

# SHADOW REPORTING AS A TOOL TO MONITOR IMPLEMENTATION OF ANTI-CORRUPTION INSTRUMENTS

## Introduction

The Human Rights Trust of Southern Africa (SAHRIT) has over the years, been working with governments and Civil Society to develop their capacity in the preparation of State Party reports and Shadow reports respectively, under human rights treaties. This presentation seeks to share best practices with civil society on how to prepare Shadow reports. Further, the focus of the presentation is on the AU Convention on Preventing and Combating Corruption as well as the United Nations Convention on Corruption. Where possible, we have included the SADC Protocol Against Corruption, as this is an area where SAHRIT has experience in.

While the United Nations Convention on Corruption, the African Union Convention on Preventing and Combating Corruption and the SADC Protocol against Corruption all make reference to state obligations to report to different committees periodically, on the progress they have made in the implementation of the treaties, they do not have set out criteria for reporting that also gives guide on what should be contained in the reports. The United Nations Convention against Corruption for instance, under article 63 (6), provides for State Parties *'to provide the Conference of the State Parties with information on its programmes, plans and practices, as well as legislative and administrative measures to implement this Convention, as required by the Conference.'*

The existing Draft Rules of Procedure for the Conference of the States Parties are also silent on the criteria for reporting.

The AU Convention, under Article 22 (h), provides that one of the functions of the Advisory Body<sup>1</sup>, which body will be created under the convention to perform an oversight role over the implementation of the Convention by States Parties, shall be to *'submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this Convention.'* This information will be provided by State Parties and within the first year after entry into force of the convention, State Parties shall submit their reports to the Advisory Board. The convention under Article 22 (7) states that *"thereafter, each State Party, through the relevant procedures, shall ensure that the national anti-corruption authorities or agencies report to the Board at least once a year before the ordinary sessions of the policy organs of the AU."* Again, though time frames provided, there is no provision within the clause that makes it clear what areas should be reported on.

The SADC Protocol against Corruption also provides guidelines on reporting. This is provided for under Article 11 (2) which states that *'Each State Party shall report to the Committee within one year of becoming a Party, on the progress made in the implementation of this Protocol. Thereafter, each State Party shall report to the Committee every two years.'*

It should be emphasized that compliance to the provisions of these treaties and successful implementation, much depends on the rules of procedure that the treaty bodies will adopt and

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<sup>1</sup> African Union Convention on Preventing and Combating Corruption, Article 22 (1).

whether these rules will address the aspect of timeously reporting, criteria for reporting as well as effective implementation.

What should be applauded though is the fact that these Conventions recognize the role of the civil society. The UN Convention makes provision for the consideration of inputs from relevant NGOs duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties.<sup>2</sup> Civil Society involvement is also emphasized within the Draft Rules of Procedure of the Conference of the States Parties of the UN.<sup>3</sup> The AU Convention and SADC Protocol against Corruption also provide for the involvement of civil society, also extended to include media, in Articles 12 and 4, respectively.

Whilst the Conference of the States Parties will only convene for the first time in December, and the AU Advisory Body and SADC Anti-Corruption Committee are still to be established, and therefore no rules of procedures have yet been adopted, which rules will provide guidelines on the reporting requirements, it is critical that efforts to build the capacity of civil society working in the area of anti-corruption continue in anticipation of the role they will be playing in monitoring the implementation of these treaties.

### **Why Shadow Reporting**

State Party reports are periodic reports by States that are party to a treaty, on the legislative, judicial, administrative and other measures, which they have adopted for the purpose of giving effect to the provisions of the treaty, and on the progress made to implement the treaty. These reports are submitted to a treaty body which is usually created by the treaty to which such State is party to.

The practice in respect of the human rights treaty bodies has been to consider reports submitted in the presence of a delegation from the reporting State and make concluding observations and recommendations for consideration by the reporting State.

Ideally, this is what the practice should be as well under the Anti-Corruption treaties and should be one of the functions of the Conference of the States Parties though the draft Rules of Procedure are silent on this aspect. The same procedures should also apply to the Advisory Body to be created under the AU Convention and the SADC Anti-Corruption Committee to be created under the SADC Protocol against Corruption.

It is very important to note that in the absence of clearly defined guidelines and procedures in so far as reporting to treaty bodies is concerned, this then becomes a challenge to the functions of civil society in respect of producing shadow reports. Shadow reports much depend on the State Party reports, though it does entail that civil society cannot continue to perform its watchdog role. This will involve monitoring compliance of States Parties to implementing the provisions of these treaties.

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<sup>2</sup> Article 13 of the United Nations Convention against Corruption

<sup>3</sup> Rule 17, Draft Rules of Procedure of the Conference of the States Parties to the United Nations Convention against Corruption.

State Party reporting is about constructive dialogue, between the reporting state and the experts. These experts would include individuals, eminent persons, institutions or national authorities, well versed in anti-corruption issues. The State must therefore be a willing party to the process. There must be political commitment to produce honest, balanced, adequate and timely reports. Government must also commit resources to the process – both financial and human.

Outside of the government process, Civil Society can also play a role in the State Party reporting process by producing shadow or alternative reports. Shadow reporting is intended to provide the civil society perspective, in respect of State obligations to, and efforts and progress made towards the domestication and enforcement of the treaties on corruption, whilst highlighting gaps and omissions that may have been made in a State Party report. Shadow reports aim to influence the decisions of treaty bodies, which influence will have an impact on concluding observations and recommendations made by the respective treaty bodies. The latter is in anticipation, as mentioned earlier, that the treaty bodies under the anti-corruption treaties will adopt similar procedures as other treaty bodies, for instance those created under the human rights treaties.

The international and regional communities have acknowledged the fact that Civil Society organizations are a key stakeholder in fighting corruption. The role of Civil Society includes, but is not limited, to monitoring how a State is implementing its obligations in terms of the conventions that it is party to. This is owed to a large extent on their watchdog role on governments' commitments and obligations. As alluded to earlier, the anti-corruption treaties have specifically recognised this role.

Civil Society's contribution can be in any of the following ways some of which include popularization of the treaties; holding governments accountable; monitoring the implementation of the treaties and raising public awareness, to mention some.

Others include;

- Watchdog function – looking out for and speaking out against violations (in corruption).
- Research, documentation and dissemination of information on corruption – this would involve monitoring of corruption trends; provision of relevant anti corruption information in respect of efforts being made i.e. legislative, regulatory and institutional reforms;
- Capacity development for governments to promote treaties on anti-corruption; for anti-corruption institutions in the prevention, investigation and prosecution of corruption offences; for communities through awareness raising activities.

SAHRIT has carried out research and conducted a number of capacity development trainings for anti-corruption institutions within SADC through the activities of the Southern African Forum Against Corruption (SAFAC). SAFAC is a network of the existing anti-corruption agencies in SADC whose primary objective is building capacity of these agencies to effectively fight corruption.

In view of the important role that Civil Society plays in fighting corruption and the promotion of good governance, governments should involve them in the reporting process. The treaty bodies must

make provision for engagement and consultation and in this respect Civil Society must be engaged in processes of report preparation at the national level.

Civil Society input is essential in the review of compliance by reporting states and non-compliance by non-reporting countries. In the case of absence of materials or reports from the State Party, information provided by civil society becomes particularly valuable to the oversight bodies and can have a strong impact when holding governments accountable. Governments' assessments of their efforts to comply with these treaties are likely to be incomplete and tend to minimize problems and maximize accomplishments. Indeed this has been SAHRIT's experience with regard to State Party reporting under human rights treaties.

Civil Society that has worked with the government to prepare the official reports may find that the government reports, as submitted, may not include their concerns. Even where Civil Society has been consulted in preparation of the official report, the final version may omit their point of view. Therefore, it is important for them to submit their own report to complete the record.

Among other contributions, Civil Society can play a role in the reporting process by:

- Providing relevant country information on corruption;
- Offering an opportunity for the government to critically self-assess its performance;
- Providing accurate and balanced information to treaty bodies through, for instance, shadow or alternative reports;
- Disseminating anti-corruption information to the general public and other stakeholders *vis*, the relevant steps or measures that have been made to ensure domestication of the treaties and also on corruption trends;
- Lobbying governments to produce reports if they are defaulting and to implement recommendations of the treaty bodies;
- Lobbying governments on ratification, domestication and implementation of anti-corruption treaties.

The UN Convention is based on the four pillars which are Preventative Measures; Criminalization; International Co-operation and Asset Recovery. The AU Convention focuses in similar areas as the UN Convention whilst the SADC Protocol focuses on Preventative Measures; Criminalization; Harmonization of Legislation; Asset Recovery and Extradition and Mutual Legal Assistance.

Based on the UN and AU Conventions, Civil Society shadow reports can focus on the core areas (pillars) which would entail reviews of the following as set out specifically in the UN and also in the AU Conventions on Corruption. Shadow reports will take into account these aspects, focusing on the extent to which State Parties have made efforts to enforce these either through legislative or institutional reform.

### **Prevention**

In view of the fact that fighting corruption requires multi-pronged strategies, there is emphasis on prevention. The UN Convention deals with prevention in Chapter Two, the AU Convention in terms of Articles 7, 10 and 11 also deals with prevention. These include model preventive policies, such as the establishment of anti-corruption bodies that have laws in place that allow for functional

autonomy and are accountable to an impartial source and enhanced transparency in the financing of election campaigns and political parties and functioning of the private sector. Prevention measures also deal with how the public sector should ideally be run to minimize any opportunities to commit corrupt acts.

States must also endeavor to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures.

Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants.

Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Conventions call on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the UN Convention enjoins each State Party *to establish and promote effective practices aimed at the prevention of corruption*. Article 12 of the AU Convention also provides for civil society and media engagement.

### **Criminalization**

Both the UN and AU Conventions require countries to establish criminal and other offences to cover a wide range of acts of corruption. These are provided for in Chapter Three and Articles 4 and 6 respectively. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Conventions go beyond criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. Both Conventions also deal with the problematic areas of private-sector corruption.

### **International cooperation**

Countries agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Conventions to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

## **Asset recovery**

This is a fundamental principle of both Conventions. This is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter under the UN Convention involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.

## **Prevention and detection of corruption**

This would touch on issues of capacity building efforts to empower the relevant authorities to effectively perform these functions. This can also be extended to include investigation and prosecution and powers of arrest. The fundamental issue is that of the legislative framework that exists to enable these processes occur. An example to be cited here is Article 4 of the SADC Protocol against Corruption that focuses specifically on Preventative Measures.

Efforts have been made to enforce this through the activities of SAFAC, collaborated by SAHRIT that have involved training of officers from the various anti-corruption agencies on corruption prevention, investigation and prosecution. Training has also been conducted on public campaigns.

## **Harmonization of Anti-Corruption Legislation**

This aims at consolidating the anti-corruption fight. An example are the efforts that have been made in the SADC region , initiated by the study that was coordinated by SAHRIT that reviewed the anti-corruption laws in the region and made recommendation on the areas that need to be addressed to foster harmonization. Without taking this into account, this collaborated approach towards fighting corruption could result in a futile effort.

## **Protection of whistleblowers**

It is very important that there exists legislation that will protect the interests and rights of whistleblowers.

## Processes: Preparation of Shadow Reports

### Information Gathering

Information for the preparation of the Shadow reports is obtained from the following sources:

1. From governments, though in some instances this may be difficult due to the high level of suspicion on the part government in respect of Civil Society. Some governments consider these to be governments' documents and may be reluctant.
2. General Comments and Concluding observations of the treaty bodies/ committees (after review of the State Party reports). These General comments arise after filing of a State report, and they usually seek clarification on certain aspects of the report. Concluding observations on the other-hand are the final comments made by the respective treaty bodies, which will give recommendations on the necessary action to be taken by State Parties to ensure compliance to the provisions of the treaties.

It is important to note that while this is the case with most human rights treaty bodies, we can anticipate that it will be the same in the case of the UN Conference of State Parties, the advisory body provided for in the AU Convention and SADC Anti-Corruption Committee under the SADC Protocol against Corruption.

3. Other sources on information include Civil Society itself; media; parliament; anti-corruption agencies; quasi-government institutions (e.g. parastatals; local authorities); the academia; UN/AU agency reports; IMF/World Bank reports; the courts, to name some.

### Coordinating:

It is critical to work with other civil society organizations working in the area of anti-corruption. There is need to set up a working committee and the process involves:

- Identifying key organizations that are useful in the committee ( this would entail getting organizational profiles with areas of specialization);
- Collaboration with Civil Society members who are accredited with the relevant treaty bodies;
- Collaboration with committee members who are trained in Shadow reporting as such members would be more effective for the purpose;
- Further division of the committee into sub-committees responsible for specific areas e.g. data collection, and report writing;
- Establishing personal contacts in key sectors that could be able to give you information or assist you with information dissemination e.g. anti-corruption agencies, government ministries and media houses;
- Setting a time frame for achievement of goals, as a network.

This coordinated effort will deal with issues of:

- Lack of capacity in terms of knowledge and skills on Shadow reporting;
- Limited funding;
- Poor civil society and government relations;
- Failure to track government state reporting processes;
- Poor information dissemination; and,
- Limited time to prepare reports.

## Organizing the report

It is essential to organize your thoughts in a clear, analytical and logical sequence. The best is by focusing on the articles of the convention or by shadowing the government format to allow for comparative analysis. You can also organize the Shadow report on the basis of identified thematic issues / areas.

The reports must:

- Be on the measures adopted by a State Party to give effect to the provisions in the conventions – these measures can be in the form of legislative, institutional, administrative, judicial, or other appropriate measures;
- Be on the progress made in respect of anti-corruption strategies that are employed on the ground;
- Indicate the factors and difficulties affecting the implementation of the conventions;
- Provide an overview of the general legislative and institutional framework within which anti-corruption authorities operate as well as within which activities are carried out - the focus can be on how anti-corruption instruments are made part of the national legal system; whether there exists any institutions or national machinery with responsibility for overseeing the implementation of anti-corruption protocols; what strategies have been adopted to effectively address corruption;
- Information and publicity - indicate whether any special efforts have been made to promote awareness among the public and the relevant authorities of what is contained in the various anti-corruption instruments and substantive provisions of the conventions.
- Adopt either an article by article approach or thematic cluster approach (this will depend on the requirements or guidelines that may be developed by the treaty bodies).

## Challenges

Some of the expected challenges that civil society can face in the preparation of Shadow reports include;

- General lack of political will and commitment to anti-corruption issues and obligations;
- Limited capacity of civil society in respect of anti-corruption issues generally and Shadow reporting specifically;

- Limited resources – human and financial;
- Poor collaboration among civil society on how coordinate and prepare shadow reports;
- Limited involvement of civil society and other stakeholders in the lobby processes for ratification, domestication, report production and dissemination of information on anti-corruption efforts being made;
- Unhealthy relations/suspicious between civil society and government – can civil society play a role in developing the capacity of governments? Can governments accommodate civil society?
- Ineffectiveness/limited capacity of watchdog agencies e.g. anti-corruption institutions; media; parliament oversight committees;
- Constitutional processes for domestication of anti-corruption treaties – a case for simplification?