

Anticorruption Protocol to the United Nations Convention against Corruption (APUNCAC)

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.”

--UN Secretary General Kofi Annan, Co-Recipient of the 2001 Nobel Peace Prize

ABSTRACT

The persistence of corruption, despite United Nations General Assembly Resolution 58/4 of 31 October 2003 adopting the *United Nations Convention against Corruption (UNCAC)* and despite the adoption of UNCAC by 187 States Parties, demands that the international community adopt stronger measures. The Model Anticorruption Protocol to the United Nations Convention against Corruption (APUNCAC) would:

- (1) establish a body of UN Inspectors empowered to investigate charges of corruption,
- (2) establish dedicated anticorruption courts,
- (3) include provisions designed to fight money laundering,
- (4) include provisions designed to exert extraterritorial jurisdiction over criminals who currently operate with impunity,
- (5) offer a promising strategy to promote the rule of law.

A 200-page text has been completed. The text seeks to anticipate and address numerous legal, substantive, and operational concerns. APUNCAC has been subjected to peer review over the past decade through numerous articles published in scholarly journals, with the objective of ensuring that APUNCAC is feasible, practical, and sensible.

The United Nations General Assembly Special Session against Corruption, to be held June 2-4, 2021 at United Nations Headquarters in New York, offers a unique opportunity to advance APUNCAC by establishing a Preparatory Committee to discuss the major substantive and administrative issues arising out of APUNCAC and to draft a text based on APUNCAC, with the objective of making a widely acceptable consolidated text of a convention available for consideration at a conference of plenipotentiaries. The model language is available at: <http://tinyurl.com/y6bkpott>.

The support of UN Delegates and specialized agencies is requested. Please contact Prof. Stuart S. Yeh, University of Minnesota, e-mail: yehx008@umn.edu.

FREQUENTLY ASKED QUESTIONS AND ANSWERS (FAQ)

1. *How would UN Inspectors conduct investigations?* UN Inspectors would conduct investigations in the same way that investigators empowered by the bilateral agreement establishing the Commission against Impunity and Corruption in Guatemala (CICIG) conducted investigations. The CICIG agreement permitted an international staff of investigators to conduct investigations on domestic territory in accordance with domestic laws. In the same way, parties to APUNCAC would voluntarily agree to facilitate investigations and prosecute offenders.

2. *How would APUNCAC insure that prosecutions would not be thwarted?* UN Inspectors would hand over each case to dedicated anti-corruption courts established and funded by the UN but operated domestically. The courts would be periodically evaluated by the *UN Commission on Crime Prevention and Criminal Justice* and funding would be redirected based upon the results of the evaluations. The model protocol incorporates special procedures designed to ensure an independent, untainted process for selecting, retaining, and ensuring the accountability of competent justices to serve those courts. Article 8 specifies that the *Commission on Crime Prevention and Criminal Justice* would exercise veto power over judicial nominations. Furthermore, APUNCAC creates a mechanism whereby the *Commission on Crime Prevention and Criminal Justice* would ensure accountability and discipline corrupt prosecutors and judges.

3. *How would APUNCAC insure the cooperation of domestic authorities with UN Inspectors?* APUNCAC empowers the *Commission on Crime Prevention and Criminal Justice* to appoint entities to monitor domestic compliance with the terms of APUNCAC, with special emphasis on cooperation, responses to obstruction of justice, and the privileges, immunities and protection of inspectors, staff and surrogates. Monitors may include national or international human rights institutions or any other entities deemed by the *Commission on Crime Prevention and Criminal Justice* to be duly qualified for the purpose of monitoring domestic compliance with APUNCAC. The *Commission on Crime Prevention and Criminal Justice* would ensure that designated monitors have regular and adequate funding to perform the responsibilities described in Article 11, would conduct periodic reviews to evaluate the performance of designated monitors, and would redirect funding based upon those evaluations. Designated monitors would “not seek nor act on instructions from any source.”

Article 10 makes obstruction of justice an offense that may be investigated by a UN Inspector. Significantly, a UN Inspector may seek a judicial opinion from a justice in the jurisdiction where the investigation is conducted regarding any alleged act involving obstruction of justice.¹ The UN Inspector may recommend charges or disciplinary actions to the appropriate prosecuting authorities or disciplinary bodies.² UN Inspectors would file reports that would be published online by Transparency International.³ The reports would be submitted to the appropriate prosecutorial, disciplinary, or oversight bodies.⁴

Article 14 provides a mechanism where a UN Inspector may, when obstruction of justice has occurred or when cooperation is inadequate, file a request for censure. Article 15 provides a mechanism where the World Bank and IMF would reduce aid and credits in response to the magnitude and frequency of acts of

¹ APUNCAC, art. 10, para. 7.

² APUNCAC, art. 10, para. 1.

³ APUNCAC, art. 10, para. 1.

⁴ APUNCAC, art. 10, para. 1.

noncooperation with UN Inspectors. Article 16 makes the *Commission on Crime Prevention and Criminal Justice* the final arbiter of disputes with regard to the actions of the Commission, ICAC, the Anti-Money Laundering Debarment Office, FINCEN, and each State Party Conflicts of Interest Board and Fair Political Practices Commission.

4. *What would compel leaders of UN Member States to adopt UNCAC?* The process through which nongovernmental organizations (NGOs) influenced the ratification of the Rome Statute provides a roadmap for obtaining ratification of APUNCAC. Ratification would be obtained through a coordinated international effort, involving pressure exerted by influential international organizations. Framed as a moral issue, signature and ratification of APUNCAC would provide a public litmus test for leaders around the world. A detailed explanation of the reasons why leaders may feel compelled to adopt UNCAC is available here: <https://www.mdpi.com/2075-471X/10/1/1/>

UN Member States would benefit from ratification of the proposed treaty because it would plug a major gap in the international sanction regime against money laundering and terrorist financing. UN Member States would benefit from innovative treaty provisions that would permit parties to trace international flows of funds into and out of bank secrecy havens and would permit investigators to follow and prosecute funding of terrorism, transnational criminal organizations, and criminal activities of corporations and executives that currently go unpunished. These provisions would benefit UN Member States because their efforts to halt terrorist financing have been stymied by the ability of terrorists to hide their funds in offshore havens. In addition, UN Member States would benefit from the proposed treaty because it would serve to address government corruption in developing nations that promotes resentment, extremism and terrorism.

5. *How would APUNCAC address grand corruption and the use of bank secrecy havens?* Special provisions of APUNCAC are designed to break the stranglehold of corrupt elites who dominate domestic power structures and undermine reform. These provisions include the American “RICO” law against racketeering, as well as a model campaign finance law and a model law deterring conflicts of interest. Significantly, APUNCAC incorporates innovative provisions designed to address money-laundering, the practice of hiding illicit funds in offshore tax havens, and the use of attorneys and financial service professionals to hide illicit revenues derived from crime--revenues that reward and drive violent criminals. APUNCAC incorporates provisions designed to address corruption in the sale of state assets, the use of loans to conduct illicit transactions, facilitation payments, and transfer pricing.

A bank clerk in a high-risk jurisdiction who repeatedly completed international wire transfers from the territory of a State Party in an amount exceeding \$3,000 without obtaining beneficial ownership information or documentation of the source of the funds would, under APUNCAC, be criminally liable and subject to arrest and extradition under APUNCAC, and under the United Nations Convention Against Transnational Organized Crime (UNTOC) for aiding, abetting and facilitating the concealment of the true nature and source of the funds.⁵ A front man who repeatedly submitted false or misleading information regarding beneficial ownership or the source of funds transmitted via bank wire would, under APUNCAC, be criminally liable and subject to arrest and extradition under APUNCAC, and under UNTOC for aiding, abetting and facilitating the concealment of the true nature and source of the funds.⁶

⁵ APUNCAC, art. 19, paras. 17, 19, art. 30, art. 40, paras. 3, 7. United Nations Convention Against Transnational Organized Crime, December 12, 2000, art. 6, para. 1, art. 16, para. 3, 2225 U.N.T.S. 278.

⁶ APUNCAC, art. 19, paras. 6, 17, 19, art. 40, paras. 1, 7. United Nations Convention Against Transnational Organized Crime, December 12, 2000, art. 6, para. 1, art. 16, para. 3, 2225 U.N.T.S. 278.

6. What are APUNCAC's advantages vis-à-vis the proposed International Anti-Corruption Court?

(A) A single International Anti-Corruption Court may be overwhelmed by the sheer number of cases of corruption—perhaps tens of thousands across the 193 UN Member States. In contrast, APUNCAC's dedicated anticorruption courts would be distributed across all 193 Member States.

(B) APUNCAC does not envision an international court with the power to bring any person before the court, including nationals of non-States Parties. Instead, UN Inspectors would refer charges to domestic prosecutors and domestic anticorruption courts. Domestic courts would decide guilt or innocence. This feature distinguishes APUNCAC from the proposed International Anti-Corruption Court.

(C) APUNCAC would fill a major gap in the international sanction regime against money laundering and terrorist financing. UN Member States would benefit from innovative treaty provisions that would permit States Parties to trace international flows of funds into and out of bank secrecy havens and would permit investigators to follow and prosecute funding of terrorism, transnational criminal organizations, and criminal activities of corporations and executives that currently go unpunished.

(D) In contrast to the International Anti-Corruption Court, APUNCAC includes an array of provisions, modeled upon the U.S. Code of Federal Regulations and New York's conflict of interest laws, to fight corruption and money laundering. This includes a version of the Racketeer Influenced and Corrupt Organizations Act (RICO), the False Claims Act, beneficial ownership reporting requirements, wire transaction reporting requirements, currency transaction reporting requirements, conflict of interest reporting requirements, and the establishment of an international Financial Crimes Enforcement Network (FINCEN) modeled on the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN). APUNCAC incorporates campaign finance rules, provisions designed to thwart bid-rigging, and a procedure to debar and criminally sanction individuals engaged in money laundering. APUNCAC is designed to exert jurisdiction over criminals operating in bank secrecy havens. In contrast, none of these provisions are incorporated into the proposal for an International Anti-Corruption Court.

CONCLUSION

APUNCAC would:

1. Establish UN inspectors
2. Give inspectors strong investigative powers
3. Establish dedicated domestic anticorruption courts
4. Install procedures to vet prosecutors and judges serving dedicated courts
5. Install strong AML requirements
6. Install strong conflict of interest reporting requirements and rules prohibiting specified conduct
7. Install a whistleblower program
8. Install strong protections regarding public procurement
9. Install incentives for private parties to pursue legal action
10. Permit class actions
11. Install campaign finance reforms
12. Protect UN inspectors and APUNCAC organs and officers

The international community could address poverty, underdevelopment, and basic human rights through implementation of a powerful international institution designed to restore accountability in dysfunctional domestic criminal justice systems. This path promises to be the most direct, effective strategy that could be adopted by the international community. The Rome Statute and the bilateral treaty establishing Guatemala's CICIG are strong precedents for APUNCAC—a treaty that would establish the same type of powerful investigative capacity that is effective in all modern democracies in fighting corruption, addressing impunity, and ensuring effective domestic public justice systems. This opens the way to solution of seemingly insoluble problems--corruption, poverty, underdevelopment and human rights.

ARTICLES

- Article 1. Relation with the United Nations Convention Against Corruption
- Article 2. Statement of Purpose
- Article 3. UN Organs [established to implement APUNCAC]
- Article 4. Scope of Application and Equal Protection [establishes equal protection under the law]
- Article 5. Irrelevance of Official Capacity [senior leaders are not immune]
- Article 6. International Commission Against Corruption [establishes UN inspectors]
- Article 7. Procedures [regarding the conduct of investigations]
- Article 8. Dedicated Courts [establishes domestic anticorruption courts]
- Article 9. Cooperation [requires cooperation with UN inspectors]
- Article 10. Obstruction of Justice [criminalizes obstruction of UN inspectors and the judicial system]
- Article 11. Monitoring [establishes system to monitor treaty implementation]
- Article 12. Privileges, Immunities and Discipline of Inspectors, Staff and Surrogates
- Article 13. Protection [of UN inspectors and staff]
- Article 14. Censure [for obstruction of justice or noncooperation]
- Article 15. Noncooperation [World Bank and IMF response to noncooperation]
- Article 16. Judgment [UN Commission on Crime Prevention is arbiter]
- Article 17. Secrecy [investigations are confidential]
- Article 18. Anti-Money Laundering Debarment Office [debarment of individuals violating APUNCAC]
- Article 19. Financial System Safeguards [beneficial owner database and AML requirements]
- Article 20. Money Laundering [defines money laundering]
- Article 21. Financial Institution Records and Reporting [AML requirements]
- Article 22. Bank Records and Reporting [AML requirements]
- Article 23. Currency Dealer Records [AML requirements]
- Article 24. Casino Records [AML requirements]
- Article 25. Transportation of Currency [AML requirements]
- Article 26. Foreign Financial Accounts [AML requirements]
- Article 27. Foreign Financial Transactions [AML requirements]
- Article 28. Financial Institution Currency Transaction Report [AML requirements]
- Article 29. Casino Currency Transaction Report [AML requirements]
- Article 30. Individual Currency Transaction Report [AML requirements]
- Article 31. Bank Currency Transaction Report Exemptions [AML relief]
- Article 32. Structuring [AML requirements]
- Article 33. Bank Suspicious Activity Report [AML requirements]
- Article 34. Savings Association and Service Corporation Suspicious Activity Report [AML requirements]
- Article 35. Money Service Business Suspicious Activity Report [AML requirements]
- Article 36. Casino Suspicious Activity Report [AML requirements]
- Article 37. Securities Broker Suspicious Activity Report [AML requirements]

Article 38. Cash Received in a Trade or Business [AML requirements]
Article 39. Financial Crime Civil Penalties [AML penalties]
Article 40. Financial Crime Criminal Penalties [AML penalties]
Article 41. Conflicts of Interest Board [to fight conflicts of interest]
Article 42. Board Powers and Obligations [handles complaints regarding conflicts of interest]
Article 43. Prohibited Interests and Conduct [rules governing public servants]
Article 44. Reporting [reporting obligations of public servants]
Article 45. Conflicts of Interest Penalties [for violations of COI rules]
Article 46. Gifts by Lobbyists [prohibits gifts]
Article 47. State Assets [rules re transfer of state assets]
Article 48. Loans [rules re loans]
Article 49. Facilitation Payments [criminalizes facilitation payments and undue advantage]
Article 50. Transfer Pricing [controls tax base erosion and profit shifting]
Article 51. Whistleblowing [COI board shall receive and act upon whistleblower reports]
Article 52. Persons Required to File an Annual Disclosure Report [rules governing public servants]
Article 53. Procedures Involving the Filing of Annual Disclosure Reports [specifies procedures]
Article 54. Information To Be Reported [reporting rules]
Article 55. Public Inspection of Reports and Privacy [re Annual Disclosure Reports]
Article 56. Retention of Reports [Annual Disclosure Reports]
Article 57. Disclosure Requirement Penalties [for failure to file accurate reports]
Article 58. Public Procurement [rules and monitoring process]
Article 59. False Claims [incentives for private parties to pursue legal action]
Article 60. Racketeering [fights a pattern of criminal activity or corruption]
Article 61. Racketeering Criminal Penalties [specifies criminal penalties]
Article 62. Racketeering Civil Remedies and Procedure [private parties may recover triple damages]
Article 63. Venue, Process, Class Actions [permits class actions]
Article 64. Expedition of Actions [expedites court proceedings]
Article 65. Closure [limits discretion to close court proceedings]
Article 66. Civil Investigative Demand [UN inspectors may demand documents]
Article 67. Priority [terms of APUNCAC presumptively determined by UN inspectors]
Article 68. Campaign Reform [re financing of political campaigns]
Article 69. Conspiracy [criminalizes conspiracy to commit an offense]
Article 70. Definitions [defines APUNCAC terms]
Article 71. Rule-Making and Adjudication [procedures to make and adjudicate rules re APUNCAC]
Article 72. Privileges, Exemptions, and Immunities [of APUNCAC organs and officers]
Article 73. Implementation [of APUNCAC organs]
Article 74. Reservations [prohibits reservations]
Article 75. Signature, Ratification, Acceptance, Approval and Accession
Article 76. Entry into Force
Article 77. Depositary and Languages
Annex: Model Guarantee [AML instrument]

AML = Anti-Money Laundering

COI = Conflicts of Interest