

GROUP 2

STRENGTHENING THE CAPACITY AND ABILITY OF CRIMINAL JUSTICE AUTHORITIES, THEIR PERSONNEL AND LEGISLATION

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I. INTRODUCTION

Group 2 started its discussion on 1 November 2010. The Group elected, by consensus, Ms. Jayasundara as its chairperson, Mr. Mizuno as its co-chairperson, Mr. Douglas as its rapporteur, and Ms. Srisanit and Mr. Tatara as its co-rapporteurs.

The group, which is assigned to discuss “Strengthening the Capacity and Ability of Criminal Justice Authorities, their Personnel and Legislation,” agreed to conduct its discussion in accordance with the following agenda:

- 1) Criminalization, focusing on gaps between the mandatory requirements of the UNCAC and legislated offences of the respective countries;
- 2) Ensuring necessary independence of the criminal justice authorities to fight corruption;
- 3) Integrity of the personnel of criminal justice authorities to fight against corruption;
- 4) Impartiality, transparency and accountability in the relevant decisions in criminal proceedings; and
- 5) Strengthening the capacity of the criminal justice system in dealing with corruption cases, including specialization;

In addition, the group decided to include political will and media as additional topics.

II. SUMMARY OF THE DISCUSSIONS

The discussion began with all participants sharing information about their countries’ measures regarding the main topic. The group agreed that the Government’s will to prevent corruption is a starting point in each country to improve the capacity and ability of criminal justice authorities, their personnel and legislation.

A. Criminalization

The group discussed criminalization, focusing on gaps between the mandatory requirements of the UNCAC and legislated offences of the respective countries. They began by arguing why corruption is still rampant in each state despite whether or not the provisions exist in their jurisdictions in accordance with the UNCAC. Each participant filled the table attached detailing which mandatory and non-mandatory provisions were incorporated in their countries.

B. Ensuring Necessary Independence of the Criminal Justice Authorities

The group discussed independence of judges, prosecutors and investigators. Most participants stated that they have good laws securing the independence of the judiciary but in reality there is a big gap between theory and practice in their countries. According to participants, prosecutors must conduct their duties

independently, but in some countries they cannot, as they are appointed by political parties or politicians, which can undermine their independence.

The lectures of visiting experts, Mr. Koh and Mr. Lam, were referred to, especially their agencies' independent investigative powers. Considering the characteristics of these agencies, it is indispensable to investigate without fear or favour. However, participants agreed that it is paramount to have a system of checks and balances to ensure that investigators, prosecutors and judges do not exceed their prerogatives.

C. Integrity of Criminal Justice Personnel

The group discussed recruitment procedures; minimum qualifications in the recruitment of judges and prosecutors, such as aptitude tests; and minimum age and competitive examinations, all of which can influence the integrity of authorities when investigating corruption cases. Most of the participants stressed the importance of criminal records as a mandatory requirement to check the integrity of authorities. However, no consensus was reached on whether someone under investigation by the authorities, or with a pending decision in the Criminal Court, can be prohibited from applying for a government post.

The majority of the participants stated that a code of conduct for judges and prosecutors exists in their respective countries. The participant from Nepal informed the group of the existence of Judicial Monitors and the participant from Congo highlighted the application of the Code only to magistrates. However, some participants declared the absence of guidelines in their countries.

All participants agreed that it is necessary to maintain the integrity of legal authorities through effective training to improve knowledge, maintaining an appropriate level of remuneration and a job rotation system. The group agreed that an efficient monitoring system is the most important measure to be taken. Some participants included the declaration of assets as one of the most effective mechanisms to check the continuous integrity of authorities.

Most of the represented countries have systems for removing or dealing with misconduct of personnel attached to the criminal justice system but it differs from country to country. The participant from Afghanistan stated that there is a specific body to deal with disciplinary actions. The participant from Pakistan referred to the efficiency of disciplinary actions in his country. The participant from Nepal informed the group that there is no provision applied to the District Court and Appellate Court, but the Supreme Court Justices can be impeached by Parliament with a two thirds majority. The participant from Japan declared that judges can only be impeached by the Special Court comprised of 15 members of the Diet and that this framework is based on the concept of checks and balances. The participant from Brazil declared that disciplinary actions are normally conducted internally but an independent body is more effective to prevent misconduct and to ensure impartiality of investigation.

In addition, the group agreed that it is important to establish an independent body to investigate/prosecute cases of corruption in existing criminal justice authorities. The participant from Brazil stated that there is an independent body in his country which has achieved considerable results in investigating misconduct of members of the Judiciary. The participant from Pakistan informed the group that in his country there is a special court for corruption. In Thailand, there is a specialized Court division dealing with corruption cases, but only for high-ranking officers and politicians. There is also an independent agency which is responsible for inquiring into all kinds of corruption offences committed by all levels of government officials. The participant from Japan stated that such an agency does not exist and declared that it is unnecessary to establish an independent body as the internal monitoring system is sufficient to investigate and prosecute corruption matters. The participant from Iraqi Kurdistan added a commentary about the lack of enforcement powers and the absence of transparency in his country.

D. Impartiality, Transparency and Accountability in the Relevant Decisions in Criminal Proceedings

Most of the participants stated that their countries have mechanisms regarding disqualification and recusal of judges. These mechanisms can be viewed as follows: a) a judge can recuse him or herself from a case and b) Litigants can ask for disqualification and recusal of judges.

In addition, most of the participants stated that their countries' court systems have three levels; all have an upper level court that can review a lower court's decision upon being appealed by parties including

prosecutors. Pakistan has a system named “judicial review” under which each party can ask the same judge to review its decision and/or appeal to a superior court if not satisfied.

Regarding transparency, the group discussed the role of the mass media, which is often more proactive in reporting than other types of reporting agencies. In most countries, the media report court decisions in some important cases. In Congo, the Government encourages the media to broadcast trials in some cases including corruption, rape and homicide. The participant from Iraqi Kurdistan stated that an independent media in his country is neither strong enough nor sufficiently equipped to report cases. In Kurdistan, the media is controlled by political parties and it has a monopoly on reporting relevant information. The participant from Nepal informed the group that print media publishes judicial decisions on a regular basis. In addition, he said that NGOs such as Transparency International also contribute to reporting relevant decisions to the general public. The participant from Pakistan stated that the mass media can pass information on corruption to the Supreme Court and in some cases the Supreme Court initiates investigation based on media reports. The participant from Brazil highlighted the importance of transparency and the proactive media in his country, which make the public aware of corruption cases.

E. Strengthening the Capacity of the Criminal Justice System in dealing with Corruption Cases, including Specialization

The group agreed that it is necessary to have an expert, such as a taxation expert, to assist criminal authorities in corruption cases. Most of the participants stated that in their respective countries when investigators, prosecutors and judges need expertise they can request it from specialists such as accountants, computer experts, etc., who can assist the authorities by delivering a report in advance and/or explaining his or her opinion before the courts.

The participant from Vietnam pointed out that lack of financial support from the government has led to a lack of expertise and insufficient training courses. The participant from Thailand said that there is a specialized court division in her country dealing with corruption cases but only for high-ranking officers and politicians. In addition, there is an independent agency in Thailand which is responsible for inquiring into all kinds of corruption offences committed by all levels of government officials. The participant from Pakistan added that there is a specialist anti-corruption court in that country.

Regarding fair and speedy trial, the participant from Thailand mentioned that there is a time limit for every process provided by law. A participant from Japan stated that two years is considered the time limit in criminal cases, but it is not mandatory. The participant from Brazil informed the group that the Constitution Act 1988 was recently amended to include the right to speedy judicial decision as a fundamental right. However, although some cases are given priority, such as those involving litigants who are more than 60 years old, corruption cases are treated as an ordinary process in the criminal court. Regarding fair and speedy investigations, some participants pointed out that it depends on the number of cases each investigator or prosecutor has at a given time.

Most of the participants agreed that it is very important to have specialized agencies to investigate and prosecute as these cases require expertise and experience. The group also reached a consensus that it is necessary to manage corruption cases swiftly.

Some countries have a specialized court to deal with corruption cases due to the number of suits involving these issues. In this particular aspect, participants agreed that establishment of a specialized court depends on the workload of the court rather than how independent it may be. The participant from Thailand informed the group that there is a specialized court division dealing with corruption cases but only for high-ranking officers and politicians, and there is also an independent agency which is responsible for inquiring into all kinds of corruption offences committed by all levels of government officials. The participant from Nepal stated that there are special investigators in his country, but there is no governmental will to establish a special court to deal with corruption cases. The participant from Brazil added that corruption cases must have priority in his country and a specialized court is essential. However, first of all, it is necessary to identify which cases are in fact corruption cases in the Brazilian jurisdiction.

Most of the participants agreed on the importance of interagency co-ordination in corruption investigations.

A participant from Japan explained that some public prosecutors work for other organizations temporarily, while dealing with corruption cases. As a consequence, Japanese prosecutors can make connections with these bodies to get information and co-operation from them.

All participants discussed how investigators can obtain necessary expertise from third parties. In Sri Lanka, as there are no in-house experts, prosecutors can ask for the issuing of a court order to obtain information from a third party. The participant from Sri Lanka also stated that people tend to follow and respect court orders. The participant from Vietnam pointed out that investigators can obtain information directly without any Court order as long as they are at the stage of investigation.

The group answered a question by a Japanese participant, to the effect that court orders are usually followed and respected in their respective jurisdictions. However, the effectiveness and enforcement of court decisions depends on the level of political influence in each country.

F. Political Will

The group agreed that strong political will is a fundamental key to combat corruption. Some participants recognized that there is no political will to combat corruption in their countries. The participant from Congo stated that the President is engaged in combating corruption. The participant from Brazil considered political will necessary not only to check whether there is compliance with the UNCAC provisions but also the effective application of the law. In Brazil, some essential reforms are necessary but it is fundamental to consider the eradication of corruption as a priority in his jurisdiction. The participant from Brazil highlighted the importance of establishing a strong education system, focusing on ethical principles to change the mentality that corruption is a way of life for many Brazilians.

G. Media

The group agreed that an independent media plays an important proactive role to ensure transparency and accountability in combating corruption in their countries. Most of the participants stated that the media in their countries is very proactive and can effectively combat against corruption and also educate the public. The participant from Kurdistan stated that information regarding corruption offences is monopolized by media owned by political parties. Although there exists an independent media in Kurdistan, it is not strong enough to work proactively to combat corruption.

III. RECOMMENDATIONS

At the end of the discussion, the group reached a consensus on the following conclusions and recommendations:

1. Each country should enact laws in accordance with the UNCAC and ensure strict adherence to the laws that exist.
2. Each country should ensure the independence of criminal justice authorities from the interference of the executive and the legislative branches and from the hierarchy of the respective bodies.
3. In selecting investigators, prosecutors and judges, the highest standards, should be maintained (e.g. adequate salary, qualifications, training, professional security and independence, highest standards of ethics and selection purely on merit), to promote integrity and to ensure an effective criminal justice system.
4. Each country should ensure strict application of disciplinary actions in the event of misconduct on the part of judicial officers and have an effective review system on judicial pronouncements.
5. Special investigating expertise and proper case management are essential to strengthen the capacity of the criminal justice system. Interagency co-operation and co-ordination are equally essential. Establishment of a special agency to deal with corruption matters can also be considered in relation to the number of corruption cases prevalent in their respective countries.
6. A strong political will and the support of the general public are essential in order to realize expected standards set out in the UNCAC.
7. A proactive and independent media to promote an awareness of corruption cases amongst the general public is important. Participation of the general public in a complaint mechanism would be effective.