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Civil Society Overview Report

by Transparency International and the UNCAC Coalition

An input to the UNCAC Implementation Review Mechanism: First year of review of UNCAC chapters III and IV

-Executive Summary-

This is the executive summary of a Transparency International and UNCAC Coalition overview report¹ that was prepared as a contribution to discussions about the review process for the UN Convention against Corruption (UNCAC) and about UNCAC implementation. That includes discussions due to take place at the fourth session of the UNCAC Conference of States Parties (CoSP) in Marrakesh, 24 – 28 October 2011.

The report makes findings, conclusions and recommendations about the UNCAC review process that started up in July 2010 and is currently assessing country implementation of UNCAC chapter III on criminalisation and enforcement and IV of the UNCAC on international cooperation. In particular it stresses the importance of civil society participation and transparency in the review process. It also surveys selected implementation challenges identified in civil society reports prepared as inputs to the review process² The aim of these reports is to provide complementary information to assist the review process, supplementing the official reports that have been produced as part of the review process.³

At the outset, we note that the UNCAC review process is highly demanding in terms of the requirements of expertise and coordination. It is to the great credit of the United Nations Office on Drugs and Crime (UNODC) and participating countries that, as we find in the report, the process is proceeding well. The process has so far produced and published four very informative Executive Summaries, analysing country implementation and making recommendations for improvements. There are also encouraging signals about the conduct of the process in many countries. While there is room for improvement, the first year of the process—naturally the most difficult—is promising in terms of establishing the basis for an effective process.

Likewise, UNCAC implementation is demanding on States Parties, in terms of human and material resources. A good start has been made in implementation in the areas covered by the UNCAC review process.

While recognising the achievements to date, Transparency International and the UNCAC Coalition (TI/ UNCAC Coalition) in this report identify essential areas for improvement in the operation of the review mechanism and review process, looking first at the functioning of the Implementation Review Group and then at the country level review process and serious. Civil society participation and transparency are key elements needed in the review process and

¹ The full report is available at <http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>. Its author is Gillian Dell, Transparency International.

² Civil society reports have so far been prepared for reviews of Argentina, Bangladesh, Brazil, Bulgaria, Chile, Lithuania, Morocco, Mongolia, Peru, Ukraine, USA and Zambia in the first year of the review process and Papua New Guinea and Vietnam in the second year. Summaries of these reports have been submitted to the 4th session of the Conference of States Parties and the full reports can be found on the website of the UNCAC Coalition: <http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>

³ Implementation of chapter III (criminalization and law enforcement) of the United Nations Convention against Corruption: Thematic report prepared by the secretariat, 25 August 2011, <http://www.unodc.org/documents/treaties/UNCAC/COSP/session4/V1185288e.pdf> ; Implementation of chapter III (criminalization and law enforcement) of the United Nations Convention against Corruption: Thematic report prepared by the secretariat, 25 August 2011 <http://www.unodc.org/documents/treaties/UNCAC/COSP/session4/V1185378e.pdf>

there are concerns in these areas. The report also highlights a small number of implementation and enforcement issues requiring closer CoSP attention. Its findings complement those of the UNODC Thematic reports submitted to the Fourth session of the CoSP.

Summary of findings and recommendations:

1. The Implementation Review Group (IRG) has failed to allow civil society organisations (CSOs) to participate as observers in its meetings. This contravenes the procedural rules that apply to the IRG, as clarified by the UN Office of Legal Affairs in its opinion of August 2010.⁴
 - **Recommendation:** The CoSP should instruct the IRG to apply Rule 17 of the CoSP Rules of Procedure. This would be in line with the UN Office of Legal Affairs' explanation of the rules. It would also be in keeping with the spirit of UNCAC, notably with its many provisions that recognise the value of civil society contributions to anti-corruption work and of transparency as a basis for government engagement in this area (See Annex 1). The IRG is an open-ended intergovernmental group tasked with keeping an overview of the review process so as to identify challenges and good practices and consider technical assistance requirements. Civil society organisations knowledgeable about anticorruption work under can make useful contributions.
2. Most countries reviewed in the first year benefited from country visits by UNCAC review teams and meetings between civil society organisations and those teams. However, elements of transparency and participation are still missing that would enhance the accountability and effectiveness of the country level review process. (See Annex 2) Areas where improvements can be made include publication of contact information for focal points and of review schedules. Publication of self-assessments and full reports should also be the norm.
 - **Recommendation:** The CoSP should encourage States Parties to apply in their review processes standards of inclusiveness and transparency as called for in the Terms of Reference for the Review Mechanism and as required in the UNCAC itself.
3. With regard to implementation into law of UNCAC chapters III and IV, the civil society reports found deficiencies in national legislation including with respect to UNCAC requirements as to the foreign bribery offence, liability of legal persons and whistleblower protection. These findings complement findings in the UNODC Thematic Report on Criminalization and Enforcement.
 - **Recommendation:** The CoSP should agree concrete follow-up measures to assist States Parties in addressing inadequacies in implementation.
4. In the area of enforcement, ten of thirteen reports found missing or insufficient data or lack of access to enforcement data.
 - **Recommendation:** The CoSP should agree measures to strengthen collection and publication of enforcement data in States Parties.
5. The reports in many countries also found insufficient independence of investigation or prosecution services and/or judiciary; and a lack of adequate resources and training for anti-corruption enforcement.
 - **Recommendation:** Enforcement issues should be given special attention by the CoSP and concrete follow-up measures agreed to improve performance in this area.

While the UNCAC review mechanism has made some remarkable steps forward, some improvements are still needed. We are optimistic that the necessary improvements will be

⁴ Office of the Legal Counsel, UN Office of Legal Affairs, Interoffice Memorandum of 5 August 2010, <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/29Nov-1Dec2010/V1056031e.pdf>

made and that the review mechanism will then be able to more fully serve its purpose of improving anti-corruption efforts and augmenting transparency and accountability worldwide.

Annex 1

Transparency and participation standards for the review mechanism

Both UNCAC itself and the Terms of Reference for the Mechanism of Review of Implementation of the Convention point to the importance of civil society participation and transparency in the fight against corruption in order to ensure the effectiveness of such efforts.

1. UNCAC provisions: Articles 5, 10, 13 and 63

UNCAC Article 5 calls on each State Party to develop anti-corruption policies that *promote the participation of society* and reflect the principles of the rule of law...transparency and accountability.

UNCAC Article 10 calls on each State Party to enhance *transparency in its public administration*. The types of measures envisioned include procedures *to allow members of the general public to obtain information* on the functioning of its public administration and on decisions and legal acts that concern members of the public and *to facilitate public access to the competent decision-making authorities*. They also include *publication of information*, which may include periodic reports on the risks of corruption in public administration.

UNCAC Article 13 requires States Parties to take appropriate measures including *“to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption”* and to strengthen that participation by measures such as, *“enhancing the transparency of and promoting the contribution of the public in decision-making processes and ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.”*

UNCAC Article 63 (4) (c) calls for the Conference of States Parties to agree on activities *facilitating the exchange of information with [inter alia] non-governmental organisations*.

2. Terms of Reference of the Review Mechanism

The Terms of Reference for the Review Mechanism agreed by the CoSP in November 2009 call for a review mechanism that is “transparent, efficient, non-intrusive, inclusive and impartial”.⁵ They also provide in paragraph 28 that “The State party under review shall endeavour to prepare its responses to the comprehensive self-assessment checklist through broad consultations at the national level with all relevant stakeholders, including the private sector, individuals and groups outside the public sector.” They further provide in paragraph 30 that “States parties are encouraged to facilitate engagement with all relevant national stakeholders in the course of a country visit.”

3. Opinion of the UN Office of Legal Affairs as to the Implementation Review Group

In August 2010, following an inquiry from the Implementation Review Group (IRG), the UN Office of Legal Affairs issued a Legal Opinion on the question of whether observers, including non-governmental organisations can participate in the work of the UNCAC Implementation Review Group.⁶

⁵ Resolution 3/1 Review mechanism, Annex 1 Terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, adopted at the 3rd Conference of States Parties, 9 – 13 November 2009

⁶ Office of the Legal Counsel, UN Office of Legal Affairs, Interoffice Memorandum of 5 August 2010, <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/29Nov-1Dec2010/V1056031e.pdf>

The opinion makes clear that Rule 17 of the Rules of Procedure of the UNCAC Conference of States Parties applies to the IRG because it is a subsidiary body of the Conference. Rule 17 covers NGO attendance at plenary meetings, oral statements, written submissions and receipt of documents.

In its opinion the UN Office of Legal Affairs noted in paragraphs 11 - 13 that:

“11. Pursuant to article 63, paragraph 3, the Conference has adopted rules of procedure. Rule 2 of those rules provides as follows concerning their scope of application:

1. These rules of procedure shall apply to any session of the Conference in accordance with article 63 of the Convention.

*2. **These rules shall apply, mutatis mutandis, to any mechanism or body that the Conference may establish in accordance with article 63 of the Convention, unless it decides otherwise.** (Emphasis added.)*

12. The Conference, when establishing the Implementation Review Group under the resolution, did not indicate that there should be special procedures for its activities or specifically give the Implementation Review Group the authority to decide upon its own rules of procedure for the conduct of its work. Therefore, the rules of the Conference apply to the Implementation Review Group as a subsidiary body that the Conference has established in accordance with article 63 of the Convention.

13. Section V of those rules concerns the participation of observers in the Conference and deals with the participation of four separate groups of observers, i.e. signatories, non-signatories, intergovernmental organizations and non-governmental organizations. It would thus be advisable that the Implementation Review Group apply the provisions of section V to its activities, mutatis mutandis.” (Italics added)

Annex 2

UNCAC Review Process: First Year of Review*

The following table provides a summary of government performance as to civil society participation and transparency in the UNCAC review process, based on information from civil society organisations in those countries, as far as they were able to obtain it.

	Contact details of "focal point" public	CSO consulted in preparation for the self-assessment	Self-assess made public	Onsite visit	CSO inputs to review team	Publish full report
1. Argentina	No	Yes upon request of CSO	Yes following access to information request	No	No	Positive indications
2. Bangladesh	Yes	No	Yes	Yes	Yes	No
3. Brazil	No	Yes	Yes	Yes	Yes	Positive indications
4. Bulgaria	No	No	No	Yes	Yes	Unknown
5. Burundi	No	No	No	Yes	Yes	Unknown
6. Chile	No	No	No	Yes	Yes	Positive indications
7. Croatia	Yes	No	No	No	No	Unknown
8. Dominican Republic	No	No	No	No	No	Unknown
9. Fiji	No, but provided on inquiry	No	No	Due	Unknown	Unknown
10. Finland	Yes	Yes	Yes	Yes	Yes	Yes
11. France	Yes	Yes	No	Yes	Yes	Unknown
12. Indonesia	Yes	Yes	Yes	Yes	Yes	Unknown
13. Jordan	Not determined	No	No	Due	Unknown	Unknown
14. Lithuania	Yes	No	No	Yes	No	Positive indications
15. Mongolia	Yes	Yes	Yes	Yes	Yes	Unknown
16. Morocco	No	No	No	Yes	No	Unknown
17. Niger	Yes	No	No	Yes	Yes	Unknown
18. Peru	Yes	No	No	Due	Unknown	Unknown
19. Rwanda	Indirectly via list of experts	No	Yes	Yes	Yes	Unknown
20. Spain	Unknown	Unknown	No	Yes	No	Unknown
21. Togo	No	No	No	Yes	Yes	Unknown
22. Uganda	No	Yes	No	Yes	Yes	Unknown
23. Ukraine	Yes	No	No	Due	Unknown	Unknown
24. USA	Yes	No	Yes	Yes	Yes	Positive indications
25. Zambia	No	Yes	No	Yes	Yes, some	Unknown
TOTAL YES	9/10 Yes	8 Yes	8 Yes	18 Yes	15 Yes	1 so far

* No information is included on Sao Tome y Principe because no contact could be identified in the time frame available.