is the only global anti-corruption multilateral treaty. UNCAC was adopted on 31 October 2003 by the United Nation General Assembly and was signed by more than 140 member countries and it covers five areas: (i) Preventive Measures (ii) Criminalization and Law Enforcement (iii) International Cooperation (iv) Asset Recovery and (v) Technical Assistance and Information Exchange (Convention against Corruption, 2021). Although UNCAC is considered as an anti-corruption landmark through its detailed provisions and global coverage, but its effectiveness is criticized (Chene and Dell, 2008). Though the convention covers wide spectrum of corruptive activities including bribery, abuse of power, abuse of functions, trading in influence, corruption in private sector and assets recovery, but limited in its impact in few areas. For example, the UNCAC monitoring mechanism has failed to fulfill its expectations (Quraishi, 2011). Weilert (2016) agrees that monitoring system of UNCAC is less stringent than Organization for Economic Co-operation and Development (OECD)'s monitoring system for example. UNCAC also faces considerable criticism regarding interpretation of ratifications regarding nation states' obligations toward UNCAC and enforcement of monitoring. Deegan (2019) highlights that not only ratification of UNCAC does have a tangible impact in fighting corruption, but also the need to track the implementation of UNCAC provisions. Quraishi (2011) criticizes UNCAC's value as an obligatory treaty and its language preciseness for effective implementation. The Convention has also been criticized for not being strong enough on private sector corruption, political corruption, and asset recovery (Webb 2005; Babu 2006 cited in Hechler et al., 2011).

This review discusses the factors that hinder effective implementation of UNCAC. The factors are categorized into three categories: (i) The absence of political will (ii) Technical obstacles and (iii) UNCAC being toothless to enforce its provisions. After discussing the three factors, the author focusses on potential measures to improve the implementation of the convention.

The absence of political will

Arguably, without political will, the fight against corruption won't have tangible results. Although some countries are using the convention effectively to fight corruption, the lack of political will is one of the primary obstacles that hinders effective implementation of

the convention in other countries (Quraishi, 2011). Some countries believe that implementing such convention leads to Infringement upon Sovereignty of such countries (Chene and Dell, 2008). This belief led to some states opposing UNCAC monitoring system as it was considered to be a breach the sovereignty of those countries (Quraishi, 2011). Quraishi (2011) also claims that there are some fears specifically from developing countries regarding the implementation of the convention. Heineman and Heimann (2006) argue that a lot of developing countries believe that stringent monitoring system will expose their deficiencies that these governments are not able to remedy effectively. Chene and Dell (2008) point out that such exposure to UNCAC monitoring may affect the aid conditionality and that their performance in implementing UNCAC could be used as a determining factor while dispersing aid. Developing countries believe that such mechanisms might be biased against their countries and hence decreases their political will to implement the convention (Chene and Dell, 2008). In many countries, political power networks enable and protect corruption for their members to sustain power. These political parties irrespective of their countries being members of UNCAC' opposes the implementation of the UNCAC as it may affect them being in power (Deegan, 2019). Scholars believe that 'natural resisters' who are major beneficiaries of corruption normally press for status quo and refrain from implementing global anti-corruption laws or conventions (Quraishi, 2011, p. 35). Researchers also claim that corrupted politicians strive to weaken the laws of their countries by preventing the implementation of conventions like UNCAC to keep their stolen funds and assets (Smith et al., 2007). The assumption of political resistance for the implementation of UNCAC applies on both developing as well as developed countries (Heimann and Dell, 2006).

Although asset recovery is one of the main pillars of UNCAC, there are several problems including the political will, the complexity of tracking international money transfer and technical difficulties in tracing the stolen money in a globally connected economy. The efforts of victim countries are often faced by the fact that the individuals in power are either corrupted or beneficiaries of corruption, while the receiving countries often don't show interest in tackling the problem as their economies benefit from these stolen money or sometimes they're reluctant to move against powerful groups of interest like banks (Smith et al., 2007). Another contradiction between the convention and the political interest is the high cost of economic sanctions. These sanctions not only impact the economy of sanctioned countries but also the sanctioning countries. Hence, both parties might not have the political will to reach the sanctioning stage and rather prefer to replace it with other measures that won't affect their economies (Quraishi, 2011). The lack of participation of civil society in the review process also hinders the implementation of UNCAC. Civil society groups including non-governmental organizations and other groups distinct from government and business are unaware of the process of UNCAC provisions and its various stages, this directly impact the output of reviews and other convention measures (Huter and Scaturro, 2019).

Technical obstacles



In addition to political unwilling, UNCAC faces various technical obstacles including members' compliance whether direct or indirect compliance. Direct compliance challenges include monitoring mechanism, treaty's language and existence of sanctions. The indirect challenges include prosecution difficulties and good governance. These compliance challenges hinder UNCAC's effectiveness against corruption (Quraishi, 2011). Independence of legal system for member states is another factor that hinders the effectiveness of UNCAC. The oversight institutions like the judiciary is deliberately kept weak or sometimes complicit, often resulting in corruption becoming unpunished (Hechler et al., 2011). Another challenge faced by UNCAC is inability of prosecuting corruption offenses due to the inadequacy of evidentiary and procedural laws in many countries. For example, financial offences or money laundering offences are normally carried out using computers and advanced software. Many developing countries don't have relevant legislation to prosecute such digital enabled financial crimes (Quraishi, 2011).

Scholars criticize the corruption definition, treaty language and ambiguity in UNCAC. Interestingly, the convention doesn't have explicit definition for corruption as the signing countries didn't agree on a standard definition for corruption (Hechler et al., 2011). Weilert (2016) agrees that the absence of comprehensive definition for corruption is a weak point of the treaty undermining its efficacy. This also points toward lack of consensus amongst member countries in identifying a generally acceptable definition of corruption, which is deemed as the corner stone of such conventions. Generally, the language of the treaty is not obligatory. Quraishi (2011) claims that lack of specific definition for corruption and the unspecific language leads for different interpretations. This shall complicate harmonization efforts specially in global conventions like UNCAC where the correlation between parties is very important specially in cross country corruption crimes. It's argued that UNCAC grants its members a wide discretion regarding privileges and immunities which may hinder the prosecution of officials (Quraishi, 2011). The ambiguity in the treaty's language sometimes lead to grey areas which are difficult to agree upon. An example of this is the "facilitation payments" and whether it's allowed or prohibited. While the United States interpreted the UNCAC's language that it allows the facilitation payment, The United Kingdom considers such payments as an offence under the anti-terrorism act (Quraishi, 2011). Although the treaty is legally binding, however its value is diminished due to ambiguity of the terminology (Quraishi, 2011). Weilert (2016) believes that UNCAC gave this margin of discretion to the countries according to their legal and cultural backgrounds just to encourage countries to participate in the convention and to overcome their fears about sovereignty.

Another challenge in the UNCAC is the monitoring and review mechanism. UNCAC has a self-evaluation system where countries are requested to evaluate themselves, answer a questionnaire and conduct self-performance review. Quraishi (2011) claims that this method is one of the easiest and most lenient review mechanisms. The independency



of this mechanism is questionable and establishing effective monitoring systems seems to be challenging due to the breadth of the convention as well as the large number of signing members (Heineman and Heimann, 2006). The higher the number of signing countries, the more difficult monitoring system will be, due to the lengthy discussions and negotiations to agree on the definitions and text for an adequate monitoring system (Quraishi, 2011). For multilateral treaties like UNCAC, the bigger number of negotiating countries, the greater efforts are required to satisfy participants interests. This process ultimately results in ambiguous or unclear wording often leading to varying interpretations.

Other major challenge faced by UNCAC is the continuation of corrupted people in power. According to Pavletic (2009 cited in Hechler et al., 2011) many influential and powerful people are most corrupt. This hinders the efforts and increase the cost of stolen assets recovery for involved agencies (Hechler et al., 2011). Asset recovery is one of the most complicated legal issues. It often requires qualified financial investigators with special set of skills to allow them to trace assets, skilled attorneys in multi-jurisdictional and multi-disciplinary litigation and forensic accountants to resolve complex transactions (Smith et al., 2007). Despite these challenges in the recovery of stolen assets, it's argued that UNCAC provision were not adequately drafted to anticipate these scenarios. Also, for money laundering, defining the crime's location is complex and investigation may lead to prosecution of a crime in two different countries, leading to various interpretations of treaty language (Quraishi, 2011).

UNCAC is toothless:

Arguably, none of the UNCAC provisions will be effective unless they are enforced through robust and transparent mechanisms like judicial sanctions. However, the independence of justice system and its integrity is only mentioned in the general terms. The convention strongly recommends establishing independent anti-corruption bodies; however, it doesn't specify how such efforts could be institutionalized. In addition to this and by leaving implementation to national laws, majority of UNCAC provisions had been weakened. Weilert (2016) argues that one of the most effective ways to prevent corruption is criminalizing of relevant corruptive acts. Promulgating and enforcing criminal laws is an important element that falls under the state's responsibility (Weilert, 2016). This assumption is linked to many factors including the treaty's language and interpretation, obligatory requirements, and interference with members legal systems. The convention also doesn't apply any monetary or military sanctions on its members and doesn't penalize its signatories for non-compliance (Quraishi, 2011).

The International Criminal Court (ICC) has jurisdiction only over limited number of offences (genocide, war crimes, crimes against humanity and the crime of aggression). This doesn't include corruption. This further limit the effectiveness of UNCAC as international cooperation and extradition are subject only to the dual criminality principle according to UNCAC. Thus, unless the offence is criminalized by both parties (the



requested and requesting states), then the cooperation provisions and extradition can't be enforced. Another challenge that faces UNCAC is its inability to protect witnesses, victims, experts, and reporting individuals. It was left to the parties to establish measures in accordance with members domestic legal system. Thus, fear of persecution discourages potential whistleblowers from providing the requisite information to incriminate corrupt individuals or groups (Quraishi, 2011). The mechanisms by which governments can be held responsible are missing. The convention also doesn't mention the role of legislators and national parliaments while briefly referring to judiciary. Although the convention mentions civil society, it is unclear about their role and contribution in fighting corruption (Hechler et al., 2011).

From the literature review, it could be concluded that the convention is relatively weak with regards to the enforcement tools and hence labeled as "toothless".

How the effectiveness of UNCAC can be improved?

In order to enhance the effectiveness of UNCAC, a lot of measures need to be taken. This includes improving legal systems, monitoring system, funding, cooperation between countries etc. Member countries shall swiftly pass new legislations and laws that mirrors the UNCAC provisions. This should include politicians' financials. However, if these new legislations and laws are not accompanied by governmental will to change the previous indecisive practices, then corruption will remain unabated (Smith et al., 2007). Quraishi (2011) argues that member countries should take measures to reinforce integrity, minimize corruption opportunities, target bribery supply / demand and strengthen the cooperation between prosecuting authorities and public officials according to member countries' national laws. Updating legislative provisions to address corruption issues is new to many countries, thus, UNCAC guidelines can help these member countries to set up parallel legislative provisions (Hechler et al., 2011). Also, UNCAC review mechanism should be simple, clearly defined, cost effective and reliable with due assurances on non-infringement upon sovereignty of member countries. This will allow for reliable data collection specially in countries with weak capacity striking the balance between the required data and the cost for obtaining it (Chene and Dell, 2008). It's believed that a more combative monitoring system needs to be established to recover stolen assets and resolve multilateral corruption cases (Quraishi, 2011).

Improving the cooperation and coordination between victim countries and receiving countries who often end up receiving the stolen funds along with aid donor countries is a key factor to enhance the effectiveness of UNCAC. Such coordination shall allow victim countries to expedite the litigation process and avoid delays in assets recovery through early communication with officials in recipient countries (Smith et al., 2007). Also, donors can help in establishing communication platforms to exchange experience and lessons learned between member countries. Huter and Scaturro (2019) believe that UNCAC can benefit from regional networks, conventions, and existing mutual practices preceding UNCAC in areas like information exchange and knowledge sharing. civil



society participation is another factor that can support UNCAC effectiveness. The participation of civil society is considered fundamental for the success of peer review process as it adds considerable public pressure to the existing peer pressure (Quraishi, 2011). Donor countries can play a key role in assisting member states and encouraging them to include their civil societies in the review process and require them to publish their self-assessment results on United Nations Office on Drugs and Crime (UNODC) website and national websites. This information should be used in initiating relevant dialogues and to obtain donor's support (Huter and Scaturro, 2019). Donor countries should also limit banks secrecy, prosecute cross-border bribery and support developing countries by providing them with legal and technical assistance and support their efforts for asset recovery claims.

Also, to increase the effectiveness of the UNCAC, Transparency International recommends that the funding for UNCAC should come directly from the United Nations instead of voluntary contributions as contributions may affect country impartiality (Quraishi, 2011). Other measures that countries shall take is to establish transparent system for public procurement, accountability measures for public financing and fair selection system for civil servants (Quraishi, 2011). UNCAC should also address the good governance aspect and political party financing. Due to differences in member countries legal systems, the financing of political parties was deleted. This deleted provision should have limited political financing and ensured financial transparency. The deletion of this provision was disappointing as UNCAC had the possibility to address this issue (Quraishi, 2011). Training programs can enhance the effectiveness of UNCAC. Thus, they should be developed and enhanced to increase the capacity of stakeholders including prosecutors, investigators, judiciary members and civil activists. Also, as per chapter six of UNCAC, support should be provided to developing countries especially in areas like asset recovery and anticorruption practices. More collaboration between victim countries and receiving countries shall limit money laundering sanctuaries. (Smith et al., 2007).

Conclusion

The UNCAC was established as a result of the need for global, in-depth treaty against corruption. It's known that corruption increases poverty and social inequality, diminishes development and rule of law. Corruption promotes criminal activities like terrorism, human trafficking and organized crimes. It also diverts public funds from important sectors like health and education. The UNCAC attempts to create a global anti-corruption framework. UNCAC is the first convention of its kind, the most complex, detailed and broadest global anti-corruption agreement currently in force (Quraishi, 2011). Though UNCAC was signed since 2003, the convention faces lot of challenges to be more effective. Huter and Scaturro (2019) argue that UNCAC in its current form is not a comprehensive blueprint to fight corruption and reform anti-corruption initiatives. It's rather a compilation of key measures that are not prioritized or sequenced. In order to enhance the effectiveness of UNCAC, the convention should have clear definition for



corruption and clarify treaty language, enhance monitoring and review mechanism, involve civil society and other stakeholders in the review process and avail platform for better cooperation between convention members. From their side, member states should have political will to implement the convention and improve their legislations and laws to address the convention legislative provisions (Huter and Scaturro, 2019). Member states should also have clear and decisive approach to investigate, prosecute and punish corrupt practices and practitioners. Huter and Scaturro (2019) claim that although member states can use the UNCAC to identify and implement good practices and robust anti-corruption policies but some other states may use it as a fig leaf to deflect political opponents or donors criticism while paying little effort to actual implementation its provisions in true spirit. On the other hand, researchers argue that UNCAC is not the goal in itself and it should rather be used as a convention that support member states to address corruption and as a technical and political tool to support good governance in the pursuit of sustainable development and complementing multilateral efforts in fighting corruption (Huter and Scaturro, 2019). Hence, If hindrances are overcome and UNCAC is effectively implemented, this will result in many benefits including: reduction in major corruption, accelerated global development, better political practices and democratic governance, international poverty alleviation and more efficient public procurement and public spending (Heimann and Dell, 2006).

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