GROUP 2

CRIMINALIZATION, INDEPENDENCE AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM, SPEEDY TRIAL, APPROPRIATE SANCTIONS AND PREVENTIVE MEASURES

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I. INTRODUCTION

Group 2 started its discussion on 5 November 2007. The group elected, by consensus, Ms. Fonachu Helen (Cameroon) as its chairperson, Mr. Amadou Bocar Tourè (Mali) as its co-chairperson, Mr. Supakit Yampracha (Thailand) as its rapporteur, and Mr. Froilan Legaspi Cabarios (Philippines) as its co-rapporteur. The group, which was assigned to discuss the above five topics, agreed to conduct its discussion in accordance with the following agenda:

1. Criminalization, focusing on the discrepancies in the respective countries' legislations vis-à-vis UNCAC requirements;
2. Independence and integrity of criminal justice bodies and personnel;
3. Measures to ensure speedy trials;
4. Effective and appropriate sanctions;
5. Raising public awareness and other preventive measures.

II. CRIMINALIZATION

A. Definition of "Criminalization"

At the beginning of this session, the group tried to define the term "criminalization" and agreed that criminalization means the process by which behaviours and individuals are transformed into crime and criminals. In the context of fighting corruption, the United Nations Convention against Corruption (UNCAC) requires States Parties to introduce criminal and other offences to cover a wide range of acts of corruption, to the extent these are not already defined as such under domestic law. The criminalization of some acts is mandatory under the convention, which also requires that States Parties consider the establishment of additional offences.

B. Mandatory Offences

All countries have enacted laws against embezzlement, misappropriation or other diversion of property by public officials. Thus, the main issue seemed to be the criminalization of active bribery of foreign public officials and officials of public international organizations. Japan and Mali have criminalized this behaviour under their domestic law. Other participants stated that their country's domestic legislation would have to be revised to meet the requirements of Article 16 of the Convention. Actually, this process is ongoing in Moldova.

The criminalization of bribery of domestic officials did not pose any serious problems, since all countries have provisions to criminalize this conduct. However, in Malawi, a small amount of money or property given

to a public official is not considered a bribe. Therefore, the group further discussed the distinction between giving a gift and giving a bribe.

Although all countries have a law to punish money laundering, the group noted that in order to fulfill their obligations under the Convention, there is a need for States Parties to expand the scope of predicate offences. Most countries have legislation that criminalized the laundering of proceeds of corruption in some way or another; however, it is yet to be seen if their legislation covers all the offences established by this Convention.

Most countries include obstruction of justice as a criminal offence in their legislation. However, in Thailand, intimidating or doing any harm to influence the witness is not an offence in itself but will be considered aggravating circumstances of the basic offence. Therefore, Thailand needs to revise its domestic law to criminalize the obstruction of justice as required by Article 25 of the UNCAC.

C. Non-mandatory Offences

To some extent, all countries have enacted laws against trading in influence, abuse of authority by public officials, and bribery and embezzlement in the private sector. No country has criminalized passive bribery of foreign public officials. There are illicit enrichment offences in Indonesia and Malawi. In Thailand and Philippines, illicit enrichment *per se* is not a crime but may trigger civil proceedings aimed at devolving the corruptly acquired assets on the State.

Even though under UNCAC some offences are non-mandatory and are left to the discretion of the States Parties, the group acknowledges the advantages of making some of these offences mandatory. Regarding this matter, international mutual legal assistance becomes an essential point to consider, because investigators have to gather evidence outside their own jurisdictions.

III. INDEPENDENCE AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

A. Definition of "Independence" and "Integrity"

The group began this session by distinguishing the definitions of "independence" and "integrity". These terms are sometimes used interchangeably, but in order to clarify the discussion topic, there must be some distinction. Finally, the group agreed upon the definition that independence, generally, means freedom from any undue interference and integrity means having good virtues or moral uprightness. Integrity pertains to the character of the personnel involved in the criminal justice system.

B. Importance of Independence and Integrity of Criminal Justice Bodies and Personnel in the Field of Corruption Control

The group recognized that the independence and integrity of criminal justice bodies and personnel is an essential element of any anti-corruption system, since if the criminal justice system is corrupt all efforts to combat corruption are in vain. Moreover, effective investigation, prosecution and adjudication of corruption cases require citizen co-operation. Certainly, the public will not co-operate with the criminal justice system if the system cannot be trusted. In order to increase public trust in the system, justice must not only be done but must also be seen to be done.

C. Current Situations of the Independence of Criminal Justice Bodies and Personnel

The group agreed that independence of criminal justice bodies and personnel can be evident in their appointments procedures, placement systems, and working conditions, as well as whether or not they have security and independence in their budgets and resources.

While the group also agreed that in most countries independence of the various anti-corruption agencies (in terms of the appointments procedure and placement, security of tenure and autonomy in budget matters) is provided by law, often by the Constitution, in practice this is not the case. There is a possibility that much undue influence is exerted by high-ranking officials and politicians.

In Japan, Malawi, Moldova and the Philippines anti-corruption personnel, investigators, prosecutors and judges, as the case may be, are appointed by the executive but this does not pose a serious problem of independence in these countries.

In Indonesia, the problem of independence of criminal justice personnel is due to their lack of security of tenure.

In Mali, public prosecutors are not as independent as judges. Their positions are not secured. The Minister of Justice can influence their decision at any time. Moreover, they can be removed or transferred at any time without cause.

In Thailand, independence of anti-corruption agencies is guaranteed by the constitution, but there is a possibility for political interference in the selection process of the investigation authority, the National Counter Corruption Commission (NCCC).

In Cameroon, besides the lack of security of tenure, judges and prosecutors are appointed, promoted, transferred and disciplined by the executive branch. The Higher Judicial Council still needs to be given absolute independence, since for now it is presided over by the Chief Executive, who is the President of the Republic. Therefore, there is a need for a real independent judicial system separated from the Ministry of Justice.

D. Current Situations of the Integrity of Criminal Justice Bodies and Personnel

There was a general consensus that integrity of the criminal justice bodies and personnel can be perceived by transparency in the selection and promotion process, the existence of a code of conduct for criminal justice personnel, transparency in the assignment of cases and proceedings, the procedure for reviewing of decisions and the requirement of the declaration of assets and income by personnel.

The average level of integrity of criminal justice personnel in all participating countries is fair. The promotion procedure is usually based on seniority and a merit system. There are codes of conduct for criminal justice personnel in most countries. Assignment of cases is managed by the supervisors of each agency so that officials cannot select their own cases. The investigation process is usually confidentially conducted; however, when the case comes to court, public trial is the fundamental principle in all countries, subject to some exceptions such as matters of security and sensitivity (e.g. family cases, sexual offences).

In all countries, the decisions of criminal justice personnel can be reviewed by the higher officer in each organization; e.g. the chief public prosecutor and higher courts. Moreover, the separation of the investigation, prosecution and adjudication process generates a system of checks and balances.

The greatest concern regarding integrity of the criminal justice bodies and personnel is the requirement for declaration of assets and income. Only Moldova requires all public servants to disclose their assets. In most countries, this procedure only applies to high-ranking state officials, including high-ranking criminal justice personnel. Therefore the group discussed further the extension of the declaration of assets requirement to lower ranking state officials. The issue of what sort of sanctions, criminal or disciplinary, should be imposed for false declarations or failure to disclose was also canvassed and it was agreed that perhaps this would need to be tailored by each country to its own situation.

IV. MEASURES TO ENSURE SPEEDY TRIALS

A. Importance of Speedy Trials in Corruption Control

The laws in all countries guarantee the right to a speedy trial for all accused, however, the concrete measures to ensure this right in each country are different. For example, in Philippines, the case against the accused will be dismissed if his or her right to a speedy trial is violated. There is a general consensus that justice delayed is justice denied. Delayed trials also diminish public trust in the criminal justice system.

Corruption cases attract a lot of media and public attention. Therefore, if trials for corruption cases are delayed, the cases will lose much of their deterrent impact, not only the special deterrent to the actual corruptor but also the general deterrent to the would-be offender and the public as a whole.

B. Situation of Delay of Corruption Trials and Contributing Factors

Having a specialized court for corruption cases, like the Philippines, Indonesia and Thailand, contributes to speedy trial of these cases. However, there are other factors which account for the delay of trials in other

countries besides the lack of a specialized court. Also, the group noted at the beginning that simply establishing an anti-corruption court may not ensure speedy trials.

Accusatorial style of trial is the prevailing system in most countries. However, in the Supreme Court Criminal Division for Persons Holding Political Position of Thailand, inquisitorial trial is used. Regarding the accusatorial trial, trial delay can be caused by the court, the public prosecutor or the defence counsel.

In most countries, the courts are overburdened. In Cameroon, Malawi and Thailand, judges have to record witnesses' testimony by themselves, either by handwriting or tape-recording respectively. This procedure causes an unnecessary delay. Trials in Cameroon, Mali and Malawi are prolonged partly due to the fact that witnesses sometimes do not speak the official language of the court. Therefore, translation is required. In this context, insufficient resources of the court can delay the trial as well.

Unlike the Philippines, there is no time limit for concluding a trial in the law of Cameroon, Indonesia, Mali, Malawi, Moldova, Thailand and Japan. Alternatively, Indonesia sets a time limit for detention during trial. This restriction, in practice, encourages the judge to conclude the case within the detention time limit.

Effective accusatorial trial requires judges to fulfill the role of competent passive referee. The judge shall be armed with the full knowledge of the rules of evidence and other related legislation. If judges are not well-trained, they cannot control the procedure. Also, in this system, the prosecution has the burden of proving all elements of crime beyond a reasonable doubt, which is a very demanding task, especially in very complex, high profile corruption cases. Proving such cases requires both reliable witnesses and a large quantity of documents. This will inevitably extend the time period of the trial.

Trial delay by the defence counsel is inevitable if one counsel handles many cases at the same time. Also the defence counsels sometimes bring applications for adjournment based on flimsy reasons or raise endless objections aimed at delaying the hearing of cases.

Japan, the Philippines and Thailand have adopted pre-trial conference/arrangement procedures in which before the trial, judge, prosecutor and defence counsel will try to narrow down the issues that must be proven by witness testimony or other evidence. Also, this procedure requires both parties to disclose its evidence to one another, to ensure that there will be no surprises during the trial and to fix the trial period. Obviously, this procedure can speed up trial in those countries.

Even though Cameroon and Moldova have not yet adopted the pre-trial conference procedures, their laws provide the defence counsel access to the prosecution evidence before and during the trial.

Discussed above are factors that account for trial delay in many countries. However, there are some causes specific to each country. For example, in Japan, trial delay is partly due to the expectation of the public that conducting a trial is a process to find the whole truth. Therefore, the prosecution sometimes asks the witness to testify in too much detail to facts related to elements of the crime.

C. Measures to Ensure Speedy Trials

The group discussed five measures to ensure speedy trials for corruption cases.

1. Specialized Court or Division for Corruption Cases

The advantage of the establishment of a specialized court or division is that the presiding judge will devote more time to corruption cases, and through consistent practice, gain the experience necessary to speed up trials, as well as conduct efficient proceedings.

Specialized courts may adopt special procedures which are not used in ordinary court, such as strengthening the effects of the judges' order.

However, the participants did not reach a consensus on this issue, as it was also argued that the designation of special courts will raise new issues of independence. Moreover, it was noted that the existing courts have more fundamental issues like manpower and resource problems to grapple with before the consideration of specialized courts.

2. Pre-trial Conference/Arrangement/Meeting

Pre-trial conferences involving prosecutors, defence attorneys and the judge, to discuss/determine issues involved in the particular case and agree on lines of argument to be pursued, may speed up the trial process. For this procedure to be effectively applied, it is necessary for all the parties to understand the issues involved and also to take steps to avoid its abuse.

3. Limitation of Trial Duration

It may be necessary to set a trial time limit in law or judicial regulation and to establish effective procedures for self-monitoring of the operation and productivity of judges. This will improve accountability in the system and enhance speedy trials. Furthermore, it is recommended that trial judges should endeavour to conclude all trials of corruption cases within a reasonable time period, prescribed by law or regulation. However, in view of inherent variations in the complexity of cases and the different situation of each country, the presiding judge should submit a report to the supervisor for cases exceeding the relevant period, to explain the underlying circumstances of the case and the reasons for the delay.

4. Training for Judges

Periodic group training courses may be required to update judges' knowledge and to share their experiences of trends in corruption cases, and the necessary legal and procedural adjustments for efficient and speedy trial of these cases. Such training courses will also enable each judge involved to identify when and how to intervene to minimize delays that could arise due to defence dilatory tactics.

5. Modernization of Judicial Proceedings

It is necessary that trial courts keep abreast of developments in information technology and acquire the necessary equipment, such as digital video recording, to improve the speed and accuracy of the documentation of trials.

V. EFFECTIVE AND APPROPRIATE SANCTIONS

A. Sanctions for Corruption Practices in Each Country

1. Criminal Sanctions

Criminal sanctions for corruption cases principally comprise the death penalty, imprisonment, fine, suspension of sentence, forfeiture and/or confiscation of assets and costs. Imprisonment terms may include life imprisonment.

2. Accessory Penalties

On the other hand, accessory or collateral sanctions may include dismissal from service, suspension or disqualification from holding public office, forfeiture of benefits from government service, public censure and civil interdiction.

3. Administrative/Disciplinary Sanctions

A guilty public servant may also be dealt with by administrative sanctions in the form of dismissal or suspension from service, reprimand, admonition, reduction of salary, demotion, forced retirement, payment of fine and forfeiture of benefits.

Unlike other countries, in the Philippines and Thailand, an administrative case for corruption pending before an administrative agency or disciplining authority may proceed separately and distinctly from the criminal action, so that the public official may be terminated from service in the administrative action irrespective of the outcome of the criminal case and even if the same is the acquittal of the accused.

B. Effective and Appropriate Sanctions for Corruption Offences

The UNCAC provision sheds light on the matter of determining whether or not the imposable penalties in corruption cases are effective and appropriate, stating for this purpose that sentences in corruption cases should be proportionate to the crime committed and deterrent enough to send a message to other would-be offenders.

Members of the group unconditionally acceded that the imposable penalty for corruption cases does not

really matter. What counts most is whether or not the enforcement of the law on the matter carries with it the necessary impact and desired deterrent effect upon the conscience, emotion and perception of public servants and of the general public as well. However, an effective enforcement of the law would also mean, and it presupposes, an efficient and effective prosecution and adjudication or trial of the case. It is humbly submitted that this formula creates a real deterrent effect in fighting corruption. However, results may vary in every jurisdiction depending on how they address or manage the situation.

On the other hand, Japan is viewed as relatively lenient in imposing sentences on corrupt individuals. However, non-criminal sanctions must also be taken into consideration as the effects are far more exacting in nature, such as outright loss of the offender's job, and public humiliation, a consequence which may even render reintegration to the community almost a fantasy.

C. Sentencing Guideline

The inconsistency of judges in the imposition of penalties within their respective jurisdictions poses a threat in the effective enforcement of the law, which in turn weakens the deterrent effect thereof. For a similar crime committed, one judge may impose the penalty of imprisonment, while other judges may impose a lesser punishment, after taking into consideration some mitigating circumstances, and some could possibly order the suspension of the sentence. Notably, the inconsistency in sentencing may indicate to the public that offenders are punished by chance or that they are at the mercy of the hearing magistrate and are not punished on the gravity or merit of the case.

None of the participating countries has formally and officially adopted a sentencing guideline to ensure uniformity and promote a sentencing pattern. Accordingly, a sentencing guideline may be adopted, most probably promulgated by the highest court that exercises administrative supervision and control over the subordinate courts nationwide. A legislative action on the matter is not necessary as the administrative action is more convenient, expedient and practical.

It is therefore recommended that the sentencing guideline shall provide for the minimum sentence imposable for the crime committed as well as an incentive for an accused to plead guilty and voluntarily co-operate with and provide material information and evidence for the prosecution to indict other accused. In this manner, it is earnestly expected that more perpetrators, while being held accountable for their own acts, are at the same time very likely to be encouraged to participate in the effective and efficient prosecution of the case.

In the meantime, the group highly recommends the courts to maintain a database of judgments promulgated to serve as a ready reference for future sentencing of the same offence and to further ensure uniformity in sentencing the offence.

D. Amnesty of Offenders

Generally, amnesty of offenders in corruption cases is frowned upon considering the gravity and nature of the offence and the possibility of reducing the impact or deterrent effect of anti-corruption laws. It is further considered that if corruption is a serious problem in a country, it is not the right time to propose the rehabilitation and/or amnesty of offenders; rather it is time for deterrence. Corruption is an act of serious breach of the trust of the state. Offenders have already lost their personal integrity by committing such nefarious acts.

However, there will come a certain point when the prevailing circumstances would suggest the grant of an amnesty. There is no hard and fast rule to determine the exact situation but the proper authorities may exercise their sound discretion to recommend the grant of amnesty as well as the procedure and requirements thereof.

VI. RAISING PUBLIC AWARENESSAND OTHER PREVENTIVE MEASURES

A. Importance of Public Awareness of Corruption

It is a widely accepted principle that sovereignty resides in the people so that all powers of the government emanate from them. This is also the reason why the people take interest in the government. The government is believed by the people to be mandated to protect and serve their general welfare.

In this light, the general public is concerned about the propriety and efficiency of the performance of each government official or employee. Every misfeasance, nonfeasance and malfeasance in the discharge of their respective functions constitutes a breach of its mandate. Corruption in the government, particularly in the administration of justice, disrupts economic development and social advancement of the people. This necessarily requires an effective preventive measure to at least control, if not eradicate, this despicable act. The collaborative effort of the entire citizenry is indeed indispensable.

B. Recommendations for Raising Public Awareness and Other Preventive Measures

1. Measures to Increase Public Awareness

Generally, the methods used in promoting public awareness include *inter alia* educational programmes through tri-media intervention; access and education through computers and other electronic gadgets; training, workshops, seminars or focus group discussions; poster-making, debate, slogan-making, etc. contests; and gathering members of various non-government organizations and other civic groups to strengthen their active roles as close observers of the system.

The indispensable role of tri-media in information dissemination and education is beyond controversy. It may include related discussions on the television, opinion columns in the newspapers and commentary programmes on the radio. Media has been considered the bridge of the government in reaching out to its people and the nation's voice to redress its grievance with the government.

Noticeably, the sensationalized nature of the reporting of corruption cases contributes to the campaigns against corruption. In most countries, creative advertisements are broadcast on television and radio and printed in the newspapers, ensuring almost blanket coverage of the issue. It was also suggested that new devices should be introduced in order to reach people in remote areas.

Use of technology is a popular mode of information dissemination and education nowadays. Most countries have adopted it as lawful means of sending or filing complaints regarding corruption offences. In the same manner, the Internet is a source of access for the general public regarding anti-corruption laws, campaigns and other pertinent information.

Training and seminars can be used as a way of preventing corruption. It may include appropriate lectures for judges, law enforcers, prosecutors, lawyers, court staff and other key players in the criminal justice system. The goal is not only to enhance their efficiency but also to widen and strengthen their capability in fighting corruption within their own houses.

During the discussion, it appeared that in Moldova, the Philippines and Thailand, students from all levels are also involved in the anti-corruption campaign and actively participate in related activities and prize contests. Young students are malleable and can be molded into responsible and honest citizens who can grow into future leaders of the people.

In a country that is ruled by the people, the emergence of anti-corruption groups is very likely. They serve as watchdogs over the acts and performance of public servants, especially those in elected offices. It is good that civil society takes its own initiative in carrying out anti-corruption campaigns through various activities and ultimately promotes public awareness thereof. In this manner, not only are the people provided with necessary information, they are also encouraged to take a stand and collaborate with other organizations for the same cause.

2. Preventive Measures

Most commonly, a public servant is bound by certain laws, rules and regulations in the conduct of its official functions. This includes prohibition of certain acts. The group recommends that restrictive provisions applicable to civil servants should not only be restrictive in nature, but must also be preventive in character. Hence, a review of the procedural and administrative laws must be undertaken as the need arises.

In the Philippines, there is a Standard Code of Conduct applicable to all government officials and employees, aside from the ethical standards applicable to members of the judiciary and lawyers. On the other hand, in other countries, such Code of Conduct is not uniformly applied to all public officials and

employees. In Thailand, the Code of Conduct for public officials is under the drafting stage in view of the recent advent of their constitution.

A random efficiency and integrity audit in all government offices is recommended by the group. This has been done in the Philippines and has had a substantial impact upon the entire bureaucracy.

Complainants in corruption cases are more often reluctant to file formal complaints and much more to testify thereon. In the Philippines, the anti-corruption authorities take appropriate action and dispose anonymous complaints by all legal means. The public official or employee concerned are furnished with a copy of the complaint and directed to submit his/her comment thereon. The authority resolves the matter based on the merits of the case and evidence on record.

Thailand adopts a money reward system as a positive motivation for key players in the criminal justice system to prevent them from engaging in any corrupt act and to resist accepting bribe that may be offered by offenders.

There is a need to improve transparency in the procurement processes of all countries. Monitoring and reporting schemes must be established.

It has also been proven in most of the countries that the declaration of assets is an effective investigative method and would more likely yield a successful prosecution of corruption offences. In some countries, the liabilities of the public servant concerned are also declared. Most participants recommend that the declaration should be applied to all public servants regardless of their rank and the nature of their appointment into office.

A zero tolerance policy in investigating, prosecuting and adjudicating corruption cases is ideal and is considered by the group a mandatory guiding principle in dealing with corruption cases to create the desired impact or deterrent effect. Under this policy, everyone must stand on an equal plane. The policy, however, requires a strong political will.

It is recommended that a job rotation policy, especially for positions with implications for financial and budgetary concerns be adopted. Imposing a fixed period for a specific assignment and then rotation or transfer to another assignment would prevent the civil servant concerned from exercising monopoly and would therefore help to prevent temptation.

Corruption, basically, has a systemic character, its resources being concealed even at the level of legislative acts. In other words, corruption becomes even more dangerous when it is based on an evasive, confusing or underdeveloped legal framework. Efficient combating of corruption is impossible without preliminary cleaning of the legal framework by removal of all norms that generate corruption and raise the probability of corrupt acts. In this sense, a specific and an especially important action is the analysis of the degree of corruptibility of drafts of legal acts. This procedure was successfully introduced in the Republic of Moldova, being among the few countries to have such a practice.

We can also mention the assessment of corruption risk within institutions, as a preventive mechanism, as used in the Republic of Moldova.

It is also important for parents to start educating their children on how to be responsible and law-abiding citizens. Family is the fundamental unit of the society and parents must take advantage of molding their children with sound moral values. There is a need for a mental overhaul concerning the general public. While advocating for an increase in salary, low remuneration shall not be interposed as a valid excuse in committing corrupt acts. This psychological approach of preventing corruption stems out from the principle that corruption has no place in an environment of honesty and integrity.

VII. GENERAL RECOMMENDATIONS

Diseases happen everywhere, but humans still try to devise prevention and cure. The problem of corruption is much the same. By preventing and correcting mistakes we lead to change.

In its final discussion, the group came up with five general recommendations regarding the main themes of this course, as follows.

1. Fighting corruption requires the unconditional commitment of the political leadership. This is particularly important where corruption has spread among the political elite;

2. There is need for proper national legislation, an independent and efficient criminal justice system and appropriate and comprehensive policies of various aspects, focusing especially on creating public awareness of the evil of corruption;

3. Effective deterrence of corruption can be ensured only through effective investigation, prosecution and adjudication;

4. Building a culture that is averse to corruption is central to the integrity of both the private and the public sectors;

5. Corruption is not a problem limited to a single country, but a global problem which requires strong co-operation among the various countries in order to combat it. The challenge facing the international community is to ensure that the UNCAC does not remain a mere aspiration but becomes an efficient functioning instrument; member countries should domesticate these principles through an enabling act. In addition, making some optional offences mandatory would enhance international mutual legal assistance.