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**Civil Society Engagement in the Implementation of the
United Nations Convention against Corruption****Document submitted by Finland****Proposal for conference room paper on civil society
engagement in the implementation of the United Nations
Convention against Corruption****1. Formulating the issue: what is the appropriate role of non-governmental
organizations?**

In 2003, the United Nations Convention against Corruption was opened for signature. It entered into force in 2005 and has become one of the most widely ratified international instruments, with 176 parties as of 1 August 2015.

In order for the Convention to achieve its purpose (as set out in article 1 of the Convention), considerable work needs to be done by the States Parties on the national level to adopt legislation, establish the necessary structures, develop policy, allocate the necessary resources and so on. Article 63 of the Convention establishes a Conference of State Parties for the review of implementation. Paragraph 7 of this article provides that the Conference “shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.”

Such a review mechanism was established in 2009, by resolution 3/1 of the Conference of State Parties (CoSP). The negotiations on this mechanism were quite difficult, involving many meetings in Vienna over a period of years,



covering a number of different issues.¹ The negotiations continued to be difficult at the 2009 session of the Conference itself, with — as so often happens in such processes — all the sides having to yield on some points, with no one apparently fully satisfied with the resulting compromise. However, what everyone seemed to recognize was that this compromise was necessary in order to start the process of review of implementation, a process which has strengthened the impact of UNCAC on the national, regional and global level. The core question is what we should do to build on this success and to further strengthen the implementation and effective use of the Convention nationally, regionally and globally.

One element of the package was paragraph 42 of the Terms of Reference of the implementation review mechanism, which states, “The Implementation Review Group shall be an open-ended intergovernmental group of State parties. It shall operate under the authority of and report to the Conference.”²

No one questions the usefulness of civil society in cooperating with the Government on the local or national level in the prevention and control of corruption. Engagement with civil society and business representatives during the review process, especially in the conduct of country visits, has emerged as a good practice. However, the reference to the intergovernmental nature of the Implementation Review Group (IRG) has become the basis of a major disagreement within the discussion of the review process. The disagreement is over the participation of non-governmental organizations (NGOs)³ as observers in the IRG as an international and intergovernmental process and in other UNCAC subsidiary bodies.

Disagreements, of course, are nothing new in international cooperation. Different countries have different approaches, different priorities and different understandings of the issues at hand. Disagreements generally lead to negotiations, which are designed to overcome these disagreements so that all the stakeholders can work more effectively together in pursuit of common goals.

The present disagreement over the role of civil society in responding to corruption, however, has become a serious one, which is consuming more and more time at various meetings in Vienna. Since the decision on the review mechanism was adopted in 2009, there has scarcely been a meeting relating to implementation of UNCAC where the disagreement did not surface, at times leading the participants to heatedly repeating their previous positions, with few indications that any useful compromise is possible. It can be said that this no longer seems to be a substantive question of whether or not civil society has a role in providing insight and analysis to the IRG and other UNCAC subsidiary bodies in support of the implementation of

¹ These negotiations are described in Matti Joutsen and Adam Graycar, When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention Against Corruption, *Journal of Global Governance* 18, 2012, pp. 425-439.

² The Terms of Reference of the implementation review mechanism are contained in an annex to resolution 3/1. See <http://unodc.org/unodc/en/treaties/CAC/IRG.html>.

³ Non-governmental organizations have also been referred to as *civil society organizations*, *third sector organizations* (to distinguish them from public sector and private sector organizations), *voluntary organizations*, and *not-for-profit organizations*. Interestingly, some speakers in the debate discussed in the present paper have argued that since their government is representative of the people, it by definition takes into consideration the different interests that in other states would be represented by non-governmental organizations.

UNCAC, but a politicized (and in mostly procedural) question that is taking focus, time and resources away from useful work on the implementation of the convention.

This paper is intended as an analysis of the lengthy discussion. Section 2 describes in brief the evolution of the debate, starting with the agreement reached in the third session of the CoSP in 2009 on the review mechanism, and continuing to the present preparations for the sixth session of the CoSP, to be held in St. Petersburg, Russian Federation on 2-6 November 2015. Section 3 sets out the arguments that have been presented by various participants on both sides of the debate, in respect of the role of non-governmental organizations in the international and intergovernmental aspect of the review mechanism. Section 4, correspondingly, sets out the arguments that have been presented for and against civil society involvement on the local and national level. The final section explores the extent to which — despite everything — common ground can be found on the way forward.

2. Evolution of the debate on the role of civil society in the review of the implementation of UNCAC

Resolution 3/1, third session of the Conference of the States Parties, 2009

As noted above, the third session of the CoSP held in Doha (9-13 November 2009), after extensive negotiations, agreed on the terms of reference for the implementation review mechanism. This agreement was a “package deal”, a compromise that contained a number of elements that were intended to incorporate the various concerns that had been raised throughout the negotiations.

Different participants would presumably emphasize different elements of this compromise, and many have noted that none of the elements should be seen in isolation; the elements form a whole. Nonetheless, in the debates that followed the 2009 decision, at least the following elements have been identified by various speakers as of particular importance to them in respect of the question of the role of civil society (the references are to the respective paragraphs of the Terms of Reference):

- The mechanism shall be transparent, efficient, non-intrusive, inclusive and impartial (para. 3(a));
- The mechanism shall not produce any form of ranking (para. 3(b));
- The mechanism shall be an intergovernmental process (para. 4);
- 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 (para. 28);
- States parties are encouraged to facilitate engagement with all relevant national stake-holders in the course of a country visit (para. 30);
- The country review reports shall remain confidential (para. 37), although States are encouraged to publish all or part of the full report (para. 38);
- The Implementation Review Group shall be an open-ended intergovernmental group of State parties. It shall operate under the authority of and report to the Conference (para. 42).

Sessions of the Implementation Review Group, 2010-2011

When the first session of the Implementation Review Group was held in 2010, the question of the participation of observers at the sessions was raised almost immediately. Some speakers pointed out that paragraph 42 of the terms of reference referred to the Group as an “open-ended intergovernmental group of States parties”, and in their view this meant that only States parties could attend its sessions (para. 53 of the report).⁴ Others, in turn, argued that although the power to make decisions in the IRG would be limited to States parties, the wording of paragraph 42 did not exclude the participation of observers, and “stressed that the rules of procedure of the Conference applied to the Group as a subsidiary body of the Conference and an integral part of the Review Mechanism and that, therefore, the participation of observers was to be treated according to rules 16 and 17 of the rules of procedure” (para. 55 of the report). Some speakers argued that a strict interpretation of the phrase “open-ended intergovernmental group of States parties” would mean that signatories which were not yet States parties could not attend, nor could intergovernmental organizations such as the Council of Europe, the OECD, the Organization of American States, and the International Monetary Fund, and in that their view this would considerably hamper the work of the IRG.

In response to this last specific point, the IRG decided on an interim basis that intergovernmental organizations could attend the resumed first session as observers, but only on the agenda item on technical assistance.

In view of the disagreement over whether or not observers could attend the sessions of the IRG (and indeed other working groups established by the CoSP),⁵ the Secretariat was requested to seek a legal opinion on the matter from the United Nations Office of Legal Affairs (para. 57 of the report). Such an opinion⁶ was received and considered at the resumed first session of the IRG.

The Office of Legal Affairs was of the opinion that “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” and that “[i]t would thus be advisable” that the IRG apply the provisions on observers to its activities, “mutatis mutandis”.⁷ The Office of Legal Affairs also referred to the past practice that for intergovernmental organizations had been allowed to attend sessions on the Open-ended Intergovernmental Working Group on Technical Assistance (para. 15).

The Office of Legal Affairs concluded as follows (para. 16):

“we would recommend that in the light of the concerns expressed in your memorandum, the Implementation Review Group take a decision on the participation of observers that is consistent with both the rules and prior practice. Alternatively, the Implementation Review Group could revert to the Conference of the States Parties and request the Conference to take a decision

⁴ CAC/COSP/IRG/2010/7, para. 53. A number of arguments were raised at the first session for and against the participation of observers; see paras. 53-56 of the report.

⁵ Already prior to the adoption of resolution 3/1, the CoSP had set up working groups to deal, respectively, with technical assistance, prevention and asset recovery.

⁶ CAC/COSP/IRG/2010/9.

⁷ CAC/COSP/IRG/2010/9, para. 12 and 13.

concerning the participation of observers in the activities of the Implementation Review Group.”

The opinion of the Office of Legal Affairs did not resolve the issue. At the resumed third session of the IRG, some speakers welcomed the opinion as confirming their understanding that observers could attend the sessions, while others argued that the opinion “did not address the issue of the application of paragraph 42 of the terms of reference, as had been requested”.⁸ Essentially, these latter speakers noted that the Office of Legal Affairs had not given due regard to the phrase, “open-ended intergovernmental group of *States parties*” (emphasis added).

There was, however, agreement on two points. First, in respect of the second session of the IRG, and as an interim measure, also signatories were to be invited to attend the agenda item on financial and budgetary matters, and also signatories, intergovernmental organizations and United Nations entities were to be invited to attend the agenda item on technical assistance. Second, and more importantly, there was agreement that the question of participation of observers in the IRG should be resolved at the next session of the Conference of States Parties.⁹

Resolutions 4/5 and 4/6, fourth session of CoSP, 2011

After lengthy informal negotiations, the Conference of States Parties, meeting in Marrakesh in 2011, drafted another compromise package which made a distinction between different categories of observers. Resolution 4/5 provides that signatories, non-signatories, entities and intergovernmental organizations could attend the sessions of the Implementation Review Group as observers. They would thus be able to receive the documents and attend the formal meetings. (There was thus no restriction on their participation in respect of individual agenda items.)

A separate decision, Resolution 4/6, applies to non-governmental organizations (NGOs). They would not be allowed to attend the sessions of the IRG. However, they would be invited to participate in special events, “briefings for NGOs” on the work of the Mechanism, to be held on the margins of sessions of the IRG. Among the elements of this resolution are the following:¹⁰

- The CoSP recognized the continuing deliberations to build confidence in the role of non-governmental organizations in the review process;
- The briefings were intended to further promote constructive dialogue with non-governmental organizations dealing with anti-corruption issues;

⁸ CAC/COSP/IRG/2010/7/Add.1, para. 40. The latter group, which opposed the participation of observers in the IRG, also argued that their position was consistent with an application of paragraph 42 “mutatis mutandis”, as called for in the opinion of the Office of Legal Affairs. However, in the light of the reference of the Office of Legal Affairs to past practice, it would seem that said opinion of the Office of Legal Affairs was that observers could attend, and that the IRG should clarify the matter by taking a specific decision on the matter. In the event, however, the IRG followed the alternative proposal of the Office of Legal Affairs, which was that the IRG defer the matter to a decision of the Conference of States Parties.

⁹ CAC/COSP/IRG/2010/7/Add.1, para. 41.

¹⁰ The full text is provided in the annex of the present paper.

- The briefings were to be conducted on the basis of the Implementation Review Group reports, thematic implementation reports and regional supplementary addenda;
- No specific country situation was to be mentioned during briefings;
- Summaries of the briefings would be prepared by the Secretariat and submitted to the IRG as conference room papers;
- NGOs were encouraged to report to the Conference and/or the Group, as appropriate, individually or collectively, on their activities and contributions to the implementation of the recommendations and conclusions of the Group approved by the Conference, including those related to meeting technical assistance needs and advancing capacity to effectively implement the Convention.

At the Conference of the States Parties, it was clear that, again, no one was fully satisfied with the compromise package. There was not even agreement on the significance of the Marrakesh compromise. For some delegations, it was seen as a starting point and, for others, the end point, the “last word” on the topic.

Simply put, some States parties had concerns about working with non-governmental organizations within the framework of the mechanism for the review of the implementation of UNCAC, while other States parties were of the view that the input of NGOs was not only valuable, but necessary for effective implementation. Since it was recognized that more work was needed to build confidence in the role of NGOs, the second paragraph of resolution 4/6 requested “States parties and signatories to use the briefings and to draw on the discussions and proposals of the fourth session of the Conference of the States Parties to continue constructive dialogue on the contribution of non-governmental organizations to the Mechanism for the Review of Implementation of the Convention.”¹¹

It should be emphasized here that when this approach was agreed in Marrakech, very few States parties had undergone a country visit or joint meeting in which civil society had participated.¹² At that time, the good practice on civil society engagement in country visits in the review of implementation of UNCAC was not yet evident.

Briefings for non-governmental organizations held on the margins of IRG sessions, 2012-2015

The first briefing for non-governmental organizations was held on the margins of the third session of the IRG, in 2012. It was very well attended, not only by representatives of non-governmental organizations, but also by a large number of States parties. The briefing was opened by the chairperson of the IRG, and a representative of the Secretariat provided an introduction. During the briefing itself,

¹¹ Note also some of the comments made by “several speakers” at the conclusion of the session of the Conference of States Parties: “... the agreement reached with respect to the participation of NGOs was meant to build confidence and trust in their ability to contribute to the work.” CAC/COSP/2011/14, para. 93.

¹² CAC/COSP/2011/8, para. 32 notes that as of 12 September 2011 (one month before the CoSP in Marrakesh), a total of 20 country visits had been conducted, but no indication is given of what stakeholders (including NGOs) had participated in these country visits.

several NGOs provided information on their activities. States parties were also active in asking questions about the potential contribution of NGOs and by commenting on statements.¹³

When the third session of the IRG was resumed after the briefing, many speakers expressed their satisfaction at how the briefing had been conducted and considered it to be a positive first step. Speakers noted that the briefing was intended to start a dialogue with NGOs and that future briefings could be improved in terms of modalities, facilities and timing in the margins of the sessions of the Group. Some speakers recommended that the format of the briefings could be developed in a way that would move away from the delivery of statements and towards a more constructive dialogue between NGOs and States parties.¹⁴ Along the same lines, several speakers stressed the usefulness of the briefing as an opportunity to receive information on the experiences and contributions of NGOs, and as a confidence-building measure (para. 67).

On the other hand, other speakers expressed criticism regarding how the briefing proceeded. Several speakers noted with concern that specific country situations had been mentioned during the briefing. Several speakers stated that in future briefings they would welcome the provision of more concrete information by NGOs on their activities, contributing to the review process, technical assistance activities and the implementation of the Convention (para. 67). Some speakers recommended that measures be taken to encourage the participation of a more diverse range of organizations, particularly from developing countries (para. 68).¹⁵

At subsequent briefings (2013, 2014 and 2015), various steps were made to make the briefings more productive, and ensure that the terms of resolution 4/6 were adhered to. For ex-ample, before each subsequent briefing got under way, the chairperson reminded the participants of the terms of resolution 4/6. The NGOs, working loosely within the framework of the UNCAC Coalition, sought to structure their respective contributions so that the States parties would have more information on their activities. For example, briefings have consisted of a set of panel discussions, each devoted to a specific issue (and each organized by the NGOs participating in the briefing). For example, the most recent briefing, which took place on the margins of the 2015 session of the IRG, dealt with measures against money-laundering, proposals regarding the Mechanism for the review of implementation, and special measures against grand corruption. The discussion in the IRG after each successive briefing reflected general satisfaction with the direction in which the briefings were evolving, and with their content, but some

¹³ The term “briefing” is thus a misnomer. The events did not consist of simple statements by the chairperson or the Secretariat, informing the NGOs in attendance on the progress of the review of implementation. The focus from the outset has been much more on what contribution NGOs may make to implementation of UNCAC. Indeed, in a way the “briefings” could also be seen as events in which NGOs provide information — “briefings” — to the States parties, and thus the events could be construed to consist more of a dialogue.

¹⁴ CAC/COSP/IRG/2012/6, para. 66.

¹⁵ The Chairman of the session of the IRG, who had chaired also the briefing, responded to these expressions of concern by noting that resolution 4/6 had in effect conferred a special status on NGOs, as “guests” of the IRG at the briefing. Some guests may behave in an undignified manner, but a good “host” (the States parties) should overlook minor aberrations and seek to ensure that the overall event goes well.

speakers continued to express their concern that at each briefing, some NGO representatives had referred to the situation in individual States parties, and that the briefings in their view had not provided very much information specifically on how NGOs could assist States parties in implementation.¹⁶

Preparations for focused debate at the sixth session of the CoSP on the role of NGOs

Over five years after the establishment of the implementation review mechanism in 2009, and despite the compromise achieved at the fourth session of the CoSP in 2011 (by which it was decided that NGOs could attend briefings in connection with sessions of the IRG), the disagreement on the proper role of NGOs in the mechanism continues. Indeed, it may be seen to have taken on new dimensions. This can be seen in different ways:

- At several meetings, generally some States parties supporting a more visible role for NGOs in the mechanism would raise this issue (whether or not the issue is featured on the agenda of the meeting), while those opposing a more visible role for NGOs would refer to the decisions already taken in Doha in 2009 and in Marrakesh in 2011;
- Negotiations on developing a review mechanism for the United Nations Convention against Transnational Organized Crime (UNTOC) have also struggled with the extent to which such a review mechanism would involve NGOs;
- More generally, some States have raised concerns about the activities of at least some non-governmental organizations on the local or national level in crime prevention and criminal justice, quite apart from the implementation of UNCAC (or UNTOC).

These debates have at times become quite heated and repetitive, and have taken time and re-sources away from what could readily be considered more productive activities that the IRG and UNCAC Working Groups, with their mix of anti-corruption experts and diplomatic representatives, could undertake.

It is presumably with this in mind that, at the fifth session of the Conference of the States Parties held in Panama in 2013, some States parties suggested that time be set aside at the subsequent CoSP, under a separate agenda item, to deal with the role of civil society in the implementation of UNCAC, including the participation of non-governmental organizations in mechanisms and bodies established by the Conference.¹⁷

The discussion in Panama on this proposal became quite heated, with a great number of speakers taking part. The report of the fifth session of CoSP,¹⁸ after noting (para. 102) that “all speakers agreed that civil society had an important role to play in the fight against corruption, the Conference and its subsidiary bodies”,

¹⁶ With reference to what is noted in footnotes 11 and 13, it would seem that different States parties, and different NGOs, have different ideas of what the functions of these “briefings” are, and how they should be conducted.

¹⁷ Note submitted by Chile, El Salvador, Mexico, Norway, Peru and Switzerland, CAC/COSP/2013/L.13. This note is provided in the annex. See the report on the fifth session of CoSP, CAC/COSP/2013/18, para. 101.

¹⁸ CAC/COSP/2013/18.

summarized the arguments for and against the proposed agenda item as follows (para. 103):

“Speakers who supported the inclusion of an additional item in the provisional agenda stressed that the areas under review in the second review cycle had particularly close links with the contributions of civil society, and that their participation in the relevant bodies was therefore necessary. They further highlighted the principle of transparency in the work of the Review Mechanism and subsidiary bodies of the Conference. Other speakers stated that the proposal to include an additional item in the provisional agenda was submitted after the deadline established in rule 51 of the rules of procedure of the Conference. They held that valuable contributions from non-governmental organizations were received under the current arrangements, especially the briefings convened on the margins of the sessions of the Implementation Review Group. They further stated that the work programme of the Conference should not be overburdened by including more items on an already heavy agenda.”

Since no agreement was reached at the time, the fifth session of CoSP was not able to adopt the provisional agenda for its subsequent session, a rather unusual situation. The heatedness of the discussion was reflected in the fact that two speakers referred to the issue at the closure of the session and requested that these be recorded; again, an unusual occurrence. These statements are provided below in full, as recorded in the official documentation on the session:¹⁹

“2. The representative of the European Union, speaking on behalf of the States Members of the United Nations that are members of the European Union, Albania, Armenia, Bosnia and Herzegovina, Canada, Chile, Colombia, El Salvador, Guatemala, Iceland, Israel, Liechtenstein, Mexico, Montenegro, Norway, Peru, Republic of Moldova, Serbia, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and the United States of America, expressed disappointment that the sessions of the working groups and mechanisms established by the Conference continued to take place without the participation of non-governmental organizations (NGOs). She expressed the view that NGOs with consultative status with the Economic and Social Council should be invited to participate as observers in sessions of the working groups and mechanisms established by the Conference, while States parties should continue to be consulted in the selection of NGOs without such status. A decision to allow NGOs to participate as observers should be based on the relevance of the work of a particular organization with regard to the subject matter under consideration at the meetings. In her view, work would need to be continued with all States parties to advance principles of openness and transparency in the sessions of the Conference and its subsidiary bodies.”

“3. In response, the representative of Pakistan expressed concern with the statement made. He acknowledged the important role of civil society in the overall efforts to prevent and combat corruption, and in particular its role in assisting States parties in the effective implementation of the Convention, and welcomed the participation of a large number of civil society organizations in the plenary sessions of the Conference. He further emphasized the need to act

¹⁹ CAC/COSP/2013/INF/3.

in accordance with the rules of procedure of the Conference and to firmly uphold the intergovernmental nature of the working groups established by the Conference. He recalled the agreement reached at the previous session of the Conference to organize briefings for civil society at the margins of the sessions of the Implementation Review Group, with a view to promoting constructive dialogue between States parties and non-governmental organizations, and building confidence and trust in the ability of the latter to contribute to the work of States parties.”

After extensive informal consultations in Vienna, tentative agreement has now been reached on the draft agenda for the sixth session of the Conference of the States Parties, to be held in St. Petersburg, Russian Federation, on 2-6 November 2015. It is to contain the following proposed agenda item:

“Implementation of Article 63, paragraph 4(c) of the Convention including discussion on cooperation with relevant international and regional organizations and mechanisms and non-governmental organizations.”

The proposal for the agenda item includes the following annotation:

“In Article 63, paragraph 4(c) of the Convention it is stated, *inter alia*, that the Conference shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of that Article, including by cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations. In its resolution A/RES/69/199 the UN General Assembly invited the Conference of the States Parties to the Convention to give due consideration to the implementation of the above-mentioned provision.”

Much depends, of course, on the willingness of the participants at the sixth session to find common ground and reach consensus. Two “package deals” have already been reached, once in Doha in 2009 and then in Marrakesh in 2011. Although practice has evolved allowing both compromises to become more inclusive, it is clear that neither of these agreements has fully resolved the issue. Further discussions and further decisions appear to be needed.

This paper is an attempt to lay out the background to the long-standing disagreement, identify and analyse the arguments put forward by the different sides, and above all see if there is common ground.

3. Arguments for and against NGO participation in the UNCAC review mechanism on the international and intergovernmental level

As noted above in section 1, this present section sets out the arguments that have been presented by various participants on both sides of the debate, in respect of the role of non-governmental organizations in the international and intergovernmental aspect of the UNCAC review mechanism. The subsequent section, section 4, sets out the arguments that have been presented for and against civil society involvement on the local and national level.

For simplicity, the two sides in the debate on the role of NGOs in the UNCAC review mechanism will be referred to respectively as supporting either a “closed model” of review (NGOs may not attend sessions of the IRG or the working groups) or an “open model” of review (NGOs may attend such sessions as observers).

3.1. Wording of the Terms of Reference of the UNCAC implementation review mechanism

According to para. 42 of the terms of reference of the implementation review mechanism, the Implementation Review Group is an “open-ended intergovernmental group of States Parties”.

According to proponents of the “closed model”, the specific reference to an “open-ended intergovernmental group of States parties” means that only States parties are allowed to attend sessions of the IRG. One representative of this model has argued that paragraph 42 constituted a “decision otherwise” pursuant to rule 2 of the rules of procedure of the Conference, which meant that the Conference had pronounced itself on the matter.²⁰

According to proponents of the “open model”, such an interpretation is at odds with United Nations rules and practice, with international human rights standards, and with stated United Nations values and objectives. The United Nations itself is an “intergovernmental organization” of member States, and yet extensive provision exists in many parts of the United Nations for the participation of NGOs in its work as observers.²¹

Similarly, although the Conference of State Parties itself consists of States Parties, its Rules of Procedure (in particular rules 2 and 17) make specific reference to the participation of different categories of observers, including that of NGOs.²²

The “open model” proponents have also argued that a strict limitation of participation to States parties would mean that also those States that have signed, but not yet ratified, UNCAC may not participate in the work of the IRG, which would unnecessarily hamper their ability to learn from the experience of States parties.²³ Similarly, intergovernmental organizations, many of which are directly involved in the implementation of international instruments on corruption (such as the Organization of Economic Cooperation and Development, the Council of Europe and the Organization of American States), or in providing funds for technical

²⁰ It would seem that the logical inference from this analysis is that subsidiary bodies are open unless the Conference decides otherwise. If so, then given that the Conference has not decided “otherwise”, Rule 2 would seem to apply to Working Groups and they should be open to all observers.

²¹ The UNCAC Coalition observes that “A 2014 report of the UN Special Rapporteur on Freedom of Association and Assembly noted that that the right to freedom of association and assembly also applies at the multilateral level and that multilateral organizations, like states, have responsibilities to maintain an enabling environment for civil society. The Special Rapporteur noted that the practice of excluding civil society organisations from UNCAC subsidiary bodies was at the bottom end of the spectrum among multilateral bodies.” At the briefing held in connection with the 2015 session of the IRG, the representative of the “Article 19” NGO referred extensively to this Report.

²² One source of confusion arises from somewhat different wording in Rules 14, 15, 16 and 17 of the Rules of Procedure. Rule 14, which refers to signatories, states that they may be allowed to “attend meetings of the Conference”, while Rule 15 (which applies to non-signatories), Rule 16 (which applies to “entities and intergovernmental organizations”) and Rule 17 (which applies to non-governmental organizations) state that observers in these categories may be allowed to “attend *plenary* meetings of the Conference” (emphasis added here).

²³ Such a strict interpretation would also exclude member States that are neither parties nor signatories, even if they are seeking to accede to and/or implement the Convention, and could thus benefit from participation in the work of the IRG, particularly in its thematic discussions.

assistance (such as the International Monetary Fund and the World Bank) would not be able to attend the sessions as observers. (The inclusion of these various categories as observers in the work of the IRG was clarified in 2011 by resolution 4/5 of the CoSP. As noted above, NGOs remain excluded.)

An argument related to the wording of the terms of reference that has less often been made is that art. 3(a) provides that the mechanism should be (among other things) transparent and inclusive. These words have apparently been interpreted differently by the two sides. Those advocating for the “closed model” see transparency and inclusiveness as extending (only) to all States parties; all State parties should have an opportunity to participate in the review process. Those advocating for the “open model” argue that transparency and inclusiveness means that also other stakeholders (including but not limited to NGOs) should be allowed to follow the review process as observers and provide inputs for States Parties to consider.

3.2. Opinion of the United Nations Office of Legal Affairs

As noted in section 2 above, the United Nations Office of Legal Affairs concluded in its opinion that the rules of procedure apply to the IRG. Accordingly (and unless the Conference itself decides otherwise), all four categories of observers may attend sessions of the IRG.

To this, proponents of the “closed model” have responded that in fact that Conference has indeed decided otherwise, as shown by the specific wording of para. 42 of the terms of reference, a point which in their view the Office of Legal Affairs had overlooked.

3.3. The IRG deals with sensitive and confidential information

An examination of the performance of the criminal justice system, in particular in responding to corruption, may raise sensitive questions of governmental inefficiencies, inappropriate procedures or even unlawful conduct on the part of certain public officials. Moreover, discussion of individual cases, whether under investigation or finally adjudicated, may touch upon confidential information.

On this basis, proponents of the “closed model” have argued that the review of implementation of UNCAC should be limited to representatives of States parties.

Proponents of the “open model” have responded by noting that, according to para. 37 of the terms of reference, the country reports are confidential, and it is at the discretion of the State party under review to publish the report. The IRG receives a copy only of the executive summary, which does not contain sensitive or confidential information, and of thematic and regional reports, in which individual countries are not identified. Both the executive summaries and the thematic reports are published on the UNODC website, and to date there do not seem to have been any concern whatsoever that sensitive or confidential information would have been published in either report. Thus, in the view of those advocating for the “open model”, the IRG is not mandated to deal with sensitive or confidential information and in practice has not done so.

3.4. The added value on the IRG level of input of all the relevant stakeholders

Several provisions of UNCAC (among them preambular para. 10, articles 5(1), 12, 13 and 39) recognize the importance of cooperating with such stakeholders as the private sector and civil society. More specifically in respect of implementation, art. 63(4)(c) provides that CoSP “shall agree upon activities, procedures and methods of work” for “cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations”. Para. 63(6) provides, among others, that the CoSP may consider “[i]nputs received from relevant non-governmental organizations duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties ...”

This is in line with the prevailing view that the implementation of UNCAC expressly requires the input of a variety of stakeholders, including for example civil society.

Proponents of the “open model” have argued that it would be consistent to involve representatives of these stakeholders also in the review of implementation on the IRG level, in order to increase the effectiveness of measures. In various connections, three different ways in which stakeholders could contribute have been mentioned: the provision of supplementary information, advocacy for specific anti-corruption measures, and the provision of assistance to States parties in implementing UNCAC (for example, assistance in the drafting of legislation or the training of practitioners).

Proponents of the “closed model”, in turn, have been of the view that, while there is wide agreement on the importance of the role of stakeholders on the local and national level, existing mechanisms (such as the briefings organized in connection with sessions of the IRG) are sufficient for consideration of the input of NGOs.

Proponents of the “closed model” have also noted that the various categories of observers do participate as observers in the sessions of the Conference of States Parties, which are held every other year. In their view, this is an appropriate forum for NGO participation on the international level, and NGO participation in the work of the IRG, as a subsidiary body of the Conference, is not necessary or appropriate.²⁴

3.5. Appropriateness or qualifications of NGOs active on the international and intergovernmental level in dealing with corruption-related issues

Non-governmental organizations represent a great variety of interests and expertise. In addition, they range from small, local organizations consisting of only a few persons operating on a fully voluntary and part-time basis, to international organizations that may have tens of thousands of members and a large permanent staff.

Within the United Nations system, certain NGOs have been accorded “consultative status” with the Economic and Social Council. Such NGOs have submitted an application for observer status at various United Nations meetings, and their

²⁴ It may be stressed here that at no time in the ongoing debate has the author of the present paper heard any representative of a State Party question the right of duly accredited NGOs to participate in the work of the Conference of the States Parties itself.

participation as observers has been approved.²⁵ As a consequence, they may attend, for example, sessions of the UNCAC Conference of the States Parties.

When the decision was made at the 2011 CoSP in Marrakesh to arrange for briefings for NGOs at the sessions of the IRG, it was agreed that the participants could include not only such NGOs with consultative status with ECOSOC, but also those “relevant” NGOs which had “been admitted to participate as observers in the session of the Conference previous to the briefing”.

In particular following individual briefings at the IRG, some States raised questions about the appropriateness or qualifications of some NGOs attending the briefings. Some of these speakers also expressed concern that those NGOs attending the briefings were not sufficiently representative of groups engaged in anti-corruption activities, nor was it quite clear who they were representing. Suggestions have been made for the development of criteria for participation in the briefings, in order to ensure that the NGOs attending were “relevant”. One speaker specified that this relevance could be assessed in the light of the extent to which a particular NGO was professional, responsible and accountable. Another speaker suggested that an NGO was “relevant” if its mandate specifically included corruption-related issues.²⁶

In the absence of further discussion on this issue of “appropriateness” or “qualifications”, it is not clear whether all who had expressed such concerns were thinking along the same lines, and how they would suggest that the issue be addressed. For this reason, some comments need be made regarding the various criteria suggested.

The multidimensionality of “relevance”. The first comment is that “relevance” can be understood in a number of different ways. If the CoSP should decide that this relevance needs to be defined, at least general agreement would have to be reached on the basic functions of an NGO. Non-governmental organizations can contribute to the implementation of UNCAC for example by providing information to governments, by identifying and advocating for specific anti-corruption measures, by awareness-raising, and by providing direct assistance (such as expertise) to States parties in implementing UNCAC. Depending on the context, any and all of these functions can be of value to individual States parties — and by extension, some NGOs may be more “relevant” to the situation in some States parties than others.²⁷

Generalist NGOs versus specialist NGOs? The mandate of NGOs varies considerably. Some NGOs on the local, national and international level have specifically been established to deal with corruption-related issues. A far larger number of NGOs on all levels focus on different issues, such as the advancement of

²⁵ This process is currently based on ECOSOC resolution 1996/31. See <https://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false>.

²⁶ These statements are not reflected in the official reports of the respective sessions of the IRG, but have been recorded in the notes made by the author of this paper, who has attended all of the sessions of the IRG, including all the briefings held thus far.

²⁷ For example, NGOs that have assisted in legal reform in one country may be of assistance to other countries with a similar legal system. NGOs that have expertise in developing whistle-blowing mechanisms may be of assistance in other countries where similar mechanisms could be adopted.

women, the alleviation of poverty, economic development, environmental protection, education, and health care, and their activities, although not primarily focused on corruption, can have significant and positive anti-corruption impacts. Many of these NGOs will also see anti-corruption activities and actors as important elements in, and facilitators for, their work. Finally, there are a large number of NGOs that are active in general in legal, criminal justice or governmental reform issues, and for this reason may well be interested in anti-corruption.

Representativeness. As noted, the question of representativeness has been raised in two senses, are individual NGOs representative of civil society groups involved in anti-corruption work, and who does an individual NGO actually represent.

As to the first sense, given that a large number of NGOs would seem to have a legitimate interest in promoting anti-corruption issues, it is not quite clear how one would determine how the range of such organizations should be “represented” at the intergovernmental and international level, whether at briefings or more widely in the implementation of UNCAC. The entire concept of NGO activity is based on voluntary action in pursuit of certain goals. Some may wish to be involved in the implementation of UNCAC on the intergovernmental and international level; others may not.²⁸ As to the second sense, each NGO can provide basic information as to the structure of their membership.

It may also be noted that the Bureau²⁹ already has a process in place to review applications for participation at the CoSP of those NGOs that do not have consultative status with ECOSOC. If there is a concern for “representativeness”, presumably some additional measures could be conceived to ensure the flow of information in both directions: information can be disseminated to potentially interested NGOs about the possibility of becoming involved in the work on implementation of UNCAC, and the NGOs themselves can provide information on the structure of their membership base.

Professionalism and responsibility. A standard definition of “professionalism” is “the skill, good judgement, and polite behaviour that is expected from a person who is trained to do a job well”. The use of the term in connection with NGOs and the implementation of UNCAC, therefore, presumably means that the speaker expects NGOs (and their representatives) to have an understanding of corruption-related issues, the expertise or resources that could provide “added value” to the implementation of UNCAC, and respect for the established ways of conducting oneself in an international setting. These are all somewhat difficult qualities to assess.³⁰

²⁸ It may be mentioned in this connection that some 350 civil society organizations have joined together to form the UNCAC Coalition, which has the express purpose of “promoting the ratification, implementation and monitoring of the United Nations Convention against Corruption” (http://uncaccoalition.org/en_US/about-us/about-the-coalition/).

²⁹ The Bureau consists of the chairperson, three vice-chairpersons and rapporteur of the Conference of the States Parties. The concept of the “Extended Bureau” consists of members of the Bureau plus the chairs of the regional groups, the Presidency of the European Union, and the Chair of the Group of 77 and China.

³⁰ The process for accreditation with ECOSOC presumably ensures that the NGOs in question have at least a certain level of “professionalism”.

“Responsibility” in this context can be understood as being closely related to professionalism: it involves the exercise of good judgement, the ability to act correctly and the ability to make decisions on one’s own.

Given the range of NGOs involved directly or indirectly in corruption-related issues, and the fact that many of them operate on a voluntary, part-time basis, it is doubtful whether the criteria of “professionalism” and “responsibility” could be elevated to the extent that only NGOs (or their representatives) the membership of which have had duly recognized training or education in corruption-related issues would be regarded as “relevant”.

Accountability. The criterion of “accountability” refers, in a wide sense, to the obligation of an individual or organization to account for its activities, accept responsibility for its activities, and disclose the results in a transparent manner. It is not directly clear from the passing references in the IRG discussion whether the speakers were referring to the accountability of an NGO (or its representative) to the constituency of the NGO itself, or to accountability in some sense to those who are responsible for the IRG process.

If it is the first sense of accountability that is at issue, the process of accreditation is designed to ensure that NGOs which have consultative status with ECOSOC are accountable in some way to their respective membership.

More recent discussions in other forums, however, suggest that it is the second sense of accountability that is at issue. For example at the recent Thirteenth United Nations Congress, representatives of some States expressed their concern that certain NGOs operating within their territory may have goals that are harmful or even hostile to those of the State.³¹ This suggests that the concern has to do with “accountability” of NGOs for their goals and sources of funding. And if this is the case, then the concerns may be alleviated if an appropriate mechanism could be developed to provide the States parties with information on whom the individual NGOs represent; who has appointed the representatives and, consequently, to whom they “report”; who has given them their mandate and based on which process; and who finances them and whether information on their sources of funding is available and accessible. Much of this information would presumably be available in the charter or other basic document of the NGO in question.

3.6. Role of NGOs as advocates

As noted above under point 3.4, one possible function of NGOs in the implementation of UNCAC is as advocates for specific anti-corruption measures. To phrase this in another way, some NGOs may have a “political agenda”; they may want to contribute to the amendment of law or policy, to restructuring of parts of local or national government, or to reallocation of existing resources.

There are clear differences from one political system to another, and even from one public official to another, in attitudes towards this role of NGOs as advocates and as political actors. For some, it is part and parcel of the freedom of association and the freedom of speech, guaranteed by international human rights standards.

³¹ See for example para. 15 of the Report on Workshop 4 of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015 (A/CONF.222/L.4/Add.1). This paragraph is cited in section 4.2, below.

Others, however, are of the view that some, if not many, NGOs act on the basis of insufficient information and use improper channels.

This latter view has been connected with concerns expressed at sessions of the IRG and the CoSP that individual NGOs have engaged in activity that was not in line with the terms of reference of the implementation review process. Examples include the publication of so-called “shadow reports”³² and the publication of reports that purport to rank States parties for example on the extent to which they have succeeded in responding to corruption. Both types of publications have been criticized by some delegations for being based on poor sources of information, and for distorting reality. Such publications are seen to serve as disincentives for investment. They may also be regarded as malicious to the extent that they question the commitment of the respective governments to anti-corruption efforts.

3.7. Role of NGOs in providing expertise and resources

Several speakers have criticized NGOs attending the briefings on the margins of the IRG for spending more time expressing their opinions regarding what States parties should do in order to improve their response to corruption (and to some extent also on how the implementation review mechanism can be improved) and less on providing information on how they, as individual NGOs, can assist States parties in their work.

Most NGOs do not have the technical competence and expertise to provide assistance. As noted above, the provision of assistance to governments is only one possible function of NGOs, alongside of the provision of supplementary information, advocacy for specific anti-corruption measures or against corruption more generally, and awareness-raising. Nonetheless, NGOs may be able to provide advice and assistance in a variety of areas depending on their mandate, membership and resources.

4. Arguments for and against the involvement of civil society on the local and national level in crime prevention and criminal justice

4.1. UNCAC provisions on the involvement of stakeholders

The terms of reference of the implementation review mechanism urge the State party under review to 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” (para. 28). Para. 30 provides that “States parties are encouraged to facilitate engagement with all relevant national stakeholders in the course of a country visit”.

As noted above, stakeholders can contribute to the implementation of UNCAC in various ways, for example by providing supplementary information, advocating specific anti-corruption measures, and providing technical assistance in implementing UNCAC (for example, assistance in the drafting of legislation or the

³² The term “shadow report” has been used to refer to reports that purport to assess implementation of UNCAC in individual States parties. Such reports have generally not been made in cooperation with the government in question. However, some of these reports have been made with the involvement of government officials, and are largely based on government sources.

training of practitioners). On the local and national level, they may also contribute to raising awareness of corruption.

Experience with the implementation review mechanism has shown how widely States parties are aware of the importance of stakeholder involvement. During the first three years of the review of implementation, 103 country reviews were conducted, and in the large majority of these — 84 — a country visit had been organized, and in 85 per cent of these country visits, in turn, sessions were held with such stakeholders.³³ It is the understanding of the experience of the author of this paper that all comments made at sessions of the IRG and of the CoSP regarding these sessions with stakeholders have been solely positive; the sessions had been seen to be useful for implementation and for the review of implementation.

Also in other respects, the discussions at the IRG and the CoSP have shown the breadth of recognition given by States parties to the importance of working together with the relevant stakeholders in preventing and responding to corruption. Several speakers have referred to their own experience in involving stakeholders in their discussions on the national level, and some have identified this as good practice.

This recognition of the value of working together with stakeholders will presumably be noted all the more often during the following five years, during which the second cycle of the review mechanism is conducted. This second cycle focuses on chapter II of UNCAC, which focuses on prevention, and chapter V, which focuses on asset recovery. Both of these chapters contain several provisions specifically referring to various stakeholders.

4.2. Bottom-up: support for civil society activism

In the light of this broad consensus on the importance of stakeholder involvement, and by extension for civil society involvement, in anti-corruption work, it is notable that diverging views have been expressed within the framework of the United Nations crime prevention and criminal justice programme on the value of non-governmental activity on the local and national level. According to one view, such non-governmental activity should be encouraged as widely as possible. According to a second view, such non-governmental activity should be supervised in order to ensure that the NGOs in question do not have malevolent intentions, or serve as a channel for importing foreign (and undesirable) social and cultural values.

The first view could be described as a bottom-up, community-based approach. Local communities have a wide range of concerns, among which may be the impact of corruption on the local level. Through awareness-raising and advocacy, they may contribute to the detection of corruption, and stimulate the authorities to respond.³⁴

This view has a direct analogy in community policing, which holds that the police and the public are jointly responsible for responding to crime and improving the quality of life on the community level. Community policing programmes generally seek to encourage public initiative, recognizing that while the goals of individual

³³ CAC/COSP/IRG/2015/2, paras. 20 and 22.

³⁴ The view is often associated with requests that governments operate in a more transparent manner, so that the public is provided with greater access to information for example on how decisions on public matters were made, and on what grounds.

civil society groups need not necessarily be in full alignment with police goals, the work of these groups supplements the work of the police. In both a literal and a figurative sense, the mobilization of the public extends the reach of the criminal justice apparatus, in a way that not only enhances the effectiveness of criminal justice, but also fosters the trust of the public in the operation of the criminal justice system.

4.3. Top-down: ensuring civil society compliance with national law

The second view could be described as a top-down approach, which seeks to ensure that civil society activity is in compliance with national law. The concerns expressed, as noted, at times refer to the potential that non-governmental organizations may have as channels for bringing unwanted foreign social and cultural values into a country. As noted in the report on the Thirteenth United Nations Crime Congress, in the course of the workshop on public participation in crime prevention and criminal justice.

“A number of speakers noted that the engagement of civil society organizations should take place within the appropriate regulatory framework, in line with national legislation and in coordination with relevant oversight bodies, for example crime prevention councils, while also ensuring that organizations had the skills and knowledge for their functions. One speaker noted that any civil society activities should be framed and moderated by Governments, that non-local non-governmental organizations (NGOs) could propagate ideas or value systems that were foreign to some countries, and that those NGOs should respect the economic, cultural, social and religious values of societies. Some speakers referred to the need to build trust and transparency in that regard.”³⁵

As expressed by one speaker at the Thirteenth United Nations Crime Congress workshop, the role of civil society is important if the groups are local and are based in the country, and if this role occurs in a certain context. Such groups understand the culture, are subject to regulation and are moderated by the government. The speaker observed that the groups should be transparent, and should respect the social and cultural values of the country in question; in the view of the speaker, this is of particular importance in developing countries.

It is rare for such concerns to be expressed within the context of implementation of UNCAC. However, as already noted above, some delegations have noted that the “shadow reports” and rankings may contain misleading and even false information, information which may be harmful to the State party in question in a variety of ways.

It should be emphasized that this second view does not question the potential utility of the work of non-governmental organizations. The focus is on ensuring that NGOs function in accordance with law.

³⁵ Report on Workshop 4 of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015 (A/CONF.222/L.4/Add.1), para. 15.

5. Seeking common ground

As described in sections 3 and 4, different views have been expressed regarding the appropriate role of non-governmental organizations in the implementation of the United Nations Convention against Corruption, and more broadly in crime prevention and criminal justice, on the local, national and international level. These views seem to have unfortunately solidified into opposition with one another, with insufficient effort by either side to understand the concerns of the other, and explore the possibility of common ground.

Two compromise “package deals” have been achieved, one in Doha in 2009 on the implementation review mechanism itself, and one in Marrakesh in 2011 on the question of observers in the work of the Implementation Review Group. One side seems to regard these package deals as the “final word”, and rejects calls for reconsideration of the issue. The other side, in turn, seems to be of the view that the work on the review of implementation is in part a “confidence-building exercise”, an exercise in the course of which those doubting the value of NGO involvement will somehow come to change their views, and the “package deals”, reached before good practices on engaging stakeholders in country visits had emerged and before most States Parties had any practical experience with the UNCAC implementation review mechanism, can and should be revisited.

If there is an earnest will to explore the possibility of common ground, therefore, the first step would seem to be to recognize that a sterile debate based on “I am right and you are wrong” positions will not contribute to the implementation of UNCAC. For some States parties the participation in particular of non-governmental organizations appears to be a real political concern, and this concern needs to be addressed. For other States, non-governmental organizations are key stakeholders in the implementation of UNCAC, and their role should be strengthened. These two views appear to be quite far apart. However, the United Nations has always sought to reach consensus on issues, and it is suggested in this paper that the two views can be accommodated.

The second step is to distinguish between four specific issues:

- NGO participation as observers in the work of the CoSP;
- NGO participation as observers in the IRG;³⁶
- Civil society involvement in the conduct of country reviews; and
- Civil society involvement more generally on the local and national level in the prevention of, and response to, corruption.

It would seem that common ground can readily be found on the first, third and fourth point. In respect of the second point, however, the search for common ground needs to continue.

³⁶ It is possible to distinguish yet a fifth issue, NGO participation in working groups established by the CoSP. Resolutions 4/5 and 4/6 refer only to the Implementation Review Group, and not for example to the Working Groups on Asset Recovery, Prevention, and Technical Assistance. However, those opposing NGO participation as observers in the IRG have argued on much the same grounds against NGO participation in other Working Groups; in their view, the IRG and the Working Groups are essentially the same type of body, and the same rules should apply to all of them.

Common ground on NGO participation as observers in the work of the CoSP

There does not appear to be any disagreement on the appropriateness of NGO participation as observers in the work of the CoSP itself. According to the rules of procedures for the sessions of Conferences of the States Parties, NGOs may participate as observers. Thus, at two year intervals, NGOs with consultative status with ECOSOC and other NGOs that apply for participation may follow the proceedings of the sessions of CoSP.

Common ground on civil society involvement in the conduct of country reviews

There is also broad agreement on the appropriateness of civil society participation in the conduct of country reviews. The terms of reference require States parties under review to “endeavour” to prepare their 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 (para. 28), and States parties are “encouraged” to facilitate engagement with all relevant national stakeholders in the course of a country visit (para. 30).

It may also be noted that the terms of reference for the mechanism call for the mechanism to be “transparent” and “inclusive” (para. 3(a)). On this point, however (as has already been noted above), there appears to be a divergence of views as to whether the “transparency” and “inclusiveness” extends (only) to States parties, or also to other stakeholders. (Many States parties — and NGOs — have called for greater “transparency” and “inclusiveness” for example in informing NGOs of the conduct and timetable of the country reviews, and in publishing the resulting country review.)

Even so, it should be noted that States parties have considerable flexibility, as sovereign States, in deciding how the broad consultations referred to in para. 28, and the engagement referred to in para. 30, are to be conducted, and with whom.

The common ground here, therefore, is that States parties are required to implement paras. 28 and 30, but have a considerable margin of appreciation in deciding how this is most appropriately to be done. The majority of States parties under review have invited stakeholders to participate in country visits. This engagement of stakeholders in national UNCAC reviews clearly would seem to be good practice. The IRG and the CoSP should explore how this success could be reinforced in the second review cycle.

Common ground on general civil society involvement on the local and national level

As noted in section 4, the disagreement over the proper role of NGOs within the framework of the implementation of UNCAC has subsequently given rise to an intensifying debate on the involvement of civil society in general in the response to corruption on the local and national level, and indeed to the involvement of civil society in general in crime prevention and criminal justice on the local and national level. One side (the “bottom-up” view) considers broad civil society activity in crime prevention and criminal justice to be quite positive, in line with the philosophy underlying community policing. The other side (the “top-down” view) stresses that such civil society activity should be based on the law, and by extension should be under the control of the government.

The two views are no inimical. Also those advocating a “bottom-up” view would undoubtedly agree that civil society activity should be based on the law, and those advocating a “top-down” view would undoubtedly welcome civil society groups that offer to help the authorities in crime prevention and criminal justice.

The key difference between the two views presumably has much to do with the degree of control, intended to ensure the lawfulness of the activity of civil society groups. To what extent, for example, can members of the public exercise their right of association and freedom of speech? To what extent are they required to file for approval of activities such as “Neighbourhood Watch” or restorative justice projects? To what extent can such civil society groups (or in general members of the public) obtain information on corporate activity and public procurement contracts, in order to detect possible corruption?

On this point, the common ground will presumably revolve around the right of civil society groups to act in a lawful manner to assist the authorities in crime prevention and criminal justice, and around the right of sovereign States to determine what laws and regulations apply to such groups. Given the wide differences between States in legal and administrative systems, as well as in economic, political and social development, there cannot be a “one-size fits all model”. Noting the principle of non-intervention in domestic affairs, it should thus be clear that for example the CoSP (or, for that matter, for example the United Nations Commission on Crime Prevention and Criminal Justice) cannot determine the specific extent to which States may regulate civil society groups, as long as the right of association and the freedom of speech, as provided in recognized international instruments, are respected.

The search for common ground on NGO participation as observers in the IRG

The three issues outlined above, therefore, can be largely defused as sources of contention. The remaining issue, NGO participation as observers in the IRG, in turn, is considerably more difficult. Difficult, but still amenable to compromise.

As has been outlined in section 3 above, the question of NGO participation in the IRG originally rested on two diametrically opposed interpretations of para. 42 of the Terms of Reference of the Implementation Review Mechanism, adopted in 2009. After two years of hard debate and long negotiations, resolutions 4/5 and 4/6 were adopted as part of a “package deal” compromise.

According to one side, para. 42 provides that only States parties may participate in the work of the IRG. Resolution 4/5 modified the decision to allow certain other categories to attend as observers, and resolution 4/6, which restricted NGO participation to a briefing held on the margins of each session of the IRG, was (in their view) a concession to the expressed desire of many States parties to involve NGOs in some way. Furthermore, in their view any attempt to raise the issue of the role of NGOs in the review of implementation was easily seen as an attempt to “renegotiate” the terms of reference of the review, and thus raise the danger inherent in reopening a delicate compromise.

According to the other side, para. 42 does not restrict participation to States parties, and other categories of participants may attend as observers without participating in the intergovernmental decision-making process. In their view, although resolution 4/5 was satisfactory in respect of certain categories of

participants, resolution 4/6 should be recognized as a compromise that was suitable only for a certain stage in the development of the Implementation Review Group. The second para. of the resolution signified that the States parties were “to continue constructive dialogue on the contribution of non-governmental organizations to the Mechanism for the Review of Implementation of the Convention”. This provision, in their view, meant that the role of NGOs in the review of implementation was to be kept under review, and thus resolution 4/6 could, in time, be replaced by an amended version.

6. The way forward

On the basis of the above, the conclusion is drawn that the States parties to UNCAC should use the possibility offered by the sixth session of the Conference of States Parties to UNCAC, to be held in St. Petersburg, Russian Federation on 2-6 November 2015, to engage in a constructive debate on the role of non-governmental organizations and, more broadly, civil society groups in the implementation of UNCAC. This debate would, it is hoped, not repeat the acrimonious “I am right and you are wrong” tones of some of the earlier debates, but would recognize both the positive contributions of NGOs, and the concerns that some States parties have about NGO involvement specifically in the work of the Implementation Review Group.

The debate should also note the positive experience that the majority of States parties have had with their engagement with non-governmental organizations in the review of the implementation of UNCAC on the national level.

The debate might be used to identify these positive contributions more clearly, and also to lay out the concerns more clearly.

A second conclusion drawn is that common ground can arguably be found *if* the following statements are accepted by the two sides as the point of departure for this debate:

1. The two sides have a different understanding of para. 42 of the Rules of Procedure.
2. The views of each side are based on fundamental concerns, which the other side should respect as legitimate.
3. Resolution 4/6, which establishes briefings for NGOs on the margins of sessions of the Implementation Review Group, is the status quo.
4. In the light of lessons learned and experiences gained in the conduct of the first cycle of the review mechanism, resolution 4/6 may be replaced by amended versions if consensus on this can be found. Such amendment may take place in a gradual fashion, with different elements adopted at different times.
5. Consensus on amendment of resolution 4/6 can be found only through continuation of “constructive dialogue on the contribution of non-governmental organizations to the Mechanism for the Review of Implementation of the Convention”.

Perhaps most importantly, ways in which the “constructive dialogue” referred to in paragraph 2 of resolution 4/6 could be continued should be identified, to keep NGOs engaged in the extensive work needed in the implementation of UNCAC, and to ensure that the concerns of some States parties regarding NGOs are respected and addressed.
