

DISCUSSIONS AND RECOMMENDATIONS

The discussion sessions were chaired by Mr. Claro Arellano, Prosecutor General of the Republic of the Philippines.

Mr. Haruhiko Ukawa, Deputy Director of UNAFEI, sat as Co-Chair, and Mr. Trimulyono Hendradi, from Indonesia, sat as Vice-Chair.

Topic (i): Effective legislation and measures to protect witnesses.

Regarding effective legislation, the participants addressed the benefits of accession to the UNTOC and its Protocols and accession to the UNCAC. Ms. Kramer, the Visiting Expert from the UNODC, noted the importance of the conventions and protocols in furthering witness and whistle-blower protection in developing countries. The UNTOC, in Article 24 (1), requires States Parties to take appropriate measures to protect witnesses, and in Article 24 (2), provides for measures which may be included in such protective action. The UNCAC, meanwhile, in its Article 33, requires States Parties to consider taking appropriate measures to protect reporting persons. The participants later engaged in a comprehensive discussion of these issues under topics (iii) and (ii) respectively, below.

Regarding effective measures, Mr. Ukawa drew attention to the police protection procedures that can be employed in the ordinary course of police duties, without the need for special advanced measures for witness protection. There was a consensus that such regular police protection is important, especially for witnesses who are not subject to comprehensive witness protection programmes.

A roundtable discussion elicited the particular elements of witness protection provided in each country, such as testimony via video-conferencing and use of pre-trial statements as evidence. It transpired that many such procedures are not employed as a matter of course in the participating countries. The participants discussed procedural protection measures at the trial stage, particularly measures to reduce face-to-face confrontation with the defendant, which can be provided to any witness in the usual course of the criminal justice procedure.

Regarding the removal of the defendant during witness testimony, and video recording of testimony at the pre-trial stage, as available in Germany, the participants carefully considered the importance of balancing the protection of witnesses with the due process rights of the defendant.

Participants also considered at length the exclusion of the media from court hearings, as the presence of the media is necessary to ensure that justice is seen to be done, but over-exposure can make witnesses easily identifiable.

The participants next considered comprehensive witness protection programmes, where ordinary protection measures are not sufficient. Relocation, change of identity and financial assistance are provided by about half of the represented countries, while psychological support, medical care and protection of relatives are less widely available.

Mr. Ukawa drew attention to the opinion of Ms. Kramer that it was not the *location* (i.e. responsible agency) of the programme that was important, but rather its autonomy, independence and competence, and that these factors were vital to ensuring the neutrality of the programme.

Ms. Kramer noted that the confidentiality of such programmes is best served by their operational separation from normal police departments. Mr. Arellano emphasized the importance of confidentiality, which he said was the cornerstone of all witness protection programmes.

Following on from a detailed discussion of police involvement in witness protection programmes, it was nevertheless observed that witness protection is a tool for the prosecutor, and that the prosecutor is in the best position to determine the value of any evidence. Threat assessment is also important however, and countries must consider for themselves who is best placed to make that assessment.

The participants also noted that minor or child witnesses may require further special measures as per the United Nations Convention on the Rights of the Child.

Topic (ii): Mitigation of punishments and/or immunity grants for persons who provide substantial cooperation in an investigation or prosecution.

The UNCAC, in Article 37(2), requires States Parties to consider mitigating punishment in appropriate cases. Most of the represented countries do provide for mitigation of punishment, but few provide for immunity grants from prosecution.

Mr. Ukawa reminded the participants of the difference between mitigation or leniency and the provision of witness protection. While mitigation or leniency is given in exchange for truthful cooperation, witness protection is not: it simply removes obstacles to full cooperation by witnesses. If any witness protection programme is to have public support and legitimacy, it must not encourage lying or be seen to reward criminals. During court proceedings, the defence will raise questions about a protected witness's credibility and motivations – the prosecution must be able to ensure that this will withstand scrutiny.

Topic (iii): Criminalization and punishment of obstruction of justice.

As noted above, one of the UNTOC's most significant provisions is in Article 23, which requires States Parties to criminalize the obstruction of justice. Likewise, the UNCAC, in its Article 25, requires States Parties to criminalize the obstruction of justice.

The participants again discussed in a roundtable format whether or not their respective countries had criminalized the obstruction of justice, if so, how they had done it, and the punishment which exists for the crime. Half of the represented countries had criminalized the use of coercive means of obstructing justice, while fewer than half had criminalized the use of corrupt means.

Despite enacting such legislation to criminalize obstruction, the participant from Malaysia explained that the authorities there still encounter challenges in its enforcement.

Topic (iv): Effective legislation and measures to protect whistle-blowers.

The UNCAC provides a range of measures, preventive and enforcement, which are important for whistle-blower protection.

Ms. Zimmermann, the Visiting Expert from Germany, and Mr. Ukawa advised participants that it is important to remember that whistle-blower protection is a separate issue to witness protection. Whistle-blowers do not necessarily become witnesses in criminal proceedings, and the protection needed for whistle-blowers as such is more limited in scope. In Germany and Japan, whistle-blower protection falls under contract or labour law rather than criminal law.

A participant from the Philippines noted that this issue has a cultural dimension, as whistle-blowing is closely related to exposing corruption in government, and it is therefore important for countries which recognize that they must address corruption to protect whistle-blowers.

Similarly, to tackle corruption as effectively as possible, the participants agreed that whistle-blowing in both public and private sectors should be addressed.

Finally, it was noted that even if witness or whistle-blower protection is excellent, corrupt or intimidated judges can still fail the pursuit of justice and hence that good governance is essential. In this regard, Mr. Ukawa advised the participants of the publication of the Report of the First Regional Seminar on Good Governance for Southeast Asian Countries, held in Bangkok, Thailand, in December 2007, which addressed "Corruption Control in the Judiciary and Prosecutorial Authorities".