

“Legal and Practical Challenges to the Ratification and Effective Implementation of the United Nations Convention against Corruption (UNCAC)”

Executive Summary

Background:

Transparency International commissioned the paper “Legal and Practical Challenges to the Ratification and Effective Implementation of the United Nations Convention against Corruption (UNCAC)” to Dr. Georges Assaf, an attorney at law based in Beirut-Lebanon in February 2006. The paper is a survey of the legal and practical challenges to the ratification of UNCAC, using Lebanon, Morocco and Bahrain as case studies.

Objectives of the White Paper:

The White Paper sought to examine whether:

- (a) The legal framework for the ratification of the UNCAC is present in all three countries (Lebanon, Morocco and Bahrain);
- (b) The institutions with the prerogative to combat corruption are present in all three countries;
- (c) The legal provisions and institutional framework to combat corruption are sufficient for the UNCAC to enter into force in all three countries.

Case Studies:

Legal and Practical Challenges to the Ratification and Effective Implementation of the UNCAC in Lebanon

Political framework

Lebanon is currently undergoing a transitional period marked by political uncertainty. Before the assassination of former Prime Minister Rafik Hariri, followed by the withdrawal of Syrian troops from Lebanese territory, the country’s institutions were particularly liable to direct interference in their functioning whereby, a recent popular poll published in the Lebanese press confirmed that over 98% believe that corruption is rampant across political and economic life in the country.

Political impediments to the ratification of the UNCAC in Lebanon include the patronage-based sectarian political system characterized by the extinction of the political ruling class to give way to the ascent of the war lords subsequent to a 15 year civil war to power. Civil society is active in Lebanon, however political will to combat corruption is still absent in the country.

A political framework more conducive to anti-corruption efforts necessitates strengthening the mechanisms of transparency and accountability in the country, and revitalizing the role of syndicates and free media. Moreover monopoly and economic hegemony needs to lend way to a competitive political system.

Legal framework

Lebanon is not a signatory of the UNCAC. An anti-corruption law has been formulated some years ago; however it has yet to be discussed at the House of Parliament. According to Article 52 of the Lebanese constitution of 1926, the President negotiates

the ratification of international conventions in consultation with the Prime Minister, to then be ratified contingent upon the approval of the Parliament.

The Lebanese penal code is in complete accordance with the provisions of the UNCAC relating to bribery, embezzlement, and misuse of public office for private gain. However one of the major impediments in the Lebanese penal code to the ratification of the UNCAC is posed by the immunities given to public sector employees where it is not permitted by law to prosecute a public sector employee prior to requesting permission from the administration he works under. Also commercial crimes can not be prosecuted without a written request from the Governor of the Central Bank and the Director of the Customs Department. Lebanese legislation also prohibits direct prosecution against judges.

Other laws combating corruption include the illicit wealth law passed in 1999, encompassing the President, the Prime Minister and the Speaker of the House, in addition to judges, public officials, and civil servants. Lebanon has also passed an anti-money laundering law in 2001, which established the Special Investigating Commission. A privatization law was passed in 2005 as well specifying the conditions for privatization, accompanied by the establishment of a Higher Council for Privatization headed by the Prime Minister alongside six ministers.

Anti-corruption bodies

- The **Special Investigating Commission** (established by Law 318) was delegated judicial status to combat money laundering in the country. SIC is based in the Central Bank, and is the only agency with the exclusive right to lift banking secrecy in the country.
- Executive oversight agencies include the **Lebanese Court of Audit** and **Central Inspection**. The Court of Audit is responsible for both the pre-auditing and post-auditing of government expenditures, while Central Inspection is the primary institution responsible for the disciplinary oversight of civil servants.
- A “Mediator of the Republic” (Ombudsman) was recently instituted. It is not operational yet in the absence of decrees for proper implementation of the law.

Legal and Practical Challenges to the Ratification and Effective Implementation of the UNCAC in Morocco

Political framework

The ascent of King Mohamed VI to power in Morocco in 1999 led many to believe that a reform movement was about to take place. However the presence of the old political and military vanguard has slowed down a reform movement now gradually unfolding alongside the mobilization of Moroccan civil society and the media.

The spread of corruption in Morocco is ascribed to the impunity characterizing the public administration, compounded by a political system where the King continues to hold absolute power and heads the executive, judicial and legislative branches of government in the glaring absence of a clear separation of powers. Observers concur that the pervasiveness of corruption in the Kingdom is due to the lack of political will to enforce accountability in the absence of the adequate accountability mechanisms and the inanity of judicial recourse.

Legal framework

The Moroccan Constitution of 1962, which describes the political system in the country as a “popular democratic kingdom” delegates to the King the prerogative to sign and ratify international conventions. Morocco has signed the UNCAC in December 2003; however it has not yet ratified the Convention.

The Moroccan penal code is in complete accordance with the provisions of the UNCAC relating to bribery, embezzlement, and misuse of public office for private gain.

As in the case of Lebanon, one of the major legal impediments to the ratification of the UNCAC is the prohibition of the direct prosecution of public sector employees. Another major loophole in Moroccan legislation moreover is the complete absence of any legal provisions tackling money laundering.

Anti-corruption bodies

- **The Special Court of Justice** is empowered to hear cases involving corruption and misuse of funds by government officials, including judges; while the High Court tries government officials after charges are brought by two-thirds of the House of Representatives.
- Financial management in Morocco is administered by the **Audit Bureau of the Ministry of Finance** alongside the **Supreme Audit Institution**.
- **Diwane al-Mazalim** (close to an Ombudsman) was established in 2001 and endowed with some oversight functions in the area of corruption.

Legal and Practical Challenges to the Ratification and Effective Implementation of the UNCAC in Bahrain

Political framework

Despite the democratic transition toward constitutional monarchy in Bahrain, and the legislative election of the House of Parliament alongside the appointment of the *Shura* Council in 2002, the lack of a clear separation of powers continues to impede democratization in the Kingdom. Civil society organizations and the media continue to operate under a tight leash, where a draft law proposal permitting the formation of political parties has still not been enacted.

In Bahrain the most glaring problem is the clear conflict between the constitutional framework and the legislation necessary for democratic transition. The result is the absence of a clear separation of powers and the subsequent imbalance between the legislative and executive branches of government, which undermines the legislative branch’s ability to monitor the executive branch. Moreover the absence of a law permitting the establishment of political parties until today indicates the continuing prevalence of a tribal system concerned with the well-being of its own constituents.

Legal framework

Article 37 of the Bahraini Constitution also delegates to the King the prerogative to ratify international conventions through a decree referred to the Majliss (elected chamber) and to the appointed *Shura* Council. The decree only enters into force once it is published in official newspapers. Bahrain signed the UNCAC in February 2005; however it has not yet ratified the convention.

The Bahraini penal code is in complete accordance with the provisions of the UNCAC relating to bribery, embezzlement, and misuse of public office for private gain. Other laws in accordance with the UNCAC include the illicit wealth law passed in 2005 in

Bahrain, where illicit wealth covers the Managing Board of companies, in which the government owns 50% or more of the shares.

Anti-corruption bodies

- The **Bahrain Monetary Agency Anti-Money Laundering Unit** is responsible for combating money laundering in the Kingdom, and investigating allegations into alleged money laundering offences and the financing of terrorist activities.
- **Financial Control Office** is guaranteed independence by law and is to assist the Government and the Chamber of Deputies in controlling the collection and disbursement of state revenues. A **Supreme Audit Commission** works to provide transparency in Bahrain.
- **Public Sector Administrative and Finances Monitoring Committee** was created in January 2002 to ensure the effective and efficient operation of public institutions. One of its first tasks was to examine the effectiveness of existing policies in countering corruption, and to propose legislation to correct any deficiencies found.

General Observations:

Countries are prepared to modernize their legislative framework in so far as it relates to anti-corruption provisions in line with the UNCAC, due to international pressure exerted by the developed countries through international treaties, such as accession to the World Trade Organization, or in the case of Morocco and Lebanon the Euro-Mediterranean Association Agreement as well, where national laws have to be reviewed in line with European laws, particularly as they relate to anti-corruption measures.

While the Penal Code in each of the three countries is largely in accordance with the UNCAC, and while multiple bodies are mandated to combat corruption, the legal and institutional framework in all three countries under consideration remain inadequate due to: (i) the dispersion of anti-corruption texts between the penal code and other laws; (ii) the multiplicity of bodies mandated to combat corruption in the absence of a clear anti-corruption strategy. The ratification of the Convention therefore remains contingent upon the adoption of a national anti-corruption strategy to completely harmonize national legislation with the provisions of the UNCAC.

Toward the Ratification of the UNCAC Regionally:

On the national level, however, beyond the legal impediments to the ratification of the UNCAC, the ratification process in Arab countries including the three countries subject of this case study is contingent upon the consideration of various challenges which include:

- (a) Developing the political will among the ruling elite to democratize the political process, open it to political parties and establish a clear separation of power between the three branches of government as well as favorable conditions for the independence of the judiciary;
- (b) Reform the Public sector through the enactment of an illicit wealth law and an Ombudsman law;
- (c) Ensure transparent and strict rules for public procurement and fair competition rules to apply to the privatization process;
- (d) Spread the culture of transparency through the civil society bodies and through establishing regulatory bodies especially in the field of broadcast media;
- (e) Formulate a comprehensive action plan to all facets of corruption in order to overcome the dispersion of anti-corruption texts;
- (f) Harmonize national legislation with the provisions of the UNCAC.