

GROUP 1

EFFECTIVE MEASURES TO SECURE PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS WITH SPECIAL ATTENTION TO ORGANIZED CRIME AND CORRUPTION

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I. INTRODUCTION

Criminal justice systems rely heavily on oral testimony of witnesses, who may be victims of crime, whistle-blowers, by-standers or experts, to the criminal act. Success or failure of any criminal case depends on the witnesses' willingness to cooperate. Globalization and the advancement of science and technology have led to more sophisticated trans-boarder crimes; money laundering, human trafficking and illicit drugs related cases are rampant. Dealing with these types of crimes in many ways requires a well co-ordinated system of ensuring witnesses and whistle-blowers are free from fear of retaliation or intimidation from the people they are testifying against. Therefore, it is for the criminal justice systems of respective countries to provide assistance, protection and support measures to victims and other witnesses in order to facilitate their ability to participate in their criminal justice systems and to give testimony that is required for maintenance of the rule of law.

The current culture of the international community enacting legislation to secure protection and cooperation of witnesses and whistle-blowers with special attention to organized crime and corruption is being driven by sophisticated levels of organized crime. The United Nations is steering the global response primarily by:

1. The United Nations Convention against Transnational Organized Crime and The Protocols Thereto which was signed in Palermo, Italy, from 12 to 15 December, 2000.
2. The United Nations Convention against Corruption, which was adopted by the General Assembly in New York, 31 October 2003.
Participating states
 - (i) Signatories - Currently, 173 member states have signed the UNTOC, including all participating countries in this 149th UNAFEI International Training course. The UNCAC has been signed by 169 member states, including all but one participating countries of this course.
 - (ii) Ratification - As of June 2010, 154 states had ratified the UNTOC. And as of 15 May 2011, 154 states had ratified the UNCAC.

II. CURRENT SITUATION

A. Legislation for Whistle-Blowers and Witness Protection

Among the participating countries, there is no formal legislation for witness protection, save for Indonesia and El Salvador. As for whistle-blower protection, some countries have legislation, example, Japan. Other countries, like Tanzania, Nepal, India, and Indonesia have provisions in various acts, such as the Prevention of Combating Corruption Act, Anti Money Laundering Act, and Anti Human Trafficking Act, and Right to Information Act. Saint Lucia has legislative provisions in this regard.

But, even in the countries with no legislation, there are various informal countermeasures.

For countries with patches of legislation there is a problem: they do not cover all types of common and serious organized crimes. Even for countries with witness protection legislation, the legislation does not operate smoothly as they are faced with challenges of budget constraints, shortage of human resources, and poor technology, and other infrastructures.

B. Criminalization and Punishment for Obstruction of Justice

Participating countries reported no specific legislation. However, all participating countries address this issue in other general legislation. For example, some countries' penal or criminal codes (acts) criminalize and provide punishment for obstruction of justice. Some countries have an obstruction of justice section in most of their legislations. Indonesia has provisions for punishment of obstruction of justice in the Witness and Victim Protection Act. Despite not being codified in separate legislation, some countries' laws provide for wide ranges of offences and lay down very stiff punishments. However, there is still much room for improvement to meet the requirement of Article 23 of UNTOC and Article 25 of the UNCAC, which provide for criminal sanctions against use of threats, physical force or promise, offering or giving undue advantage to induce false testimony, or to interfere in giving testimony, or the production of evidence in a proceeding. In some countries, group members discovered a lack of effective criminalization of bribery or attempted bribery of witnesses.

C. Mitigation of Punishment and/or Immunity Grants for Persons who Provide Substantial Co-operation in an Investigation or Prosecution

No specific legislation exists in participating countries. India has provisions in its Criminal Procedure Code for the court to grant immunity to any accused making true and complete disclosure about the crime and role played by each accused before a court, subject to conditions. India also introduced plea-bargaining, as per the UN Charter, in 2006. Indonesia has provisions in the Witness and Victims Protection Law (No.13. 2006). Nepal has provisions of demand for full or partial remission of punishment in the charge sheet to an accused who helps in investigation under the Anti-Corruption Act, Human Trafficking Act and Narcotics Drug Control Act.

III. COUNTERMEASURES AND BEST PRACTICES

A. Punishment for Obstruction of Justice

No participating country has specific legislation that deals with punishment for obstruction of justice. Some countries provide for punishment of obstruction of justice in their criminal codes, however these provisions do not conform to Article 23 of the UNTOC or Article 25 of the UNTOC. After a long discussion, we found that there are acts which are not described as obstruction of justice but in the real sense they have power of making a witness fearful, for example, an accused person driving a car or loitering near the victim's house or school.

B. Victims and Witness Support

Few participating countries have a codified system for victim and witness support. In many countries, informal victim and witness support is provided. In Japan, prosecutor's offices have a staff member who is obliged to provide psychological support to the victim and escort him or her to court. In Japan, the Legal Support Center provides legal, psychological and financial support to victims/witnesses. In addition, in some special cases, a person such as a relative may be allowed to accompany victims/witness during testifying. This kind of system is applied also in Tanzania, Indonesia and Nepal. In India, apart from having such a system, some NGOs also take up the responsibility of providing psychological support to victims who are witnesses, in exceptional cases. In some countries, there is provision of in camera trial, especially in sexual assault cases, to make the victims psychologically comfortable. In some countries, there is also provision for examination of female witnesses in presence of female police personnel.

C. Procedural Protection Measures at Trial Level

In this area, group members discussed various measures such as measures to reduce face-to-face contact with defendants, measures to make it difficult or impossible for defendants to trace the witness and measures to limit the witnesses' exposure to the public.

In reducing face-to-face confrontation between the victim/witness and the defendant, the following measures were discussed. First, the use of pre-trial statements of witnesses in lieu of oral testimony was found to be used in Nepal, Japan and in Indonesia, in some special cases. Otherwise, this type of evidence is not free from challenges as it defies the principle of fair hearing and the accused's right to cross-examine the witness. Secondly, the group members discussed the removal of the defendant from the court room during trial. This kind of procedure is used in Japan and Indonesia. It was stated that if the witness seems unable to testify in court due to defendant's/accused's presence, the court may, upon submission from the public prosecutor, order removal of accused/defendant from court room. However, this procedure can work only where the accused is represented by a counsel. Third, testimony via closed circuit television or audio-visual links such as video conferencing was discussed: in all countries, except for Nepal, such type of testimony is codified in the legislation. The study tour to Tokyo District Court revealed how effective the procedure is in reducing witnesses' fear and at the same time balancing defendants' rights to a fair hearing as it affords the accused a right to cross-examine the witness. In India, in some cases, a defendant attends court from prison through video link. A big challenge with these procedures is the high cost of the equipment.

For measures to make it difficult or impossible for defendants to trace the witness, the following were discussed. One, shielding was found to be popularly used in Japan. In this procedure, panels/curtains to protect the witness against defendants are used. This type of procedure is cheap and easy to use. Two, anonymous testimony is neither codified nor commonly used. This type of testimony has its setback as it denies the defendant his or her right to know who is testifying against him or her and cross-examine him or her. Lastly, limiting disclosure of personal information was discussed. Japan and Indonesia have this procedure in practice. For the remaining participating countries it was advised to adopt this type of procedure as it has proved to be effective in protecting witnesses without incurring any cost.

As for measures to limit witnesses' exposure to the public and psychological stress, it was found that all the participating countries have this mode of witness protection. In India, there is provision for transfer of trial from the jurisdiction of one High Court to another, by moving an application with the Supreme Court and favourable orders of the supreme court. In Japan, bullet proof panels are used to protect witness against any possible attack from defendants' gangs.

D. Police Protection (Physical Protection)

This is a very common witness protection method, applied in countries with and without witness protection legislation. The moment the witness reports a matter before the police, depending on the seriousness of the case and the danger that may face the witness, police officers provide a partial or full time guard at his or her residence, body-guard the witness on his or her way to or from home, or patrol his or her premises. Sometimes police officers do provide temporary relocation for witnesses or provide a temporary shelter at police buildings. Monitoring of mail and telephone calls to the witness, changing his or her telephone numbers, and installation of security devices at his or her home (such as electronic warning devices like alarms or fencing), are commonly used. Another strategy is minimizing public contact with uniformed police officers by use of discreet premises to interview the witness. Although not every participating country uses all measures in this category, it was emphasized that while awaiting enactment of witness protection legislation, this type of witness protection be used on an informal basis.

E. Comprehensive Witness Protection Programme

The USA, the Philippines, Indonesia and El Salvador have comprehensive witness protection programmes which include: relocation, changing identities, temporary safe houses, temporary financial assistance, training and providing for employment, providing personal security.

F. Mitigation of Punishment and Immunity Grants

In the USA, cooperation plea agreements allow judges to reduce jail sentences imposed on justice collaborators in investigation or prosecution of organized crime. Also, in the USA and the Philippines, collaborators can be granted immunity against prosecution and in that case become legally bound to testify.

IV. CHALLENGES AND EXPERIENCES

- A. Lack of legislation is the major setback towards successful implementation of these programme/s. Most of the practices are ad-hoc measures and experience has shown that once these ad-hoc measures

fail there is no formal way of dealing with such issues. Legislation should be available to take care of this situation. Implementing these programmes informally leaves open the possibility of problems. For example, since most justice collaborators are themselves criminals, accusations of corruption and conflict of interest against officials of the justice system are possible, even likely.

- B. Witness protection programmes are capital intensive and most countries do not have the resources needed to sustain such programmes.
- C. For small countries, it is difficult or almost impossible to relocate witnesses within the country.
- D. Since there is no dedicated personnel for witness protection programmes, it remains in the hands of personnel who perform this job in an ad-hoc manner without any expertise.
- E. Since there is no one agency to coordinate amongst different departments, many times, lack of adequate information and ineffective communication leads to failure in providing proper protection.
- F. There are acts which are not described as obstructions of justice but in the real sense they have power of intimidating a witness. For example, an accused person driving a car or loitering near the victim's house, work place, or school or loitering around family members and relatives.
- G. In countries with no legislation for whistle-blower and witness protection, there has been a rise in serious criminal acts, as many offenders are not caught because witnesses hesitate to cooperate with law enforcement agents for fear for their safety and unfair treatment.
- H. Lack of legislation for mitigation of punishment and grants of immunity in these nations has worsened the situation as junior members of crime gangs never volunteer to disclose any information that may lead to apprehensions of the heads of those gangs.
- I. The need to balance the protection of witnesses without violating the defendant's constitutional rights to fair hearing of their trial.
- J. One of the challenges that some of the countries with witness protection programmes are facing is absence of any international/regional agreements/treaties with other countries. Thus, when it is difficult to relocate witnesses within the country, it is not possible to relocate them outside the country. Lack of any agreement also results in no effective cooperation in investigation of crime and control of criminals. Since organized crime has no boundaries, member states should not allow criminals the luxury and advantage of a borderless field of operation.
- K. Slow disposition of cases can increase the possibility of exposure to threats that may lead to non-cooperation.

V. RECOMMENDATIONS

Having completed their discussion, the group members made a number of recommendations:

1. Whistle-blower and witness protection legislation should be enacted in all participating states and each country should seek to ratify the UN conventions (UNTOC and UNCAC).
2. Mitigation of punishment, grant of immunity, and separate criminalization and punishment for obstruction of justice legislation should be enacted by participating countries, and should include actions, gestures and any psychological threat to the witness.
3. There is a need for participating countries without witness protection and whistle-blower protection laws to, in the interim, formulate policies that will guide the implementation of counter-measures.
4. Since many participating countries, except Japan, are developing countries, with scarce resources, in the short term, emphasis should be on the procedural kind of witness protection, which is cost-effective and takes little time to implement.

5. Bi-lateral, regional and international cooperation is much needed. Those should be formalized in the form of signed treaties and or protocols, which should help in relocating and protecting witnesses, cooperation in crime investigation, extradition of criminals, and for Mutual Legal Assistance in controlling transnational organized crime.
6. Better coordinating efforts from various stake-holding agencies and professionals, for example, police, the judiciary, prosecutors, social welfare departments, etc. All should function under the umbrella of one department to stream-line the functioning of the programme.
7. There is a need to emphasize human resource capacity building of stake holders.
8. Member countries are urged to review infrastructures available in court buildings or prosecutors offices with a view to providing separate waiting rooms and/or separate entrances for witnesses. This may be a measure that would not require a large budget, but at the same time ensures psychological and physical comfort of the witness.
9. Member states should make rules in their legal system to fast-track all serious crimes, especially those involving witnesses needing protection. A time-frame for the disposal of the case should be formalized and adhered to, save under special circumstances with due permission from the court.

VI. CONCLUSION

Experience has shown that assistance and protection measures yield positive results. Security measures should be considered in all instances where witnesses genuinely believe that there is an imminent threat to their lives as a result of their involvement in assisting the police in investigating a criminal case. Additional procedural protection measures may then be implemented.

Over the years, witness protection programmes have developed sophisticated practices allowing the change of identity of threatened witnesses and their relocation to a safe place as the only effective means of protection. The success of those operations has had a positive impact on securing crucial evidence and has made witness protection a key element in the effort to effectively fight organized crime.

On the other hand, the field of whistle-blowing is still in its infancy. Only a few countries have attempted to adopt comprehensive laws that encourage and protect whistle-blowers. In many places, the laws are limited in scope and provide few protections. However, there is now considerable international pressure for countries to adopt standard laws and practices but if these laws are adopted in a vacuum, it is unlikely that they will succeed. Many governments and organizations seem hostile and whistle-blowers regularly face hostility. Few countries have made serious efforts to address cultural issues to internalize whistle-blowing as a positive means of improving organizations and governments.

Moreover, research is needed on the effectiveness of the existing legislation and policies, how the witness and the society in general feel towards whistle-blowing, and what measures can be taken to improve the culture of openness in the society.

It should be noted that some protection measures are on the borderline of violating of some of the defendant's right to a fair trial. Therefore, in adopting protection measures, all efforts must be made to strike a balance between protecting the witness and guaranteeing the defendant's rights.