



TRANSPARENCY
INTERNATIONAL
ZIMBABWE
The Coalition Against Corruption



ENFORCEMENT OF
ANTI-CORRUPTION LAWS:
ZIMBABWE
UNCAC CIVIL SOCIETY REVIEW 2013

Context and purpose

The UN Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in December 2005. It is the first legally-binding anti-corruption agreement applicable on a global basis. To date, 165 states have become parties to the convention. States have committed to implement a wide and detailed range of anti-corruption measures that affect their laws, institutions and practices. These measures promote prevention, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information exchange.

Concurrent with UNCAC's entry into force in 2005, a Conference of the States Parties to the Convention (CoSP) was established to review and facilitate required activities. In November 2009 the CoSP agreed on a review mechanism that was to be "transparent, efficient, non-intrusive, inclusive and impartial". It also agreed to two five-year review cycles, with the first on chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation), and the second cycle on chapters II (Preventive Measures) and V (Asset Recovery). The mechanism included an Implementation Review Group, which met for the first time in June-July 2010 in Vienna and selected the order of countries to be reviewed in the first five-year cycle, including the 26 countries (originally 30) in the first year of review.

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". Further articles call on each State Party to develop anti-corruption policies that promote the participation of society (Article 5); and to enhance transparency in their public administration (Article 10); Article 63 (4) (c) requires the CoSP to agree on procedures and methods of work, including cooperation with relevant non-governmental organisations.

In accordance with Resolution 3/1 on the review mechanism and the annex on terms of reference for the mechanism, all States Parties provide information to the CoSP secretariat on their compliance with the UNCAC, based upon a "comprehensive self-assessment checklist". In addition, States Parties participate in a review conducted by two other States Parties on their compliance with the convention. The reviewing States Parties then prepare a country review report, in close cooperation and coordination with the State Party under review, and finalise it upon agreement. The result is a full review report and an executive summary, the latter of which is required to be published. The secretariat, using the country review report, is then required to "compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organised by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group". The terms of reference call for governments to conduct broad consultation with stakeholders during preparation of the self-assessment and to facilitate engagement with stakeholders if a country visit is undertaken by the review team.

The inclusion of civil society in the UNCAC review process is of crucial importance for accountability and transparency, as well as for the credibility and effectiveness of the review process. Thus, civil society organisations around the world are actively seeking to contribute to this process in different ways. As part of a project on enhancing civil society's role in monitoring corruption, funded by the UN Democracy Fund (UNDEF), Transparency International (TI) has offered small grants for civil society organisations (CSOs) engaged in monitoring and advocating around the UNCAC review process. This aims to support the preparation of UNCAC implementation review reports by CSOs, for input into the review process.

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Introduction

Zimbabwe signed the United Nations Convention against Corruption (UNCAC) on 20 February 2004 and ratified it on 8 March 2007.¹

This report reviews Zimbabwe's implementation and enforcement of selected articles of Chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation) of the United Nations Convention against Corruption (UNCAC). The report is intended as a contribution to the UNCAC implementation review process currently under way covering those two Chapters. Zimbabwe was selected by the UNCAC Implementation Review Group in July 2010 by a drawing of lots for review in the second year of the process. A draft of this report was provided to the government of Zimbabwe.

Scope. The UNCAC articles that receive particular attention in this report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), trading in influence (Article 18), abuse of functions (Article 19), money laundering (Article 23), liability of legal persons (Article 26), witness protection (Article 32), protection of reporting persons (Article 33), compensation for damage (Article 35) and transfer of sentenced persons (Article 45).

Structure. Section I of the report is an executive summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information; as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in Zimbabwe as well as access to information issues. Section III reviews implementation and enforcement of the convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and section V elaborates on recommended priority actions.

Methodology. The report was prepared by Transparency International Zimbabwe (TI Z) with funding from Swedish International Development Cooperation Agency (SIDA). The group made efforts to obtain information for the reports from government offices and to engage in dialogue with government officials. All the statements and the assessments of the report are based on the information obtained for the purposes the report. As part of this dialogue, a draft of the report was made available to them.

The report was prepared using guidelines and a report template designed by Transparency International for the use of CSOs. These tools reflected but simplified the United Nations Office on Drugs and Crime (UNODC) checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The report template asked a set of questions about the review process and, in the section on implementation and enforcement, asked for examples of good practices and areas in need of implementation and enforcement, asked for examples of good practices and areas in need of improvement in selected areas.

¹ <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

I. Executive Summary

Zimbabwe has codified and enacted a significant portion of its principal anti-corruption legislation (the Criminal Law (Codification and reform) Act and the Anti-Corruption Commission Act for example) between the years that Zimbabwe signed and ratified the UNCAC (2004 and 2007 respectively). Even though the implementation of the provisions of the UNCAC is not complete, the new legislation is notable as it exhibits a clear desire by the Zimbabwean government to transpose the obligations placed on it by this instrument of international law. However, the enforcement of the legislation is a greater challenge.

Despite the commendable steps already taken by the Zimbabwean government, the convention has not been fully implemented. It is therefore important to consider areas of deficiencies in order to address them and achieve full compliance. From a legislative perspective the focus areas are those areas where compliance is partial due to the fact that an article in the UNCAC may be construed as existing in the legislation solely as a result of interpretation but it is not expressly encompassed. As to enforcement there are promising developments, but capacity building of the anti-corruption agency and significant improvement in the cooperation of the law enforcement bodies is needed.

Conduct of process

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	Yes
Was civil society consulted in the preparation of the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	No
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes
Was civil society invited to provide input to the official reviewers?	Yes
Has the government committed to publishing the full country report?	No

Availability of information

The availability of information needed for the report was uneven.

Legislation in Zimbabwe is well codified and readily accessible in hard copy from the Government printers and in addition, most of the legislation can be found on various websites (for free) with relative ease.

Obtaining information to assess the level of enforcement was a much more difficult process as the case law is difficult to access and the enforcement statistics have not been compiled. It is clear however, that there is indeed a level of enforcement from the cases presided over in the Magistrates' Court of Zimbabwe. The documentation of cases is however in hard copy, uncategorised and accessible only upon attaining the requisite clearance. The media has also proven to be a good source of at least the existence of enforcement. Corruption cases are regularly reported in the media, though it this is not sufficient to provide adequate statistical data. Another source of case law is the internet. It is recognised, however, that reports on the internet may not always be 100% accurate or factual.

Implementation and enforcement

Table 2: Implementation and enforcement summary table

UNCAC article	Status of implementation (Is the article Fully / Partially / Not implemented?)	How are these provisions enforced in practice? (Good/ Moderate/ Poor)
Art 15 (Bribery of national public officials)	Fully	Good
Art. 16 (Bribery of foreign public officials)	Not	n/a
Art.17 (Embezzlement, misappropriation or other diversion of property by a public official)	Partially	Poor
Art. 18 (Trading in influence)	Partially	Poor
Art.19 (Abuse of functions)	Fully	Good
Art. 23 (Money laundering)	Fully	Poor
Art. 26 (Liability of legal persons)	Partially	Poor
Art. 32 (Protection of witnesses)	Partially	Poor
Art. 33 (Protection of reporting persons)	Partially	Poor
Art. 35 (Compensation for damage)	Fully	Poor
Art. 45 (Transfer of sentenced persons)	Partially	Poor

Zimbabwe has complied to quite a great extent with the provisions of the UNCAC especially with regard to the articles that form the basis of this report. Areas of good compliance are the legislative provisions on bribery of national public officials and the abuse of function or position. There is also a level of “partial” compliance with the UNCAC where for example the scope of a certain offence such as bribery or criminal abuse of functions, is broad enough to encompass other offences such as trading in influence.² Another instance where this occurs is the offence of abuse of functions that encompasses some aspects of embezzlement.³ This compliance is deemed to be partial due to the fact there are no express / direct provisions in the legislative framework of Zimbabwe addressing certain aspects of the UNCAC although these aspects may still result in criminal liability subject to the interpretation of an adjudicator or law enforcement agent making it a subjective endeavour. There is also a level of complete non-compliance such as in case of foreign bribery.

Various corruption cases have been published in law reports (see part III.) as well as been placed in the public domain through the media:

- *S v Mangoma*, presided over by Justice Bhunu (judgement delivered on the 28th day of June 2011). The accused, who was Minister of Energy and Power Development, was charged with criminal “abuse of duty as a public officer”, in contravention of Chapter IX (Bribery and Corruption) s. 174(1)(a) of the Criminal Law Code [Chapter 9:23]. The accused was acquitted by the High Court.⁴
- “CDF scandal: MP freed on bail” – an on-going (widely publicised) case of members of parliament being accused and tried for the misappropriation of USD 50,000 earmarked for

² An example is the case which appeared in the Chronicle Newspaper (17/08/2012), “Magistrate nabbed over bribery case”. The Magistrate allegedly traded in influence, but was charged with criminal abuse of functions.
www.chronicle.co.zw/index.php?option=com_content&view=article&id=39419:magistrate-nabbed-over-bribery-case-&catid=46:crime-a-courts&Itemid=138

³ An example is the case which appeared in the Sunday Mail Newspaper (03/02/2013), “Senior Nurse to perform community service”. His actions squarely fit into Article 17, however, he was convicted of “criminal abuse of duty as a public officer”.
www.sundaymail.co.zw/index.php?option=com_content&view=article&id=33545:senior-nurse-to-perform-community-service&catid=38:local-news&Itemid=131.

Another example is “CDF scandal: MP freed on bail” – an on-going (widely publicised) case of members of parliament being charged with “criminal abuse of duty as a public officer” for the misappropriation of USD 50,000 earmarked for constituency development.
www.newsday.co.zw/2012/02/23/2012-02-23-cdf-scandal-mp-freed-on-bail/

⁴ www.zimlil.org/zw/judgment/harare-high-court/2011/74 Case No: B 317/2011 Judgment Number: 74 Media Neutral Citation: [2011] ZWHHC 74 Judgment Date: 15 March 2011

constituency development. This particular article was published in the *Newsday* of the 23rd of February 2012.;⁵

- “*Drama, As Prosecutor Arrested for Bribery*” – describes the arrest (by the Zimbabwe Anti-Corruption Commission) of a public prosecutor accused of receiving a bribe.⁶
- “*Bribed Police Officer Frees Prisoners*” - an on-going case in Kadoma Magistrates’ Court which was reported in the *Newsday* on the 5th of April 2012.⁷
- “*Prosecutor gets ox bribe*” – an on-going case in the Karoi Magistrates’ Court in which a public prosecutor allegedly received an ox to facilitate the withdrawal of assault charges against an accused person. This case was reported in the *Newsday* on the 19th of April 2012.⁸

Suffice it to say, the occurrence (or appearance) of such cases in the media is very common across state and non-state owned publications. This clearly shows a certain level of efforts to enforce those anti-corruption provisions that do exist. However, as already alluded to, such media reports may not conclusively and solely be relied upon for the assessment of the level of enforcement of the provisions of the UNCAC that have been criminalised or codified in Zimbabwean law.

Recommendations for priority actions

1. Improve the availability of information on cases and statistics to members of the public, including electronically accessible information.
2. Adopt provisions on criminalisation of foreign bribery. Improve legislation on protection of witnesses, experts and victims and on liability of legal persons.
3. Unify existing legislation by adoption of stand-alone acts on laundering of proceeds of crime as well as on protection of whistleblowers.
4. Build the capacity of the individuals and institutions tasked with curbing corruption.
5. Develop a more coherent enforcement system that interlinks investigation, arrest and prosecution.

II. Assessment of Review Process for Zimbabwe

A. Conduct of process

The details of the focal point for Zimbabwe were not made publicly available. After making a few enquiries, which started with the Ministry of Home Affairs (the ministry responsible for the Police) and ended with the Zimbabwe Anti-Corruption Commission (ZACC), TI Z was able to locate, and get an audience with the focal point. The General Manager of ZACC is the focal point for the Government of Zimbabwe (GoZ) for the UNCAC self-assessment check-list. It is also noteworthy that finding the details of the focal point and getting an audience was a fairly straight-forward process with the state exhibiting a willingness to interact with TI Z.

TI Z was, however, not invited to take part in the preparation of the state’s self-assessment checklist responses and the focal point indicated that neither were any other CSOs. The focal point also made it clear that the first draft of the self-assessment checklist was complete and had been sent to the United Nations Office on Drugs and Crime (UNODC) for review. TI Z was informed that this step would precede any other measure including engagement of CSOs. The focal point informed TI Z that

⁵ www.newsday.co.zw/2012/02/23/2012-02-23-cdf-scandal-mp-freed-on-bail/

⁶ www.newsday.co.zw/2012/02/23/2012-02-23-drama-as-prosecutor-arrested-for-bribery/

⁷ www.newsday.co.zw/2012/04/05/2012-04-05-bribed-police-officer-frees-prisoners/

⁸ www.newsday.co.zw/2012/04/19/2012-04-19-prosecutor-gets-ox-bribe/

the report had not been made publicly available. It was unclear whether this would transpire even at the conclusion of the review process.

In the month of August 2012, TI Z was informed by the focal point that the external UNCAC reviewers from Malawi and Madagascar were in Zimbabwe to conduct the external report. TI Z was further invited to take part in the country visit of the external reviewers. This showed a level of willingness to interact with CSOs in this process. Although TI Z was able to have some level of interaction with the external country reviewers from Malawi and Madagascar, this interaction was limited.

B. Availability of Information

The accessibility of information in Zimbabwe varies depending on the type of information that one wishes to obtain. Access to copies of laws and regulations is relatively easy with this information available in hard copy or on the internet. However, it is more difficult to obtain complete⁹ statistical information about enforcement as it is not publicly available or accessible.¹⁰ It is possible to obtain information about the details of certain cases as members of the public have access to court proceedings but this will obviously be both insufficient and impractical should one require information about the totality of cases of the last five years.

Shortcomings in the availability of information were evident when TI Z approached the Magistrates' Court at Harare (Criminal Division), where most corruption cases in the capital city are likely to be presided over as a court of first instance. TI Z was informed, by the Director of Public Prosecutions, that information on cases could not be availed without approval from the Attorney General's office. When the Attorney General's Office was engaged in writing, TI Z was informed that TI Z would need to provide specific case numbers to be given the details. TI Z then wrote the Police and ZACC for case numbers and/ or assistance but this correspondence was never responded to and an audience was unattainable. TI Z also attempted approaching the Public Protector for information on corruption cases, again, this was to no avail as the letters were never responded to and an audience was never granted. TI Z also resorted to citing the Access to Information and Protection of Privacy Act in an effort to attain this information.

In April 2013, TI Z was eventually granted access, by the Judicial Service Commission (JSC), to court records in the Magistrates' Court of Zimbabwe where the majority of corruption cases are likely to be presided over. The willingness to assist research into corruption cases by this state institution is commendable. However, due to the compilation of information (it is not electronically recorded or filed nor is it categorised or collated between courts), TI Z and the JSC agreed to restrict the access to the largest Magistrates' Court in Harare (the capital city) at Rotten Row and in Bulawayo (the second largest city) at Tredgold. The media and some websites (such as the website of the Legal Resources Foundation) have also proven to be sources of information albeit inconclusive as these sources do not necessarily paint the entire picture.

⁹ The term "complete" is used because there are a few cases that can be found on the internet and through the media. However, TI Z is of the opinion that one cannot compile conclusive statistics based on this information alone as it does not give a well-rounded reflection of cases – these cases not always adequately reported.

¹⁰ TI Z was able to gain access to records; however, this was only after access was officially granted by the Judicial Service Commission. One may not simply peruse official court records without being cleared to do so.

III. Implementation and Enforcement of the Convention

A. Key issues related to the legal framework and enforcement of laws

1. Areas showing good practice

An area of exceptional compliance is bribery of national public officials (Article 15) where bribery is criminalised in the Criminal Law (Codification and Reform) Act (s.170; Bribery). This act even goes as far as broadly defining a “public officer” as a national official (s. 169; Interpretation in Chapter IX Bribery and Corruption). Another example of good compliance with the UNCAC (especially from a legislative perspective) is with regard to the offence of abuse of functions (Article 19) or position, that is; *the performance of, or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity*. This offence has been adequately criminalised in the Criminal Law (Codification and Reform) Act (s.174; Criminal Abuse of Duty as Public Officer) to effectively echo the requirements of the UNCAC. These two aspects are regularly placed before the courts as well and these are the most prominent corruption offences presided over in Zimbabwe.

UNCAC Article 15: Bribery of National Public Officials. Section 169 read together with s. 170 of the Criminal law (Codification and reform) Act of Zimbabwe under Chapter IX (Bribery and Corruption) criminalises bribery of national public officials in accordance to the provisions of the UNCAC. Such criminalisation includes active and passive bribery. The definition of bribery is broad, and it covers instances where no tangible item is offered (“any gift or consideration as an inducement or reward”) and where the advantage is promised or given either directly or indirectly through an intermediary (“in relation to his or her principal’s affairs or business”). The definition of “public officer” is broad and includes any person who performs a public function or provides a public service (“a person holding or acting in a paid office in the service of the State, a statutory body or a local authority”). However, it is unclear whether the principal may also be held liable or just the agent.

UNCAC Article 19: Abuse of Functions. This provision has been fully transposed into Zimbabwean law, s. 169 read together with s. 174 of the Criminal law (Codification and reform) Act of Zimbabwe under Chapter IX (Bribery and Corruption) criminalises abuse of duty as a public officer in accordance to the provisions of the UNCAC. Abuse of functions when committed intentionally in Zimbabwean law is a criminal offence. The legislation specifies that the section is designed for a “public officer” just like the UNCAC specifies “public official”. It is also noteworthy that in this legislation, “public officer” is defined and the definition is sufficiently similar to that of a “public official” as defined under Chapter 1 (General Provisions), Article 2 (a) of the UNCAC. Further, the legislation is drafted to include an action or an omission by said public officer. The legislation does not specifically require that the act or omission be in exchange for an undue advantage as prescribed in the UNCAC.

UNCAC Article 33: Protection of Reporting Persons. There are indeed mechanisms for the protection of reporting persons. From the legal perspective; s 14 of the Prevention of Corruption Act for example, criminalises the victimisation of any person giving information concerned with corrupt practices. In practice, there are also anonymous hotlines for reporting corruption (TI Z’s reporting framework for example) and although these are not necessarily legislated for, the identities of reporting person are protected.

But Zimbabwe is in need for the enactment of a whistle blowers protection act which will protect reporting persons even better.

UNCAC Article 35: Compensation for damage. Section 278 of the Criminal Law (codification and reform) Act specifies as follows: “A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be”. This means that “entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation”.

2. Areas with deficiencies

The legislative framework in Zimbabwe does not define and, or make the distinction between; a “foreign public official” and an “official of a public international organisation” as provided in the general provisions of the UNCAC (Article 2) and recommended in the UNCAC Legislative Guide.¹¹ Further, there is absolutely no scope for physical protection to the extent of relocating witnesses where necessary as envisaged in Article 32 (Protection of witnesses, experts and victims) subparagraph 2 (a).

UNCAC Article 16: Bribery of Foreign Public Officials. There is no legislation in the Zimbabwean context that criminalises bribery of foreign public officials. In fact, the legislation in place specifically mentions and defines a “public officer” in line with the requirements of a “national public official” as articulated in the UNCAC. Such a definition is to the exclusion of a “foreign public official” and an “official of a public international organisation” as defined in the general provisions of the UNCAC (Article 2) and recommended in the UNCAC Legislative Guide respectively. As such, there is no (or at least shouldn’t be) meaningful or noteworthy enforcement of Article 16 of the UNCAC in Zimbabwe in practice because the illegality has not been legislated.

UNCAC Article 17: Embezzlement, misappropriation or other diversion of property by a public official. The legislation on embezzlement, misappropriation or other diversion of property by a public official is included in criminal law. However, it is not expressly drafted as articulated in the UNCAC. “*Criminal abuse of duty as a public officer*” seems to be the nearest definition there is to “*embezzlement*” and, in practice, when one embezzles funds, he or she may be charged with this offence.¹² There is also legislation on the “*unauthorised borrowing or use of property*” but it does not stipulate, “*by a public official*” as the UNCAC does.

UNCAC Article 18: Trading in influence. There is no specific section for trading in influence but the offence of criminal abuse of office and/or bribery are broad enough to encompass trading in influence. These offences involve the active and passive exchange of an undue advantage for a real or supposed influence with a view of obtaining an undue advantage from an administration or public authority of the state party. Although this is a matter of interpretation, one can note that this has been the practice in some instances.¹³

UNCAC Article 23: Laundering of proceeds of crime. There are various pieces of legislation that deal with laundering of proceeds of crime such as the Bank use Promotion and Suppression of Money Laundering Act, the Serious Offences (Confiscation of Profits) Act, the Criminal Law (Codification and Reform) Act and the Prevention of Corruption Act to name few. The various provisions that deal with conversion, acquisition, transfer and concealment also cover a wide range of predicate offences as required in the UNCAC.

Key Weaknesses include:

- The range of legislation that covers laundering of proceeds is rather wide with different pieces of legislation covering different aspects – it is disjointed as perpetrators may fail to be encompassed i.e. the Bank use and Promotion and Suppression of Money Laundering Act is to a great extent focused on banking thus excluding other sectors.
- The wide range of legislation makes it difficult to interpret.

¹¹ www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html

¹² An example is the case which appeared in the Sunday Mail Newspaper (03/02/2013), “Senior Nurse to perform community service”. The allegations coincide very well with Article 17, however, the accused was convicted of “criminal abuse of duty as a public officer”. www.sundaymail.co.zw/index.php?option=com_content&view=article&id=33545:senior-nurse-to-perform-community-service&catid=38:local-news&Itemid=131.

Another example is “CDF scandal: MP freed on bail” – an on-going (widely publicised) case of members of parliament being charged with “criminal abuse of duty as a public officer” for the misappropriation of USD 50,000 earmarked for constituency development. www.newsday.co.zw/2012/02/23/2012-02-23-cdf-scandal-mp-freed-on-bail/

¹³ An example is the case which appeared in the Chronicle Newspaper (17/08/2012), “Magistrate nabbed over bribery case”. The Magistrate allegedly traded in influence, but was charged with criminal abuse of functions. www.chronicle.co.zw/index.php?option=com_content&view=article&id=39419:magistrate-nabbed-over-bribery-case-&catid=46:crime-a-courts&Itemid=138

UNCAC Article 26: Liability of legal persons. There is legislation in place which holds legal persons liable for offences (not specifically/ expressly corruption related offence) under criminal law¹⁴. The criminal liability however, depends on the criminal liability (and intention) of a natural person who has committed the offence. Although there is the provision for monetary and other sanctions for corruption related offences of legal persons, the extent or mode of calculation of the sanctions is unclear. It is thus difficult to gauge whether the penalties incurred will be a sufficient deterrent in comparison to the potential profit a legal person may gain as result of engaging in corrupt activities.

UNCAC Article 32: Protection of Witnesses, Experts and Victims. Protection for witnesses, experts and victims is fairly comprehensive in the Zimbabwean context¹⁵ but it also seems to be subject to the means of the State, which are not robust. It also does not include protection for families and associates. The protection provides for persons who report offences, assist with investigations and/or cooperate with cases (through a blanket designation of “any other person... giving any information”), in addition to those who actually testify. Victims should also be provided with an appropriate and secure opportunity to present their views and concerns during criminal proceedings. Section (2) (a) of Article 32 refers to the protection of witnesses to the extent of physical protection that may constitute relocation and limitations on disclosure of identity information. While this section contains a *proviso*; “to the extent necessary and feasible”, the Zimbabwean legal framework does not seem to make any provision, even to the extent necessary and feasible. Again, the assumption is that if it does not exist in law, it cannot be enforced in practice. That said, it is acknowledged that it is possible that such mechanisms may exist but are not publicly known precisely for the protection of witnesses. However, due to the fact that this can neither be proven nor disproved, it is assumed this provision does not exist in Zimbabwe – it certainly does not exist in law.

Key weaknesses may include:

- Lack of easily accessible, anonymous complaints mechanism
- Lack of protection from employer reprisals in the workplace
- Lack of physical protection (including relocation).

UNCAC Article 45: Transfer of sentenced persons. The Extradition Act allows the relevant minister to enter into agreements (bilateral or otherwise) with governments of foreign countries in terms of any international agreement, treaty or convention (i.e. the UNCAC).

The UNCAC stipulates that the transfer of sentenced persons is, “in order that they may complete their sentences” in the country that they are extradited to. The Zimbabwean legislation does not make such an express specification.

B. Key issues related to enforcement system

The enforcement system is challenging to assess, information isn't publicly available and special authority must be granted to view these records. Further, these records are manually kept at each individual court meaning one must travel to each court individually across the country to access information:

- **Existence of cases or investigations and adequate sanctions imposed:** The availability of case law information in Zimbabwe for corruption is challenging. The court of first instance for criminal cases is usually the Criminal Division of the Magistrates Court. Many of these cases may not reach the High Court for appeal/ review. In Zimbabwe, at present, it is only cases in the High Court that are reported and made publicly available (even then, the time between the conclusion of a case and its being reported is considerable and thus obtaining up-to-date reports is difficult). The result of this is that it is difficult to assess the existence of cases or investigations and adequate sanctions imposed. Non-the-less, TI Z was granted limited access to court records specifically for this report. Of the two courts that TI Z was afforded access (Rotten Row and Tredgold); there were approximately 52 bribery cases with

¹⁴ s 277 of the Criminal Law (Codification and Reform) Act; Act 23/2004, 6/2005 (s.11), 9/2006 (s.31). SI s 30A/2007, 134/2007. Chapter XVI, s. 277; Criminal liability of corporations and associations and their members, employees and agents and, s 385 of the Criminal Procedure and Evidence Act – Prosecution of corporations and members of associations.

¹⁵ s 14 of the Prevention of Corruption Act and, s 198, 319 A and B of the Criminal Procedure and Evidence Act

10 convictions. In terms of Abuse of functions, there were approximately 69 cases and 17 convictions. This information was compiled by viewing the Court Record Books (CRB) for 2011 and 2012.

- **Independence of public prosecutors and other enforcement agencies and of judiciary:** The level of independence of public prosecutors and other enforcement agencies and the judiciary (although provided for in law¹⁶) is difficult to ascertain in practice. Further, many media reports allege that certain public prosecutors and members of the police play an integral role in corruption to the extent that not only do they accept bribes but they go as far as soliciting them as well.¹⁷ The preliminary findings of the Global Corruption Barometer conducted by TI Z also suggest that certain enforcement officials partake in corruption.
- **Priority given to corruption cases:** There is an Anti-Corruption Commission in Zimbabwe and this commission's core mandate is to combat corruption. This demonstrates a willingness to prioritise corruption cases. Although the creation of such a commission is a progressive step, the chairman of the commission has personally stipulated that the commission needs assistance in capacitating it as it is, *inter alia*, understaffed.¹⁸
- **Coordination between investigation and prosecution:** In Zimbabwe, the Anti-Corruption Commission (ZACC) has the mandate to, *inter alia*, investigate, but lacks powers of arrest and/ or prosecution. This issue is actually a source of controversy in Zimbabwe at the moment to the extent that it is at present the subject of litigation¹⁹ with one school of thought calling for the commission to at least be afforded powers of arrest. Such calls are based on the fact that ZACC's efforts may be undermined by an overreliance on the other agencies. Another school of thought suggests that affording ZACC such powers undermines the doctrine of separation of powers and the status quo should prevail. Regardless of one's reasoning, TI Z is of the opinion that the existence of such debate and controversy clearly exhibits the fact that there is discord in the current coordination of investigation and prosecution and this needs to be addressed.

1. Statistics

The compilation of statistics of corruption cases (investigations, arrests, prosecutions, acquittals and convictions) has proven to be a great challenge. In the first place, these statistics are not publicly available on the internet and through state organs in the same way the legislation on the same topic is. Further, attempts to obtain these statistics from various state institutions including the public protector, the police, the office of public prosecutions were challenging. However, the Judicial Service Commission (JSC) granted TI Z special leave to view records of corruption cases at two specific Magistrates' Courts. There is no electronic information available and information is in hard copy. Further, cases are not categorised meaning one has to peruse all criminal cases to extract information. The information is not centrally stored either meaning one has to visit each individual court making the compilation of national statistics extremely challenging.

One is also free to observe cases as they unfold in court but this would obviously be insufficient for compiling complete national statistics over the past five years. Further, there are various media reports, again, this is insufficient as not all cases make it into the newspapers. Even when a case is in the media, it will generally inform the reader of an arrest and a charge but may not have the details of the prosecution and outcome.

¹⁶ s 79 B (Independence of the Judiciary) – Constitution of Zimbabwe

¹⁷ Examples include: "Drama, As Prosecutor Arrested for Bribery" – describes the arrest (by the Zimbabwe Anti-Corruption Commission) of a public prosecutor accused of receiving a bribe; www.newsday.co.zw/2012/02/23/2012-02-23-drama-as-prosecutor-arrested-for-bribery/

¹⁸ This was stated by the chairman of ZACC in The Zimbabwean (Newspaper) on 17 May 2012; www.thezimbabwean.co.uk/news/zimbabwe/58309/news-roundup.html

¹⁹ A political analyst, Goodson Nguni, has taken this issue before the High Court of Zimbabwe to clarify the extent of ZACC's powers. The matter is *sub judice*. www.int.herald.co.zw/index.php?option=com_content&view=article&id=41529:anti-graft-teams-powers-challenged&catid=37:top-stories&Itemid=int.herald.co.zw/index.php?option=com_content&view=article&id=41529:anti-graft-teams-powers-challenged&catid=37:top-stories&Itemid=130

2. Information on cases and investigations

As highlighted earlier in this report, the reporting system for case law in the Zimbabwean context makes it very difficult to present many cases for consideration. The Zimbabwe Law Reports (the official reporting journal) only include cases up to 2009. Further, corruption is a crime in Zimbabwe and the majority of criminal law cases in Zimbabwe are heard in the Magistrates' Court which does not have a publicly available reporting system. As such, the cases in the following list are some corruption cases that appear in the Consolidated Index to the Zimbabwe Law Reports (ZLR) 2000 – 2009. These are cases which were heard in the High Court of Zimbabwe, mostly as appeals from the Magistrates' Court. It is also noteworthy that the UNCAC was not specifically considered in the ZLR during the period in question.

S v Paradza 2006 (1) 20 (H)²⁰: The accused was a High Court Judge and was accused of urging a fellow judge to act in a way that would result in favour being shown to himself or a business colleague. The accused was held to be in direct contravention of the Prevention of Corruption Act (Chapter 09:16) s 4 (a) which (although now repealed²¹) criminalises actions by a public officer contrary to his duties for the purpose of showing favour or disfavour (or the incitement thereof as in *casu*). Further, it was held that it was not necessary that any inducement be offered. It is noteworthy that the accused fled the country, seeking political refugee status and becoming a refugee in New Zealand. He has since become a staunch critic of the Zimbabwean government alleging that his case was a result of political oppression while accusing the government of interfering with the independence of the judiciary.

S v Nyoni 2002 (1) 260 (H)²²: This was a criminal matter involving a contravention of the Prevention of Corruption Act (Chapter 09:16) at (the repealed²³) s. 3 (1) (b) (i) which criminalises bribery. In *casu*, the accused had been found guilty of bribing police officers. The accused had been sentenced to serve 12 months in prison but sought to appeal the sentence and serve community service instead. The Judge held that corruption is such a serious offence (especially in the Zimbabwean context) that community service would not be a commensurate penalty for this offence. The Judge further stated that he intended on setting a precedent for the severity of the offence.

Mawere v Minister of Justice 2008 (2) 140 (S)²⁴: This case scrutinised the meaning and extent of "specification"²⁵ in terms of the Prevention of Corruption Act (Chapter 09:16). Particularly, whether the responsible minister is obliged to inform the specified party of his intention to declare said party specified. The appellant was a citizen and resident of South Africa although he had previously been a resident and citizen of Zimbabwe. It was held upon appeal in the Supreme Court of Zimbabwe that, specification of a person under the Act is simply a declaration. "It is neither an arrest nor detention. It is a declaration that is made in order to facilitate an investigation. Even though the specification of a person may have serious implications, it would defeat the whole purpose of specification if a person were to be informed that it was intended to investigate him as this would give him an opportunity to take whatever action he could to frustrate the intended investigations". It was further held that the appellant could not avoid being investigated simply because he was not a citizen or resident of Zimbabwe. "There is nothing to prohibit investigating the activities of a person simply because he resides outside Zimbabwe".

²⁰ Case no: HC 2475/03, CRB 152/04, Media Neutral Citation ZWHHC 7

²¹ This and other provisions were repealed by the Criminal Law (Codification and Reform) Act. This means that they still exist in law but in another act. TI Z is of the opinion that this for the purposes of legislative uniformity.

²² Case No: HCA 150/2000, CRB NK 638/2000, Media Neutral Citation: [2002] ZWBHC 22

²³ This and other provisions were repealed by the Criminal Law (Codification and Reform) Act. This means that they still exist in law but in another act. TI Z is of the opinion that this for the purposes of legislative uniformity.

²⁴

²⁵ In summation, "specification" occurs when the minister has reasonable grounds to believe that one has taken part in corruption – he/ she is specified and once specified there will be certain restrictions to financial transactions and a concurrent investigation to probe further and ascertain whether the specified individual has indeed taken part in corrupt activities wherein the appropriate legal actions will ensue. The government gazette is a periodic publication that highlights all legal notices ie sale of property/ change of name/ intellectual property notices/ enactment of new legislation etc – a bill (and most legal documents) that has been approved by parliament is only considered to have force and effect in law once published in the government gazette – publication in the government gazette is equivalent to having placed a matter in the public domain.

3. Examples of good practices or progress in enforcement

Good practices in the fight against corruption in Zimbabwe do exist, examples of these include:

- a. Although there is still a lot of work that needs to be done to capacitate it, the existence of the Zimbabwe Anti-Corruption Commission (ZACC) is commendable and it shows a willingness to comply with the UNCAC and other instruments. Further, it forms a foundation on which to build. This commission has also made significant attempts to eradicate corruption such as spearheading an investigation that ultimately led to the arrest of certain parliamentarians for the embezzlement of funds. This matter is *sub judice*.
- b. The work of the local Chapter of the African Parliamentarian Network Against Corruption (APNAC)²⁶. This institution is noteworthy due to the fact that it is a coalition and/ or cross-section of parliamentarians who have pronounced that they are committed to the fight against corruption. It is important to have legislators who are committed to this cause because they can drive the process of transposition of the UNCAC and other international instruments. .
- c. The Judicial Service Commission (JSC) has recently become an independent body with separate administration from the Ministry of Justice and Legal Affairs. This is noteworthy because it affords the judiciary the requisite level of autonomy and this development will hopefully aid in the reduction of claims that the government interferes with the judiciary regardless of whether these allegations are true or not.

4. Significant inadequacies in the enforcement system for UNCAC-related offences

There are also various inadequacies when it comes to the enforcement system for the UNCAC - related offences.

- a. The capacity of ZACC has been described (even by ZACC itself²⁷) as substandard. This substandard capacity affects the efficacy of this organisation. Not only is this institution understaffed but it is debatable whether those in the rank and file are abreast with best practice in terms of investigation and general enforcement. Although its existence is a good point of departure, more work needs to be done in this regard.

Further, Zimbabwe may also require assistance in getting its reporting standards in line with global best practice as well as in capacitating the institutions tasked with enforcement. Institutions mandated to fight corruption may often require assistance (operational, technical and even financial) in order to effectively enforce the UNCAC and ZACC is no exception.

There is a case that emerged in the media that a political analyst filed a High Court Application seeking an order declaring that ZACC has no arresting powers²⁸. This case is quite important because it highlights the point that the powers of ZACC are either not clear or are in fact insufficient and this is an area that needs to be addressed in order to robustly enforce the UNCAC. Technical assistance in drafting the correct legislation may be necessary in this regard. The Chairman of ZACC also told a parliamentary committee on defence and home affairs that his panel would soon seek clarity on its mandate. He said for his commission to be effective, it should be allowed to operate independently of

²⁶ There is group Zimbabwean MPs that are active (some to a commendable extent) in Anti-Corruption discourse. They mostly are involved (as participants or otherwise) in anti-corruption forums in order to be on the cutting edge of the best practice. They are also meant to spearhead/ advocate for pro anti-corruption legislation and legislative provisions.

²⁷ This was stated by the chairman of ZACC in The Zimbabwean (Newspaper) on 17 May 2012; www.thezimbabwean.co.uk/news/zimbabwe/58309/news-roundup.html

²⁸ The Herald 15 May 2012.

the home affairs ministry²⁹. It is of the paramount that the independence of ZACC be safeguarded. ZACC has also indicated that it is too understaffed to adequately carry out its mandate (financial assistance would be helpful in this regard).

- b. There seems to be dissonance between the agencies responsible for enforcement. There are three aspects here, investigation, arrest and prosecution. In Zimbabwe, three different agencies deal exclusively with each of these aspects (with the exception of the police who have an overlap – being able to investigate and arrest). The trouble is, it has been argued that the efficacy of agency is dependent on the next and if one agency fails to perform the entire system could potentially fall apart. Further, this system also has the potential to cause detrimental delays between investigation and prosecution.

IV. Recent Developments

The Public Finance Management Act (PFMA) came into effect in 2010. This act, *inter alia*, provides for the control and management of public resources as well as the protection and recovery thereof. This act is significant because it provides for the examination and audit of public accounts as well as for matters pertaining to financial misconduct of public officials. It further increases transparency in public expenditure by making government ministries accountable to submitting financial statements for scrutiny by parliament (upholding a system of checks and balances). The major drawback associated with this act was the fact that for a considerable period of time the regulations governing it were not published in the government gazette. As such, the PFMA could not be fully and adequately implemented. It is encouraging to note that these regulations have finally (in 2012) been gazetted.

Zimbabwe is currently in the process of drafting the National Code on Corporate Governance (herein “the code”).³⁰ This initiative is especially encouraging due to the fact that much of the anti-corruption discourse in Zimbabwe concentrates on the public sector, yet corruption exists in all aspects of the economy (private sector included). The code will certainly assist in updating the outdated company law principles that exist in Zimbabwe and will be modelled primarily around the King III Report.³¹ Although, the exact release date is unknown, this process has been on-going with a great level of public consultation. The Institute of Directors in Zimbabwe (IoDZ) has reliably informed TI Z that this document is its final stages.

Finally, Zimbabwe has just arrived at the end of a constitution making process. Community-based outreach consultations were conducted and sticking points were debated and discussed in the media and otherwise³². The political negotiators and the Constitution Select Committee (COPAC) eventually produced a draft³³ which was the subject of a referendum where it was endorsed by the people of Zimbabwe. It is noteworthy that the new Constitution contains some highly progressive aspects insofar as transparency, accountability and good governance are concerned. Further, the Constitution places an even greater emphasis than its predecessor on the transposition of international instruments³⁴. The UNCAC stands to gain significant mileage as a result of the new Constitution. It will be a useful tool for the purposes of advocating for implementation and could also shift the focus on the enforcement of the UNCAC.

²⁹ The Zimbabwean 17 May 2012.

³⁰ <http://nccg.co.zw/>

³¹ <http://www.library.up.ac.za/law/docs/king111report.pdf>

³² TI Z held an Ethics and Accountability Forum meeting precisely to discuss the new constitution.

³³ www.copac.org.zw/

³⁴ S. 34 ‘The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.’

V. Recommendations for priority actions

There are a few recommendations for priority actions with regards to Zimbabwe's implementation of the UNCAC.

- a. There are areas where the level of compliance is good but amendments to the legislation can still be made to increase compliance even further. An example of this is bribery of national public officials; this can be amended to articulate whether a principle may be held liable for an agent acting on the principles behalf.
- b. The enactment of a whistle blowers protection act would create a wider protection for whistle blowers which would in turn encourage whistle blowing and curb corruption. It is recommended that a bill is drafted and tabled before parliament for consideration. Such an enactment would be a noteworthy step in the fight against corruption in Zimbabwe.
- c. The enactment of a single piece of legislation the deals with "Laundering of proceeds of crime" will ensure a holistic and coherent level of transposition of article 23 within the Zimbabwe context.
- d. The legislation and provisions that exhibit insufficient legislative drafting to completely satisfy the requirements of the UNCAC, such as offences prescribed by Articles 16, 17 and 18, must be drafted and enacted so that the UNCAC can be fully transposed in the Zimbabwean context. Civil society has a role to play in this regard in terms of monitoring the legislature, advocating for adherence to Zimbabwe's obligations under the UNCAC and even drafting model bills for consideration by parliament and government in general.
- e. The legislative provisions on liability of legal persons should be amended to clearly articulate the extent of the imposition of sanctions. Further, the protection of witnesses, experts and victims should include; the provision of an easily accessible, anonymous complaints mechanism, protection from employer reprisals in the workplace as well as physical protection (including relocation).

One's ability to make coherent recommendations for improvement from an enforcement perspective in Zimbabwe is greatly inhibited by the inaccessibility of corruption cases. However, in the circumstances, this in itself becomes a recommendation.

- a. Ensuring the independence of ZACC is of the paramount importance. ZACC also needs to be fully capacitated through the legislation which operationalizes it as well as the resources available to it.
- b. The authorities (ZACC, the Police, the Attorney-General's office and the Judiciary) responsible for enforcing anti-corruption laws need to be adequately educated on the existence of the UNCAC as well as best practice in terms of enforcement.
- c. There needs to be a more coherent enforcement system that interlinks investigation, arrest and prosecution.
- d. Non-Governmental Organisations (NGOs) have been engaging enforcement organisations to assist them with technical and other needs. Such support needs to not only continue but increase as it will enable the state to fill various gaps that exist in the Zimbabwean framework.
- e. The Zimbabwean government needs to take steps and measures to make cases of enforcement more accessible. Swifter reporting and publication of cases is a good point of departure in this regard. The use of technology and the internet in reporting is also highly recommended. Technical assistance should be offered in this regard if necessary.

- f. In increasing its level of compliance, Zimbabwe may require technical assistance: in the first place in effectively drafting legislation and secondly in the arena of enforcement. Some of the requirements of the UNCAC have never been enforced in Zimbabwe, as such, the technical expertise may be lacking.
- g. Information and statistics pertaining to corruption in Zimbabwe need to be made publicly available and accessible.

Appendix

List of persons consulted: Mary-Jane Ncube (Transparency International Zimbabwe), Itai Andrew Chikowore (Transparency International Zimbabwe), Brian Penduka (Consultant), Prof. John Makumbe (University of Zimbabwe), Mutuso Dhliwayo (Zimbabwe Environmental Law Association), Hon. W. Madzimore (African Parliamentary Network Against Corruption), Yvonne Chatsama (Ministry of Justice and Legal Affairs), Tawanda Zhuwarara (Zimbabwe Lawyers for Human Rights), Bellinda Chinowawa (Zimbabwe Lawyers for Human Rights), Stembile. J. Chakunda (Zimbabwe Revenue Authority), Betty Tiyani (Human Rights and Development Trust of Southern Africa), Anyway Mutetwa (Human Rights and Development Trust of Southern Africa).

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