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PREVENTION OF CRIME AND TREATMENT OF OFFENDERS

UNAFEI'S RESOURCE MATERIAL SERIES

RESOURCE MATERIAL SERIES NO. 115

FEATURED ARTICLES

VISITING EXPERTS' PAPERS

UNAFEI'S EVENT ON REDUCING REOFFENDING WITH PNI EXPERTS

**The United Nations Asia and Far East Institute
for the Prevention of Crime and the Treatment of Offenders**

PREVENTION OF CRIME AND TREATMENT OF OFFENDERS

RESOURCE MATERIAL SERIES NO. 115

UNAFEI

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INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community this issue of *Prevention of Crime and Treatment of Offenders*, UNAFEI's Resource Material Series No. 115. After holding training courses online for two and a half years due to the Covid-19 pandemic, I am particularly pleased to inform you that, with the exception of the 179th International Training Course, all the other programmes covered in this issue took place in person in Tokyo, Japan.

On 22 October 2022, UNAFEI and the Asia Crime Prevention Foundation (ACPF) commemorated their 60th and 40th anniversaries, respectively, by hosting a symposium at the Ministry of Justice of Japan. The theme of the event was "Creating Inclusive Societies: Approaches to Reducing Reoffending". This issue contains the presentation papers of two of the lecturers and esteemed UNAFEI alumni: Dr. Matti Joutsen (Special Advisor, Thailand Institute of Justice) and Mr. Severino H. Gaña Jr. (International Director, ACPF).

This issue also contains the work product of the 179th International Training Course, on "Juvenile Justice and Beyond – Effective Measures for the Rehabilitation of Juveniles in Conflict with the Law and Young Adult Offenders", and the 24th UNAFEI UNCAC Training Programme on "Identifying, Tracing, Freezing, Seizing, Confiscating and Recovering Proceeds of Corruption: Challenges and Solutions". Both of these programmes were held to promote Goal 16 of the 2030 Agenda for Sustainable Development, which underscores the importance of governance and the rule of law in promoting peaceful, just and inclusive societies.

Also included is the Chair's Summary of UNAFEI's Event on Reducing Reoffending with PNI Experts, which was held at UNAFEI from 18 to 21 October 2022. The meeting addressed the theme of "Enhancing Technical Assistance to Reduce Reoffending and Promote an Inclusive Society".

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice, the Japan International Cooperation Agency and the Asia Crime Prevention Foundation, for providing indispensable and unwavering support to UNAFEI's international training programmes and other activities.

Finally, I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series.

March 2023

MORINAGA Taro
Director of UNAFEI

PART ONE

RESOURCE MATERIAL SERIES No. 115

Work Product of UNAFEI's 60th and ACPF'S 40th Anniversary Event

UNAFEI

VISITING EXPERTS' PAPERS

CREATING INCLUSIVE SOCIETIES: THE REDUCTION OF REOFFENDING IN THE CONTEXT OF THE UN CRIME PROGRAMME

*Matti Joutsen**

I. UNAFEI

Three things have brought us together at this Symposium. First, the celebration of the 60th anniversary of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI). Second, a shared interest in the reduction of reoffending. And third, the leadership displayed by Japan in the development of United Nations guidelines on this topic.

UNAFEI is the oldest institute in the United Nations Crime Programme Network, and has a rich legacy of activities over the past sixty years. For this reason, it has a special place in the UN Crime Programme.

UNAFEI's distinctive approach to promoting good practice in crime prevention and criminal justice has been the organization of training courses and seminars for practitioners. Especially over the past two decades, UNAFEI has expanded its technical assistance format to include, for example, bilateral and subregional seminars. It has also organized Workshops at UN Crime Congresses, thematic workshops at sessions of the UN Crime Commission, and ancillary meetings and side events, often in cooperation with Member States as well as with other institutes in the UN Crime Programme Network.

The establishment of UNAFEI in 1962 marked a significant growth of the capacity of the UN Crime Programme to provide technical assistance in the region, and beyond. From Japan's point of view, the training courses and seminars have the added benefit of providing the participants with information on Japanese experiences and developments in crime prevention and criminal justice, as well as insights into Japanese culture more broadly.

In 1982, the Asia Crime Prevention Foundation (ACPF) was established to support UNAFEI programmes, for example by co-organizing public lectures and study tours. The ACPF also provides a framework for the networking of UNAFEI alumni, both within Japan and internationally. This is an important function, considering that over the years, more than 6,200 criminal justice practitioners have participated in UNAFEI's courses and seminars, and many of them have moved on to play leading roles in crime prevention and criminal justice in their own country.

II. THE REDUCTION OF REOFFENDING IN THE UN CRIME PROGRAMME

The second thing that connects us here today is an interest in the reduction of reoffending.

Corrections in general has been the subject of the active international exchange of experience for over 150 years. It has been endlessly debated in academic and professional conferences, dealt with by the League of Nations, and specifically included in the UN Crime Programme from the outset.

Over the course of those 150 years, the theory of correctional treatment has evolved, and the priority given to it on the global level has changed. At first, the focus in criminology was on the individual offender. The goal was to diagnose the specific "cause of crime", which would guide the practitioner in proper treatment of the offender in a custodial environment.

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This explains why, when the UN Crime Programme was established seventy years ago, the topics identified by the General Assembly dealt almost *solely* with corrections: the assessment of offenders before sentencing; institutional treatment and different prison regimes; the training of correctional staff; pre-release treatment; and after-care.

From today's perspective, we might note the relative absence in that first formulation of the UN Crime Programme of such issues as the victim of crime, the work of the police, the prosecutor and the judge, and discussions of specific forms of crime such as property crime, violent crime, and economic crime. These would come, but many years later.

Similarly, the First UN Crime Congress, held in 1955, dealt almost solely with corrections. The five Congress themes were:

- the proposal for Standard Minimum Rules for the Treatment of Prisoners;
- selection and training of personnel for penal and correctional institutions;
- open penal and correctional institutions;
- prison labour; and (as the only non-corrections-related topic)
- the prevention of juvenile delinquency.

Since those early years, the approach to correctional treatment has changed.

- We are more aware of how the economic and social environment can lead an individual to crime,
- We are more aware of the potentially negative impact that the operation of the criminal justice system itself may have on the individual suspect or offender,
- There is a growing concern about prison overcrowding, and
- More attention is being paid to community-based sanctions and other measures, including restorative justice.

Each successive UN Crime Congress has reflected our changing understanding of, and our national priorities in, crime prevention and criminal justice, including corrections. For example, the Third and the Fourth UN Crime Congresses reflected a continuing shift towards viewing crime not so much as an issue of individual conduct, but more as an issue of economic and social development.

It can also be argued that the concerns and approach of the host country inevitably colour the discussions at a Congress. The Third UN Crime Congress, held in Stockholm in 1965, was the first UN Crime Congress to examine the specific question of reoffending: one of the themes was "Measures to combat recidivism." This was high on the agenda of the host government, Sweden.

The agenda items at the Fourth UN Crime Congress, held in Kyoto in 1970, dealt with social defence policies in relation to development planning, public participation in crime prevention and control, the Standard Minimum Rules on the Treatment of Prisoners, and the organization of research for policy development in social defence – issues which Japan has regarded as important in crime prevention and criminal justice. All of these issues have a corrections aspect.

Beginning during the 1980s and the 1990s, however, national representatives gathered at UN Crime Programme meetings in Vienna were increasingly voicing concerns about transnational crime as a security threat, to the extent that "domestic" criminal justice concerns such as corrections and the reduction of reoffending received less and less attention. This is reflected in the topics considered at meetings in Vienna. It is even more visible at the UN Crime Congresses. The Sixth UN Crime Congresses in 1980, and the Seventh UN Crime Congress in 1985 – forty years ago! – were the *last* UN Crime Congresses to have a separate theme specifically devoted to corrections.[1]

Thus, at the same time as the scope of the international debate on corrections and reoffending expanded

[1] These Congress themes were the deinstitutionalization of corrections and its implications for the residual prisoner (1980), and criminal justice policies in relation to problems of imprisonment, other penal sanctions and alternative measures (1985).

to include different concerns and new approaches, a second trend in the United Nations was towards relatively *less* discussion at the global level on these themes.

This is not to say that corrections disappeared entirely from the UN Crime Programme, or even from the UN Crime Congresses. Instead of being discussed at global meetings in Vienna or as separate themes at UN Crime Congresses, the topic was being dealt with by members of the Programme Network of Institutes, in Congress workshops, as well as in technical cooperation projects conducted by the UN Secretariat through its growing network of field and regional offices.

The Programme Network of Institutes, for example, has cooperated in organizing Workshops at the UN Crime Congresses, and several of these have been related to corrections. In Kyoto last year, the topic was "Reducing reoffending: Identifying risks and developing solutions." UNAFEI, of course, had the primary responsibility for this most recent workshop.

Several of the institutes in the Network, in addition, have been active in respect of corrections. For example, the Australian Institute of Criminology, HEUNI, ILANUD, the Korean Institute of Criminal Policy, the National Institute of Justice (in the United States) and UNICRI have published studies and technical reports on different aspects of corrections. The newest PNI member, the Thailand Institute of Justice, has been particularly active, as befits an institute established in particular to work on issues related to the pressing problems faced by women offenders.[2]

But there is one PNI member that has been pre-eminent in dealing with corrections: UNAFEI. Look over the long list of UNAFEI activities, and you will find at least one UNAFEI international training course or seminar on corrections *almost every single year*.

Arguably the most influential single UNAFEI contribution to the UN Crime Programme was the organization of one expert meeting.[3] A draft proposal formulated at that meeting, following further revision, led to the adoption by the UN General Assembly of the United Nations Standard Minimum Rules for Non-custodial Measures. In recognition of its provenance, it is officially known as the Tokyo Rules.

The Tokyo Rules are an example of UN standards and norms. This term refers to instruments adopted by the General Assembly and ECOSOC that are intended as benchmarks in the development of crime prevention and criminal justice. As noted on the UNODC website, "These standards and norms provide flexible guidance for reform that accounts for differences in legal traditions, systems and structures whilst providing a collective vision of how criminal justice systems should be structured."[4]

Over the years, a considerable number of UN standards and norms have been adopted. The first was the Standard Minimum Rules on the Treatment of Prisoners. Originally adopted in 1955, these have been updated in 2015. The revised version is known as "the Nelson Mandela Rules." In addition to the Tokyo Rules and the Nelson Mandela Rules, there are two other key standards and norms that deal with corrections, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), and the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

Standards and norms are commonly referred to as "soft law" instruments, in the sense that they provide guidance but are not legally binding. This does not mean that standards and norms are meaningless, and have no practical effect. Indeed, in many Member States, the Nelson Mandela Rules, the Tokyo Rules and the Bangkok Rules have been used as a basis in legal reform.

Especially during the 1990s, there was considerable debate in the UN Crime Commission over the status of the standards and norms, and over whether new instruments should be developed. Some key Member States argued that the UN supposedly already has a sufficient number of standards and norms, and the focus

[2] A background document is available on publications by the various institutes on corrections and related issues.
[3] Draft of Proposed United Nations Standard Minimum Rules for the Non Institutional Treatment of Offenders, UNAFEI, 1988.
[4] https://www.unodc.org/unodc/en/commissions/CCPCJ/ccpcj-standards-and-norms.html

of future activities should be on implementation on the national and local level, through technical assistance projects, training and research. Why should the UN do more on the global level?

There are several ways to answer that question. We are constantly learning from research and experience. The global exchange of experience helps to identify promising approaches, and how to adapt the standards and norms to the national and local context. Earlier standards and norms may need to be updated, as happened with the Nelson Mandela Rules. We may become aware of significant gaps in the standards and norms that need to be filled with new instruments, as happened with restorative justice, and with the treatment of women offenders.

Furthermore, the earlier UN standards and norms are essentially *minimum standards*, and deal, for example, with the rights of the defendant and the convicted offender. More recent standards and norms often take the form of *guidelines*. They are intended to be practical, to inform practitioners around the world as to what appears to "work," and what seems promising.

The Sustainable Development Goals, in turn, stress the importance of a cross-cutting approach to different fundamental goals. Member States should seek to balance social, economic and environmental sustainability. If we want progress in preventing and countering transnational crime, we need at the same time to work on the performance of the domestic criminal justice system, and that includes corrections. We still have a lot to learn from one another also on the global level.

III. PLACING THE PROPOSED GUIDELINES ON THE REDUCTION OF REOFFENDING INTO THE OVERALL CONTEXT OF JAPAN'S CONTRIBUTION TO THE UNITED NATIONS CRIME PROGRAMME

All of this helps to answer the question of why we need to continue working on United Nations standards and norms. This brings me to the third thing that I mentioned as having brought us together today: The leadership displayed by Japan in the development of UN guidelines on the reduction of reoffending. You may not be aware of the remarkable extent to which, time and time again, Japanese experts have been involved when key decisions have been made, not just on the draft guidelines, and not just on corrections, but more broadly in the UN Crime Programme.

The Meiji Restoration in Japan in 1868 came at an auspicious time, when broader international cooperation began to take shape in crime prevention and criminal justice. Practitioners and policymakers from different countries started to exchange their experiences and insights at international conferences. For example, Japan's diplomatic representative to Tsarist Russia, Minister Tokujiro Nishi, attended the Fourth Congress of the International Penal and Penitentiary Commission (IPPC), held in St. Petersburg, Russia, in 1890. Japan continued to send delegations to subsequent IPPC Congresses.

When the United Nations was established, its work on crime prevention and criminal justice was largely a continuation of the work of the IPPC. The broad outline of the work of the UN is familiar to many of you: the sessions of the UN Crime Commission, the organization of UN Crime Congresses (which continue the tradition started by the IPPC), the development of standards and norms, the activity of UNAFEI and the other institutes that form the UN Crime Programme Network, as well as the extensive technical assistance.

Before the Crime Commission was established in 1991, there was a much smaller body, the UN Crime Committee. Only an alternating handful of experts attended – at first, only four or five individuals at each meeting. Vice Minister of Justice Yoshitsuga Baba attended the meetings in 1965 and 1969, and Mr. Atsushi Nagashima (as the personal representative of Vice Minister Baba) attended the 1966 meeting. Considering that by 1960 the UN had one hundred Member States, it is fair to say that *during these early years, a disproportionately large number of UN Crime Committee participants were Japanese.*

Japanese experts have also been active in the UN Secretariat. In order to help prepare the Fourth UN Crime Congress, a Japanese civil servant, Mr. Minoru Shikita, was sent to the UN Secretariat, from 1967 to 1970. He served ultimately as the Officer-in-Charge of the Secretariat unit dealing with crime and justice, and

then as the Deputy Executive Secretary at the Fourth UN Crime Congress itself. He returned to the UN Secretariat during the 1980s, to serve as the Chief of the same UN Secretariat unit. In this capacity, he was responsible also for the organization of the Seventh UN Crime Congress in 1985.[5]

I have already mentioned that during the 1980s, some Member States wanted a change in the UN Crime Programme priorities. They argued that the growth of transnational crime required a more action-oriented UN Crime Programme, one which they believed was not being provided by the small UN Crime Committee, which – again in their view – seemed to be devoting much of its time to the drafting and adoption of "soft law" resolutions.

The discussions ultimately led to a General Assembly decision to restructure the UN Crime Programme in 1990 and 1991. Much of these discussions took place within the framework of the UN Crime Committee itself. I am sure that by now it would not surprise you to hear that the chairperson of the Committee at that decisive time was Japanese: Mr. Minoru Shikita, who took over this position in 1988.

The most notable and ultimately far-reaching structural change was that the UN Crime Committee was replaced by the United Nations Crime Commission. The Commission consists of 40 Member States, elected for three-year terms. So far, over a hundred Member States have served on the UN Crime Commission for at least one term. Of these countries, only six have been re-elected time after time, without interruption, since 1992: Brazil, China, Iran, the Russian Federation, the United States – and Japan.[6]

Moreover, Japan's active involvement is also reflected in the composition of the Bureau of the UN Crime Commission: the chairperson, three vice-chairpersons, and rapporteur at each session, who are responsible for guiding the discussions. There have so far been thirty sessions of the Commission. A Japanese representative was elected to the Bureau a total of six times, and in three of these cases, as chairperson.[7]

Thus, a disproportionately large number of UN Crime Commission participants have been Japanese, and in addition they have served disproportionately often in positions of responsibility.

The Fourteenth UN Crime Congress, held in Kyoto in March 2021, can be regarded as the epitome – so far – of the contribution of Japan to the UN Crime Programme. Its planning and organization showcased the contribution of many Japanese agencies and individuals (in particular the Ministry of Justice, the Ministry of Foreign Affairs, and UNAFEI).

Organizing any international conference requires a considerable effort. Organizing a major global conference in the middle of a global pandemic would seem the stuff of an organizer's nightmare. Due largely to the determined efforts of Japan, the Fourteenth UN Crime Congress was held successfully, although in a hybrid format, with only a few hundred participants on-site, and the vast majority participating online from around the world. The Kyoto Congress set the pattern for how UN hybrid conferences can be organized.

At earlier UN Crime Congresses, one of the most difficult tasks had been the negotiation of the Congress Declaration. The host government of Japan was well aware that in order to have the Kyoto Declaration adopted during the opening ceremony would require very careful preparation and wide consultations with Member States. At the same time, the host government wanted a Declaration that would identify the various priorities.

In this, Japan clearly succeeded. The Kyoto Declaration is remarkably substantive, balanced, well-structured and well-written.[8] No longer does transnational crime appear to dominate the UN Crime

[5] Shikita-sama has served in a number of roles in Japan and internationally. He has also been prosecutor, professor, Deputy Director and Director at UNAFEI, and chairperson of the ACPF.

[6] In addition, several countries have served with only a few brief "gap years." Among them are Austria, Canada, Indonesia, Mexico, Nigeria, Pakistan and Thailand.

[7] A Japanese representative served as chairperson of the UN Crime Commission at the sessions in 1996, 2017 and 2022. A Japanese representative served as vice-chairperson at the sessions in 2015, 2016 and 2021.

[8] Earlier Congress Declarations were negotiated over a protracted period of time in advance of the Crime Congress, and then during long hours extending at times late into the night at the Congress venue itself. As a result, the text tended at

Programme agenda; I would say that Japan's leadership has helped to restore a balance between transnational crime, and such domestic crime prevention and criminal justice concerns as corrections. The Kyoto Declaration also very clearly approaches crime and justice through the framework of the Sustainable Development Goals.

The text of the Kyoto Declaration is the result of consensus among Member States, but it can be seen to have a Japanese imprint. One can see nods to such Japanese institutions as voluntary probation officers. The concept of a "culture of lawfulness," which many foreign observers readily associate with Japan, had aroused some heated criticism by a few Member States largely on the grounds that it was not "agreed language." Nonetheless, it found its way into the Kyoto Declaration. And most importantly for today's Symposium, the Kyoto Declaration calls for work on the reduction of reoffending.[9]

Overall, Japan has emerged as one of the major contributors to the United Nations Crime Programme. Its contribution has been institutional, personal and substantive.

The institutional contribution of Japan has been seen in the sessions of the UN Crime Commission, and in the extensive technical assistance provided by UNAFEI. For example, the 6,200 practitioners who have attended UNAFEI events have helped to strengthen their respective criminal justice systems. Japan also has the distinction of being the only UN Member State to have organized two UN Crime Congresses, in 1970 and in 2021.

The greatest personal contribution of a Japanese representative to the UN Crime Programme is undoubtedly that of Mr. Minoru Shikita. However, I would like to draw attention also to the successful work of Minister of Justice Yoko Kamikawa in guiding the preparations for the Fourteenth UN Congress, and of H.E. Ambassador Takeshi Hikihara in the negotiations in Vienna, including the difficult work on the Kyoto Declaration.

Japan's approach to negotiations can be described as low-keyed and constructive, seeking to avoid confrontation and to find ways to take the Crime Programme forward. This has been helped by the fact that for over sixty years, Japan has been a consistently active participant in these negotiations.

Since decisions within the UN Crime Programme are made by consensus, it is not possible to definitely determine how Japan's participation has influenced the substance of the Programme. Nonetheless, it can be argued that over the years, several aspects of Japanese criminal policy have influenced the evolution of the UN Crime Programme. Among these are efforts to promote greater community involvement in crime prevention, such as through the use of voluntary probation officers; and to strengthen networking among practitioners in order to foster the international exchange of promising practice.

And today, we can recognize how the sustained Japanese interest in decreasing the prison population, improving institutional corrections, and expanding the use of non-custodial measures in order to reduce reoffending is helping us to formulate new UN guidelines.

My conclusion is that *Japan is a major global power in the UN Crime Programme, and is recognized as such by its peers, the other Member States.*

I can also say that all of this is a record of which Japan can be proud.

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times to be rather rambling, with the readability suffering from the layers of last-minute amendments. The structure and style of the Kyoto Declaration are much clearer and more straightforward.

[9] Note can also be made of the references to the establishment of regional networks for practitioners, and involving youth in crime prevention forums, topics that Japan has identified as areas in which it intends to continue contributing to the UN Crime Programme. At a side event organized during the 2022 session of the UN Crime Commission, Assistant Vice Minister Noriko Shibata described Japan's follow-up work to the Kyoto Congress as being based on three pillars, one of which was the work on the guidelines on the reduction of reoffending. In respect to regional networks for practitioners, in January 2022 Japan organized an Asia-Pacific regional forum on mutual legal assistance that brought together about 130 participants. A second meeting is planned for January 2023. In respect to youth, in October 2021 Japan organized the First Global Youth Forum on a Culture of Lawfulness. (Personal notes by the author from the 2022 session of the UN Crime Commission.)

INTERNATIONAL COOPERATION OF THE ASIA CRIME PREVENTION FOUNDATION (ACPF) AND THE CRIME PREVENTION PRACTITIONERS ASSOCIATION OF THE PHILIPPINES (CPPAP) FOR THE ENHANCEMENT OF CRIMINAL JUSTICE

*Severino H. Gaña, Jr.**

It gives me great pleasure to congratulate the Asia Crime Prevention Foundation (ACPF) Chairman Mikinao Kitada, ACPF Vice Chairman Terutoshi Yamashita, ACPF Programme Management Bureau Director Hiroyuki Yoshida, Members of the ACPF Board of Directors, Staff and Supporters of the ACPF on the occasion of our milestone 40th Anniversary, as well as, to the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders (UNAFEI) Director Taro Morinaga, Deputy Director Irie Junko, UNAFEI Professors and Staff on its 60th or Diamond year. My heart is happy with pride for having been a part of UNAFEI and ACPF's productive years in the field of crime prevention and treatment of offenders.

As mentioned in the introduction, I have been a Public Prosecutor of the Department of Justice in the Philippines, for 35 years. During that period, I handled many cases and endeavours, several of which I am very proud of, related to international cooperation for the enhancement of criminal justice, such as:

1. The development of the Philippines-Japan Halfway House in 1996;
2. Activation and Enhancement of Volunteer Probation Aides with the assistance of UNAFEI;
3. The conviction of Kosumi Yoshimi in Japan for murder and arson;
4. The conviction of Chow On Park alias Haruhiko Arai in Japan for Abandonment of a Corpse;
5. The rescue of Filipino women trafficked in Malaysia and the eventual conviction of the accused Singapore National Eugene Beng Hua Lim a.k.a Alfred Lim in Malaysia for Human Trafficking.

Some of you may wonder, "How did I, a humble public prosecutor in the Philippines, contribute to the success of the above-mentioned projects and cases?"

It started about 31 years ago, when I graduated from UNAFEI's 89th International Training Course with the theme "Effective and Innovative Counter-Measures Against Economic Crimes". Since then, I have been invited to UNAFEI's International Trainings and Seminars, as a visiting expert on various subject matters on Criminal Justice and subsequently at important events of ACPF. My membership and involvement in ACPF as one of its International Directors, is borne out of my association with UNAFEI. The bond goes long and is prolific.

At UNAFEI, I was able to discourse on important subject matters including that of transnational organized crimes, firearm regulation, human trafficking, whistle-blower security and protection, and criminal trials. My humble contributions to UNAFEI in the form of at least (10) presentation papers now form part of its published resource materials.

In those thirty-one (31) years, I have certainly gained a great wealth of information and experience that have moulded me into a more aware, concerned and passionate justice worker not only for my home country, the Philippines, but for the community of nations as a whole. I should say that UNAFEI played a big role in moulding me into what I am now and for whatever I have contributed to my country, and to some extent, to the international community.

* Attorney, Manila, Philippines.

I. THE PHILIPPINES-JAPAN HALFWAY HOUSE (PJHH)

My membership in the ACPF is especially highlighted by my having met and associated with the then eminent Mr. Minoru Shikita, ACPF's former Chairman that led to the creation of the first Halfway House in the Philippines, the Philippines-Japan Halfway House (PJHH) in 1996, which was constructed inside the National Bilibid Prison Reservation Compound in Muntinlupa City, Philippines. Japanese Architect Tadao Ando, a Pritzker Awardee, also donated his services and designed the facility. The PJHH is a cooperative venture between the Philippines and Japan, made possible through the help of the Asia Crime Prevention Foundation (ACPF) –Tokyo. The benevolence of the Asia Crime Prevention Foundation was coursed through its Filipino sister organization the Crime Prevention Practitioners Association of the Philippines (CPPAP).

After the construction of the facility in 1996, the ACPF and the Nagoya West Lions Club continued to donate resources and supported the implementation of programmes in the PJHH. Equipment, a vehicle and tools were acquired. Another 180-square-meter structure was built for the training and workshop and completed in November 2000 with funds provided by Nagoya West Lions Club, where regular training, workshops and vocational courses are being held.

Since 1997, the facility has been able to service 608 clients. Programmes and services include casework and counselling, productivity training, medical and health services, homelife services, skills training and vocational education and therapeutic community modality application modules.

For more than two decades now, the Philippines-Nagoya Japan Halfway House has served as a temporary home for both pre-release and released prisoners where they receive support for their physical, social, spiritual, including economic growth. Its programmes prepare its clientele of reformed prisoners to be reintegrated into the society through counselling, skills training and job placement.

II. ACTIVATION AND ENHANCEMENT OF VOLUNTEER PROBATION AIDES WITH THE ASSISTANCE OF UNAFEI

In the Philippines, the treatment of offenders and individuals who are in conflict with the law is undertaken by the government through the Department of Justice (DOJ), the Department of the Interior and Local Government (DILG), and the Department of Social Welfare and Development (DSWD). Through the Board of Pardons and Parole (BPP) and the Parole and Probation Administration (PPA), the DOJ formulates, implements and monitors programmes and activities for offenders on probation and parole. Enlistment and training of then Volunteer Probation Aides (VPAs) started in 1977, while the PPA was preparing for the operationalization of the national probation programme. Towards 1980, the VPA programme dwindled from around 2,123 VPAs to only 100, due to budgetary limitations in the reimbursement of travelling expenses.

Providentially, Japan, through UNAFEI, came to their rescue. Consistent with its objectives, UNAFEI intensified and enhanced its training programme on the prevention of crimes and treatment of offenders. The Philippine-Japan Joint Seminar on "Enhancing Community Involvement in Crime Prevention "which was held in Manila, in consultation with a visiting professor from UNAFEI, submitted to JICA a proposal on the project "Revitalization of the VPA System in the Philippines". Beginning in 2003, through the technical and financial assistance of UNAFEI, PPA revitalized its VPA system with due consideration of its past experience. Thereafter, UNAFEI through the facilities of JICA-Net, started a series of seminars involving Probation Officers in the Philippines that were further developed in a project called The Holistic Approach in the Treatment and Rehabilitation of Offenders. From then on, several trainings were conducted by UNAFEI and JICA in support of the project which lasted until 2010, benefitting hundreds of participants in the Philippines. The establishment of the local and national level VPA organizations is of vital importance for the effective promotion, utilization and sustainability of the VPA programme. The vision is to have an empowered VPA organization that will eventually be able to function independently and provide for their own needs.

This remarkable initiative has revitalized Volunteer Probation Assistance (VPA) in the Philippines which signifies the indispensable role of Japan, with the cooperation of UNAFEI and ACPF, in the development of sustainable treatment of offenders in the Philippines.

III. THE CPPAP

The Crime Prevention Practitioners Association of the Philippines (CPPAP) is a private association established to institutionalize the involvement of the private sector in crime prevention in the Philippines and to act as a conduit for professional, technical and logistical assistance from the Asia Crime Prevention Foundation (ACPF) in Tokyo. It was created upon the invitation of the ACPF-Tokyo to Philippine alumni of UNAFEI in order to establish an ACPF affiliate in the Philippines.

One of the programmes of the CPPAP is the management of the Philippines-Japan Halfway House (PJHH). This programme is jointly being managed by the CPPAP with the Department of Justice through the Bureau of Corrections and the Probation and Parole Administration.

IV. OTHER CPPAP PROJECTS

Aside from the management of the PJHH, the ACPF and CPPAP have branched out to other projects to include providing regular donations to the Correctional Institution for Women (CIW). Through their benevolence, hygiene kits (toiletries), basic medicines and vitamins were provided to senior clients of the CIW. The livelihood products of the CIW are also being sold during the month of March (women's month) in selected private and government offices.

In 2019, the ACPF and CPPAP intensified their partnership by branching out to different activities. On March 22, 2019, twenty-six (26) members of ACPF visited the selected criminal justice agencies to further assess the support they provide to persons deprived of liberty (PDL). It is noteworthy that most members of the delegation were Volunteer Probation Officers (VPOs) in Japan who helped facilitate the rehabilitation of offenders as well as the acceptance of the offender by the community. The group visited the Bureau of Corrections, the National Police Commission, the Parole and Probation Administration and the Correctional Institution for Women.

Currently, CPPAP and ACPF are conducting joint programme enhancement to heighten awareness in crime prevention, crime reporting and enhancing coordination with government authorities. To kick off the project, CPPAP and ACPF started the Crime Prevention Seminar for Japanese Businessmen in the Philippines which was conducted in cooperation with the Japanese Chamber of Commerce and Industry of the Philippines (TJCCIP).

V. THE KYOTO CONGRESS

It is with great honour and pleasure to recount that I was able to participate in the On-Line Ancillary Meeting during the 14th UN Criminal Justice (The Kyoto Congress) held in March 2021. This was made possible through the kind invitation of ACPF and UNAFEI wherein I reported "The Impact of International Training Courses and Seminars in UNAFEI for the Promotion of Rule of Law in Participating Countries".

The said Kyoto Congress adopted a "Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the achievement of the 2030 Agenda for Sustainable Development. Sections 10 and 12 of the said Declaration, acknowledge the significance of the cooperation of the NGOs to enhance multidisciplinary efforts to prevent and combat crime, as well as through the provision of technical assistance and capacity-building in crime prevention and criminal justice.

Consistent with the 2021 Kyoto Declaration, the CPPAP and ACPF undertake to further enhance its programme by providing and organizing trainings, seminars, workshops and conferences related to advancing crime prevention, criminal justice and the rule of law through the cooperation and coordination between law enforcement and other criminal justice institutions, and other governmental sectors, as well as to support their work, by engaging in and fostering multi-stakeholder partnerships with the private sector, civil society, academia and the scientific community, and with other relevant stakeholders as appropriate.

VI. JICA

One of the biggest and major strategic development partners of the Philippines is the Japan International Cooperation Agency (JICA) whose work in our country spans more than six decades of promoting economic growth, supporting socio-economic development, recovery or economic stability and addressing international challenges including achieving human security. The significance of the partnership is anchored on collaboration and cooperation under shared universal values including freedom, democracy, the rule of law, respect for basic human rights, and a free and open economy. In every challenge and issue faced by the Philippines, "JICA is always there to support and assist us". In fact, during the height of the Covid-19 pandemic, JICA was one of the leading organizations that helped the Philippines through its comprehensive assistance and holistic approach to fight the pandemic. JICA has also provided many opportunities to Filipinos to further their learning and development through trainings or study opportunities in Japan. Its training programme for young leaders benefited some 3,000 Filipinos over the years and, it is noteworthy to mention that JICA has provided support and assistance that paved the way to the attendance of more 330 Filipino participants to UNAFEI's courses. For this, my deepest and heartfelt gratitude to JICA.

VII. ACTUAL APPLICATION OF INTERNATIONAL COOPERATION

UNAFEI has not only served as a hub for learning, it has created a formidable network for the promotion of cooperation among members of the United Nations, especially among developing countries in the Asia and Pacific region.

In the case of the Philippines and Japan, for instance, these countries have yet to have an extradition or mutual legal assistance treaty. However, the absence of this formal agreement has not prevented us, the Philippines, from lending our needed cooperation on matters that involve enforcement of the law in Japan. I, for one, can attest to several instances in the past where I, in my capacity as an official of the Department of Justice, rendered assistance to the Government of Japan in some investigations being conducted in Japan but where witnesses and some forms of evidence were in the Philippines and must be secured in order to help in the investigation. Let me cite three (3) actual cross-border cases I personally handled:

A. Kosumi Yoshimi Case

This is a criminal case of a Japanese son who had his father killed for insurance purposes. He conspired with three Filipinos in Japan. The incident happened in Nagoya-shi, Japan. The Japanese son together with the three Filipinos helped each other to kill and burn his father and his house. One Filipino fled to the Philippines. Japanese Prosecutor Hama of Nagoya requested me to interview and take the written statement of the Filipino who fled to the Philippines to clarify some discrepancies, which I did in Prosecutor Hama's presence in the Philippines. At the conclusion of the trial proceedings in their cases, all three accused were found guilty for the murder of the Japanese father and arson for burning his house. The son was sentenced to life imprisonment and the two Filipinos were sentenced for fifteen years with labour.

B. The Case of Chow On Park, alias Haruhiko Arai

This is a case of a Japanese man who shot and killed another Japanese man. His cohort placed the corpse at the back of a vehicle and drove it to a parking lot in Osaka and left it there. For having done that, he was paid 30 million yen. He instructed his Filipina wife to bring the money to the Philippines. She kept the money inside safe deposit boxes in two Philippine banks. The Chief Prosecutor of Osaka requested assistance for the recovery of the money and dispatched two Japanese prosecutors to the Philippines. I sought the assistance

of our law enforcement to locate the Filipina wife and we succeeded. I convinced the wife to return the money, and I personally turned over the money to the Philippine Department of Foreign Affairs to be sent back to Japan. The money was finally used as evidence in connection with the pending criminal proceedings in Osaka, and Haruhiko Arai was eventually convicted and sentenced to suffer imprisonment for the crime of Abandonment of a Corpse that he had committed.

C. The Case of Singapore National Eugene Beng Hua Lim, alias Alfred Lim

On 30 June 2008, Marilyn Bagsit and Marilou Capistrano escaped from Eugene Beng Hua Lim a.k.a Alfred Lim agency office after enduring abuse and maltreatment. They asked the Philippine Embassy in Kuala Lumpur for assistance, and they were referred to the Department of Justice. Being the Chairman of the Human Trafficking Task Force, their case was assigned to me by our Secretary of Justice. I immediately contacted my good friend, whom I met in one of UNAFEI's training courses, then the Head of the Royal Malaysian Police, Police Inspector General Tan Sri Dato Musa Bin Hassan and also an officer of ACPF Malaysia. He acceded to my request for legal assistance, and I brought the two victims of human trafficking to his office in Kuala Lumpur. After hearing the testimonies of the victims, he immediately ordered the arrest of the said suspect. Malaysia's Attorney General's Chambers filed a criminal case against Lim in July 2009.

I personally brought the two victims to Kuala Lumpur during scheduled hearings. The High Court in Kuala Lumpur convicted Eugene Beng Hua Lim a.k.a Alfred Lim on two counts of human trafficking and sentenced him to 3 years of imprisonment for each count. I have also rescued three victims of human trafficking in Labuan, Malaysia, and one victim in Sabah through the cooperation of the Royal Malaysian Police Officials.

Ladies and Gentlemen, UNAFEI training courses and seminars that involve the participation of justice workers of diverse backgrounds, cultures and practices, are not only venues of discourse, learning, information exchange and international cooperation. They are in themselves powerful and effective occasions that promote and strengthen the rule of law not only in Asia but the world over. They not only capacitate participants in their distinct functions in the justice system but also inspire and motivate them to become better, if not the best, in their fields. The challenging times ahead in terms of crime prevention and solution demand that international cooperation and exchanges among countries, governments and civil or non-governmental organizations are sustained. For this reason alone, UNAFEI, with the support of ACPF, has been as worthwhile an undertaking as it is worth keeping.

VIII. CLOSING STATEMENT

In closing, let me assure you that CPPAP and your friends from the Philippines wish to convey the warmest felicitations and greetings for ACPF's and UNAFEI's anniversary celebrations. You will continue to be our avowed and treasured friends, and we would like to think that this celebration pays homage to the promotion of peace, friendship and good-neighbourhood. This occasion makes us realize that our areas of cooperation are beyond that of trade, commerce and economics. More importantly, we are exploring a long and binding partnership for the promotion of more humane treatment of offenders in both our beloved countries – Japan and the Philippines.

We are particularly appreciative of the continued support extended by the ACPF, particularly ACPF Nagoya, for the operation of the Philippines-Japan Halfway House and all the other projects for the rehabilitation of offenders. In all sincerity, we in the Philippines are so happy that the Japanese people have contributed towards enhancing the quality of life of our less fortunate members of society. We want to assure you that your effort has provided us with so much inspiration. We hope to see more of your kind in this world and pray that warm-hearted people like you have long and fruitful lives.

Lastly, collaboration among nations requires treaties and/or bilateral agreements such as extradition and mutual legal assistance. For those of you who are familiar with foreign relations, you know that these processes are costly and tedious. The institutions such as UNAFEI and JICA, and ACPF, a UN NGO in general consultative status with ECOSOC, are the silent facilitators for forging sustainable relationships

between nations. They are the cornerstones of partnership between countries, a bridge to cross-border relations, and a seed in which international cooperation blossoms.

For this, please accept our sincerest appreciation and thank you for inviting me to celebrate with you. This occasion will remain in my heart along with the treasures of my memories. Let me reiterate our gratitude to ACPF Chairman Mikinao Kitada for showing interest and concern to CPPAP in particular and to the Philippines in general.

PART TWO

RESOURCE MATERIAL SERIES No. 115

Work Product of the 179th International Training Course

UNAFEI

VISITING EXPERTS' PAPERS

REHABILITATING YOUNG ADULT OFFENDERS

*Garner Clancey**

I. INTRODUCTION

Youth justice systems in various jurisdictions around the world cater for children and young people up to the age of 18 years. While there are marked differences in the minimum age of criminal responsibility across jurisdictions ranging from seven to 14 years of age (or older in rare circumstances) in most jurisdictions (Cipriani 2009), there are greater similarities with regards to the upper age limit of youth justice systems. Eighteen years is generally the standard upper age for youth justice systems (Pease and Tseloni 1996), resulting in a delineation between youth justice and adult criminal justice systems.

There is no magical maturation that takes place at this age (Stone 2019). A young person on turning 18 years does not magically acquire greater insight, wisdom and restraint (Loeber and Farrington 2012). They are not blessed with any greater ability to plan or to understand the consequences of their actions. Consequently, this division between youth justice and adult criminal justice systems has been increasingly criticized and the cliff-edge between the two systems should be considered a slope (Stone 2019).

Developments in neuroscience have been especially relevant to these criticisms. Developments in neuroscience, termed the "neuroscientific turn" (Brewster 2020) suggest that brain development does not finish until mid-twenties, which suggests that the protections afforded to children and young people in youth justice systems might usefully be applied to young adults. Capacity for insight, understanding of consequences of behaviour and ability to plan, among other skills, develop over time as brain development and maturity occurs.

This paper will explore some of the key features of youth justice systems, noting that they are far from homogenous, and how many aspects of these youth justice systems might be extended to young adults. A small number of examples where young adult offenders are treated in broadly similar ways to young offenders will be considered here. The paper will then conclude with consideration of some of the challenges facing jurisdictions who would seek to apply some of the approaches and methods used in youth justice systems to those adult offenders.

II. COMMON KEY FEATURES OF YOUTH JUSTICE SYSTEMS

Numerous protections and provisions operate in youth justice systems in recognition of the greater vulnerabilities of children and young people (Richards 2011). For example, a minimum age of criminal responsibility is set in recognition that children below a particular age, determined in each jurisdiction, do not have the capacity to know that their behaviour is unlawful (Cipriani 2009). This means that young children cannot be held criminally responsible. Many youth justice systems have legislative provisions that protect the identity of the children and young people who enter their youth justice systems so that any stigma associated with their offending does not haunt them into their futures (Richards 2011). Many jurisdictions have legislative provisions that allow for offences committed as children or young people to be cleared at the time they turn 18 years of age, if not completely expunged from their criminal records (although some jurisdictions have seen attacks and dismantling of these provisions over time (Kurlychek and Shah 2018)). Many jurisdictions will have legislative guidance to protect children and young people in their dealings with police, including needing an adult to be present at the time of police interview and for children

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and young people to be held separately to adults in police cells (Council of Europe 2010). Legislative and policy directions establishing diversionary measures to keep children and young people out of the formal youth justice system have a long history in many jurisdictions (Scharf 1978) and have a general pattern of evidence that is positive (Wilson, Brennan and Olaghere 2018). Separate specialist children's courts operate to deal with matters involving children and young people (Cashmore 2013). This serves to reduce the potential for contamination through children and young people mixing with adult defendants. Legislation guiding the operation of youth justice systems routinely emphasizes rehabilitation, whereas adult sentencing provisions will invariably emphasize individual and general deterrence, among other sentencing principles (Stone 2019). Separate youth detention facilities ensure that children and young people remanded in or sentenced to custody do not interact with adult prisoners or inmates. This again serves to reduce risks of contamination (Richards 2011), as well as protecting vulnerable children and young people from violence and intimidation which might occur if co-housed with older inmates. These and other provisions and protections are hallmarks of youth justice systems which recognize the vulnerabilities of children and young people and their reduced culpability for their behaviour.

Many of these provisions are broadly consistent with the various international conventions and guidelines for children and young people in conflict with the law, such as the United Nations Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

III. "NEUROSCIENTIFIC TURN"

Significant developments in neuroscience in recent years have shed light on brain development, challenging previous assumptions about the period over which brain development occurs. There is now general agreement that brain development largely slows in the mid-twenties.

Prior to this time, there are a range of behaviours that might be impacted through the development of the brain, particularly the prefrontal cortex. Logical reasoning, abstract reasoning, and intellectual abilities develop through adolescence and late adolescence. Their development of logical and abstract reasoning potentially places young people as more vulnerable to peer pressure, less able to anticipate consequences or judge risks, and they have less life experience to draw on when making critical decisions (Schmidt, Rap and Liefaard 2020).

Moreover,

> Psychological functions that are relevant in the context of criminal culpability and responsibility, such as inhibition (constraining impulses) and the suppression of interferences (risk-taking behaviour), are not fully developed until after the 20th year of life … The higher executive functions of the brain, such as planning, verbal memory and impulse control, are only fully developed around the age of 25 (Schmidt, Rap and Liefaard 2020: 175).

This neuroscientific evidence helps, at least partially, explain the age-crime curve, which suggests elevated levels of offending from mid-teens to mid-twenties (Farrington 1996). This age-crime curve has a long history, with the first recorded example published in 1831 (Matthews and Minton 2018), and widespread replication, meaning that it goes beyond a single jurisdiction or socio-cultural context, although recent youth crime declines in various countries has prompted some to question the static nature of the age-crime curve (Matthews and Minton 2018).

Nonetheless, on the basis of the "neuroscientific turn", there have been calls to expand the types of provisions common to youth justice systems to young adult offenders.

IV. INITIATIVES FOR YOUNG ADULT OFFENDERS

With the growing recognition that young adults are also continuing to experience brain development, there have been calls to variously extend some of these common features of the youth justice system to young adults. Those in favour of doing so not only cite developments in neuroscience to support these claims, but also note changes in social dynamics that now see many young adults, at least in some parts of the world, experiencing a protracted adolescence, at least in the sense of remaining in education longer and staying in the family home until they are older (Arnett 2004). This, some argue, highlights a reduced taking of responsibilities that in prior generations would have been acquired much earlier in life. This, it might be argued, is evidence of the need to extend some of the protections from youth justice systems to those in the early twenties.

Some jurisdictions have adopted or are experimenting with initiatives reflecting these concerns. In Australia, there are a number of relevant examples of policies and systems established to respond to the needs of young adults. In the Australian state of Victoria, there has been a "dual track" system for many decades (Victorian Sentencing Advisory Council 2019). This system allows young adults (aged 18-21 years) to serve their custodial sentence in a Youth Justice Centre as opposed to an adult prison if the young adult is thought to be particularly impressionable, lacking in maturity, or thought to be vulnerable to undesirable influences in an adult prison. This system is thought to recognize the continuing development of the young adult's brain and that young adults also generally have good prospects of rehabilitation. Thus, the system also recognizes that adult prisons may not be the best at fostering such development and rehabilitation.

However, if a young adult does continue to offend and they are further incarcerated, they might be held in Port Phillip Prison in Victoria, which has a specialist youth unit ("Penhyn") for young adult inmates aged 18-25 years of age who are first time offenders with no criminal record (Victorian Sentencing Advisory Council 2019). Similar prison programmes operate in other Australian jurisdictions, in an effort to separate more vulnerable inmates from the general prison population.

Australian jurisdictions also have various forms of diversion and specialist courts (for example, drug courts and Aboriginal-specific courts, as well as specific treatment initiatives connected to courts for family violence and gambling) for those in possession of illicit drugs or whose offending is related to their drug use. Many of these are not specifically designed for young adults, but given the well established age-crime curve, see a significant proportion of participants being young adults. There have been calls from some Australian scholars to extend diversion interventions such as police cautions to adults (Thompson et al 2014), again with a focus on young adults. Similar arguments are raised as have been advocated by those in the youth justice area promoting diversion. Less formal interventions have been shown to be effective at diverting people away from formal criminal justice interventions and are cost-effective when compared with the costs of running court systems (Wang and Weatherburn 2018).

Beyond Australia, various jurisdictions have embraced similar provisions. The Netherlands has famously extended aspects of the youth justice system to capture young adults (up to the age of 23 years). Other European countries, such as Germany, have also adopted broadly similar provisions (Farrington, Loeber and Howell 2012). These arrangements provide greater flexibility to relevant courts when sentencing a young adult. This can mean that young adults are sentenced to serve a period of a custodial sentence in a youth facility rather than an adult prison (Schmidt, Rap and Liefaard 2020).

In addition to these somewhat system-level structures that treat young adults as still maturing and developing rather than completely matured individuals, there are a variety of correctional interventions that vie for attention. Some, such as the Risk-Needs-Responsivity (RNR) model, have amassed a body of positive empirical analysis, while others, such as the Good Lives Model, continues to be promoted for its more holistic framing of people in conflict with the law, but perhaps has less clear evidence of success (Lösel 2012). Each of these two major approaches are described briefly here.

The RNR model employs an offence-focused approach to rehabilitation activities. The RNR model stipulates that there are four criminogenic needs that have the greatest correlation with offending behaviour (the Big Four) – antisocial personality pattern, pro-criminal attitudes, social supports for crime and a history

of antisocial behaviour. Additionally, there are another four peripheral needs that contribute to offending behaviour – problematic family relationships and circumstances, problems at school or work, lack of pro-social leisure activities and substance abuse (Bonta and Andrews 2007).

Somewhat in contrast, the "Good Lives Model" emphasizes the importance of a holistic and therapeutic approach to rehabilitation (Ward & Maruna 2007). It focuses on "human goods", such as agency, quality relationships and a purpose-filled life, to reduce the risk of reoffending, therefore moving beyond a risk focus. This approach appeals to some criminal justice practitioners because it does not just frame young adult offenders as offenders but rather as people with wants, needs, skills and wishes.

Other approaches to young adult offender rehabilitation exist and individual jurisdictions will have their own approaches to rehabilitating young adult and other offenders. Models of this kind often arise from particular legal and cultural contexts and attempts to apply them need to consider these and related issues.

V. CHALLENGES OF EXTENDING PROVISIONS OF YOUTH JUSTICE SYSTEMS TO YOUNG ADULTS

While all of this makes good sense, I would argue that there are a number of challenges associated with making this shift toward less punitive interventions for young adult offenders. The first relates to the current state of youth justice systems in various jurisdictions. Many jurisdictions have youth justice systems that struggle to achieve the standards and norms established in various international conventions and are areas requiring substantial reform if they are to meet these standards (Reddy and Redmond 2018). This makes it difficult to contemplate expanding the system to capture young adult offenders. This is especially the case when many jurisdictions have, over time, seen a hardening of the distinction between youth justice and adult criminal justice systems. In the spirit of "law and order" and "tough on crime" policy (Garland 2000), some jurisdictions have passed laws to trigger transfers from youth justice to adult custody at 18 years of age, rather than keeping young adults in youth custodial facilities as might have been the case historically. In the Australian state of New South Wales, reports over many years highlighted the significant number of over 18 year-olds in youth detention. Legislative amendments now allow for transfer for more young people to adult custodial facilities when they turn 18. Thus, the movement to extend the reach and/or principles of youth justice systems to capture young adults is working against the recent tide of legislative and policy reform in some jurisdictions.

Secondly, youth justice systems are generally considerably more expensive for governments than adult systems (NSW Auditor General 2017). Extending the reach of a youth justice system potentially increases the costs for governments in administering the various youth justice and adult correctional systems. While there might be grounds to argue that providing greater opportunities for young adults to stay in the youth justice system ultimately saves money by delivering better reoffending outcomes and being potentially less traumatic, there will be challenges to mounting arguments for this to occur if it results in initial increased expenditure. Invariably, governments and treasury departments have finite resources and their willingness to extend youth justice-like provisions to young adults might be tempered by any additional costs.

Thirdly, youth justice custodial facilities grapple with managing the very different developmental needs of children and young people and struggle to separate them according to developmental need, offending history, status (that is remand versus sentenced to custody), gender and the like. These issues are likely to be exacerbated if older detainees are housed in custodial facilities with quite young children.

Moreover, various inquiries have shown that children and young people in custody have often experienced forms of assault and sexual assault (Royal Commission into Institutional Responses to Child Sexual Abuse 2017). Child safe guidelines and frameworks have been developed to protect children and young people in custody. Extending the age range of those held in the same facility will invariably create additional management and security challenges that will need to be carefully managed.

With these challenges in mind, I would argue that there is considerable merit to working to improve prevention and diversion measures to keep young adults out of the criminal justice system for as long as

possible. Noting that the age-crime curve suggests a significant decline in offending of those nearing 24 or 25 years, there is likely to be considerable human and financial benefit for prolonging their entry into the criminal justice system. This means working to extend existing diversionary measures, such as cautioning schemes, conferencing programmes, treatment referrals and the like to cover young adults. Simultaneously investing in prevention efforts and providing strong post-release support services for young people leaving custody will help in reducing the contact young adults have with the criminal justice system. Prioritizing employment and housing support in any post-release arrangements is important and ever more so with pressure on limited housing stock in some jurisdictions and poor employment outcomes for ex-detainees or inmates (Mills, Latimer, Gordon, Groot and Milne 2021).

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VIOLENCE AGAINST CHILDREN AND JUSTICE FOR CHILDREN IN THE CONTEXT OF NATIONAL SECURITY AND COUNTER-TERRORISM

*Hannah Tiefengraber**

I. INTRODUCTION: "VIOLENCE AGAINST CHILDREN" AS A FRAMEWORK FOR ACTION

When working with children[1] in contact with the justice system as victims, witnesses or alleged offenders, it can be observed that too often the obstacles in the children's journeys can be traced back to episodes of violence, neglect and ill treatment. Indeed, exposure to violence can hamper personal, intellectual and social development of a child, and studies have shown that long-term exposure to violence can put children at risk of becoming involved in crime and violence in the future.[2] It is therefore important to recognize that consequences of violence against children cause considerable harm not only to the child but also result in high costs for society as a whole. Globally, an estimated one billion children – or one out of two children worldwide – suffer some form of violence[3] each year.[4] The fact that many of those children may come into contact with the justice system as alleged offenders in the future provides a clear image of how sectoral approaches tend to fail to respond to the real challenges faced by these children. Children's right to protection from violence[5] is based on the knowledge that children present additional vulnerabilities as they are still developing physiologically, socially, emotionally, neurologically and cognitively. They differ from adults in their social and emotional maturity, and their ability to make judgments and decisions, and this means they are unlikely to understand the impact of their actions or to comprehend criminal proceedings.[6] This necessitates the special protections and treatment children are entitled to under international law.

The most recent child rights instrument approved by the United Nations General Assembly in 2014, the "United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice"[7] ("Model Strategies") were developed to help States to

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[1] Refers to every human being below the age of eighteen years as per Article 1, Convention on the Rights of the Child, (1989).

[2] Maxfield and Spatz Widom, "The Cycle of Violence: Revisited 6 years later" *Paediatrics & Adolescent Medicine* 150, 4 (1996), SOS Children Villages International, *The Right to Protection: Ending Violence Against Children* (2017), p. 11. Psychiatric Times, "From Victim to Aggressor" Psychiatric Times 24(7) (1 June 2007); Lam et al., "Will Victims Become Aggressors or Vice Versa? A Cross-Lagged Analysis of School Aggression" *Journal of Abnormal Child Psychology* (2017). WHO Regional Office for Europe, *The Cycles of Violence: The Relationship Between Childhood Maltreatment and The Risk of Later Becoming a Victim or Perpetrator of Violence* (EUR/07/50631214) (2007). Gómez, "Testing the Cycle of Violence Hypothesis: Child Abuse and Adolescent Dating Violence as Predictors of Intimate Partner Violence in Young Adulthood" *Youth & Society* 43(1) (2011).

[3] When referring to "violence" against children, it is important to stress that this is not limited to physical violence but that the Convention on the Rights of the Child adopts a broader definition and refer to "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse", see Convention on the Rights of the Child, (1989), Article 19.

[4] See WHO, Global status report on preventing violence against children 2020, (2020).

[5] The Convention on the Rights of the Child foresees an obligation for Member States to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". See Convention on the Rights of the Child, (1989), Article 19.

[6] The Committee on the Rights of the Child has referred to documented evidence in the fields of child development and neuroscience that indicates that "maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing". See Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019), para 22.

[7] United Nations Model Strategies and Practical Measures on Violence against Children, A/RES/69/194 (18 December 2014).

address the need for integrated violence prevention and child protection strategies. They acknowledge the complementary roles of the justice system on the one hand, and the child protection, social welfare, health and education sectors, on the other, in working together to create a protective environment and in preventing and responding to violence against children.[8] Using "violence against children" as a framework for action when it comes to the treatment of children recruited and exploited by criminal and armed groups, including terrorist groups, by the justice system is particularly relevant as these children may have been exposed to high levels of violence and should be treated and considered primarily as victims.

II. THE PHENOMENON OF CHILD RECRUITMENT AND EXPLOITATION BY CRIMINAL AND ARMED GROUPS, INCLUDING TERRORIST GROUPS

The recruitment and exploitation of children by criminal and armed groups, including terrorist groups, is a complex phenomenon that has been evolving considerably in the past years while new risks and challenges for children emerge. The Covid-19 pandemic has increased children's vulnerabilities in the context of new means of recruitment employed by these groups, such as through the use of online communication and grooming, as misinformation is amplified through social media.[9] Research indicates that children who have been recruited and exploited by criminal and armed groups, including terrorist groups, are subjected to extreme levels of violence, including forms of cruel, inhuman and degrading treatment.[10] Girls are particularly vulnerable to the threat and reality of sexual and gender-based violence.[11] Exposure to this level of violence has grave implications for children's development and well-being, as well as for the development of the communities in which they live. It can result in high risk of stigmatization and marginalization of children involved with such groups and generates challenging rehabilitation and reintegration needs.[12]

Children may become recruited or exploited for a wide variety of reasons and there are different types of factors that need to be taken into account. Negative circumstances and elements affecting the child that may be linked to the lack of socio-economic opportunities; marginalization and discrimination; poor governance and violations of human rights and prolonged and unresolved conflicts. Other factors or incentives that "pull" children towards the groups may include: a child's individual background and motivations; sense of collective grievances and victimization; influence of distorted and misused beliefs, political ideologies and ethnic and cultural differences; material inducements; and significant influence of leadership, social and family networks.[13] Most importantly, it should be highlighted that these groups deliberately choose to exploit children's vulnerabilities and recruit them as they may present particular strategic advantages to the groups, as well as "propaganda value".[14] Some children are recruited using brutal and violent methods such as kidnapping. Others may join due to material inducements because they have no other choice to survive, for protection, or because they feel a responsibility to defend their families and communities.[15] Peers and relatives may also have a strong influence on children's behaviour by serving as role models, and research shows that children are particularly susceptible to peer influence, including pressure to engage in antisocial behaviours.[16]

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[8] It is important to note that there is currently no universally accepted, comprehensive definition of "terrorism" or "terrorist group".

[9] UNICRI, Stop the Virus of Disinformation, the risk of malicious use of social media during COVID-19 and the technology options to fight it, (November 2020), p. iii.

[10] UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice Section*, (2017) p. 2.

[11] Ibid., p. 15. See also : O'Neil, Siobhan and Van Broeckhoven, Kato, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict*, New York: United Nations University, (2018), p. 72-73.

[12] See also: O'Neil, Siobhan and Van Broeckhoven, Kato, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict*, (New York: United Nations University, 2018), p. 199-200; 255.

[13] UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice Section*, (2017), p. 30-31.

[14] See also: O'Neil, Siobhan and Van Broeckhoven, Kato, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict*, New York: United Nations University, (2018), p. 45-46.

[15] See UNODC, *Prevention of Child Recruitment and Exploitation by Terrorist and Violent Extremist Groups: The Role of the Justice System: A Training Manual*, (2019), p. 22.

[16] Ibid.

Today, children recruited and exploited by criminal and armed groups, including terrorist groups, come into contact with the justice system and are being arrested, detained and prosecuted under counter-terrorism legislation in increasing numbers globally.[17] Frequently, punitive approaches are given prevalence over restorative justice approaches which may expose these children to further risks of violence.[18] A rights-based approach anchored in international law should be applied to make sure that all children, regardless of their potential status as alleged offenders and the gravity of the alleged offence, receive the care and protection they need and to ensure that their status first and foremost as victims of violations of international law is recognized.

III. JUSTICE FOR CHILDREN IN THE CONTEXT OF NATIONAL SECURITY AND COUNTER-TERRORISM: THE INTERNATIONAL LEGAL FRAMEWORK

Identifying the applicable international legal framework for children recruited and exploited by criminal and armed groups, including terrorist groups, can be difficult, especially in the national security and counter-terrorism context. There is a need for adopting a holistic approach to prevent and respond to violence against children perpetrated by these groups, recognizing the interconnection between different legal regimes, as international law offers responses that are valid and can lead to effectiveness.

In international humanitarian law one can find the basis of the prohibition of child recruitment and use in hostilities for children, as well as the right of special protection of children affected by conflict.[19] This prohibition of the use of children is later reprised and broadened in the Rome Statute,[20] whereas international human rights law provides the broadest prohibition of child recruitment.[21] The universal legal framework on counter-terrorism also promotes the prohibition of recruitment, and is increasingly recognizing the victimization of children.[22] Finally, United Nations standards and norms may also provide guidance on how to prevent and respond to this serious form of violence in the field of crime prevention and criminal justice.

IV. MEASURES TO PREVENT AND COUNTER CHILD RECRUITMENT AND EXPLOITATION IN THE CONTEXT OF NATIONAL SECURITY AND COUNTER-TERRORISM, ANCHORED IN INTERNATIONAL LAW

A. Prohibition of Child Recruitment and Use in Hostilities

Prohibition and criminalization of child recruitment and exploitation are crucial and can also be seen as means to prevent this serious form of violence against children, as it will trigger key obligations of the State

[17] See United Nations Global Study on Children Deprived of Liberty (2019), p. 640.

[18] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019), para 99.

[19] Article 77.2 of the First Additional Protocol to the Geneva Conventions prohibits the recruitment of children under the age of 15 years by the armed forces of the State and their participation in hostilities in the context of an international armed conflict, while Article 4.3 of the Second Additional Protocol explicitly prohibits the recruitment of children under the age of 15 years by non-State armed groups in the context of a non-international armed conflict.

[20] Rome Statute of the International Criminal Court (2002), Article 8.2 (b) (xxvi) concerning conscription or enlistment into the armed forces; and Article 8.2 (e) (vii) concerning conscription or enlistment into armed forces or armed groups.

[21] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, (25 May 2000), article 4. See also: Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("Palermo Protocol"), (15 November 2000).

[22] Universal conventions and protocols applicable to the fight against terrorism such as the International Convention for the Suppression of Terrorist Bombings, (1997), do not specifically address the issue of child recruitment and use by terrorist groups. However, they do specify that the obligation to criminalize and prosecute acts of terrorism applies not only to the immediate perpetrators of such offences, but also to those who instruct others to commit the alleged terrorist act. Several resolutions adopted by the UN General Assembly as well as the Security Council condemn child recruitment, see notably Security Council Resolution 1373(2001); Security Council Resolution 2178(2014), and General Assembly Resolution 70/291(2016).

in relation to ensuring children's protection through the provision of services,[23] and it allows to shift the blame from child victims to those who recruit and exploit children to hold them accountable.

Specific provisions of international humanitarian law prohibit the recruitment and use of children in hostilities by the armed forces of a State and by non-State armed groups in the context of armed conflict for children under the age of 15 years.[24] The prohibition of the recruitment for this age category can also be found in international human rights law.[25] At the same time, within the framework of international criminal law, the Statute of the International Criminal Court establishes as a war crime the conscription or enlistment of children under the age of 15 years into armed forces or armed groups, as well as their use to participate actively in hostilities.[26]

These provisions are complemented to protect children between the age of 15 and 18 years, whose recruitment is prohibited by the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[27] In addition, the Worst Forms of Child Labour Convention includes the forced or compulsory recruitment of children for use in armed conflict in the list of "worst forms of child labour". The Convention also specifies that the worst forms of child labour include "work which, by its nature or the conditions in which it is carried out, is likely to harm the health, safety or morals of children",[28] which may include participation in hostilities. Under this Convention, States Parties are obliged to take immediate and effective measures to ensure the prohibition and elimination of these worst forms of child labour (including criminalization)[29] as a matter of urgency.

B. Children Recruited and Exploited by Criminal and Armed Groups, Including Terrorist Groups, Should Be Considered and Treated as Primarily Victims

To understand why, according to international law, child victims of recruitment and exploitation by terrorist and violent extremist groups should always be considered and treated primarily as victims and the implications of this principle, it is important to recognize that no child recruitment can be regarded as truly voluntary.[30] The perception of child recruitment and exploitation as a voluntary act places the blame on the child and can have far-reaching consequences. It leads to a focus of public action against the child and not against the groups and individuals that are recruiting. Moreover, it can also lead to stigmatization and thus reduce the number of complaints to authorities against acts of recruitment, for fear of reprisals or sanctions.[31] It is therefore important to clarify the misconception of "voluntary recruitment" and recognize that there is also an inherent power imbalance between these groups, which deliberately target children for recruitment, and a child who is particularly vulnerable to these recruitment tactics.[32] Indeed, the United Nations Special Representative of the Secretary-General for Children and Armed Conflict stated that recruitment processes are often characterized by elements of both coercion and voluntary recruitment, making such distinctions extremely difficult.[33] This has also been recognized by the International Criminal Court in the *Lubanga Dyilo*

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[23] See UNODC, *Prevention of Child Recruitment and Exploitation by Terrorist and Violent Extremist Groups: The Role of the Justice System: A Training Manual*, (2019), p. 65.

[24] Article 77.2 of the First Additional Protocol to the Geneva Conventions which prohibits the recruitment of children under the age of 15 years by the armed forces of the State and their participation in hostilities in the context of an international armed conflict, while Article 4.3 of the Second Additional Protocol explicitly prohibits the recruitment of children under the age of 15 years by non-State armed groups in the context of a non-international armed conflict.

[25] Convention on the Rights of the Child, (1989), Article 38.

[26] Rome Statute of the International Criminal Court (2002), Article 8.2 (b) (xxvi) concerning conscription or enlistment into the armed forces; and Article 8.2 (e) (vii) concerning conscription or enlistment into armed forces or armed groups.

[27] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, (25 May 2000), article 4.

[28] International Labour Organization, Worst Forms of Child Labour (No. 182) (1999), Article 1.

[29] Worst Forms of Child Labour Recommendation, 1999 (Recommendation No. 190).

[30] UNODC *Roadmap on the Treatment of Children Associated with Terrorist and Violent Extremist Groups* (2019).

[31] UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice Section*, (2017), p. 26-27.

[32] See UNODC, *Justice for Children in the Context of Counter-Terrorism: A Training Manual*, (2019), p. 28. See also: O'Neil, Siobhan and Van Broeckhoven, Kato, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict*, (New York: United Nations University, 2018), p. 45-46.

[33] Hamilton C., and Dutordoir L., *Children and justice during and in the aftermath of armed conflict*, Working Paper No. 3. New York: Office of the Special Representative of the Secretary-General for Children and Armed Conflict, (2011), p. 28.

case, where the Court found that the distinction between voluntary and forced recruitment of a child is not only legally "irrelevant" but also superficial in practice.[34]

The principle that these children should be considered and treated primarily as victims has been set by the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles").[35] In addition, in 2018 the Security Council reinforced the principle by emphasizing that "children who have been recruited in violation of applicable international law by armed forces and armed groups and are accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law".[36] This has also been reiterated by the Committee on the Rights of the Child that urged Member States to consider alternatives to prosecution and detention, including measures focusing primarily on children's reintegration while applying due process for these children.[37]

C. Child Recruitment and Exploitation as a Form of Human Trafficking

The Palermo Protocol links exploitation of children directly to their recruitment and other acts of trafficking. Its Article 3 defines trafficking in persons inter alia as "the recruitment (…) of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of another person, for the purpose of exploitation."[38]

When committed against adults, trafficking requires the establishment of an element of "means", including the threat of force or other forms of coercion cited above, to achieve the consent of a person having control over another person. Nevertheless, the presence of the "means" element is not required in the case of child trafficking.[39] The fact that the Palermo Protocol does not require this element to be established for children indicates that the consent of the child, when it comes to recruitment, should always be considered irrelevant. Where there are indications of exploitation and trafficking of children, it is understood that the child victim was not free to make clear and informed choices regarding, for example, any possibility of escaping from the trafficker or finding other alternatives. The principle of non-penalization or non-punishment of victims of trafficking, including children, has been recognized in regional and international legal instruments[40] and is particularly important to consider when defining the criminal justice response for children accused of offences in the context of their recruitment and exploitation. The recognition of child recruitment as a form of trafficking shows how different forms of violence against children are inherently linked.

D. Detention as a Measure of Last Resort

As per international law, a child should only be in detention as a measure of last resort and for the shortest appropriate period of time.[41] Still, many countries continue to deprive children of their liberty. According to the 2019 United Nations Global Study on Children Deprived of Liberty, there are approximately 1.5 million children deprived of liberty per year on the basis of a judicial or administrative decision. It found

[34] In its judgment to the Lubanga Dyilo case, the ICC has agreed that the distinction between voluntary and forced recruitment is superficial in practice in the context of armed conflict. See International Criminal Court (ICC), Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, (14 March 2012), para. 612.

[35] See UNICEF, *The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, (February 2007). This legal instrument is non-binding but nevertheless represents a strong commitment by Member States.

[36] Security Council Resolution 2427 (2018).

[37] Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the justice system*, 18 September 2019 (CRC/C/GC/24), para 100.

[38] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, (15 November 2000).

[39] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, (15 November 2000)., article 3(c).

[40] The principle of non-penalization of trafficked persons is recognized in regional and international legal instruments, including : Council of Europe Convention on Action against Trafficking in Human Beings, art. 26; Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principles 7 and 8; Basic Principles on the Right to an Effective Remedy for Victims of Trafficking in Persons, article 7 (f) (A/69/269, annex); United Nations Global Plan of Action to Fight Human Trafficking (General Assembly resolution 64/293, annex).

[41] Article 37(b), Convention on the Rights of the Child, (1989).

that children have been detained in the context of national security in 31 countries and, while at least 35,000 children are deprived of liberty in situations of armed conflict, at least 1,500 children are detained in the context of national security in countries without conflicts on their own territories.[42]

There is a significant body of research demonstrating the harms that children experience when they are deprived of their liberty, that can hinder their rehabilitation and their ability to assume a constructive role in society, as per article 40 (1) of the Convention on the Rights of the Child. According to the Global Study, the impact on children is "inherently distressing, potentially traumatic and [has an] adverse impact on mental health, often exacerbated by poor treatment and unsatisfactory conditions."[43] Detention in itself disrupts the positive support networks that children need to rehabilitate and reintegrate including their family and social relationships, and education and work prospects. It can have significant impacts on the children's security, their development and well-being.[44] In addition, children who are associated with criminal and armed groups, including terrorist groups, may be particularly vulnerable to violence by peers, staff of detention facilities or other adults, due to the stigma attached to national security and terrorism. There is often an assumption that these children represent a risk and should be subject to targeted measures such as: placement in solitary confinement; detention in special sections or facilities under severe security regimes; and being deprived of access to services and programmes such as access to vocational training and education.[45] Regardless of the offence committed, above all, detention of children should be used as a measure of last resort and for the shortest appropriate period of time, regardless of the gravity or nature of the alleged offence.

E. Primacy of Child Justice Law for All Children in Conflict with the Law

Article 40 of the Convention on the Rights of the Child provides for an obligation of States Parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.[46] The Committee on the Rights of the Child stressed that trials of children by military tribunals and State security courts are a breach of rights for children, who should always be dealt with in specialized child justice systems.[47] This means that children over the minimum age of criminal responsibility and under the age of 18 must be dealt with within a specialized system irrespective of the severity of the offence that a child is charged with. In this regard, no exceptions should be permitted according to international law, even for the most serious offences, and a specialized system should be the primary jurisdiction for children charged with terrorism-related offences.[48]

A specialized child justice system entails notably the establishment of a minimum age of criminal responsibility as well as the availability of a variety of dispositions, such as "care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".[49]

F. Prosecution as a Measure of Last Resort and the Application of Alternatives to Judicial Proceedings (Diversion)

The Committee on the Rights of the Child has urged Member States to refrain from charging and prosecuting children for expressions of opinion or association only, as well as to consider non-judicial measures that are focused on reintegration as alternatives to prosecution and detention for children recruited and exploited by criminal and armed groups, including those designated as terrorist groups, and children charged in counter-terrorism contexts.[50]

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[42] Nowak, M., *United Nations Global Study on Children Deprived of Liberty*, (2019), p. 640; 659.
[43] Nowak, M., *United Nations Global Study on Children Deprived of Liberty*, (2019), p. 261.
[44] See also: ICRC, *Children in Detention*, Brief, (November 2014), p. 16.
[45] See UNODC, *Justice for Children in the Context of Counter-Terrorism: A Training Manual*, (2019), p. 110.
[46] Convention on the Rights of the Child, (1989), Article 40(3).
[47] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019), para 96.
[48] See UNODC, *Justice for Children in the Context of Counter-Terrorism: A Training Manual*, (2019), p. 48.
[49] Convention on the Rights of the Child, (1989), Articles 40(3) and 40(4).
[50] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019), paras 100-101.

Alternatives to judicial proceedings, or diversionary measures, aim to channel or divert children in conflict with the law away from judicial proceedings through the development and implementation of procedures and programmes that foster their rehabilitation and reintegration.[51] According to international law, they should be, whenever appropriate and desirable, available for children, providing that human rights and legal safeguards are fully respected.[52] The Global Counterterrorism Forum (GCTF) has produced recommendations which emphasize that successful alternative interventions such as diversion can reduce the risk of public safety and security by effectively rehabilitating and reintegrating individuals so that they can become productive members of society.[53] Nevertheless, applying diversionary measures for children in terrorism-related proceedings can be hindered by different factors such as justice professionals' lack of knowledge and resources to implement these measures effectively or legislation restricting the use of diversion to certain types of offences. Given the seriousness of crimes and threats posed to national security in the context of counter-terrorism or organized crime, many justice professionals may also consider that diversionary measures are not suitable as a response to children suspected of such offences.[54]

However, it is important to stress that there are no limitations under international law on the use of diversion, and it can and should be used when children are suspected of terrorism-related offences as much as for other serious offences whenever deemed appropriate.[55] Diversionary measures, including restorative justice measures, should not be perceived as "soft measures" but can be ways most adapted to addressing the root causes of the child's involvement with crime and violence. Individual assessment of children in conflict with the law can be a useful tool for strategic and planning considerations, keeping in mind that diversion from judicial proceedings can be introduced at any stage of the justice process by different justice professionals, depending on the conditions set by national law.[56]

G. Rehabilitation and Reintegration as Primary Objectives for Children Recruited and Exploited by Criminal and Armed Groups, Including Terrorist Groups

As per the Convention on the Rights of the Child, States shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, recruitment etc.[57] When it comes to children in conflict with the law more specifically, the Convention also stresses the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[58] This is particularly important also in the context of justice responses to children recruited and exploited by criminal and armed groups, including terrorist groups, in view of the serious forms of victimization suffered by these children.

The "rehabilitation" or recovery of child victims of recruitment and exploitation by criminal and armed groups, including terrorist groups, includes medical and psychological care and required legal and social services to be provided to children for them to recover from physical and psychological harm and help them resume a normal life.[59] The Optional Protocol on the Involvement of Children in Armed Conflict[60] also calls on States to provide assistance to victims of child recruitment for the purposes of their rehabilitation.

On the other hand, "reintegration" refers to the safe process through which a child victim and/or a child who has been in conflict with the law transitions back into the community, recovers physically and psychologically and acquires attitudes and behaviours conducive to assuming a constructive role in society[61]

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[51] UNICEF, Toolkit on Diversion and Alternatives to Detention (2009), Glossary of Terms.
[52] Convention on the Rights of the Child, (1989), Article 40(3)(b).
[53] GCTF, Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses, (2015).
[54] See UNODC, *Justice for Children in the Context of Counter-Terrorism: A Training Manual*, (2019), p. 74.
[55] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019), para 100.
[56] See UNODC, *Rehabilitation and Reintegration of Child Victims of Recruitment and Exploitation by Terrorist and Violent Extremist Groups: A Training Manual* (2019).
[57] Convention on the Rights of the Child, (1989), Article 39.
[58] Convention on the Rights of the Child, (1989), Article 40(1).
[59] See UNODC, Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary, (2009), p. 58 of the commentary in reference to article 29 (7) (c).
[60] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, (25 May 2000), Articles 6 and 7.
[61] This definition has been adapted from article 39 and 40 of the Convention on the Rights of the Child. It takes into account

in accordance with articles 37 (b) and 40 (4) of the Convention on the Rights of the Child. Challenges that need to be taken into account when it comes to ensuring effective rehabilitation and reintegration in the national security and counter-terrorism context may include the experience of violence of children, stigma and exclusion attached to the type of offence, as well as the impact of deprivation of liberty. Access to psycho-social support is an important part of a child's rehabilitation, as well as a precondition for reintegration.[62] It includes various forms of interventions such as life skills, emotional management and mentoring. A strengths-based approach to rehabilitation builds on pre-existing strengths of the child, helping the child develop new strengths and capabilities and may help her or him build self-confidence, learn to trust and develop new relationships.[63]

V. CONCLUSION

When it comes to the treatment of children recruited and exploited by criminal and armed groups, including terrorist groups, by the justice system, responses to the difficult questions often arising in the context of national security and counter-terrorism can be found in international law, as well as standards and norms. While children associated with these groups may have been exposed to extreme levels of violence and may therefore have special rehabilitation and reintegration needs, the international legal framework on justice for children should apply to all children, regardless of the gravity of the offence. It is important to recognize these children's status and treatment as primarily victims, irrespective of their potential status as alleged offenders. Moving away from punitive approaches towards child-sensitive justice approaches is key in order to address children's rehabilitation and reintegration needs, and to avoid lasting consequences for children's and society's development alike.

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[62] It includes various forms of interventions such as life skills, emotional management and mentoring. Ideally, psychosocial interventions should be combined with other interventions that address material wellbeing, health, education, and protection, and that build on local resources and coping mechanisms. See UNODC, *Rehabilitation and Reintegration of Child Victims of Recruitment and Exploitation by Terrorist and Violent Extremist Groups: A Training Manual*, (2019), pp. 23-30.

[63] See UNODC (2019), *Rehabilitation and Reintegration of Child Victims of Recruitment and Exploitation by Terrorist and Violent Extremist Groups: A Training Manual*, p. 132.

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PARTICIPANTS' PAPERS

IMPLEMENTING EFFECTIVE REHABILITATION AND COMMUNITY REINTEGRATION PRACTICES FOR YOUNG OFFENDERS IN SINGAPORE

*Tay Yan Lee Angeline**

I. BACKGROUND

This paper outlines Singapore's efforts to implement effective rehabilitation and Community Reintegration Practices for young offenders sentenced to Reformative Training Centre. Singapore's robust criminal justice system consists of tough laws against crime, highly professional and prosecutorial agencies such as the police force, the Corrupt Practices Investigation Bureau and the Attorney-General's Chambers, as well as our independent, efficient, and effective judiciary.

In addition to efforts to prevent and fight crime, Singapore has also focused and invested resources in the rehabilitation of offenders, especially juvenile and young offenders. As a nation, Singapore's response to youth offending has been to pursue a fine equilibrium in the management of juvenile offenders such that the justice and restorative models complement each other as mutually supportive elements of the juvenile justice system.

II. JUVENILE OFFENDERS IN SINGAPORE

A. Juveniles and Young Offenders in Singapore

In Singapore, persons aged 10 to under 16 years old are defined as "juveniles" while a person who is 14 years of age or above and below the age of 18 can be referred to as a "young person". The following principles and considerations underpin the rehabilitation of juvenile offenders in Singapore:

(i) Diversion from court process where possible and appropriate;
(ii) Institutionalization as the last resort;
(iii) The family as the basic building block of society and change agent;
(iv) The many helping hands approach to community rehabilitation.

Juveniles who have committed offences are not excused of accountability for their misconduct. However, principles of care, welfare and protection are in place through a continuum of preventive and rehabilitative services available for their respective circumstances. Community-based rehabilitation programmes such as the Community Service Order (CSO) and Probation Order are used to rehabilitate young offenders in the community. Residential rehabilitation programmes such as Juvenile Rehabilitation Centres and Reformative Training Centre (RTC) belong to the tail-end of the continuum, where RTC is seen as a last resort for the young person. The reformative training sentence is reformative in nature compared to an imprisonment sentence. Rehabilitation efforts in RTC have led to positive outcomes thus far and further elaboration will be shared in the subsequent sections.

Looking at the youth offending situation in Singapore, there was a 43.3 per cent fall in the number of youth offenders between 2010 and 2020. The number of juvenile and young offenders has been on a general downward trend in the past decade. It should be noted, however, that the decline in the number of youth offenders between 2019 and 2020 might be partly due to the temporary impact of the Covid-19 pandemic and the resulting movement restrictions, which might have disrupted the commission of certain types of crimes.

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Despite the downward trend, from 2016 to 2020, three types of offences were observed to be on an upward trend namely shop theft, cheating and related offences, and drug abuse. Across the four years, there were four times the number of male young offenders compared to female young offenders.

B. Singapore's Evidence-informed Rehabilitation and Reintegration

In Singapore, we believe every offender, especially a young person, has the potential to live a crime-free life and be a contributing member of society. This first part of the paper will discuss Singapore's rehabilitation approach and the factors necessary to make it work.

Firstly, to help offenders desist from crime, the Singapore Prison Service (SPS) adopts evidence-informed rehabilitation and reintegration practices. Singapore's rehabilitation system is based on both international and locally conducted research that is contextualized. Our experience highlights that a throughcare approach that includes intervention programmes conducted during the in-care phase would be better supported by the pre-release preparation and reintegration case management in the community.

Secondly, SPS designs psychology-based correctional programmes (or PCPs),[1] drawing from evidence-informed models in the corrections literature such as from the Risk-Need-Responsivity (RNR) model,[2] the Good Lives Model[3] (GLM) and Desistance Theory.[4] As each young person has unique needs, differentiated rehabilitative intervention programmes are aligned to various rehabilitation needs of the RTs.

Thirdly, Singapore applies the principles of implementation science, which is the scientific study of methods to promote the integration of research findings and evidence-informed interventions into policy and practice. As part of implementation science, we evaluate our programmes on both process and outcome.

III. REFORMATIVE TRAINEES (RTS)

A. Minimum Detention Period

Research has shown that youths with shorter institutional stays were found to have lower recidivism rates[5] and that longer detention may work against their rehabilitation. A minimum detention period of six or twelve months followed up by community supervision are legislated for young persons sentenced to RTC. The release of the trainees to community supervision will be subject to their progress and suitability for release, such as: responsivity to rehabilitation, family support, and aftercare arrangements. While the recidivism rate for 2019 was recorded to be lower than the previous years, SPS continues to observe and monitor the revised RT Regime's impact on supporting rehabilitation and successful reintegration of the young offenders.

B. Profile

According to Erikson's stages of psychosocial development, youths develop a sense of identity as they make the transition from childhood to adulthood. During this phase, youths may experience some role confusion and experiment with a variety of behaviours and activities as they seek to achieve an identity. These behaviours and activities may be risky as youths typically have problems anticipating consequences and controlling their impulses due to the under-development of the part of the brain that is responsible for

[1] PCPs play an important role in the rehabilitation of offenders, stimulating readiness to change in offenders and helping them understand the factors which contributed to their offending behaviours. These interventions provide structured learning and application of prosocial skills to aid the offenders in developing a reintegration plan that addresses their unique life situations, challenges, and goals.

[2] Andrews, D. A. & Dowden, C. (2006). "Risk Principle of Case Classification in Correctional Treatment: A meta-analytic investigation." *International Journal of Offender Therapy and Comparative Criminology*, 50 (1), 88–100.

[3] Ward, T., & Stewart, C. A. (2003). "Good lives and the rehabilitation of offenders: A positive approach to treatment." In Linley, A. & Joseph, S. (Eds.), *Positive Psychology in Practice* (pp. 598-616). John Wiley & Sons.

[4] Maruna, S. (2003). "Desistance from Crime: A Theoretical Reformulation." *Cologne Journal for Sociology and Social Psychology, 43*, 171-194.

[5] Winokur, Smith, Bontrager, Blankenship (2008). Juvenile recidivism and length of stay. *Journal of Criminal Justice*, 36, 126-137.

executive functioning. Below are some of the descriptive characteristics of RTs generally observed by RTC staff:

- Short attention span;
- Prevalence of gang affiliations;
- Lack of motivation to change;
- Lack of family support.

C. Operating Model

In consideration of the existing literature and reformative nature of the RT sentence, the RT philosophy is one that believes that every youth is capable of change. We aspire to create a safe and supportive environment that empowers youths to take ownership of their lives and realize their potential. Within RTC, RTs would be engaged actively in programmes and by staff to live out the values that were jointly chosen by RTC staff, further amplifying the behaviours exhibited by each RT. In RTC, the respective elements of intentional staff engagement, programmes, and processes, defined RTC as a "Transformative Environment (TE)". Further elaborations of the TE will be shared in the subsequent segment.

D. Transformative Environment – Staff

Staff are a critical factor in the transformative environment as RTs generally portray a lack of motivation to change with mandated programmes to attend. Voluntary and genuine emotional involvement (trust, support, reciprocity) have been found to be critical in the development of working alliances between support persons working with the youths.[6] Youths who have good relationships with correctional staff perceived the greatest likelihood of success on release in the following areas – potential for success, social networks, managing substance abuse/ reoffending, and conflict reduction. In this regard, staff are intentional in forming working alliances with each RT and through the engagement, impact positively towards their change journey. One of the ways this is done is through the adoption of restorative practices[7] in the daily engagement with RTs and use a collaborative stance when working with the RT as part of the management strategy.

RTC staff, consisting of correctional unit officers (CUO), correctional rehabilitation specialists (CRS) and reintegration officers (RO) work closely with each other to support the rehabilitation and reintegration of the RTs. CUOs are uniformed staff who carry out daily routine operations and facilitate the smooth attendance of RTs for their respective programmes. On top of these functions, the CUO takes on a secondary role akin to a life coach to the RTs, motivating them towards planning their prosocial life upon release from RTC. While they used to focus on delivery of psychological interventions, CRSs have in recent years taken on a more active role in the daily routine operations of RTC, for example, facilitating restorative circles among RTs and engaging RTs' families.

To help CUOs better engage, manage, and positively influence the RTs, specialized training in the areas of youth developmental theories, engagement of youths, management of resistant youths, and management of mental health issues in youths are provided. The concerted effort from the various stakeholders in the rehabilitation of RTs would not only allow for the development and implementation of both sound operational and rehabilitation policies that characterize the Transformative Environment in RTC, but also ensure an increase in quantity and quality of services. For example, it helps staff to understand how to work with RTs who might present with a short attention span.

E. Transformative Environment – Prison School or Vocational Training

Currently, RTs are channelled into either the education or vocational training pathway based on their interests and eligibility. RTs could pursue an education at the Prison School, i.e., National Institute of Technical Education (ITE) Certificates, GCE "N" Levels, "O" Levels, or "A" Levels during their stay in RTC. For RTs who are on the vocational training pathway, they could also attend courses under the Singapore Workforce Skills Qualifications (WSQ) framework to acquire marketable vocational skills to enhance their employability.

[6] Marsh, S. C. & Evans, W. P. (2009). Youth Perspectives on their Relationships With Staff in Juvenile Correction Settings and Perceived Likelihood of Success of Release. *Youth Violence and Juvenile Justice, 7*, 46-67.

[7] Costello, B., Wachtel, J. & Costello, T. (2009). *The Restorative Practices Handbook*. International Institute for Restorative Practices, p. 50.

F. Transformative Environment – Psychology-based Correctional Programmes (PCP)

The programme framework for the tier-based PCPs is developed based on the evidence-informed Principles of Effective Rehabilitation, namely the Risk-Needs-Responsivity (RNR) model, which prescribes a differentiated approach of rehabilitation for young offenders with different rehabilitation needs profiles based on empirically supported assessments. In the programme, RTs attend different tiering of PCPs based on their assessed needs. They are guided to evaluate the extent that their offending behaviours helped them achieve their goals and are equipped with skills to secure their goals in more socially acceptable ways.

Considering the developmental needs of the youth offenders, specific intervention strategies are incorporated in the tier-based PCPs to make them youth centric. For instance, narrative and strength-based approaches are utilized to support the youths in developing a pro-social narrative of self-identity to enhance their sense of agency in desisting from crime and violence. Youths are responsive to active modes of learning; hence more hands-on and experiential activities are designed to increase their levels of engagement.

G. Transformative Environment – Family Engagement

SPS recognizes that good family support during incarceration is essential to an offender's rehabilitation journey. Family programmes seek to increase offenders' knowledge, skills, and confidence in maintaining ties and rebuilding stronger relationships with their loved ones. Through these programmes, offenders learn about the roles in their families and take meaningful actions to change for the sake of their families.[8] Research has shown that the involvement of the family and the community is critical in the effective rehabilitation of young offenders. RTC staff observed that family support was lacking for the RTs, and they had also turned towards forging closer ties with friends from their gangs, many of whom RTs considered as their "family". Besides the family programmes, RT's families are also engaged regularly by both CUO and CRS on the progress of their children before supporting the reintegration of RTs back to their families. As we encourage closer family ties to be bridged and rekindled, we also observed that RTs often would begin to distance themselves from their gang affiliations. Thus, engaging the families, helps with the overcoming of challenges stated earlier.

H. Future Action Plans

Moving forward, we believe we can do more in expanding the prosocial supportive network of each RT by providing a positive Befriender prior to community supervision. The Befriender could also increase the social capital of the young offender by sharing his/her resources such as employment and leisure-activity options.

Our current efforts in engaging RT's families have illuminated the possible reintegration challenges faced by the RT when he/she returns home. We believe that with timely assessment of and providing the support needed by the families of our youths, it would further allow us to equip families as they provide guidance and love.

Considering the developmental stages of the RTs, another possible exploration would be to enhance the current array of employment options for RTs and allowing them to have concrete job matches before ROS. Employment brings with it opportunities to practice the various skills shared during the PCP programmes, and being financially independent could further develop the young offenders, propelling them towards living meaningful prosocial lives.

IV. CONCLUSION

Over the past decade, SPS has incorporated and implemented youth-informed practices that attend to youths' pathways to offending. The practices include: (1) developing evidence-informed youth targeted

[8] As part of SPS's continuous review of programmes, two programmes – the Social Skills Training Programme (SSTP) and the Family Reintegration Programme (FRP), were developed and implemented. Attended by all newly admitted offenders, SSTP seeks to raise their awareness of the impact crime and incarceration have on family relationships. It also equips them with basic skills in managing and enhancing family and social relationships, such as communication skills, conflict resolution skills and emotion regulation techniques.

programmes and processes in the transformative environment which addresses social skills for pro-social living; (2) implementing staff training and encouraging collaborations between operations and rehabilitation staff to equip staff with skills to de-escalate conflict and deal with offenders' motivation to change; (3) family and parenting programmes that address the parental guidance and positive supervision of RTs, and (4) conducting community interventions that support RTs when they are out in the community to facilitate successful rehabilitation and reintegration.

All in all, our approach is underpinned by the belief that every person in Singapore, especially our young offenders, has the right to live in an environment free of crime, and that young offenders should be provided with the necessary help to rehabilitate and successfully reintegrate into our society as contributing citizens.

THE JUVENILE JUSTICE SYSTEM IN SRI LANKA THROUGH A CRITICAL EYE

*Jalashi Changa Lokunarangoda**

I. ABSTRACT

A child is considered a person under the age of 18. This *internationally* accepted age might be different when it comes to different jurisdictions. However, the term "juvenile" is used for those children who are under the age of 18. In the whole world, children are considered to be a vulnerable group, as they are not able to make decisions alone, and they can be subjected to abuse easily. Therefore, it is an internationally accepted norm that juveniles should be kept out of prisons although they have committed very serious acts. A number of international instruments come into play in order to uphold juvenile justice.

The United Nations Convention on the Rights of the Child is considered as the most important piece among all the other international instruments. Also, the Beijing Rules (UN Standard Minimum Rules for the Administration of Juvenile Justice) set out the boundaries for juvenile delinquency. Despite the fact that there are many other international instruments, Sri Lanka mainly adheres to those two instruments. Sri Lanka, however, adopts a different judicial process which is unique to its own legal system when it comes to juvenile cases. It mainly focuses on rehabilitation and reintegration when it comes to punishments. Sri Lanka's legal framework has set out a number of protective methods for the betterment of juveniles.

- The Constitution of 1978 has a separate chapter on fundamental rights, and it safeguards the rights of every citizen including all children.
- Directive principles set out the State's obligation to protect and promote the rights of children and their best interests.
- The Child Rights Charter, which had come into effect after the ratification of the United Nations Convention on the Rights of the Child, also had contributed immensely in upholding juvenile justice.
- The Children and Young Persons Ordinance No. 48 of 1939 stipulated the definition of a child and also provided provisions for the establishment of the juvenile court in the country.
- Penal Code Act No. 2 of 1882 sets out the age of criminal responsibility
- Youthful Offenders (Training Schools) Ordinance No. 28 of 1939
- Code of Criminal Procedure Act No. 15 of 1979
- Probation of Offenders Ordinance No. 42 of 1944
- Prison Ordinance No. 16 of 1877

Although there is comprehensive legislation which safeguards the rights of juveniles which goes hand in hand with the international setup, there are loopholes which have to be addressed immediately in order to meet the real ends of justice.

II. INTRODUCTION

The definition of a juvenile under the Sri Lankan legal point of view is different compared to the

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internationally accepted view. According to the Children and Young Persons Ordinance,[1] a child means a person under the age of 14 years and a young person means a person who has attained the age of 14 years but is under the age of 16 years. Young persons who are between the ages of 16-18 are not considered juveniles under this ordinance. However, according to the children's charter[2] of Sri Lanka, a child means any person under the age of 18. Therefore, it is clear that there is an inconsistency in Sri Lankan Law as to the definition of a child.

Juvenile delinquency means a distinct set of offences created for children and adolescent persons. Sri Lanka follows a distinct judicial process to try juvenile delinquency cases and also adopts distinct methods of punishments which focus on their rehabilitation, correction and reintegration into society as law-abiding citizens. However, the prevailing correctional methods, mainly the institutional rehabilitation methods, were not successfully reached due to various problems and flaws.

Sri Lanka has adopted both institutional and community-based mechanisms in the correctional procedure of juvenile delinquency which interconnects with the process of juvenile offenders. Most of the time convicted children and young persons are not committed to prisons. They will be sent either to remand homes, approved or certified schools. Those are the three types of correctional institutions established under the CYPO[3] to rehabilitate children and young persons during the period of punishment. These institutions are administered by the Department of Probation and Child Care and the correction programmes are conducted by the Provincial Department of Probation and Child Care Service.

The existing legal framework dictates that if somebody who is below 16 years of age has committed a crime, they should be sent to a remand home for an interval not exceeding a month. If the criminal is under 18 and the offence is punishable by death, the court should detain them in a remand home until the president pardons them. For any indictable crime, the court should detain them in the remand home until the Minister's pleasure is fulfilled. Juveniles may be committed to a certified or accepted school for a maximum period of three years. Nonetheless, if the court finds the juvenile to be unruly or defiant and unable to be held in a remand home or a licensed school, they may be incarcerated.

As discussed in the abstract section, Sri Lanka has a very comprehensive legislative framework when it comes to juvenile justice. Although it is comprehensive, there are ongoing issues which have to be addressed in order to achieve justice.

III. JUVENILES & THE LAW

A. Legal Framework

Sri Lanka ratified the CRC[4] on 12 July 1990. The primary Acts governing juvenile justice in Sri Lanka are:

(1) The Children and Young Person Ordinance, No. 48 of 1939 (CYPO);
(2) The Probation of Offenders Act, No. 10 of 1948 (POA); and
(3) The Youthful Offenders (Training School) Act, No. 42 of 1944 (YOTSA).
(4) Penal Code of Sri Lanka 1885

1. CYPO

The CYPO can be considered as the main legislative enactment which safeguards the rights of juveniles. It mainly provides for the establishment of Juvenile Courts, the treatment of juvenile offenders and the safeguarding of children and young persons in need of care and protection. It also provides for the establishment of separate Juvenile Courts for the purpose of hearing cases dealing with children and young persons. According to the CYPO, a "Juvenile Court" is a court of limited power that convenes to listen to accusations brought against children and adolescents, or to exercise other authority granted to it. This court

[1] Children and Young Persons Ordinance No. 48 of 1939.
[2] Child Rights Charter.
[3] Children and Young Persons Ordinance No. 48 of 1939.
[4] Convention on the Rights of the Child 1989.

also offers a specialized system of Juvenile Courts and alternative punishments in order to protect the interests of children who are part of the justice system.

CYPO[5] requires a law enforcement officer to notify a relevant Probation Officer (PO) in the event a child or young person is to be brought before a Magistrate. In terms of section 17(2) of the CYPO, upon receiving notification from a law enforcement officer, the PO is required to investigate the background of the child and prepare a report to be submitted to the court.[6] Section 13 of the CYPO casts a specific obligation on law enforcement officers and the court to ensure the separation of children or young persons from adult offenders during the pendency of their case.[7] This section fulfils the conditions established in article 37 of the CRC, that every minor who has been deprived of their freedom should be kept separate from adults unless it is advantageous for the child to not follow this guideline.

In the event a child or young person is found guilty of an offence, the CYPO grants the court the discretion to order both institutional and non-institutional sentences. Institutional sentences include:

(a) committing the individual to custody in a remand home for a specified period that does not exceed one month,
(b) ordering that the individual (provided that he or she has reached twelve years of age) be sent to an approved or certified school for a period of three years.

Non-institutional sentences include:

(a) placing the individual in the care of a PO,
(b) placing the individual in the care of a parent, guardian or relative that executes a bond (with or without sureties), or
(c) placing the individual in the care of a fit person.

Under all of the above, the court is also permitted to levy a fine.

The CYPO also places an obligation[8] on courts to commit a child that is not released on bail to a remand home instead of a prison until the conclusion of his or her trial. Furthermore, under this section, courts are mandated to commit a young person to a remand home instead of a prison, unless he or she is "so unruly" or "depraved" as to make detention in a remand home unsafe for the existing occupants. Moreover, section 23(1) of the CYPO states that a child or young person shall not be committed to prison in default of the payment of a fine.

2. POA

The POA stipulates the conditions in which a court can impose a Probation Order. This order is used as an alternative to placing children who commit a crime in a correctional facility. The YOTSA outlines the setup of training schools to detain, educate, and reform male delinquents aged 16-22.

3. PC

The Penal Code[9] sets out the minimum age of criminal responsibility. Earlier the age of criminal responsibility was set out as 8 years,[10] and also section 76 has stipulated that nothing constituted an offence which is committed by a child above the age of 8 years and under the age of 14 years who has not attained sufficient maturity of understanding.[11] However, this has been recently amended, and the age of criminal responsibility has been raised to 12 years,[12] and the age of sufficient maturity level had been raised to 12-14 years.

[5] Section 17(1) of the CYPO.
[6] Ibid., Section 17(2).
[7] Ibid., Section 13.
[8] Ibid., Section 15.
[9] Penal Code 1885.
[10] Ibid., Section 75.
[11] Ibid., Section 76.
[12] Section 75 of the Penal Code amended by Act No.10 of 2018.

B. Setup and Shortfalls

1. Stipulate a uniform definition of a child, and an internationally acceptable age of minimum criminal responsibility.

2. Consider the deprivation of a child's liberty being a matter of last resort.

3. Prioritize the diversion of children away from the formal justice system.

4. Distinguish the responses applicable to children in conflict with the law and children in need of care and protection.

5. According to Article 40 of the CRC,[13] incorporate alternatives to institutionalization such as access to counselling, foster care, education and vocational training. However, it appears that Sri Lanka lacks these kinds of alternatives.

6. The CYPO has no obligation to keep the child informed of the progress of their case, provide details of their impending legal proceedings, or explain their reasons for being arrested. This lack of information could be detrimental to the child's safety and legal rights when they come into contact with the justice system.

7. Due to the term "Juvenile Courts" being applied to the courts that are responsible for hearing cases concerning children, it can give off the impression that the children who appear in these courts are criminals, rather than those who might require help. It is necessary to amend the name given to these courts in order to avoid any misconceptions.

8. In order to collect evidence to determine if a child has committed an offence, section 10(2) of the CYPO allows the Juvenile Court to remand the child in question for a period not exceeding twenty-one days. However, this time limit does not align with international frameworks that require children to be deprived of their liberty for the shortest possible period of time.

9. Even though a distinction is made under the CYPO when dealing with the treatment of children under sixteen and adult offenders, the final outcome may not be any different. According to the CYPO[14] a detention order by an approved or certified school lasts for a period of three years, which is longer than an adult would be detained for an equal offence.

10. The CYPO defines a "young person" as an individual between the ages of fourteen and sixteen. Therefore, children between the ages of sixteen and eighteen are placed in the formal justice system, and treated in the same way as adults. Also, children of those ages are incarcerated in prisons with other adult offenders, thereby further obstructing their rehabilitation and reintegration into society.

11. It appears that the courts were not placing enough importance on the social report given by the pertinent PO when it comes to sentencing.

12. There is no comprehensive register of childcare institutions, which indirectly challenges the courts when selecting institutions that are best able to address the unique requirements of children in need of care and protection.

13. Because there is an inadequate number of childcare organizations, Courts are generally forced to put children who are in conflict with the law, as well as those who are victims of crime, in the same facility. These places tend to be of a punitive nature, which can result in the traumatization of both the perpetrators and victims.

[13] Article 40(3)(b) United Nations Convention on the Rights of the Child.
[14] Section 42(2) of the CYPO.

C. Institutional Framework

These institutions include: Sri Lanka Police, the Attorney General's Department, the Judicial Medical Officer, the Courts, the Department of Probation and Child Care Services and the National Child Protection Authority.

The Department of Probation and Childcare Services is responsible for administering correctional and support services to young offenders and those in need of care and protection. The Department supervises the work of Probation Officers and Child Rights Promotion Officers, and they also offer institutional care as an alternative way of safeguarding children in the legal system.

The CYPO mandates POs to oversee minors who have broken the law and to guarantee the welfare of youngsters who need care and support and have been assigned to their custody. POs are also entitled to be informed by the police if there is a child or adolescent who is brought to court. In this regard, POs have the possibility to make sure that kids are safeguarded within the legal system.

The department has various centres which are tailored to the needs of the children depending on their age. There are six Remand Homes which look after children during the pre-trial phase, while five Certified Schools offer organized vocational training. Additionally, each state has a Safe House which offers housing and care for those with pending court cases. The eight Receiving Homes provide a safe and protective environment for those who are unable to stay with their families either temporarily or in the long term. Those with misbehaving tendencies are taken to National Training and Counseling Centers, while Approved Schools, Voluntary Children's institutions, and Detention Homes look after the other children.

IV. APPLICATION OF LAW

A. Hypothetical Scenario

Offence: Grave sexual abuse / S.365B(2)(b) of the Penal Code of Sri Lanka.
Age of the victim: 6 years
Age of the suspect: 14 years & 5 months
Facts of the case:

- The victim is the brother of the suspect.
- Suspect is mentally ill but has not undergone any medical treatment due to the financial situation.
- Suspect had dropped out from school when he was 10 years old due to continuous bullying by friends and teachers.
- Their father had abandoned them. Their mother is the sole breadwinner of the family and she takes care of both these children by working day and night.
- Most of the time the children are living alone at their home.
- One day the suspect had sexually abused the victim (the act amounted to GSA).
- The complaint had been lodged by a neighbour.
- Version of the victim
- This is the only time that the suspect had done something like this.
- The suspect loves him a lot.
- Suspect is the one who had look to after him when the mother is not around.

A) Action Flow

B. Discussion

❑ Is he a child according to CYPO?

No. He should have to be below the age of 14. However, according to the Penal law, he is considered to be a child as the age is below 18.

❑ Can a juvenile be arrested?

Yes. There is no bar to that. (This is not a formal arrest like putting on handcuffs)

❑ Can a juvenile be detained?

Yes. There is no bar. Children may be detained in remand homes for children, or the OIC of the police can grant bail without detaining.

❑ Should this case be referred to the formal hearing?

There is no alternative method to solve this kind of offence apart from formal hearing. After referral to juvenile court, the case can be dismissed.

❑ Are the risk factors accessed before the formal hearing?

No, they will be assessed during the process of hearing.

❑ Is every juvenile case referred to the two juvenile courts?

No, since we have only two courts, the cases will be referred to Magistrate's court sitting as a juvenile court.

V. RECOMMENDATIONS

The children are more susceptible to forms of rehabilitation than adults. A majority of persons that come into conflict with the law in their youth grow up to be righteous citizens. Therefore, the correct path needs to be shown to the child offenders. That will make them law-abiding citizens in this country. There are a lot of changes which need to be done in order to achieve the correct path. Some of them are mentioned below.

- The Penal Code is recommended to be amended, so a line is drawn between the age of commission of a crime and the age at which the conviction is made.

- Alternative legal frameworks to handle children in conflict with the law should be prioritized.
- Effective educational opportunities and counselling, stabilizing family environments, and promoting community-based programmes should be facilitated.
- The international recommendations, standards which are set out in the international conventions need to be adopted and adapted accordingly and should incorporated into the domestic framework.
- It is recommended that awareness needs to be increased among the law enforcement authorities, prosecutors, and other relevant parties in relation to the international standards of juvenile justice and also those parties need to be trained well to handle the challenges and other issues that involve minors.
- Need to have a uniform definition of "child".
- A provision should be inserted into the legislation barring the arrest of juveniles in order to fall in line with the international instruments.
- More juvenile courts should have to be established as we have only two currently. We should at least have one juvenile court for each province. Otherwise, the cases should have to be referred to magistrate's courts which will sit as a juvenile court.
- The name given to the court should have to be replaced with a name like "family court" like in Japan or "court of care".
- Need to maintain a comprehensive register for childcare institutions.
- Recommendations should be made in order for the investigating officers & the certified schools to use the "Risk and need assessment tool". A uniform tool for each and every delinquent will not do any good for the offenders who need special treatment.
- Proper reintegration systems such as halfway houses need to be established. This recommendation will also take time as it needs financial support.
- Should have to guide the relevant authorities (i.e. department of probation/ department of prisons) to maintain a national statistics system which can illustrate details of juvenile offenders.
- Awareness programmes should have to be conducted island wide after identifying the risk factors in order to prevent juvenile delinquency as prevention is better than cure.
- Need to promote diversion and alternative solutions such as mediation boards and family conferencing in order to prevent the matters going into the judicial system.

Appendix A

CRC	Convention on the Rights of the Child
CRPOS	Child Rights Promotion Officers
CYPO	Children and Young Persons Ordinance
DPCCS	Department of Probation and Child Care Services
PC	Penal Code
PO	Probation Officer
POA	Probation of Offenders Act
YOSTA	Youthful Offenders (Training School) Act

REPORT OF THE COURSE

The 179th International Training Course
on Management of Correctional Facilities and Rehabilitation of Offenders (Online)
"Juvenile Justice and Beyond – Effective Measures for the Rehabilitation of Juveniles in Conflict with the Law and Young Adult Offenders"

1. Duration and Participants
   - From 6 to 29 September 2022
   - 24 overseas participants from 16 countries

2. Programme Overview

Juveniles are socially and psychologically immature, and they are susceptible to stress and trauma. On the other hand, juveniles are often more responsive to efforts at rehabilitation and reintegration with appropriate intervention and support. Hence, it is important for correctional services to promote well-being and personal development by providing appropriate measures and treatment, making use of the formative period. In addition, this approach should also be extended to young adult offenders because cognitive function changes gradually; consequently, young adults are similar to juveniles in many respects.

In light of the above, this programme provided opportunities to share each country's practices and discuss effective institutional and community-based treatment and juvenile justice systems for juveniles in conflict with the law and young adult offenders.

3. Method of Training

This programme was exclusively conducted online due to the Covid-19 pandemic. In consideration of time differences between countries, the programme was conducted in two groups. Since the participants needed to continue their professional and family duties during the programme, some lectures were recorded in advance and broadcasted on-demand for their convenience, followed by live Q & A sessions with the lecturers.

4. The Content of the Programme

(1) Lectures by Visiting Experts

- Ms. Hannah Tiefengraber
  Associate Expert, United Nations Office on Drugs and Crime, Global Programme to End Violence against Children
  "Juvenile Justice and Violence against Children in the Context of Counter-Terrorism and National Security"

- Dr. Garner Clancey
  Associate Professor, University of Sydney Law School
  "The Rehabilitation of Young Adult Offenders"

(2) Lectures by Experts

- Mr. NASU Akihiro
  Certified Clinical Psychologist, Research Officer, Centre for Evidence-Based Research, Correctional Training Institute
  "Use of a Risk Assessment Tool for Juveniles and Evaluation of Programme Effectiveness"

- Mr. TACHIBANA Yoshinori
  Family Court Investigating Officer, Tokyo Family Court, Tachikawa Branch
  "Investigation and Coordination by Family Court Investigating Officers in Criminal Cases Involving Juveniles"

(3) Lectures by UNAFEI faculty members

- Professor NAKAYAMA Noboru
  "Overview of Juvenile Hearings in Japan"

- Professor MIYAGAWA Tsubura
  "International Standards and Norms for Juvenile Justice" and "Juvenile Institutional Corrections in Japan

- Professor OTSUKA Takeaki
  "Juvenile Community-based Corrections in Japan"

(4) Individual Presentations
Participants shared the practices and the challenges in their respective jurisdictions regarding the theme of the programme through their individual presentations. All the presentations were recorded and uploaded online for reference by participants in the other group.

(5) Group Workshops (Case Study)
Participants were divided into four groups according to time zones. The participants discussed a fictional case of a juvenile offender and explored appropriate measures and treatment for the juvenile based on risk assessment and best practices for rehabilitation and reintegration, which are the main topics of this training programme.

A 16-year-old male juvenile in the fictional case faced multiple problems in his family and educational environment and, consequently, he assaulted his colleague. Based on on the facts of the case, the following three topics were discussed: (i) assessment of the juvenile's risk of reoffending, (ii) treatment, education and vocational training necessary for the juvenile, and (iii) improvement of the relationship between the juvenile and his family and support for his family. The results of the discussion were presented by each group.

Assessment of offenders is effective in measuring the risk of reoffending as well as in improving the treatment of offenders. In this programme, there were several explanations on the importance of the risk assessment, and each group discussed the risk of the juvenile in the fictional case, referring to their knowledge gained from the lectures. The participants constructively discussed and developed best practices for each group although the systems and practices differ from country to country.

(6) Action Plans
At the end of the programme, each participant presented Action Plans based on the abovementioned lectures, individual presentations, and group workshops. They identified the challenges in their countries and proposed possible solutions based on what they learned from the lectures, presentations by the other participants and discussions in the group workshops. It was obvious from the Action Plans presented by the participants that everyone remarkably enhanced their understanding on juvenile justice and related issues and was eager to put their plans into practice in their countries.

5. Feedback from the Participants

We received a lot of positive feedback from the participants. They commented that all the lectures, group workshops and interactions with lecturers and participants were very useful. Relevant materials provided prior to and during the programme (UN documents, research articles, publications and videos) were also highly evaluated. Several participants commented that observation visits to facilities and agencies in Japan would have contributed to enhance their understanding further.

6. Comments from the Programming Officer (Professor MIYAGAWA Tsubura)

In light of the plasticity of juveniles and young adults, the timely and appropriate intervention to help and protect juveniles in conflict with the law and young adult offenders is a critical issue for the entire world. In addition, as a problem that has emerged through lectures and the group workshops, it is also necessary to provide their families support and to include the whole community in taking comprehensive approaches. This is because the sound development of juveniles and young people is hindered by inappropriate

environments, poverty, and organized crime and violent extremism.

Throughout the training period, the participants enthusiastically and actively participated in all the sessions. The final Action Plans were creative presentations from a wide viewpoint such as approaches to the local community and the importance of capacity-building of staff. All the presentations were very meaningful and substantial. I am sure that the participants will make the most of what they have learned from the programme. Despite the inability to meet in person, it was worth providing the opportunity to learn from each other online.

PART THREE

RESOURCE MATERIAL SERIES No. 115

Work Product of the 24th UNAFEI UNCAC Training Programme

UNAFEI

PARTICIPANTS' PAPERS

PETROBRAS: SETTLEMENT OF A FOREIGN BRIBERY CASE AND IMPLICATIONS FOR ASSET RECOVERY

*Aldo de Campos Costa**

I. CONTEXT

Petróleo Brasileiro SA, better known as Petrobras, is a Brazilian state-controlled energy company headquartered in Rio de Janeiro, Brazil, that operates to refine, produce and distribute oil, oil products, gas, biofuels and energy. The Brazilian government owns more than 50 per cent of Petrobras's common shares with voting rights.

From 2003 to April 2012, the company was embroiled in one of the largest corruption schemes ever investigated and prosecuted by Parties to the OECD Anti-Bribery Convention.[1] The corruption scandal erupted in 2014 and involved corrupt dealings among companies and officials from Brazil as well as those from other countries.

Petrobras engaged in a large-scale expansion of its infrastructure for producing oil and gas, a matter of significant interest to investors. During this period, certain former senior executives of the company colluded with its largest contractors and suppliers to inflate the cost of its infrastructure projects.

In return, the companies executing those projects paid billions of dollars in kickbacks that typically amounted to one to three per cent of the contract cost on a cartel-like rotating basis. Petrobras' senior managers received these illegal payments and shared them with their political sponsors, who assisted them in securing their management positions within the company.[2]

The overcharges caused by the kickbacks resulted in an inflation of property, plant and equipment, resulting in an overstatement of assets. Members of Petrobras Executive Board and Board of Directors also engaged in other bribery plots with companies that sought to win contracts with Petrobras or obtain better terms.

Billions of dollars were embezzled in this manner for the personal gain of the corrupt executives, as well as to finance the electoral campaigns of high-level figures. Bribes paid by Petrobras executives moved through bank accounts in the United States, Britain, Sweden, Switzerland and Uruguay.[3] The extensive investigation into the plot, known as operation "Car Wash", has given rise to many separate and coordinated foreign bribery enforcement actions.

* Assistant Prosecutor to the Prosecutor General, Brazil's Federal Prosecution Service. The opinions expressed herein are the author's and do not necessarily reflect the views of Brazil's Federal Prosecution Service.

[1] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019), http://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm>, accessed Jan. 16, 2023.

[2] Securities and Exchange Commission press release 2018-215, *Petrobras Reaches Settlement with SEC for Misleading Investors* (Sept. 27, 2018), <https://www.sec.gov/news/press-release/2018-215>, accessed Jan. 21, 2023.

[3] Pedro Fonseca and Marcelo Rochabrun, *World's biggest oil traders paid bribes in Brazil scandal*, Reuters (Dez. 5, 2018), <https://www.reuters.com/article/us-brazil-corruption-petrobras-idUSKBN1O41EC>, accessed Jan. 16, 2023.

II. BACKGROUND

A. Petrobras Securities Class Action Settlement

As a result of the corrupt executives' failure to implement Petrobras's internal controls, their exploitation of deficiencies in those controls, and their submission of false certifications in connection with Petrobras's internal process for preparing its filings, the company made material misstatements and omissions in financial statements that concealed from investors and regulators the massive bribery and bid-rigging scheme. The ensuing scandal decreased Petrobras's share price by more than 80 per cent and its American Depository Shares (ADS) by 78 per cent.[4]

As of December 2014, just months after the appearance of some of the first confessions, Petrobras ADS investors on the New York Stock Exchange brought a class action against the company's executives, its auditor and security underwriter before the United States District Court for the Southern District of New York[5] under the Securities Exchange Act of 1934 and the Securities Act of 1933.[6]

According to the complaints, Petrobras had fabricated public statements and regulatory documents, distorting the company's financial picture by unlawfully capitalizing payments to cartel members.[7] It was alleged that the plaintiffs misrepresented the company's financial controls and ethical practices concerning its business and management.[8]

As of June 2018, the court approved the settlement for close to $2.95 billion that was reached in December 2017.[9] In terms of class action settlements involving foreign issuers, it was the largest in a decade.[10] Also, it was the fifth largest settlement ever reached in a United States class action.[11]

B. Non-Prosecution Agreement with the SEC

The United States Department of Justice (DOJ) concluded an investigation into Petrobras's violation of the Books and Records Provision of the Foreign Corrupt Practices Act (FCPA) on 27 September 2018, after Petrobras accepted a non-prosecution agreement. The DOJ announced that Petrobras had agreed to pay $853,000,000 in penalties. Based on the company's full cooperation and remediation, the fine was reduced by 25 per cent off the lowest end of the applicable United States Sentencing Guidelines range.[12]

Under the non-prosecution agreement, the company's obligations to the United States would be complete upon paying $85,320,000, equal to 10 per cent of the total criminal penalty, to the DOJ. The deal also stipulated that Petrobras should pay another $85,320,000 to the Securities and Exchange Commission ("SEC") as a civil penalty and the remaining 80 per cent of the total criminal penalty, equal to $682,560,000, to Brazil under their respective agreements. If the company did not pay to Brazil any part of the $682,560,000 in the timeframe specified in the "agreement between Brazilian authorities and the company," Petrobras would be required to pay that amount to the United States Treasury, except that the DOJ would credit up to 50 per

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[4] Javier El-Hage, *Shaking the Latin American Equilibrium: The Petrobras & Odebrecht Corruption Scandals* (Nov. 4, 2019), https://news.law.fordham.edu/jcfl/2019/11/04/shaking-the-latin-american-equilibrium-the-petrobras-odebrecht-corruption-scandals/#_edn27>, accessed Jan. 16, 2023. See also: Kevin M. LaCroix, *Petrobras Securities Suit: Judge Rakoff Rejects Company's 'Adverse Interest' Argument; Rules Brazilian Investors Must Arbitrate Brazilian Securities Law Claims*, The D&O Diary (Aug. 2, 2015), <https://www.dandodiary.com/2015/08/articles/securities-litigation/petrobras-securities-suit-judge-rakoff-rejects-companys-adverse-interest-argument-rules-brazilian-investors-must-arbitrate-brazilian-securities-law-claims/>, accessed Jan. 16, 2023.

[5] El-Hage, *supra*, note 4.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Cleary Gottlieb, *Petrobras Granted Final Approval of Class Action Settlement* (Jun. 25, 2018), <https://www.clearygottlieb.com/news-and-insights/news-listing/petrobras-granted-final-approval-of-class-action-settlement>, accessed Jan. 16, 2023

[10] Bloomberg, *Pomerantz Recovery on Behalf of Petrobras Investors Reaches $3 Billion* (Feb. 2, 2018), <https://www.bloomberg.com/press-releases/2018-02-02/pomerantz-recovery-on-behalf-of-petrobras-investors-reaches-3-billion>, accessed Jan. 16, 2023.

[11] Ibid.

[12] El-Hage, *supra*, note 4.

cent of that amount paid to the SEC.

A non-prosecution agreement with the DOJ under which Petrobras accepts responsibility under United States criminal law for the acts of certain former Petrobras executives and officers that gave rise to violations of books and records and internal controls provisions under Title 15 of the United States Code, Section 78m. None of those individuals remain employed by or associated with the company. The agreement acknowledges that, in addition to the misconduct described by the DOJ, the company was "victimized" by an embezzlement scheme that included the participation of former executives and officers of Petrobras.

Still within the framework of the agreement, Petrobras would continue to cooperate with the DOJ in any ongoing investigations and prosecutions relating to the conduct, including of individuals, to enhance its compliance programme and to report to the DOJ on the implementation of its enhanced compliance programme. The DOJ said it reached this resolution based on several unique factors presented by this case, including that Petrobras is a Brazilian-owned company that "entered into a resolution with Brazilian authorities" and is subject to oversight by Brazilian authorities, and that, in addition to the significant misconduct engaged in by Petrobras, a few executives of the company engaged in the embezzlement scheme that victimized the company and its shareholders.

According to the DOJ, while Petrobras did not voluntarily disclose the conduct, it notified the government of its intent to cooperate fully and took all necessary corrective measures after being made aware of the misconduct allegations. Petrobras's cooperation included, for example, conducting a thorough internal investigation, proactively sharing in real-time facts discovered during the internal investigation and sharing information that would not have been otherwise available to law enforcement authorities, making regular factual presentations, facilitating interviews of and information from foreign witnesses, and voluntarily collecting, analysing and organizing voluminous evidence and information in response to requests, including translating key documents.

In addition, Petrobras reportedly took significant corrective measures, including replacing the company's top executives and implementing governance reforms, as well as disciplining employees and ensuring that the company no longer employs or is affiliated with any of the individuals known to the company to be implicated in the conduct at issue in the case.

C. Cease and Desist Order with the SEC

The same day the DOJ announced the non-prosecution agreement, the SEC also made public it had both charged and settled with Petrobras for misleading United States investors by overstating by $2.5 billion, the value of assets that were spent on bribes.[13] Disgorgement and prejudgment interest totalling $933,473,797 were to be paid by the company to the SEC after approval by the United States District Court for the Southern District of New York, offset by any payments made to the class action settlement fund of $2.95 billion.[14]

As reported by the SEC, Petrobras raised billions of dollars through its United States shares traded on the New York Stock Exchange. At the same time, the members of its executive board and board of directors cooked the books to conceal the massive, undisclosed bribery and corruption scheme from investors and regulators. Shortly, Petrobras's financial statements failed to disclose truthful information about its operations, misguiding American investors.[15]

The agreement with the SEC resolved allegations that former Petrobras executives committed violations of specific provisions of the Securities Act of 1933, as well as of the books and records and internal controls and false filings provisions of the Securities Exchange Act of 1934. The company admitted making misstatements and omissions in SEC filings and documents related to a 2010 global IPO of equity securities, none of which involved intent. SEC agreement limited company admissions to details related to DOJ settlement.

[13] SEC press release 2018-215, *supra*, note 2.
[14] El-Hage, *supra*, note 4.
[15] SEC press release 2018-215, *supra*, note 2.

Nevertheless, in a file submitted to the SEC on 27 September 2018, the company presented itself as a victim of the embezzlement scheme. It announced that it had already recovered approximately $449 million in restitution. Petrobras further stated that the settlement did not constitute an admission of wrongdoing and would "continue to pursue all available legal remedies from culpable companies and individuals."[16]

D. Consent Agreement with Brazilian Prosecutors

Petrobras said it would sign a "consent agreement" with the Brazilian Federal Prosecution Service in the same file submitted to the SEC.[17] This deal should provide that the sum of $682,560,000 of the non-prosecution agreement signed with the DOJ had to be deposited by Petrobras into a "special fund" in Brazil to be used in "strict accordance with the terms and conditions of the consent agreement, including for "various social and educational programs to promote transparency, citizenship and compliance in the public sector."

This consent agreement was signed on 23 January 2019, with federal prosecutors involved in the Car Wash operation in Curitiba, Brazil.[18] Petrobras assumed the following obligations in the agreement: (a) to maintain a compliance programme, as well as periodically review them in order to attest to their effectiveness; and (b) to transfer the amount of $682,560,000 to an account linked to a Federal Court in Curitiba within 30 days from the date of ratification of the agreement.

Section 2.4 of the consent agreement stated that 50 per cent of the $682,560,000 would be used to set up an endowment fund, so the proceeds would be used for "projects, initiatives and institutional development of entities and networks of reputable entities [...] that strengthen the Brazilian society's fight against corruption." The administration of this fund would be provided by an entity to be constituted within a maximum period of 18 months after the ratification of the agreement as a private foundation, and it would have representatives of the operation "Car Wash" in its decision-making body.

The other 50 per cent, per Section 2.5 of the agreement, would satisfy eventual convictions or agreements with shareholders who invested in the Brazilian stock market and filed a class action until 8 October 2017. The amount would remain deposited in an interest-bearing judicial account. After two years, monetary additions and interest would be used to establish the private foundation referred to in Section 2.4.

The federal judge who ratified the deal on January 25 said that it was essential to put some of the money into a foundation in the form of an "endowment" intended to "foster the implementation of an anti-corruption program" since "public investment in the implementation of anti-corruption measures is notoriously scarce and is generally subject to budgetary constraints."

E. Outcome

The content of the consent agreement signed between Petrobras and the prosecutors in charge of the Car Wash corruption investigation was harshly criticized for misrepresenting the non-prosecution agreement between the oil company and the DOJ, which only provided the credit of the penalty in favour of Brazil, without conditioning the creation of a legal entity under private law and without allocating this amount to specific activities.

It was also promptly questioned by the Prosecutor General,[19] who stated that the ratification of the agreement conferred upon federal prosecutors a function and obligations that were beyond the constitutional limits of their assignments,[20] involving a concentration of authority between the activity of investigation and litigation and the execution of a billionaire budget, with revenues derived from an international agreement

[16] Petrobras press release, *Petrobras Reaches Coordinated Resolutions with Authorities in the United States and Agreement to Remit Bulk of Associated Payments to Brazil* (Sept. 27, 2018), <https://petrobras.com.br/en/news/petrobras-reaches-coordinated-resolutions-with-authorities-in-the-united-states-and-agreement-to-remit-bulk-of-associated-payments-to-brazil.htm>, accessed Jan. 16, 2023.

[17] Ibid.

[18] "Consent agreement" available at <https://www.mpf.mp.br/pr/sala-de-imprensa/docs/acordo-fundo-petrobras/view>, accessed Jan. 16, 2023.

[19] Docket available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5650140>, accessed Jan. 16, 2023.

[20] Prosecutor General's motion available at <https://www.conjur.com.br/dl/dodge-vista-acao-stf-fundo-bilionario.pdf>, accessed Jan. 16, 2023.

to which they are neither party nor interested.

As mentioned by the Prosecutor General, the clauses of the agreement revealed how certain members of the task force assumed administrative and financial commitments and spoke for the institution without the power to do so, only to undertake all steps in the process of establishing a private foundation, and managing its resources.

The House of Representatives and a few political parties also expressed concern about the consent agreement, but from a different perspective. A more in-depth review of what is set out in the non-prosecution agreement shows that at no point was it determined that the $682,560,000 should be processed by prosecutors on the Car Wash team. The agreements require that the amount be handed over to Brazilian authorities.

According to the DOJ agreement, the expression "amount the Company pays to Brazil" implies, at the level of the Brazilian political-administrative organization, necessarily, the Federal Union. It is, therefore, evident that only in favour of the Brazilian National Treasury could the deposit of the amount corresponding to 80 per cent of the total criminal penalty stipulated in the non-prosecution agreement have been validly made.

It was also pointed out that the Federal Court in Curitiba did not have jurisdiction over the use of public funds. Only the Federal Union, through the constitutional body – the National Congress – could define how government revenues are to be applied following budgetary principles. To avoid them coming into play, the Petrobras agreement with federal prosecutors has used an instrument defined in Brazilian law as an exception to the regulation, which states that revenue earned by the Federal Union must be collected in a single treasury account: a fund. However, the attempt to outlaw Congress failed because the funds made available for the constitution of the private foundation could only be constituted by legal authorization under Brazilian law, which did not happen.

Based on these reasons, on 19 March 2019, the Brazilian Supreme Court granted a stay that did not allow the entry into force of the consent agreement.[21] A few months later, on 17 September 2019, the court declared the deal void. At first, the assets were supposed to be used to protect the Amazon Rainforest and for primary education, but in 2020, most went towards fighting the Covid-19 pandemic.

The provision to set aside half of the amount deposited by Petrobras for potential payments to the minority shareholders of the company itself was also deemed unlawful, as follows: (a) the funds would belong to the Federal Union rather than to Petrobras; (b) the satisfaction of Petrobras's liabilities would have been "explicitly prohibited" in the agreements signed by the company with the U. S. authorities; (c) the minority shareholders are to "consort with Petrobras in enjoying the burdens and bonuses of the business activity," otherwise the company would suffer excessive damage, either because the transit of values could "characterize a co-mingling of assets," either because Petrobras "had also fallen victim to offenses investigated in Brazil and abroad."[22]

III. CHALLENGES

One of the most controversial developments regarding the recovered assets in Operation "Car Wash" is the consent agreement held between the Federal Prosecution Service and Petrobras, according to which a large sum of the recovered money that stemmed from agreements with American authorities regarding FCPA violations would be destined to an anti-corruption private foundation to be administered by federal prosecutors.[23] It is a study case that presents intriguing challenges to investigators, prosecutors, and courts,

[21] Ruling available at <https://www.migalhas.com.br/quentes/340190/stf-proibe-que-mp-defina-destino-de-valores-de-condenacoes-e-acordos>, accessed 16 Jan. 2023.
[22] Ruling available at <https://www.migalhas.com.br/quentes/326997/moraes-destina-recursos-recuperados-da-lava-jato-para-combate-a-covid-19>, accessed 16 Jan. 2023.
[23] João Daniel Rassi, Emerson Soares Mendes and Pedro Luís de Almeida Camargo, *The Asset Tracing and Recovery Review: Brazil*. The Laws Review (Oct. 17, 2021), <https://thelawreviews.co.uk/title/the-asset-tracing-and-recovery-review/brazil>,

as summarized below.

A. Defining "Legitimate Owners" and "Victims"

The question of who is or should be considered a victim of transnational corruption is not only essential but also complex. The international framework provided by the United Nations Convention against Corruption (UNCAC) encourages countries to seek restitution for losses (Art. 35), proactively share information (Art. 56), and repatriate proceeds of corruption offenses (Art. 57), returning such property to its prior "legitimate owners" or compensating the "victims" of the crime, but do not define these terms. Petrobras is a mixed joint stock corporation whose majority shareholder is the Brazilian state. It provides an example of a company associated with a settlement of a foreign bribery case where the money was not returned to its stakeholders, who were the most directly impacted by the practice.

B. Legal Framework

Three aspects should be taken into consideration in discussing legal frameworks of settlements: whether the offender can be held liable under criminal, civil, or administrative law or some combination of the above (form of the liability); whether the court is involved and to what extent the court will review and approve the settlement (judicial oversight) and whether and to what extent the content and terms of the settlements are public (transparency of the settlement).[24] The Petrobras case failed to anticipate the relevant authorities who should play a role in the "agreement between Brazilian authorities and the company," as well as the extent of judicial involvement in this settlement. The competent authorities also only learned of the agreement once it was concluded.

C. Binding on Third Parties

A foreign bribe settlement should have legal effects only between its parties (*inter partes*). While the parties may agree for the benefit of a third party, they may never provide for stipulations to the detriment of a third party that is not a party to the agreement (*res inter alios acta alteri non nocet*). For such stipulations to be binding on that third party, that party must become a party to the agreement which contains these stipulations. As seen in the Petrobras case, the obligations set out in the non-prosecution agreement were binding on a foreign prosecuting authority that was not a party to the agreement.

D. Excessive Discretionary Power of Prosecutors

Despite their potential appeal, settlements in foreign bribery cases raise specific questions. For example, the power of the prosecutors in the Petrobras case was largely unchecked.[25] For example, the agreements concluded with Petrobras gave the DOJ, and indirectly the Brazilian prosecution authorities, a broader discretionary power to choose the form of redress they would have if the case proceeded to a fair trial. Their monetary sanctions choices, for example, had a direct impact on the designation of the beneficiary of the assets.[26] Confiscated or disgorged assets representing crime proceeds could more directly fit UNCAC's description of recoverable assets than other forms of monetary sanctions.[27]

E. Reparation to Third Parties

Several countries have used settlements to conclude transnational corruption cases. In some cases, such as the Alstom affair and the Mercator/James Giffen case,[28] the settlement has included fines and reparations to be paid to a charitable or a developmental institution. The Petrobras case raises an interesting issue: in which circumstances an endowment to a nongovernmental organization whose purpose is to fight corruption may be identified as an appropriate vehicle through which a corrupt company can make amends to countries whose officials it bribed?

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accessed Jan. 16, 2023.

[24] Jacinta Anyango Oduor, Francisca M. U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park and Oliver Stolpe. *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington, DC: World Bank, 2014), p. 21.

[25] Ibid., p. 48.

[26] See Oduor, *supra*, p. 85.

[27] Ibid., p. 85.

[28] See Oduor, *supra*, p. 95.

F. Implications for Asset Recovery

In the context of settlements, the nature of various monetary sanctions may determine who has a legitimate claim under UNCAC. Depending on the legal system under which sanctions are imposed, sanctions may be "paid" through various methods, including compensation, confiscation, disgorgement, fines, reparations, and restitution. In the Petrobras case, the United States allowed 80 per cent of the money associated with the DOJ agreement to be remitted to Brazil. In other words, reparations, in the form of *ex gratia* payment, made up nearly all the monetary sanctions. While Brazil was ultimately not awarded any damages upon the statement of facts of the agreement,[29] one could argue that since the crime of corruption was committed against Petrobras or the "collective interest" rather than specifically against the Brazilian state, Brazil could not contend that it had suffered damage as a result of a crime and could not thus make a legitimate claim for restitution.[30]

IV. CONCLUSION

Although the money associated with the agreements that Petrobras concluded with the DOJ and the SEC was not returned to its stakeholders, there is a clear tendency in all jurisdictions, regardless of their common law or civil law traditions, as well as in developed and developing countries, to resolve many foreign bribery cases through settlements.

Nevertheless, there is a limited understanding of how these settlements are agreed upon and implemented, which may create specific challenges for asset recovery. Most agreements fail to demonstrate a consistent approach to remediation, and law enforcement agencies need more of a conceptual or practical framework to guide the provision of corrective measures.[31]

The Petrobras case not only marks the beginning of a new front of concern and litigation for international corporations and individuals implicated in allegations of corruption but also provides several lessons for the international community to consider, as follows:

A. Allocation of Settlement Amounts

As far-reaching settlements become more common, the question of who should receive the proceeds has come to the forefront. In order to allocate the various settlement amounts, negotiators need to learn to differentiate the primary forms of monetary sanctions that can be part of an agreement. Some of them, such as restitution and reparations, will usually be paid to aggrieved parties (or "victims"), and others, such as fines, will usually be paid to the state.[32]

B. Limit of Authority

The involvement of several authorities often gives rise to conflicting and competing demands. Responding to requests from one authority may be perceived by another as a threat to its investigation or even a breach of its laws. Thus, where more than one authority may be involved, negotiators should know each authority's power to settle the case. It is important to keep expectations and negotiations within this authority limit.[33]

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[29] Many Brazilians view Petrobras and the Brazilian people as victims of the systematic embezzlement and graft scheme. See Megan Zwiebel, *State-Owned Entity, Victim and Perpetrator: The Special Case of Petrobras*. Anti-Corruption Report (Oct. 31, 2018), < https://www.anti-corruption.com/2629686/stateowned-entity-victim-and-perpetrator-the-special-case-of-petrobras.thtml>, accessed Jan. 16, 2023. See also Roger Hamilton-Martin, *Petrobras: Perpetrator or victim of corruption?* (Feb. 12, 2016), <https://globalinvestigationsreview.com/just-anti-corruption/article/petrobras-perpetrator-or-victim-of-corruption>, accessed Jan. 16, 2023.

[30] Ibid., p. 89.

[31] Sam Hickey, *Remediation in Foreign Bribery Settlements: The Foundations of a New* Approach, Chicago Journal of International Law, Vol. 21, No. 2 (2021), <https://chicagounbound.uchicago.edu/cjil/vol21/iss2/5>, accessed Jan. 16, 2023.

[32] Rebecca Hughes Parker, *The View from a Brazilian Prosecutor*. Anti-Corruption Report (Jan. 10, 2018), < https://www.anti-corruption.com/2567211/the-view-from-a-brazilian-prosecutor.thtml >, accessed Jan. 16, 2023.

[33] Ephraim Wernick and Pete Thomas, *How Companies Can Respond to the Boom in FCPA Enforcement Fueled by International Cooperation*, Anti-Corruption Report (Oct. 30, 2019), <https://www.anti-corruption.com/4129106/how-companies-can-respond-to-the-boom-in-fcpa-enforcement-fueled-by-international-cooperation.thtml>, accessed Jan. 16, 2023.

C. Overlapping Authorities

This increased international cooperation complicates how companies self-report, and various overlapping authorities make navigating settlement even more difficult.[34] Therefore, coordination with foreign and national authorities is critical to minimizing the likelihood of receiving duplicate sanctions before entering a globally coordinated resolution. The same conduct can lead to different penalties in different jurisdictions.[35]

D. Negotiation Preparedness

Negotiating as a government representative requires a great deal of work prior to negotiation to ensure that negotiators have the support of all interested parties. It is possible for a third party with an actual or potential interest in the transaction to intervene in the process of negotiation or to protect its interests later on.

E. Agreement Language

The language used in international settlement cases may be inapplicable to local conditions or situations being discussed. Hence, an inflexible insistence on their terms may lead to unsatisfactory results for both parties. To avoid future disputes, negotiators should carefully review agreements to ensure they are consistent with the agreement they seek.[36]

F. Need for Mandate

To negotiate on behalf of other individuals or organizations, agents need a mandate from these individuals and authorization to act on their behalf. That mandate might include the legal authority to sign an agreement. However, in most cases, this will consist of negotiating instructions regarding the kinds of agreements that can be considered and tentatively accepted during a negotiation.[37]

G. Fulfilment of UNCAC's Requirements

Settlement-based enforcement provides flexibility to reward offenders' self-reporting and cooperation and to reach more timely findings in complex cases.[38] However, this should not represent an acceptable cost of corrupt business dealings or encourage recidivism.[39] UNCAC demands that sanctions be commensurate with the seriousness of the corruption offence to avoid potentially adverse side effects,[40] such as society receiving less information about the wrongdoing, little opportunity to assess the sanction, and less reason to expect sanctions to deter corruption.[41]

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[34] Ibid.
[35] Ibid.
[36] Jeswald W. Salacuse, *Seven Secrets for Negotiating with Government: How to Deal with Local, State, National, or Foreign Governments--and Come out Ahead* (New York: AMACOM/American Management Association, 2008), p. 130.
[37] Ibid., p. 49.
[38] Tina Søreide and Kasper Vagle, *Settlements in corporate bribery cases: an illusion of choice?* European Journal of Law and Economics 53, 261–287 (2022), <https://doi.org/10.1007/s10657-022-09726>, accessed Jan. 16, 2023.
[39] See Gillian Dell, *Making Sure Settlements Deter Corruption*. UNCA Coalition (Nov. 8, 2013), <https://uncaccoalition.org/making-sure-settlements-deter-corruption/>, accessed Jan. 16, 2023. Regarding recidivism, see Sydney P. Freedberg, Karrie Kehoe and Agustin Armendariz, "*As US-style corporate leniency deals for bribery and corruption go global, repeat offenders are on the rise*," ICIJ (Dec. 13, 2022), <https://www.icij.org/investigations/ericsson-list/as-us-style-corporate-leniency-deals-for-bribery-and-corruption-go-global-repeat-offenders-are-on-the-rise/>, accessed Jan. 16, 2023.
[40] See Elly Proudlock and Christopher David, *Bribery and corruption: negotiated settlements in a global enforcement environment*, Practical Law (Oct. 1, 2014), <https://content.next.westlaw.com/practical-law/document/I0422c5f1611d11e498db8b09b4f043e0/Bribery-and-corruption-negotiated-settlements-in-a-global-enforcement-environment/>, accessed Jan. 16, 2023.
[41] See Søreide and Vagle, *supra*, p. 261.

BEST PRACTICES IN KENYA ON INVESTIGATION AND PROSECUTION OF CORRUPTION AND RELATED OFFENCES, ASSET RECOVERY AND INTERNATIONAL COOPERATION

*Judy Bliss Thuguri**

I. INTRODUCTION

The promulgation of the Constitution of Kenya 2010 (the Constitution) was the beginning of a new dawn in Kenya as it established independent institutions and commissions crucial in the fight against corruption and economic crimes.

The Constitution binds all persons and State Organs in government[1] and incorporates international laws through adoption of the general rules of international law, treaties or conventions ratified as part of the law in Kenya.[2] For this reason, the United Nations Convention against Corruption (UNCAC) ratified by Kenya on 9 December 2003[3] forms part of the laws of Kenya by virtue of the Constitution. Other international laws ratified by Kenya relevant in the fight against corruption are the United Nations Convention Against Transnational Organized Crime ratified on 5 June 2005[4] and the African Union Convention on Prevention and Combating Corruption (AUCPCC) ratified on 7 March 2007,[5] among others. In addition to the Constitutional provisions, there are legal frameworks in Kenya that provided for the standards, measures and rules to be implemented in the fight against corruption.

This paper will examine these legal frameworks, best practices and challenges faced in Kenya in the course of investigation and prosecution of corruption cases and more so in identifying, tracing, freezing, seizing, confiscation and recovery of proceeds of crime.

II. THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

The ODPP is an independent office established under the Constitution mandated to exercise State powers of prosecution. The Office is headed by the Director of Public Prosecutions (DPP) who under the Constitution exercises state power of prosecution and may:[6]

i. Direct the Inspector-General of the National Police Service to investigate any offence or allegation of criminal conduct, which the Inspector General is obligated to comply with.

ii. Institute and undertake any criminal proceedings against any person before any court (other than a court martial) in respect to any offence allegedly committed.

iii. Take over and continue any criminal proceedings instituted against any person before any court (other than a court martial) that is instituted by another person or authority.

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[1] Constitution of Kenya 2010, Article 2(1).

[2] Ibid, Article 2(5) and (6).

[3] http://kenyalaw.org/treaties/treaties/129/United-Nations-Convention-against-Corruption

[4] http://kenyalaw.org/treaties/treaties/142/United-Nations-Convention-against-Transnational-Organized

[5] http://kenyalaw.org/treaties/treaties/38/African-Union-Convention-on-Preventing-and-Combating

[6] The Constitution of Kenya 2010, Article 157.

iv. Discontinue with leave of court, at any stage before judgment is delivered, any criminal proceeding instituted or taken over by the DPP.

Other powers and functions of the DPP pursuant to Article 157 of the Constitution are to:[7]

i. Promote appropriate standards of practice by public prosecutors, assistant prosecutors, and any other person exercising prosecutorial authority under the ODPP Act.

ii. Implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime.

iii. Cooperate with the National Police Service, investigative agencies, the courts, the legal profession and other Government agencies or institutions so as to ensure the fairness and effectiveness of public prosecutions.

iv. Set the qualification for the appointment of prosecutors.

v. Review a decision to prosecute, or not to prosecute, any criminal offence.

vi. Advise the State on all matters relating to the administration of criminal justice; and

vii. Do all such other things as are necessary or incidental to the performance of its functions under the Constitution, the ODPP Act or any other written law.

The DPP in exercise of his or her powers and function shall not require the consent of any person or authority in commencing criminal proceedings or be under the direction or control of any person or authority.[8]

A. Department of Economic, Organized and International Crimes

The ODPP is structured into six departments that specialize in different areas for effective service delivery. The Department of Economic, Organized and International Crimes is mandated to prosecute cases related to economic, international and emerging crimes. The Department has the following thematic divisions:

i. Anti-Corruption and Economic Crimes Division

ii. Anti-Money Laundering and Asset Forfeiture Division

iii. Banking and Financial Crimes Division

iv. International, Transnational and Organized Crimes Division

v. Counter Terrorism Division

vi. Land and Environment Division

The mandate of the Department includes:

i. To prosecute all corruption and economic crimes investigated by the Ethics and Anti-Corruption Commission (EACC) and the Directorate of Criminal Investigations (DCI).

ii. To advise and give directions to the EACC and the DCI over the investigations of corruption and related offences.

iii. To prepare and submit to the National Assembly of Kenya an annual anti-corruption report as provided under section 37 of the Anti-Corruption and Economic Crimes Act.

[7] Office of the Director of Public Prosecutions Act 2013, Section 5(4).
[8] The Constitution of Kenya 2010, Article 157 (10).

iv. To provide legal and policy guidelines to other agencies on Anti-Corruption and other related matters.

v. To undertake research and make recommendations on the status of policies and laws relevant to corruption regarding economic crimes.

III. INVESTIGATIVE AGENCIES ON ANTI-CORRUPTION, MONEY-LAUNDERING AND PROCEEDS OF CRIME

The main investigative agencies in Kenya that conduct investigations into these cases are:

A. Ethics and Anti-Corruption Commission (EACC)

The EACC is established under the Ethics and Anti-Corruption Commission[9] pursuant to Article 79 of the Constitution which is mandated among other functions to develop a code of ethics, promote standards and best practices in integrity and anti-corruption for State officers, investigate and recommend to the DPP cases of acts of corruption, bribery, economic crimes or violation of codes of ethics prescribed in law, and institute and conduct proceedings in court for recovery or protection of public property, or for freezing or confiscation of proceeds of crime related to corruption.

B. Directorate of Criminal Investigations (DCI)

The DCI is established under the National Police Service of Kenya[10] mandated to among other functions undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money-laundering, terrorism, economic crimes, piracy, organized crime and cybercrime among others.[11]

Following the establishment of the EACC in 2011, questions were raised on whether the DCI can investigate anti-corruption cases, which led to various petitions being instituted in the High Court challenging investigations conducted by the DCI on anti-corruption cases. This question has since been settled with courts finding that investigation carried out by the DCI and recommendations made thereby to the DPP cannot be faulted on account of not having been conducted by the EACC as the DCI are also mandated to investigated economic crimes under section 35(b).[12]

C. Asset Recovery Agency (ARA)

The Asset Recovery Agency[13] is mandated to conduct investigations into suspected cases of money-laundering, confiscate and conduct criminal and civil forfeiture of proceeds of crime or unexplained assets suspected to have been acquired through crime.

IV. LEGAL FRAMEWORK GOVERNING ANTI-CORRUPTION AND MONEY-LAUNDERING IN KENYA

A. The Proceeds of Crime and Anti-Money Laundering Act (POCMLA)[14]

The Act was enacted in 2009 to provide for offences of money-laundering and the identification, tracing, freezing, seizing and confiscation of proceeds of crime. Section 2 of the Act defines proceeds of crime as:

[9] Act No. 22 of 2011.
[10] National Police Service Act No. 11A of 2011 of the Laws of Kenya, Section 28.
[11] Ibid, section 35(b).
[12] Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR; Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima. (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR;Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR.
[13] Proceeds of Crime and Money Laundering Act No. 9 of 2009 of the Laws of Kenya, Section 53.
[14] Act No. 9 of 2009.

> *Any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.*

It further defines property to mean:

> *all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal documents or instruments evidencing title to or interest in such property.*

The common predicate offences in this Act are provided for under Section 3, 4, 5 and 7 of the Act, which provides for the offences of money-laundering, acquisition, possession or use of proceeds of crime, failure to report suspicious transactions related to proceeds of crime and financial promotion of an offence. The Act covers a broad range of offences encountered in Kenya and provides for prosecution of financial institutions that failing to report suspicious transactions and persons who act as intermediaries in transporting, transmitting or transferring property suspected to be proceeds of crime.

B. Anti-Corruption and Economic Crimes Act (ACECA)[15]

The Act was enacted in 2003 with the aim of providing for the prevention, investigations and offences on corruption, economic crimes and other related offences. The Act defines corruption as offences amounting to bid rigging, dealing with suspect property, bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or offences of dishonesty connected to tax, rate or impost levied under any Act.[16]

Common predicate offences encountered in Kenya are provided for under section 42, 45, 46, 47, 47A of the Act, which provides for offences of conspiracy to commit offences involving corruption or economic crimes, conflict of interest, wilful failure to comply with applicable procedures of law, fraudulent acquisition of public property, abuse of office and dealing with suspect property.

C. Bribery Act[17]

This Act provides for the prevention, investigation and offences related to bribery. The most common offences under this Act are provided for under section 5 and 6 of the Act which provides for offences on giving and receiving of a bribe. The Act further provides for measures on protection of whistle-blowers which cautions against intimidation or harassment of persons who provide information to law enforcement institutions or testimony in court. Further, it provides for the offences against persons who harass or intimidate whistle-blowers or witnesses in regard to offences under the Act or persons who disclose information of informants and or witnesses causing the said informants or witnesses to be harassed or intimidated.[18]

D. Public Procurement and Asset Disposal Act[19]

The Act provides for the procedures of public procurement and asset disposal for public entities. This Act plays a crucial role in identification of offences arising from breach of procurement laws by public officers.

[15] Act No. 9 of 2009 of the Laws of Kenya.
[16] Ibid, section 2.
[17] Act No. 47 of 2016 of the Laws of Kenya.
[18] Ibid, section 21.
[19] Act No. 33 of 2015 of the Laws of Kenya.

V. INVESTIGATIONS INTO THE IDENTIFICATION TRACING FREEZING, SEIZURE AND CONFISCATION OF PROCEEDS OF CORRUPTION IN KENYA

A. Identifying and Tracing Proceeds

1. Reporting of Suspicious Financial Transactions

As provided under Article 14 of UNCAC, Kenya has enacted legislation to enhance financial reporting of suspicious transactions as a measure to detect and prevent money-laundering. The Financial Report Centre (FRC) is mandated to assist in the identification of proceeds of crime and money-laundering.[20] FRC receives, analyses and interprets reports of suspicious transactions made by reporting institutions and upon review of the reports, if the Director-General finds that there are reasonable grounds to suspect that the transactions involve proceeds of crime or money-laundering, the Director-General refers the matter to the investigative agencies for investigation.[21]

Reporting institutions such as banks and designated non-financial businesses are required by law to report all suspicious transactions to FRC. Currently, it is a mandatory requirement for all financial institutions to report any cash transactions of Kenya shillings (Ksh.) 1,000,000 and above and provide supporting evidence on the nature and reasons of the transactions by their respective clients.[22] Failure to report suspicious transactions by financial institutions or natural persons required by law to report such transactions is an offence in Kenya punishable to an imprisonment of a fine not exceeding ten million Kenya shillings or the amount of the value of the property involved in the offence, or for a natural person, imprisonment for a term not exceeding seven years or a fine not exceeding two million, five hundred thousand shillings or both.[23]

A case study on reporting of suspicious transactions in Kenya is the case of Family Bank *Limited & 2 Others -vs- Director of Public Prosecutions & 2 Others.*[24] A brief background of this case was that sometime between 2014 to 2016 large sums of money estimated at Ksh. 791,385,000 were illegally paid from the Ministry of Public Service, Youth and Gender Affairs State Department for Public Services and Youth to bank accounts operated by one Josephine Kabura, a sole proprietor of several companies to wit Reinforced Concrete Technologies, Home Builders and Roof and All Trading held in Family Bank Limited.

Large cash withdrawals were then made by the said Josephine Kabura with no explanations for the large cash transactions where Family Bank Limited failed to report these transactions. Upon investigations being conducted by the DCI, the DPP was satisfied that Family Bank Limited contravened the reporting obligations under section 44 of POCAMLA among others and was criminally liable for the offence of failure to report suspicious or unusual transactions or activities related to money-laundering or proceeds of crime contrary to section 44(2) as read with section (5) and 16(2) of the POCAMLA. Recommendations were therefore made for charges to be instituted against the responsible bank officials.

The Bank through a Constitutional Application No. 488 of 2016 sort for conservatory orders to prohibit the DPP from prosecuting its officials for the stated offences. However, the high court dismissed the said application where the bank filed an appeal against the said ruling. The appeal was subsequently dismissed by the Court of Appeal.

2. Acquiring and Analysing Objective Evidence

The ODPP by virtue of Article 157(4) of the Constitution and section 5(b) of the ODPP Act mentioned above works closely with investigative agencies by either giving advice or conducting prosecution led investigations. The role of the ODPP in the course of such investigations is to ensure that the evidence acquired follows the money trail from its source to beneficiaries of the proceeds of crime. Secondly, the ODPP ensures that the evidence acquired is admissible in court by meeting the evidentiary threshold provided in the Evidence Act on admissibility of electronic records[25] and the Guidelines on the Decision to

[20] Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009, section 21.
[21] Ibid, section 24.
[22] Ibid section 44.
[23] Ibid section 5 as read together with section 16(2).
[24] [2018] eKLR.
[25] Cap 80 of the Laws of Kenya, Section 106B.

charge. The ODPP in analysing the evidence acquired applies the *"follow the money approach"* to ensure that each layer on the movement of money from one point to the other is followed to identify all suspects and beneficiaries of the proceeds of crime.

Investigative agencies are also equipped with experts specialized in different fields such as financial analysis, ICT and forensic document examiners who identify and extract information relevant to the areas of investigations and prepare forensic reports. The ODPP also engages experts trained in various fields such as fraud, finance and procurement to guide on areas of focus in cases of money-laundering and proceeds of crime to ensure that the Office prosecutes its cases effectively and efficiently with high chances of success.

3. Acquiring Suspect/Witness Statements

In Kenya, there is no legal framework in place on admissibility of evidence acquired through undercover operations. The same, however, is information that is acquired through intelligence by the National Intelligence Service (NIS) or the FRC, where upon review of the information, the intelligence services have reasons to believe that a crime has been committed, the same is forwarded to the investigative agencies for investigation. The aim is to ensure that information acquired through intelligence is converted into evidence admissible in court.

In Kenya, the law provides for the protection of informers whether from intelligence services or civilian.[26] This is in tandem with the Constitution, which provides for protection of witnesses and enactment of legislation providing for the protection, rights and welfare of victim of offences.[27] In line with this requirement, the Witness Protection Agency is established under section 3A of the Witness protection Act,[28] whose mandate is to provide protection to witnesses referred to them either by investigative agencies or the DPP. This function is extended to protection of Victims under the Victim Protection Act.[29]

A case study relevant to protection of witnesses is in the case of *H.E Hon. Mbuvi Gidion Kioko Mike Sonko & Others -vs- DPP & Others*. In this case, the ODPP in collaboration with the EACC and Witness Protection Agency acquired orders to protect all witnesses including experts due to reports received on threats and intimidations of witnesses most of whom were employees of the organization under investigation. Aggrieved by this decision, Hon. Mike Mbuvi Gidion Kioko Mike Sonko filed an application before the High Court for review of the witness protection orders.[30] In the said application, the Applicant argued that the witness protection orders interfered with his rights to a fair hearing guaranteed under Article 50 of the Constitution of Kenya. The High Court in its ruling dismissing the application held that:

> *In determining the issues herein, the first issue of paramount importance is that of the position of witness protection. Article 50 in its various sub-articles guarantees an accused person the right to fair hearing. At sub-article 2(c) and (d), the right to adequate time and facilities to prepare a defence, and the right to public trial before a court established under the constitution, which seems to be the contested rights in this application are clearly anchored. At sub-article 8, the constitution states, thus:*
>
> > *'This article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality public order or national security.'*
>
> *The deduction that I reach from all these are that whereas Article 50 of the Constitution guarantees and declares the right to fair hearing for an accused person, the same article also declares that the same right guaranteed may be limited where it is justifiable, for the protection of witnesses, vulnerable persons, morality, public order or national security.*

[26] Anti-Corruption and Economic Crimes Act No. 3 of 2003 of the Laws of Kenya, section 65; Proceeds of Crime and Money Laundering Act No. 9 of 2009 of the Laws of Kenya, Section 20; Bribery Act No. 47 of 2016 of the Laws of Kenya, section 21.
[27] The Constitution of Kenya 2010, Article 50(8) and (9).
[28] Act No. 16 of 2006 of the Law of Kenya.
[29] Act No. 17 of 2014 of the Laws of Kenya.
[30] High Court Anti-Corruption and Economic Crimes Miscellaneous Case No. 23 of 2020.

However, in the case of *Director of Public Prosecution -vs- The Chief Magistrate Court Milimani Anti-Corruption Division & 18 Interested Parties*[31] the DPP sort for review of orders of the trial court directing the DPP to supply a chronology of calling the witnesses accompanied by a list of documents that each witness will be relying on to the defence 7 days in advance to the hearing and any change to be communicated to the parties 3 days before the hearing.

The DPP in seeking review of these orders argued inter alia that the Learned Magistrate erred in law by failing to consider that its duty not only lied in guaranteeing the rights of accused person to fair hearing under Article 50 of the Constitution, but to also safeguard the rights of witnesses and victims under Article 50(9) of the Constitution on grounds that disclosing the order in which the witnesses would testify prior to the hearing would put the witnesses at risk of intimidation or interference as the witnesses were not under witness protection.

The court in its ruling, however, disagreed with the position of the DPP and found that the directions to supply a "chronology of witnesses" was necessary in the circumstance of the case and that in regard to the safety of the witnesses, the court was not persuaded that the directions shall expose them to danger.

The ODPP in developing its strategies for handling anti-corruption established the Victim and Witness Facilitation Unit intended to facilitate costs incurred by witnesses scheduled to testify in court.

It is an offence to give false information to the FRC or an authorized officer punishable by imprisonment for a term not exceeding two years or a fine not exceeding one million shillings or both.[32] In addition, under ACECA, it is an offence to obstruct or hinder, assault or threaten a person conducting investigations under the act, deceive or knowingly mislead the commission, destroy, alter or conceal or remove documents, records or evidence that is relevant to an investigation or make false accusation to the commission. Such a person is liable on conviction to a fine not exceeding Kenya shillings five hundred thousand shillings or to imprisonment for a term not exceeding five years or both.[33]

In regard to plea bargaining, the same is provided for under section 137A-O of the Criminal Procedure Code.[34] In 2019 the ODPP launched the ODPP Plea Bargain Guidelines to guide prosecutors on the best practices and application of the plea bargaining provisions. In addition to plea bargaining, the ODPP also has the Diversion Policy Guidelines also launched 2019.

Further, there is the Anti-Corruption and Economic Crimes (Amendment) Bill, 2021 that is currently pending before the senate that seeks to amend the Anti-Corruption and Economic Crimes Act to provide for the procedure of entering into deferred prosecution agreements. The same is targeted at dealing with offences arising from corruption or economic offences which include offences under POCAMLA. If passed, the same will allow the DPP to enter into Deferred Prosecution Agreement in considering prosecution of alleged offences of corruption and economic crimes.

This provides alternatives to prosecution in regard to offences under POCAMLA and addresses the challenges faced in identifying persons to be charged on behalf of artificial persons such as the financial institutions. Two cases relating to plea bargaining are:

(a) Republic vs Family Bank Limited and 7 Others[35]

The brief background as provided above is that Family Bank and its senior managers were charged under the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009, with several counts of failing to report suspicious transactions and abetting money-laundering involving the National Youth Service transactions. The matter was concluded under plea bargain where the Court recorded the plea agreement, convicted them and fined Family Bank a total of Kshs. 64.5 million.

[31] High Court Anti-Corruption and Economic Crimes Division Application No. E005 of 2021.
[32] POCAMLA No. 9 of 2009 of the Laws of Kenya, section 10 as read with section 16.
[33] ACECA No. 3 of 2003 of the Laws of Kenya, section 66(1) and (2).
[34] Cap 75 of the Laws of Kenya.
[35] Anti-Corruption Case No. 306 of 2016.

(b) Republic vs Jackson Mbute Mbugua and 5 Others[36]

The accused persons were jointly charged with conspiracy to defraud the Government of L.R. No. 209/16441 which was allocated to the then City Council of Nairobi for use by Racecourse Primary School. Prior to the hearing of the matter, the accused persons initiated a plea agreement negotiation with the DPP. This resulted in an agreement to restore the parcel of land to the Government. At the time of conclusion of this case, the parcel of land was valued at KShs. 700 million.

The ODPP recognizes that corruption offences are complex in nature and in most instances, it becomes difficult to conclude criminal cases instituted in court expeditiously due to the large number of witnesses, accused persons and voluminous documents involved in proving the case. Secondly, in some instances, it is difficult to have witnesses who are not tainted with acts of corruption making them possible suspects in the case. In such cases, the ODPP considers the approach of *"Using the small fish, to catch the big fish"* in order to strengthen the prosecution's case and hold the most culpable to account.

Interestingly, section 5 of ACECA also gives the trial magistrates the power to obtain evidence from any person either directly or indirectly involved in an offence and pardon such person on condition that he or she makes full and true disclosure of the circumstances within his or her knowledge in relation to the offence. This section, however, is yet to be actively utilized in corruption matters.

B. Freezing, Seizing and Confiscation of Proceeds of Crime and Money-Laundering and Asset Recovery

Section 53 of the POCAMLA established the Asset Recovery Agency that is mandated to handle criminal forfeiture provided under Part VII and civil forfeiture provided under part VIII of the Act.

The difference between criminal and civil forfeiture is that criminal forfeiture proceedings are based on investigations and/or prosecutions of criminal offences that lead to acquisition of proceeds of crime or money-laundering. Upon conviction of a defendant on the predicate offence(s), the court convicting the accused/defendant, upon application of the Attorney-General, the Asset Recovery Agency or on its own motion, inquires into any benefit which the accused/defendant may have acquired through the offence or criminal activity and if found that the accused/defendant benefited, the court in addition to any punishment imposed makes a confiscation order.[37]

Prior to conviction and/or charging of suspects, the Agency may also apply for *ex parte* restraining orders/preservation orders to preserve properties suspected to be proceeds of crime or money-laundering. These orders are issued by court upon being satisfied that there are criminal investigations in regard to an offence, or reason to believe that a person leads a criminal lifestyle and has benefited from his criminal conduct.[38]

Civil forfeiture on the other hand provided for under section 81 to 99 of the POCAMLA deals with unexplained assets. Unlike criminal forfeiture, which is anchored on predicate offences, civil forfeiture is based on evidence that a person is in possession of assets that are not commensurate to his earning (unexplained assets). These proceeds are instituted by the Asset Recovery Agency in the High Court where upon conclusion, the assets are confiscated if the court is convinced that the defendant failed to prove how he or she acquired the assets.

Aside from the ARA, the EACC also has powers to investigate and commence forfeiture proceedings of unexplained assets and apply for orders of preservation of suspect property.[39] Civil Forfeiture proceeds, therefore, provide for non-conviction-based confiscation of proceeds of crime.

Proceedings under civil forfeiture and criminal forfeiture are considered to be civil in nature and, therefore, unlike criminal proceeds, the burden of proof is on a balance of probability.[40]

[36] Anti-Corruption Case No. 2 of 2012.
[37] POCAMLA, Section 61.
[38] Ibid, section 68.
[39] ACECA No.3 of 2003, Section 55 and 56.
[40] POCAMLA No. 9 of 2009, Section 56(1) and 81(1).

VI. INTERNATIONAL COOPERATION

Mutual legal assistance (MLA) in Kenya is governed by the Mutual Legal Assistance Act[41] which provides for giving and received by Kenya information in regard to investigations, prosecutions and judicial proceedings touching on criminal matters. In addition to the MLA Act, POCAMLA provides for international assistance in investigations and proceedings under section 114 to 120 of the Act. The Attorney General (A.G) of the Republic of Kenya is the central authority, while competent authorities are made up of the A.G, criminal investigation agencies and any person or authority designated by the A.G by notice in the Gazette.[42] As provided for in the MLA Act, ARA, EACC and DCI are competent authorities being investigative agencies.

The EACC has the power to cooperate and collaborate with other state organs and agencies, foreign governments, international or regional organizations in the prevention and investigation of corruption.[43] In addition, the DCI's functions include collection and providing of criminal intelligence and coordinating the country's Interpol Affairs.[44]

In 2013, the Director of Public Prosecution was designated by virtue of a Gazette Notice No. 1847 by the A.G as a Competent Authority for purpose of processing requests in respect of MLA in criminal matters being the prosecutorial authority in Kenya as provided for under Article 157 of the Constitution.

Recognizing that international relations are key in enhancing MLA, the ODPP has enhanced its regional and international cooperation to strengthen its capacity in facilitation of MLA and Extradition. To begin with, the Office has enhanced collaborative engagements with prosecutorial authorities and professional networks which include the East Africa Association of Prosecutors (EAAP), International Association of Prosecutors (IAP) and the Africa Prosecutors Association (APA).

The EAAP is made up of prosecution authorities from Kenya, Rwanda, Burundi, South Sudan, Tanzania, Uganda, Ethiopia, DRC, Malawi, Mozambique and Zambia whose objective is to promote and facilitate cooperation among members in detection, investigations and prosecution of crimes in the Region and offering legal assistance to its members.

In addition, the ODPP actively participates in the IAP established with the aim of fighting transnational crimes such as drug trafficking, money-laundering and fraud. In May this year, the ODPP Kenya hosted the International Association of Prosecutors 4th Regional Conference of Africa and Indian Ocean and the East Africa Association of Prosecutors Conference 2022. The theme of the conference was *"Effective Mechanisms to Respond to Emerging Crimes and Transnational Organize Crime in Africa: Country Experiences and Challenges"*. The conference was attended by prosecutors and actors within the criminal justice system across the globe saw participants discuss, among other topics, the best practices in the tracing, recovery and forfeiture of illicit funds held in crypto-currencies and harmonization of asset recovery legal frameworks. Through international and regional cooperation, the ODPP has entered into Memorandums of Understanding (MoUs) to enable provision of informal information sharing and cooperation, which is key in facilitating expeditious acquisition of information through MLA.

In addition, the ODPP has partnered with various development partners such as the European Union (EU), the United States Department of Justice (USDOJ), the British High Commission (BHC) among others that have played a key role in training of ODPP prosecutors and other agencies in regard to the MLA processed in their country and providing advice on acquiring expeditious MLA.

The ODPP in execution of its mandate also has the Anti-Money Laundering and Asset Forfeiture Division that facilitates MLA. In the case of *Director of Public Prosecutions vs Chrysanthus Barnabas Okemo & 4 Others*,[45] the supreme court confirmed that the ODPP is a lead agency in extradition matters in Kenya.

[41] Act No. 36 of 2011.
[42] Ibid, section 2.
[43] Ethics and Anti-Corruption Commission Act No. 22 of 2011, section 11(3).
[44] National Police Service Act No. 11A of 2011 of the Laws of Kenya, Section 35(a) and (i).
[45] (Petition 14 of 2020) [2021] KESC 13[KLR].

A successful case study involving MLA is the case of *Republic v Grace Sarapay Wahkungu & 2 Others*.[46] The accused persons among them being the then Sirisia Member of Parliament, being directors of Erad Supplies and General Contractors Limited were charged with an offence of uttering a false document contract to section 353 as read with Section 349 of the Penal Code Cap 63 of the Laws of Kenya, perjury contrary to section 108(1) as read with section 110 of the Penal Code and fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA 2003.

The brief facts of the case were that the company fraudulently uttered a false invoice for the sum of US Dollars 1,146,000 as evidence to the arbitration dispute between Erad Suppliers and General Contractors Limited and National Cereal and Produce Board in Kenya purporting to be an invoice supporting a claim for cost of storage of 40,000 metric tonnes of white maize allegedly incurred by Chelsea Freight. Due to this, the Company acquired public property in terms of payments made thereto of Ksh. 297,086,505 allegedly incurred by Chelsea Freight on 19 March 2013, Ksh. 13,364,671.40 purporting to be the cost of storage of 40,000 metric tonnes of white maize on 27 June 2013 allegedly incurred by Chelsea Freight and loss of profit and interest and US Dollars 24,032.00 purported to be the cost of storage of 40,000 metric tonnes of white maize allegedly incurred by Chelsea Freight and loss of profit and interest on 2 July 2013.

Part of the evidence submitted in court by the DPP to prove the charges against the accused persons was acquired by the Investigating Officer from EACC through MLA from the Republic of South Africa in a bid to verify the existence of two companies of interest, namely Chelsea Freight and Ropack International, alleged to be domiciled in South Africa. Through MLA, the Investigating Officer managed to contact the directors of Chelsea Freight who denied having dealt with Erad Suppliers and General Contractors Limited, the third accused in the matter. The South African police also confirmed through MLA that some persons of interest alleged to have been domiciled in South Africa were not in South Africa. The witnesses from South Africa also testified in court in regard to the findings of the investigating officer acquired through MLA.

Upon conclusion of the matter, the accused persons were found guilty of the offences and convicted accordingly.

VII. STRATEGIES ADOPTED IN PROSECUTION AND INVESTIGATION OF CORRUPTION AND MONEY-LAUNDERING CASES IN KENYA

Some of the measures implemented in Kenya for effective prosecution and investigations of corruption are:

A. Development of Policies and Guidelines

The Guidelines on the Decision to Charge 2019, Plea Bargain Guidelines and Explanatory Notes 2019 and the Diversion Policy and Guidelines 2019 have been key policy documents in guiding prosecutors on the evidentiary threshold to be met prior to making the decision to charge and providing guidance on the application of plea bargaining and diversion in criminal matters. This has led to institution of watertight cases in court with high chances of success and has increased our conviction rates in corruption cases.

In addition, implementation of plea bargaining and diversion as alternatives to prosecution has encouraged expeditious conclusion of minor corruption cases, which in turn has created more room for hearing and determination of complex cases.

B. Inter-Agency Collaboration and Cooperation

The ODPP has been part of multi-agency teams consisting of various investigative agencies from the EACC, DCI, Kenya Revenue Authority (KRA) among other agencies conducting prosecution guided investigations so as to ensure that investigations of anti-corruption and money-laundering matters are concluded expeditiously while ensuring that the same meet the evidentiary threshold.

[46] Anti-Corruption Case No. 31 of 2018 [2020] eKLR.

C. Establishment of Special Anti-Corruption Courts

Section 3 of ACECA requires the Chief Justice of Kenya to appoint and gazette special magistrates to hear and determine cases on offences of corruption, bribery, economic crimes and related offences. In line with this provision, the Judiciary of Kenya established the Chief Magistrate Anti-Corruption Division whose mandate is to hear and determine the cases prescribed in the Act.

Further, in 2015, the then Chief Justice of the Supreme Court of Kenya Hon. Dr. Willy Mutunga established vide gazette notice No. 9123 the High Court Anti-Corruption Division to hear and determine all Constitutional Petitions, revision applications and appeals arising from offences of corruption, economic crimes and related offences. The Court also handles matters filed in relation to criminal and civil forfeiture provided under POCAMLA.

The judges and magistrates in these divisions are specially trained to handle such matters making judicial the process more efficient and expeditious.

D. Specialized Training of Prosecutors

The ODPP through its Prosecution Training Institute (PTI) has collaborated with various stakeholders and partners in providing specialized trainings to prosecutors on various thematic areas among them being transnational and economic crimes.

E. Use of Experts

The ODPP and Investigative Agencies recruit and consult experts in various fields such as financial, forensics and fraud to assist in technical areas of investigations and advice on areas of focus during prosecution of the case.

F. Preventive and Deterrence Measures

These are measures implemented in recognition that investigations into corruption, economic crimes and money-laundering offences are complex in nature and ordinarily take a long time to conclude and prosecute. For this reason, alternative measures are considered to disrupt the commission and/or furtherance of such offences. One of the measures implemented in the country is the investigation and prosecution of matters such as tax offences investigated by the KRA which are likely to be investigated and concluded much faster than other predicate offences.

Other strategies adopted are as discussed above such as international cooperation and witness facilitation that have been effective in regard to MLA and Extradition and ensuring that witnesses are available for the cases.

VIII. CHALLENGES IN IDENTIFYING, TRACING, FREEZING, SEIZING, CONFISCATING AND RECOVERING PROCEEDS OF CORRUPTION AND SOLUTIONS

Challenges faced in regard to investigations conducted in identifying, tracing, freezing, seizing, confiscating and recovering proceeds of corruption and prosecution of the same are:

i. Limited capacity in expertise and resources.

ii. Slow processes in identification of proceeds of crime outside the country.

iii. Inadequate legislation especially in regard to handling of state officers suspected and or charged with offences related to proceeds of crime as they remain in office even after being charged.

iv. Inadequate funds for the protection and facilitation of witnesses.

v. Inadequate utilization of technology in the identification, tracing, freezing, seizing, confiscating and

recovery of proceeds of corruption.

Although Kenya has enacted various statutes in this regard, more needs to be done on the legal frameworks in order to seal the loopholes hindering effective investigations and prosecution. Further, there is need for more international cooperation and collaborations and funding towards the war against corruption.

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MALDIVES: CHALLENGES IN RECOVERING PROCEEDS OF CORRUPTION AND SOLUTIONS

*Aminath Shama Naseer**

I. INTRODUCTION

Acts of corruption are not bold or loud like a terror attack. They are silent and lurk around all corners of public offices. They are not noticeable until it is too late. The story is the same wherever we look. The same patterns can be seen in the Maldives, now well-known for the Maldives Marketing and Public Relations Company (MMPRC) Scandal, which saw embezzlement of millions of dollars of state funds through an organized operation by public officials at the top ranks in 2014 and 2015. This paper will explore the challenges to recovering proceeds of corruption, lessons learned from MMPRC cases, and possible solutions in the Maldives.

II. CHALLENGES IN RECOVERING PROCEEDS OF CORRUPTION

A. Institutions

1. Anti-Corruption Commission of the Maldives.

The Anti-Corruption Commission (ACC) is the first modern form of democratic institution with the major functions to prevent and prohibit corruption within the public sector of the Maldives. The ACC was established on 16 October 2008, under section 199 (a) of the Constitution of the Republic of Maldives, which was ratified on 7 August 2008.[1] The ACC is administrated under the Anti-Corruption Commission Act (13/2008), which was ratified on 24 September 2008.

The constitution of Maldives states that the definition of corruption shall be written in the Anti-Corruption Commission's Act, which now defines acts of corruption by expressly mentioning specific sections of chapter 510 of the Penal Code of Maldives. The Penal Code criminalizes bribery[2] to public officials, misuse of official authority[3] among others.

2. Prosecutor General's Office of the Maldives

The Prosecutor General's Office of the Maldives, also established in 2008, is the prosecution authority of the Maldives[4] that oversees all investigations, ensures a fair and effective investigation and makes prosecuting decisions.

B. Current Legal Framework

The current legal framework for asset recovery in the Maldives has its limitations, but despite this, it is being used across the board in all types of cases at present. Since 2020, the prosecution strategy has changed to file a petition for the recovery for proceeds of crime along with the charges that PGO files. This section of the paper will briefly look into the current legal framework and its challenges and limitations to the recovery of proceeds of crime.

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[1] S.199 of the Constitution of the Maldives 2008.

[2] S.510 of the Penal Code of Maldives 2014.

[3] Ibid., S.512, S.513.

[4] Article 223, The Constitution of Maldives 2008.

1. Criminal Procedure Code (CrPC) and Its Limitations

Under the Criminal Procedure Code (CrPC) of the Maldives, S.192 paves way for the court to issue a confiscation order of proceeds of a crime upon a conviction. The provision states that, the court may only issue this order if the statute under which the accused was charged expressly provides for the confiscation of proceeds of crime with regard to that offence.

The CrPC provides for the court to amend the order of confiscation if additional proceeds of crime were identified after the initial warrant.[5] It also provides for cases where the defendant was found to have possessed the proceeds of the crime at one point, but it can no longer be identified or located. Under S.195, in such cases the court has the discretion to issue a warrant to confiscate money or property equivalent to the proceeds of crime if the property was given or sold to a third person; taken outside the jurisdiction; there has been unreasonable reduction in the value of the property; or it has been comingled with other monies or properties. In addressing the existence of third-party rights, the CrPC states that it should not bar the confiscation unless the third party can prove that he/she is a *bona-fide* purchaser.

Although the regime appears to be comprehensive and adequate enough, S.192 of the CrPC limits instances where prosecution could seek an order of confiscation and the court to issue an order as it provides that the statute under which the prosecution decides to charge must expressly provide for confiscation of the proceeds of crime. Offences of corruption are now listed under chapter 510 of the PC; however, the PC does not stipulate that the proceeds of those crimes can be confiscated. This is a move away from the legal position of the prior PC of Maldives which expressly provides for confiscation upon conviction. S.14 of the current PC further states that filing criminal charges would not bar civil actions to recover proceeds of crime.

However, this poses a challenge, and there is debate whether recovery can be sought when the PC has not provided for it. The Supreme Court of Maldives (SC) recently published a sentencing guideline which indirectly addresses this. While it does not address confiscation, it addresses the court's role in awarding damages. S.48 of this guideline states that it is at the discretion of the presiding judge to make an order awarding damages, but the judge may only do so if the prosecution has filed a petition to award damages at the time of submission of charges. This same principle also applies to confiscation according to recent decisions of the criminal court.

2. Case Study on the Limitations of the CrPC

In 2014 and 2015, Maldives was shaken by the blatant and open corrupt practices which led the top officials of the then government to embezzle millions of dollars in state funds. The PGO has filed charges against various individuals and companies alike in their involvement in this scheme. An individual named Hamid Ismail was one of them, who facilitated the siphoning of state funds. A 100 per cent State Owned Enterprise (SOE) named The Maldives Marketing and Public Relations Company (MMPRC) received $5 million by leasing an inhabited island of the Maldives to a third party to develop as a tourist island on 4 June 2014. The investor issued a cheque in the amount of $5 million pursuant to the agreement, which was endorsed by the Managing Director of the MMPRC, facilitating the cheque to be deposited to a company which Hamid Ismail had a 99 per cent share. The funds were deposited and dispersed to various other accounts and eventually cashed. Part of the funds were exchanged for Maldivian currency and used for company purposes. Hamid Ismail was charged with facilitating the embezzlement of State funds. The Criminal Court of Maldives (CrC) found him guilty and convicted him. The case was appealed to the High Court of Maldives (HC), which affirmed the decision of the CrC. It was then appealed to the SC; however, the SC also affirmed the decision of the CrC and the HC.[6] The recovery was not addressed in any of the stages because the prosecution did not seek a confiscation order. After the decision of the SC, the PGO sought an order of confiscation at the CrC under S.192 of the CrPC. The CrC rejected the petition on the grounds that S192 can be applied by a judge when deciding on the case and not independently. The PGO believed that the CrC was not wrong in this decision and since the court cannot give a wider interpretation to the section, PGO has brought the issue to the notice of the Attorney General's Office who is in charge of legislative drafting by the State, and the SC. So far, no changes have been brought to the law.

[5] S.194 of the CrPC.

[6] Case Number: 2019/SC-A/48 (Hamid Ismail vs Prosecutor General's office), Supreme Court Maldives.

3. The Prevention of Money Laundering and Terrorism Financing Act 2014 (AMLA) and Its Limitations

Although the PC does not address the confiscation of proceeds of crime, The Prevention of Money Laundering and Terrorism Financing Act 2014 (AMLA) does address this. Under S.62 of the act, it allows for the court to issue an order of confiscation upon conviction of an offence stipulated in the act. Under this section, the prosecution may ask to confiscate: (1) the laundered funds or property; (2) the instrumentalities used in the commission of a predicate offence; (3) the proceeds of crime, or funds and property derived from proceeds of crime; (4) the intended proceeds of crime or proceeds of crime; (5) the instrumentalities; (6) funds or property with which the proceeds of crime have been intermingled; (7) property derived directly or indirectly from proceeds of crime, including income, profits or other benefits from the proceeds of crime.

The confiscation order pursuant to this section is made against the person to whom the funds or property belong to, unless their owner can establish that he acquired them by actually paying a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds and that he was unaware of their illicit origin.

4. Case Study on Confiscations in Money-Laundering Cases

Although the AMLA came into effect in 2014, there have been very few prosecutions under the act. The first charge under the AMLA was brought against the former President of Maldives, Mr. Abdullah Yameen Abdul Gayyoom (Yameen) in 2019 in relation to the MMPRC scandal. The case (now widely known as the Vodamula case) has been concluded by the Supreme Court, and some answers as to confiscation/recovery were received in this case.

Yameen was the President of Maldives between 2013 and 2018. During his tenure in 2014 and 2015, the MMPRC was used as a vehicle to siphon State funds and eventually these funds were dispersed to variety of illegal activities, including bribery, corruption, illegal political spendings. After this scheme came to light in October 2015, the president's office requested a special audit of the MMPRC from the Auditor General's office. This audit report was published on 4 February 2016, and it details the widespread scheme, noting that the MMPRC was being used as a vehicle to siphon State funds and that the Managing Director of the MMPRC was illegally endorsing the cheques the MMPRC was receiving, and a majority of these cheques were then deposited to a private company called Scores of Flare Pvt Ltd (SOF). Over 70 million dollars and over 100 million Maldivian Rufiyaa was funnelled through SOF.

The facts of the case are that the MMPRC leased an island named GA.Vodamula to a company on 11 October 2015 for $1 million. The investor issued a cheque to the MMPRC for the amount. The cheque was endorsed by the Managing Director of the MMPRC and diverted to the SOF. A few days later, the SOF issued two cheques of $500,000 directly to the then President Yameen. Both cheques were deposited into the president's account by a staff member working for SOF on two separate dates. Yameen kept these funds in his account, and transferred this amount, along with the other monies in his account to an investment bank account. The bank and Yameen agreed that he would keep a total of $3.4 million dollars, which includes the $1 million deposited by SOF, in the investment account for 36 months from 14 March 2017. The investment matured on 14 March 2020.

Between the time that Yameen received the monies to his account and up until the time he deposited the money and later questioned by the authorities in relation to the monies, various activities took place. After the initial investigations in relation to the MMPRC were launched, in 2016, the president of the ACC notified Yameen that he has received $1 million dollars over the phone. Yameen asked the president to quickly determine if the money was State funds belonging to the MMPRC. Despite many attempts by the ACC, the president refused to cooperate during the investigation and refused to give a statement. In 2017, the ACC sent a list of questions that they wanted to ask about the MMPRC scheme to the president and Yameen's statement was taken, albeit, not through the traditional methods. In 2018, the election was upcoming and rumours of the $1 million to Yameen's accounts were fast spreading and opposition was quick in their step to use this against Yameen. Yameen then informally discussed with the ACC to hand over the $ 1 million to the ACC until such an investigation could be carried out to determine the source of funds. After this discussion, the ACC sent a letter to Yameen asking him to sign an agreement to transfer the monies he received from SOF to an Escrow account under the ACC's name. Yameen replied to this letter in writing agreeing to do so. In March of 2020, an agreement was signed and pursuant to this agreement Yameen transferred $1 million. The legal minister of the president's office officially informed the ACC that Yameen

had in fact transferred $1 million to the account as agreed.

Fast forward to 2019, the FIU sent a Transaction Analysis report in relation to an STR raised by the bank in relation to $1 million dollars transferred from a well-known businessperson in Maldives to a former minister's account, who then transferred this amount to the then President Yameen. It was only then that investigative authorities discovered that Yameen had in fact lied to the ACC, and he had not transferred the $1 million that he received from SOF to the escrow account per the agreement, and he had in fact transferred $1 million he acquired through other methods. The ACC also discovered that he was still harbouring suspected proceeds of crime in his investment banking account, and it was maturing and acquiring profits throughout this time.

A case was initiated against the president for providing false information to the investigative authorities and on suspicion of money-laundering. In his defence, Yameen claimed that the monies were given to him by his former Vice President for his political spending. He could not provide the source of funds and why he would receive such a large amount, how it is legal, and why he invested money he received for political spending for 36 months, and had it held in a bank account unutilized during his presidential campaign. In February 2019, Yameen was charged with money-laundering. The prosecution did not ask for a confiscation order for the monies laundered; however, the investigative authorities had his account frozen pursuant to a court order they sought. In November 2019, he was convicted of money-laundering. He appealed the decision to the HC, which affirmed the decision of the CrC. He then appealed the case to the SC, which then overturned the decision in November 2021.[7]

The decision of the SC was an interesting one, not only because it was irregular, and the SC departed from legal principles that the SC has always upheld. For the purpose of this discussion, the decision itself is not important, and it is what the SC said about the suspected proceeds of crime that is important. The SC, while finding that Yameen was not guilty, stated that, Yameen acquired the money, and invested it knowing very well that it was suspected proceeds of crime and that he as the president of Maldives, has done this without a second thought to his responsibilities as the president, and he has in fact put forward his own interests before his people and the electorate. And for this reason, the SC concluded that the State has the right to pursue a civil case to recover the monies without it hindering the rights of Yameen under S.60 of the constitution, which expressly lays down the principle of double jeopardy.

Pursuant to this decision, the MMPRC has initiated a case against the former president to recover the $1 million. The case is now ongoing. This is the first case in which a civil action was sought after an accused was acquitted. Hence, it is yet to be seen how this would change or impact the asset recovery regime.

5. Challenges Identified during the Investigation of the MMPRC Scandal

It is worth noting that after Yameen's tenure ended in 2018, the current government came into power with the promise of recovering lost state funds through the MMPRC. The President established the Presidential Commission on Corruption and Asset Recovery (PCCAR), with the task to investigate the corruption cases that were not adequately investigated and recover lost state funds. The PCCAR entered into a joint investigation agreement with the Maldives Police Service (MPS) and the ACC. The PCCAR was dissolved in early 2022, and the exact reasons for the decisions were not made public by the President's office. But it is thought that the commission was duplicating resources and work that was done by the ACC. Following the dissolution, all the pending investigations and documents maintained were handed over to the ACC, which is continuing the work.

The PCCAR during its tenure noted various challenges to asset recovery and asset-recovery-focused investigations on many platforms including their public appearances to the parliament. Some of the many noteworthy challenges are listed below.

(a) Lack of proper mechanisms for property registries

No law in Maldives requires an integrated property registry to be kept. The Maldives is geographically made up of small islands, which means that all islands have their own property registry. It takes a lot of

[7] Case Number: 2021/SC-A/30 (Abdullah Yameen Abdul Gayyoom vs. Prosecutor General's Office), Supreme Court of Maldives.

effort and time for the investigative authorities to determine if someone has property somewhere other than where his permanent address is registered, and criminals often take advantage of this system.

(b) Unjust enrichment not being an offence in the Maldives

The investigation of the MMPRC scandal uncovered public officials and high profile politically exposed persons (PEPs) and their family members and close associates in possession of large amounts of unexplained wealth completely unmatched to their income. The investigative authorities often come to a dead end when this happens because no law in Maldives prohibits such possession and there is no law that would allow investigative authority to question these persons. There is also no law that would have the persons answerable in any other avenue.

With the PCCAR continuously advocating for unjust enrichment being criminalized, on 6 May 2021, the parliament passed an amendment to the PC, adding a new offence named "unjust enrichment". However, upon reading the elements of the offence, it becomes very clear that the act criminalized was not really that of unjust enrichment but in fact money-laundering. This section is, therefore, pointless because under S.18 of the Penal code, the prosecution must prioritize prosecutions under the AMLA if there are similar provisions in the PC criminalizing the same acts that are criminalized under the AMLA.

(c) Cash-based economy

The Maldivian economy is very cash intensive. All businesses big and small are heavily operated through cash. Although businesses earning over a certain amount requires registration with the Maldives Inland Revenue Authority (MIRA), and declaration and payment of Goods and Services Tax (GST), many do not comply with this. Under the law, MIRA can only take action if the business is registered with MIRA and is evading tax. This leaves a large loophole for all criminals. Furthermore, under Maldivian law, while tax evasion is classified as a serious offence under the CrPC, the offence warrants house arrest under the Tax Administration Act and is considered a level 1 misdemeanour under the PC and warrants a jail sentence of 4 months and 24 days. Under S.1005 of the PC, this sentence is often reduced and changed to house arrest considering the sentence prescribed under the Tax Administration Act. Additionally, it is noteworthy that it is only recently that the parliament passed the Income Tax Act, which prescribes tax brackets and requires individuals and businesses to declare and pay taxes if they receive a certain amount of income.

(d) Record keeping

Under law, banks and businesses alike are required to maintain records up to 5 years. Often times, acts of corruption and money-laundering are not discovered until much later in Maldives, evident from the MMPRC scandal of which investigations are still ongoing. This creates a great obstacle for a speedier investigation and sometimes for any investigation at all.

(e) Legal framework for asset recovery being limited

The challenges posed by the current legal framework is detailed in 2.2 of this paper.

(f) Lack of accountability and symbolic asset declarations by public officials

One of the things that investigation of the MMPRC scandal brought to light was the requirement of public officials to declare their assets. This is a requirement under the law, and the Auditor General's Office has the mandate to receive and vet them. However, it came to the attention of the investigators that many parliamentarians and top government officials did not file the declarations during the time periods they were required to do so. Furthermore, inaccuracies were noted in many that were filed, with many officials omitting to include properties and monies that they have to their names. For instance, in the Vodamula case, the prosecution noted that the president himself did not declare his assets to the Auditor General for 4 years during his tenure. There were no actions taken and no accountability by the public officials regarding this.

(g) Designated Non-Financial Business and Professions (DNFBP) are not regulated

The MMPRC scandal revealed public officials with extravagant lifestyles, with luxury properties to their names. These properties were often bought from private real estate firms and were paid for in cash in bulk. Under S.39 of the AMLA, dealers in real estate shall report as a suspicious transaction to the Financial Intelligence Unit when involved in transactions for their client concerning the buying or selling of real estate. However, there is no mechanism for such reporting in place, and DNFBP's remain largely unregulated to this date.

(h) In rem proceedings are not provided for in the law

An effective asset recovery regime would be independent from the criminal justice system. A legal framework should be drawn up for the state to proceed with *in rem* proceedings against the property or monies in question whether or not a criminal investigation or prosecution is ongoing. This would allow the police and prosecution to prioritize and focus on the important cases.

III. SOLUTIONS

Maldives has come a long way, albeit slowly, in terms of its asset recovery regime. The Maldivian law and legal system have prescribed various avenues for asset confiscation. These avenues are not effectively utilized by state institutions for various reasons. Lack of procedures and mechanisms is at the top of this list. However, it is notable that the prescribed avenues are still not being employed to the full extent.

Changes to the current law to close the loopholes are needed, and the Attorney General's Office appears to be working on it. It is a myth to think that in every single case of corruption a conviction could be acquired. Hence, specific legislation on the recovery of proceeds of crime allowing *in rem* proceedings and detailed procedures for asset tracing, freezing, management, and confiscation is required for effectively recovering proceeds of crime.

IV. CONCLUSION

The asset recovery regime in the Maldives is in its infant stage and much work needs to be done to learn the lessons from the past experiences, especially the MMPRC scandal, and patch the loopholes of the statutes and keep the regime afloat. With it being young and merely symbolic and unemployed for much of its existence, the familiarity with the regime is low among the investigators, prosecutors and others involved in the criminal justice system. Much work needs to be done to train on the current legal framework and improve it.

CRIMINAL JUSTICE RESPONSE TO CORRUPTION

*Butrus Yai**

I. INTRODUCTION

A. Brief Overview

South Sudan gained its independence from Sudan on 9 July 2011, after a long civil war in Sudan between the government of the Republic of Sudan and then southern-based rebel group, the Sudan People's Liberation Movement/Army (SPLM/A). The warring parties reached an agreement titled the Comprehensive Peace Agreement (CPA). The peace agreement was successfully mediated by the Intergovernmental Authority on Devolvement (IGAD). The CPA guaranteed, among other rights, the right of southern Sudanese to a right of self-determination,[1] in which they choose, either to vote for unity of Sudan or vote for separation of Sudan, after the end of interim period six years. In a referendum held in January 2011, Southern Sudanese overwhelmingly voted for separation by 99 per cent to form an independent state. After independence, South Sudan approved the transitional constitution that created a legal framework for the country and that would transform it from an autonomous region to an independent state. Under the constitution, South Sudan adopted a decentralized system of government,[2] which provides three levels of government: national government level, sitting in the capital city of Juba, headed by the president; state levels of government headed by a governor, sitting in each state capital city (South Sudan has ten states and three administrative areas); and local government levels within the states headed by a commissioner.

The national government level has three pillars of government: the national legislature (comprised of the National Legislative Assembly and the Council of States), the executive and the judiciary. In contrast, each state government and local government have only two organs: the state legislative assembly and the executive.

B. Definition of Corruption

Efforts have been exerted by many scholars, researchers, economists and many others to define corruption. As a result, many definitions around the globe have been reached so far. Corruption has been defined as a form of dishonesty or a criminal offence which is undertaken by a person or an organization which is interested in a position of authority, in order to acquire illicit benefits or abuse power for one's personal gain. Corruption may involve many activities which include bribery, peddling influence and embezzlement.[3] Stephan D. Morris,[4] a professor of politics, wrote that political corruption is the illegitimate use of public power to benefit a private interest. Economist Lan Senior defined corruption as an action to secretly provide a good or a service to a third party to influence certain actions which benefit the corrupt, a third party or both in which the corrupt agent has authority.[5] The World Bank economist Daniel Kaufmann extended the concept to include "legal corruption" in which power is abused within the confines of the law – as those with power often have the ability to make laws for their protection.[6]

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[1] The Comprehensive Peace Agreement (CPA).

[2] The Transitional Constitution of South Sudan, 2011.

[3] En.m.wikipedia.org

[4] Morris, S.D. (1991), Corruption and Politics in Contemporary Mexico. University of Alabama Press, Tuscaloosa.

[5] Senior, I. (2006), Corruption – The world 's big C., Institute of Economic Affairs, London.

[6] Kaufmann, Daniel; Vicente, Pedro (2005)." legal protection" (PDF). world bank. Archived from the original (PDF) on 5 May 2015.

II. EFFORTS TO COMBAT CORRUPTION

The Constitution of South Sudan, 2011, provided for the establishment of an independent Anti-Corruption Commission with the functions to protect public property, investigate and prosecute only cases of corruption and combat administrative malpractice in public institutions.[7] The Commission is mandated to prevent and combat corruption at all levels of government and institutions as well as to direct and provide oversight for all persons holding constitutional posts and senior public officers to make declaration of their income, assets and liabilities.[8] The Anti-Corruption Commission Act, 2009, that was enacted during the then autonomous regional Government of Southern Sudan (GOSS), has mandated the South Sudan Anti-Corruption Commission (SSACC) to investigate and prosecute alleged cases of corruption in collaboration and coordination with the Ministry of Justice and Constitutional Affairs (MoJCA). However, the Commission had been criticized by a large number of South Sudanese of not doing enough to combat the rampant corruption in the country by taking a serious and significant step towards investigation and prosecution of corruption-related cases.

The president of the republic had declared a fight against corruption on many occasions. Practically, in 2012, he revealed that corrupt government officials had stolen an estimated $4 billion from public funds; he sent a letter to 75 officials and individuals close to the government officials to return the stolen money and offered them amnesty should they return the stolen money. $60 million has been recovered or returned to the government.[9]

Corruption in South Sudan – for some government officials – seemed to be a common practice that official keep doing on regular basis as long as he or she holds that particular position. The money being stolen or embezzled from public funds ended up in foreign bank accounts or spent on purchasing properties in foreign countries, especially East African countries neighbouring South Sudan. The government had made a call for global support to recover assets stolen by South Sudanese government officials and individuals associated with them.

South Sudan, in fulfilment of its international commitments to join hands with the international community in the fight against corruption, has acceded to the United Nations Convention Against Corruption (UNCAC) and has enacted the Anti-Corruption Commission Act, 2006, and the Anti-Money Laundering and Counter Terrorist financing Act, 2012. It also established an Independent Commission to tackle and take the lead in fighting against corruption in the country. Efforts are under way to enact domestic legislation, such as an Asset Recovery Act, Mutual Legal Assistance (MLA) and Extradition Act, and other relevant legislation, to form a legal basis for cooperation with other counties in areas of collecting and exchanging information, provision of evidence obtained by other jurisdictions, to assist in criminal investigations, prosecution of corruption offences and more especially on matters related to identification, tracing, freezing, seizing, confiscating and recovering proceeds of corruption.

III. INVESTIGATIONS IN SOUTH SUDAN

Criminal investigations in South Sudan are governed by the Code of Criminal Procedures Act, 2008. The Act vests investigative powers in the Police under the supervision of Public Prosecution Attorneys. The Act also gives investigative powers to Public Prosecution Attorneys or Magistrates to complete the investigation him- or herself, where necessity requires.[10]

A. The Investigation of Corruption Offences

Investigation of cases/offences related to corruption is the responsibility of the Anti-Corruption Commission, to initiate the investigations on alleged corruption that occurred or are about to occur. In doing so, and as a matter of collecting evidence, the commission can search bank accounts held by the suspects.

[7] The Constitution of South Sudan, 2011.
[8] South Sudan Ant-Corruption Commission Act, 2009.
[9] BBC.co.uk/news/June 2012
[10] The Code of Criminal Procedures Act, 2008.

South Sudan's Anti-Corruption Commission Act, 2009 states that:

> the commission shall have the power to investigate any allegation, facts, conditions, practices or matters, including the search of bank accounts and other assets of spouses, children and others in a domestic relationship, which it considers necessary or proper to determine whether any person is engaged in or about to commit corruption.
>
> If the commission has reasonable suspicion that a corruption offence has been committed or is about to be committed, the commission shall form an Inquiry/Investigation Committee headed by a member of the Commission and shall designate competent officers to investigate the case.[11]

1. The Investigation Reports

The investigation committee prepares, compiles and submits a final report to the Commission showing: (a) The facts determined by the Investigation Committee; and (b) The findings and recommendations of the Investigation Committee. In the event that the findings of the report of the Investigation Committee recommend prosecution, the case which was the subject matter of the investigation shall be referred to the Ministry of Justice and Constitutional Affairs for prosecution.[12]

2. Identifying and Tracing Proceeds

Under the Anti-Money Laundering and Counter Terrorist Financing Act, 2012, the Financial Intelligence Unit (FIU) is mandated to receive and analyse reports of suspicious transactions from reporting persons (banks, financial institutions, accountants, cash dealers and customs officers among others). If the FIU has reasonable grounds to suspect that the transaction involves money-laundering or embezzlement of public funds or any other related offences, it shall disseminate the report to the appropriate law enforcement agency to take appropriate legal action.[13] The FIU also can give instruction to any reporting person to take appropriate steps to facilitate inspections of suspicious transactions that involve funds or property that are proceeds of crime. The reporting persons are protected under the above-mentioned law, which states clearly that:

> Notwithstanding any other written law, no action, suit or other proceeding shall lie against a reporting person, or any director, officer, employee or representative of the reporting person, on grounds of breach of banking or professional secrecy or by reason of any loss resulting from an investigation, prosecution, or other legal action taken against any person, following a report or information transmitted in good faith under this chapter, whether or not the suspicion proves to be well founded.[14]

Acquiring and analysing objective evidence like documents, bank records, data stored in electronic devices, is an essential process when investigating cases of money-laundering, embezzlement of public funds or any corruption related offences. It sheds light on the truth of how the acts were committed and the motive of the offenders and their associates in the commission of the crime.

The investigation process in South Sudan requires the suspect to attend the investigation. In situations where the suspect is in another jurisdiction, he/she has to be extradited to attend the investigations. The witnesses are always summoned to come and provide truthful testimonies on subject matter of investigation during pre-trial investigation and subsequent trial. The witnesses and their immediate dependents are provided protection from harm or danger as a result of their testimony. However, South Sudan did not enact legislation to regulate compulsory systems to testify under subpoena, but the penalties for perjury and obstruction of justice are regulated under the Penal Code Act, 2008.

The legal framework on criminalization of money-laundering in South Sudan is governed by the Act of parliament legislation titled Anti-Money Laundering and Counter terrorist Financing Act, 2012. It criminalized acts of money-laundering and provided penalties therefor. Moreover, the predicate offences under the Anti-

[11] South Sudan Anti- Corruption Commission Act, 2009.
[12] South Sudan Ant- Corruption Commission Act, 2009.
[13] Anti-Money Laundering and Counter Terrorist Financing Act, 2012.
[14] Anti-Money Laundering and Counter Terrorist Financing Act,2012 Chapter IV.

Money Laundering Act include but are not limited to: any dealing which amounts to illicit drug trafficking under legislation related to narcotic drugs and psychotropic substances, terrorism including terrorist financing, participating in an organized criminal group and racketeering, trafficking in human beings and smuggling immigrants, illicit arms trafficking, sexual exploitation including sexual exploitation of children, armed robbery, kidnapping, smuggling forgery and corrupt practices among others.[15]

In carrying out investigations, it is mandatory to cooperate and coordinate – where necessity requires – with other investigative authorities being a governmental or a private institution as long as that would serve the interests of justice.

3. Case Study (1): *Government of South Sudan v. John Agau and Others*

This case started when the president of the Republic issued an order in June 2015 suspending top officials in his office accusing them of corruption.[16] Investigations were conducted and revealed that 16 officials were involved in corruption in the office of the president. The matter was referred to the High Court for trial. The Court established that the suspects jointly misappropriated public funds, abused their power and positions, forged the signature of the president on financial forms and official documents, counterfeited stamps and seals of the office of the president and other government institutions for the purpose of cheating and misappropriating of public funds. The court sentenced them to life imprisonment for stealing $14 million and 30 million South Sudanese pounds,[17] seventeen (17) vehicles and other exhibits related to the case were confiscated. In the subsequent appeals, the supreme court ordered acquittal of six suspects as innocent including the former chief administrator in the office of the president.

4. Accurate and Expeditious Freezing, Seizing and Confiscation

Freezing or seizing of assets involves temporarily prohibiting the transfer, conversion, disposition or movement of assets or temporarily assuming custody or control of assets on the basis of an order issued by a court or other competent authority.[18] Freezing is an action that temporarily suspends rights over the asset, e.g.[19] applying to freeze a bank account. Seizure is an action to temporarily restrain an asset or put it into the custody of the government and may apply to physical assets such as a vehicle. These measures are used to temporarily prevent the movement of assets pending the outcome. Confiscation of assets is a permanent deprivation of assets by order of a court or other competent authority. Confiscation (or asset forfeiture) is used after the final outcome of the case, as it is a final measure that stops the criminal from accessing assets obtained from a crime.[20] In order to be able to successfully conduct criminal investigations and to ensure that assets are secured throughout the investigations, it is important that the investigation agencies can freeze or seize such assets for the duration of investigation and criminal procedure.

Non-conviction-based confiscation has been seen as an alternative confiscation tool by many countries around the globe, especially in developing counties (particularly African countries), and it has been implemented with different levels of success. NCB asset forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction – whether the defendant is dead, unknown, missing or immune from prosecution, or in cases where the statute of limitations prevents prosecution. It benefits from the lower evidentiary threshold required to obtain a confiscation order, when compared to proceedings designed to determine criminal liability.[21]

5. Case Study (2): The Case of Dura Saga

Dura is a South Sudanese name for Sorghum, in 2008 the National Ministry of Finance and Economic Planning of Southern Sudan, gave more than 290 companies/traders contracts to deliver dura to the States,[22] in a move to eradicate the hunger that people were suffering. The state governments were expected to receive dura from the companies/traders and then write a letter upon receipt to the national ministry of

[15] Ant-Money Laundering and Counter Terrorist Financing Act,2012. Chapter I.
[16] https//sudantribune.com>article 5…
[17] http://www.aa.com.tr>africa>16
[18] http://www.oecd-illibrary.org>sites
[19] Fighting Text crime -The Ten Global Principles, Second Edition.
[20] Fighting Text Crime -The Ten Global Principals, Second Edition. Principal 4.
[21] https: knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022pdf
[22] http://en.m.wikipedia.org/corruption_in_south_sudan

finance to confirm the delivery of the dura. However, the companies/traders falsely claimed to have delivered dura to destination (state). The state governments lied to the national ministry of finance that the dura had been delivered. Then, the ministry approved payment for the goods that had not actually been delivered. The government of South Sudan paid millions of dollars for undelivered dura.[23] The committee was formed to investigate the matter. Unfortunately, the investigations into the case of dura were unsuccessful.

B. International Cooperation

1. Identifying and Tracing Proceeds

Asset recovery refers to the process whereby an investigator tracks, identifies and locates proceeds of crime. Asset tracing can be conducted by a number of parties, including law enforcement authorities, prosecutors, investigating magistrates, private investigators or interested parties in private civil actions. The investigators trace assets for the purpose of freezing and seizing them, so that these assets can be confiscated through a judicial order and returned to the victims of crime.[24]

2. Utilization of Suspicious Transaction Reports from Financial Intelligence Units

Under the Anti-Money Laundering and Counter Terrorist Financing Act, 2012, the Financial Intelligence Unit (FIU) have a duty to receive and analyse reports of suspicious transactions from reporting persons. If the FIU has reasonable grounds to suspect that the transaction involves money-laundering or embezzlement of public funds or any other related offences, it shall disseminate the report to the appropriate law enforcement agency to take appropriate legal action.[25] Thus, suspicious transaction reports from financial intelligence are essential in fighting crimes of money-laundering and identifying and tracing of proceeds of corruption.

3. Utilization of Interpol (ICPO)

South Sudan is a member of the International Criminal Police Organization, and by virtue of being a member, it can get benefits from the services that are rendered to member states, including cooperation between law enforcement agencies and secure exchange of information, especially in the area of apprehension of culprits who commit crimes in South Sudan and make their way to other jurisdictions around the globe.

4. Mutual Legal Assistance (MLA)

Mutual Legal Assistance in criminal matters is a process by which states seek and provide assistance to other states in serving of judicial documents and gathering evidence for use in criminal cases.[26] South Sudan has neither acceded to a Mutual Legal Assistance Treaty nor enacted domestic legislation on Mutual Legal Assistance (MLA). However, the country is applying the principle of reciprocity following the diplomatic channels when applying for mutual legal assistance and extradition. In the absence of an MLA law, the practice in South Sudan is that the Director of Public Prosecution (DPP) checks and verifies compliance and implements all outgoing requests to requested states and incoming requests from requesting states. The DPP ensures that all mutual legal assistance requests, including requests related to money-laundering and terrorist financing, are processed and executed without delay in a timely manner. All requests have to go through diplomatic channels. There is no agreed or adopted exemplar request for mutual legal assistance in the office of the DPP. However, the essential requirements include: the name of the central authority; summary of the facts relevant and statement of the relevant laws; purpose of the request and nature of the assistance sought; and other useful information.

C. Asset Recovery

Asset recovery refers to the process by which the proceeds of corruption transferred abroad are recovered and repatriated to the country from which they were taken or to rightful owners.[27] UNCAC provides for direct recovery of assets, whereby a foreign state is able to initiate a civil action in a foreign jurisdiction to establish title and ownership of property.[28] It means that courts should be able to order compensation or damages to a foreign state and recognize them as legitimate owners of property.

[23] http://www.voaafrica.com/amp/south-sudan-probe-sorghum-dura-saga-corruption
[24] http://eucrim.eu/articles/tracking-and-tracing-stolen-assets-foreign-jurisddictions/
[25] Anti-money laundering and Counter Terrorist Financing Act, 2012.
[26] http://www.unodc.org
[27] UNCAC, Chapter V.
[28] UNCAC, Article 53.

1. Legal Framework

South Sudan has no domestic legislation on asset recovery, yet the country applies the best practices and principles under the United Nations Convention Against Corruption (UNCAC) and other similar international treaties and conventions. Currently, the Directorate of Public Prosecutions of the Ministry of Justice and Constitutional Affairs is using *The Asset Recovery Handbook, A Guide for Practitioners*, as a guide on all legal matters related to asset recovery. Efforts are underway to enact domestic legislation on asset recovery and mutual legal assistance and extradition in South Sudan.

IV. CHALLENGES FACED IN FIGHTING CORRUPTION

The challenges that South Sudan is facing in fighting against corruption could be summarized as follows:

(i) Continued rebellion and conflicts;
(ii) Lack of political will;
(iii) Political instability;
(iv) Political influence on the Judiciary;
(v) Lack of integrity, accountability and transparency;
(vi) Lack of tough domestic legislation on corruption; and
(vii) Fear of rebellion if corrupt politicians/officials are prosecuted.

V. PROPOSED POSSIBLE SOLUTIONS FOR SOUTH SUDAN

Corruption is a global problem that all countries of the world have to confront. However, the solutions can only be home grown.[29] The solutions that South Sudan needs to adopt to make fighting against corruption meaningful, in my humble view, is to have sincere political will. The politicians regardless of their political affiliations must show commitment and join hands with the president, in his declared commitment and readiness in fighting corruption. In addition to that, South Sudan needs to restore peace and stability, the country has suffered from war, conflict and rebellions from different groups against the government. Starting from the Heglig crisis boundary war over oil-rich regions between South Sudan's Unity and Sudan's South Kordofan States, coming to internal senseless wars and conflicts of 2013 and 2016 between armed rebel groups known as Sudan People's Liberation Movement/Army (SPLM/A) and other groups on one side and the government of South Sudan on the other side. The wars and conflicts and continued rebellion affected South Sudan economically and formed fertile soil for corruption to prevail in the country. Moreover, there is an urgent need to enact tough domestic legislation on corruption offences and make necessary amendments to the existing laws, establish and strengthen the institutions mandated to take the lead in the fight against corruption. There is a need also to prioritize accountability and transparency when handling or managing public funds. Furthermore, the government must ensure the independence of the Judiciary and create a conducive environment in which the judiciary can perform its judicial functions without being subject to any form of duress, pressure or influence from politicians, any other persons or institutions and give justice a chance to prevail. Thus, South Sudan can enjoy the fruits of the fight against corruption.

[29] Johnny Saverio Ayiik, former Deputy Chairperson of the Anti-Corruption Commission.

THE ASSET RECOVERY REGIME IN SRI LANKA – ILLEGALLY DERIVED ASSETS

*G.A.D. Sajeevani**

I. INTRODUCTION

Corruption is in the limelight of the present Sri Lankan society, as many claim that the economic, social and political changes in the country are due to the damage caused to the nation by stolen State assets through corruption. Exploring possibilities of substantial recovery of State assets stolen as proceeds of corruption has become the main theme of the day. Depriving the people responsible for corruption from enjoying the fruits of corruption, the proceeds of corruption, while making efforts to recover stolen assets has become a major challenge in the current administration of criminal justice. The innovative methods of introducing crime proceeds into financial systems by the perpetrators of corruption calls for holistic approach and joint efforts by all law enforcement authorities, at both national and international levels, towards investigating and prosecuting corruption offences. Asset recovery, freezing, seizure and confiscation of proceeds of crime are governed by several legal provisions in different legislation in specific contexts.[1] The country is focusing on enacting composite legislation on Anti-corruption, Proceeds of Crime and Whistleblower Protection with a view of establishing a strong legal framework to combat corruption and for successful recovery of stolen State assets.

II. IDENTIFICATION, TRACING, SEIZING AND CONFISCATION OF PROCEEDS OF CORRUPTION

The true origin of concealed corrupt assets by white collar offenders has made it virtually impossible to identify and trace ill-gotten wealth. Existing legal provisions in different pieces of legislation attempt to prevent illicit asset flows through keeping due diligence on financial transactions and to recover and confiscate or forfeit proceeds of corruption to the State. Investigation and prosecution of corruption offences involve many procedural steps under different legislation, creating different corruption offences, on recovery of proceeds of corruption.

A. Investigations

1. Substantive Offences and Investigative Powers

The offences of corruption leading to recovery of assets are contained in several pieces of legislation. Transaction with property realized from an unlawful activity is an offence under the Prevention of Money Laundering Act (PMLA).[2] The Act encompasses a wide range of offences such as unlawful activities[3] leading to money-laundering. The definition of *unlawful activity* under the PMLA includes the offences under the Bribery Act[4] and corruption offences under the Penal Code[5] such as dishonest misappropriation of property, criminal breach of trust and cheating.[6] The offences cover even the intentional acquisition or use of proceeds

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[1] Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (Sec. 4, 6 (1) (d)), Tobacco Tax Act No.8 of 1999 (S.15(2)), Forest Ordinance [Sec. 40(1)], Poisons, opium & Dangerous Drugs Act as amended by Act, No. 13 of 1984 [Sec. 79] and the Customs Ordinance 1870 (e.g. sec. 125) deal with the seizure of assets.

[2] Section 3 of the Prevention of Money Laundering Act, No. 5 of 2006 as amended by Act No. 40 of 2011.

[3] Ibid., Section 35.

[4] Part II and V of the Bribery Act No. 11 of 1954.

[5] Penal Code Ordinance No.2 of 1883.

[6] Ibid., Sections 386, 388,399 and 401.

of crime in the presence of knowledge of it being proceeds of crime at the time of its receipt. This includes continuation of retention or concealment of proceeds. The term *transaction* as defined[7] in the PMLA covers all instances of conversion and transfer of proceeds of corruption. Any attempt, conspiracy or abetment relating to the offence also have been made offences under the said provision. Conviction for the commission of a predicate offence, the unlawful activity, is not a pre-requisite in proof of the offence of money-laundering.

A person can be charged with any of the predicate offences or money-laundering as separate charges, without any limitation. The Judicature Act[8] provides for jurisdiction of High Courts even for the offences committed offshore by citizens. The Bribery Act provides for similar jurisdiction to courts in soliciting and accepting gratification outside the country.[9] Jurisdiction[10] under the PMLA is available for the commission of unlawful activities outside the country, constituting offences in the offshore jurisdiction or constituting offences if committed in Sri Lanka.

Bribery by public officials,[11] judicial officials,[12] members of parliament,[13] any other person[14] and corruption,[15] the abuse of authority for unlawful loss to the State or for unlawful benefits for him/her or any other person are offences under the Bribery Act. Section 23A of the Bribery Act draws a presumption of bribery against a person who fails to explain the deficit between the known expenditure over known income, illicit enrichment. This provision places a reverse burden of proof to the accused to explain legal means of acquisition of property. Similar provision in the PMLA under section 4 draws the presumption of unlawful origin of assets in illicit enrichment cases.

The offences under the Bribery Act are being investigated and prosecuted by the independent Commission to Investigate Allegations of Bribery or Corruption (CIABOC). The offences under the Penal Code and the PMLA are being investigated by the Police Department and prosecuted by the Attorney General's Department. The Commission to Investigate Allegations of Bribery or Corruption Act (CIABOC Act)[16] entrusts with the independent Commission, comprising of three Commissioners including two retired judges of the Court of Appeal or Supreme Court, several powers of investigations. The Commission can exercise these powers on its own, without seeking judicial orders. It includes calling for information from government institutions, mobile telephone service providers, impounding passports and prohibition orders on transfer of assets.[17] The Police Department as opposed to this is investigating offences under the direct supervision of the Magistrates according to the provisions of the Code of Criminal Procedure Act, where the investigators are expected to report the investigative steps to the Magistrates from time to time.[18] The Financial Intelligence Unit (FIU) established under the Financial Transactions Reporting Act (FTRA)[19] is the regulator as to suspicious financial transactions.

2. Identification and Tracing of Proceeds of Corruption

Most of the investigations still use only the traditional methods of identifying/detecting proceeds of corruption such as relying on information leading to sting operations and witness statements. The CIABOC has a dedicated hotline operated during 24 hours to get swift information as to the commission of offences enabling the investigators the early detection of assets as corpus of the offences. This includes bribes accepted by public officials. Early information as to solicitation of bribes provide opportunity for the investigators to trap the offenders while accepting the bribe.

[7] Section 35 of the Prevention of Money Laundering Act No. 5 of 2006.
[8] Section 9(1)(f) of Judicature Act No.2 of 1978.
[9] Section 89(A) of the Bribery Act No. 11 of 1954.
[10] Section 35(p) of Prevention of Money Laundering (Amendment) Act No.40 of 2011.
[11] Sections 16, 17, 19, 21, 22, 23 of the Bribery Act No. 11 of 1954; Public Servant under Section 90 of the Act include a wide range of officials employed in any authority using public funds including public companies.
[12] Ibid., Section 14.
[13] Ibid., Section 14 & 15.
[14] Ibid., Part II.
[15] Ibid., Section 70.
[16] Commission to Investigate Allegations of Bribery or Corruption.
[17] Section 5 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.
[18] Code of Criminal Procedure Act No. 15 of 1979.
[19] Financial Transactions Reporting Act, No.6 of 2006.

Detection of proceeds of corruption through financial transactions are being monitored by the FIU on a risk-based approach. The FIU regulates and supervises all the institutions subjected to the reporting obligations under the FTRA. Both natural and legal persons[20] are governed under the FTRA. The FTRA require the subject institutions to have mechanisms in place for customer due diligence and identification on beneficial ownership. Banks are under an administrative responsibility of reporting suspicious transactions and in default subjected to criminal sanctions. Further, the said Act requires the subject institutions to maintain records on such information and also to report suspicious transactions[21] to the FIU. The regulations[22] issued by the FIU cover many natural and legal persons susceptible to assist in transferring proceeds of corruption and include rules as to the due diligence by financial institutions,[23] designated non-finance businesses,[24] and insurers.[25] The regulation and supervision by the FIU prevent transfer of proceeds of crime as an early step, before a reactive recovery. The FIU assistance to the investigative authorities, both the police and the CIABOC to identify the proceeds of corruption enable the tracing of the said assets before concealments.

The FIU is empowered under the FTRA to share information with domestic authorities. It has a legal obligation to refer matters or information as to suspicious transactions to relevant law enforcement authorities. The FIU from time to time has been an informant to the CIABOC on suspicious transactions triggering assets and corruption investigations enabling early detection. All the financial institutions under the rules issued by the FIU are under the obligation to preserve customer due diligence information over a period of six years[26] preserving the identification of information on assets.

The assets and liabilities disclosure system[27] of public officials and elected officials exposes illicit financial flows. This system prevents public officials claiming further legitimate income and assets further to declared assets and income. Declarations while taking a self-preventive measure for a public official increasing wealth illegally, also provides evidence enabling comparison of declared assets and the detected assets to detect proceeds of bribery, ensuring the recovery of the same.

The CIABOC Act[28] empowers the CIABOC[29] to search and seize proceeds of crime without obtaining court orders before destruction or concealment of such evidence. This is open even for non-produced documents on request of CIABOC. Section 5 of the CIABOC Act empowers the Commission to call for inter alia financial information from banks of a suspect, his/her spouse and children, company in which the person is a director, a trust in which the person has a beneficial interest or a firm in which the person is a partner. This includes bank documents, account opening forms, customer information, mandates, registrations etc.

Section 16 of the Prevention of Money Laundering Act (PMLA) makes it an exception to secrecy provisions in other laws to divulge such financial information under the PMLA. The FIU or an authorized officer under section 18 of the FTRA has the power to examine books and records of institutions in order to see the compliance status. This stands both as a preventive mechanism against illicit finance flows and early detection method of proceeds of corruption.

Information from financial institutions and public records such as land registry, motor traffic registration and company registration are being used to trace the proceeds. Border crossed proceeds are traced through international cooperation networks such as INTERPOL and the Egmont Group, leading to Mutual Legal Assistance. Dual criminality is a hurdle in obtaining formal international assistance where some of the

[20] Section 33 of the Financial Transactions Reporting Act, No.6 of 2006.
[21] Part I of Financial Transactions Reporting Act, No.6 of 2006.
[22] http://fiusrilanka.gov.lk/rules_directions.html
[23] Financial Institutions (Customer Due Diligence) Rules, No. 1 of 2016 - Extraordinary Gazette No 1951/13, January 27 of 2016.
[24] Designated Non-Finance Business (Customer Due Diligence) Rules, No. 1 of 2018. - Extraordinary Gazette No 2053/20, January 10 of 2018.
[25] Insurers (Customer Due Diligence) Rules, No. 1 of 2019 - Extraordinary Gazette No. 2123/14, May 13 of 2019
[26] http://fiusrilanka.gov.lk/docs/Rules/2016/1951_13/1951_13_E.pdf
[27] Declaration of Assets and Liabilities Law No. 1 of 1975.
[28] Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994; Section 7.
[29] Commission to Investigate Allegations of Bribery or Corruption.

substantive offences are found not to be criminal offences in the requested State.

Whistle-blowers are protected under the Assistance to and Protection of Victims of Crime and Witnesses Act.[30] They are protected from harassment, intimidation, coercion, violation or suffering from loss or damage in mind, body or reputation or any adverse change in the condition of employment.[31] They are given an immunity under the CIABOC Act from all criminal and civil litigation resulting from providing any information to the CIABOC.[32] In addition, section 23 of the CIABOC Act provides for the protection of the witnesses by making interference with witnesses an offence under the Act. Further, Section 81(1) of the Bribery Act provides for pardoning accomplices for the purpose of obtaining evidence at a trial. Similar provision is available under Section 256 of the Code of Criminal Procedure Act in relation to offences under other penal legislation. These provisions encourage the participants of the offences and the witnesses and informants to provide information to the law enforcement authorities, as to the flows of proceeds of corruption enabling early detection and tracing of such assets.

(a) Case study

In a concluded case[33] under Section 23A of the Bribery Act, a person employed in a government institution as a naval engineering assistant had been charged for accumulation of wealth in excess of his known income. Several assets detected by the CIABOC investigators included deposit of money to three bank accounts, a van and a motor bike. The deficit of expenditure over income was claimed to be Rs. 3,500,000/-. The accused at the trial failed to explain the means of income for the deficit. The CIABOC investigators detected and traced the property questioned in the indictment as unexplained acquisitions. This had been done through searching the registries at the Department of Motor Traffic and through obtaining documentary evidence from both government and private banks. However, none of the properties were seized or frozen. The exact means of acquisition of each property was not properly explained and, hence, the difference between the total income and expenditure had been considered at the trial. Having drawn the adverse presumption of bribery in absence of proper explanation for the money spent on acquisitions the court imposed a sentence of five years' rigorous imprisonment and a fine of Rs. 5,000/- on the accused. A mandatory additional penalty of the value equivalent to the deficit presumed to have acquired from bribery (Rs. 3, 500,00/-) was also imposed as a confiscation of the value of the proceeds of bribery.

3. Freezing and Seizing

The PMLA contains specific provisions[34] on freezing of proceeds of money-laundering. Designated police officers are empowered under section 7 of the PMLA to issue Freezing Orders, extending to seven days, over such property. This Order can be extended even to any person or institution who will have to give effect to the said order. Contravention of the same amounts to a criminal offence under the same provision of the PMLA. As a measure to track and identify the proceeds, Section 12 of the PMLA empowers the court to issue Orders to the possessors, controllers etc. of property as informed by the police to deliver identification documents of the property to the designated police officer. If any person is in breach of such Order the court may issue a search Order with a view to seize the required documents.

The appointment of a receiver of seized proceeds by court, upon an application of a designated police officer, for obtaining the possession and management of the same is governed under Section 11 of the PMLA.[35] In the event of forfeiture or confiscation of property section 15[36] of the PMLA empowers the court to appoint a receiver to be in-charge of such property.

The FIU also has the power to do an administrative freezing of property up to seven days.[37] The general law on freezing and seizure of assets, process to compel the production of documents and other movable

[30] Assistance To And Protection Of Victims Of Crime And Witnesses Act, No. 4 Of 2015.
[31] Ibid., Section 6.
[32] Section 9 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.
[33] HC B 1855/2010 Decided on 20.09.2018.
[34] Section 6-12.
[35] Prevention of Money Laundering Act No. 5 of 2006 as amended by Act No.40 of 2011.
[36] Ibid.
[37] Section 15(2) of the Financial Transactions Reporting Act No. 6 of 2006.

property, is found in the Code of Criminal Procedure Act.[38]

Under FTRA the authorized officers have the power[39] to seize any cash or negotiable instruments suspected to be the evidence of the commission of any offence referred therein. Provisions for seizure and detention of such recoveries are also provided for in the same Act.[40] Section 26 of the FTRA prescribes the procedure in disposal of assets. Accordingly, the procedure is subjected to the discretion of the High Court of the Western Province Holden in Colombo. This provision provides for continued detention orders based on evidentiary value for the matter under investigation. However, the total period of detention is limited to two years. The same provision allows the High Court to release the seized items for justifiable reasons to any claimant. At the expiration of the period of one year, in absence of any claimant for the seized items, the items are forfeited to the State.

The CIABOC under Section 7 of the CIABOC Act has the power to authorize its officers to search any place or person reasonably suspected to be in possession of evidence or non-produced material as requested for by the CIABOC. This section empowers the searching officers to seize any of the aforesaid material relevant for the commission of any offence under the Bribery Act or the Declaration Law.[41]

4. Confiscation

The Bribery Act provides for additional penalties, in addition to the fines imposed as a sentence after conviction, equivalent to the value of the gratification accepted[42] or the value of property, not exceeding three times of such value, presumed to have been acquired through bribery.[43] In illegal accumulation of wealth cases the value of the proceeds is being considered a basis for confiscation[44] in imposing a fine upon the convict for three times the value of the proceeds and subjecting his/her property equivalent to such value of the fine being confiscated. The court has the discretion even to make an order forfeiting[45] the proceeds of bribery in lieu of additional penalties. Under the Declaration of Assets and Liabilities Law the assets omitted to have declared are forfeited to the State.[46]

Property of a convicted person under Section 3 of the PMLA is subject to be forfeited. Forfeiture of proceeds derived from money-laundering,[47] value-based confiscation[48] of proceeds of money-laundering and extended confiscation of proceeds of assets[49] belongs to the convict of money-laundering are provided for in the PMLA. In light of this both laws enable confiscation of proceeds of corruption.

Section 28A (1) proviso of the Bribery Act precludes prejudicial Orders of forfeiture or confiscation being made against the interest of *bona fide* purchases of subject property. A similar provision is available under Section 13(2) of the PMLA.[50]

Confiscation and forfeiture are wholly dependent upon the conviction of the accused. Upon an acquittal the seized and frozen proceeds are subjected to production disposal procedure under the CCPA.[51]

(a) Case Study

In a bribery case[52] concluded in the year 2019, the first accused who was the Secretary to a prominent ministry had solicited a bribe of USD 3 Million to facilitate an ongoing investment by a foreign national. The

[38] Part VI of the Code of Criminal Procedure Act No. 15 of 1979.
[39] Ibid., Section 25.
[40] Ibid., Section 25.
[41] Declaration of Assets and Liabilities Law No. 1 of 1975.
[42] Section 26 of the Bribery Act No.11 of 1954.
[43] Ibid., Section 26A.
[44] Section 26A of the Bribery Act No. 11 of 1954.
[45] Ibid., Section 28A.
[46] Section 9(3A) Declaration of Assets and Liabilities Law No. 1 of 1975.
[47] Section 13(1) of the Prevention of Money Laundering Act No. 5 of 2006 .
[48] Section 13 of the Prevention of Money Laundering Act No. 5 of 2006.
[49] Ibid., Section 13(4).
[50] Ibid as amended by Act No. 40 of 2011.
[51] Chapter XXXVIII of the Code of Criminal Procedure Act No. 15 of 1979.
[52] HC/PTB/1/04/2019 Decide on 19.12.2019.

ministry in which the accused was an employee had had an official involvement relating to the said investment. He further had solicited Rs. 3 million and Rs. 100 million from the same investor on different dates. An advance of Rs. 20 million had been demanded on a later date. Said money had been accepted at a sting operation conducted by the CIABOC upon the information of the complainant investor. The bribe money had been recovered on the spot in the possession of the accused. The second accused who was a chairman of a prominent public entity had conspired with, aided and abetted the first accused in soliciting and accepting the money. Both the accused were convicted and the court while imposing a sentence of 20 years' rigorous imprisonment and a fine of Rs. 65, 000/- upon the first accused also imposed an additional penalty of Rs. 20 million for accepting the solicited money. In this case the value of the gratification accepted by the accused had been recovered and confiscated as an additional penalty under Section 26 of the Bribery Act.

B. International Cooperation

1. Identifying and Tracing of Proceeds of Corruption

The Mutual Legal Assistance in Criminal Matters Act governs[53] the whole regime of international cooperation as to criminal matters. Part VII[54] of the MACMA relates to tracing, seizure and freezing of proceeds of crime. Enforcement of foreign Orders are subjected to section 19 of the MACMA. Non-conviction-based confiscation also is provided for in the amended Act.[55] The law does not provide for confiscation of property of foreign origin through domestic adjudication of offences. Also, seizing, freezing and preservation of property based on future confiscation upon reasonable grounds is not provided for in the law. Section 27 of the PMLA[56] provides that for the purposes of investigation and prosecution of offences under the Act, the matters relating to international cooperation should be governed by the MACMA.[57] Accordingly, such cooperation can be sought on the basis of being a commonwealth country, an existing agreement, a United Nations treaty obligation or under reciprocity.[58] The Central Authority for requests is the Secretary to the Ministry of Justice.

The FIU under FTRA may share and disclose with its foreign counterpart institutions any information or suspicious transaction reports on agreed terms and conditions.[59] Agreements between the foreign authorities and the FIU are entered into with the permission of the Minister in-charge of the FIU. Such agreements ensure the relevancy of information to the foreign agency and the confidentiality as to the use of such information. From the year 2017 to 2021 the FIU has received 148 such requests for information and has sent 266 similar requests to its counterparts. In the year 2021 the FIU has responded to 19 such requests.[60] The legislation requires securing confidentiality and restricted use of information provided. Accordingly, as a member of the Asia Pacific Group (APG) on money-laundering the FIU has entered into a Memorandum of Understanding (MOU) with its counterparts from more than 34 countries.[61] Sharing of such information is also available under other international networks such as INTERPOL, the Egmont Group, the South Asian Association of Regional Cooperation (SAARC) and the Bay of Bengal Initiative for Multi-Sectoral Economic Cooperation (BIMSTEC).

The FTRA prohibits[62] maintaining anonymous or identified by number accounts. Section 11 of the FTRA permits disclosure of financial information, subjected to secrecy, in court proceedings. Hence, bank secrecy cannot be a ground for refusal of any assistance request. Absence of dual criminality also is not a direct reason for a refusal of a request but subjected to the discretion[63] of the Central Authority, the Secretary to the Ministry of Justice.[64] Sections 15 & 17 of the MACMA provide for assistance in search and seizure of proceeds and tracing of proceeds, respectively. The Financial Intelligence Unit is the domestic centre for the

[53] Sections 17,18 & 19 of the Mutual Assistance in Criminal Matters Act No. 25 of 2002.
[54] Ibid., Sections 17-19.
[55] Mutual Assistance in Criminal Matters (Amendment) Act No. 24 of 2018.
[56] Prevention of Money Laundering Act No. 5 of 2006 as amended by Act No. 40 of 2011.
[57] Mutual Legal Assistance in Criminal Matters Act No. 25 of 2002.
[58] Section 2 ibid as amended by Act No. 24 of 2018.
[59] Sections 16, 17 of the Financial Transactions Reporting Act No. 6 of 2006.
[60] FIU Annual Report 2021 http://fiusrilanka.gov.lk/docs/AR/FIU_AR_2021.pdf
[61] http://fiusrilanka.gov.lk
[62] Section 2 of the Financial Transactions Reporting Act No.6 of 2006.
[63] Section 6(1) of the Mutual Assistance in Criminal Matters Act No.25 of 2002.
[64] Section 4 of the Mutual legal Assistance in Criminal Matters (Amendment) Act No. 24 of 2018.

Egmont Group network. Sri Lanka became a member of the GlobE network and agrees to share information on an informal basis with its member countries.

The FTRA empowers[65] the authorized officers to search any person leaving or arriving Sri Lanka, upon suspected grounds of committing an offence under the FTRA on currency reporting. Requisite declarations[66] to the customs and immigration and emigration authorities as to the excessive limit of outgoing and incoming foreign currency as prescribed under the regulations screens, prevent and detect the illegal transfer of money. Even for the offshore remittances of money, the tax clearance of the Inland Revenue Department is required as a preventive measure of transferring ill-gotten money.

Section 7 of the MACMA provides for international cooperation on identification and locating possible witnesses for proceeds of corruption.

III. ASSET RECOVERY

Recovery of assets is through the direct execution[67] of conviction-based foreign confiscation orders under MACMA. Direct recovery of proceeds of corruption is not available under Sri Lankan law. Prompt reply to a Mutual Assistance request is a responsibility of the Central Authority.[68] Prompt transmission of information on exigent instances is provided for by the law.[69] While making evidence received from a competent authority as prescribed admissible in judicial proceedings,[70] the amended MACMA facilitates video conferencing of witnesses at domestic judicial proceedings from different States.[71] This provision also facilitates joint investigations by local and foreign authorities. Section 17 of the MACMA as amended specifically deals with requests for tracing proceeds of crime. Fresh legal provisions in the amended MACMA includes preservation, search and seizure of computer data.[72]

The Criminal Investigation Department and FIU in 2018 did promptly assist Bangladesh and Taiwan on a cross-border wire transaction. The stolen assets detected, seized and repatriated to Bangladesh amounted to around USD 20 Million. Similar occurrences of fraudulent wire transfers had been detected by the CID from time to time and had assisted the foreign jurisdictions in that regard.

IV. CHALLENGES

Legal restriction[73] in the CIABOC Act as to the maintenance of secrecy except only for the purposes of the CIABOC Act is a major challenge for investigations. This provision debars exchange of information even with law enforcement authorities such as FIU and police. When the police investigate corruption-related Penal Code offences and the offence of money-laundering, the CIABOC is prohibited by law from sharing information with those institutions even in the presence of same transaction offences of bribery and corruption. The CIABOC cannot seek joint investigations with the said institutions. Investigation of the same incident by both police and the CIABOC on different offences enable concealing proceeds and loss of vital evidence in view of delay and absence of coherence between investigations.

Non-availability of proper coordination among domestic law enforcement authorities too is a defect in the

[65] Section 24 of the Financial Reporting Act No.6 of 2006.
[66] Regulations made under the Exchange Control Act No.12 of 2017 https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/laws/cdg/Foreign_Exchange_Act_Direction_No_2_of_2021_e.pdf
[67] Sections 19, 20 of the Mutual Legal Assistance in Criminal Matters Act No. 25 of 2002 .
[68] Section 5A of the ibid as amended by Act No.24 of 2018.
[69] Ibid., Section 5B.
[70] Ibid., Section 11.
[71] Ibid., Section 14.
[72] Ibid., Part VIIA.
[73] Section 17 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.

criminal justice system. If all the law enforcement authorities investigating into one and the same incident under different legislation have a legal basis to join together and share information within the respective authorities, it expedites detection and tracing of proceeds before possible conversions.

Given the complexities in cross-border transactions the requisite of providing the evidentiary basis, the nexus between the suspect and the assets as proceeds of crime, remain a challenge in the absence of expertise in identifying and tracing the proceeds of corruption. Discovering concrete evidence on illegally accumulated foreign assets is a challenge faced by the CIABOC. Tracing cooperative witnesses also is a challenge in the background of absence of a strong witness protection regime.

Unavailability of a designated authority with expertise for the management of the seized property is a main lacuna in law. Absence of comprehensive legal provisions as to the seizing, freezing, forfeiture and confiscation of proceeds of all types of corruption offences is an existing gap in the law. Present laws do not lay down provisions for non-conviction-based confiscation. Hence, acquittal of the accused of a corruption case ends at releasing even proceeds of corruption to the same owner upon claim without confiscation.

The present legal provisions relating to witnesses and informants of corruption offences are not sufficiently protected under the legal provisions providing physical and mental protection from all forms of harassments, including employment related matters, relocation or non-disclosure of identity of informants.

The dual criminality requirement under MACMA would be a basis for refusal of requests for assistance. Hence, absence of offences such as bribery by foreign public officials, trading in influence, private sector bribery etc. would be subject to the discretion of the Central Authority.

Inadequacy of trained and specialized investigators and prosecutors is a similar challenge for lack of operational and financial dependence based on the general recruitment and financial procedures. Requirement of methodical training to professional investigators is a key step to secure successful recovery of assets.

Absence of a common approach with regard to the recovery of assets including legislation addressing all aspects of recovery of proceeds of corruption supported by an effective enforcement system remain the main lapse in the criminal justice system. Added to that lack of overarching measures as to the revelation of beneficial ownership, third-party ownership and unregistered assets remain an obstacle for timely detection of proceeds of corruption. Special investigative techniques such as wiretapping, use of bugging devices etc. are also not legitimized under the law.

V. PROPOSALS

The secrecy provision in the CIABOC Act should be relaxed to share information among law enforcement authorities for successful investigations. Laws should be amended to enable forming of joint investigation teams with different authorities. Further, the CIABOC as the special agency to deal with bribery and corruption, should be mandated to investigate and prosecute incidental offences under the Penal Code and the offence of money-laundering committed within the same transaction.

A composite law on proceeds of crime would rectify the existing lacunas in law. These include the property management authority, non-conviction-based confiscation, extended confiscation, value-based confiscation, civil forfeiture etc.

Legal provisions are required on wider protection to informants, victims and witnesses of corruption offences and special investigative techniques enabling the CIABOC to take swift actions on identification and tracing of proceeds. Provisions on offences such as private sector bribery, bribery of foreign public officials, trading in influence and sports corruption would cater for dual criminality requirements on mutual assistance requests. Strengthening the CIABOC with operational and financial independence is advisable for having skilled and professional investigators and prosecutors.

VI. CONCLUSION

The legal and institutional framework relating to identification, tracing, seizing, freezing and confiscation of proceeds of crime in Sri Lanka reflects the involvement of a number of institutions such as CIABOC, FIU, police, Attorney General and Ministry of Justice and the existence of a number of related laws. Although the existing legal provisions fulfil the requirements under UNCAC, some areas need to be further strengthened, while some concerns call for consideration of fresh legal provisions in order to have a coherence and completeness on the subject. Considering the multiple involvements and differences in legislation, a composite law on the subject of asset recovery is a key requirement under the present context. Currently the authorities are in the process of drafting a composite Proceeds of Crime Bill covering all the aspects of recovery of stolen assets. It is expected to provide logical, technical and practical solutions for many issues raised relating to asset recovery including international cooperation. Recent amendment of the Mutual Legal Assistance in Criminal Matters Act No. 24 of 2018 has already addressed many issues relating to foreign jurisdiction-based recovery of proceeds of corruption. The proposed composite Anti-Corruption Bill would further strengthen the national anti-corruption body's readiness to recover such proceeds.

Appendix

A. Abbreviations

CIABOC Act	Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994
CIABOC	Commission to Investigate Allegations of Bribery or Corruption
CID	Criminal Investigation Department
FIU	Financial Intelligence Unit
FTRA	Financial Transactions Reporting Act No.6 of 2006
GlobE	Global Operational Network of Anti-corruption Law Enforcement
INTERPOL	The International Criminal Police Organisation
MACMA	Mutual Legal Assistance in Criminal Matters Act No.25 of 2002
PMLA	Prevention of Money Laundering Act, No.5 of 2006

B. Legislation

Assistance to and Protection of Victims of Crime and Witness protection Act No.4 of 2015
Bribery Act No.11 of 1954
Code of Criminal Procedure Act No. 15 of 1979
Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994
Customs Ordinance No. 17 of 1869
Declaration of Assets and Liabilities Law No 1 of 1975
Financial Transactions Reporting Act No. 6 of 2006
Forest Ordinance No. 16 of 1907
Judicature Act No. 2 of 1978
Mutual Legal Assistance in Criminal Matters Act No.25 of 2002
Mutual Legal Assistance in Criminal Matters (Amendment) Act No.24 of 2018
Penal Code No.2 of 1883
Poisons, opium & Dangerous Drugs Act as amended by Act, No. 13 of 1984
Prevention of Money Laundering Act No. 5 of 2006
Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979
Tobacco Tax Act No.8 of 1999

REPORT OF THE PROGRAMME

The 24th UNAFEI UNCAC Training Programme
"Identifying, Tracing, Freezing, Seizing, Confiscating and Recovering Proceeds of Corruption: Challenges and Solutions"

1. Duration and Participants
   - From 2 to 28 November 2022
   - 30 overseas participants from 21 jurisdictions
   - 2 participants from Japan

2. Programme Overview

This programme mainly focused on the challenges that criminal justice practitioners face in identifying, tracing, freezing, seizing, confiscating and recovering proceeds of corruption and asset recovery, and it explored solutions to those challenges. In particular, the programme considered the following topics: (i) effective investigative techniques for identifying and tracing proceeds of corruption in each jurisdiction, (ii) accurate and expeditious preservation and secure confiscation of proceeds of corruption and (iii) international cooperation. Also, this programme, through lectures on best practices and the participants' discussions, aimed to enhance the participants' knowledge of measures to improve anti-corruption efforts in their respective jurisdictions and to establish a global network for the exchange of updated information on the practices of the respective jurisdictions.

3. Contents of the Programme

(1) Lecturers

The following visiting experts from overseas and Japanese experts, as well as UNAFEI faculty members, gave lectures as follows:

- Visiting Experts

  - Mr. Federico Paesano
    Senior Financial Investigation Specialist
    Basel Institute on Governance

  - Mr. Tuomas Salminen
    External Affairs Coordinator
    Office of the Director, Division of External Operation, Registry
    International Criminal Court

  - Ms. Vera Wang
    External Affairs Coordinator
    Office of the Director, Division of External Operation, Registry
    International Criminal Court

- Japanese Experts

  - Mr. SATO Takuma
    Deputy Director of Second Investigation Division
    Criminal Investigation Bureau
    National Police Agency

  - Mr. YUKI Takeshi
    Chief, Japan Financial Intelligence Center (JAFIC)
    National Police Agency

  - Mr. ICHIKAWA Hiroshi
    Public Prosecutor
    Director of Special Investigation Division
    Tokyo District Public Prosecutors Office

- Mr. SEKI Yoshitaka
  Public Prosecutor
  Deputy Director of Public Security Division
  Tokyo District Public Prosecutors Office

(2) Individual Presentations

Participants shared the practices and the challenges in their respective jurisdictions regarding the theme of the Programme through their individual presentations. Materials of all presentations were uploaded online for later reference by participants.

(3) Group Workshops

The participants were divided into three groups and exchanged their views and knowledge through discussions on topics: (i) effective investigative techniques for identifying and tracing proceeds of corruption in each jurisdiction, (ii) accurate and expeditious preservation and secure confiscation of proceeds of corruption, and (iii) international cooperation.

Regarding investigative techniques and preservation and confiscation, the participants mainly discussed measures to obtain information and evidence from financial institutions and measures to preserve assets in accounts, such as freezing accounts. Some participants pointed out that bank secrecy laws are often an obstacle to investigation, and that it is often difficult to conduct expeditious and effective identifying, tracing and preservation of the proceeds of corruption under legal systems which require judicial scrutiny for these measures, especially in the early stage of investigation, where sufficient evidence has not been collected to persuade judges. In this regard, the participants recommended the following practices: establishing a legal framework which allows prosecutors to issue preservation orders which are subject to judicial review, and encouraging financial institutions to include consent-based provisions in consumer banking contracts that permit the institutions to provide law enforcement authorities with account records. In addition, the need for awareness-raising among the public as part of preventing corruption and protection of whistle-blowers were pointed out.

Regarding international cooperation, it was recognized that issues identified regarding topics (i) and (ii) may be obstacles to international cooperation such as mutual legal assistance. In addition, the general issues regarding international cooperation are the delay or failure in responding to requests for mutual legal assistance in investigations, the complexity of procedures, as well as lack of information sharing on requirements for accepting such requests in respective jurisdictions. As measures to promote international cooperation, the participants were in favour of promoting information sharing and harmonization of legal frameworks, informal information exchanges through various frameworks both bilateral and multilateral, recognizing the necessity of collecting evidence in collaboration with foreign law enforcement authorities.

Each group concluded the programme by presenting their action plans based on the challenges they identified and what they learned in the lectures, presentations by the fellow participants and discussions.

4. Feedback from the Participants

Most participants commented that the lectures, individual presentations and group workshops helped them gain knowledge. On the other hand, some commented that it would have been better if more specific information and best practices had been exchanged. We appreciate all the feedback from the participants and take them into consideration in planning our training programmes in future.

5. Comments from the Programming Officer

Combating corruption is an issue that all countries face, and asset recovery is an urgent issue throughout the world. I felt the enthusiasm of the participants in the programme by their active participation. The participants were highly interested in the lectures, presentations and group workshops, which led to active discussions. We hope that the knowledge gained from this course will help the development and enhancement of each participant's jurisdiction.

This programme was held in person for the first time since UNAFEI's in-person training courses were suspended due to the Covid-19 pandemic. In-person communication throughout the programme made it easier for the participants to understand the content of the programme as well as to establish personal

connections. We hope that this personal network will contribute to preventing corruption and asset recovery in the future.

SUPPLEMENTAL MATERIAL

UNAFEI

CHAIR'S SUMMARY

Enhancing Technical Assistance to Reduce Reoffending and Promote Inclusive Societies
Tokyo, Japan
18 – 20 October 2022

Opening Ceremony

1. Mr. MORINAGA Taro, Director of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), delivered opening remarks and welcomed the participants to the meeting. The fourteen experts from the field of crime prevention and criminal justice and twelve UNAFEI faculty members who participated in the meeting are listed in Annex 1.

2. The discussion was chaired by Ms. IRIE Junko, Deputy Director of UNAFEI. Recalling the theme of the event – "Enhancing Technical Assistance to Reduce Reoffending and Promote an Inclusive Society" – the Chair elaborated the purpose of the meeting: to identify promising practices to reduce reoffending, implementation challenges in developing countries, and the role of technical assistance in overcoming the challenges. Details of the specific programmes and technical assistance projects to reduce reoffending that were presented during the discussion session are available in Annex 2.

Country Presentations

3. The country presentations were designed to illustrate some of the ways in which criminal justice systems around the world are pursuing efforts to prevent crime and promote reintegration by reducing reoffending. The presentations identified numerous challenges to the implementation of effective measures in developing countries. Unsurprisingly, prison overcrowding, which was noted to have resulted largely from overreliance on custodial sentences and prolonged pretrial detention, undermines rehabilitative prison environments. The ability of criminal justice systems to respond to this issue is limited by endemic problems such as the lack of financial resources, lack of equipment and facilities, insufficient staff and inadequate training. These challenges are exacerbated by the lack of administrative structures to handle community release schemes.

4. *Prison environments* remain a significant obstacle to the success of – and even the ability to provide – prison-based rehabilitation programmes. In Cambodia, the underdeveloped state of prison facilities puts needed programmes on hold, resulting in the promotion primarily of agricultural programmes, which does not provide offenders with marketable skills. In Samoa, prisons are managed by police officers, which creates clear conflicts of interest and can undermine the rehabilitative purpose of imprisonment, while the prevalence of organized crime within prisons undermines rehabilitation efforts in Brazil. Kenya reported a lack of training and manuals on rehabilitative practices, which is an issue faced by many developing countries. Efforts to expand *non-custodial measures and community support* are often frustrated by lack of public awareness and understanding of the purpose of community corrections. Most countries reported issues with the stigmatization of offenders by the community and weak political support for or prioritization of offender rehabilitation, and strong cultural traditions and attitudes against offenders were reported in Timor-Leste, Cambodia and Samoa. The *absence of disaggregated data and reliable statistics* is an issue that impacts all aspects of the criminal justice system in developing countries. Data on arrests, imprisonment and reoffending can help policymakers and practitioners throughout the system make better rehabilitative decisions.

5. Despite these significant challenges, the country presentations identified promising practices aimed at reducing reoffending. *Timor-Leste* has, on its own initiative and with the support of technical assistance providers, developed measures for reducing reoffending that include assessment and evaluation procedures,

a court-supervised release process, and family reintegration strategies. *Samoa* has had success with art and painting programmes, which are low cost, easy to implement and can result in income to the offender and the correctional institution through revenue sharing upon the sale of the artwork. Also in Samoa, the Graffiti Project, conducted in partnership with the private sector, was reported as effective to make youth realize the difficulty of removing graffiti from buildings and preventing the practice of graffiti generally. Finally, although underutilized, Samoa reported that its indigenous infrastructure provides opportunities for greater partnership in reducing reoffending through community-based measures. In *Cambodia*, prison-based vocational training programmes and subsequent employment were identified as factors that could significantly reduce reoffending. In *Kenya*, the probation service has succeeded in obtaining greater resources by demonstrating its value to key criminal justice stakeholders (particularly judges) in several ways. Social inquiry reports are used to assess offenders prior to the imposition of a sentence, and informal social control (family and community) and a multidimensional, multi-stakeholder approach is recognized as key to reducing reoffending, as demonstrated by Kenya's use of Community Probation Volunteers. Kenya's experience also demonstrated the important role of probation in handling the emergency release of prisoners during the Covid-19 pandemic. As *Brazil* faces issues of overcrowding, non-prosecution agreements are used as a measure to avoid incarceration, and "semi-open" prison regimes are used to facilitate rehabilitation by promoting work release so that offenders can find employment in society.

Discussion Session

Session 1: Use of non-custodial measures to prevent reoffending

6. While prison overcrowding can impact countries at any stage of development, the impact on developing countries is particularly severe. It was noted that non-custodial measures are necessary to decongest prisons, and they have the added benefit of being more effective at rehabilitating most offenders and maintaining family ties. The discussion identified challenges that many countries face in implementing such measures: (i) lack of an appropriate legal framework (inadequate range of non-custodial sentences and measures, lack of probation and parole systems, and the absence of gender-responsive measures as well as measures that address special needs, such as drug use disorders and mental health needs); (ii) insufficient development of sentencing guidelines that would be needed to avoid overreliance on custodial sentences by courts; (iii) low levels of awareness and understanding among other key stakeholders, including the police, prosecutors, correctional authorities, policymakers and the general public; (iv) limited infrastructure, capacity and resources; (v) insufficient cooperation between the relevant authorities and with the private sector and representatives of the community; and (vi) insufficient research on the effectiveness of different sentences and measures.

7. Given the relative insufficiency of legal frameworks and low awareness, technical assistance projects may require extensive training materials and workshops, and the translation of materials into local languages. Other valuable resources may include the creation or revision of forms to help social workers and judges assess risk and analyse treatment options for offenders who would benefit from non-custodial sanctions or measures. Electronic monitoring was also discussed as a measure to facilitate community-based treatment, and it was reported that it could contribute to reducing reoffending, provided that it is used, where appropriate, in conjunction with psychosocial and other forms of tailored support, and that the risk of net-widening is taken into consideration. The difficulty of assessing the effectiveness of these approaches was discussed, and it was suggested that evidence of effectiveness is important because of the scepticism that some justice systems or policymakers have toward non-custodial measures due to the perception that they lack a deterrent effect.

Session 2: Rehabilitation in the custodial environment

8. The projects and practices presented during the session demonstrated the critical importance of technical assistance projects in addressing and making meaningful improvement to custodial environments in developing countries. Staff training on the implementation of the Nelson Mandela Rules, the Bangkok Rules and other relevant standards and norms is an important first step not only to ensure that personnel understand and respect the relevant human rights standards but also to identify performance gaps and

urgent priorities. In addition to training, many of the projects presented focused on introducing offender assessment and classification tools in order to enhance prison safety and security and to enhance the ability of correctional officials to provide individualized treatment. Meaningful prison work programmes were also discussed as a means to support social reintegration of offenders by providing offenders with vocational skills and increase their employability upon release. In a developed country, offenders who worked in the prison industry programme are reported as being only one third as likely to reoffend. While these programmes have great potential in developing countries, it was observed that the creation of a rehabilitative environment in line with the Nelson Mandela Rules, the Bangkok Rules and other relevant United Nations standards and norms is a precondition to success.

Session 3: Effective supervision and support of offenders in the community

9. The discussion focused on the importance of multi-stakeholder partnerships to ensure effective support for offenders in the community. The social partnership model was introduced as a means to organize the private sector to provide offenders with knowledge, resources and opportunities necessary to succeed in society, and the offenders who benefited from these partnerships often developed pride in their vocational accomplishments and their successful rehabilitation. The importance of family contact and continued engagement in society during incarceration was also stressed as a means to facilitate reintegration upon release, but practices should be gender-responsive and provide alternative solutions, such as halfway houses, when family contact is not practical or is inappropriate. To promote a multi-stakeholder, multidisciplinary approach to offender rehabilitation and reintegration, national action plans and requiring knowledge of offender rehabilitation for the certification of certain professionals, such as social workers and psychologists, can be considered. Additionally, peer support groups were discussed as an effective measure to maintain offender motivation and progress toward rehabilitation while reintegrating into society.

Session 4: Measuring the impact of strategies to reduce reoffending

10. The presentations and interventions introduced sophisticated and innovative approaches to measuring the impact of strategies to reduce reoffending, such as demonstrating programme accountability and effectiveness through cost-benefit analysis. Another approach involved the integration of data collection systems and the use of statistical models for programme evaluation. As many developing countries lack reliable data, technical assistance to support data collection and the compilation of crime statistics can add sustained value to a criminal justice system. On the issue of defining "reoffending", some scepticism was expressed regarding the adoption of a single metric or indicator, and it was suggested that technical assistance focus on encouraging the adoption of clear definitions, which may vary somewhat in each country and each individual project, and providing guidance on the use of accurate terminology. It was also stated that issuing identity documents is a problem in many developing countries, leading to the problem of identification of individuals and tracking them through the justice system. In addition to the importance of quantitative data, it was also observed that complementary qualitative data, whether through clinical practice or in the form of personal stories of offenders, can help build a narrative to influence policymakers and the media on the value of successful rehabilitation and reintegration strategies.

Recommendations

11. Participants shared the following ideas on enhancing technical assistance for developing countries to support their efforts to reduce reoffending:

(a) Use of non-custodial measures to prevent reoffending

(i) Provide assistance through a step-by-step approach that targets the availability and quality of non-custodial measures and the ability to apply them effectively. This approach may require detailed review of legislation and sentencing policies (e.g., sentencing and prosecutorial guidelines) to ensure that non-custodial measures are available, are gender responsive and can be properly applied, as well as review of substantive criminal law to ensure that outdated penal offences and punishments are repealed and that sanctions, including non-custodial measures and custodial sentences, are

proportionate to the offence;

(ii) Provide key stakeholder groups (such as law enforcement officials, prosecutors, judges, probation officers, lawyers, victims, offenders, social services and non-governmental organizations, community volunteers) with information and training on the functions and use of non-custodial measures, for example, through the preparation of handbooks, toolkits and other practical resources;

(iii) Promote closer cooperation among criminal justice decision makers and representatives of community-based-services agencies in order to identify and respond to the needs of offenders, in particular members of vulnerable populations, and promote utilization of alternative and restorative justice processes, including customary justice mechanisms and indigenous infrastructure, in line with the domestic legal system and relevant international standards and norms;

(iv) Promote the implementation of non-custodial measures that are based on individualized assessments, which may include psychosocial and other tailored support and protocols for referral from criminal justice agencies to the respective health, mental health, social welfare or other agencies.

(b) Rehabilitation in the custodial environment

(i) Focus on raising prison conditions and substantial compliance with the Nelson Mandela Rules, the Bangkok Rules and other relevant United Nations standards and norms as a basis for effective treatment programmes, based on the understanding that the prison environment directly impacts inmates' prospects of rehabilitation and reintegration;

(ii) Provide training on the Nelson Mandela Rules, the Bangkok Rules and other relevant United Nations standards and norms;

(iii) Introduce offender assessment and classification tools to enhance prison safety and security and enable the provision of individually tailored treatment programmes;

(iv) Facilitate contact with family and friends and supplement visitation with use of technology and other means insofar as it is conducive to maintaining ties;

(v) Facilitate enhanced access to treatment and other support services;

(vi) Develop and promote vocational-training and life-skills-development programmes that are not guided solely by existing gender stereotypes and without undue influence from private actors, including through the establishment of prison industry schemes and in partnership with the community, which may include the private sector;

(vii) Promote inter-agency and multi-stakeholder cooperation to ensure the continuity of care as the offender moves from the custodial to the community setting.

(c) Effective supervision and support of offenders in the community

(i) Promote partnership with the private sector to create employment opportunities for offenders, to provide entrepreneurship training and small business guidance to enable offenders to start their own businesses, and to expand access to capital and other resources for offender rehabilitation and reintegration;

(ii) Raise public awareness and enhance engagement of stakeholders, including the private sector, by publicizing ex-offenders' positive experiences of rehabilitation through employment and entrepreneurship, and involve ex-offenders as peer counsellors and role models in rehabilitation and reintegration programmes;

(iii) Support community corrections agencies in identifying new community partnerships including with universities and other educational institutions, social welfare organizations and volunteers,

and involving them in offender rehabilitation and reintegration;

(iv) Assist countries with the establishment of post-release support programmes and facilities, such as halfway houses, aftercare treatment centres, case management services, employment and educational programmes, etc., in line with the Tokyo Rules;

(v) Encourage partnerships with peer support groups with the aim of ensuring ongoing community support beyond the term of the criminal justice intervention.

(d) Measuring the impact of strategies to reduce reoffending

(i) Clearly define "reoffending" and similar terms within the context of specific studies, reports and technical assistance projects;

(ii) Provide sustainable, progressive (step-by-step) assistance to countries in their development of data collection systems and processes for the analysis and publication of statistics in the area of crime prevention and criminal justice;

(iii) Incorporate data collection and analysis with the implementation of evidence-based technical assistance projects;

(iv) Promote quantitative approaches to measure the effectiveness of strategies to reduce reoffending, improve rehabilitation programmes and demonstrate their impact – reliable data can convince politicians and the public of the positive impact of a project as well as enhance motivation of frontline officers to pursue and expand effective practices;

(v) At the same time, promote qualitative approaches to effectiveness by, for example, collecting stories of success and challenges – both by and about offenders – and implementing a professional media strategy to raise public awareness and understanding.

(e) Measures to enhance collaboration and information-sharing among technical assistance providers

(i) The PNI should, in close cooperation with the UNODC, facilitate information sharing on promising technical assistance projects and practices in the field of crime prevention and criminal justice through regular in-person meetings and other forums;

(ii) Governments, the private sector and other donors are encouraged to provide adequate financial and other resources to ensure the ability of technical assistance providers to engage in such collaboration and information-sharing forums.

Closing of the Session

12. Prior to adjournment, the PNI experts collectively expressed thanks to UNAFEI for organizing the event and for arranging an online lecture from the Tokyo Public Prosecutors' Office and study visits to the Supreme Court of Japan, including a courtesy call on Justice Toru Sakai, the Higashi Nihon (East Japan) Adult Medical Corrections Center and Shisui-en Halfway House, which enriched the meeting and improved their understanding of the Japanese criminal justice system and practices to reduce reoffending.

20 OCTOBER 2022
TOKYO, JAPAN

ANNEX 1

PARTICIPANT LIST

(In-person participants)

1. Ms. Jee Aei LEE, Crime Prevention and Criminal Justice Officer, United Nations Office on Drugs and Crime (UNODC)

2. Ms. Fumiko AKASHI, Consultant, United Nations Office on Drugs and Crime (UNODC)

3. Mr. Leif VILLADSEN, Deputy Director, United Nations Interregional Crime and Justice Research Institute (UNICRI)

4. Mr. Andrew Karokora MUNANURA, Legal and Training Consultant, United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI)

5. Mr. Douglas DURAN CHAVARRIA, Director, United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD)

6. Dr. Vincent Cheng YANG, Senior Associate, International Centre for Criminal Law Reform & Criminal Justice Policy (ICCLR)

7. Mr. Josh OUNSTED, Thematic Leader, Access to Justice, Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI)

8. Dr. Phiset SA-ARDYEN, Executive Director, Thailand Institute of Justice (TIJ)

9. Ms. Chontit CHUENURAH, Director of Office for the Bangkok Rules and Treatment of Offenders, Thailand Institute of Justice (TIJ)

(In-person observers)

1. Dr. Matti Tapani JOUTSEN, Special Advisor, Thailand Institute of Justice (TIJ)

2. Mr. Clarence Joseph Thomsen NELSON, Justice, Supreme Court of Samoa

3. Mr. Severino Hunt GAÑA Jr., International Director, Asia Crime Prevention Foundation (ACPF)

(Online participants)

1. Ms. Marcella CHAN, Director of Programs, International Centre for Criminal Law Reform & Criminal Justice Policy (ICCLR)

2. Dr. Mana YAMAMOTO, Research Expert, United Nations Interregional Crime and Justice Research Institute (UNICRI)

(UNAFEI Faculty)

1. Mr. MORINAGA Taro, Director

2. Ms. IRIE Junko, Deputy Director

3. Ms. KIDA Makiko, Professor

4. Ms. TAKAI Ayaka, Professor

5. Mr. YAMANA Rompei, Professor

6. Mr. KUBO Hiroshi, Professor

7. Mr. OKUDA Yoshinori, Professor
8. Mr. NAKAYAMA Noboru, Professor
9. Ms. MIYAGAWA Tsubura, Professor
10. Mr. OTSUKA Takeaki, Professor
11. Ms. TANAKA Mii, Professor
12. Mr. Tom SCHMID, Linguistic Adviser

ANNEX 2

REDUCING REOFFENDING: PROMISING PRACTICES AND TECHNICAL ASSISTANCE PROJECTS

Non-custodial Measures

With the objective of promoting the effective use of non-custodial measures, UNODC's project in Sri Lanka undertook a detailed assessment, organized a series of webinars with national stakeholders, convened a national forum for sharing recommendations and assisted in the formulation of a national strategic plan. To increase the capacity of criminal justice actors, webinars and capacity-building workshops were conducted in each of the nine provinces of Sri Lanka to reach as many practitioners as possible nationwide. UNODC also endeavoured to raise awareness on the rationale and benefits of using non-custodial measures through development of a handbook on community-based correction procedure, assistance with the offender management system and developing a training module on custodial measures for judges. To maximize the use and reference of its tools, UNODC translated its tools into local languages wherever possible.

TIJ has been working to promote the implementation of the Bangkok Rules by working on gender-sensitive solutions, including preparation, together with the UNODC, of a Toolkit on Gender-Responsive Non-Custodial Measures. The Toolkit was the product of an expert meeting in Bangkok and aims to ensure gender equality in the use and application of non-custodial measures, addressing the negative impact of incarceration on women convicted of minor crimes. The Toolkit draws on the Tokyo Rules and the Bangkok Rules to offer non-custodial sentencing options for countries seeking to implement gender-responsive policies. To promote and disseminate the Toolkit, it was translated into Thai, and a workshop was held to promote it.

ILANUD has designed a matrix of risk and protection factors aimed at building restorative plans in juvenile justice processes. The matrix has been used by the psychosocial teams of the Costa Rican judiciary to assist judges and social workers to gather and analyse treatment options for juveniles. The matrix includes 13 protection factors and 24 risk factors, such as education, work, socioeconomic and family factors, and relationships. Importantly, the tool does not stigmatize the juvenile and is used to identify positive treatment opportunities. ILANUD introduced the study in Argentina which demonstrated the impact of electronic monitoring in conjunction with psychosocial support on the reduction of recidivism compared to imprisonment. It compared the re-arrest rates of two groups of similar population based on factors including the seriousness of the crime: the first group is made up of individuals whose last period under supervision was spent under electronic monitoring, and the other one spent their last period under supervision in prison. The result showed that the group released on electronic monitoring experienced reduced re-arrest rates of between 11 and 16 percentage points, or approximately half the baseline recidivism rate.
http://nrs.harvard.edu/urn-3:HUL.InstRepos:28548029

Rehabilitative Custodial Environments

UNODC is engaged in a three-year technical assistance project in Ghana to strengthen the compliance of the Ghana Prisons Service with the Nelson Mandela Rules. The project's main goals are: (i) to improve the most urgent prison conditions, (ii) to implement a classification tool and (iii) to implement rehabilitation programmes for social reintegration. In-person training on the Nelson Mandela Rules is targeting 1,000 out of Ghana's approximately 9,000 prison officers, complemented by UNODC's e-learning course on the Rules. Prison conditions are being improved by prioritizing urgent needs such as access to health care and other basic services, and a new classification tool aims at enhancing prisoners' rehabilitation and prison security and safety procedures. To enhance rehabilitation, the project is focusing on improving prisoners' contact with the outside world and providing education programmes and vocational training, psychosocial support and post-release social reintegration measures. Legislative assistance to update and establish laws on prison management and community service and parole regulations was highlighted as an important measure for the sustainability of the improvements made during the project.

ICCLR introduced CORCAN – Canada's prison industry programme through which inmates manufacture goods (furniture, office supplies, etc.) and provide services (laundry, farming, etc.). The programme is a fundamental component of the offender rehabilitation scheme by helping incarcerated offenders gain work experience, earn money, learn vocational skills and earn trade certificates. Involvement in CORCAN

increases employability after release, and those who worked for CORCAN are only one third as likely to reoffend. It was noted that from 2017 to 2018, inmates earned 14,100 vocational certificates; 61 per cent of offenders employed with CORCAN are granted day parole; and 58 per cent of offenders who obtained a trade certification found community employment in their trade. The overall results were regarded as positive.

UNICRI has broad experience introducing prison-based assessment tools – coupled with training on interviewing techniques – to countries seeking to enhance rehabilitative environments in prison, and these tools have been applied to the assessment of violent extremist offenders. UNICRI's assistance to Mali helped improve rehabilitation and reintegration of violent extremist offenders in and after detention, and prison-based assessment was complemented by a programme outside prison to promote alternatives to violence. The programme also supported prison management by delivering capacity-building, gap analysis and development of a Risk Assessment Tool to determine the level of radicalization leading to violence, and by training prison staff to use the tool. UNICRI is developing plans to provide assistance to Moldova to strengthen the inter-agency coordination mechanism to ensure seamless transition from prison to the community, and assistance to the Central African Republic to introduce an offender classification system and training to help correctional officials identify the individualized needs of each detainee. UNICRI is also planning to use artificial intelligence and related technologies to facilitate the provision of services, including human-centred rehabilitation.

Effective supervision and support of offenders in the community

ILANUD has provided legal technical assistance to El Salvador in conjunction with the UNDP to revise the legal framework to improve possibilities for social reintegration, mainly of individuals affiliated with gangs, and to draft a restorative justice law. ILANUD also supported the adoption of regulations to facilitate the expungement of criminal records in Costa Rica. By expunging criminal records for minor crimes (up to a three-year sentence) immediately upon completion of the sentence, the measure is intended to increase the employability of offenders. For more serious crimes, wait periods for expungement increase from 1 to 3 to 10 years. Previously, there was a 10-year wait period for expungement of all criminal records regardless of the seriousness of the offence.

TIJ supports the social partnership model for social reintegration by offering practical work experience to women scheduled for release from prison. The project offers work experience in massage therapy, spa treatment and coffeehouses and included the opening of a museum on women prisoners, which tells personal stories of their pathways to crime and to rehabilitation. The aim of the museum is to enhance public awareness by providing a detailed understanding of the complex lives of women prisoners. TIJ also introduced its "Hygiene Street Food for Chance" programme, though which it partnered with the private sector to provide food-industry training from professional chefs and to provide women with food carts to sell street food in a hygienic manner.

UNAFRI has assisted a project to enhance family contact in Uganda. In Africa, stigmatization of offenders is a serious problem that often results in their ostracization from society. The project, "From Prison Back Home", forms the bedrock of Uganda's rehabilitation and reintegration programme, asserting that, to bring an offender back into society, a needle is required to re-stitch the torn social fabric. The project advocated starting rehabilitation immediately upon incarceration and maintaining family contact throughout the custodial sentence. Other measures promoted by the project include vocational training for offenders and linking inmates with trade schools and universities around the world, ensuring that inmates are exposed to the outside world through access to print and broadcast media, and promoting communication between inmates and their families through social workers. UNAFRI is also encouraging the government of Uganda to establish a legal framework for community care.

Measuring the impact of strategies to reduce reoffending

TIJ developed a model to prove the cost-benefit of its projects to its stakeholders. TIJ is following up with participants through detailed interviews within eight months of programme completion. One of the data points is income earned through the field in which the offender was trained. Direct costs and opportunity costs of reoffending are also estimated, as well as the social costs of crime and related governmental expenditures. The reoffending rate of the programme is also compared with the national reoffending rate.

For each dollar invested in the programme, TIJ has calculated 8.2 dollars in benefits to society. TIJ hopes to apply this analysis to all of its programmes in the future.

UNAFEI introduced Japan's practices on data collection through the System for Crime and Recidivism Prevention (SCRP), which links up data from public prosecutors' offices, the Correction Bureau and the Rehabilitation Bureau. This has made it possible to conduct cross-organization evaluation. The Ministry of Justice Case Assessment Tool (MCJA) programme was developed to identify the likelihood of reoffending among juveniles and involved the statistical analysis of 6,000 juveniles admitted to juvenile classification homes. The analysis found that a substance abuse treatment programme was effective at reducing reoffending within the first six months of programme completion. It was observed that when providing technical assistance, evidence-based practices need to be implemented over the long term, realistically and sustainably. UNAFEI also shared Japan's experience providing technical assistance to Uzbekistan on data collection and the publication of crime statistics in the form of white papers. The importance of taking a long-term approach and pursuing steady, incremental success was underscored.

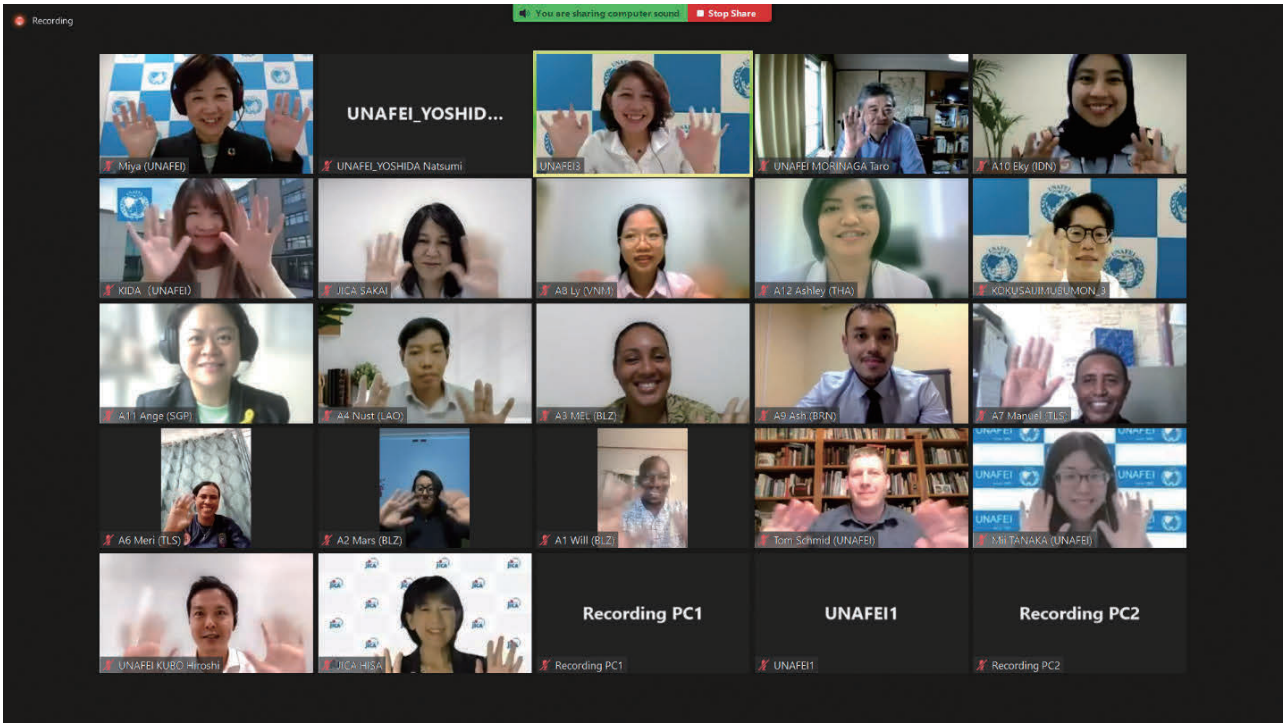
RESOURCE MATERIAL SERIES
No. 115

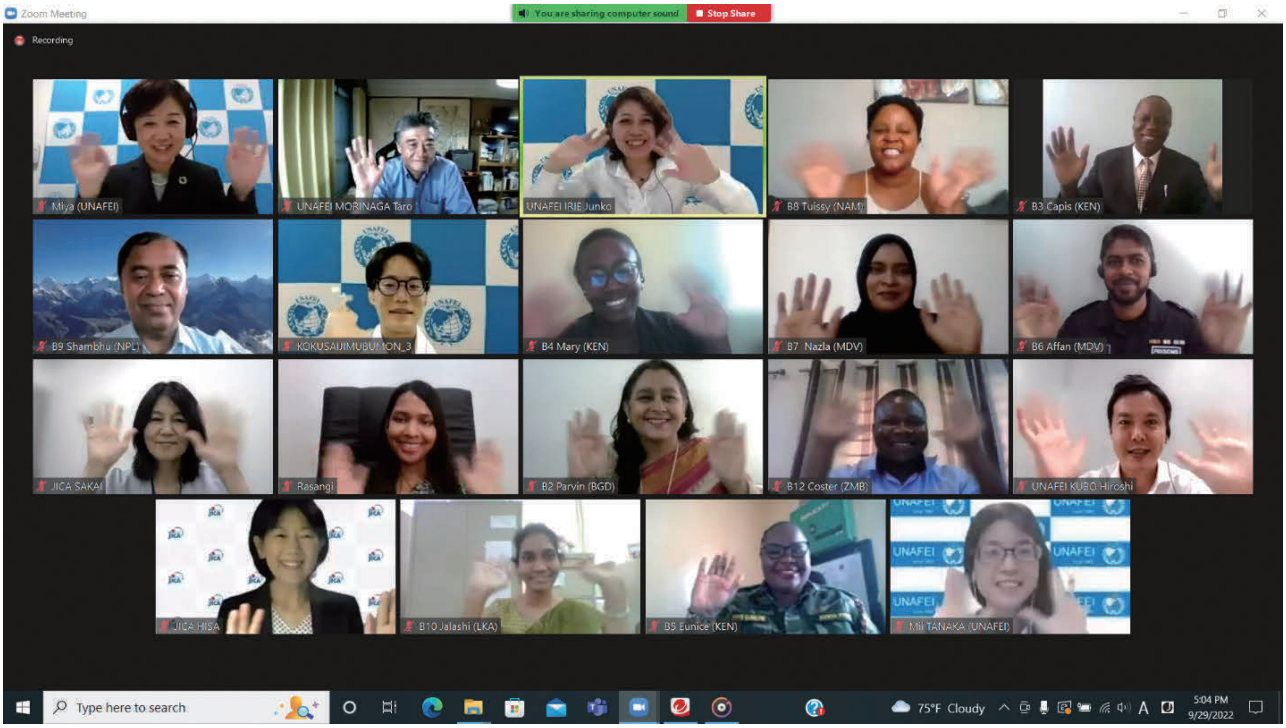
APPENDIX

UNAFEI

PHOTOGRAPHS

THE 179TH INTERNATIONAL TRAINING COURSE





THE 24TH UNAFEI UNCAC TRAINING PROGRAMME

RESOURCE MATERIAL SERIES INDEX			
Vol.	**Training Course Name**	**Course No.**	**Course Dates**
1	Public Participation in Social Defence	25	Sep-Dec 1970
2	Administration of Criminal Justice	26	Jan-Mar 1971
3	[Corrections]	27	Apr-Jul 1971
	[Police, Prosecution and Courts]	28	Sep-Dec 1971
4	Social Defence Planning	29	Feb-Mar 1972
	Treatment of Crime and Delinquency	30	Apr-Jul 1972
5	United Nations Training Course in Human Rights in the Administration of Criminal Justice	n/a	Aug-Sep 1972
	Administration of Criminal Justice	31	Sep-Dec 1972
6	Reform in Criminal Justice	32	Feb-Mar 1973
	Treatment of Offenders	33	Apr-Jul 1973
7	[Administration of Criminal Justice]	34	Sep-Dec 1973
8	Planning and Research for Crime Prevention	35	Feb-Mar 1974
	Administration of Criminal Justice	36	Apr-Jun 1974
9	International Evaluation Seminar	37	Jul 1974
	Treatment of Juvenile Delinquents and Youthful Offenders	38	Sep-Nov 1974
10	The Roles and Functions of the Police in a Changing Society	39	Feb-Mar 1975
	Treatment of Offenders	40	Apr-Jul 1975
	NB: Resource Material Series Index, Nos. 1-10 (p. 139)	n/a	Oct 1975
11	Improvement in the Criminal Justice System	41	Sep-Dec 1975
12	Formation of a Sound Sentencing Structure and Policy	42	Feb-Mar 1976
	Treatment of Offenders	43	Apr-Jul 1976
13	Exploration of Adequate Measures for Abating and Preventing Crimes of Violence	44	Sep-Dec 1976
14	Increase of Community Involvement	45	Feb-Mar 1977
	Treatment of Juvenile Delinquents and Youthful Offenders	46	Apr-Jul 1977
15	Speedy and Fair Administration of Criminal Justice	47	Sep-Dec 1977
	Prevention and Control of Social and Economic Offences	48	Feb-Mar 1978
	Report of United Nations Human Rights Training Course	n/a	Dec 1977
16	Treatment of Offenders	49	Apr-Jul 1978
	Dispositional Decisions in Criminal Justice Process	50	Sep-Dec 1978
17	Treatment of Dangerous or Habitual Offenders	51	Feb-Mar 1979
	Community-Based Corrections	52	Apr-Jul 1979
18	Roles of the Criminal Justice System in Crime Prevention	53	Sep-Dec 1979
19	Arrest and Pre-Trial Detention	54	Feb-Mar 1980
	Institutional Treatment of Adult Offenders	55	Apr-Jul 1980
20	Institutional Treatment of Adult Offenders	55	Apr-Jul 1980
	Integrated Approach to Effective and Efficient Administration of Criminal Justice	56	Sep-Nov 1980
	NB: Resource Material Series Index, Nos. 1-20 (p. 203)		Mar 1981
21	Crime Prevention and Sound National Development	57	Feb-Mar 1981

	Integrated Approach to Effective Juvenile Justice Administration (including Proposed Guidelines for the Formulation of the Standard Minimum Rules for Juvenile Justice Administration: A draft prepared by UNAFEI on the basis of the reports of the study groups at the 58th International Training Course)	58	May-Jul 1981
22	Contemporary Problems in Securing an Effective, Efficient and Fair Administration of Criminal Justice and Their Solutions	59	Feb-Mar 1982
	Securing Rational Exercise of Discretionary Powers at Adjudication and Pre-adjudication Stages of Criminal Justice Administration	60	Apr-Jul 1982
23	Improvement of Correctional Programmes for More Effective Rehabilitation of Offenders	61	Sep-Nov 1982
24	Promotion of Innovations for Effective, Efficient and Fair Administration of Criminal Justice	62	Feb-Mar 1983
	Community-Based Corrections	63	Apr-Jul 1983
25	The Quest for a Better System and Administration of Juvenile Justice	64	Sep-Dec 1983
	Documents Produced during the International Meeting of Experts on the Development of the United Nations Draft Standard Minimum Rules for the Administration of Juvenile Justice	n/a	Nov 1983
26	International Cooperation in Criminal Justice Administration	65	Feb-Mar 1984
	Promotion of Innovation in the Effective Treatment of Prisoners in Correctional Institutions	66	Apr-Jul 1984
27	An Integrated Approach to Drug Problems	67	Sep-Dec 1984
28	Contemporary Asian Problems in the Field of Crime Prevention and Criminal Justice, and Policy Implications	68	Feb-Mar 1985
	Report of the Fifth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions	n/a	Mar 1985
	Report of the International Workshop on the Role of Youth Organizations in the Prevention of Crime Among Youth	n/a	Jul 1985
	Follow-up Team for Ex-Participants of UNAFEI Courses	n/a	Dec 1985
	Community-Based Corrections	69	Apr-Jul 1985
29	In Pursuit of Greater Effectiveness and Efficiency in the Juvenile Justice System and Its Administration	70	Sep-Dec 1985
30	Promotion of Innovation in Criminal Justice Administration for the Prevention of New Criminality	71	Feb-Mar 1986
	The Quest for Effective and Efficient Treatment of Offenders in Correctional Institutions	72	Apr-Jul 1986
31	Economic Crime: Its Impact on Society and Effective Prevention	73	Sep-Nov 1986
	Report of the International Seminar on Drug Problems in Asia and the Pacific Region	n/a	Aug 1986
32	Advancement of Fair and Humane Treatment of Offenders and Victims in Criminal Justice Administration	74	Feb-Mar 1987
	Non-institutional Treatment of Offenders: Its Role and Improvement for More Effective Programmes	75	Apr-Jun 1987
33	Evaluation of UNAFEI's International Courses on Prevention of Crime and Treatment of Offenders, and Drug Problems in Asia	76	Aug-Sep 1987
	Crime Related to Insurance	77	Oct-Dec 1987

	Report of the Sixth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions	n/a	Sep 1987
	Report of the Workshop on Implementation Modalities for the Twenty-Three Recommendations Adopted by the International Seminar on Drug Problems in Asia and the Pacific Region	n/a	Sep 1987
34	Footprints, Contemporary Achievements and Future Perspectives in Policies for Correction and Rehabilitation of Offenders	78	Feb-Mar 1988
	Search for the Solution of the Momentous and Urgent Issues in Contemporary Corrections	79	Apr-Jul 1988
	Resolution of the Asia and Pacific Regional Experts Meeting	n/a	Mar 1988
	Report of the Meeting of Experts on the United Nations Draft Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)	n/a	Jul 1988
35	Quest for Effective International Countermeasures to Pressing Problems of Transnational Criminality	80	Sep-Nov 1988
36	Advancement of the Integration of Criminal Justice Administration	81	Feb-Mar 1989
	Innovative Measures for Effective and Efficient Administration of Institutional Correctional Treatment of Offenders	82	Apr-Jul 1989
	Report of the Expert Group Meeting on Adolescence and Crime Prevention in the ESCAP Region	n/a	Aug 1989
37	Crime Prevention and Criminal Justice in the Context of Development	83	Sep-Nov 1989
	International Workshop on Victimology and Victim's Rights	n/a	Oct 1989
38	Policy Perspectives on Contemporary Problems in Crime Prevention and Criminal Justice Administration	84	Jan-Mar 1990
	Wider Use and More Effective Implementation of Non-custodial Measures for Offenders	85	Apr-Jun 1990
39	Search for Effective and Appropriate Measures to Deal with the Drug Problem	86	Sep-Dec 1990
40	Development of an Effective International Crime and Justice Programme	87	Jan-Mar 1991
	Institutional Treatment of Offenders in Special Categories	88	Apr-Jul 1991
	NB: Resource Material Series Index, Nos. 21-40 (p. 333)	n/a	n/a
41	Effective and Innovative Countermeasures against Economic Crime	89	Sep-Dec 1991
42	Quest for Solutions of the Pressing Problems of Contemporary Criminal Justice Administration	90	Jan-Feb 1992
	Further Use and Effectual Development of Non-Custodial Measures for Offenders	91	Apr-Jul 1992
43	Quest for Effective Methods of Organized Crime Control	92	Sep-Nov 1992
44	Policy Perspective for Organized Crime Suppression	93	Feb-Mar 1993
	Current Problems in Institutional Treatment and Their Solution	94	Apr-Jul 1993
45	Effective Countermeasures against Crimes Related to Urbanization and Industrialization—Urban Crime, Juvenile Delinquency and Environmental Crime	95	Sep-Dec 1993
46	Promotion of International Cooperation in Criminal Justice Administration	96	Jan-Mar 1994

	Effective Treatment of Drug Offenders and Juvenile Delinquents	97	Apr-Jul 1994
47	Economic Crime and Effective Countermeasures against It	98	Sep-Dec 1994
48	The Effective Administration of Criminal Justice: Public Participation and the Prevention of Corruption	99	Jan-Mar 1995
	The Institutional Treatment of Offenders: Relationships with Other Criminal Justice Agencies and Current Problems in Administration	100	Apr-Jul 1995
49	The Fair and Efficient Administration of Criminal Justice: The Proper Exercise of Authority and Procedural Justice	101	Sep-Dec 1995
50	Crime Prevention through Effective Firearms Regulation	102	Jan-Mar 1996
51	Improvement of the Treatment of Offenders through the Strengthening of Non-custodial Measures	103	Apr-Jul 1996
	International Cooperation in Criminal Justice Administration	104	Sep-Nov 1996
52	The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials	105	Jan-Feb 1997
	The Quest for Effective Juvenile Justice Administration	106	Apr-Jul 1997
53	The Role and Function of Prosecution in Criminal Justice	107	Sep-Nov 1997
	The Ninth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions	n/a	Oct 1997
54	Current Problems in the Combat of Organized Transnational Crime	108	Jan-Feb 1998
	Effective Treatment Measures for Prisoners to Facilitate Their Reintegration into Society	109	Apr-Jul 1998
55	Effective Countermeasures against Economic and Computer Crime	110	Aug-Nov 1998
	The Role of Police, Prosecution and the Judiciary in the Changing Society	111	Jan-Feb 1999
56	Participation of the Public and Victims for More Fair and Effective Criminal Justice	112	Apr-Jul 1999
	The Effective Administration of Criminal Justice for the Prevention of Corrupt Activities by Public Officials	113	Aug-Nov 1999
57	International Cooperation to Combat Transnational Organized Crime—with Special Emphasis on Mutual Legal Assistance and Extradition	114	Jan-Feb 2000
	Current Issues in Correctional Treatment and Effective Countermeasures	115	May-Jun 2000
58	Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes	116	Aug-Nov 2000
	Current Situation and Countermeasures against Money Laundering	117	Jan-Feb 2001
59	Best Practices in the Institutional and Community-Based Treatment of Juvenile Offenders	118	May-Jul 2001
	Current Situation of and Countermeasures against Transnational Organized Crime	119	Sep-Nov 2001
60	Effective Administration of the Police and the Prosecution in Criminal Justice	120	Jan-Feb 2002
61	Enhancement of Community-Based Alternatives to Incarceration at all Stages of the Criminal Justice Process	121	May-Jul 2002

62	The Effective Administration of Criminal Justice to Tackle Trafficking Human Beings and Smuggling of Migrants	122	Sep-Oct 2002
63	The Protection of Victims of Crime and the Active Participation of Victims in the Criminal Justice Process Specifically Considering Restorative Justice Approaches	123	Jan-Feb 2003
64	The Effective Prevention and Enhancement of Treatment for Drug Abusers in the Criminal Justice Process	124	Apr-Jun 2003
65	Effective Countermeasures against Illicit Drug Trafficking and Money Laundering	125	Sep-Oct 2003
	Sixth International Training Course on Corruption Control in Criminal Justice	6th UNCAC	Nov 2003
66	Economic Crime in a Globalizing Society—Its Impact on the Sound Development of the State	126	Jan-Feb 2004
67	Implementing Effective Measures for the Treatment of Offenders after Fifty Years of United Nations Standard Setting in Crime Prevention and Criminal Justice	127	May-Jun 2004
	Measures to Combat Economic Crime, Including Money Laundering	128	Aug-Oct 2004
68	Crime Prevention in the 21st Century—Effective Prevention of Crime Associated with Urbanization Based upon Community Involvement and Prevention of Youth Crime and Juvenile Delinquency	129	Jan-Feb 2005
69	Integrated Strategies to Confront Domestic Violence and Child Abuse	130	May-Jun 2005
	Seventh Special Training Course on Corruption Control in Criminal Justice	7th UNCAC	Oct-Nov 2005
70	The Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power—Twenty Years after Its Adoption	131	Aug-Oct 2005
71	Strengthening the Legal Regime for Combating Terrorism	132	Jan-Feb 2006
	Eighth International Training Course on Corruption Control in Criminal Justice	8th UNCAC	Oct-Nov 2005
72	Effective Prevention and Enhancement of Treatment for Sexual Offenders	133	May-Jun 2006
73	Challenges in the Investigation, Prosecution and Trial of Transnational Organized Crime	134	Aug-Oct 2006
	Ninth International Training Course on Corruption Control in Criminal Justice	9th UNCAC	Oct-Nov 2006
74	Promoting Public Safety and Controlling Recidivism Using Effective Interventions with Offenders: An Examination of Best Practices	135	Jan-Feb 2007
75	Effective Measures for the Treatment of Juvenile Offenders and their Reintegration into Society	136	May-Jun 2007
76	Corporate Crime and the Criminal Liability of Corportate Entities	137	Sep-Oct 2007
	Tenth International Training Course on the Criminal Justice Response to Corruption	10th UNCAC	Oct-Nov 2007
77	Effective Legal and Practical Measures for Combating Corruption: A Criminal Justice Response	138	Jan-Feb 2008
78	Profiles and Effective Treatment of Serious and Violent Juvenile Offenders	139	May-Jun 2008

79	The Criminal Justice Response to Cybercrime	140	Sep-Oct 2008
	Eleventh International Training Course on the Criminal Justice Response to Corruption	11th UNCAC	Oct-Nov 2008
	The Improvement of the Treatment of Offenders through the Enhancement of Community-Based Alternatives to Incarceration	141	Jan-Feb 2009
80	Effective Countermeasures against Overcrowding of Correctional Facilities	142	May-Jun 2009
	Twelfth International Training Course on the Criminal Justice Response to Corruption	12th UNCAC	Jul-Aug 2009
	Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials	143	Sep-Nov 2009
81	The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Criminal Justice Process	144	Jan-Feb 2010
82	Effective Resettlement of Offenders by Strengthening "Community Reintegration Factors"	145	May-Jun 2010
83	Attacking the Proceeds of Crime: Identification, Confiscation, Recovery and Anti-Money Laundering Measures	146	Aug-Oct 2010
	The 13th International Training Course on the Criminal Justice Response to Corruption	13th UNCAC	Oct-Nov 2010
84	Community Involvement in Offender Treatment	147	Jan-Feb 2011
85	Drug Offender Treatment: New Approaches to an Old Problem	148	May-Jun 2011
86	Securing Protection and Cooperation of Witnesses and Whistle-blowers	149	Aug-Sep 2011
	Effective Legal and Practical Measures against Corruption	14th UNCAC	Oct-Nov 2011
87	Trafficking in Persons—Prevention, Prosecution, Victim Protection and Promotion of International Cooperation	150	Jan-Feb 2012
88	Evidence-Based Treatment of Offenders	151	May-Jun 2012
89	Trafficking in Persons—Prevention, Prosecution, Victim Protection and Promotion of International Cooperation	152	Aug-Sep 2012
	Effective Legal and Practical Measures against Corruption	15th UNCAC	Oct-Nov 2012
90	Treatment of Female Offenders	153	Jan-Feb 2013
91	Stress Management of Correctional Personnel—Enhancing the Capacity of Mid-Level Staff	154	May-Jun 2013
92	Effective Collection and Utilization of Evidence in Criminal Cases	155	Aug-Oct 2013
	Effective Measures to Prevent and Combat Corruption and to Encourage Cooperation between the Public and Private Sectors	16th UNCAC	Oct-Nov 2013
93	Protection for Victims of Crime and Use of Restorative Justice Programmes	156	Jan-Feb 2014
94	Assessment and Treatment of Special Needs Offenders	157	May-Jun 2014
95	Measures for Speedy and Efficient Criminal Trials	158	Aug-Sep 2014
	Effective Measures to Prevent and Combat Corruption Focusing on Identifying, Tracing, Freezing, Seizing, Confiscating and Recovering Proceeds of Corruption	17th UNCAC	Oct-Nov 2014
96	Public Participation in Community Corrections	159	Jan-Feb 2015
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