

The UN Crime Programme: Sensitive issues in negotiations

Introduction: the focus on resolutions and the importance of wording

Many United Nations meetings revolve around the presentation, discussion and adoption of draft resolutions. In addition to urging Member States to undertake certain activities, the resolutions drive the work of the United Nations by setting out the agenda and by tasking the UN Secretariat with various work (such as the preparation of reports for future meetings, and the organization of the meetings themselves). Resolutions are also important as statements of policy: what issues are important and why, and what should be done about them.

Different states have different priorities, and there are often disagreements over what should be done. This paper identifies some of the issues that have been debated within the scope of the United Nations crime programme.

The mandate of the UN: what can be discussed in Vienna?

Issue: how strict can and should the borderlines be between what is discussed within the framework of the UN crime programme, and what is discussed by other elements in the UN system, such as the UN bodies debating human rights, the advancement of women, education, climate change and urban development?

Appearance of the issue in practice:

- references in draft resolutions to issues (such as violence against women, or environmental crime) that would seem to overlap with the mandate of other elements of the UN may be opposed, even if they are simple references to the importance of an issue (an example was the demand of one representative that references to human rights be deleted from a draft resolution, on the grounds that human rights are dealt with in Vienna, and thus “there are no human rights in criminal justice”)
- references that merely cite resolutions and work by other elements of the UN are generally accepted, in line with the “one UN” approach.

Financing of activity, including technical assistance

Issue: what activities should be covered by the regular UN budget, and what activities require the identification of “extrabudgetary funds”. The UN Crime Commission itself cannot decide on the UN budget, and therefore any draft resolution that may have financial implications (staff work by the Secretariat, organization of a meeting, and so on) would require a “statement of financial implications” from the Secretariat, and indication of how the funding would be obtained.

Appearance of the issue in practice:

- major donors to the UN budget tend to oppose increases in the regular UN budget, and require that any additional activities be conducted subject to the availability of extrabudgetary funding. Those states that support an activity may argue that it is so important that it should be funded from the regular UN budget. (This issue is at present very topical in connection with the negotiations over a mechanism for review of the implementation of the UN Convention against Transnational Organized Crime and its protocols.)
- If there are financial implications which cannot be covered by the regular UN budget, then the phrase “... subject to the availability of extrabudgetary funds” (or something along the same lines), is inserted into the draft. If it is not possible to identify the source of such funding, then the relevant provisions of the resolution (if the resolution is adopted) will not lead to any action.

Conditionality of technical assistance

Issue: States requesting technical assistance tend to oppose even implicit requirements that, in order to receive such assistance, they must take certain steps (such as adopt certain legislation or certain policies). They generally argue that this constitutes interference in domestic matters. Donors, in turn, may be of the view that certain steps are necessary for the assistance to have the intended impact.

Appearance of the issue in practice:

- Developing countries, in particular, are sensitive to any phrasing of draft resolutions that would appear to imply that they must take certain action before they can receive any funding. Their principle argument is that the international community can successfully respond to crime only if all states have the possibility to take the requisite measures – and therefore, (unconditional) technical assistance is required.

Multilingualism

Issue: the UN has six working languages: Arabic, Chinese, English, French, Russian and Spanish. States have the right to participate in the work of the United Nations in their preferred language. Nevertheless, much of the work of the UN takes place in informal settings, in which case there is no allocation for interpretation. In practice, most of the representatives based in Vienna are able to work in English, and these informal negotiations will generally be conducted in English.

Appearance of the issue in practice:

- Proposals for holding expert meetings or other meetings in only one UN language may be opposed by those whose language would not be used.
- States may oppose expert meetings in general and require that the meetings be “open-ended intergovernmental meetings” which would implicitly require that all six UN working languages can be used. (This, in turn, increases the costs of the meetings and lessens the willingness of states to offer to host such meetings.)¹
- If a meeting (even an “informal meeting”) is held in one UN language only, representatives of other language groups may argue that any decisions made even provisionally can be subjected to new debate, once the consideration proceeds to a forum where all six languages may be used.
- If consideration is based on documentation (such as is the case with the adoption of a draft report), the consideration may be postponed until the documents are available in all six working languages.

Recovery of assets

Issue: Concern that some states do not take sufficiently effective action in tracing, freezing, seizing and confiscating illegally obtained assets and, in particular, in returning them to the country of origin.

Appearance of the issue in practice:

- Developing countries tend to take the view that those countries to which the proceeds of crime (for example, of corruption) have been transferred have an obligation under the two UN crime conventions to be much more efficient in recovery and repatriating the proceeds of crime. The states to which the funds are transferred, in turn, are in general of the view that the proper legal procedure must be followed, and this, in turn, entails the provision of sufficient evidence that the assets in question are indeed the proceeds of crime, and that the requesting state (and not any third party) is the legitimate owner.

Trafficking in cultural property

Issue: Concern that some states do not take sufficiently effective action in tracing, freezing, seizing and confiscating trafficked cultural property and, in particular, in returning them to the country of origin.

Appearance of the issue in practice:

- As with the debate over the recovery of assets, many developing countries from which cultural artefacts have been taken are of the view that the states to which the artefacts have been taken are not sufficiently efficient in tracing, recovering and returning the cultural property. The states

¹ Expert meetings continue to be held for such technical purposes as the drafting of manuals.

to which the artefacts are transferred, in turn, may find that the artefacts were legally taken out of the country in question.

- In some cases, developing countries call for the return of artefacts that have been taken from the country many years before, and the records showing the provenance of the artefacts may in the interim have been destroyed, for example in a war.

Should negotiations begin on a UN convention on cybercrime?

Issue: some states call for a UN cybercrime convention, while other states want the emphasis placed on technical assistance and the strengthening of the response on the basis of existing regional conventions (in particular, the Council of Europe Cybercrime Convention, known as the Budapest Convention).

Appearance of the issue in practice:

- Paragraph 42 of the 2010 Salvador Declaration invited the Commission to consider convening an open-ended intergovernmental expert group to conduct a comprehensive study of the problem of cybercrime and responses to it “with a view to examining options to strengthen existing and to propose new national and international legal or other responses to cybercrime”.
- A draft report has been prepared (http://css.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf), and the UN intergovernmental expert group on cybercrime has held three meetings, the most recent on 10-13 April 2017.
- The main argument for a UN cybercrime convention is the need for a global convention in the drafting of which all UN member states can participate; those supporting a UN convention tend to regard the Budapest Convention as a regional instrument (although open to any state, even outside of Council of Europe membership). The Budapest Convention is seen to reflect “First World interests”.
- The main arguments against a UN cybercrime convention include the lack of need (implementation of existing standards and legislation is more important than the drafting of new instruments), the expense of drafting and implementing a UN convention, and the difficulties that would arise if there are two competing conventions with dissimilar provisions.

Development of peer review

Issue: UNCAC is the first UN convention for which national implementation has been subjected to peer review. The concept of peer review was unfamiliar to many states, and there was concern (for example) that allowing foreign states to examine what action has been taken in a state constitute intervention in domestic matters, which would be against the UN Charter.

Appearance of the issue in practice:

- Although there were considerable difficulties in the negotiation of the mechanism for the review of the implementation of UNCAC, and several states were sceptical of the concept of peer review (in particular the necessity for a “country visit” that would allow discussions with a broad range of stakeholders), there are at present few, if any, state parties that regard the UNCAC implementation review mechanism as intrusive. Country visits have been conducted in the vast majority of reviews.
- The major concern has to do with the expense of a multilingual review process, which may, in the case of an individual country under review, require the translation of hundreds of pages into one or two languages during the review process, followed by translation of the executive summary into all working languages. The country visits also require travel and other costs.
- A separate issue is that the UNCAC peer review mechanism is different from those used for example by the OECD or the Council of Europe; in particular, in the UNCAC process the state party under review has control over what information is used and how the report is written, the Implementation Review Group may not consider the situation in any individual state party, and there is no rigid follow-up process.

Role of civil society

Issue: This is perhaps the major disagreement within the UN crime programme at present. It arose in connection with the negotiation of the UNCAC implementation review mechanism (2006-2011), and centres on different understandings of the “intergovernmental nature” of the United Nations. Basically, some states are of the view that non-governmental organizations (NGOs) should not have a role in many international discussions on crime prevention and criminal justice within the UN framework, while other states are of the view that non-governmental organizations can strengthen the international response.

Appearance of the issue in practice:

- Within the framework of the UNCAC implementation review mechanism, NGOs may attend only plenary sessions of the Conference of the States Parties, but not sessions of the working groups or of the Implementation Review Group (IRG). A one-day “briefing” is organized for duly accredited NGOs in connection with the annual main session of the IRG.
- This status quo is viewed by some state parties as the result of a “final” decision, resting on a delicate balance, and should not be re-opened. Other state parties are of the view that the status quo is a matter that should be kept under constant review in view of the “constructive dialogue” between the states parties and the NGOs called for by the 2011 session of the Conference of states parties (the “Marrakesh compromise”).
- In connection with the ongoing negotiations over an implementation review mechanism for the UN Convention against Transnational Organized Crime (UNTOC), there is disagreement over whether the UNCAC mechanism can and should serve as a model. While there is a general sense that a somewhat enhanced version (“Marrakesh plus”) would be acceptable, some argue that the two conventions are so different that the UNCAC mechanism cannot serve as a model. Others argue that two of the protocols to UNTOC make specific reference to NGOs, and

therefore NGOs should have an enhanced role in the review of implementation of UNTOC.

- More generally within the work of the UN Commission, earlier resolutions have included many references to the necessity of states working together with NGOs also on the international level. Currently, the same states that have opposed NGO involvement on the international level in the review of the implementation of UNCAC tend to object to references in draft resolutions to civil society also in other connections.
- If references to NGOs in a draft resolution seem to have strong support, some objecting states may insist on language to the effect that the activity of such NGOs must be subject to the law of the state in question.
- A related point of contention has been the accreditation of NGOs to various meetings within the framework of the UN crime programme. The basic rule is that NGOs that have consultative status with ECOSOC may attend UN meetings, unless decided otherwise. Other NGOs may apply for permission to attend. The Secretariat drafts a list of such requests and circulates it among missions in Vienna. Now and then a state will object to a specific NGO, in which case the matter is dealt with by the Bureau. If the Bureau cannot reach agreement, the issue must be decided by the meeting itself. (So far such issues have almost always been solved amicably before the start of the meeting.)

Ranking of states

Issue: The issue of the ranking of states arose, in the framework of the UN crime programme, with concern by several member states that the “Transparency Index” published by Transparency International misrepresented the extent of corruption in their countries. In their view, such indexes were not only misleading, but could even be harmful for example by providing disincentives for foreign investment.

Appearance of the issue in practice:

- One of the principles on which the UNCAC implementation review mechanism is based is that the reviews should not involve any ranking of states parties. Thus, the UN Secretariat is specifically prohibited from comparing the amount of corruption in specific countries. (More generic comparisons, however, are permissible, although also these would be examined carefully.)
- Although the principle of avoiding any ranking was adopted only in the context of UNCAC, the Secretariat has become cautious also when reporting more generally on the levels of reported crime, or the operation of the criminal justice system. Tables listing for example the number of reported homicides or the number of prisoners per capita in different countries tend to be avoided, and may be replaced by charts or graphs showing groups of countries.

Questionnaire fatigue

Issue: Some states are of the view that UNODC *notes verbale* that ask states for information may place an excessive burden on practitioners in states. For this reason they tend to seek to limit the number and scope of such requests.

Appearance of the issue in practice:

- The Commission has considerably curtailed the number of requests for information on implementation of UN standards and norms.
- The scope of the UN crime trend surveys has been restricted.

Wording of resolutions: shall, should, may consider (and so on)

Issue: resolutions of UN bodies generally call for action. The obligatory nature of the calls varies, and is usually indicated by phrases such as “States shall ..”, “States may ...” and “States may consider ...”.

Appearance of the issue in practice:

- UN Crime Congress declarations and resolutions of sessions of the Conferences of the States Parties are much more likely than those of the UN Crime Commission to include a mandatory phrase such as “States shall ...” (or, for the Conferences of State Parties, “States parties shall ...”). The UN Crime Commission, in turn, is generally not deemed to have the mandate to require that member states of the UN act in a certain way, or that they refrain from taking certain action. For this reason, softer formulations such as “States may consider ...” or “States are urged to ...” tend to be used.
- The references may be further qualified with phrases such as “subject to their constitutional principles”, “subject to their legal system” or the like.
- In respect of intergovernmental and other bodies, a formulation such as “[IGO X] is invited to ...” may be used.
- In respect of the UN Secretariat, the standard formulation is “the UNODC is requested to ...”

Incorporation in draft resolutions of references to decisions or the work of other entities

Issue: different entities have different memberships, and different states may well have different views regarding their effectiveness or indeed their value.

Appearance of the issue in practice:

- Language that appears to endorse the work or decisions of other entities will often be weighed carefully. Such language may well be rejected for example with the argument that not all the members of the UN Commission (or other UN crime programme body) are familiar with the

work of the entity in question, and thus cannot endorse its work.

- Language referring to entities that have a limited membership (such as regional organizations) may be rejected on the grounds that it is not the role of the UN body in question to comment on them or implicitly endorse their work.
- Language referring to a specific entity may be rejected as not representative of such entities in general. Alternatively, some states may require that many different entities, from different regions, are listed in the same connection.