Under the Patronage of the

Ministry of Justice & Central Commission for the Prevention of Corruption in the Kingdom of Morocco

Regional Workshop on "Witness and Whistleblower Protection"

Rabat, Morocco

2-3 April 2009

Background Paper

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1. Introduction

In the framework of the Arab Anti-Corruption and Integrity Network (ACINET), the UNDP Programme on Governance in the Arab Region (POGAR) is organizing a regional workshop on the "Protection of Witnesses and Whistleblowers" in Rabat (Morocco) on April 2-3, 2009. The workshop will be hosted and held under the patronage of the Ministry of Justice and the Central Authority for the Prevention of Corruption in Morocco, and in collaboration with the UN Office on Drugs and Crime (UNODC).

This workshop is ACINET's first event since its establishment on 30 July, 2008 in Amman with the support of 17 Arab countries[1]. This workshop was preceded by a series of preparations that focused on expanding the Network's membership, enhancing communication among its members and developing its Programme of Work for 2009 in order to support its actions which aim at serving its objectives as per the network's Charter and Rules of Procedure.

Despite the fact that several legal systems in the Arab region have addressed aspects of witness and whistleblower protection, this topic remains relatively new and underdeveloped in the Arab region. The manner in which this topic was dealt with remains superficial and thus requires additional focus and support to enable the Arab countries to set up and maintain an effective system for the protection of witnesses and whistleblowers. This matter is of great significance for the efforts aimed at combating crime in general, and corruption in particular, which is increasingly viewed as a major governance deficit, with a severe negative impact on human development.

Finally, it is important to note that this topic was selected from among a set of priorities which were defined by Arab countries, based on the results of different consultations which took place in 2007 and 2008.

2. An Overview on the Arab Anti-Corruption & Integrity Network (ACINET)

The establishment of ACINET is the result of concerted efforts that started soon after launching the **Good Governance for Development in Arab Countries Initiative** at the Dead Sea in Jordan in 2005. ACINET's concept was crystallized in late 2007 in the context of the very same initiative, leading to its establishment during a regional conference held in Amman (Jordan) on 29-30 July, 2008, under the patronage of the Prime Minister of Jordan, with the participation of high-level delegations from 17 Arab countries, and with the support of UNDP-POGAR.

[1] For more information about ACINET, please visit the website of the Good Governance Initiative for Development in Arab Countries: www.arabgov-initiative.org

ACINET is composed of experts representing Arab governmental parties concerned with enhancing integrity and combating corruption and which announce their accession to the network according to the mechanisms stipulated in its Rule of Procedure. Accession is voluntary and does not entail any financial obligations on the members. A non-official (non-governmental) group, including representatives from different civil society organizations and private sector institutions, supports and cooperates with the network. The network is entitled to establish other groups to support its actions, such as donor groups or observer groups from the parties concerned with combating corruption in other countries from outside the region.

The network acts as a forum for Arab governmental bodies concerned with enhancing integrity and combating corruption and as a means to promote exchange of knowledge, expertise and experience among them and with non-governmental bodies. It constitutes a regional framework to support the national efforts aimed at implementing Arab and international charters and conventions relevant to combat of corruption, especially the UN Convention against Corruption.

3. Workshop Topic: Protection of Witnesses and Whistleblowers

The workshop addresses the "protection of witnesses" and the "protection of whistleblowers" which are of utmost importance with respect to the efforts of combating crime, including crimes of corruption. The witnesses' role in searching for the elements of the crime is significant to reach real justice and punish the perpetrators. Moreover, a whistleblower's role might often contribute to uncovering or preventing the crime at an early stage, in addition to acting as a deterrent and an important obstacle to those involved in suspicious acts. Moreover, it gives the employee and the citizen in general a more efficient mean to monitor the performance of those in charge. This consolidates the participation of individuals in particular and the society in general, in combating different forms of crime and promoting the assistance provided to public authorities to fulfill their duties in this regard.

The witnesses' and the whistleblowers' role is accompanied by several risks and dangers. It requires a set of guarantees ensured by the public authorities, to protect them from any procedures or harm that might be inflicted upon them after testifying or reporting. People often have important information about a crime that took place or that is about to take place, but they do not report it or give their testimony, due to the complexity of the procedure, and their lack of belief that the authorities are capable of enforcing the rule of law, or for fear of being subjected to arbitrary measures or reprisals. If those people do not feel that they have the freedom to give their testimony or provide information about a corruption crime, for instance, this will undermine the authorities' power to combat this crime[2]. Hence, the protection of witnesses and whistleblowers is a cornerstone in combating crime, therefore they should be given the necessary attention, especially with

[2] See the legislative guide of the UN Convention against Corruption, prepared by UNODC, UN publications, 2006, p.148.

the expansion and diversity of criminal activities, which renders combating it a very difficult task, especially corruption crimes, which are often perpetrated and committed in the shadows and behind closed doors.

3.1. Legal differentiation between Protection of Witnesses and Protection of Whistleblowers

In this framework, it is essential to observe the legal differentiation between the concepts of "protection of witnesses" and other parties in the lawsuit, such as experts, victims and the collaborators of justice (Pentiti) on the one hand, and the "protection of whistleblowers" on the other, while checking for common grounds.

Protection of witnesses means ensuring the protection of people who give their testimony on incriminated acts, through setting procedures to provide them with physical protection. Such procedures may include changing the residence of these people, concealing information regarding their identity and presence or imposing restrictions on their disclosure, as well as drawing up new rules for evidence, enabling them to give their statements in a way that guarantees their safety.

Regarding the protection of whistleblowers, it refers ensuring protection to the people who report to the competent authorities any facts relevant to criminalized acts as per the laws in force, whether they are civil servants or ordinary individuals, regardless of filing a lawsuit concerning a certain crime.

3.2. Protection of Witnesses and Protection of Whistleblowers in international conventions

The international interest in this cornerstone of fighting crime was reflected via the provision for the protection of witnesses and whistleblowers in several international conventions, perhaps the most important of which are the UN Convention against Corruption (UNCAC) and the UN Convention Against Transnational Organized Crime (UNTOC). UNCAC reinforced the issue of the protection of witnesses, experts and their relatives, as well as all people are in close relation with them in Article 32, where paragraph 1 provided for the following:

> *"Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."*

Article 32, in the second paragraph, added examples on the types of measures that may be adopted in order to protect the witnesses and experts, their relatives and other persons close to them:

The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

The convention also encouraged the endorsement of agreements and arrangements to protect witnesses, experts, their relatives, as well as other persons close to them in paragraph 3 of Article 32:

States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

As for paragraph 4 of the same article, it pointed out that the provisions of this article also apply to the victims if they are witnesses.

Paragraph 5 of the same article provided for the protection of victims, calling on State Parties to "enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense." However the convention did not stop at that amount of protection. Rather, it addressed this issue again in Article 25, concerning the obstruction of justice, criminalizing certain types of influence on witnesses.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention.

Finally, the convention addressed a special type of protection; the protection of persons who participate or participated in perpetrating an act that is criminalized in the convention, and then assisting the authorities or providing them with useful information. They are known as collaborators of justice or the "pentiti", i.e. the repentant perpetrator in Italian.

Paragraph 4 of Article 37 grants the repenters a set of incentives and includes them in the protection which witnesses enjoy, as stipulated in Article 32 above.

As for the incentives, they are narrated and documented in paragraph 1 of the same article:

> *Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

The second paragraph provides for the possibility of mitigating the punishment in appropriate cases:

> *Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

Paragraph 3 encourages State Parties to consider the possibility of granting immunity from prosecution:

> *Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

As for the fifth and last paragraph, it addressed the issue of international cooperation in providing such protection:

> *Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

These provisions enhanced the terms of UNTOC (2000) which preceded UNCAC in this regard, addressing these issues in articles 9, 24 and 25[3].

[3] **Article 9 of the UNTOC** binds State Parties adopt legislative and administrative effective measures to promote integrity and to prevent, detect and punish the corruption of public officials. **Article 24 of the same convention** binds Member States to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them. These measures may include: 1- Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons; 2- Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony

Concerning the protection of whistleblowers, UNCAC dedicated a separate article (33) for this issue, which stipulated that:

> *Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

Paragraph 4 of Article 8 tackled the "protection of whistleblowers" if the whistleblower is a public official. It required "each State Party to consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions."

However, the subject of the whistleblowers protection- and despite its significance and indispensable role in establishing an efficient system to combat corruption- is peculiarly sensitive. Experience proved that in spite of the media's and other specialized groups' exaltation of the whistleblowers' role, it is necessary to take a profound look at the method of setting up such a system in order to guarantee its proper-functioning. This is because the nature of these systems, allows public officials to settle their personal accounts, or to block routine administrative decisions taken against them, as a result of failure to fulfill their duties. Added to that is the enormous squandering caused by such allegations which take a lot of time and consume huge resources to solve them, thus undermining the confidence in the government, especially considering that what was reported is related to mismanagement more than being an act of corruption that is legally criminalized.

Accordingly, policymakers should be encouraged to develop a system that enables the adoption of corrective measures inside public administrations before the "whistle-blowing" stage, which is a procedure that ought to be protected, provided that it does not automatically affect the results of the investigation and the search for evidence.

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to be given through the use of communications technology such as video links or other adequate means. With respect to the protection of corruption crime victims, **Article 25 of the same convention** binds Member States to take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

3.3. Protection of Witnesses and Protection of Whistleblowers in Arab Countries

In the Arab region, a few countries started to reconsider the texts and procedures related to the protection of witnesses and whistleblowers, in reference to the increasing awareness about this important topic. While some might believe that the existing legislations which ensure protection for witnesses are sufficient, still the problem lies in implementation, and hence, in the institutional procedures and capacities.

Regarding the protection of whistleblowers in corruption offences, the prevailing view expressed the need to launch a serious workshop in the region in order to develop and enhance a modern system in this regard, including the transmission of new legislations, as well as the development of capacities and practical approaches. Despite the issuance of some laws in a few countries, there still are some procedures and measures which can be adopted to enhance this system.

In Yemen for example, Anti-Corruption Law No.36 of 2006 tackled the issue of protecting whistleblowers. In Article 24, the law binds each person aware of a corruption offence to report and submit all the information to the competent authority for validation and the adoption of the necessary legal procedures. The same article binds the authorities to take the initiative and commence inquiries and investigations into the corruption crimes published on different media outlets. The law obliged the Supreme National Commission for Combating Corruption in Article 27 to ensure "the legal, occupational and personal protection to the witnesses, experts and whistleblowers in corruption crimes". However, it put off the definition of protection procedures and special measures to a list that would be set up for this issue.

In Jordan, the Anti-Corruption Authority Law of 2006 stipulated in Article 7 that the Authority has the "powers to conduct the necessary inquiries to follow up on any corruption case based on its own initiative or based on information emanating from any party." Yet, until today, no law has been promulgated or no measure has been adopted to enhance the protection that is supposed to be ensured to witnesses and whistleblowers in corruption crimes.

In mid-2008, a law to reward the informants was promulgated in Iraq. Article 1 states that the purpose behind this law is to "encourage those who provide reports or information that may lead to the recovery of the assets and funds owned by the State and the public sector, and the arrest of perpetrators and the adoption of legal procedures; in addition to and whoever gives information about cases of administrative and financial corruption, by rewarding the informant. The law cites rewards for public officials and civil servants and for anyone who gives information about cases of administrative and financial corruption.

In Algeria, Law No. 01/06 on Prevention and Combat of Corruption tackled the protection of witnesses and whistleblowers. Article 45 provided for the protection of witnesses, whistleblowers and victims through imposing imprisonment and fine on any person who resorts to revenge or intimidation or threat in any means and under any

form against the witnesses, experts, victims, whistleblowers or their family members and other persons close to them. Article 47 of the same law provided for imprisonment and fine in case of non-reporting of corruption offences. This article applies to every person who knows, in the course of his profession or job about a crime stipulated in the Anti-Corruption Law, but fails to report it to the competent authorities at the proper time.

Moreover, in Lebanon, work is underway to prepare a draft law for the protection of whistleblowers, that tackles the nature of disclosure that would ensure protection, the procedures which should be adopted in this framework, as well as the rules relevant to the protection and guarantees which whistleblowers and corruption victims receive, and the compensation and the rewards which whistleblowers deserve.

This quick overview shows that some Arab countries have taken real steps towards enhancing the protection of witnesses and whistleblowers in the framework of efforts to fight corruption. However, in light of the lack of capacities, the insufficient legal and institutional frameworks and shortage in information on relevant issues, the efforts to implement UNCAC remain greatly incomplete. Therefore, examining this topic would provide significant knowledge and experience in this regard, in light of what international conventions encourage, with respect to offering technical and mutual help among countries. Paragraph (i) of Article 60 of UNCAC states:

> *Each State Party shall, to the extent necessary, initiate, develop or improve specific training programs for its personnel responsible for preventing and combating corruption. Such training programs could deal, inter alia, with the Methods used in protecting victims and witnesses who cooperate with judicial authorities.*

In this regard, ACINET can lead a significant role through promoting knowledge of decision makers by supporting cognitive networking activities with their counterparts, and through holding workshops and specialized training sessions on programs for the protection of victims and witnesses. Such workshops and trainings would guarantee the participation of specialized international experts in these topics.

4. Regional Workshop Programme

Based on the aforementioned, it is obvious that enhancing the capacities to draw up, implement and carry out mechanisms and special programs for the protection of witnesses and whistleblowers efficiently is a major element of UNCAC and a basic pillar of the system to combat crime in general. Hence, joining the international and regional efforts in this regard and benefiting from previous experiences would be useful to countries wishing to develop their frameworks in order to promote their capacities to combat crime in general, and corruption, in particular.

In this regard, the regional workshop to be held on April 2-3, 2009 in Rabat (Morocco) constitutes the first of its kind in the Arab World on this level, and is the first ACINET activity in 2009.

The workshop is organized according to the following:

4.1. First Session: Introduction to Witness and Whistleblower Protection

This session will be presenting an introduction on the subject of witness and whistleblower protection, as defined by the UN convention against Corruption (UNCAC), in addition to defining the categories requiring protection such as witnesses, experts, victims, collaborators with justice, and whistleblowers. Furthermore, the session shall aim at addressing the standards for witness and whistleblower protection, in light of international standards and best practices. It will further define the concept of legal protection of witnesses and legal protection of whistleblowers in accordance with the provisions presented in Articles 8(4), 25, 32, 33, and 37 of UNCAC, and related Articles presented by the United Nations Convention on Transnational Organized Crime (UNTOC).

4.2. Second Session: The State of Witness and Whistleblower Protection in Arab Countries

This session will shed light on the practical status of the protection of witnesses and whistleblowers in Arab countries and the challenges in this regard. Members of the Arab Governmental Experts Group (AGEG)[4] for self assessment of UNCAC, and Arab experts representing the official parties concerned with combating corruption, which are also members of ACINET, will demonstrate the legislative and practical experience of their countries in terms of the protection of witnesses and whistleblowers. They will discuss whether such protection programs do exist in the Arab region, and the extent to which these should be developed on the level of legislation and institutional building, training, and other.

4.3. Third Session: Protecting Witnesses, Experts, Victims and Collaborators of Justice: Approaches and Challenges

This session will illustrate and discuss the main elements of these regulations and the best practices, in addition to presenting practical experiences in this context. International experts will present the European experience in the protection of witnesses and collaborators with justice, and will review the successful experiences and lessons learnt from developed countries in this field. In addition, part of the discussion will be allocated to the study of a particular situation in a particular country, with relevance to the protection of witnesses, experts, victims, collaborators with justice.

[4] AGEG, established in December 2007 constitutes the nucleus of cognitive exchange on the regional level regarding issues relevant to combating corruption and promoting transparency in the framework of the good governance initiative. So far, it has included experts from 17 Arab countries. It might be expanded to include other countries soon. With the support of UNDP and in cooperation with UNODC, those experts will meet in more than one workshop and in more than one event in the coming three years to contribute to the efforts of combating corruption in the Arab region.

4.4 Fourth Session: Protecting whistleblowers: Approaches and Challenges

Session four will present and discuss the necessary requirements to produce effective legislations for the protection of whistleblowers, in addition to the requirements of developing and activating integrated systems for this purpose. This axis will also assess and discuss successful and practical experiences and lessons learnt from developing countries in the area of whistleblower protection. In addition, part of the discussion will be allocated to the study of a particular situation in a particular country, relevant to the protection of whistle-blowers.

5. Conclusion

It is expected that the regional workshop will provide the basis to develop and launch a series of activities to support the protection of witnesses and whistleblowers in the Arab region. These activities seek to enhance the knowledge of policymakers and practitioners in this regard, based on relevant international principles and standards, and by benefiting from best practices and practical experiences in countries within and outside the region.

Another objective is to provide a useful basis for research on reform and modernization in this area, and to enhance a more accurate understanding of these needs. This workshop will contribute to setting the general framework to carry out a specialized study on the protection of witnesses and whistleblowers, based on a comparative approach and taking into consideration the international legal framework for the protection of witnesses and whistleblowers. Moreover, the study is expected to demonstrate various approaches and experiences in this regard, and provide technical recommendations and policy options for the Arab countries.

This regional workshop serves the overall aim of ACINET and its strategic objectives, through providing a unique opportunity for sharing knowledge and experiences among Arab countries, and between them and their peers from other countries as well international expertise, and through contributing to knowledge and capacity development in Arab countries regarding what they consider as priorities for promoting integrity and combating corruption.