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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 the Resource Material Series No. 86.

This volume contains the work produced in the 149th International Training Course, conducted from 25 August to 30 September 2011, and the 14th UAFEI UNCAC Training Programme, conducted from 13 October to 10 November 2011. The main theme of the 149th Course was “Securing Protection and Cooperation of Witnesses and Whistle-blowers”. The main theme of the 14th UAFEI UNCAC Training Programme was “Effective Legal and Practical Measures against Corruption”.

With regard to the 149th Course, witness statements and testimony are the cornerstones of criminal proceedings. Without them, successful investigation and prosecution of criminal conduct is almost impossible. Likewise, whistle-blowing often plays a key role in exposing criminal conduct that would otherwise remain undetected. However, securing the cooperation of witnesses and whistle-blowers can be difficult. Obstacles to their full cooperation include fear for their safety, the risk of retaliation, and other disadvantageous treatment. To remove these obstacles, measures that provide adequate protection are much needed. Further, obstruction of justice, including witness tampering, should be criminalized and properly punished.

In the case of witnesses who are themselves implicated in crime or conspiracy, immunity from prosecution or mitigation of punishment will strongly encourage cooperation. Properly administered, these measures can be a particularly effective tool in the fight against organized crime and corruption.

These considerations are reflected in the United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC), which require States Parties to provide effective protection for witnesses; criminalize obstruction of justice; consider the options of granting immunity or mitigating punishment for cooperating witnesses; and consider adopting appropriate measures to protect whistle-blowers.

With regard to the 14th UAFEI UNCAC Training Programme, corruption is a problem that constantly needs to be challenged and this is the reason UAFEI holds an annual multiple country course specifically on corruption control. UAFEI’s course focuses chiefly on the measures contained in the United Nations Convention against Corruption, which was adopted by the General Assembly of the United Nations in 2003. The Convention was adopted in recognition of the harm corruption can cause, especially in developing countries, and the fact that it can transcend national borders.

The Convention came into force in December 2005 and requires States Parties to implement a number of measures to tackle corruption in a comprehensive way, including measures directed at prevention, criminalization, international co-operation, and asset recovery. UAFEI’s annual UNCAC Training Programme is our contribution to promoting the ratification and full implementation of the Convention by all UN Member States, and a step closer towards freeing the world from the grip of corruption.

In this issue, in regard to both the 149th International Training Course and the 14th UAFEI UNCAC Training Programme, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the Reports of the Courses are published. I regret that not all the papers submitted by the participants of each Course could be published.

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.

Finally I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular, the editor of Resource Material Series No. 86, Ms. Grace Lord.

March 2012

Tatsuya Sakuma
Director of UNAFEI
PART ONE

RESOURCE MATERIAL SERIES
No. 86

Work Product of the 149th International Training Course
“Securing Protection and Cooperation of Witnesses and Whistle-blowers”

UNAFEI
SECURING PROTECTION AND COOPERATION
OF WITNESSES AND WHISTLE BLOWERS

Severino H. Gaña, Jr.*

I. BACKGROUND

Witnesses are crucial factors in the dispensation of justice in any civilized society. In the criminal justice system, prosecution of cases fails or succeeds, depending on the willingness of witnesses to testify.

A witness is the “eyes and ears” of the Court. The information provided by a witness aids in the identification and arrest of the suspect. A witness is often times indispensable in the conviction of the accused.

Witnesses to crime usually experience trauma. Worse, he and/or his family and loved ones are at risk of being harassed, threatened, influenced, bribed, hurt, harmed or even killed by influential and powerful individuals or groups, especially in organized crimes. A witness is forced to change residence and leave his work. He will endure tremendous personal, family and financial inconvenience. For these reasons, a person is usually reluctant, or even refuses to be a witness.

The Philippine government has taken appropriate measures to provide effective protection against potential retaliation to witnesses in criminal proceedings and grants them rights and benefits as well. Republic Act No. 6981 or “The Witness Protection, Security and Benefit Act” was enacted on 24 April 1991 by President Corazon Aquino, to encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation.

Under the law, the Department of Justice (DOJ), through the Secretary as Chief Implementor, formulates and implements the Witness Protection, Security and Benefit Program. The Department may call upon any department, bureau, office or any other executive agency to assist in the implementation of the Program and the latter offices are legally obliged to render such assistance (Section 2, RA 6981).

II. SALIENT FEATURES OF THE LAW

A. Admission into the Program (Section 3, RA 6981)

Any person who has witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify before any judicial or quasi-judicial body, or before any investigating authority, may be admitted into the Program. Provided, that:

1) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code, or its equivalent under special laws;

2) his testimony can be substantially corroborated in its material points;

3) he or any member of his family within the second civil degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively, because or on account of his testimony; and

4) he is not a law enforcement officer, even if he would be testifying against the other law enforcement officers. In such a case, only the immediate members of his family may avail themselves of the protection

* Senior Deputy State Prosecutor, Department of Justice, Philippines.
B. Witness in Legislative Investigations (Section 4, RA 6981)
In case of legislative investigations in aid of legislation, a witness, with his express consent, may be admitted into the Program upon the recommendation of the legislative committee where his testimony is needed when in its judgment there is pressing necessity therefor; Provided, that such recommendation is approved by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

C. Duties and Responsibilities of a Witness (Section 5, RA 6981)
Before a person is provided protection under this Act, he shall first execute a memorandum of agreement which shall set forth his responsibilities including:

1) to testify before and provide information to all appropriate law enforcement officials concerning all appropriate proceedings in connection with or arising from the activities involved in the offense charged;

2) to avoid the commission of a crime;

3) to take all necessary precautions to avoid detection by others of the facts concerning the protection provided him under this Act;

4) to comply with legal obligations and civil judgments against him;

5) to cooperate with respect to all reasonable requests of officers and employees of the Government who are providing protection under this Act; and

6) to regularly inform the appropriate program official of his current activities and address.

C. Breach of the Memorandum of Agreement (Section 6, RA 6981)
Substantial breach of the memorandum of agreement shall be a ground for the termination of the protection provided under this Act: Provided, however, that before terminating such protection, the Secretary of Justice shall send notice to the person involved of the termination of the protection provided under this Act, stating therein the reason for such termination.

D. Confidentiality of Proceedings (Section 7, RA 6981)
All proceedings involving application for admission into the Program and the action taken thereon shall be confidential in nature. No information or documents given or submitted in support thereof shall be released except upon written order of the Department or the proper court.

Any person who violates the confidentiality of said proceedings shall upon conviction be punished with imprisonment of not less than one year but not more than six years and deprivation of the right to hold a public office or employment for a period of five years.

E. Rights and Benefits of a Witness Admitted to the Program (Section 8, RA 6981)
The witness shall have the following rights and benefits:

(1) To have a secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or tolerable level. When the circumstances warrant, the Witness shall be entitled to relocation and/or change of personal identity at the expense of the Program. This right may be extended to any member of the family of the Witness within the second civil degree of consanguinity or affinity.

(2) The Department shall, whenever practicable, assist the Witness in obtaining a means of livelihood. The Witness relocated pursuant to this Act shall be entitled to a financial assistance from the Program for his support and that of his family in such amount and for such duration as the Department shall determine.

(3) In no case shall the Witness be removed from or demoted in work because or on account of his absences due to his attendance before any judicial or quasi-judicial body or investigating authority, including legislative investigations in aid of legislation, in going thereto and in coming there from: Provided,
That his employer is notified through a certification issued by the Department, within a period of thirty (30) days from the date when the Witness last reported for work: Provided, further, that in the case of prolonged transfer or permanent relocation, the employer shall have the option to remove the Witness from employment after securing clearance from the Department upon the recommendation of the Department of Labor and Employment.

Any Witness who failed to report for work because of witness duty shall be paid his equivalent salaries or wages corresponding to the number of days of absence occasioned by the Program. For purposes of this Act, any fraction of a day shall constitute a full day salary or wage. This provision shall be applicable to both government and private employees.

(4) To be provided with reasonable travelling expenses and subsistence allowance by the Program in such amount as the Department may determine for his attendance in the court, body or authority where his testimony is required, as well as conferences and interviews with prosecutors or investigating officers.

(5) To be provided with free medical treatment, hospitalization and medicines for any injury or illness incurred or suffered by him because of witness duty in any private or public hospital, clinic, or at any such institution at the expense of the Program.

(6) If a Witness is killed, because of his participation in the Program, his heirs shall be entitled to a burial benefit of not less than Ten Thousand Pesos (P 10,000.00) from the Program exclusive of any other similar benefits he may be entitled to under other existing laws.

(7) In case of death or permanent incapacity, his minor or dependent children shall be entitled to free education, from primary to college level in any state, or private school, college or university as may be determined by the Department, as long as they shall have qualified thereto.

F. Speedy Hearing or Trial (Section 9, RA 6981)

In any case where a Witness admitted into the Program shall testify, the judicial or quasi-judicial body, or investigating authority shall assure a speedy hearing or trial and shall endeavor to finish said proceeding within three (3) months from the filing of the case.

G. State Witness (Section 10, RA 6981)

Any person who has participated in the commission of a crime and desires to be a witness for the State, can apply and, if qualified as determined in this Act and by the Department, shall be admitted into the Program whenever the following circumstances are present:

(1) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code or its equivalent under special laws;

(2) there is absolute necessity for his testimony;

(3) there is no other direct evidence available for the proper prosecution of the offense committed;

(4) his testimony can be substantially corroborated on its material points;

(5) he does not appear to be most guilty; and

(6) he has not at any time been convicted of any crime involving moral turpitude.

H. Sworn Statement (Section 11, RA 6981)

Before any person is admitted into the Program, he shall execute a sworn statement describing in detail the manner in which the offense was committed and his participation therein. If after said examination of said person, his sworn statement and other relevant facts, the Department is satisfied that the requirements of this Act and its implementing rules are complied with, it may admit such person into the Program and issue the corresponding certification.
If his application for admission is denied, said sworn statement and any other testimony given in support of said application shall not be admissible in evidence, except for impeachment purposes.

I. Effect of Admission of a State Witness into the Program (Section 12, RA 6981)

The certification of admission into the Program by the Department shall be given full faith and credit by the provincial or city prosecutor who is required not to include the Witness in the criminal complaint or information and if included therein, to petition the court for his discharge in order that he can be utilized as a State Witness. The Court shall order the discharge and exclusion of the said accused from the information.

Admission into the Program shall entitle such State Witness to immunity from criminal prosecution for the offense or offenses in which his testimony will be given or used and all the rights and benefits provided under Section 8 hereof.

J. Failure or Refusal of the Witness to Testify (Section 13, RA 6981)

Any Witness registered in the Program who fails or refuses to testify or to continue to testify without just cause when lawfully obliged to do so, shall be prosecuted for contempt. If he testifies falsely or evasively, he shall be liable to prosecution for perjury. If a State Witness fails or refuses to testify, or testifies falsely or evasively, or violates any condition accompanying such immunity without just cause, as determined in a hearing by the proper court, his immunity shall be removed and he shall be subject to contempt or criminal prosecution. Moreover, the enjoyment of all rights and benefits under this Act shall be deemed terminated.

The Witness may, however, purge himself of the contumacious acts by testifying at any appropriate stage of the proceedings.

K. Compelled Testimony (Section 14, RA 6981)

Any Witness admitted into the Program cannot refuse to testify or give evidence or produce books, documents, records or writings necessary for the prosecution of the offense or offenses for which he has been admitted into the Program on the ground of the constitutional right against self-incrimination but he shall enjoy immunity from criminal prosecution and cannot be subjected to any penalty or forfeiture for any transaction, matter or thing concerning his compelled testimony or books, documents, records and writings produced.

In case of refusal of said Witness to testify or give evidence or produce books, documents, records, or writings, on the ground of the right against self-incrimination, and the state prosecutor or investigator believes that such evidence is absolutely necessary for a successful prosecution of the offense or offenses charged or under investigation, he, with the prior approval of the department, shall file a petition with the appropriate court for the issuance of an order requiring said Witness to testify, give evidence or produce the books, documents, records, and writings described, and the court shall issue the proper order.

The court, upon motion of the state prosecutor or investigator, shall order the arrest and detention of the Witness in any jail contiguous to the place of trial or investigation until such time that the Witness is willing to give such testimony or produce such documentary evidence.

L. Perjury or Contempt (Section 15, RA 6981)

No witness shall be exempt from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion pursuant to this Act. The penalty next higher in degree shall be imposed in case of conviction for perjury. The procedure prescribed under Rule 71 of the Rules of Court shall be followed in contempt proceedings but the penalty to be imposed shall not be less than one (1) month but not more than one (1) year imprisonment.

M. Credibility of Witness (Section 16, RA 6981)

In all criminal cases, the fact of the entitlement of the Witness to the protection and benefits provided for in this Act shall not be admissible in evidence to diminish or affect his credibility.

N. Penalty for Harassment of Witness (Section 17, RA 6981)

Any person who harasses a Witness and thereby hinders, delays, prevents or dissuades a Witness from:
(1) attending or testifying before any judicial or quasi-judicial body or investigating authority;

(2) reporting to a law enforcement officer or a judge the commission or possible commission of an offense, or a violation of conditions or probation, parole, or release pending judicial proceedings;

(3) seeking the arrest of another person in connection with the offense;

(4) causing a criminal prosecution, or a proceeding for the revocation of a parole or probation; or

(5) performing and enjoying the rights and benefits under this Act or attempts to do so shall be fined not more than Three Thousand Pesos (P 3,000.00) or suffer imprisonment of not less than six (6) months but not more than one (1) year, or both, and he shall also suffer the penalty of perpetual disqualification from holding public office in case of a public officer.

Pursuant to the directive of DOJ Secretary De Lima to strengthen the Witness Protection Program, the following measures have been recommended for implementation:

1. **Proactive Implementation**
   
   Program’s implementors in the regions have been directed to adopt a proactive stance in seeking out witnesses in cases involving political killings, media murders and human rights violations. Although application for admission for witness protection coverage necessarily requires strict compliance with statutory requirements, stringent vetting procedures and the identification and evaluation of threats, program personnel have been directed to liberalize admission requirements particularly when threat level on bona fide witnesses in media and political killings is high.

2. **Enhancement of Witness Benefits**
   
   Witnesses often decline proposal to testify for the prosecution not only because of fear of physical harm but more often because of economic dislocation. To allay witnesses’ uncertainty because of a drastic change in their way of life upon admission into the Program, economic benefits and social services should be enhanced.

   Psychological counseling which are presently undertaken in coordination with the Department of Health and Department of Social Welfare and Development shall be extended ample logistical support.

   Direct financial assistance shall likewise be increased to ameliorate witness’s economic condition.

   Increase in employees’ benefits.

3. **Skills Training for Witnesses**
   
   To prepare witnesses in re-joining mainstream society after their discharge from the Program as protected witnesses and to lessen their dependence on the Program consistent with security requirements, a wide-ranging vocational orientation-training program is being undertaken in cooperation with Technical Education and Skills Development Authority (TESDA) and/or Technology and Livelihood Resource Center (TLRC) to prepare them for suitable employment here and abroad.

4. **Institutionalization of Coordination with Judiciary and other Pillars of Criminal Justice System**
   
   Speedy disposition of cases is a key feature in the maintenance of a reliable and credible witness protection program. Prolonged pendency of cases particularly before the high courts results to apathy and indifference of witnesses on the success of the case. Loss of opportunity, isolation and boredom associated with extended confinement in relocation sites and safe houses away from native community and relatives dampen witnesses’ resolve to testify.

5. **Upgrade in Training and Equipment of Protective and Administrative Personnel**
   
   Acquisition of firearms suitable for encounters, body armor and communication equipment for use of protective personnel are essential requirements for enhancement of the Program’s protective capability.
Upgraded training of administrative personnel should likewise be undertaken to keep them posted on trends in record keeping and confidentiality.

Purchase of utility vehicles to augment the Program’s aging fleet to transport witnesses from regional relocation sites to trial venues across the country is an operational necessity for the security and well being of witnesses.

III. IMPLEMENTATION OF THE WITNESS PROTECTION PROGRAM

Although there has been a marked increase in the number of applications for coverage under the WPSB Program due mainly to the increasing awareness of the importance of protecting witnesses in the prosecution of heinous crimes, the Program has remained under resourced. From the stand point of the prosecutors and law enforcers, witness protection and care has become a vital tool in the effective prosecution of criminal cases.

From only six admissions in its inception in 1991, the Program has expanded its operations through the years. For the period covering 1 January 2011 to 30 June 2011, a record of 74 applications were filed with the Program. Out of this number, 70 applicant witnesses were admitted and added to the witnesses already being maintained by the Program. As of 30 June 2011, the Program had under its coverage a total of 471 witnesses nationwide.

The increase in the number of witnesses in 2010 is partly due to the infamous Maguindanao Massacre with which claimed 57 innocent lives. Suspects, including members of the powerful Ampatuan political clan, have been charged with 57 counts of murder. These cases are pending trial before the Quezon City Regional Trial Court. Hundreds of persons have been indicted in these cases. Because of the huge number of witnesses and the gravity of the offences, and the notoriety of the accused, these cases gained national interest. Hence, the Program poured tremendous resources to secure the witnesses in these cases.

From the assumption to the Presidency of His Excellency, President Benigno C. Aquino, III, 1 July 2010, up to 30 June 2011, 193 applications for coverage under the Program have been filed with 155 having been approved.

On the other hand, form the period 1 January 2011 – 30 June 2011 out the 34 cases decided with witnesses covered under the Program testifying, 32 cases have been won, thereby posting a conviction rate of 94%.

IV. PROGRAM SPECIAL CONCERNS:
MEDIA MURDERS, EXTRA JUDICIAL KILLINGS,
AMPATUAN MAGUINDANAO MASSACRE & REBELLION CASES

Because of the rise in media murder cases and extrajudicial killings, the Philippines was labelled by the international media organizations as the most murderous country for journalists.

To dispel the impression that in our country many killers and masterminds of journalists who expose corruption in government get off the hook owing to the weakness of our criminal justice system, DOJ Secretary Leila De Lima directed the Program implementors to be involved in case buildup, identification of potential witnesses under threat, filing of charges, securing of warrants and relocation of witnesses in a number of cases.

V. SOME CASES WITH WITNESSES COVERED BY THE PROGRAM

A. People of the Philippines versus Joseph Ejercito Estrada, et.al. for Plunder

This case sets a historical precedent as the accused was a president of the country. Plunder is the act of public officers of amassing immense wealth through a series or combination of overt or criminal acts, in violation of the public trust. Estrada was convicted for the systematic collection of 545 Million Pesos in illegal gambling pay-offs and the receipt of 189 Million Pesos commission from stock market purchases using state pension funds. The Program covered 12 witnesses over a period of ten years and spent a total of 11.6 Million Pesos for their protection and well-being.
B. People of the Philippines versus Amin Iman Boratong et.al. for Drug Trafficking
Operatives of the Anti-Ilegal Drugs Special Operations Task Force in a City in Metro Manila raided an area notorious for sale and distribution of illegal drugs leading to the eventual arrest of the operator Boratong, his wife and their cohorts who were convicted and sentenced to life imprisonment. Because Boratong earned at least 900 Million Pesos in this shabu business, he is also charged of money laundering. The Program covered two vital witnesses including Boratong’s right hand man whom he threatened and attempted to bribe.

C. People of the Philippines versus Congressman Romeo Jalosjos for Statutory Rape
The Program covered the victim/complaining witness who was sexually abused on several occasions by then incumbent congressman of Zamboanga del Norte, a province in southern Philippines. The victim and three (3) other witnesses were granted financial assistance and protection for six years until Jalosjos was sentenced to two life terms. Jalosjos was so influential that while in jail but pending appeal of the conviction, he managed to be re-elected. However, he was dropped from the rolls of the House of Representatives when the Supreme Court later affirmed his guilt.

D. People of the Philippines versus Estanislao Bismanos, et.al. for Murder
Journalist Marlene Esperat was a crusader against corruption and for good governance. She was killed in her residence in front of her husband and children because of her exposé of the 432 Million Pesos fertilizer fund scam in the Department of Agriculture involving high ranking officials. Three of the accused were convicted and sentenced to life imprisonment but the suspected masterminds remain at-large. Six witnesses were covered by the Program, three of whom are the victim’s children.

E. People of the Philippines versus Mayor Antonio Sanchez, et.al for Rape with Homicide
Antonio Sanchez, then the mayor of Calauan, Laguna and his men, including the Chief of Police of said town, were convicted of the crime of rape with homicide and murder on seven counts and all of them sentenced to seven terms of life imprisonment, for each raping Aileen Sarmienta and killing her and her boyfriend Allan Gomez. The Program covered two witnesses who were both members of the security team Sanchez. In another unrelated case, Sanchez was also given a double life term by the Supreme Court.

F. People versus Claudio Teehankee, Jr. for Murder and Homicide
These cases gained wide publicity because the perpetrator of the crime was the son of a former Chief Justice of the Supreme Court and brother of a former Undersecretary of the Department of Justice. Many people expected acquittal of Teehankee but he was found guilty of murder and homicide. The Program secured and protected the mother of victim Maureen Hultman.

G. People of the Philippines versus Senior Police Inspector Jose Flores, et. al. for Murder with Unintentional Abortion, Murder (2 Counts) and Frustrated Murder
Six police officers framed four women for shoplifting, detained them for two days then assaulted and stabbed them. As a result, three women were killed and one of them was pregnant. The Program covered the lone survivor and only eyewitness, Myrna Diones. Five of the accused were convicted and sentenced to life imprisonment while one of them was acquitted.

H. People of the Philippines versus Fransisco Juan Larranaga, et.al. for Kidnapping and Rape with Homicide
The program covered seven witnesses against seven accused who included scions of rich, prominent, influential families in Cebu who raped and killed sisters Jacquiline and Marijoy Chiong. Foreign groups from Europe especially from Spain lobbied for the accused because the one of them is a Spanish citizen but they were all convicted.

VI. ISSUES AND CHALLENGES
A. Intelligence and Security Force
The Program has no organic intelligence and security force. The Intelligence Security and Operations Group (ISOG) is composed of contractual personnel and sometimes augmented by the Philippine National Police (PNP) and the National Bureau of Investigation (NBI) as may be necessary. In the past, there were plans for the establishment of an organic security force to strengthen the Program’s organizational structure. The plans were shelved mainly because of financial constraints. Salaries for new positions would weigh
heavily on the budget of the Program and would affect the financial and other needs of witnesses.

B. Support System for Witnesses
Witnesses often decline to testify for the prosecution not only because of fear of harassment or physical harm but more often because of economic dislocation. Relocation and confinement to a safehouse result in loss of opportunities, isolation and boredom. The program strongly pursues speedy trial as a vital measure to avoid witnesses becoming disinterested and also recognizes that witnesses need a strong support system to sustain their resolve. For example, professionals are needed to address the needs of witnesses for psychosocial counseling. Job skills and livelihood training to prepare them to rejoin mainstream society and the competitive work force are also required. To address this concern, the Program has engaged the services of trained counselors from the Department of Health and trainers from the Technical Education and Skills Development Authority and the Technology and Livelihood Resource Center which are also government agencies. They are enjoined to keep confidential all matters pertaining to the witnesses.

C. Disqualification of Law Enforcement Officers
Under the law, law enforcement officer is not qualified to be admitted to the Program. This poses a problem in a case where he will testify against his superior who has power and authority over him. In such a case, only the immediate members of his family are covered by the Program and may avail of witness protection and benefits.

D. No Special Protection to Witnesses in the Early Part of the Investigation
Some cases do not progress beyond the initial stage of police investigation because of the lack of special protection to witnesses at this point. If protection for a witness is necessary, the police or thereafter the prosecutor during preliminary investigation may recommend that a witness be admitted to the Program. Admission to the program requires strict compliance with statutory requirements and careful evaluation, hence, it takes time. As a stop-gap measure, the Program has liberalized admission requirements and processes if the level of threat is high and especially in cases of killing by organized groups or when it politically motivated or when the victim is a member of a media. Provisional coverage for a period of 90 days, subject to re-evaluation, is allowed for witnesses so that they can be afforded protection and other benefits, pending completion of the requirements and final evaluation of their application.

VII. PROPOSED AMENDMENTS TO RA 6981
A. Proposed Amendments to the Witness Protection Security and Benefit Act (Republic Act No. 6981)
A bill was introduced in Congress proposing several amendments to RA 6981. The Department of Justice was invited to submit its recommendations to the Committee on Justice. The proposed amendments to RA No. 6981 seek to:

1. Create a separate Witness Protection Program that will cover witnesses in legislative investigations;
2. Increase the penalty for violation of the confidentiality rule;
3. Prohibit the courts from issuing injunctions or restraining orders against the admission of witness;
4. Empower the Secretary of Justice to order the concerned agencies to effect a change in the name, middle name, or surname of a witness;
5. Clarify that the admission of an offender under the Program is distinct and independent from a discharge of an accused from an information or criminal complaint by the court in order that he may be a state witness pursuant the Rules of Court;
6. Increase the penalty for a witness who, after having been admitted the Program, refuses to testify.
SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLEBLOWERS: PART II

Severino H. Gaña, Jr.*

I. BACKGROUND

The Philippine government recognizes that graft and corruption are threats to the sustained growth and development of the country. It admits that initiatives against graft and corruption, which include administrative measures and legislative actions to enhance transparency and effectiveness of sanctions against corrupt behaviour, have fallen short of expectation.

By increasing the chances of discovering corrupt practices, whistle-blowing makes it costly to search for a corrupt partner. By enhancing the transparency and control, individual’s actions done in behalf of a principal whistle-blowing may promote an individual’s accountability and prevent the breakdown in principal-agent relations that happens when a corrupt act is committed.

The potential of whistle-blowing to cure corruption is slowly gaining recognition and support in the public and private sectors. In the Philippine Congress, several measures have been proposed to encourage whistle-blowing. Generally, these bills suggest that the exposure of wrongdoings in government will deter corruption, and therefore, should be encouraged by instituting measures that will protect whistleblowers from reprisals and harassment.

The motives for whistle-blowing and the lack of whistleblower protection have often lent controversy to whistle-blowing. Although whistle-blowing has been studied in considerable detail in developed economies, there is still lack of similar studies in the Philippine contexts. Cultural obstacles notwithstanding, whistle-blowing could be a promising anti-corruption practice in the Philippines. However, its adoption and eventual institutionalization requires an in-depth look into the existing political, social, cultural and legal structures that hamper and promote the practice, as well as the level of awareness and attitude towards whistle-blowing among direct stakeholders. In addition, any proposed measure towards its adoption should be carefully designed, factoring an inherent pitfalls alongside potential benefits.

II. AN ACT PROVIDING FOR PROTECTION, SECURITY AND BENEFITS OF WHISTLEBLOWERS

“Proposed Whistleblower Protection Act of 2011”

A. Salient Features

Public Office is a public trust. It is the policy of the State to promote and ensure full accountability in the conduct of its officers and employees, and exact full retribution from those who shall engage in improper conduct. Toward this end, the State shall:

(A) Maintain honest and high standards of integrity in the public service;
(B) Safeguard the national interest through the prosecution of corrupt and erring public officials and employees; and
(C) Encourage and facilitate the disclosure of corrupt conduct and practices in the public service by providing benefits provided in existing laws.

B. Definition of Some Terms

“Whistleblower” shall refer to any person who has personal knowledge or access to any data,
information, factor event constituting improper conduct; Provided that such person must not have any direct participation in such improper conduct, or in cases where such person participated in any improper conduct, such person is not the most guilty and shall therefore qualify as a state witness against the persons subject of such disclosure.

“Qualified Whistleblower” shall mean a whistleblower qualified and admitted into the Whistleblower’s Program of the Implementing Agency in accordance with this Act and its implementing rules and regulations.

“Acts constituting improper conduct” shall mean any act or omission of a public officer or employee solely, or in cooperation, conspiracy with, or with the assistance of, private persons which is covered by or constitute a violation of:

(1) Presidential Decree No. 46 otherwise known as “Making it punishable for Public Officials and Employees to receive, and for Private persons to give, gifts on any occasion, including Christmas;”

(2) Republic Act No. 3019 otherwise known as “Anti-Graft and Corrupt Practices Act;”

(3) Republic Act No. 6713 otherwise known as “An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees;”

(4) Republic Act No. 7080 otherwise known as the “Anti-Plunder Law;”

(5) Title VII of Book Two of the Revised Penal Code on Crimes Committed by Public Officers; and

(6) All other laws which penalize or sanction any act or omission of a public officer or employee.

“Implementing Agencies or Agency” shall collectively or individually refer to the Department of Justice (DOJ), the Office of the Ombudsman, the Commission on Human Rights (CHR), and the Public Attorney’s Office (PAO).

C. SEC. 4. Coverage
Notwithstanding the provisions of law on prescription of crimes, this Act shall cover all acts constituting improper conduct irrespective of the time of commission.

D. SEC. 5. Admission/Qualification to the Program
Whistleblowers, whether from the public or private sector, shall be entitled to the benefits under this Act, provided, that all the following requisites concur:

(a) The disclosure is voluntary, in writing and under oath;
(b) The disclosure relates to acts constituting improper conduct;
(c) The information to be disclosed is admissible in evidence;
(d) The whistleblower appears to be not the most guilty;
(e) The whistleblower is not a beneficiary of the act or acts of improper conduct in the amount of more than One Million Pesos (Php 1,000,000.00) or any kind of consideration of the same value.

It is only upon concurrence of the above requisites can a whistleblower be qualified and thus admitted to the program as provided for in this Act.

E. SEC. 6 Necessity of Testimony
The testimony of a whistleblower in court shall not be necessary for the entitlement of the benefits and protection under this Act. In the event that the whistleblower’s testimony is required as found by the Implementing Agency to be necessary and indispensable for a successful investigation or prosecution of a case, he/she shall be entitled to the additional benefits and protection under Republic Act 6891, otherwise known as the “Witness Protection, Security and Benefit Act”, funding for which shall be sourced from the budget as provided under Section 32 hereof.

F. SEC. 7 Credibility of a Whistleblower
In all cases, the fact of the entitlement of the qualified whistleblower to the protection and benefits
provided in this Act shall not be admissible in evidence to diminish or affect his credibility.

G. SEC. 8 Perpetuation of Testimony
Once admitted into the program, a whistleblower may perpetuate his/her testimony pursuant to Rule 134 of the Revised Rules of Court.

H. SEC. 9 Memorandum of Agreement with the Whistleblower
Before a person is provided protection and benefits as a whistleblower for the State, he/she shall first execute a Memorandum of Agreement with the Implementing Agency which shall set forth his/her responsibilities including the following:
(a) To provide information to and testify before all branches or agencies of government appropriate proceeding on facts constituting improper conduct;
(b) To avoid a commission of a crime;
(c) To take all necessary precautions to preclude detection by others of the facts concerning the protection provided him/her under this Act;
(d) To cooperate with respect to all reasonable requests of officers and employees of the government who are providing him/her protection under this Act; and
(e) To regularly inform the appropriate program official of his/her current activities and address.

I. SEC. 10 Breach Memorandum of Agreement
Substantial breach of the Memorandum of Agreement provided for in Section 9 hereof, shall be a ground for termination of the protection and benefits provided under this Act. Provided, however, that before terminating the same the Implementing Agency shall send notice to the qualified whistleblower concerned, stating therein the reason for such termination.

Provided, finally, that substantial breach of the Memorandum of Agreement shall be punishable by imprisonment of not less than six months but not more than one year independent and separate from any other criminal liability that may be incurred by reason of such breach.

J. SEC 11. Confidentiality
Except insofar as allowed by this Act, during and after this disclosure, and throughout and after any proceeding taken thereafter, a whistleblower is entitled to absolute confidentiality as to:
(a) His/her identity;
(b) The subject matter of his/her disclosure; and
(c) The person to whom such disclosure was made.
There shall be no such confidentiality in his/her identity if a whistleblower makes a public disclosure of a conduct constituting improper conduct unless, notwithstanding such public disclosure, he/she has taken means and measures obviously intended to preserve his/her anonymity.

K. SEC. 12 Confidential Information
No person to whom a disclosure has been made or referred shall divulge any information that may identify or tend to identify a whistleblower or reveal the subject matter of such disclosure, except only as to the following circumstances:
(a) The whistleblower consents in writing prior to a disclosure of an information;
(b) The disclosure is indispensable and essential as determined by the Implementing Agency, taking into consideration the necessary proceedings to be taken after the disclosure; or
(c) The disclosure or referral is made pursuant to an obligation under this Act. The prohibition on disclosure under this Section shall apply to any person who has become privy to any confidential information, whether officially or otherwise.

L. SEC. 13 No Breach of Duty of Confidentiality
A whistleblower who has made a disclosure under this Act on whom a provision of law, regulation, issuance, practice or other convention, imposes upon him/her a duty to maintain confidentiality with respect to any information disclosed, is considered not to have committed a breach thereof.

M. SEC. 16 False and Misleading Disclosures
A whistleblower who deliberately and voluntarily gives false or misleading information in connection
with acts or omissions constituting improper conduct shall be guilty of an offense and shall suffer the penalty of imprisonment of not more than two years and perpetual absolute disqualification from holding public office, in case of public officer or employee without prejudice to other liabilities under existing laws.

N. SEC. 17 Protection against Disciplinary Action or Reprisals
A whistleblower who has made or is believed or suspected to have made a disclosure under this Act is not liable to disciplinary action for making said disclosure.

Prohibited acts under this section include retaliatory action in a workplace or prejudicial conduct towards a whistleblower, such as: discriminatory actions behind policies and procedures, reprimand, punitive transfers, unwarranted referral to a psychiatrist or counselor, and undue poor performance reviews. Other prejudicial actions include obstruction of an investigation, withdrawal of essential resources, undue reports and the attachment of unfair personnel file notes.

To this end, any employer who shall discourage and impose sanctions or reprisals based on workplaces interaction, which shall include workplace ostracism, questions and attacks on motives, accusations of disloyalty and dysfunction, public humiliation, and the denial of work or promotion, or who encourages, causes or does retaliatory action or reprisal against the whistleblower or anyone believed or suspected to be one shall be liable for an offense defined under this Act.

Any employee who refuses to follow orders of employers that would cause them to violate any provision of this Act shall likewise be protected from reprisals and retaliatory action in the workplace.

For purposes of this protection, an applicant for employment shall be deemed an employee and entitled to such protection.

Provided however, that an employer of a whistleblower shall be notified through a certification issued by the Implementing Agency within a period of 30 days, from the date when the whistleblower last reported for work. Provided further that an employer shall have the option to remove said whistleblower from employment after securing a clearance from the Civil Service Commission and the Department of Labor and Employment, which ever the case may be, in case of a prolonged absence due to transfer or permanent relocation under this Act or RA 6891.

O. SEC. 18 Protection against other Actions
A whistleblower who has made a disclosure under this Act shall not be subject to any liability whether administrative, civil, criminal for making such disclosure. No action, claim or demand may be taken against a whistleblower for making such disclosure, nor any evidence presented shall be use against him/her in court.

This protection shall also operate as immunity in favor of a whistleblower against any action or proceeding taken against him/her by reason of his/her disclosure.

Provided however, that the whistleblower appears to be not the most guilty.

P. SEC. 23 Financial Rewards for Whistleblowers
A qualified whistleblower shall be entitled to a corresponding monetary reward on a contingency basis, equivalent to at least ten percent of the amount which may be recovered or the amount of one million pesos (Php 1,000,000.00), whichever is lower, as a result of his/her disclosure.

Q. SEC. 28. Powers and Functions of the Implementing Agencies or Agency
In addition to their respective powers and functions under existing laws, the Implementing Agencies shall:

(a) Supervise, monitor and coordinate all efforts relative to the implementation and enforcement of the provisions of this Act;
(b) Investigate all disclosures made under this Act, prosecute or recommend prosecution of the same when warranted;
(c) Evaluate the qualification of whistleblowers for coverage within this Act, and whichever the case may be, make the appropriate decision on their entitlement to the benefits and security and protection extended herein;

(d) Undertake, in coordination and cooperation with the private and public sectors, an information campaign to educate the public on the provisions and benefits of this Act;

(e) Develop plans and implement programs to further encourage whistleblowers on acts constituting improper conduct with a view to effective deterrence and/or prosecution;

(f) Control and administer, through coordination and consistent with the provisions and purpose of this Act, the protection and benefits of whistleblowers and the funds necessary to carry out the provisions of this Act;

(g) Call upon, or deputize and department, bureau, office or any other government agency or public official to assist in the effective implementation and enforcement of this Act; and

(h) Grant immunity in accordance with the provisions of this Act and its implementing rules and regulation.

III. CONCLUSION

Today, witness protection is viewed as crucial in combating organized crimes. In the investigation and prosecution of crimes, particularly the more serious and complex forms of organized crime, it is essential that witnesses have trust in the criminal justice system. This is the cornerstone of successful investigation and prosecution.

Experiences have shown that witnesses can turn hostile during crucial court proceedings due to threats, coercion and monetary considerations and other innumerable corrupt practices ingeniously adopted to smother and stifle truth. As we require observance of the laws by our citizens, let us also provide them with equal assurance of security and protection necessary to counteract the peril of being hunted or harassed by anti-social elements.

In the Philippines, witness and victim protection programmes are formal systems designed to provide full range of physical protection, psychological support and other assistance to its beneficiaries. However, it should be emphasized that witness and victim protection cannot be viewed in isolation, rather, as a crucial part of a comprehensive system designed to effectively investigate and prosecute perpetrators of crimes, including even human rights violations. Protection measures will be ineffective if other parts of the criminal justice system do not function well. Every step of the process, from investigation to conviction and punishment should be analysed. Possible risks to witnesses should be identified and reforms should be made to limit those risks.

The issues related to whistleblower legislation are quite complex. The question of witness protection, for example, though not an obvious consideration, might arise in situations where a whistleblower becomes a witness in proceedings relating to the information disclosed. Particularly, the widespread hostility towards individuals perceived as informers. This heightens the need for members of the public to be assured that adequate safeguards are implemented to secure their protection. An important advantage of having whistleblower legislation is its tendency to foster development of internal mechanisms for handling disclosure of wrongdoings within organizations, as this helps increase accountability and transparency. Furthermore, whistleblowers whose exposes led to the prosecution of corrupt officials will be granted immunity from administrative, civil or criminal liability and provided some form of financial assistance.

Since there is no such law in the Philippines, certain adjustments may be needed to the existing witness protection and legal aid schemes in order to provide much needed support to whistleblowers. The speedy enactment of the pending Whistleblower’s Bill by the Philippine legislature would certainly be a welcome development.
PROTECTION OF WITNESSES AND WHISTLE-BLOWERS:
HOW TO ENCOURAGE PEOPLE TO COME FORWARD TO PROVIDE TESTIMONY AND IMPORTANT INFORMATION

Karen Kramer*

I. INTRODUCTION

The issue of witness protection has been gaining attention by countries, not only as to how to better protect witness under threat but also how to better assist them during their contact with the criminal justice system. The reasons for the attention may be due both to the increase and globalization of crime which has the affect that countries are looking outward on what other countries are doing that might help them. Additionally, the issue is being raised due to the jurisprudence and practice of the international tribunals and courts1 (as well as from international and regional human rights bodies. In this regard, justice systems, whether national or international, have in common the need to get people to come forward and provide information and testimony.

Prosecutors depend upon witnesses who are reliable - whose testimony can be accepted as truthful, accurate and complete. The recall of witnesses and their ability and willingness to relate relevant information may be affected by many factors, including age (such as for both child and elderly witnesses), intellectual or physical impairment, language, by their relation with the offender or involvement in the case or offence or due to trauma they have suffered as a victim. Depending upon the situation, we might be able to provide support to the persons to help them overcome their particular obstacle. These factors (recollection, ability and willingness) may also be adversely affected when witnesses are afraid that their cooperation (whether by making a statement to police or testifying in court) will cause the person(s) about whom they are providing information to retaliate and cause harm to them or those close to them (i.e. family members). In such circumstances, we might be able to provide some forms of protective measures that will alleviate their fears. Often both support and protective measures might need to be provided together. So the first point I would like to make is that it is not easy to talk about the issue of witness protection without also talking about assistance measures. They often go hand in hand – because for the most part their aim is to facilitate or enable witnesses to tell fully and truthfully what they know. Although I cannot cite any studies, the experience of practitioners suggests that support, assistance and protection measures yield positive results, instilling confidence in victims and witnesses to come forward and give information or testimony.2 Moreover, for victims, being able to tell their story with dignity may help in them in their recovery process.

Therefore it is both good practice as well as common sense that criminal justice systems should provide assistance measures to victims and other witnesses in order to facilitate their ability to participate in the criminal justice system and to give the kind testimony that is required for the maintenance of the rule of law.

In recognition of the importance of the testimony of victims and witnesses in relation to organized crime and corruption, both the United Nations Convention against Corruption (UNCAC) and the earlier Convention against Transnational organized Crime (UNTOC) contain provisions regarding the protection of witnesses and victims. The Trafficking and Smuggling Protocols to the UNTOC also contain specific provisions on protection and assistance.

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1 Such as the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL).

2 UNODC, Good Practices, p. 27.
A. UNTOC Article 24

“Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.”

Article 24 notes further that measures envisioned above may include: measures for physical protection, for relocation and for non-disclosure or limitation on the disclosure of information concerning the identity or whereabouts of such person and providing evidentiary rules to permit witness testimony to be given in a manner that ensures their safety such as permitting the use of communications technology and video links.

B. UNTOC Article 25

“Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation…” and establish procedures to provide access to compensation and restitution for victims of offences covered by the Convention.

So who is a witness? There are different legal definitions but generally, a witness is a person who has given or who has agreed to give information or evidence or has agreed to participate in a matter relating to an investigation or the prosecution of an offence. For common law countries, with their emphasis on in-court testimony and confrontation, the essence of a witness is that they have or will give testimony. In many jurisdictions, experts can also be deemed witnesses and this would be consistent with the intent of the UNTOC and the UNCAC which specifically mentions experts. Some protection laws also include court personnel (judges, prosecutors, court clerks), the media, and human rights defenders. These persons may come in contact with information about matters relating to the investigation or prosecution of offenses and therefore the state has an interest in affording them protection if needed.

C. Victim and Witness Assistance

“Assistance measures aim at supporting a witness to cope with the psychological and practical obstacles of testifying. As noted in the UNODC Good Practices for the Protection of Witnesses, recognizing the need to provide for the well-being of victim-witnesses and aware that the admission criteria of witness protection programmes are overly rigid, a number of countries have introduced special witness assistance or support schemes that are distinct from witness protection. Implemented in close cooperation with law enforcement, judiciary and immigration authorities and civil society, such schemes aim to create the conditions that would allow vulnerable witnesses not only to testify in physical security but to avoid revictimization as well.

There should also be services that are provided just to victims to help them in obtaining medical, social, and psychological service that may be provided by the state or by non-governmental organizations and service providers (these often have more financial resources or provide better services than government); and assistance in obtaining compensation and/or restitution where provided for.

1. Minimum Assistance Measures
   - Information about the rights of victims
   - Information about the roles of actors in the criminal justice system
   - A room where victims and other witnesses can wait before giving testimony so that they do not have to wait what can be hours in close proximity to the accused person and his family or friends to minimize any intimidation or threats
   - Provision of an advocate or person who can accompany a vulnerable witness or children when being questioned and also when testifying
   - Identification of other obstacles to participation in a criminal hearing or trial (such as transportation to the court or child care)

2. Procedural or In-Court Protections
   “Procedural measures” are actions that can be requested by law enforcement, the prosecutor or the
witness that can be taken by the court during testimony to ensure that witnesses may testify free of intimidation or fear for their life. Such measures may include:

- use of a witness pre-trial statement instead of in-court testimony;
- testimony via closed-circuit TV or video conferencing;
- voice and face distortion techniques;
- removal of the accused or the public from the courtroom (closed door session);
- withholding identity or anonymous testimony (usually for a certain period before the trial or hearing).4

The elements typically taken into account by courts when ordering the application of procedural measures are:

- nature of the crime (sexual, family, organized, gang);
- type of victim (child, victim of sexual assault, an innocent by-stander of a co-defendant);
- relationship with the defendant (family member, no relationship, subordinate or gang member);
- any acts of threat or intimidation;
- degree of fear and stress of the witness;
- importance of the testimony.

Procedural measures can be grouped into three general categories depending on their purpose:

(i) “Measures to reduce fear through avoidance of face-to-face confrontation with the defendant,” such as the use of pre-trial statements in lieu of in-court testimony (where permitted); removal of the defendant from the courtroom (while still watching the trial via a video link); and testimony via closed-circuit television or audio visual links, such as video-conferencing.

(ii) “Measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of the witness,” by the use of anonymous testimony or a screen, curtain or two-way mirror to shield the witness while giving testimony.

(iii) “Measures to limit the witnesses’ exposure to the public and psychological stress.” such as by a change of the trial venue, removal of the public from the courtroom (hold the session “in Camera”) and by having the presence of an accompanying person to provide support for the witness.”5

These measures may be used alone or in combination for greater protection. It is important to keep in mind that however procedural measures are used, due consideration should be due consideration should be given to balancing the witness’s legitimate expectation of physical safety against the defendant’ rights to a fair trial.6

A measure that is being more readily used is that of testimony by video-conference.

Videoconferencing refers to the real-time transmission of video (visual) and audio (sound) transmission between two locations. It allows the virtual presence of a person in the territory over which the state or entity has jurisdiction.7 This technology allows for witnesses to testify from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location. In the courtroom setting, it means that a judge, the defendant, the defence counsel and the prosecutor can ask questions of the witness and see and hear the witness’s answers and demeanour in real time transmission.8 Videoconferencing equipment can permit the concurrent transmission of computer images, such as documents [and photos] so that video can be displayed on one screen and the computer data on another. In other words, a remote witness can be seen on a big screen while the document being discussed by the witness can be visible simultaneously also to the judge/jury on screen monitors.

Although the taking of remote testimony via videoconferencing is more often used in the context of mutual legal assistance between states, it is also increasingly used to take the testimony of protected

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5 UNODC, Good Practices for the Protection of Witnesses, p. 33.
6 Ibid., p. 33.
7 Mutual Legal Assistance in Criminal Matters Act, Canada, Article 22.1(1), R. S., 1985c.30 (4th Supp.).
8 Fredric Lederer, The legality and practicality of remote witness testimony, p. 20.
witnesses. In this regard it can be used either to avoid direct contact between the witness and the defendant and hence has value for some vulnerable witnesses. It can be also used when the physical security of a witness at a particular court or jurisdiction cannot be adequately addressed.\(^9\)

Video conferencing technology has advanced to allow for transmission with no interruption or delay and with excellent visual displays. It is deemed reliable and once up and running, relatively easy and cost effective to use. Moreover, the transmissions can be encrypted so as to prevent the identification of both locations of the videoconference.\(^10\) Countries that use video-conferencing all report that the once the courts have some experience using the technology that they welcome it use as a cost and time saving measure. It is an investment that all major courts should make as it can be used also for the purpose of holding meetings between judges or prosecutors in other parts of the country or for training purposes.

In the majority of cases, witnesses do not face a life-threatening situation as a result of being a witness. Generally, they suffer fear of reprisal, verbal threats, intimidation, harassment, property damage and in some cases assault. An assessment should be done to determine what type of measures are required and can be provided.

3. Basic Protective Measures

Basic protective measures, which can be provided by the police or prosecutor, may include:

- applying for temporary restraining orders and asking to have the accused in custody;
- police transportation to and from court;
- enabling contact with authorities by providing a trusted contact point to call;
- providing temporarily a mobile phone or change of phone number;
- use of a safe house or facilitating temporary relocation with friends/family;
- close protection, regular patrolling around the witness’s house;
- installation of security devices at the places of residence and work- doors, locks, alarms and video cameras;
- police monitoring of mail and telephone calls;
- provide counseling on methods to enhance one’s own safety.

Provisions for ‘safe custody’ allow a court to order that a woman or child is put in a protective room, which could be a jail or a shelter. Children can be placed in safe custody if there is any reason to believe an offence may be committed against them until the alleged perpetrator’s case is concluded. It has been noted that the use of safe custody provisions and consequent deprivation of liberty and restrictions on movement are gender neutral, but, in practice, the provisions have a disproportionate impact on women and girls, and those in poverty. The conditions in the homes/shelters/custody are often not good and there is no proper access to legal aid, and thus no access to legal redress. The Special Rapporteur on Violence Against Women has noted that imprisoning victims and/or witnesses is not only unjust, but puts them at great risk of custodial violence. If homes or shelters are to be used, having guidelines on how to run them are important.

The protection of witnesses is based on three building blocks complimenting and supporting each other with the most complete system being a mixture of all three disciplines. It thus refers to a range of methods and measures that can be applied at all stages of the criminal proceedings to ensure the safety and security of witnesses in order to facilitate their cooperation and testimony. The measures taken should be proportional to the threat and of limited duration.

It should be noted that protection of any form should never provide a motivation to testify but merely remove or counter the witness’ view that he or she is in danger if he or she cooperates. Moreover, no person should ever be forced to accept protection measures. Consent should always be given by a witness.

As a practical matter, most protective measures will not work without a willing (consenting) witness. In some cases, the threat to a witness will be too great to keep him/her safe by normal police measures. The goal of witness protection programmes is to ensure the safety of a small number of important witnesses before, during and after the trial and this will normally entail relocation and sometimes providing a different identity.

There are countries large enough geographically or in terms of population to relocate within national borders. Most are not or have the problem that due to very specific sub-cultures within regions, anyone from the outside is immediately recognized as not belonging which in turn, leads to people becoming curious. Therefore, for most countries, relocating to another country is the only solution which requires cross border cooperation. Witness protection programmes are the subject matter of Part II of this paper.

**II. WITNESS PROTECTION PROGRAMMES**

As mentioned in part I of the presentation, witness protection programmes (hereinafter referred to as a WPP) have been developed as a tool of last resort in order to protect witnesses whose lives are in danger due to their cooperation with the government. Normally, the type of witness protected by such programmes are collaborating or insider witnesses who are testifying against organized criminal groups that have the means to try to silence such witnesses and where normal protections provided by the police would be insufficient to protect them before, during and after their testimony is provided.

To fully understand how such programmes function as well as their benefits and limitations, we should look at the following issues:

- basic principles and elements of a WWP;
- institutional location of a WWP;
- admissibility criteria;
- why the programmes are mainly concerned with collaborating witnesses;
- rights and responsibilities of the protected person and of the WWP;
- relocation and change of identity and their implications for protected persons;
- international cooperation for relocation of witnesses;
- costs of running and financing of programmes;
- emerging issues for WPPs.

The UNODC Good Practices for the Protection of Witnesses manual defines a witness protection programme as: “A formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.”

Witness protection programmes have been defined by the Council of Europe as: “A standard or tailor-made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice.”

The primary objective of any witness protection programme is to safeguard witnesses in cases of serious threat which cannot be addressed by other protection measures in cases of special importance where the evidence to be provided by the witnesses cannot be obtained by other means.

The objectives can be broken down to the following elements:

- to protect persons;
- serious cases of importance to the state
- evidence/information is crucial

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12 Council of Europe, Recommendation Rec (2005)9, of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice.
• only this witness can provide the information/testimony that is required
• witness under serious threat to be in such a programme
• witness is suitable
• last resort – meaning that there are no viable alternatives for keeping the witness safe.

Witness protection programmes have commonly developed because of need. Perhaps as a result, some countries progressively developed witness protection capabilities and programmes without a specific legislative basis, such as the Netherlands, Norway and New Zealand. In these countries, policy, coupled with the agreements signed with witnesses admitted to the programme, provide a sufficient and adequate framework for the programme’s operations. It is further interesting to note that countries without a specific legal basis include both common law as well as civil law countries that would normally require authorizing legislation.

However, it is recommended that covert protection programmes be grounded in policies and a legal framework due to their impact on the rights of the accused, the life of the protected persons and due to the financial resources needed to fund such programmes. In addition, other laws, such as criminal procedure codes and rules of court, will likely need to be reviewed and updated in order that they are not inconsistent.

At minimum, legislation should include:
1. That the programme is voluntary;
2. Application and admission criteria and procedures (which may set out duties of other authorities, such as the prosecuting authority);
3. The authority responsible for the programme’s implementation;
4. The rights and obligations of the parties;
5. Types of protection measures that may be used;
6. Criteria upon which a witness may be terminated from the programme;
7. That the programme’s operations are confidential and provide for penalties for the disclosure of information about protection arrangements or about the identity or location of protected witnesses;
8. Allow for international cooperation;
9. Report yearly on their work and effectiveness.

A. Operating Principles
Witness protection programmes are covert units meaning all information about witnesses and the operational actions taken by the programme must be kept confidential. This will also mean that they need to have their own databases for storing information that can not be accessed by other law enforcement personnel. A WPP will a accounting mechanism that is transparent but that also can maintain the confidentiality of its witnesses. Anything spent on the witness (such as plane tickets) may reveal the witness’ true identity or location. Therefore, in order to maintain confidentiality, witness protection programs usually require special procedures for auditing and reporting.

Vetting of staff is also mandatory because the greatest risk of compromise to a programme is the human element. Therefore all staff, including administrative personnel, must be vetted to ensure the highest possible level of security.

B. Location of the Programme
Witness protection programmes can be institutionalized in different ways. “For some countries, the police force is the programme’s natural environment, as out-of-court protection of witnesses is seen primarily as a police function. For others, separating protection from the investigation is of higher value in order to ensure objectivity and minimize the risk that admission to the programme unwittingly may become an incentive for witnesses to give false testimony that they believe the police or prosecution wants or needs.”13 Where a programme is located within the police force, “ the isolation and autonomy (organizational, administrative and operational) of the covert unit responsible for the implementation of

13 Good Practices, p. 45
the programme from the rest of the police force is of great importance.\textsuperscript{14} This is not just to just maintain independence from the investigating functions of the police but also to safeguard the integrity of the programme. Police are naturally inquisitive and officials outside the programme may try to seek information which could jeopardize a witness’ security or the integrity of the programme. Countries where witness protection is led by the police include, Australia, Canada, Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia, and the United Kingdom.

In other countries, programmes are separated organizationally from the police and sit under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor. Examples of countries where the WPP falls under the Ministry of Justice or the prosecuting authority are: Bulgaria, Columbia, the Netherlands, the Philippines, Slovenia, South Africa and the United States.

“In a third group of countries, programmes may fall under the Ministry of Justice and implemented by a multidisciplinary body consisting of high-level representatives of the law enforcement, prosecutorial, judicial and government authorities and sometimes from civil society. That body takes decisions on such matters as admission to the programme and termination. It may also exercise some oversight over implementation of the programme and make budgetary submission to the Government.” Italy and Serbia both have this model.\textsuperscript{15}

In 2010, the Government of Kenya amended its Witness Protection Bill of 2006\textsuperscript{16} and created an independent witness protection agency with a “Advisory Board”. The Board consists of the Minister of Justice, the Minister of Finance, the National Security Services, the Commissioner of Police, the Commissioner of Prisons, the Director of Public Prosecutions and the Chairperson of the Kenyan National Commission on Human Rights. The principle function of the Board shall be to advise the Agency generally on the exercise of its powers and the performance of its functions under the Act, particularly as to the formulation of witness protection policies, general administrative oversight, approve budgetary submissions and other functions as may be required under the Act or other law.\textsuperscript{17}

C. Different Parts/Units dealing with Victims and Other Witnesses

Within these categories, witness protection programmes can further organize themselves to have one sub-unit dealing with victims and another dealing with collaborators of justice (former criminal associates). They may also divide themselves into divisions according to responsibilities, such as for administration, operations, logistics, etc…

In sum, the location of the programme is not important as long as it meets with the principles of:

• separation from investigative agencies;
• operational autonomy from the police;
• confidentiality of operations.\textsuperscript{18}

Operational independence is important to avoid conflict of interest with investigating authorities because we always need to keep in mind that the credibility of the witness (to the judge or jury) can be negatively impacted by perception of conflict of interest.

D. Criteria Necessary for Admission to a Programme

A request to be admitted to a protection programme can be made, depending upon the jurisdiction, by the witness, a law enforcement agency, a prosecutor or a judge. There should be standard procedures for the information required when making a request. Then the request would generally be forwarded to the decision-making authority with a recommendation on whether or not the request should be accepted. This process ensures that sponsorship from non-prosecution sources includes a knowledgeable analysis of the potential value to the prosecutor of the admissible evidence elicited from the proposed programme.

\textsuperscript{14}Ibid.
\textsuperscript{15}Good Practices, p. 46.
\textsuperscript{16}UNODC supported the Department of Public Prosecution in the drafting of the amendments.
\textsuperscript{17}Kenyan Witness Protection Act Amendment Bill, 2010, Part I B, 3Q (1).
\textsuperscript{18}Good Practices, p. 46.
candidate. Upon getting a referral request for protection, the witness protection programme or the protection authority (which might be within the MOJ or might be a commission) will conduct an assessment that will look at the following elements:

- Importance of the case;
- Value of testimony – is the testimony important and could it be obtained in another way or from another person;
- Threat and Risk Assessment - the level of the threat and risk it can be carried out;
- psycho-social assessment - the personality and psychological fitness of the person to adjust to and follow the stressful rules of the programme;
- The family situation of the person, such as, number of family members that would need to be included, their ages, any medical issues or special needs, their criminal records, etc.;
- The danger that the person may pose to the public if relocated under a new identity (typically applies to justice collaborators).

As noted in the Good Practices manual, “A distinction between “threat” and “risk” should be made. A threat assessment looks at whether the life of the witness is in serious danger, and should address issues such as:

- The origin of the threat (group or person);
- The patterns of violence;
- The level of organization and culture of the threatening group (for example, street gang, Mafia-type group, terrorist cell);
- The group’s capacity, knowledge and available means to carry out threats.

A risk assessment examines the chances of the threat materializing and assesses how it can be mitigated. The assessment is conducted according to set standards and using a matrix. Action is taken to reduce the probability of the threat being carried out, for example by using unmarked cars to transport witnesses, resettling witnesses temporarily or providing them with new identities. The assessment is conducted by the witness protection unit and is a key factor in providing tailor-made protection to suit the needs of the witnesses.”

E. Cooperating Witnesses

Why is a WPP is generally used to protect witnesses who are insiders – criminal associates who become cooperating witnesses (also called justice collaborators, state witnesses, supergrasses and pentiti (Italian for “those who have repented”))? This can be answered by looking at why prosecutors need them. As a result of their membership/association, these witnesses can provide crucial information/evidence about those that are more important (hence more culpable) in the organization. which can not be obtained by usual law enforcement measures (surveillance, wire-taps, informants, etc.). What is their motivation to cooperate? These are people used to looking out for themselves and will not help the government out of good citizenship. It could be for personal reasons, such as betrayal or revenge or resentment, etc. More often, they are facing serious criminal charges themselves. If they agree to cooperate with the prosecution by providing information, they want something in exchange, such as a reduction in sentence and protection for themselves or loved ones while and/or after serving a prison term.

In some cases, they can be offered immunity from prosecution. Immunity from prosecution can be granted in exchange for testimony about a certain event. There are two kind of immunity. Use Immunity prevents the prosecution only from using the witness’s own testimony or any evidence derived from the testimony against the witness. It allows the government to prosecute the witness using evidence obtained independently of the witness’s immunized testimony. The government should be required to provide that the evidence is bases upon an independent and legitimate source from the immunized testimony.

Transactional (or total or blanket) immunity completely protects the witness from future prosecution for crimes related to his or her testimony. For example, if the witness testified about participating in a drug sale,

19 Good Practices, p. 52.
he/she could not thereafter be charged for a crime that stemmed from her immunized testimony. This kind of immunity is very rare.

Due to the ethical concerns over grants of immunity, some countries provide that the “benefit” to collaborators is not complete immunity for their involvement in criminal activities but rather a sentence reduction that may be granted only at the end of their full cooperation in the trial process. “Legislation and policy in a number of countries clearly separate admission to a witness protection programme from any benefits that participants may be granted by the prosecution or court with respect to past criminal behavior, and they provide that justice collaborators must serve some prison time for their crimes.” 21 In these cases they must enter a plea of guilty before they testify to the information provided to the Government and the prosecutor can recommend to the judge a reduction in sentence, which the judge may or may not follow. The plea agreement will require that the witness testify fully and truthfully. Otherwise, any promises by the government can be withdrawn.

It is interesting to note that in the United States, over 90% of witnesses in their witness security programme remain in custody serving long sentences. As a result, the WPP operates in cooperation with the Bureau of Prisons to protect the programme’s witnesses.

The rights and obligations of the witness and of the WPP should be set out in a memorandum of understanding. For the witness, obligations normally include:

1. Provide truthful and complete testimony;
2. To comply with the protection authorities’ instructions and not to compromise any assistance provided or the confidentiality of the programme;
3. Not commit criminal offenses;
4. Disclose all information about past criminal history;
5. Disclose assets and all financial and legal obligations;
6. Fulfill any legal obligations to third parties prior to entering the programme. Recurring financial obligations can continue to be fulfilled following admission the programme through an intermediary, usually the protection programme.

For the WPP obligations normally include:

1. Carry out all necessary protection measures;
2. Arrange all matters related to relocation;
3. Provide financial support (issue of duration);
4. Provide initial assistance with job training and finding employment;
5. Provide counseling and other social services, including education or language training.

The issue of financial support varies between countries in terms of duration and how it is calculated. Most collaborating witnesses have no legitimate source of income even though they might have money and assets. Some programmes will forfeit all assets that can not be shown to have been legally obtained. So the problem is do you finance them in the lifestyle to which they have lived or if it is illegitimate income, provide them subsistence support. There is also the question of the duration of financial support. A protected witness should not be made better off by being in a programme. The danger with putting a protected witness in a worse financial situation is that they might return to criminal activity. Therefore, the aim of most WPPs is to enable to witness to become self sufficient as soon as possible.

F. Inter-agency Cooperation

One of the hardest parts of beginning a WPP is getting cooperation from other agencies upon which it depends for looking after the needs of its witnesses, while maintaining confidentiality. As noted, the WPP will become the intermediary for many aspects of a protected witness’ life. Also, change of identity, (whether it is the provision of a new identity or the permanent change of the existing identity) will require documents and the cooperation of other agencies. This cooperation can be attained through memorandums of understanding at the Ministry level or between the WPP with the concerned agency and will require the building of trust and understanding.

21 Good Practices, p. 20.
G. Relocation and Identity Change - Implications for Witnesses and Family Members

Some countries with large populations (like the United States and Italy) and/or large geographic territory (like Canada and the United States) can relocate within their territories. Most countries do not have this option and for them relocation (with or without identity change) means sending their protected witness to another country. This has profound an impact on the lives of such witnesses as it means severing all ties to the past and leaving behind family and friends and anything else that might identify or be raced back to the witness. Relocation is especially hard for family members and can result in depression as well as other psychological disorders. Moreover, if the security of a witness is even accidentally compromised, he/she and any family members will have to be relocated and begin again the process of adjustment and reintegration.

So it is the impact on the lives of the protected persons as well as the financial expense of the programmes that makes a WPP a tool of last resort.

Successful relocation will depend upon a number of factors, including:

- Ethnic and cultural background
- Language
- Living standards
- Physical well-being
- Presence of a support system
- Ability to become self-sufficient.

When we speak of relocation to another country we mean with the knowledge and consent of the receiving country. Further we mean that the WPP of the receiving country will take responsibility for protecting the witness from the sending country. How do countries legally establish such cooperation? The most common method, as with other forms of law enforcement cooperation is through agreements either between authorizing agencies (Ministry to Ministry) or directly between witness protection authorities. It can also be done through regional or multi-lateral treaties. The Baltic countries of Estonia, Latvia and Lithuania entered into a tri-lateral treaty for cooperation in witness protection. However, the treaty route is a long and cumbersome process and not recommended. The United Nations Convention against Transnational Organized Crime was used by Slovenia as a legal basis for relocation cooperation while it was amending its protection law to add a provision that gave the protection authority the ability to directly engage in such cooperation.

H. Obligations for Sending and Receiving Countries

- Contacts between authorized agencies should respect principles of confidentiality.
- Disclosure of all information, including criminal record, threat level, status and needs of the witnesses; number of persons to be relocated with the witness, the witness’ financial status;
- Compliance with immigration laws;
- Agreement as to who covers the financial support and other costs of maintaining the witness;
- Understanding of how the witness will be integrated into the new environment.

The most important element in international cooperation is trust between the protection authorities and understanding of how each conducts its business. In this regard, one of the most useful ways to build trust for new programmes is by forging regional or sub-regional networks. In Europe for example, there is a network of European protection programmes overseen by Europol, the European Police Agency. There is also a sub-European network of countries that cooperate frequently. They have allowed other countries with new programmes who are not yet European Union members to join the network as observers. At least one of these countries reports that this experience was very beneficial for its development. The United States Marshall’s Service holds a yearly meeting in different regions of the world for any witness protection authority.

I. Staffing of a WPP

A witness protection handler is part physical protector and part social work/psychologist. Witness protection is largely a police type function with a twist. Instead of being in the role of investigator/hunter, the protection case agent or handler must protected persons are manipulative serious criminals. Some
of the persons are sociopaths who will have not much else to do but to manipulate the system in order to get as much as they can out of the programme. In addition to case agents, a WPP needs persons trained in conducting threat assessments as well as persons who can do psycho-social assessments to determine suitability to enter a programme. It may also need people who can made new identity documents.

J. Financial Costs of a Programme

As we have seen a WWP needs specialized personnel and this includes the necessity for specialized training. It will also require a covert location and equipment to ensure that it can operate in a covert manner.

A good witness protection law is of little use if there is not funding for the programme to effectively perform its duties. The greatest cost involves relocation. It is said that a programme should have funding to financially support each witness for five years. Each family member of the witness raises the cost. So countries with large extended families will find it more expensive than others. Clearly costs will vary with the standard of living and inflation of countries. A safe rule is to have a reserve fund that can be tapped in addition to the yearly budget as unexpected issues are likely to arise. Some countries use confiscated funds to fund their WPPs. This is fine to supplement programmes but since the amount confiscated in any year can not be predicted, it is not a good idea to solely rely on confiscated assets to fund protection programmes. An example of costs in Serbia are as follows:  

<table>
<thead>
<tr>
<th>Total costs of witness relocation in Serbia for 1 person per month =1000 EUR (in inner Serbia) to 1500EUR (in Belgrade)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A Apartment rent (furnished, 60m2): 150 – 400 EUR / month</td>
</tr>
<tr>
<td>2. Utilities: 100 EUR / month</td>
</tr>
<tr>
<td>3. Living costs: 350-500 EUR / month</td>
</tr>
<tr>
<td>4. Health services: 1000 EUR per year</td>
</tr>
<tr>
<td>5. Language course: 50-150 EUR</td>
</tr>
<tr>
<td>7. Other miscellaneous expenses: 1000 EUR per year</td>
</tr>
<tr>
<td>8. Apartment rent (furnished, 60m2): 150 – 400 EUR / month</td>
</tr>
</tbody>
</table>

Other costs increase depending on the children’s age

Total costs for a 4 person family per month can range from 1500-2200 EUR.

K. Concluding Thoughts

Even with the most limited of resources most countries can do a lot better about making witnesses feel like cooperating by taking the minimal steps to appear to be interested in their needs and welfare. Begin with implementing what your law already allows, such as police and procedural protective measures. These measures when used effectively by trained personnel can provide adequate protection for the vast majority of witnesses in need, keeping in mind that protection measures are just one of other important tools and procedures that should be collectively applied. Doing the above requires special training, for law enforcement personal, prosecutors, and judges, at minimum. Training should also consider the special needs of women and children. There are many good practices and knowledge to be shared along with already developed training so don’t invent the wheel, seek support. UNODC and other organizations can provide tools, training, and can point you in the right direction by providing advice on getting what you need. Many basic measures are not costly or require much in the way of additional staff. Waiting rooms and the use of simple barriers as shields in court should not be hard to implement.

If the legal framework is outdated or does not allow for needed measures, establish an interagency task force that can educate itself on what is wrong and/or could be improved. The task force should embrace officials of relevant law enforcement and Judicial bodies, other relevant agencies (immigration) and policy makers and could also include NGOs, academic institutions or other civil society institutions in order that they will understand and support any required changes. Organizations like UNODC will likely to be happy to facilitate such a working group.

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22 This is informal information provided by an official of the Serbian Ministry of Interior at a conference.
1. **Recommendations for those Countries considering Establishment of a WWP**

   WPPs need a legislative basis and then to begin modestly. One of the most common mistakes is to try to protect to many witnesses at the beginning. A few witnesses will allow the programme to gain experience and confidence. Take serious the need to prioritize the kind of cases the protection programme will be used for as well as to properly conduct and use threat assessments. The safety of the witnesses goes hand in hand with the integrity of the programme.

2. **In Summary**

   1) Have a legal basis and develop legislation in consultation with all agencies that will need to be involved to gain early buy-in and understanding;
   2) Ensure that there will be funding to begin the programme and that the funding will allow the programme to grow and make mistakes;
   3) Begin modestly to develop experience;
   4) Prioritize cases;
   5) Seek help and training from other WPP. There is no reason to make the same mistakes and you can begin to build up cooperation and trust;
   6) If there is no network in your region, start one. UODC will be happy to support such a network;
   7) Within the network, look at whether some agreed minimum standards (such as defining living standards and benefits to be received by witnesses) would be useful or look at ways to simplify and expedite procedures

**III. WHISTLE-BLOWER PROTECTION**

**A. Who is a Whistle-blower and what do we mean by Whistle-blower Protection?**

   Now I will look at corruption and the different kind of protective measures that can be provided to the so-called whistle-blower. Often people will talk about witness protection and whistle-blower protection as if they are the same thing. They are different ways of handling a similar need: which is to encourage people to come forward with information about matters that may violate laws or pose a threat to the public health and safety by decreasing the possible obstacles or liabilities that coming forward may have. However, when we refer to whistle-blowers and whistle-blower protection, we are addressing the issue of corruption and fraud in all its many forms. So to understand how whistle-blower protection is different from witness protection, we need to understand whistle-blowing.

   First, it is helpful to note that organized crime and corruption/fraud have some common element. Both are generally motivated by some economic or material benefit or gain. The other thing they have in common is that they both thrive in secrecy. Penetrating organized crime requires informants, undercover law enforcement agents and insiders who decide to cooperate with authorities.

   Corruption and fraud also operate in a kind of secrecy which can be due to the limited number of people with access to information about the conduct. Whenever a risk arises that the activities of an organization (public or private) have gone wrong, it is usually the people working for the organization who first know about it. While employees are the people best placed to raise concerns and so enable the risk to be removed, stopped or replaced, they also often have the most to lose. Professor Pamela Bucy, of the University of Alabama, makes the compelling point in, *Information as a Commodity in the Regulatory World* that:

   “What has changed in recent years is the nature of the wrongdoing the regulatory world seeks to control. Because of the information revolution created by computerization and the interconnectedness resulting from globalization, massive fraud, and corruption and graft of every kind are easier to commit and harder, if not impossible, to detect. More ominously, the impact of such wrongdoing is more pervasive and more cataclysmic than ever before. In short, the stakes are higher.

   This new world requires a more effective regulatory response. An indispensable component of such a response is information from knowledgeable persons about the wrongdoing committed by others for economic gain. Without such information, public regulation is doomed to too little, too late, and too expensive in public resources.”
Corruption and fraud, both public and private, committed in one country can and more often do have an adverse affect in another country. Due to its transnational nexus, there is the need to combat it across borders. All international and regional anti-corruption conventions/instruments provide provisions for the protection to whistle-blowers and witnesses.

One of the main international corruption instruments with whistle-blower provisions is the UN Convention against Corruption (UNCAC). It, however, does not define the concept of a whistle-blower. Instead it refers to “any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention.”

In fact there is no agreed definition as there is a variety of laws and with some very different means. But some common elements are that whistle-blower is

- a person with privileged access to data or information;
- the disclosure is made to an internal entity or to external entities, such as regulatory bodies, ombudsmen, anti-corruption entities, law enforcement agencies or the media;
- with the purpose of evaluating/assessing the risk, threat, conduct so that it can be removed, stopped or reduced.

A person may “blow the whistle” internally within the organization, to an external entity such as a regulatory body, ombudsmen, or anti-corruption entity; to law enforcement or to the media. Depending upon the information provided, the entity to which they report, the nature of the problem, the whistle-blower may be just someone who like an informant gives information without having his or her identity disclosed. However, unlike an informant, most whistle-blowers are persons who disclose not for any private benefit but in order to benefit the larger community. In many cases, whistle-blowers receive no benefits for their disclosure. However, some anti-corruption laws do provide rewards for those that disclose wrongdoing, mainly for fraud and corruption. A whistle-blower can also become a witness.

B. What kind of Protection do Whistle-blowers need? What is the Problem?

Whistle-blowers can be subjected to informal discrimination or harassment or ostracized by peers and management. They can be demoted or moved to less desirable locations, lose jobs, or face discrimination by future employers. It also can be illegal to disclose the information about the conduct, especially if blowing a whistle would require the disclosure of information classified under national security laws and would be illegal to reveal. Thus whistle-blowers can be charged with crimes or with violating employment agreements for divulging information, or public laws which might make the information they disclose a crime. In some cases they may face threats and physical danger. In such cases, they may be eligible for admission to a witness protection programme.

C. What kind of Protections can Whistle-blowers be provided?

1. Anonymity

Some whistle-blower laws provide for the protection of the identity of the whistle-blower. This is important in cases where the employee feels that there will be retaliation if they disclose information. The New Zealand Public Disclosure Act requires who receive protected disclosures use their best efforts not to disclose identifying information unless it is “essential to the effective investigation, essential to prevent risk to public health or public safety, or it is essential having regard to the principles of national justice. However, confidentiality may provide a false sense of security since there is likely only a small number of people in an organization who would be aware of the disclosed wrongdoings so it would not be difficult to identify them. Often protections apply to individuals who identify themselves as part of their disclosure.

Anonymity may be useful in jurisdictions where the legal system is not strong or there are concerns

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2. Employment Status Protections

The most important protections that whistle-blower laws can provide is prohibit discrimination and ensure that any harms to the employment status of the person are remedied immediately. The definitions should be broad enough to catch any possible retaliation.

The South African Protected Disclosures Act Section 1(VI) sets out an extensive list of harms that are prohibited:

(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated;
(c) being transferred against his or her will;
(d) being refused transfer or promotion;
(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
(f) being refused a reference or being provided with an adverse reference, from his or her employer;
(g) being denied appointment to any employment, profession or office;
(h) being threatened with any of the actions referred to in paragraphs (a) to (g) above; or
(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

An important issue is the burden of proof. The question is whether the employee is required to make the often very difficult showing (with little chance of getting evidence) that the dismissal was a result of making the disclosure, or placing the burden on the organization to show that the decision is legally justified and not based on their whistle-blowing.

In South Africa, a dismissal following a disclosure is deemed to be an "automatically unfair dismissal".

In the United States, the agency has the burden to show “by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure”.

In the United Kingdom, the burden of proof depends on the length of employment of the employee. If they have been an employee for more than one year, than the employer must prove the dismissal had nothing to do with the disclosure; if they have been employed less than one year, the employee must prove that it did.

3. Compensation & Rewards

Compensation can be provided for real and emotional harm. Most whistle-blowing laws provide for compensation to the whistle-blower in cases where they have suffered harms that cannot be remedied by injunction. This includes lost salary but can also include money for suffering. Often, the laws use discrimination statutes to determine harm from harassment.

Some anti-corruption laws also allow for rewards for disclosing fraud and corruption. In Korea, those who discriminate against whistle-blowers are punished. And a financial reward is given if the disclosure of corruption leads to increase in revenue or prevents loss in a public organization. The amount ranges from 4% to 20% of the amount of money increased, recovered or saved.

The Kenya Revenue Authority rewards persons who blow the whistle on those evading tax with the reward being a certain percentage of the amount recovered as tax.

4. A Concluding Thought

This presentation has looked at different forms and mechanisms of the protection of persons who provide information, either for ongoing investigations, prosecutions or to report public or private wrongdoing. I
would like to conclude with a passage, entitled “Why Information Matters” taken from an article titled, *Rewarding whistleblowers as good citizens, Response to the Home Office consultation*, by Public Concern at Work, a UK based organization:

“For any law to be enforced, the courts or state need information about its breach. It is safe to assume that those people who are victims of a breach will have good reason to report the matter or pursue a private claim for compensation. The difficulty of relying on this route is that it can only be taken after the event when damage has been done. Another way that laws are enforced is by the authorities obtaining information from perpetrators who have been or believe they are soon to be caught and who, in exchange for the evidence that secures the conviction of their collaborators, are offered immunity or reduced sentences.

A third way is to enable, reassure and encourage those people who are neither victims nor perpetrators but who witness wrongdoing that they can or should challenge it themselves or report it to the authorities. Such conduct is part of the fabric of most communities and of most successful societies. It is often viewed as part of one’s human obligations and, ethically, it is based on the maxim of *do unto others as you would be done by*. However, where a state seeks to harness and govern this ethic to strengthen its own power at the expense of that of the society – as most tyrannies and totalitarian regimes have by encouraging anonymous informing direct to the authorities – it invariably leads to the destruction of the society and subsequently of the state.

In most cases, the police are able to enforce the law and clear up crime only with information from victims, from perpetrators and/or from witnesses or good citizens. As to this last group, the criminal courts have long had a power to give rewards to good citizens who openly help stop, detect or prove a crime, but this operates as an expression of gratitude for – rather than an inducement to – such conduct. More recently in the UK, Crimestoppers was established to offer a convenient, anonymous route for witnesses/good citizens to tip off the police about crimes. While it advertises rewards of up to £1000 for successful tip-offs, only 4% of those eligible claim theirs.”

Crimestoppers was established in 1985, by businessman Michael Ashcroft who, as a result of the murder of a Police Constable, suggested to the Metropolitan Police Commissioner that he could offer money for a reward for anybody coming forward with information. It was believed that many people knew who had committed the crime but were afraid to speak up.

From this event the idea grew into the concept of the partnership of business, the media and the police running an organization whereby people with information about crimes and criminals could pass that information to the police safely.

Crimestoppers’ success depends on being seen by the public, communities, partners and all donors to be independent. This means that all publicity material, commentary and presentation show them as independent from the police and importantly, that nobody can make them reveal the identity of a caller.

In 23 years, Crimestoppers has never given the police the details of a caller in spite of being under great pressure at times to do so; this position is respected by senior police officers who recognize the long term damage that could be done by “breaking” anonymity.

Crimestoppers has grown internationally and is seeks to share their experience with others.

UNODC supports Crimestoppers as a good example of public private partnership against crime and as yet another means of enabling the public to share important information with government authorities by guaranteeing anonymity or in some cases to give rewards for crimes that have already taken place.
CREATE INCENTIVES TO COOPERATE BY PROTECTING AND REWARDING COOPERATORS AND STIGMATIZE AND SEPARATELY PUNISH OBSTRUCTION OF JUSTICE

Robert E. Courtney III*

I. INTRODUCTION: CRIMINAL CONSPIRACIES, A CODE OF SILENCE AND WITNESS INTIMIDATION

Most nations and international organizations today recognize that criminal conspiracies pose greater threats to society than the actions of individuals. We have only to scan the headlines of any major newspaper in any country to see examples of criminal organizations and their impact on our nations. From violent organizations like Italian Mafias and drug cartels, to private armies of entrenched political groups in developing countries, to smaller, but insidious conspiracies that corrupt public officials, organized criminal activity has become a fact of modern life. Almost 50 years ago the United States Supreme Court summarized the danger of criminal conspiracies as follows: “[C]ollective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often… makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.” 1

The damaging impact of these criminal organizations has resulted in increasing international cooperation and the adoption of international agreements such as the UN Convention Against Transnational Crime (UNTOC)2 and the UN Convention Against Corruption (UNCAC). 3 Such Conventions recognize that if left unchallenged by law enforcement, criminal organizations pose significant dangers to the foundations of our very institutions of government.

Standing in opposition to modern criminal conspiracies are the law enforcement systems of our individual countries. As we all know, because of our strong commitment to due process and the rule of law, we require formal evidence be presented in court before someone can be convicted of a crime. So we must develop

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* Department of Justice Attaché, Embassy of the United States in the Philippines.
2 In the Foreword to the UNTOC, UN Secretary General Kofi-Annan described the threats to civil society by criminal conspiracies in these words: “Arrayed against these constructive forces, however, in ever greater numbers and with ever stronger weapons, are the forces of what I call “uncivil society”. They are terrorists, criminals, drug dealers, traffickers in people and others who undo the good works of civil society. They take advantage of the open borders, free markets and technological advances that bring so many benefits to the world’s people. They thrive in countries with weak institutions, and they show no scruple about resorting to intimidation or violence. Their ruthlessness is the very antithesis of all we regard as civil. They are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars, but they are not invincible.”
3 The preamble to UNCAC describes some of the dangers posed by official corruption as the reason for member states joining UNCAC in these words: “concerned … about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering, Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States, Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential… [member states have acceded to UNCAC].”
systems and policies that empower our police and prosecutors to obtain the necessary judicial evidence.

It is the experience of the United States that without witness testimony from “insiders” to entrenched criminal organizations, there is little likelihood of convicting the leaders and breaking the criminal conspiracy. But the difficulties in obtaining the witnesses needed to convict the leaders of criminal conspiracies can be daunting. The leaders of organizations insulate themselves from criminal prosecution by passing orders through underlings; the criminal bosses often never personally “get their hands dirty” in the commission of criminal acts by their syndicate; and the leaders often order violence and intimidation by lower level members to prevent witnesses from testifying. The organizational structure of the American La Cosa Nostra [Mafia] Organization illustrates how criminal conspiracies compartmentalize their actions for the purpose of protecting and insulating the leaders from being caught by law enforcers. See Annex I, Structure of La Cosa Nostra [Mafia] Organization. Furthermore, these organizations impose a Code of Silence on its members and ruthlessly punish those who break the Code either by informing to the police or by testifying in court.

In order to effectively respond to the threats of these criminal organizations, our countries’ law enforcers need special, coordinated tools and procedures to obtain the critical testimony of “insiders” needed to break the conspiracies and convict the leaders. This paper addresses four of the tools used by the United States.

The first tool is the protection of witnesses. This paper offers an introduction to the United States’ Witness Protection Program. The Witness Protection Program is designed to provide the basic incentive for witnesses to cooperate by removing, or at least minimizing, the fears of physical harm to those who become witnesses and testify.

The second tool involves a system that provides for mitigation of punishment for those persons who offer to cooperate with United States prosecutors. Since most insiders have committed crimes, they fear being punished for their past crimes if they cooperate and testify. Law enforcement can overcome this obstacle by adopting policies that encourage cooperation by mitigation of criminal sanctions when cooperating witnesses admit their involvement in the crimes about which they testify. The United States employs a procedure referred to as a “cooperation plea agreement” that allows judges to reduce jail sentences for those who cooperate.

The third prosecution tool we will discuss involves a process to provide a witness with a form of immunity from prosecution; this process takes away the legal ability of a witness to refuse to testify. This procedure has a societal price, namely, a person who has criminal culpability may completely avoid prosecution. As a result, decisions in individual cases about whether to provide immunity are carefully reviewed by supervisors in the Department of Justice. We will explore some of the advantages and disadvantages of immunity grants later in this presentation.

The final “tool” this paper will discuss is actually multifaceted and involves ways to prosecute and punish efforts to obstruct justice. Actions that are intended to prevent witnesses from offering testimony need to be criminalized with heavy sanctions. Society as a whole must strongly condemn attacks on witnesses and their families. No nation can say it respects the Rule of Law if that nation’s laws and ethics do not stigmatize and severely punish witness intimidation. Law enforcement must be empowered to aggressively investigate and prosecute those who would obstruct justice by attacking or intimidating witnesses and their family members. In support of these public policies, the United States has created specialized crimes and procedures for punishing acts that harm or threaten harm to witnesses and their families.

II. WITNESS PROTECTION

Over 40 years ago the United States’ Federal Witness Protection Program (“the Protection Program”) was created by an act of the U.S. Congress entitled “the Organized Crime Control Act of 1970.” The Protection Program was created to obtain witness testimony in Italian Mafia cases. To this end, the law created a system to provide for the health, safety and welfare of witnesses and their families before, during and after the conclusion of the trial proceedings. In the years since it was created, the Protection Program has been expanded to other types of significant criminal conspiracy cases, not just those involving Italian
Mafia cases, and has been modified to address issues not originally foreseen, such as providing protection for incarcerated cooperating witnesses.

From the very beginning of the Protection Program United States law provided that the United States Witness Protection Program would be prosecutor-driven. Thus, the statute gives the United States' Attorney General the authority to provide for witness relocation and protection. This authority is codified at Title 18, United States Code, Section 3521, a copy of which is attached hereto as Annex II. As noted, the approach followed in the United States gives the prosecutor the authority to decide who should be admitted into the Protection Program. Accordingly, neither judges nor defence attorneys have a role in this decision.

Section 3521 (a)(1) states in relevant part: “The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.”

Notice that protection is authorized not only for the witness, but also for the immediate family of the witness and others "closely associated" with the witness. Thus, parents, spouses and children are covered; as, for example, are common law spouses. Who else might be provided protection is decided on a case-by-case manner.

However, because of the expense and difficulty involved in providing protection not only for witnesses but also for family members, the Protection Program is only available for major crimes. Under Section 3521 the Attorney General can authorize protection when 1) the underlying case involves an “organized criminal offense” or “other serious offense” AND 2) the Attorney General decides it is “likely” that a crime of violence or obstruction of justice would be directed at the witness or the judicial proceeding in which the witness will testify. So if the underlying crime is not a “serious offense”, even if there is some chance of violence or obstruction of justice, the Witness Protection Program will not be an option.

Over the last 40 years procedures and criteria have been established under the authority of the Attorney General to ensure that the Protection Program only admits people who are witnesses in important cases and who are not likely to constitute a future danger to society. In practice this involves the case prosecutor submitting a detailed application for a witness which, among other things:

- describes the seriousness of the criminal case in which the witness will testify,
- gives details regarding the background of the witness and those family members who want to accompany the witness,
- discusses the criminal history of the witness and the role of the witness in criminal activities; and
- contains an assessment of the danger to the witness and family members

In the implementation of the Protection Program a special unit in the Criminal Division of the Department of Justice in Washington, known as the Office of Enforcement Operations (“OEO”), oversees and administers the operation of all phases of the Protection Program, including the decision of who should be accepted into the Protection Program. The prosecutor’s request to protect a witness is submitted to OEO for decision.

In addition to the prosecutors in OEO, two other agencies have substantial roles in implementing the protection features of the Protection Program. These are the United States Marshals’ Service (Marshals’ Service) and the Federal Bureau of Prisons (“BOP”). The Marshals’ Service handles protection for non-

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4 Section 3521(a)(2) recognizes the need to determine the details of how the Attorney General would exercise his authority in deciding when protection is appropriate.
5 In these other cases, the danger is often short-lived, that is, it exists during the pendency of the judicial proceeding. In such cases, protection may be offered by local police units by arranging short-term housing until the case is over.
6 It should be emphasized that the Protection Program is only available to witnesses and their families. It is not designed to provide protection to non-witnesses who may feel threatened by criminal elements.
incarcerated witnesses and their family members; BOP handles protection for witnesses who are serving jail sentences by establishing “jails within jails” that only house cooperating witnesses.

Of course, no one can be forced to go into the Protection Program. It is purely a voluntary decision on the part of a witness to request and accept protection under the umbrella of the Protection Program. Indeed, a person can decide to leave the Protection Program at any time. However, because it is expensive and complex to protect people, at the outset there is a written agreement that is signed by the witness and the Marshals’ Service that details what each has agreed to do. Thus, when it has been determined that a witness is a suitable candidate for the Protection Program, the witness and his or her adult family members who are to be protected will be asked to sign a Memorandum of Understanding. The Marshals’ Service agrees to satisfy each commitment set forth in the MOU as long as the witness remains in good standing in the Protection Program. On the other hand, the Marshals’ Service will not be required to provide amenities or services not included in the document. Typically the Marshals’ Service agrees to relocate the witness and family to another part of the United States, to provide a new identity, and to help the family start a new life, which includes basic job location assistance for the relocated witness and, as well as the payment of living expenses for a period of time.

The witness’ obligations can be difficult to honor, especially the agreement not to take any action that might divulge the new identity and residential location. This means the witness cannot return to the “danger area,” or stay in contact with friends and relatives, except through means authorized by the Marshals’ Service. If the witness breaches his security, OEO will expel him from the Protection Program and no longer authorize the Marshals’ Service to provide services. (This does not mean that the witness’ new identity will be revoked; nor does it mean that in the event of an actual danger that the witness will not be provided appropriate protection. However, OEO may refuse to approve continued payment of subsistence or provision of other types of support.)

The restrictions on the witnesses are often as stressful as the testimony given in court. Some witnesses find the Protection Program so restrictive they are unable to adjust. Some even decide to return to their old home city. There are a number of instances where witnesses who withdrew from the Protection Program and returned to the “danger area” were murdered. For example, against the advice of the Marshals’ Service a man from Philadelphia, Pennsylvania who had been a cooperating witness against the LCN found the Protection Program too restrictive and decided to leave the Protection Program and return to his old hometown. He was murdered within a matter months of returning to the “danger area.”

The humorous (and grossly inaccurate) portrayal of the Protection Program in the comedic movie My Blue Heaven does catch one element many familiar with the Protection Program have experienced. The principal character in the movie describes his attitude toward the changes required by participation in the Protection Program as follows: I get to never see my parents again or my loved ones. I get to live in a place ... it’s okay don’t get me wrong ... the air is clean, the people are nice ... but for a guy like me raised on the sidewalks of the city that never sleeps, it’s a living hell.

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7 Some of the specific assistance that 18 USC Section 3521 [see Annex II] authorizes when a witness and his family have to be relocated to another part of the United States include:
(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;
(B) provide housing for the person;
(C) provide for the transportation of household furniture and other personal property to a new residence of the person;
(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;
(E) assist the person in obtaining employment; and
(F) provide other services necessary to assist the person in becoming self-sustaining.

8 The “danger area” is the broadly considered to be the areas where the witness is likely to be known or recognized, and therefore potentially targeted for violent retribution. Thus, for example, the “danger area” for a witness from New York City could include a large area of the East Coast of the United States since that is the geographic area in which he is most likely to be recognized.

9 It is not uncommon for a wife of a prospective witness to break down in tears when told that she will not be able to attend her mother’s funeral in the “danger area” when/if her mother should die.

10 From dialogue of “Todd Wilkerson”, a fictional participant in the Witness Protection Program, as portrayed by Steve Martin
Perhaps as a result of its strict rules, it is undeniable that the Protection Program has been a tremendous success. No relocated witness who followed the Marshals’ Service rules has been harmed, and there have been thousands of successful prosecutions throughout the United States as a result of courtroom testimony from protected witnesses. Most notably, the entrenched leadership of the LCN organizations, which justified the original creation of the Protection Program, has been convicted in cities throughout the United States based upon the testimony of “insiders” who were protected by the Protection Program.

III. COOPERATION GUILTY PLEA AGREEMENTS - MITIGATION IN RETURN FOR COOPERATION

The United States experience is that there are two types of fears that deter would-be cooperating witnesses from testifying. The first is the fear of physical violence from the people they can expose through testimony. As discussed in Part II above, in the United States we deal with this fear by making available the Witness Protection Program. However, would-be witnesses often have a second fear that deters them from cooperating. This is the fear of being prosecuted and incarcerated for their acts as part of the criminal organization.

This fear of being prosecuted has been “institutionalized” by the United States’ Italian Mafia, known as La Cosa Nostra (LCN). As a prerequisite to full “membership” in the organization, the LCN requires a prospective member to participate in a murder. In addition to demonstrating that the member has the “qualities” desired by this vicious organization, it was believed that participation in the murder also made future cooperation impossible. Since the penalties for murder were so great and the societal repulsion to murder was so strong, the LCN believed that those who participated in murders would never become cooperating witnesses. In response the United States has developed another “tool” to minimize the fear of prosecution by cooperating witnesses.

This other “tool”, which works hand-in-glove with the Witness Protection Program, is the “Cooperation Plea Agreement.” It is a fact that most “insiders” in serious criminal conspiracies have personally committed criminal acts. The Cooperation Plea Agreement is a mechanism which allows criminal “insiders” to plead guilty and to receive reduced jail sentences if they provide “substantial assistance” to the prosecution by cooperating and testifying.

It is the policy of the United States, incorporated in statutory law, to encourage such cooperation by allowing judges to impose jail sentences that are less than the sentences they would have received if the defendant had not cooperated. This policy recognizes that persons who have committed serious crimes should not be allowed to avoid all penal sanctions by agreeing to testify. At the same time, the policy gives the “insider” hope that at the end of the process, the insider will still have the opportunity to start a new life. It is the collective judgment of the United States that the cost of allowing reduced sentences for cooperation against leaders of the criminal organization is justified by the need to defeat the criminal organizations that pose such serious threats to civil society.

in MY BLUE HEAVEN (Warner Brothers Pictures 1990).

11 After a new, would-be member has participated in a murder, the LCN has a special “ceremony” where a man who is considered “qualified” to be a full or “made” member of the organization swears an oath of allegiance, i.e., the oath of Omertà, the Mafia code of silence. Though the ceremony varies from family to family, it usually involves the pricking of the trigger finger of the inductee, then dripping blood onto a picture of a Saint, which is then set afire in his hand and kept burning until the inductee has sworn the oath of loyalty to his new “family.” The oath is along the lines of “[a]s this card burns, may my soul burn in Hell if I betray the oath of Omertà,” or “As burns this saint, so will burn my soul. I enter alive and I will have to get out dead.”

12 Under Title 28 United States Code, Section 994 the United States Sentencing Commission is required to adopt Sentencing Guidelines that all United States federal courts will apply when sentencing persons convicted of a crime. Section 994(n) states: “The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” This policy is re-enforced by Title 18 United States Code Section 3553(e) which specifically authorizes a judge “upon motion by the Government” to impose a sentence below the mandatory minimum sentence if the convicted person has provided “substantial assistance” in the investigation or prosecution of another person who has committed an offence.
Prosecutors desiring the testimony of “insiders” always need to weigh the importance and public value of the insider testimony in the specific case against the risk that a serious criminal will not receive appropriate punishment. The Cooperation Plea Agreement is the balancing mechanism that allows both testimony and appropriate penal sanctions. Over the past thirty years the United States has developed considerable experience in the use of Cooperation Plea Agreements. It is now common to require criminal-witnesses to plead guilty to representative criminal violations and face the likelihood of jail sentences.

The potential of severe criminal sentences, including mandatory minimum sentences for certain drug offenses, provide incentive for criminals to turn on their criminal associates and “flip”. As discussed below, a man facing a mandatory 20 years in jail, can receive a lesser sentence if he provides the police and prosecutor “substantial assistance” by providing information and testifying against his drug associates. Likewise, a man facing life in jail for participating in murders for a criminal syndicate can also have a chance to receive a lesser jail sentence if he testifies against the leadership of the organization for which he worked.

Unlike the Witness Protection Program that is controlled by the prosecutor, a Cooperation Plea Agreement requires the active involvement of the defence attorney and the judge, as well as the prosecutor. First, the prosecutor discusses the case with his or her supervisors and obtains approval from the leadership of the prosecution office to consider a Cooperation Plea Agreement with the specific defendant in the specific case. Next, the prosecutor and defence attorney discuss the proposed plea agreement and its likely meaning in the specific case. If the agreement is acceptable to the defence attorney and the client, the plea agreement must be set forth in writing and signed by the prosecutor, the defence attorney and the defendant. Next, the agreement is presented to the judge who can accept or refuse the agreement. Moreover, all parties understand and agree that the decision as to what sentence will be imposed is solely the decision of the judge.

Cooperation Plea Agreements used by the US Department of Justice expressly state that the agreement does not bind the judge with respect to what sentence ought to be imposed. Thus, it is the judge, informed by his or her training and by having a full understanding of the case, who decides what sentence to impose.

If the judge decides to accept the agreement, the judge will require the defendant-cooperator to plead guilty in open court to the charges covered by the plea agreement. In most cases the defendant-cooperator will testify for the prosecution after the judge has accepted the plea agreement and after the defendant-cooperator has pled guilty. Thus, sentencing is deferred until the defendant-cooperator has completed cooperating with the prosecutor so that the judge may consider the significance of the cooperation. The expected cooperation can often involve several trials and different crimes, depending on the knowledge of the defendant-cooperator. In most violent criminal conspiracy or drug cases, the defendant-cooperator will be held in jail without bail and will be incarcerated in a Bureau of Prisons Protected Witness jail while cooperating and awaiting sentence.

When the time comes to sentence the cooperating defendant, the judge is required by law to consider and evaluate these five factors:

1. the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
2. the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
3. the nature and extent of the defendant’s assistance;
4. any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
5. the timeliness of the defendant’s assistance.

Section 5K1.1 of the United States Sentencing Guidelines.

Applying these five factors, the judge decides a) whether to reduce the jail sentence the cooperating witness would otherwise be imposed and b) by how much to reduce the sentence.

13 The time spent in jail will count toward whatever jail sentence is ultimately imposed.
14 In the United States sentencing in Federal Court is guided by Sentencing Guidelines. The provision of these guidelines applicable in sentencing cooperators is Section 5K1.1. A copy of this provision is attached in Annex III.
The positive effects of a cooperation plea bargaining system is that law enforcement has something to offer to overcome the fear of the potential witness that he will receive the same jail sentence he would have received if he did not cooperate. Together with the Protection Program, the Cooperation Plea Agreement offers hope to the cooperating insider that he or she may have a new life free from the influences of the criminal syndicate they are exposing.

A. Witness Protection Program and Cooperation Plea Agreements in Practice

One example of the effectiveness of these two tools, taken from our experience in prosecuting the LCN in Philadelphia, Pennsylvania illustrates this. In the period between 1991 and 1993 a war broke out between two competing factions of the LCN. During this period there were a series of murders and attempted murders, including a brazen motor vehicle ambush on a major expressway at the height of rush-hour. These competing acts of violence were ordered by the LCN “boss” and by his rival. Neither of the men actually pulled a trigger or was near the scenes of the violent crimes. Indeed, the LCN structure, depicted in Annex I, is designed to insulate the leadership from the commission of crimes ordered by those leaders. As a result of investigation, prosecutors learned the identity of three men who were “shooters” in three LCN murders and built prosecutable cases against them. After much thought, prosecutors approached their defense attorneys and entered into separate cooperation plea agreements with the each of the three conspirators AND sponsored them for the Witness Protection Program. Each man was required to plead guilty to his participation in the murders. Based upon their testimony, together with other evidence developed in a two year investigation, prosecutors charged the entire leadership of the Philadelphia LCN, including the boss and 22 others, with the crime of Racketeering and multiple acts of murder and extortion. After a three month trial, interrupted at one point by the murder of a brother of one of the insider-witnesses, all were convicted. At sentencing the boss and his “underboss” were sentenced to life in jail without the possibility of parole. The three cooperating witnesses were sentenced respectively to 10, 12½ and 15 years in jail for their role as “shooters” in murders ordered by the “boss.” Without the Cooperation Plea Agreements they would have been sentenced to life in jail. Each served his sentence in a Bureau of Prisons Witness Protection facility in different federal jails, and thereafter was protected by the Protection Program.

IV. WITNESS IMMUNITY: A WAY TO COMPEL TESTIMONY

Our prior discussions about Witness Protection and Cooperation Plea Agreements were based upon a common assumption, namely that the prosecutor was dealing with a witness who was willing to testify. Sometimes, however, the prosecutor will face the situation where a critical witness refuses to testify. The refusal to testify could arise from a number of motives. For example, the witness may fear for his safety but not want to enter the Witness Protection Program because of its stringent rules; or the witness does not want to plead guilty as part of a Cooperation Plea Agreement; or the witness does not want to testify against his criminal friends and associates. What tools does a United States prosecutor have to obtain testimony when facing a reluctant witness? One answer under United States law is for the prosecutor to apply to the court for a grant of “use immunity.”

A. Overview of the Operation of a Grant of Compelled Use Immunity

Under United States law a person has a Constitutional right not to testify in a judicial proceeding if the testimony might tend to incriminate him in a criminal offence. See Fifth Amendment to the U.S. Constitution. However, the U.S. Supreme Court has long held that a grant of “use immunity” 15 to a witness provides the equivalent protection offered by the Fifth Amendment. 16 Thus, if a witness is granted “use immunity” the witness no longer has a Fifth Amendment right to refuse to testify.

15 “Use immunity” means that, while the government may prosecute witness for offences related to subject matter of witness’ testimony, the witness’ testimony itself and any fruits there from, may not be used against witness in any criminal case except prosecution for perjury arising out of testimony. “Use immunity” should be differentiated from “transactional immunity” which provides complete protection from prosecution for certain criminal acts. In theory a person given “use immunity” could still be prosecuted for a crime he testified about, if the prosecutor had independent evidence that was not derived from the immunized testimony. See, U.S. v. Apfelbaum, 445 U.S. 115 (1980). Such prosecutions are rare.

The procedure for giving a witness “use immunity” is contained in statutory law at Title 18 U.S.C. Sections 6002 and 6003. These provisions are set forth in Annex IV. Under Section 6003, a U.S. prosecutor, with the approval of the Attorney General or his designees, can apply to the court for an order giving a specific witness “use immunity.” Section 6002 specifically states that if a court has issued an order giving use immunity to a witness, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Under the above process, if a prosecutor obtains a grant of “use immunity” for a witness and then subpoenas the witness to appear in court to answer questions, the witness has no legal right to refuse to testify. A failure to answer questions after being granted use immunity will result in the witness being found in civil contempt of court and incarcerated until the witness agrees to answer questions, or until the conclusion of the judicial proceeding in which the witness has been called to testify (but not more than 18 months in all). Title 28 United States Code, Section 1826. We sometimes refer to this as a situation where the witness has the key to the jail door – all he has to do to get out of jail is agree to testify.

B. Practical Considerations involving Grants of Immunity

There are a number of considerations and practical difficulties related to obtaining compelled testimony using a grant of immunity. Some of the following may be present in specific cases.

First, there are basic moral considerations involved in forcing a witness to testify that will create actual risks of serious danger to the witness and/or family members. Sometimes, because of fear, a witness will invoke his Fifth Amendment Right and refuse to testify when the witness did not commit a crime or where there is little likelihood to be prosecuted. Thus, a grant of immunity will traumatize a witness. United States law enforcers do not want to create victims of new crimes; and we also believe there is a moral obligation to consider the safety of witnesses. There are many instances where the prosecutor will forego and not use the immunity power because it will jeopardize innocents. Obviously, this decision may hinder development of the criminal prosecution under investigation.

Second, all trial lawyers know the maxim of not asking a question when you do not know the answer. With an unwilling witness who is being forced to testify, the prosecutor will often find himself not knowing what the answer to his questions may be or if the answer will be what he expects. This is particularly a concern where a frightened witness may lie rather than incriminate a criminal who may hurt the witness or the witness’ family. A frightened immunized witness is an unknown quantity for a prosecutor.

Third, with a grant of immunity the prosecution gives up its ability to prosecute a criminal. In this connection, a prosecutor must be very careful not to immunize a person who is more culpable than the person against whom testimony will be given.

Each case presents its own set of problems and issues. Whether to seek a grant of use immunity is a question that can only be answered in a case-by-case determination.

V. OBSTRUCTION OF JUSTICE

A. Introduction

It is the strongly-held view of the United States Department of Justice that the protection of our witnesses involves much more than taking a witness into the protective shield of a witness protection program. It must also include law enforcers’ aggressive use of criminal sanctions against all unlawful efforts...
to prevent witnessed from testifying and from obstructing the administration of justice. Potential witnesses need to know that the law criminalizes obstruction; that law enforcers actively look to protect witnesses by investigating and arresting where appropriate; and that the courts take obstruction of justice seriously by imposing significant sentences on violators.

In the United States we have two methods of imposing criminal sanctions on those who obstruct justice. The first consists of specialized criminal violations addressing various types of obstruction; and the second requires sentencing courts in all criminal cases to focus on whether there were efforts to obstruction of justice and if so to enhance, that is to increase, jail sentences.

B. Obstruction of Justice Crimes

The federal laws criminalizing obstruction of justice in the United States have evolved over the years as our experience has grown. If you examine the United States’ federal criminal code, you will see that there are twenty-two separate laws all grouped under the label “Obstruction of Justice.” In our earlier years the United States responded to specific problems that obstructed the criminal justice system by enacting legislation directed to the specific problem. See for example, 18 U.S.C. Section 1501 which is captioned “Assault of a Process Server” and 18 U.S.C. Section 1502 which is captioned “Resistance to Extradition Agent.” These statutes are largely historical and seldom relevant to the modern world. Others laws are directed at protecting officials within the justice system, namely, judges, court personnel and jurors who decide cases. These laws are obviously still viable and important.

However in the mid-1980s we recognized limitations and gaps existed in the laws pertaining to witnesses. As a result, we enacted two very broad obstruction of justice laws to supplement existing laws. These new laws were intended to respond to modern dangers and sophisticated methods that can be used to threaten witnesses and impede judicial proceedings. These two laws are codified at Title 18 U.S.C. Section 1512 (“Tampering with a witness, victim or an informant”) and Section 1513 (“Retaliating against a witness, victim or an informant”). Copies of these laws are appended at Annexes V and VI, together with Title 18 U.S.C. Section 1515 at Annex VII which contains relevant definitions.

There are several features of these laws that are noteworthy.

1. Obstructions aimed at Preventing Testimony - Section 1512

From the criminal’s point of view, preventing testimony by witnesses is the critical goal. The greatest danger to a witness or a family member of a witness exists before the witness has appeared in court. Examples of fearsome violence against family members of government witnesses are too common. Two examples drawn from our experience involves the murder of a government witness’ brother early on the morning he was scheduled to testify against members of the La Cosa Nostra (LCN). Another involves the arson murder of five female family members of a witness against the leader of a violent drug organization; murders arranged by the drug leader from jail. In each of these two cases, despite the awful violence, the witnesses testified and did so effectively.

In recognition of this pre-testimony danger, Section 1512 focuses on conduct occurring before the witness has testified. Section 1512’s scope is very broad and not only protects witnesses, but also victims of crime, informers and family members of witnesses. Thus, violence directed against a family member of a witness or a victim is covered when the family member is targeted because of the relationship to the witness or victim. In sum, the protective scope of 1512 covers any person who is intimidated, harassed, or killed on account of his or her relation to, a victim, witness or informant.

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19 See Title 18 United States Code, Sections 1501 through 1521, including 1514A.
20 The drug boss is currently facing federal charges in Philadelphia, Pennsylvania relating to these cruel murders.
21 The legislative history is clear that the purpose was to reach family members. The Congressional Record states: “Although the former law protected witnesses, parties, and informants, it was unclear whether that law reached the intimidation of third parties (for example, the spouse of a witness) for the purpose of intimidating the principal party. Section § 1512 of Title 18 plainly covers such conduct, for it speaks of conduct directed toward “another person.” See 128 Congressional Record House Report 8203 (daily ed. Sept. 30, 1982).
There are many different ways a criminal can try to prevent a witness from giving testimony. Section 1512 was written broadly to outlaw as many different methods of preventing testimony as possible. Thus, Section 1512 prohibits the use of intimidation, harassment, threats or physical force, including killing or attempts to kill, when the conduct is aimed at “affecting the presentation of evidence in official proceedings”, or “at impeding the communication of information” to Federal law enforcement officers.22

The last provision above makes it clear that the law prohibits conduct which tries to stop a witness from talking to an investigator – not just to stop courtroom testimony. This is the purpose of the phrase “impeding the communication of information to a law enforcement officer.” Because, the law applies to the investigatory stage it is not necessary to show that an official proceeding is pending or about to be instituted at the time of the offense. The logic of this approach is clear; the best way to impede or obstruct a criminal case is to prevent it from ever being investigated. Therefore the law is violated if the defendant’s intent is to prevent someone from testifying at some point in the future. Criminals who keep witnesses from talking to the police can avoid arrests and trials altogether.

To state this differently, Section 1512 protects potential as well as actual witnesses. With the addition of the words “any person,” it is clear that a witness is “one who knew or was expected to know material facts and was expected to testify to them before pending judicial proceedings.

The U.S. Congress also recognized that transnational criminals attempt to prevent witnesses from providing information and testimony in U.S. proceedings. As a result, to provide the maximum coverage permitted by United States’ law, the U.S. Congress also provided that 1512 applies to acts occurring outside the United States as well as inside, when the intent is to influence the proceeding in the United States’ jurisdiction. So an international criminal who attempts to obstruct a United States proceeding, will violate Section 1512.

2. Retaliating for Testimony - Section 1513

Although criminals prefer to prevent witnesses from testifying, there are many cases involving after-testimony retaliation against witnesses and family members. So Section 1513 was designed to fill a gap in federal law by proscribing threats of retaliation and attempts to retaliate.

In the United States criminal organizations will retaliate against those who have testified against members of the syndicate. Section 1513 give prosecutors a strong tool by specifying that a violation occurs if person causes or threatens to cause a) bodily injury or b) damage to tangible property of a witness, victim or informant who participated in an official proceeding or who communicated information to law enforcement officers.

Like § 1512, the Federal courts have extraterritorial jurisdiction over acts occurring outside the United States.

3. Attempts – Not Necessary to Actually Harm a Witness

It is important that obstruction of justice crimes must contain a provision outlawing “attempted” acts of obstruction. I am certain that each nation represented at this conference has laws which punish murder and assaults. So if a witness is assaulted or murdered, the laws of our nations could use those statutes to impose serious sanctions. But often obstruction involves intimidation and threats that fall short of actual violence. To be effective in obtaining cooperating witnesses, the law must deter obstruction of justice as much as possible. Thus, a critical component in a national strategy to obtain cooperating witnesses is enactment of special laws that criminalize attempts to obstruct justice by threatening or harming witnesses and members of their families, as we have discussed previously. As you see from Annexes V and VI, both Section 1512 and 1513 do criminalize attempts.

4. Punishment for Violations of Section 1512 or 1513

In the United States the severity of punishment for obstruction of justice crimes depends on the amount of violence involved and the nature of the obstructive conduct. The punishment provisions can be found at Section 1512(3) and 1513(2) of Annexes V and VI. If Section 1512 is violated, for example and:

• a witness was killed, the death penalty or life imprisonment can be imposed; or

• if there was an attempted murder or the attempted use of force, a maximum of 30 years in jail can be imposed; or
• if there was the use of intimidation and threats, or the destruction of evidence, a maximum of 20 years in jail can be imposed.

B. The Second Way to Punish Obstruction - United States Sentencing Guidelines – Look for Obstruction in All Cases

In addition to specialized crimes for obstruction of justice discussed above, there is a second way the U.S. criminal law imposes sanctions for obstruction of justice. Even if a criminal is not convicted of an obstruction of justice crime, if the criminal obstructed or attempted to obstruct justice he can still be punished for the obstructive conduct. We do this through sentencing procedures established by the United States Federal Sentencing Guidelines.

Under the Sentencing Guidelines, if the sentencing judge finds that the defendant engaged in acts that were intended to obstruct justice, the defendant can have his jail sentence increased. At the sentencing hearing following a conviction the U.S. prosecutor is permitted to introduce evidence to establish facts showing a defendant attempted to obstruct justice, and therefore should receive a greater jail sentence. If the judge agrees, the judge can increase the defendant’s jail sentence.

The relevant Sentencing Guideline states: “If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant’s offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels. [This results in a greater period of incarceration.]” United States Sentencing Guideline 3C1.1.

In order to help judges apply this Guideline, the Sentencing Commission has given the judges examples of conduct that can result in an increase in the jail sentence. These include:
• threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
• committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offence of conviction;
• producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
• destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
• escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
• providing materially false information to a judge or magistrate judge;
• providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offence;
• providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
• threatening the victim of the offence in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

C. Should the Prosecutor charge Obstruction of Justice or seek Enhanced Jail Sentence?

Under United States law, when an obstruction occurs, the prosecutor has a choice to make. In most cases whenever there is an act to obstruct justice, the criminal is trying to prevent law enforcement learning about a “core crime.” By “core crime” we mean, a criminal who tries to prevent the witness from testifying has already committed a crime, such as a theft, drug dealing, or some other crime. This past crime I call the
“core crime.” So the intent of the criminal obstructing justice is to prevent being prosecuted for the “core crime.” However, as we have seen above in the discussion of Sections 1512 and 1513, when the criminal threatens a witness, he has committed a new crime.

When this happens the United States prosecutor has options. The prosecutor can either bring a separate prosecution for obstruction of justice or the prosecutor can bypass a trial on the crime of obstruction of justice and seek to increase the jail sentence that would be imposed after conviction for the “core crime.”

Thus, for example, assume a United States prosecutor has a multiple defendant drug case for selling methamphetamine. Assume further that one of the defendants by himself threatened a drug courier with harm if he testified or provided information to law enforcement. The prosecutor could decide to add another charge against the one defendant for obstruction of justice. However, as we shall discuss, the prosecutor could decide that it is easier to convict all of the defendants beyond reasonable doubt on the drug charge and at sentencing present the facts of the obstruction to the sentencing court.

VI. CONCLUSION

In order to defeat modern criminal organizations, law enforcement needs to adapt to the challenges posed by these sophisticated criminal syndicates. This means civil society must realize that tools appropriate for dealing with individual criminal acts are not adequate when dealing with the modern, sophisticated criminal organizations. Accordingly, our nations must provide law enforcement with the tools necessary to obtain testimony from members of these criminal conspiracies. This testimony will protect society from criminal organizations and at the same time provide due process in the legal proceedings against the leaders of these conspiracies. In the United States the Witness Protection Program, Cooperation Plea Agreement and strong Obstruction of Justice laws have been effective tools in eliminating and minimizing entrenched criminal organizations. The United States’ experience can offer a baseline that other countries may reference when considering how to deal with modern criminal organizations.
ANNEX I

Structure of La Cosa Nostra [Mafia] Organization

- Boss
- Underboss
- Consiglieri
- Capodecina
- Soldiers
- Associates
§ 3521. Witness relocation and protection

(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may, by regulation—

(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(B) provide housing for the person;

(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(E) assist the person in obtaining employment;

(F) provide other services necessary to assist the person in becoming self-sustaining;

(G) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure, except that the Attorney General shall, upon the request of State or local law enforcement officials or pursuant to a court order, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Attorney General knows or the request indicates that the person is under
investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence;

(H) protect the confidentiality of the identity and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons; and

(I) exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provisions of law as may be required to maintain the security of protective witnesses and the integrity of the Witness Security Program.

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph (G).

(b)(2) Deductions shall be made from any payment made to a person pursuant to paragraph (1)(D) to satisfy obligations of that person for family support payments pursuant to a State court order.

(b)(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(G) shall be fined $5,000 or imprisoned five years, or both.

(c) Before providing protection to any person under this chapter, the Attorney General shall, to the extent practicable, obtain information relating to the suitability of the person for inclusion in the program, including the criminal history, if any, and a psychological evaluation of, the person. The Attorney General shall also make a written assessment in each case of the seriousness of the investigation or case in which the person’s information or testimony has been or will be provided and the possible risk of danger to other persons and property in the community where the person is to be relocated and shall determine whether the need for that person’s testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under this chapter, the Attorney General shall consider the person’s criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person’s testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child’s parent who would not be so relocated, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person’s testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

(d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including—

(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;

(B) the agreement of the person not to commit any crime;

(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;

(D) the agreement of the person to comply with legal obligations and civil judgments against that person;

(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter;
(F) the agreement of the person to designate another person to act as agent for the service of process;

(G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;

(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and

(I) the agreement of the person to regularly inform the appropriate program official of the activities and current address of such person.

Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of the program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.

(d)(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of understanding shall be signed by the Attorney General and the person protected.

(d)(3) The Attorney General may delegate the responsibility initially to authorize protection under this chapter only to the Deputy Attorney General, to the Associate Attorney General, to any Assistant Attorney General in charge of the Criminal Division or National Security Division of the Department of Justice, to the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

(e) If the Attorney General determines that harm to a person for whom protection may be provided under section 3521 of this title is imminent or that failure to provide immediate protection would otherwise seriously jeopardize an ongoing investigation, the Attorney General may provide temporary protection to such person under this chapter before making the written assessment and determination required by subsection (c) of this section or entering into the memorandum of understanding required by subsection (d) of this section. In such a case the Attorney General shall make such assessment and determination and enter into such memorandum of understanding without undue delay after the protection is initiated.

(f) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.
PART K - DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

1. the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
2. the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
3. the nature and extent of the defendant’s assistance;
4. any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
5. the timeliness of the defendant’s assistance.

Commentary

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.
2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant’s affirmative recognition of responsibility for his own conduct.
3. Substantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background. A defendant’s assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

(EFFECTIVE November 1, 2010)

United States Sentencing Commission
ANNEX III-A

CRIMES AND CRIMINAL PROCEDURE
TITLE 18, United States Code, Section 3553(e)

MITIGATION OF SENTENCE
FOR COOPERATING WITNESSES

§ 3553. Imposition of a sentence

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum.—
Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.
CRIMES AND CRIMINAL PROCEDURE
TITLE 18, United States Code, Sections 6002, 6003

IMMUNITY OF WITNESSES

§ 6002. Immunity generally
Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings
(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and
(2) such individual has refused or is likely to refuse to testify or 28 U.S. C. § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

(1) the court proceeding, or
(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.
(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the
determination of an appeal taken by him from the order for his confinement if it appears that the appeal is
frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of
as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or
to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts
to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to
imprisonment for not more than three years, or a fine of not more than $10,000, or both.
§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(a)(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(a)(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(b)(1) influence, delay, or prevent the testimony of any person in an official proceeding;
(b)(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(b)(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant’s sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—
(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.
ANNEX VI

CRIMES AND CRIMINAL PROCEDURE

TITLE 18, United States Code, Section 1513

OBSTRUCTION OF JUSTICE

RETAILIATION FOR TESTIMONY

§ 1513. Retaliating against a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for—

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings, shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 30 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

(f) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(g) A prosecution under this section may be brought in the district in which the official proceeding (whether pending, about to be instituted, or completed) was intended to be affected, or in which the conduct constituting the alleged offense occurred.
ANNEX VII

CRIMES AND CRIMINAL PROCEDURE

TITLE 18, United States Code, Section 1515

OBSTRUCTION OF JUSTICE

DEFINITIONS

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term “official proceeding” means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(a)(2) the term “physical force” means physical action against another, and includes confinement;

(a)(3) the term “misleading conduct” means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(a)(4) the term “law enforcement officer” means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
(B) serving as a probation or pretrial services officer under this title;

(a)(5) the term “bodily injury” means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(a)(6) the term “corruptly persuades” does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term “corruptly” means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.
SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS: A BARBADIAN PERSPECTIVE

Roland Cobbler*

I. INTRODUCTION

According to Deosaran (2007) the state of crime, delinquency and justice across the Caribbean has become increasingly problematic over the last twenty years. He further purports that some of the reasons for this phenomenon include technologically driven crimes, ineffective policing, ineffective judicial institutions, weak law enforcement, and crime and violence driven by drug trafficking. Since crime has the potential to affect the quality of life in any society, the development of effective mechanisms to combat crime is one of the most critical issues that many governments are likely to encounter. Although there are various initiatives which can be developed and implemented by both the government and civil society to address confronting issues of crime, these initiatives can only be effective if they coincide with an effective criminal justice system. Similarly, within the criminal justice system it is essential that special attention be placed on the ability of law enforcement officials to make the necessary arrests and the subsequent conviction of persons involved in criminal activity.

The existence of witnesses is not only important to the police department for solving cases under investigation, but it also plays a pivotal role in the justice system in securing successful convictions. Therefore, the cooperation of a witnesses who can readily identify perpetrators supports the view that “securing protection and cooperation of witnesses and whistle blowers” is essential for the effective administration of justice and the maintenance of the rule of law.

II. THE BARBADOS PERSPECTIVE

A. The Need for Witness Protection

In the fight against serious crimes such as gang violence and organized crime, it is essential for the criminal justice system to be able to provide effective protection for witnesses, informants, and whistle-blowers, to protect them against intimidation, attacks and retaliations. Increasingly, many countries throughout the world are enacting specific legislation or adopting policies to protect witnesses whose collaboration with law enforcement authorities or testimonies in the law courts would endanger the lives of their families or themselves.

1. Current Legislation and Measures to Protect Witnesses

Barbados, on the other hand, has not progressed to the stage of standardizing similar strategies. This existing approach may be based on the fact that there have been no significant reports to indicate that witness intimidation actually exists. Additionally, unlike many other territories whose criminal justice systems are constantly challenged by serious cases of organized crime and terrorism, there is no recorded crime to signify that this nature of criminality is in existence in Barbados. However, there is a possibility that some cases of organized crime may exist as individuals have been arrested and charged for offences such as money laundering. From a Barbadian perspective, the most serious offences to confront the criminal justice system which are likely to require a witness protection programme are murder and drug trafficking. According to the Royal Barbados Police Force Crime Statistical Office, crime in Barbados is classified under five major categories, namely: Major Crimes Against The Person, which includes offences such as murder, serious bodily harm, endangering life, kidnapping, robbery and sex-related crimes; Minor Crimes Against The Person, which include offences such as assaults, wounding and harassment; Major Crimes Against

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Property, which include burglaries, arson/attempted arson and criminal damage; Minor Crimes Against Property, which include theft, fraud and other theft-related crimes, and finally, Other Crimes, which include drugs crimes, firearm crimes, public order breaches, and escaping lawful custody (See Appendix A).

Although Barbados does not have a standardized witness protection programme integrated into its criminal justice system, the implementation of such a programme has been identified as being essential in the fight against serious crimes. The increasing importance of the implementation of such a programme is primarily based on the fact that over the years a number of the homicides occurring in the country are closely linked to drug affiliation. The necessity of the implementation of a witness protection programme is generally advanced by the fact that one of the characteristics of criminal organizations includes the intimidation of informants and potential witnesses. According to the Barbados Advocate (2008) in a newspaper article entitled “New Laws coming”, the honourable Prime Minister of Barbados, Mr. Freundel Stuart, who was then the Attorney General and acting Prime Minister, stated that the Government was promising the introduction of new laws to deal firmly with thugs who threaten court witnesses with personal liquidation. He further suggested that while he had no evidence of witness intimidation locally, discussion with regional counterparts currently grappling with that problem, had convinced him it could be a major threat “sooner rather than later”.

The necessity of witness protection on the island can be further advanced based on the fact that presently, during the course of police investigations, witnesses are normally asked to identify a perpetrator in a criminal matter from a face-to-face line-up. This form of identification can result in witnesses developing a sense of fear or insecurity.

In a recent High Court case in Barbados, the sitting Judge and a senior prosecutor openly criticized the recent trend of eyewitnesses changing their testimonies at the High Court after giving detailed statements to the police and at the Magistrates Court. These comments came as a result of the prosecution having to discontinue a murder case against one man because eyewitnesses either said they had lied at the Magistrate Court or that police and even the Magistrate had threatened them into testifying. One witness even skipped the island during the trial. The judge in his summation noted that there was a trend “where young persons in serious matters have been cut down like fowls for absolutely no reason at all and where young persons, young men in particular, see what was going on; (they) watched their peers being executed and gave statements to police indicating what they had seen and then go to the Magistrates’ court and say something different and then come to the High Court and say something completely different.” The judge further suggested that he was worried about this trend which, according to him, was undermining our court system and threatening the very fabric of our society. The overarching factor being that after witnessing their friends murdered on the street in execution-style killings, witnesses don’t want to testify to the point that they are changing their stories or running off the island.

**B. Effective Legislation and Measures**

1. **Current Local Legislative Measures**
   
   (i) **Criminalization and Punishment**

   Despite the fact that Barbados does not have a standardized witness protection programme, effective legislation and measures do exist to ensure that some level of protection is available for witnesses to safeguard the criminal justice system from destabilization. Currently, the Transnational Organized Crime (Prevention and Control) Act 2011-3, which was passed in the House of Parliament on 7 February 2011, mirrors the philosophy of the United Nations Convention against Transnational Organized Crime (UNTOC) to which Barbados is a signatory, and provides some degree of satisfaction in deterring witness interference. According to Section (6), subsections (1) and (2) of the Act, a person who, in relation to a witness or justice system participant involved in criminal proceedings to which the Act applies:

   - uses or threatens to use physical force;
   - intimidates; or
   - promises or offers a financial or other material benefit,

   (...), resulting in interference with the judicial process, especially in the case of witnesses, is guilty of the
offence of Obstruction of Justice, if the individual’s actions subsequently:

- induce false testimony;
- interfere with the giving of testimony; or
- interfere with the production of evidence.

Similarly, this Act is supported by common law legislation where persons whose actions are considered likely to pervert the course of justice, are normally arrested and charged for their behaviour.

2. Current Local Regulatory Measures

Additionally, other available measures to provide witnesses/victims with assistance and support are facilitated by the Royal Barbados Police Force as outlined in the General Standing Orders (GSO) of the organization. These standing orders stipulate written guidelines for members of the police force on the policy and procedures regarding the rights of victims and witnesses involved in criminal matters, and provides further details on the assistance and services available to them. It is the policy of the organization that the safety and welfare of all victims and witnesses to a crime in Barbados are of the highest concern. Such individuals are to be treated with fairness, compassion and dignity at all times, and their rights under the law and fundamental human rights must be preserved and administered with equity. Prompt beneficial assistance to witnesses/victims is a commitment the police force undertakes. Section 179 of the GSO’s clearly states that a witness protection scheme shall be designed to increase successful prosecution through the protection of witnesses and their families. Such a scheme shall be utilized by the police when:

- A witness or family member has been threatened;
- An actual threat to the safety of a witness or a family member exists.

However, each case is evaluated on its own merit based upon the imminence of the threat or the potential violence. The protection may be a minimal, (periodic patrolling and security check of the citizen’s residence), or in more serious matters, placing the citizen in protective custody. It is the responsibility of each member of the force to ensure that this order is followed and that the intent and spirit of the order is provided to the public. Nevertheless, organizational responsibility to facilitate victim/witness programmes is the obligation of the force’s Community Relations Department. This department seeks to ensure that the requisite assistance is available for victims/witnesses and provides:

- Referrals to other sources of help, including domestic abuse programmes, social service agencies, support groups, etc.;
- Information on how the criminal justice system operates;
- Support for appearance in court in terms of providing someone to accompany witness/victim to court;
- Assistance with safety concerns.

3. Regional Cooperation

Another promising approach to witness protection to which Barbados is likely to be a beneficiary is the signing of an agreement in 1999 by several sovereign states in the region to establish the Regional Justice Protection Programme. The heads of states in recognizing the need to uphold the integrity of the justice system of member states of the Caribbean Community (thereinafter referred to as “the community”), and the need to prevent any interference in the administration of justice by the intimidation or elimination of witnesses, jurors, judicial and legal officers, and law enforcement personnel and their associates, were convinced that a cooperative approach by the Caribbean community was the most effective way to confront and overcome any potential threat to the criminal justice system. Additionally, heads of the member states were also conscious of the need to establish, develop and maintain an appropriate and effective infrastructure at the national and regional levels in order to safeguard and enhance the credibility and integrity of the justice systems. The signatories to the agreement agreed on 23 stipulations which are listed as Article 1 to Article 23. However, this paper seeks to highlight those conditions which speak specifically to the practical aspects of witness protection. Article 3 of the agreement highlights those Persons who are eligible to participate in the programme and states that:

- Participation in the Regional Programme shall be open to member states of the community; or
- Any other territory which, in the opinion of the conference is willing and able to enjoy the rights and assume the obligations established by the agreement.
The objectives of the programme is clearly outlined in Article 4 which states that the objectives of the Regional Programme shall be to promote and ensure the proper administration of justice by providing participants with such protection, assistance and security as would enable them to perform their functions with efficiency and confidence when there is a threat to their lives, safety, or property, arising from, or directly or indirectly related to the performance of, their duties or obligation in the administration of justice. The functions of the Agency providing witness protection are expounded in Article 10. According to the agreement, the agency providing protection and assistance shall:

- Conduct interviews with prospective participants to establish suitability for entry into the national programme;
- Examine the threats and risk assessments submitted by the investigative agency;
- Require a prospective participant or a participant, as the case may be, to undergo such medical tests and examinations, and psychological and psychiatric evaluations as would determine his or her physical and mental health;
- Submit a report to the Administrative Centre on the matters relating to the participant’s physical and mental health;
- Protect participants approved by the Administrative centre and those accorded provisional entry into the programme on an emergency basis;
- Organize relocation, if necessary, of a participant approved on an emergency basis;
- Review threat and risk assessments throughout the relevant proceedings, including any appeal process and where appropriate after such proceedings;

The scope of protection under the National Programme is illustrated in Article 12 and suggests that:

- States Parties shall take such measures as are necessary and reasonable to protect the safety, health and welfare of participants in national programmes. Such measures may include, where necessary:
  - Providing accommodation;
  - Defraying relocation expenses;
  - Providing living expenses;
  - Establishing new identities;
  - Providing assistance in rehabilitation.

Article 13 summarizes the procedure for registration of participants and suggests that:

- States Parties establish and maintain a register of participants in national programmes. These Registers may be in electronic form should include information which must be accorded a security classification not below “Top Secret”. This information must include:
  - Names and addresses of participants;
  - Assumed names, if any;
  - New identities, where appropriate;
  - Details of convictions, if any;
  - Case references;
  - Date of commencement of participation in the programme and date of termination.

States Parties shall determine the conditions under which access to the register may be accorded to an approved authority. The register shall be kept at the Administrative Centre which shall be responsible for its safe custody.

The relocation of participants is facilitated in the programme based on the terms highlighted in Article 14. The conditions outlined in this article state that:

- States Parties shall cooperate with the Board and each other in the relocation of participants under national programmes;
- A determination to relocate a participant in a jurisdiction other than the jurisdiction in which the participant ordinarily resides shall be made by the Administrative Centres of the sending State Party and the receiving State Party;
- Prior to the relocation of a participant in a different jurisdiction, the sending State Party and the
receiving State Party shall establish an arrangement determining the rights and obligations of the respective States Parties and the participants being relocated.

Article 15 highlights Legislative and other measures and encourages States Parties to undertake and to adopt legislative and other measures necessary to discharge their obligation under the agreement, thereby to:

- Facilitate in their jurisdiction, the incarceration of persons convicted of offences against the laws of the sending State Party;
- Provide protective custody for participants in national programmes;
- Protect identities;
- Establish offences and sanctions for:
  - Unauthorized disclosure of information, corruption and unethical practices;
  - Unlawfully interfering with a participant.
- Provide for the liability of a State Party and its representatives resulting from acts or omissions causing injury to participants.

4. International Cooperation

The Regional Justice Protection Programme is further supported by a formal framework for mutual assistance and international cooperation which was established and referred to as the Bridgetown Accord “on partnership for prosperity and security”. This Accord was ratified in Barbados in 1997 through a mutually structured US-Caribbean summit between the then US President Mr. Bill Clinton and the Caribbean Heads of State, Government of the Caribbean Community (Caricom), and the Dominican Republic. Subsequently an informal meeting was held in Barbados in 2010, between the US Secretary of State Mrs. Hillary Clinton and the foreign Ministers of Caricom and the Dominican Republic, with the exception of Trinidad and Tobago and Suriname. This meeting was used to officially launch and reaffirm the commitments made at Caribbean-US Dialogue on Security Co-operation. Noteworthy is the fact that this partnership for prosperity and security as outlined in the Bridgetown Accord includes:

- An Arms Trafficking Control Regime for the Caribbean; which focuses on money laundering, illicit drugs reduction, education, rehabilitation and eradication;
- Criminal Justice Protection Programme (including personal security of witnesses, jurors, judicial and law enforcement personnel) in cases of murder related to drug trafficking, gun running and human trafficking);
- Strengthening of Regional Security Forces; by combined and co-operative interdiction efforts, and the collection, analysing and sharing of information.

5. Other Measures

Another important aspect of the criminal justice system in Barbados is the fact that provisions are made for criminal procedural protection. The supreme courts have been designed with the necessary technology to facilitate the process whereby witnesses can testify and give evidence by means of closed circuit television, whether in Barbados or outside of the country. However, to date the necessity to test this modern technology has not been required. In addition to the protection available to witnesses through the earlier mentioned legislation and policies, the existing legal framework of the country enhances and supports the level of protection available to witnesses. Such protection can be facilitated through the Sexual Offences Act Chapter 154, the Evidence Act Chapter 121, and the Bail Act Chapter 122.

Section 106, subsection (1) of the Evidence Act regulates aspects of disclosure as it relates to confidential communication and documents. Under this section, where on the application of a person who is an interested person in relation to a confidential communication or a confidential document, the court finds that, if evidence of the communication or document were presented in the proceedings, the likelihood of:

- Harm to an interested person;
- Harm to the relationship in the course of which the confidential communication was made or the confidential documents prepared;
- Harm to the relationship of the kind concerned;

 together with the extent of the harm, overweighs the desirability of admitting the evidence, the court
may direct that the evidence not be presented. Likewise, section 109 of the same act implies that where the public interest in admitting evidence that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the evidence, the court may, either of its own motion or on the application of any other person, direct that the evidence not be presented. For the purpose of this section, evidence that relates to matters of the state includes evidence which, if presented:

- Would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law;
- Would tend to prejudice the proper functioning of government.

The Bail Act can also be identified as a significant legislation to assist in aspects of witness protection. Under section 5 of the act, where a defendant is accused or convicted of an offence that is punishable with imprisonment, the court may refuse an application for bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not:

- Would interfere with witnesses;
- Commit an offence; or
- Fail to surrender to custody.

Under this act, a defendant can also be kept in custody once the court is satisfied that he or she should be kept in custody:

- For his or her own protection;
- For protection of the community; or
- If he or she is a child or young person, for his or her own welfare.

Additionally, under section 30 of the Sexual Offences Act, where the accused is on trial on indictment for an offence under the act, and the complainant is a minor, the court shall hear the evidence of the minor in camera. Similarly, where the accused is on trial on indictment for an offence under the Act, and the complainant is of full age, the court may give leave for the evidence of the complainant to be heard in camera. Under section 35 of the Act, after a person is accused of an offence under this Act, no matter likely to lead members of the public to identify a person as the complainant in relation to that accusation shall either be published in Barbados in a written publication available to the public or be broadcast in Barbados except, where on the application of the complainant or the accused, the court directs that the effects of the restriction is to impose a substantial and unreasonable restriction on the reporting of proceedings and that it is in the public interest to remove the restriction in respect of the applicant.

The prevalence of witness interference is difficult to quantify for various reasons, such as unreported crime. However, the fact that it does exist has become more obvious with the changing nature of crime. The importance of enacting legislations to counteract incidents of witness intimidation can never be overemphasized, since witnesses play a crucial role in the administration of justice. Although there are no significant reports to indicate that witness intimidation is a major problem in Barbados, there have been a few instances where individuals were engaged in activities which were considered to be intimidating.

C. Criminalization and Punishment of Obstruction of Justice

The necessity of the criminalization and subsequent punishment of persons who seek to obstruct the course of justice is critical in protecting the integrity of the administration of justice. The obstruction of justice is becoming prevalent in Barbados. The manifestation of this crime in Barbados is usually in the form of witness intimidation, and has the potential to damage the democratic functioning of our society. Alleged interference in the judicial process is usually reported in the newspapers. One case in point was highlighted in a local newspaper, the Daily Nation (2011), where the girlfriend of a convicted manslayer was remanded overnight pending trial on charges of perverting the course of justice and harassing a juror who served in her boyfriend’s case. The circumstances of the case were based on the fact that the accused uttered words and gestures intended to cause intimidation or fear of retaliation, in the presence of a juror, for the verdict delivered in her boyfriend’s case. The criminalization and punishment of persons who engage in witness intimidation have been utilized worldwide as a specific response to reduce these occurrences. In Barbados, criminalization and punishment for witness interference can be initiated by the Transnational Organized Crime (Prevention and Control) Act 2011-3. Based on this Act, if a person is convicted of the offence of obstruction of justice under section (6), that individual is liable on conviction on indictment to a fine of
$500,000, or to imprisonment for 10 years, or both. Likewise, punishment can also be initiated under the common law offence of perverting the course of justice. In addition, under the existing laws of Barbados, the Public Order Act enacted in 1993 criminalizes and punishes the use of threats. According to section 27 of the Act, a person is guilty of an offence if he or she:

- Uses towards another person threatening, abusive or insulting words or behaviour; or
- Distributes or displays to another person any writing, sign or other visible representation that is threatening, abusive or insulting.

According to the Act, an individual is guilty of an offence and is liable on summary conviction to imprisonment for a term of two years or to a fine of $500.00 or both, if:

- With intent to cause another person to believe that immediate unlawful violence will be used against him or her or any other person by any person; or
- With intent that another person is likely to believe that unlawful violence will be used or it is likely that such violence will be provoked.

Punishment for committing comparable offences against judges, prosecutors and law enforcement officials are normally initiated under the same legislation.

D. Mitigation of Punishment and/or Immunity Grants for Persons who provide Substantial Cooperation in an Investigation or Prosecution

1. Shortcomings

The securing of witnesses and their cooperation in criminal proceedings is also critical to the successful administration of justice. Universally, various countries worldwide in an effort to facilitate the process of securing witnesses and their cooperation, have adopted several techniques such as the utilization of plea bargaining, witness immunity, protection for whistle-blowers and developing criminal informants. However, in Barbados the mitigation of punishment and/or immunity grants for persons who provide substantial cooperation in an investigation or prosecution, plea bargaining, and protection for whistle-blowers are all measures which are not available to criminal justice practitioners. However, this practice may become necessary in the future as the country becomes more developed. Nevertheless, the primary method of securing witnesses and their cooperation is a role specifically performed by the police through the development of informants. For the police to be successful in investigating criminal activities, the use of informants is of uttermost importance. Therefore, in recognizing the significant role informants play to assist in police investigations, specific procedures were established under the General Standing Orders (GSO) of the Police Force, to guide the relationship between the department and informants. Under section 182 of the GSO, the procedures to be followed to ensure protection of the police department and informants are:

- An informant master file shall be kept under the strict control of each Detective Divisional Inspector at the divisional level, and a copy kept under strict control of the Officer in charge of Criminal Investigation Department (C.I.D.), Headquarters. All information at the Divisional level shall be relayed to the officer in charge of C.I.D.;
- The file shall contain background information on all informants and a record of each transaction;
- The Detective Divisional Inspector and Officer in charge of C.I.D. shall personally maintain this file which shall be confidential;
- The file shall be locked away at all times and each transaction with the informant be given a code.

To protect the identity of informants, section 183 of the GSO further suggests that the following shall be used:

- Accept the information on the terms of the informants;
- The name of the informant shall not be used in reports;
- Arrange how and where the informant can be located, other than the individual coming to the office;
- Meet the informant where the contact will not be evident;
- Informant will not be called upon to testify in court;
- The investigator’s organization shall not be identified in any correspondence with the informant;
- The proper name of the informant shall not be used on the telephone, only the designated code.

Section 201 of the GSO also makes provision for the funding of confidential informants, and states that
there shall be times in certain major cases that paying any informant for intelligence will be required. This procedure shall be followed in instances where:

• The commander of the Criminal Investigation Unit (C.U.I.) shall be advised of the case circumstances and evaluate its merit for approval or disapproval;

• If the request is given preliminary approval, the commander of the C.U.I. shall, in writing, develop a formal request outlining the nature of the case, its total circumstances, the amount of the request and justification for the request;

• This letter shall be transmitted in a sealed secure envelope to the Assistant Commissioner in charge of the division;

• The assistant Commissioner of Police shall review the request for his approval;

• He shall then submit in writing, a formal request for informant funds to the Commissioner of Police;

• Upon review the Commissioner may or may not approve the request. If approved, the Commissioner shall provide the funds to the Assistant Commissioner in charge of the division who shall sign a receipt documenting the transaction.

Additionally, there are citizens at various levels in the society who willingly pass on sensitive information if an atmosphere conducive to this activity is created. In this regard, securing witnesses and witness cooperation is a natural extension of the Police Force’s community policing trust.

III. CONCLUSION

Barbados, like many other territories worldwide, shares similar concerns about the evolution of organized crime and its affiliated attributes. However, despite the efforts in the fight against crime, several challenges do exist which impede the process of an efficient criminal justice system. The greatest weakness of our criminal justice system is that it has become overwhelmed with cases for trial and does not function in a fluent fashion, resulting in prompt determination of the guilt or innocence of those charged with a criminal matter. One significant reason for this weakness is the fact that many prosecution witnesses retract statements made earlier to the police and in some cases become hostile witnesses in the courts. Witnesses turn hostile with predictable regularity in cases involving heinous crimes or high profile personalities due to external pressure, thereby leading to failures in the criminal justice system. Other challenges include the fact that there are several individuals who in some cases are willing to provide the police with the necessary information to solve criminal matters, but are reluctant to give written statements or testify in the law courts. Additionally, there are some instances were persons may willingly give written statements and testify in the law courts. However, during trial, individuals have been known to digress from what they said initially in their statement. This lack of cooperation may sometimes be intensified depending on the community in which the particular individual resides. Such reluctance may also be as a result of a perceived notion or actual threat of retaliation by the offender or his cohorts, or simply be as a result of more generalized community norms and attitudes that discourage cooperation with law enforcement officials. Furthermore, in some communities, close ties between witnesses, offenders, and their families may deter witnesses from cooperating with the police. Witnesses today are being increasingly harassed, bribed, threatened, abducted and even killed. As a result, many persons are reluctant to become witnesses in criminal proceedings.

Suggestions to overcome the mentioned challenges may include, firstly, increasing the appointment of Judges and Magistrates with the intention of speeding up the country’s backlogged court system. Secondly, specialized training can be provided for personnel to assist in the enhancement of their knowledge, skills and techniques in questioning hostile witnesses. Additionally, communities which hold anti-policing attitudes and norms should be increasingly targeted with intensified community oriented policing initiatives so that residents can develop trust to cooperate with the police by providing information and assistance to achieve the desired goals. Finally a standardized witness protection programme and legislation can be incorporated into the criminal justice system and the relevant information provided to heighten the awareness of citizens that protection is available for persons who are willing to cooperate in criminal proceedings. The successes of these strategies are likely to increase the possibility of conviction for those persons who would otherwise evade the law, and facilitate the coming forward of more persons would be willing to give evidence.
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APPENDIX A


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<td>D Assaults/Wounding (Minor)</td>
<td></td>
<td>1627</td>
<td>1462</td>
<td>1503</td>
<td>1532</td>
<td>1505</td>
</tr>
<tr>
<td>E Other Crimes Against the Person</td>
<td></td>
<td>31</td>
<td>24</td>
<td>23</td>
<td>30</td>
<td>21</td>
</tr>
<tr>
<td><strong>SUB TOTAL</strong></td>
<td></td>
<td>2947</td>
<td>2725</td>
<td>2736</td>
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<td>2898</td>
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Table 2. Minor Crimes against the Person

<table>
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<th></th>
<th>YEARS</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
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<tr>
<td><strong>3 MAJOR CRIMES AGAINST PROPERTY</strong></td>
<td></td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>A Residential Burglary</td>
<td></td>
<td>1383</td>
<td>1178</td>
<td>1389</td>
<td>1375</td>
<td>1580</td>
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<tr>
<td>B Commercial Burglary</td>
<td></td>
<td>451</td>
<td>394</td>
<td>470</td>
<td>414</td>
<td>321</td>
</tr>
<tr>
<td>C Other Burglary</td>
<td></td>
<td>12</td>
<td>22</td>
<td>30</td>
<td>19</td>
<td>18</td>
</tr>
<tr>
<td>D Sacrilege</td>
<td></td>
<td>18</td>
<td>20</td>
<td>23</td>
<td>23</td>
<td>19</td>
</tr>
<tr>
<td>E Arson</td>
<td></td>
<td>23</td>
<td>11</td>
<td>13</td>
<td>19</td>
<td>22</td>
</tr>
<tr>
<td>F Attempted Arson</td>
<td></td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>G Criminal Damage</td>
<td></td>
<td>572</td>
<td>524</td>
<td>467</td>
<td>490</td>
<td>512</td>
</tr>
<tr>
<td>H Other Crimes (Attempts)</td>
<td></td>
<td>5</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>SUB TOTAL</strong></td>
<td></td>
<td>2465</td>
<td>2150</td>
<td>2395</td>
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<td>2472</td>
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Table 3. Major Crimes against Property
### Table 4. Sex-Related Crimes

<table>
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<tr>
<th>SEX RELATED CRIMES</th>
<th>YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2006</td>
</tr>
<tr>
<td>A Rape</td>
<td>75</td>
</tr>
<tr>
<td>B Assault With Intent to Rape</td>
<td>2</td>
</tr>
<tr>
<td>C Sex with Minor</td>
<td>31</td>
</tr>
<tr>
<td>D Indecent Assault</td>
<td>65</td>
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<tr>
<td>E Serious Indecency</td>
<td>16</td>
</tr>
<tr>
<td>F Other Sex Crimes</td>
<td>11</td>
</tr>
<tr>
<td><strong>SUB TOTAL</strong></td>
<td><strong>200</strong></td>
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### Table 5. Thefts and Related Crimes

<table>
<thead>
<tr>
<th>THEFTS AND RELATED CRIMES</th>
<th>YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2006</td>
</tr>
<tr>
<td>A Theft of Livestock</td>
<td>16</td>
</tr>
<tr>
<td>B Theft of Agricultural Produce</td>
<td>40</td>
</tr>
<tr>
<td>C Theft of Postal Packet</td>
<td>0</td>
</tr>
<tr>
<td>D Theft of Use</td>
<td>14</td>
</tr>
<tr>
<td>E Theft of Motor Vehicle</td>
<td>115</td>
</tr>
<tr>
<td>F Theft from the Motor Vehicle</td>
<td>351</td>
</tr>
<tr>
<td>G Theft of Bicycle</td>
<td>82</td>
</tr>
<tr>
<td>H Theft from Person</td>
<td>233</td>
</tr>
<tr>
<td>I Theft from Shops and Stores</td>
<td>251</td>
</tr>
<tr>
<td>J Other Thefts</td>
<td>954</td>
</tr>
<tr>
<td>K Handling Stolen Property</td>
<td>28</td>
</tr>
<tr>
<td>L Unlawful Possession</td>
<td>3</td>
</tr>
<tr>
<td>M Going Equipped</td>
<td>11</td>
</tr>
<tr>
<td>N Fraud Related Crimes</td>
<td>124</td>
</tr>
<tr>
<td>O Attempts</td>
<td>1</td>
</tr>
<tr>
<td><strong>SUBTOTAL</strong></td>
<td><strong>2223</strong></td>
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### Table 6. Other Crimes

<table>
<thead>
<tr>
<th>OTHER CRIMES</th>
<th>YEARS</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>2006</td>
</tr>
<tr>
<td>A Drug Crimes</td>
<td>919</td>
</tr>
<tr>
<td>B Firearm Crimes</td>
<td>118</td>
</tr>
<tr>
<td>C Escaping</td>
<td>19</td>
</tr>
<tr>
<td>D Explosives</td>
<td>0</td>
</tr>
<tr>
<td>E Public Order Breaches/Other Summary Crimes</td>
<td>546</td>
</tr>
<tr>
<td><strong>SUB TOTAL</strong></td>
<td><strong>1602</strong></td>
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### Table 7. Summary of the Categories of Crime

<table>
<thead>
<tr>
<th>SUMMARY OF CRIMES</th>
<th>YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL CRIMES AGAINST PERSON</td>
<td>2947</td>
</tr>
<tr>
<td>TOTAL CRIMES AGAINST PROPERTY</td>
<td>4688</td>
</tr>
<tr>
<td>TOTAL OTHER CRIMES</td>
<td>1602</td>
</tr>
<tr>
<td>GRAND TOTAL OF ALL CRIMES</td>
<td>9237</td>
</tr>
</tbody>
</table>
WITNESS PROTECTION IN TANZANIA

Ayub Yusuf Mwenda*

I. EFFECTIVE LEGISLATION AND MEASURES TO PROTECT WITNESSES IN TANZANIA

While in my office sometime in May 2011, a retired woman who resides in Mara region with her husband, a retired civil servant, and their only granddaughter, a secondary school girl aged 16 years old, came to speak to me. Having introduced herself, she told the story that brought her to my office.

On 7 May 2011 her granddaughter, while on her way home from school, was raped by a young man from a neighbouring school; she screamed for help, to no avail. As her assailant was familiar to her, she reported the incident to the police and the suspect was arrested and charged with rape before the resident magistrate court. The woman’s concern before me was for her granddaughter’s security; she narrated that one day her granddaughter, while at school, saw the rapist with his friend, roaming around her school compound as if they were searching for her whereabouts. She was frightened and told her grandmother about the incident upon her return home. As if that was not enough, three days later, the grandmother was summoned by her granddaughter’s school headmaster and was informed that the alleged rapist’s father complained to him (the headmaster) that her granddaughter had concocted a rape story against his son and that he wanted the headmaster to persuade her to discontinue the case, which was already filed in court. She refused and that as there is no witness protection unit in the country, she decided to transfer her granddaughter to another school in a different district.

In another criminal case at Musoma Resident Magistrate Court, an accused person was facing a charge of grievous harm. When the case was fixed for hearing and summonses to appear and testify issued, witnesses failed to appear. Following a prolonged adjournment, the case was dismissed for want of prosecution viz. s.225 [5] of the Criminal Procedure Act; intelligence revealed that witnesses compromised with the accused’s relatives not to appear and testify.

Also, in another case in the same court’s registry, an accused who was arraigned for illegal fishing jumped bail; his sureties were also not found. It was then learnt that the accused was related to a rich and famous political figure who is believed to have bribed the said witnesses and relocated them to another area.

These cases show how in Tanzania witness protection is a rare phenomenon. Tanzania, like other countries, is not spared the challenges obtaining in both ordinary and new forms of organized crimes. More rampant crimes are those related to corruption, sexual and gender-based violence, terrorism, money laundering, etc. It is increasingly observed that the perpetrators of these crimes are not easily traced and, once traced, the investigative and prosecution processes encounter a number of obstacles because key witnesses feel insecure, due to the threats posed to them and their families by the offenders or their relatives. Witnesses don’t show or offer to court material evidence known to them because they are intimidated. Successful administration of justice in criminal matters, like in other judicial proceedings, requires investigation and prosecution processes to collect cogent evidence and have it adduced in court through reliable and credible witnesses. Currently, Tanzania experiences a series of adjournments in criminal cases, which finally either result in dismissal or acquittal of the accused due to non-attendance of witnesses.

As opposed to some other countries, like South Africa, where legislation for witnesses’ protection has been enacted, in Tanzania, none exists, although patches of provisions from different acts bear elements of witness protection.

* Principal State Attorney, Attorney General’s Chambers, Directorate of Public Prosecutions, Tanzania.
Section 22 of The Anti-money Laundering Act No.12 of 2006 states:

“(1) Notwithstanding any other written law, no action, suit, or other proceeding shall lie against any reporting person or any director, officer, employee or representative of a reporting person on ground 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 part whether or not the suspicion proves to be well founded.

(2) In any criminal proceedings brought under this Act, the court may, upon an application by the Attorney General, order

(a) Witness testimony be given through the use of communication technology such as video conferencing''.
(b) Non-disclosure of or limitation as to identity and whereabouts of witness, taking into account the security of the informer or the witness, or
(c) Any other protection as the court may upon application by the Attorney General order’.

(3) The provisions of subsection (1) of this section shall apply equally to the victim in so far as are witnesses.”

The problem with the wording of this section, especially the use of the word “may”, is that the courts are vested with discretion of either issuing the said orders or not; there is a need to amend this section and make it mandatory for courts to issue the said orders upon application by the Attorney General by inserting the word “shall” in lieu of “may”.

Another piece of legislation that provides for witness protection is The Sexual Offences Special Provisions Act No. 4 of 1998. Section 28 of this Act, which amended Section 3 of The Children and Young Person’s Act, Cap 13 reads:

“where a child of less than eighteen years of age is a witness or victim……in a case involving sexual offence…the evidence of the child shall be adduced in proceedings conducted in camera”.

This provision of the law does not provide adequate protection to the victim/witness for the following reasons:

(i) The child is exposed to the accused person as there are no curtains between them, thus he or she or his or her parents are subjected to threats/intimidation;
(ii) Most parents of victims are bribed and refrain from taking their victim children to testify before the court of law.

In the Prevention and Combating Corruption (PCCA) Act, 2007, Section 52 provides for protection of whistle-blowers and witnesses:

“(1) No witness shall in any proceeding for an offence under this Act be regarded as an accomplice by reason only receiving or making payment or delivered by him or on his behalf of any advantage to the person accused or, as the place may be by reason of receiving or making any payment or delivery of any advantage by or on behalf of the accused to or from him.

(2) Where a person

(a) discloses to an officer that a public officer, body corporate or public body is or has been involved in an act of corruption; and
(b) at the time he makes the disclosure believes on reasonable grounds that the information he discloses may be true and is of such a nature to warrant investigation under this act he shall not incur civil or criminal liability as a result of such disclosure

(3) any person who victimizes a person who has made a disclosure under subsection 2 commits an offence
and upon conviction be liable to a fine not exceeding 500,000 Tanzanian Shillings or to imprisonment to a term of not exceeding one year or both

(4) In this act victimization means an act:
   (a) Which causes injuries or loss;
   (b) Of intimidation or harassment;
   (c) Of discrimination, disadvantage or adverse treatment in relation to person’s employment;
   (d) Amounting to threat of reprisal.”

The protection and immunity provided to victims of crime and informers under Section 52 of the Prevention and Combating of Corruption Act of 2007 (PCCA); Section 22 of the Anti-Money Laundering Act No. 6/2006; and Section 28 of the Sexual Offences Special Provision Act No.4 of 1998, to mention but a few, have not yet solved the challenges faced by law enforcement agencies.

Apart from the acts mentioned above, there is other legislation i.e. The Penal Code Act, and Cap 16 of the Laws and the Tanzania Evidence Act that sound unfriendly to witnesses: they provide for punishment against witnesses who either refuse to testify or turn hostile. These provisions pose a problem as most of the eye witnesses do refrain from cooperating to issue their statements before the police and other law enforcement agents.

To me, these pieces of legislation would be of great significance if the legislation for witness protection would come into play; here, whatever happens in court as far as perjury and giving false information to public officers is concerned, the party to blame is the state, for failure to enact the law to ensure safety and security for witnesses.

II. PROBLEMS RESULTING FROM ABSENCE OF LEGISLATION FOR WITNESS PROTECTION

A. Civilians taking the Law into their own Hands
   In Tanzania, civilians have developed tendencies to punish suspects by either assaulting or killing them under the pretext of so-called mob justice. They do so for the reason that once a suspect is arraigned in court they will be released for want of prosecution. This led to the Court of Appeal of Tanzania to make the following statement in one of its decisions:
   “We wish to observe as far as we know there is no civilized country in the World in which the so called mob justice is regarded as justice. Depending upon the particular facts of the case, an attack in the course of administering mob justice which results in the death of the victim may under the law of the country constitute murder, provided common intention existed, it would not matter who inflicted the fatal wound or wounds”.

B. Discharge of Accused Persons in Courts
   Following prolonged adjournments of cases for non-appearance of witnesses, Section 225 of the Criminal Procedure Act, Cap 20, empowers courts to discharge accused persons.

C. Economic Hardship to Witnesses
   Some witnesses who receive threats of harm tend to quit their jobs and go to hide in places where it is hard to acquire new jobs, causing economic hardship to them and their families. For example, In one case at Musoma Resident Magistrate Court, the key witness, who was a watchman at a robbed hotel, received threats from the accused’s relatives which made him quit his job. He went to hide at a village where he cannot find work. His family is suffering as he is the sole breadwinner for the family.

D. Increased Number of Habitual Offenders
   Discharge of accused persons in courts of law tends to encourage other people/offenders to get involved in criminal acts.
III. GOVERNMENT EFFORTS TO ESTABLISH A WITNESS PROTECTION UNIT

In November 2009, the United Nations Office on Drugs and Crimes (UNODC), with the assistance of the Office of the Attorney-General of Kenya, held the first Witness Protection Conference in East Africa. The purpose of the conference was to, *inter alia*, introduce witness protection programmes as a highly effective crime fighting tool to countries in Eastern Africa; to determine the current legislative and operational capacities and resources available for the protection of vulnerable and threatened witnesses and to establish what needs, if any, are available in the region with regard to witness protection related issues.

The results and deliberations in regards to witness protection were discussed during the Regional Ministerial Conference on Promoting the Rule of Law and Human Security in Eastern Africa, held in Nairobi from 23–24 November 2009. The Ministers and Heads of Delegations who participated in the Conference had endorsed the “Regional Programme 2009-2012 on Promoting the Rule of Law and Human Security in Eastern Africa”, through the “Nairobi Declaration” (hereafter called the Regional Programme).

The purpose of the Regional Programme is to support the efforts of States in the Eastern African region to effectively respond to evolving security threats of, among others, organized crime, illicit trafficking, corruption, terrorism, drug abuse, HIV and Aids, and to promote the rule of law and human security.

One of the priority needs identified in the Regional Programme is the provision of technical assistance in strengthening or establishing witness protection programmes.

A request for such support was received from the Director of Public Prosecutions for Tanzania. As such, the assessment was auctioned with the following objectives:

1) Assess the witness and victim protection situation in Tanzania based on interviews and meetings with identified relevant national role-players;
2) Raise awareness and foster discussion between these and some external role players in regards to witness and victim protection by means of workshops;
3) Identify the areas of possible technical assistance to Tanzania in strengthening and/or establishing witness and victim assistance and protection mechanisms and explore the possibility of mobilizing the financial resources needed to implement this programme.

The preparatory assistance mission developed a number of recommendations on the provision of possible UNODC interventions focusing on technical assistance in strengthening or establishing witness protection measures and a witness protection programme in Tanzania.

The proper protection of witnesses and victims in criminal matters is highly reliant on a criminal justice system that functions soundly, through proper investigations, competent prosecution and a well-functioning judiciary that can ensure a speedy trial. Witness protection measures start at the investigation phase through police protection and good investigative practices in the field. In court, this is followed by judicial protection measures and if these two measures fail, the availability of special protection measures like the witness protection programme should be available to intervene and secure the witness and his or her testimony. For this reason, the UNODC also identified related training and resource needs within the greater Tanzanian criminal justice system. These additional issues cover, in very wide terms, the specific needs of actors within the criminal justice system in relation to their being able to fulfil their obligations under national legislation on corruption, anti-money laundering, terrorism, trafficking and organized crime. Specific institutions that mentioned their inherent lack of training are the police, prosecutors and judiciary. UNODC promised to support the office of the Director of Public Prosecutions Tanzania, the Office of the Public Prosecutor Zanzibar, the Tanzanian Police Force and the judiciary with the following interventions.

A. Legislative and Policy Needs

The following legislation and supportive policies and or rules of court need to be developed.

- *Witness and Victim Rights and Protection (including video link evidence)*
- Sexual offences;
- Plea-bargaining legislation.
In developing this legislation in the Tanzanian mainland and Zanzibar, UNODC reviews current legislation to identify possible conflicting sections and to address that at the same time.

1. Witness and Victim Rights and Protection
   There is no legislation or specific policies that deal with witness or victim protection or that acknowledge the rights of victims and witnesses. Although there are provisions in selective legislation that provide for some measures, there is a general acceptance that these measures do not provide sufficient recourse and protection. As such, it is suggested that a comprehensive law is developed to acknowledge the rights of witnesses and victims to protection and to provide extensive options for protection measures before, during and after court testimony. This should also include legislation and rules of court to provide for special measures of protection such as use of video link testimony and a witness protection programme.

   With the long term costs of witness protection programmes being extremely high, the focus should be on providing more sustainable interventions that reach the same goals, such as the use of video link testimony.

   Once legislation has been passed, this should be followed by training of all actors that would use the legislation during the different phases of the criminal justice process.

2. Sexual Offences
   There is no law on family violence, special sexual offences legislation or gender-based violence investigations, and thus no specific policies on dealing with the victims' and witnesses' interaction with the criminal justice system in these matters.

   Sexual offences and their investigation, as well as lack of support mechanisms and protection measures for witnesses, are having a negative effect on prosecutions. As such, any new programmes should focus on policies and the building of capacity within the criminal justice system in investigation and prosecuting sexual offences in relation to the support and protection services offered by police, prosecution services and judiciary.

3. Plea-bargaining Legislation
   There is currently no provision for the use of plea-bargaining within the criminal justice system of Tanzania and it has been identified as a crucial tool lacking in the armoury of the public prosecutors. Plea-bargaining legislation has obvious benefits as it relieves court congestion; reduces the risks and uncertainties in a trial; and it has great information-gathering value – especially in intelligence-driven operations where the police and prosecutor would want to use the testimony of a collaborator of justice. The combination of intelligence-driven investigations, plea-bargaining and witness protection has been used in many countries to successfully prosecute terrorism, corruption, organized crime and mass organized human rights violations.

B. Setting up of a Union Witness Protection Unit
   It is suggested that a specialized Witness Protection Unit is created within the Tanzanian Police Force whose sole task and purpose will be to provide special protection to threatened witnesses and victims in terms of a covert witness protection programme - set up and managed in terms of internationally accepted best practices.

   The creation of this capacity would need to be negotiated with all the relevant state departments as successful witness protection programmes require inter-departmental commitment and ownership. Witness protection in Tanzania would thus need to be an inter-departmental operation between the Tanzanian Police Force as a Union entity, and the separate Directors of Public Prosecutions.

   The suggested comprehensive Witness Protection Act should provide for the creation and special powers of such a Unit and should be developed for both territories in accordance to their unique circumstances.

   Following those suggestions, a separate process of consultations was launched to consult all sectors within the criminal justice system on mainland Tanzania and Zanzibar.
C. Capacity-building of Presiding Officers (Magistrates and Judges)

Magistrates in subordinate courts need training on their general duties as Magistrates and in regards to victims and witness rights and protection. However, before training is done, legislative provision should be introduced on victims’ and witnesses’ rights and protection.

D. Capacity-building of Prosecutors

The prosecution service (mainland Tanzania and Zanzibar) with a great number of young and newly appointed prosecutors, need a lot of specialized training in specialized fields. This would include training on victims’ and witnesses’ rights and protection once legislation has been passed.

Based on those findings, UNODC prepared a proposal for extensive consultations and sensitization with key stakeholders in Tanzania & Zanzibar on creating special witness protection legislation, providing for special protection measures of video link testimony and to create a national or union witness protection unit; this proposal was then forwarded and discussed by the ministerial cabinet to find ways of implementing those proposals. The outcome is yet to be known but we expect drafting of the witness protection legislation will commence soon.
I. INTRODUCTION

Disputes are inevitable and are often decided on the basis of evidence before a court of law. The principle of evidence law is that the burden of proof of proving the accused has committed the offence in a criminal case lies on the plaintiff. Likewise, in civil cases, the burden of proof lies on the plaintiff. The principle of the criminal law ensures that the prosecutor should prove the accused guilty beyond reasonable doubt. The testimony of witnesses is one of the main forms of evidence. They may be justice collaborators; victim-witnesses; other types of witness (innocent bystanders, expert witnesses, or others). As per Nepalese evidence law, all persons, including accomplices, may be competent to be a witness unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, physical or mental diseases or any other cause of the same kind. Witness testimony is taken as evidence only if given before a court of law. Except for expert witnesses, witnesses are usually permitted only to testify to what they experienced first hand. Witnesses are not like other evidence; they are human beings and are often threatened by criminals with reprisals or other harm. This is why the protection of witnesses is imperative to the integrity and success of the judicial process. Witness protection in criminal cases begins with formal police or ad hoc protection. Ad hoc protection measures may continue during testimony in the form of judicial or court protection measures. If the threat is high, special protective measures such as relocation and identity change as a part of formal protection may be employed. The primary objective of witness protection is to protect the physical security of witnesses for the purpose of securing their testimony. Psychosocial health and socio-economic considerations have a prominent role in the protection of witnesses prior to, during and after testimony. Police protection and support are other measures in the investigation and prosecution stages which ensure expedient investigation, confidentiality, monitoring, and which mitigate security issues.

II. CURRENT SITUATION OF WITNESS PROTECTION IN NEPAL

Nepal is in a transition stage. The old tyrannical monarchical reign has been changed to a Republican system through the proposal passed by the Constitutional Assembly on 29 May 2007 at its first meeting. Making the new constitution and bringing the peace process to a logical conclusion is the fundamental task of the Constitutional Assembly, government and political parties. The political situation is very volatile. The political situation is fragile and the absence of a comprehensive witness protection policy contributes to the general climate of impunity and prevailing human rights violations. Relevant provisions on witnesses in the Civil Code, 1963 and Evidence Act, 1974 are only related to the procedure on witness testimony but not directly related to witness protection. Non-government organizations (NGOs), and international non-governmental organizations (INGOs), including the United Nations and some government agencies, have regularly expressed their deep concerns regarding the witness protection policy and recommended numbers of measures to be taken by the government to ensure effective delivery of justice and accountability of both past and present human rights violations. A report presented before Human Rights Council at its Fifteenth session indicates the actual situation of witness protection in this country.

In July 2010, lawyers and human rights defenders working on the case of Arjun Bahadur Lama, a school teacher who was forcibly disappeared and killed by Maoists during the country’s recent decade-long conflict,
were threatened by Maoist cadres after one of the main suspects in the case was refused a visa by the US embassy. The attitude of the chairman of the Maoist party, who publicly denounced the accusations as ‘false’ and accused the human rights organizations of having launched a campaign to ‘defame’ the Maoists potentially encouraged such threats. The same month, lawyers defending the case of Ghan Shyam Mahato, a 14-year old domestic helper who had been cruelly abused by his employers, were manhandled and threatened by relatives of the perpetrators who have close links with the Maoists and who threatened to burn down the lawyers’ practice should the perpetrators be sent to jail.2

The efficacy and efficiency of the justice system depends upon state competence and its ability to prevent witnesses at all stages of the dispute resolution process from being harmed and threatened with harm. Witness protection generally depends on what the state can offer in this regard. Witnesses are often failed by the justice delivery mechanisms. Even the formal institutions of the country is not accountable for their criminal activities.3 Allegations of threats and interference present in the course of criminal justice administration are common.

Explaining the current situation in Nepal, in a South Asian regional seminar and national consultation on witness and victim protection, the Office of the United Nations High Commissioner for Human Rights in Nepal (OHCHR-Nepal) called on the government to establish an effective mechanism to ensure protection of all victims and witnesses of human rights violations and abuse. According to an OHCHR statement, a major obstacle that prevents cases of human rights violation from being successfully prosecuted in courts is the absence of an effective witness protection mechanism. The government has already committed to safeguarding the rights of victims and witnesses, including their protection, through the ratification of a number of international human rights treaties, including the International Covenant on Civil and Political Rights. In the light of the future establishment of the transitional justice mechanisms, it is now time for Nepal to adopt specific measures to make such protection a practical reality.4

As per the interim constitutional mandate the constitution of the Truth and Reconciliation Commission is also yet to be constituted, which hampers the logical conclusion of the peace process and brings past allegations under the judicial process. Criminalization of politics and political criminalization is common, and interferes with witnesses’ ability to deliver a real statement before a court of law.

III. CURRENTLY AVAILABLE MEASURES AND LEGISLATION FOR WITNESS PROTECTION

Witness protection programmes play a prominent role in the administration of justice. At least the following five key elements determine the functioning of state and international criminal justice witness protection programmes:5
1. The financial security and political parameters within which a protection programme functions.
2. The structure and independence of the protection mechanism.
3. The extent to which a programme is able to procure cooperation from state and non-state institutions locally and internationally.
4. The efficacy and efficiency of the justice system as a whole.
5. The nature and scale of the threat to witnesses.

In Nepal there is no specific witness protection programme or policy. However, there are some legal provisions scattered through different acts, regulations, directives and practices which are close to the

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2 A written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization with general consultative status 23 August, 2010 on HUMAN RIGHTS COUNCIL Fifteenth session, Agenda Item 4, General Debate ALRC-CWS-15-01-2010.
3 Army personnel involved in the Bardiya National Park killings, which led to the death of two women and a child under suspicious circumstances in March 2010, have reportedly threatened the victims’ families and witnesses and managed to make them sign an agreement in which they have promised that they will withdraw the First Information Report they had filed against 17 army personnel. Ibid.
4 The Kathmandu Post, 18 December, 2010.
European Model that provides witness protection, plea bargaining, and immunity from prosecution. Generally, witness assistance and support programmes are conducted by the police and non-governmental organizations like Maiti Nepal, Forum for Law and Development (FWLD), and the Legal Assistance Center (LAC). During the investigation, the investigating authorities are not bound to disclose the investigation and the witnesses involved in the case. If there is any threat to any witness during the investigation, it is the duty of the concerned police to protect the witness. As mentioned in the Rule Regarding Government Cases, 1999, it is the duty of the concerned police to present the government witness through a government attorney to the court of law for their testimony. Regarding police (physical) protection of witnesses, there is no specific police protection for witnesses; however, it is the duty of the government to protect its citizens from any physical risk and danger. If the police and public prosecutor think there is the necessity for physical protection of any witness, then police surveillance and patrolling of the witnesses’ area is common. As an ultimate resort, the police can keep the witness in a secure place. Some Procedural Protection measures are also practiced during the trial stage. Nepal respects the right of the accused to confront witnesses as fundamental right; however, there is very limited provision to reduce fear through avoidance of face to face confrontation with the defendant. Section 6 of the Human Trafficking Act is an example in this regard. There is no special measure to make it difficult or impossible for the defendant or organized criminal group to trace the identity of witnesses. There are provisions to limit the witness’s exposure to the public and psychological stress as the hearing is held in camera. Cases like rape and juvenile delinquency are heard in camera and records are also kept confidential as per the guidelines made by the Supreme Court decision of FWLD v. Government of Nepal. After this decision some legislative provisions were made, such as section 7 of the Domestic Violence Act, 2009, and section 27 of the Human Trafficking Act, 2007. There is provision in the Domestic Violence Act to provide psychological counselling in the service centre but separate service centres are yet to be established and police and NGOs are supporting those who need psychological counselling. There is no specific financial assistance programme which covers all the requirements of a witness protection programme. However, there are some provisions, like the Rehabilitation Fund and Rehabilitation Centres, in the Human Trafficking Act. As per the Government Cases Regulation 1999, witnesses presented before a court of law shall get travel and daily allowances equal to any citizen who need psychological counselling. However, there are some provisions, like the Rehabilitation Fund and Rehabilitation Centres, in the Human Trafficking Act. As per the Government Cases Regulation 1999, witnesses presented before a court of law shall get travel and daily allowances equal to any citizen.

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6 Basically there are two models in witness protection programmes. (1) The US model: Despite even the threat of death, US citizens have a legal obligation to provide testimony in civil and criminal proceedings. (2) The European model: provides for witness protection, plea bargaining and immunity from prosecution for those who assist. As explained by Chris Mahony, differences between these models are: Variations in the criminal justice landscape as well as differences in legal systems result in different witness protection systems. Fyfe cites four main elements that differentiate European protection mechanisms from the US model. The first is legislative, where protective mechanisms, like that of the UK, have only recently been enshrined in law despite protective measures and admission criteria being broadly congruent. The second element is the variance in jurisdiction or location. The police are generally provided a greater role but in some cases the judiciary, government or special boards are empowered to admit and protect witnesses. The third source of variance between European and US protection systems is the nature and scale of criminality that threatens witnesses. In Italy, where organized criminality is prevalent, thousands of participants enter the programme, while there are only around 650 per year in Germany. Finally, an attempt to negate differences that impede cooperation among EU member states is evident in the creation of the European Liaison Network, which comprises the heads of protection programmes. Despite its establishment, the formulation of standardized admission agreements and other common areas of practice have proven difficult to conclude. Ibid.

7 Because of the effort of this NGO is in human trafficking sector, its chairperson, Anurada Koirala, was selected as CNN Hero of the Year 2010.


9 Proceedings to be held in camera: (1) If it is so requested by the Victim, the court shall conduct in camera proceedings and hearings of the complaint relating to this Act. (2) During in camera proceedings and hearings pursuant to subsection (1), the claimant, defendant, their legal practitioners and those who are so permitted by the Court, shall be allowed to enter into the court room.

10 In camera court proceedings:
(1) Court proceedings and hearings for an offence under this Act shall be conducted in In-Camera.
(2) Only parties to the proceeding, their attorneys or other non-parties permitted by the court may enter to the court during the proceeding and hearing under Sub-section (1).

to the non-gazetted first class civil servant from the concerned police office.\textsuperscript{12}

During the testimony the court shall forbid the asking of any question which could unnecessarily insult or annoy the witness.\textsuperscript{13} In the course of conducting examination-in-chief or re-examination, a party to the case shall not ask any leading question, which suggests the intended answer, if so objected to by the opposing party. If the court thinks that such questions are necessary to decide the dispute it can give permission for only those question to be asked.\textsuperscript{14} Capacity building and training for officers involved in witness assistance and protection programmes is not common. During training they are trained in various human rights issues and to some extent the subject matter of witness protection is included. Due to the limitation of resources, separate waiting rooms for witnesses are not provided. This issue is being addressed on a case-to-case basis. A special Court disposes corruption cases, and this court follows the Special Court Act’s procedure. This Court shall have to decide a case generally within six months from the date of filing. Likewise, in cases relating to domestic violence, the Summary Procedure Act, 2028 (1971) shall be followed. In our respective court regulations there is special provision for those cases in which anyone who is aged, a woman, a child or disabled gets priority in the proceeding. However, its execution is not so satisfactory. This Truth and Reconciliation Bill is under consideration by the Legislature-Parliament to provide justice to the victims who suffered gross human rights violation during the armed conflict in Nepal. The Witness Protection Bill and Perjury Bill\textsuperscript{15} are drafted and kept on the Nepal Law Commission’s website to collect stakeholders’ suggestions and comments for further improvement. This witness protection bill defines offences, undue influence and other terminologies. This bill also makes the provision for the witness protection committee at the district level under the Chairmanship of the District Police Officer. Other members are the District Attorney and the Officer as designated by the Chief District Officer. This committee formulates and implements the witness protection programme in the district. The provision of non-disclosure of the witness, assessment of the threat, voluntary participation, relocation of the witness, post testimony assistance, psychological support, reintegration, access to records, security agreement, compensation, education and skill development training, confidentiality of the records, exemption from the proceeding and punishment etc., are mentioned in this draft bill. The perjury bill is concerned with the controlling of false statements of the witness.

IV. CRIMINALIZATION AND PUNISHMENT OF OBSTRUCTION OF JUSTICE

Obstruction of justice is the frustration of governmental purposes by violence, corruption, destruction of evidence, or deceit. The general obstruction of justice provisions are tampering witnesses, retaliating against witnesses, and obstruction of pending court proceedings, conspiracy, and contempt. Nepal has no specific law regarding the obstruction of justice. In some laws obstruction of justice is defined as crime. Some of the provisions regarding the obstruction and punishment thereof are mentioned in some legislation. Offence under the Human Trafficking and Transportation Act shall be fined up to Ten Thousand Rupees.\textsuperscript{16} In addition, in course of collection of particulars of narcotic drugs, if any particular or document is not provided by any person, organization-institution or association, demanded by the Narcotic Drugs Control Officer or investigating authority such person, organization-institution or association shall be liable to such punishment which shall be half of the punishment to the actual offender.\textsuperscript{17} Similarly, any one obstructing an investigation of an offence under Corruption case trying officer may punish up to six month imprisonment or fine up to five thousand or both on the recommendation of investigating officer.\textsuperscript{18} The case of contempt of court is tried under the Interim Constitution of Nepal, 2007, Supreme Court Act, 1990 and Administration of Justice Act, 1991.\textsuperscript{19} Except the above mentioned provisions most of the cases are prosecuted under the Some Public

\textsuperscript{12} Rule 15 and 16 of the Rule Regarding Government Cases, 1999.
\textsuperscript{13} Section 51 of Evidence Act, 1977.
\textsuperscript{14} Section 50 of Evidence Act, 1977.
\textsuperscript{15} http://www.lawcommission.gov.np
Last visited on May 25, 2011.
\textsuperscript{16} Section 22 of Human Trafficking and Transportation (Control) Act, 2007.
\textsuperscript{17} Section 17B of Narcotic Drugs (Control) Act 1976.
\textsuperscript{18} Section 51 of Prevention of Corruption Act, 2002.
\textsuperscript{19} The Supreme Court shall be a court of record. The Supreme Court may impose punishment of up to one year’s imprisonment or fine of up to ten thousand rupees, or both, to the person convicted, in cases wherein the Supreme Court has initiated the proceeding of its own contempt or contempt of subordinate courts or judicial authorities if anyone obstructs the
(crime and punishment) Act, 1970. Now a Penal Code is drafted and the following provisions of this code address the obstruction of justice.

1. No person shall create hurdles or obstruction while serving of summonses, notice or arrest warrant or order issued lawfully or while carrying out search, seizure recovery or survey and measurement or conducting a public inquiry (Sarjamin) or while arresting a person as per arrest warrant. Whoever creates hurdles or obstruction as referred shall be liable to a punishment with an imprisonment not exceeding six months or with a fine not exceeding five thousand rupees or with the both.

2. No person shall prevent or obstruct a public official by use of force or manhandling or by any other manner from discharging his/her official duty. Whoever commits an offence referred shall be liable to a punishment with an imprisonment not exceeding six months or with a fine not exceeding five thousand rupees or with the both.

3. No person shall prevent or obstruct in any other manner a person who, after having knowledge that an offense has been committed or is about to be committed, goes to provide information or notice about such an offense to the police or a competent authority. Whoever commits an offence referred shall be liable to a punishment with an imprisonment not exceeding two years and with a fine not exceeding twenty thousand rupees.

V. MITIGATION OF PUNISHMENT AND/OR IMMUNITY GRANTS

A. Mitigation of Punishment

Mitigation is that which tends to soften, temper or make less harsh or severe. Mitigating circumstances surrounding a criminal offence are those circumstances that tend to lessen the apparent badness of the particular crime or the apparent badness of the defendant. Mitigating circumstances are not limited by the law; they may be unlimited in number, as long as they are based upon evidence introduced by either the prosecution or the defense at trial or sentencing.

Mitigating factors are circumstances that do not constitute a defence, legal excuse or justification for the crime, but which decrease its guilt or enormity. A mitigating factor is one that can be considered as extenuating or reducing the degree or moral culpability of the defendant, and tends to support imposition of justice delivery process. Similarly, the Appellate Court can punish up to six month of imprisonment or fined up to five thousand or both in the contempt of court to those who obstruct the justice. District Court can impose punishment up to one month imprisonment or fine up to one thousand or both.

20 Article 2 of this Act prohibits the following acts:

(a) To hinder or obstruct any public servant from discharging his/her official duty by committing battery or riot or by any other way;
(b) To break public peace by committing battery or riot in any public place;
(c) To break public peace or to make obscene show by using obscene speech, word or gesture in public place.
(d) To print or publish any obscene materials by using obscene language or by any word or picture which denotes obscene meaning; or to exhibit or sell or distribute such obscene publication in public place other than the purpose of public health or health science;
(e) To cause undue hindrance in the regular operation of postal service, communication, transportation, electricity supply or any other such essential social service;
(f) To trespass on any governmental or non-governmental office or anyone’s building or land by committing riot; or to stay or remain there in without any authority;
(g) To damage any public or private property by committing riot or pelting stone or by any other way.
(h) To insult women in public place by committing molestation (Hatapata);
(i) To make undue behavior in public place.
(j) To hinder or obstruct anyone or to stop his/her pathway or passage in a condition when he/she is staying anywhere or walking on the road or traveling by any vehicle; or to commit riot, molestation, battery, nuisance or misconduct; or to capture or damage any property or vehicle of such person having with him/her in the said condition with keeping intention to harass or cause trouble him/her;
(k) To threat or scold or tease or to commit any undue act or to express any undue thing to anyone through telephone, letter or any other means or medium with keeping intention to intimidate, terrorize or cause trouble or to insult or defame or harass to him/her;
(l) To commit any act or express anything, which causes intimidation or terror in general public and breaks public peace, by entering or not entering in any public gathering, assembly or demonstration; or to show weapon.
a lesser sentence. This is mainly a judicial function and its legal basis is the court’s authority to determine appropriate sentence however it is depends on the criminal law of the respective state whether there is special legislation may or may not be needed.

The Supreme Court of Nepal has recognized and incorporated the following mitigating circumstances as mitigating factors for reducing the punishment.21

1. Infanticide or killing of newly born child by his or her own mother;
2. Pursuance of suicide pact;
3. Excessive use of the right of private defence;
4. Exceeding the limitation determined by section 14 of the chapter ‘Of Homicide’ of Country Code (Prevocational Murder);
5. Intoxication;
6. Mistaken identity of victim or transferred malice;
7. Mistake of fact or duress;
8. Diminished responsibility; and
9. Battered women syndrome and syndromes arising from social tension.

In the case of Shanti B. K. vs. His Majesty’s Government,22 the Supreme Court has laid down some significant principles regarding the act of sentencing, which may serve as guidelines for the subordinate judges. In this case the Supreme Court has identified the following mitigating circumstances to reduce the punishment as per the 188 No. of the Chapter on Court Management of Country Code.23

1. Whether or not the murder has been committed in a premeditated manner and with a motive of killing;
2. Murder committed with cruelty and torture;
3. Nature and degree of crime;
4. The motive and social background of the offender;
5. Circumstances around commission of the crime;
6. Age of the offender;
7. Physical, mental, economic and family conditions of the offender;
8. Opinion or feelings of the victim;
9. Damage or loss caused to the victim or the society;
10. Past criminal record of the offender;
11. Whether or not the accused has assisted the judicial process by revealing the truth in the court;
12. Whether or not the offender has experienced the feelings of remorse or repentance following commission of the crime;
13. Whether or not the crime has been committed at the instigation or under the pressure caused by someone else; and
14. Other appropriate factors relating to the particular case.

B. Immunity Grants

Law gives immunity to some people as per their relationship and nature of work. There are some

23 This provisions is as follow which is typical in criminal jurisprudence:
Despite confession by the accused in a case involving punishment of imprisonment for life with confiscation of entire property or of imprisonment for life pursuant to law, where the adjudging chief of office has a ground to suspect that it might be an accident, or in view of the circumstance of commission of the offense, the punishment as referred to in law will, in his or her view, be so severe if it is imposed on he accused and lesser punishment should be imposed on him or her, then the chief of office shall determine the punishment imposable by law, and explicitly set down in the reference memorandum such opinion as he or she has made, along with the reason for the same, and judgment shall be referred accordingly. Even the authority making final verdict may also determine punishment that is lesser than that specified by law if the authority also holds such opinion.
provisions in our evidence act which grants immunity from prosecution to certain people. Except those provisions Nepalese laws do not allow immunity to the witness. As per those provisions the parents, son, daughter, husband or wife of the party to the case shall not be compelled to be a witness against such party. Likewise any communication made during their marriage is also immunized. No judge shall, except otherwise order has been made by the Superior Court, be compelled to answer any question which came to his or her knowledge or regarding any act he or she performed in the court as such judge. Expert, public personnel police are not compelled to be a witness to the extent which jeopardizes their profession. Communication between the lawyer and client is also granted immunity. Except above mentioned provision witness shall have to answer.

Except the above mentioned provisions immunity is limited against self incrimination. Immunity from prosecution occurs when a prosecutor grants immunity, usually to a witness in exchange for testimony or production of other evidence which should be accurate, truthful and complete cooperation. It is immunity because the prosecutor essentially agrees to never prosecute the crime that the witness might have committed in exchange for said evidence.

The prosecution may grant immunity in one of two forms i.e. complete immunity (completely protects the witness from future prosecution for crimes related to his or her testimony) and Partial immunity (prevents the prosecution only from using the witness’s own testimony or any evidence derived from the testimony against the witness).

In Nepalese context there is complete as well as partial immunity provision in some legislation that helps in investigation and prosecution. Human Trafficking and Transportation (Control) Act, 2007 prescribed the partial immunity by reducing the punishment 25 percentage who substantially cooperate the investigation and prosecution agencies.24

Similarly, section 18C of Narcotic Drugs (Control) Act, 1976 prescribed complete as well as partial immunity.25 In addition to the above mentioned provisions section 55 of Prevention of Corruption Act 2002,26 the investigating authority may give complete or partial remission in the claim of punishment with regard to the accused that assists in the process of investigation carried out under this Act having him presented as a witness on its behalf.

VI. PROTECTION OF WHISTLE-BLOWERS

A whistle-blower is a person who tells the public or someone in authority about alleged dishonest or

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24 Provision of section 21 is as follows.

Exemption from penalty:

(1) If an accused charged of committing an offence under this Act accepts an offence and co-operates the police, public prosecutor or court to collect evidence and arrest other accused or abettor, and if he/she has committed the offence for the first time, court can reduce the punishment up to twenty five percent so prescribed for that offence.

Provided that, if the assistance is not proved by the evidence or he/she gives statement against the support provided to the police or prosecutor, a case may be registered notwithstanding anything in the prevailing laws.

(2) Notwithstanding anything contained in Sub-Section (1), there shall be no reduction in claimed punishment, pursuant to this section, in the following conditions:

(a) To provide exemption in punishment to the principal accused,

(b) If the case involved is trafficking or transportation of a child,

(c) If exemption in the punishment has already been provided 21 of this Act is as follows:

25 18C Punishment may be remitted: Notwithstanding anything contained in prevailing laws, any person who helps in finding the principal offender and assists by providing the information and clue about gang in which he/she, him/herself engaged or other gang involved in the transaction of narcotic drug punishable under this Act, if there is a demand for full or partial remission of punishment in the charge-sheet, the judicial authority also may remit in punishment accordingly.

26 This provision is as follows:

The investigating authority may give complete or partial remission in the claim of punishment with regard to the accused who assists in the process of investigation carried out under this Act having him/herself presented as a witness on its behalf.

Provided that in case other evidences do not prove his assistance or in case he becomes hostile later on, the case may be filed against him again notwithstanding anything contained in this Act or in other prevailing laws.
illegal activities/misconduct that may be a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations, and corruption, occurring in a government department, a public or private organization, or a company. Whistle-blowers are commonly seen as selfless martyrs for the public interest and organizational accountability. Most whistle-blowers are internal, and believe in taking action with respect to unacceptable behavior within an organization. Some whistleblowers are external and report misconduct to lawyers, the media, law enforcement agencies or watchdog agencies or the state.

The concept of a whistle-blower is new for Nepalese context and not very often used. We do not have specific and comprehensive whistle-blower protection act includes definition of employee, protected disclosers, subject matters of disclosers, protected activities and so and so. An NGO called Pro-Public is advocating for whistleblower protection in Nepal. A Bill has been drafted for lobbying purpose. The proposed Bill speaks of rewarding the whistle-blower with up to 10000 rupees for accurate information, and punishing a whistleblower with up to 5000 rupees for fake reporting. Apart from the rewards and punishments, the Bill also contains a number of provisions related to the process of making complaints and providing due protection to whistle-blowers.

However, there are some legal provisions which are related to whistle-blower. Section 56 of Prevention of Corruption Act, 2002 has a provision for the protection of informers. This provision, however, is largely confined only to the breach of secrecy. The existing Act makes some provision for information disclosure, but the provisions in the Act are meant more to discourage false reporting rather than encourage and protect accurate reporting. Section 49 of the Act makes provision for imposing a fine not exceeding 5,000 rupees for anyone filing false or wrong complaints with an intention to cause losses, damage or harassment. Section 58 makes provisions for distributing rewards but it is not specific in terms of amounts to be awarded to the whistle-blower.

The Right to Information Act, 2007 introduced this concept in Nepalese jurisprudence. This act defines “Public body” very widely and section 29 of the same act provides the protection of whistle-blower. The concept of “shoot the messenger” is widespread in Nepalese culture in this regard. If the employee discloses any illegal misconducts of the organization concerned, even if the law protects them from employer retaliation, they may be punished with suspension, demotion, termination, wage reduction and/or harsh misconduct by other employees.

27 This provision is mentioned that Notwithstanding anything contained in the prevailing laws, no action shall be taken against a public servant for disclosing confidentiality under the law relating to the terms and condition of his/her service who gives information for taking legal action in case of corruption committed or going to be committed or for preventing to be committed.
28 As per this act “Public Body” means the following body and institution list:
(1) A body under the constitution,
(2) A body established by an Act,
(3) A body formed by the Government of Nepal,
(4) Institution or foundation established by the law, public service.
(5) Political Party or organization registered under the preventing law.
(6) Body Corporate under the full or partial ownership or under control of the Government of Nepal or such body receiving grants from the Government of Nepal.
(7) Body Corporate formed by a Body established by the Government of Nepal or the law upon entering into an agreement,
(8) Non-Governmental Organization/Institutions operated by obtaining money directly or indirectly from the Government of Nepal or Foreign Government or International Organizations/Institutions,
(9) Any other Body or Institution prescribed as Public Body by the Government of Nepal by publishing notice in the Gazette.
29 Section 29 of this Act is as follows: Protection of Whistleblowers:
(1) It shall be a responsibility of an employee of a Public Body to provide information on any ongoing or probable corruption or irregularities or any deed taken as offence under the prevailing laws.
(2) It shall be the duty of the information receiver to make the identity of whistleblower in accordance with Sub-Section (1) confidential.
(3) The whistleblower shall not be terminated from his/her post or punished with any legal responsibility or caused any loss or harm for giving information pursuant to Sub-section (1)
(4) If any punishment or harm is done to the whistleblower against Sub-Section (3), the whistleblower may complaint, along with demand for compensation, before the commission for revoking such decision.
(5) While investigating the complaint pursuant to Sub-Section (4), the Commission may order to revoke the decision of removal from the office if so removed from office and for the compensation if any damages caused to the whistleblower.
VII. INTERNATIONAL OBLIGATIONS OF NEPAL

Nepal has ratified the UN Convention against Corruption of 2003\textsuperscript{30} and UN Convention against Transnational Organized Crime, 2000.\textsuperscript{31} Articles 24 and 25 of the United Nations Convention against Organized Crime (UNTOC) and Article 32 of the United Nations Convention against Corruption (UNCAC) require States Parties to take appropriate measures to provide effective protection for witnesses. These two conventions state two measures for witness protection: physical protection of witnesses, including relocation and non-disclosure or limiting the disclosure of information concerning the identity and whereabouts of witnesses, and an evidentiary rule to permit witnesses to testify in a manner that ensures their safety. As per the article 9 of the Treaty Act, 1990\textsuperscript{32} as a party to these conventions Nepal is obliged to take necessary measures to protect witnesses, including legal provisions.

VIII. RECENT PROBLEMS AND CHALLENGES

Participation in a trial as a witness can be a source of great anxiety for many people and may seriously affect the quality of their deposition. The absence of comprehensive witness protection policy and other measures leads to the following problems:

1. Police, prosecutors and justice authorities have not institutionalized regular, early meetings with prosecution witnesses to determine their physical as well as psychological well-being. Such meetings are particularly helpful in the case of child or juvenile witnesses and when witnesses suffer from significant impairment of intelligence, social functioning or a physical disability or disorder affecting the quality of the delivery of their evidence.

2. Witness protection mechanisms are facing the lack of proper training and equipment to provide adequate protection for individuals at risk and have often failed to do so, even when serious concerns regarding the safety of a particular person have arisen.

3. The absence of a witness protection mechanism has made victims and witnesses vulnerable to threats and intimidation and has also endangered the work of all those who speak out against abuses: notably human rights defenders, lawyers and journalists.

4. The absence of any security arrangements for victims during police investigations even results in allegations of torture being investigated by police officers belonging to the same police station as the alleged perpetrators. These perpetrators are also typically not transferred to another police station or suspended during investigations, making victims of torture extremely vulnerable to threats and reprisals.

6. State institutions are not friendly to the witness in terms of time and other physical facilities.

7. The government has remained passive concerning the witness protection programme, including the Witness Protection Act and Perjury Act. Nepal has accepted the obligation to protect witnesses by ratifying the UN Convention against Corruption and the UN Convention against Transnational Organized Crime.

8. Criminalization of politics and political criminalization is common and influences the witness’ statement and ultimately hampers the criminal justice system.

\textsuperscript{30} Nepal ratified this convention on 13 February, 2011.
\textsuperscript{31} Nepal ratified this convention on 24 June 2011.
\textsuperscript{32} Art.9 of the Treaty Act is as follows:
Treaty Provisions Enforceable as good as Laws: (1) In case of the provisions of a treaty, to which Nepal or the Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament. Inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.
(2) Any treaty which has not been ratified, accede to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement.
9. The main dispute resolution mechanism for the transition period i.e. the Truth and Reconciliation Commission, is yet to be constituted.

10. In the absence of a comprehensive whistle-blower act, and the bad governance of the public sector as well as the private sector are not disclosed properly. The case of bad governance of the banking sector is very crucial in this regard.

11. Nepal is facing financial problems due to limited economic resources and may not be able to introduce witness friendly infrastructures.

**IX. POSSIBLE WAYS FORWARD**

Nepal has no specific witness protection programme. The existing provisions are traditional and not sufficient to establish an effective, efficient, independent and impartial witness protection mechanism and policy. The following points are possible ways to address the issue.

1. The Witness Protection Bill should be passed by parliament immediately, with necessary amendments to establish an effective, independent and impartial witness protection system, capable of providing protection to victims and witnesses of crimes, including human rights violations attributable to state agents and members of other powerful and/or armed groups.

2. Ensure that the investigation and prosecution for alleged crimes during the insurgency are addressed in future by constituting a Commission on Enforced Disappearances and a Truth and Reconciliation Commission equipped with strong witness protection mechanisms.

3. Provide law enforcement agencies with appropriate training and resources to enable them to ensure the protection of vulnerable individuals. Such training should include interviewing techniques, discussion of court arrangements and familiarization with trial procedures.

4. Investigation should be prompt, impartial and independent and should address intimidation, threats and attacks against victims, witnesses, lawyers and human rights defenders who are engaged in working to ensure justice and dismantle Nepal’s entrenched system of impunity.

5. A witness management plan in addition to the National Witness Protection Program should be made for those who do not qualify for the formal witness protection programme.

6. Political criminalization and criminalization of politics should be controlled so as to make the environment friendly for witnesses to deliver their real statement and produce evidence to the court.

7. A separate and comprehensive whistle-blower act should be enacted to secure protection of whistle-blowers.

8. Nepal should approach the international community to cooperate in matters like relocation of witness and financial support.

**X. CONCLUSION**

The efficacy and effectiveness of any country’s criminal justice system is dependent upon the cooperation of witnesses. Witnesses become reluctant if there are no witness protection measures to protect them from intimidation, threats and reprisal. No one wants to be in danger for helping others. Maintaining the law and order of the country is the prime responsibility of the government. Likewise, criminal territory is not limited by political borders; particularly organized crime. The need to protect witnesses and secure their cooperation is universal but it differs depending on the situation of each country. In this regard, Nepal should have to address the above mentioned problems by introducing a comprehensive witness protection programme and policy.
REFERENCES

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 UNCAC. 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/acused'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 use 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.
I. INTRODUCTION

It is important to implement witness protection measures, because witnesses’/victims’ support and protection is key to the success of the criminal justice system.

The criminalization of obstruction of testimony is equally important as the actual protection of witnesses because that will ensure that the witness is protected.

Our group has been assigned to discuss the topic “Effective Measures to Secure Protection and Cooperation of witnesses”, with particular attention to be focused on non-organized crimes such as sex crimes, crimes involving child victims, or violent crimes. We agreed to conduct the discussions based on the following agenda: 1) Effective legislation and measures to protect witnesses; 2) Criminalization and punishment of obstruction of justice.

II. EFFECTIVE LEGISLATION AND MEASURES TO PROTECT WITNESSES

A. The Current Situation

1. Police Protection of Witnesses

   From the discussion, it was verified that the police force of each country has a primary responsibility to ensure effective measures to secure protection and cooperation of witnesses. Some examples are police patrols for witnesses and escort of witnesses and victims. One good example of physical protection was provided by Hiroshima Prefectural Police Department.

2. Procedural Protection Measures at Trial Stage

   Most participants’ countries have measures to limit witnesses’ exposure to the public or psychological stress and many countries have measures to reduce fear through avoidance of face-to-face confrontation with the defendant and measures to make it difficult or impossible for the defendant to trace identity of the witness. Existing legislation in Japan permits the use of screens during the testimony of witnesses. Additionally, other measures include the giving of evidence via video link, the likelihood of witnesses being accompanied in court, separate waiting rooms for witnesses, legislation to prevent disclosure, financial assistance, psychological support, and coordination among relevant government agencies.

   All participants’ countries consider it important to balance witness safety and the defendant’s right to a fair trial; for example, all countries have cross-examination.

3. Comprehensive Witnesses Protection Programme

   Only one country, El Salvador, has legislated to support a standardized witness protection programme. In
other countries, existing legislation and other measures are used for witness protection.

4. Other General Matters

Some countries have programmes of training on witness assistance and their protection as well as international cooperation with regard to the protection of witnesses.

It is observed that some countries have measures to enable the prompt disposition of pending cases, namely pre-trial conference procedures, which clarify arguments and disclosure of evidence.

B. Problems and Challenges

1. Police Protection of Witnesses

Some countries have special guidelines for protection of witnesses. Countries which do not have such guidelines have to deal with protection of witness case-by-case.

Most participants’ countries have insufficient training for police officers regarding witness protection.

2. Procedural Protection Measures at Trial Stage

There are a few countries which do not have any measures to reduce the hostility a witness may face when testifying.

Although some measures are employed, they do not include voice distortion or concealing identifying information of the witness from the defendant.

When introducing countermeasures mentioned above, balancing witnesses safety and the defendant’s right to a fair trial is an important consideration.

3. Comprehensive Witness Protection Programme

Only one country has a comprehensive witness protection programme. The others protect witnesses case-by-case.

The country with a comprehensive witness protection programme still has problems with international relocation resulting from ineffective implementation treaties. The other problem is change of identity of witnesses, resulting from lack of guidelines.

4. Other General Matters

There is a necessity to improve capacity building and training for officers involved in witness assistance and protection.

All participants observed that its a necessity to cooperate in witness protection.

The majority of the participants’ countries have a lengthy trial process, which in some cases results in witnesses being reluctant to participate in the criminal justice system.

Likewise, those countries are also facing financial constraints, because this programme is expensive to effectively implement.

C. Countermeasures

1. Police Protection of Witnesses

Establishing specific witness protection guidelines, forming a special unit for witness protection, regular patrols, creating a special hotline for witnesses and adequate training are all essential countermeasures which could be adopted to address issues related to police protection of witnesses.

In order to prevent secondary victimization in cases of sexual offences, training courses for police officers should be provided.
2. Procedural Protection Measures at Trial Stage

Regarding the countermeasures to reduce fear through the avoidance of face-to-face confrontation with the defendant at the trial stage, there are measures such as the giving of testimony via closed circuit TV or video conferencing, the use of pre-trial statements instead of in-court testimony, the removal of the defendant from the courtroom, the provision of separate waiting rooms, and recorded testimony and shielding. These are all significant measures that could be employed to reduce the fear experienced by some witnesses.

In the identification of countermeasures to make it difficult or impossible for the defendant to trace the identity of witnesses, effective measures may include the use of anonymous testimony, limiting the disclosure of information that can be linked to the witness’ identity, punishing persons who willingly provide information on witnesses to the defendant and distortion of the witness’ voice or face.

To limit witness exposure to the public and psychological stress, effective countermeasures could include exclusion of the public from the courtroom during trial (evidence in camera), or allowing the presence of an accompanying person to provide support for the witness. Some measures to reduce fear through avoidance of face-to-face confrontation with the defendant are also applicable for limiting the witness’ exposure to the public and psychological stress.

The above measures are also effective in terms of child abuse and sex crime.

We have to consider the rights of the defendant as well as the rights of the witness, for example: allow the presence of the defence lawyer at all stages of the process and allow the witness an accompanying person during the trial; ensure cross-examination; and disclosure of relevant information to the defendant’s counsel.

3. Comprehensive Witness Protection Programme

According to the visiting experts, Mr. Gaña, Ms. Kramer, and Mr. Courtney, and the experience of El Salvador, and based on the discussion we had in our group, we identify the following measures as a comprehensive witnesses protection: relocation, change of identify, financial assistance, psychological support, coordination among the relevant governmental agencies, work and study relocation, medical assistance, job training for witnesses and training for police officers.

4. Other General Matters

In an effort to ensure the best results from a witness protection programme the following points are essential: family protection and assistance, safe houses and shelters, training for officers involved in witness assistance and protection, international cooperation (e.g.) treaties and prompt disposition of pending cases.

D. Recommendations

- The police should protect witnesses if necessary.
- It is crucial to introduce legislation and establish organizational structure of witness protection measures.
- The witness protection measures are necessary for all countries, and countries that do not have this policy should implement it. Countries that have such policies in place should consider their own situation and make the necessary improvements.
- A comprehensive protection programme is an effective system to protect the witness; on the other hand, when we looked the financial burden, and the burden placed on the witness, it should be considered as a last resort, therefore at the introduction of the programme, we have to carefully examine its necessity. If the programme is not necessary, we should take other specific measures to protect the witness.
- We have to ensure sufficient state budget for running the programme, and the enactment of legislation that provides for the proceed of crime to be utilized for witness protection budgets.
- For victims of sex crime it is important to prevent secondary victimization and in the case of child victims it is important to implement measures specifically for children so that sex crime victims and children can feel comfortable making a statement in Court.
III. CRIMINALIZATION AND PUNISHMENT OF OBSTRUCTION OF JUSTICE

A. The Current Situation

Obstruction of justice is criminalized in all represented countries but one, based on the provisions outlined in UNTOC and UNCAC, in addition to their existing legislation.

In some of the countries, when unjust acts are taken against witnesses or sex crime victims, the punishment imposed on those perpetrators is severe, based on the stipulations in the legislation.

Most of the countries, with the exception of one, define the offence of witness interference as obstruction of justice.

For one country, among the actions that are stipulated under UNCAC and UNTOC, there are measures against assault and intimidation, but there are no particular measures that punish unreasonable benefits or the promise of unreasonable benefits.

B. Problems and Challenges

In one country, providing undue advantage or promising to provide undue advantage to the witness for the purpose of making or encouraging a false statement or not making any statement are not penalized. In other countries, there is effective legislation, but some countries have problems when it comes the enforcement of such legislation.

C. Countermeasures

It was observed that in one country there is a need to establish a separate provision for providing or promising to provide undue advantage.

For those countries which have problems with the enforcement of legislation, improvement measures must be taken, so that the law can be enforced more easily and effectively.

D. Recommendations

In order to ensure the cooperation and protection of witnesses, it is necessary to implement correct measures to criminalize obstruction of justice, and in order to realize this with regard to countries in which legislation is not adequate, improvement is necessary. As for countries in which legislation is adequate but enforcement is not, enforcement must be improved so that legislation is effective.
PART TWO

Work Product of the 14th UNAFEI UNCAC Training Programme
“Effective Legal and Practical Measures against Corruption”

UNAFEI
I. INTRODUCTION

The Corrupt Practices Investigation Bureau (CPIB) is the sole agency responsible for combating corruption in Singapore. CPIB was set up in 1952, before Singapore gained independence from the British. It is one of the oldest agencies in the world dedicated to combating corruption, and we have developed over the past 59 years to our current state today.

In this paper, I will touch on the development of the approach in fighting corruption in Singapore. As a whole, the overall strategic approach to fighting corruption applies across the board, with no distinction made on whether it is petty corruption or high level corruption. No exception is made for anyone and there are no “black areas” the law cannot deal with. In our experience, the same commitment to action is necessary in order to be successful in curbing corruption at all levels.

II. CORRUPTION SITUATION

Before June 1959, Singapore was part of the British Empire. Corruption thrived during the colonial period. Local junior officers, such as police, customs, immigration and Inland Revenue officers, were routinely on the take. During World War II, the Japanese military occupation bred corruption further into the Singapore society, as practices of bribery could be justified because it was all about survival. After World War II, corruption spread among civil servants because the risks of detection were low, the punishments mild and the rewards great. Corruption had become a way of life for many Singaporeans, to enable them to cope with their low salaries and rising inflation.

The breakthrough came only after we attained self-government from the British on 3 June, 1959. The government realized then that corruption was caused by both the incentives and opportunities to be corrupt. Therefore, measures to eradicate corruption were designed to minimize or remove these two causes. As a result, they initiated a comprehensive anti-corruption strategy - the law was strengthened, rigorous enforcement took place and government administration was improved.

After almost 60 years of relentless fighting against corruption, our Singapore government has managed to minimize the level of corruption. Right now, corruption is a fact of life rather than a way of life, as corruption still exists, but at the individual rather than systemic level. Today, we have one of the cleanest public sectors in the world.

We are also one of the least corrupt nations in the world, together with Denmark and New Zealand, based on Transparency International’s Corruption Perceptions Survey in 2010, and have been the least corrupt country as ranked by the Political Economic & Risk Consultancy (PERC) for the past ten years.

Some of you may be wondering: ‘How did Singapore manage to transform itself from a corruption infested city into one of the least corrupt nations in the world?’ According to our former Minister Mentor, Mr. Lee Kuan Yew, Singapore is what it is today because of its system of transparency and integrity.

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III. POLITICAL WILL

In addition, political will is a key ingredient in the transformation effort from Singapore’s corruption infested past. Without the unwavering determination to overcome corrupt systems, no anti-corruption strategy will work. We are fortunate that our government gives their fullest support to CPIB to investigate and prosecute anyone, including ministers, who are involved in corruption.

In 1975, CPIB convicted Wee Toon Boon, then a serving Minister of State in the Government of the ruling party. Such action demonstrated to the public the determination of the government to keep Singapore clean. And this has won the public’s support in the ongoing fight against corruption. With the efforts put in and with public support over the years, corruption was thus brought under control.

IV. FRAMEWORK OF CORRUPTION CONTROL

Besides strong political will as the foundation, we are supported by the following factors, which form the Anti-corruption Strategy:

- Effective Anti-Corruption Acts (Anti-Corruption Laws)
- Effective Anti-Corruption Agency (Independent CPIB)
- Effective Adjudication (Independent Judiciary) and
- Efficient Government Administration (Responsive Public Service).

A. Effective Acts (Laws)

Effective laws provide the basis for the fight against corruption. The law must define corruption offences and their punishments and the powers of enforcement against it. As society and the environment changes all the time, it is necessary to review the law periodically to ensure that it is up to date. The powers of enforcement must be well provisioned so that the law will have bite.

In Singapore, we rely on two key acts to combat corruption. The first one is the Prevention of Corruption Act (PCA). This governs the primary offences of corruption and the powers of the enforcement agency, which is CPIB. The second act is the Corruption, Drugs Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) which provides for the seizure and forfeiture of proceeds which a person convicted of corruption cannot satisfactorily account for. The PCA was enacted in 1960 to replace the previous Prevention of Corruption Ordinance. Since then, the Act had undergone numerous amendments to increase the powers of investigation of the Corrupt Practices Investigation Officers, enhance punishments for corruption and to plug loopholes to prevent exploitation by criminals.
The law must support law enforcement with a cutting edge. This is vital as corruption offences are particularly difficult offences to deal with. Unlike general crime where there is a victim who tells us everything that happened, in corruption offences, both the giver and the receiver are guilty parties who have the motivation to hide and not tell the truth. This makes investigation and evidence gathering more challenging. To be successful, the law must provide sufficient teeth for law enforcement.

The principal law we use is the Prevention of Corruption Act. The following are the distinctive features which may differ from anti-corruption laws in other countries:

a) *The Act allows CPIB to investigate corruption in both the public and private sectors & we can deal with both the giver and the receiver.* We have dealt with cases in the private sector since the early beginnings. In some countries, anti corruption agencies do not deal with private sector. It is of strategic importance for Singapore to keep Singapore companies clean because if not, other countries will not want to trade with Singapore and they will not want to invest money in Singapore. We also deal with givers of bribes. If we don’t, they may continue to give bribes and escape punishment and this will worsen the corruption situation due to the demand-supply dynamics.

b) *There is a Presumption clause – Presumption of corruption when a public officer is found to have received bribes.* What this means is that a public officer charged in court has the duty to explain to the court that what he received was not received corruptly. If he fails to explain to the satisfaction of the court, he would be presumed to have received the money corruptly. Of course, we do not just depend on this to secure conviction but we will bring all the evidence we have to court and this presumption clause is an additional help for prosecution.

c) Next, *an acceptor of a bribe would be considered guilty even if he, in fact, had no power, right or opportunity to return a favour to the bribe giver.* This came about because some corrupt offenders took bribes and then were unable to deliver the expected favour. Even so, they should not escape punishment.

d) *The Act forbids the use of customary practices, for example, giving/accepting of red packets in Chinese New Year as an excuse for giving/accepting bribes.* No one can go to court and be excused by saying that the bribe disguised as red packet is goodwill money and nothing illegal. In the past, CPIB was very busy during Chinese New Year and had to lookout for bribes disguised as goodwill money. Nowadays, with the enforcement actions taken, the public knows and offenders will not try to use the festive occasion as a camouflage for bribe taking.

e) *The Act also empowers the Court to order bribery receivers to pay a penalty equal to the amount of bribe received apart from punishment in the form of fines and/or imprisonment terms.* This means if accused took $1 million dollars, he has to surrender back that amount. This emphasized the principle that the accused ought not to enjoy any benefit from any corrupt activity.

f) *When a person is found to have committed corruption offence, the Principal could recover the amount of bribe as a civil debt.* An example is the manager of a MNC convicted of corruption offence for receiving kickbacks for contracts he granted to others. He was sentenced to 10 months’ imprisonment and ordered to pay a penalty of about $300,000, being the total of bribes received by him. After the sentencing, the MNC commenced civil action under the Prevention of Corruption Act to recover the bribes from the Manager. The manager appealed to the Court of Appeal against the claim on the ground that he had already paid penalty to the State for the bribes he had received and he could not be liable to pay the claim to the MNC, otherwise it would be tantamount to making him pay twice for the same bribes. However, his appeal was dismissed by the Court of Appeal. The court ruled that this was not double jeopardy and the law allowed for it. The manager is thus still liable to pay the MNC.

g) *The Act renders Singapore citizens to be liable for punishment for corrupt offences committed outside Singapore and to be dealt with as if the offences had been committed in Singapore.* We have dealt with cases where Singaporeans commit corruption abroad and prosecute them in Singapore.
Besides the PCA, we have the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA in short) which was enacted in 1999. The principle for the Act was to ensure that corruption does not pay. It also covers the confiscation of benefits not only from corruption but also drug offences and other serious crimes. The CDSA provides the Court with powers to confiscate the pecuniary resources and properties when a person is convicted of corruption offence and cannot satisfactory account for those resources to be confiscated. The objective is to ensure that the perpetrators will not benefit from corruption.

B. Effective Enforcement

Another important aspect in fighting corruption is to take effective enforcement actions. If there are tough laws but lax enforcement, corruption will still flourish because the corrupted escape detection and investigation. It is therefore crucial to devote priority and attention to setting up an effective enforcement agency.

A key success factor in Singapore’s anti-corruption effort is the setting up of an independent and strong anti-corruption agency. If you have got very strong enforcement, there will be very high probability of being caught if you commit a corrupt act and hide a stash of money.

In Singapore, CPIB is the only agency empowered to investigate corruption offences. Any other law enforcement agency which comes across or receives reports and information on corruption will have to hand over the case to CPIB.

CPIB has independence of action. We can investigate any person or corporation in government or private sector, no matter who he is and which position he is holding. CPIB reports directly to the Prime Minister – this is important as it will block any undue interference from any person and to ensure that CPIB operates without fear or favour, regardless of race or social status. CPIB’s independence of action is also guaranteed by the Constitution, which allows the Elected President of Singapore to authorize Director CPIB to investigate the Prime Minister of the day if he prevents the carrying out of a corruption investigation against any of his Senior Officials, Minister or himself.

Our Bureau slogan, “Swift and Sure”, is the message to the public and corrupt offenders that there will be swift action, certainty of results and justice will take its course. CPIB is always committed fully to our mission of fighting corruption through swift and sure action. Swift action means we will take prompt action on a corruption complaint while sure action means when we look into the complaint, we will investigate the matter thoroughly and get to the bottom of it to seek the truth.

Singapore has adopted an anti-corruption strategy to ensure that anyone involved in corruption will be detected, investigated, prosecuted and punished. We have successfully prosecuted corrupt offenders and sent them to serve time in the jail. This stance has served as a deterrence to like-minded persons not to indulge in corrupt activities.

Having a strong capability is easier said than done. Our current success does not guarantee future success. In a way, it is a race against the corrupt and the criminal-minded as they resort to use of technology and more sophisticated modus operandi to commit corruption. There are more and more ways to hide corrupt proceeds. It is incumbent on the enforcement agency to build enough capability to deal with them. For example, in terms of computer forensic capability – we need to have the ability to extract evidence from computers, financial investigation capability to follow the money trail and uncover hidden corrupt proceeds.

C. Effective Adjudication

Sure detection and strict enforcement of laws, no matter how effective, must however, be supported by effective adjudication. Aided by the tough laws, our judiciary recognizes the seriousness of corruption and it has always adopted a deterrence stance towards corrupt offenders. Any public officers convicted of corruption will usually be sentenced to jail. In recent years, even offenders from the private sector convicted of corruption offences were sentenced to serve time in the prison.
All our court proceedings are open and in public hearings. There is transparency in our Judiciary and the processes in hearing cases are made known to the public. Decisions are documented and subject to public scrutiny. Both the prosecution and the defence can appeal against any decision made by the Courts.

Judgments from the court will provide some benchmarks as to the severity of offences and their corresponding sentences. For instance, in a recent Appeal case involving a private banker convicted of corruption involving bribes of $150,000 (Wong Teck Long vs PP), when the accused appealed against his conviction and sentence, the High Court not only dismissed the accused’s appeal but enhanced his original sentence from 4 months’ to 15 months’ imprisonment. In passing this judgment, the CJ said:

“To safeguard the overall public confidence in the integrity of our banking and financial industry as well as Singapore’s reputation as a regional and financial hub, punishment for deplorable and corrupt acts, such as that of the appellant, must be swift and harsh so that a strong message will be sent out to the offender at hand and would-be offenders that Singapore does not, and will not, without exception, condone corruption.”

In addition to the fine or jail sentence imposed, the court will also impose a financial penalty on the offender equal to the amount of bribes the offender had taken. So this again sends a clear message that the offender is not allowed to enjoy any of the benefits or gains obtained.

On top of this, cases involving government procurement or contracts, administrative actions will be taken to cancel the contract and/or to debar suppliers who were convicted of corruption offences from future government contracts for up to five years.

Apart from criminal sanctions, the Prevention of Corruption Act also provides for recourse to civil suit for recovery of bribe monies in addition to criminal prosecution. This has been tested in the court. The CPIB had prosecuted a facilities manager in a large private company for corruption. He took bribes of almost $300,000 in return for awarding contracts. He was convicted and sentenced to ten months’ jail and ordered to pay to the State a penalty of about $300,000, equal to the amount of bribes he had pocketed. After the prosecution was over, his company brought a civil suit against him to recover the amount of bribes he had accepted whilst employed by them. The accused appealed to the court against this, stating that since he had been ordered to pay back the penalty, he cannot be asked to pay twice, and on this second occasion through the civil suit. The Court of Appeal dismissed his appeal stating that the law expressly provided for two distinct provisions - a criminal proceeding to disgorge benefits and civil proceedings to recover the bribe monies and therefore it is possible that there can be a double disgorgement and it can act as a further deterrence against corruption. This sends the message very clearly to corrupt offenders that they will be made to pay heavily for their corrupt activities.

D. Effective Administration & Good Governance

1. Preventive & Administrative Measures in the Public Sector

   Besides using legal means to deal with corrupt offenders, the Singapore Government has also introduced administrative measures to curb corruption. Strict rules and regulations have been formulated to govern the conduct of public officers. A high standard of discipline is expected and a public officer:
   a) cannot borrow money from any person who has official dealings with him;
   b) his unsecured debts and liabilities cannot at anytime be more than three times his monthly salary;
   c) cannot use any official information to further his private interest;
   d) is required to declare his assets at his first appointment and also annually;
   e) cannot engage in trade or business or undertake any part-time employment without approval; and
   f) cannot receive entertainment or present in any form from members of the public.

2. Efficient Administration

   The last pillar is the efficient administration, which is also a key to reducing corruption. An efficient administration is one which values integrity and incorruptibility. As such, we have put in place measures to ensure that the right persons with the right values are in the service. Another important aspect of an efficient administration is that it can foresee and anticipate the needs of the public (inclusive of businesses) and is able to react appropriately, coming up with measures to meet its customer’s needs. If we have tough enforcement, but the government of the day is inefficient in meeting public needs, then opportunities are
open for corruption to seep in to “make things happen”.

The civil service in Singapore had initiated major reforms in 1995 under the “Public Service in the 21st Century” (PS21) to attain sound administrative governance, organizational excellence and service orientedness. Such improvements in efficiency and effectiveness in public service delivery have played a part in curbing corruption and reduce its opportunities. This is because when we are able to deliver a service promptly, it will leave no opportunity for corruption compared to a service which takes a long while and tedious processing stages.

Under PS21, there were several major initiatives to reduce bureaucracy and cut red tape, such as:

a) The **Pro-Enterprise Panel Movement**. The Pro-Enterprise Panel receives and vets suggestions from the public to help ensure that government rules and regulations are supportive of a pro-business environment in Singapore. The public and companies can provide suggestions through the internet and these suggestions have resulted in changes in the rules and regulations.

b) The **Zero-In-Process**. It aims to reduce inefficiencies in services whereby the public has to visit several agencies for related reasons. In the past, issues which cut across agencies were tossed around from one agency to another without being resolved. The ZIP makes sure that such cases are being looked into promptly by a lead agency and ZIP teams will be formed to tackle and propose solutions on issues which cut across agencies.

c) The **POWER (Public Officers Working to Eliminate Red-tape)**. It aims to cut red tape by streamlining public sector rules and procedures. And it allows public officers to exercise greater flexibility when dealing with operational issues, bearing in mind the spirit and intent of the regulations. A POWER website has been set up to receive suggestions and views on improvements from public officers and to channel them to the respective regulators for follow up action.

d) The **Cut-Red Tape Movement**. Under this, public officers are encouraged to reduce red-tape within the government. Through the internet, the private sector and public can write to the government with suggestions on cutting of red tape. Such feedback can promote transparency and reduce business costs. There is a Cut Waste website where the public can submit their observations/suggestions on areas where government can cut expenditure. The government department concerned will have to respond to the public’s query. This has helped to keep government to be on alert on issues affecting the public and it has also helped to minimize wastage of government spending, if any.

The Singapore Government’s main aim of undertaking the PS21 initiative is to improve efficiency and effectiveness in the provision of its public services. Nevertheless, the initiative has produced a side benefit of corruption prevention. Firstly, by empowering and engaging officers for continuous improvement, the officers become more engaged and they will take pride in their work and, as such, it is less likely the officers will be tempted or involved in corruption-related activities. Secondly, by cutting red tape and making services easier and more accessible, it creates less opportunity for public officers to ask for bribes to smoothen a transaction. Thirdly, soliciting views and feedback from the public and being transparent in the government departments’ policies and service standards has also helped to limit the opportunity for public officers to solicit for bribes.

The Singapore Government has also taken actions to better serve the nation in the digital age by embarking upon the e-Government Action Plans (eGAP). Since 2000, the Singapore Government has introduced several master plans. The latest e-government master plan, eGov2015, was launched in June 2011 by Deputy Prime Minister and Minister for Home Affairs Teo Chee Hean at the eGov Global Exchange 2011. eGov2015 aims to realize the vision of a Collaborative Government by facilitating more co-creation and interaction among the Government, businesses and people for greater value creation. It also aims at delivering excellent public services as well as connecting the citizens to the government. Several electronic services were implemented to provide higher levels of convenience, efficiency and effectiveness for the public.
One of the e-services initiatives is the introduction of e-Citizen portal, where citizens can access government services from their homes, e.g. lodging a corruption report or renewing their passports through the internet, etc. Another e-government initiative is the business.gov.sg portal. This portal provides the public with information and assistance in planning their businesses and starting companies. One of the services provided by this portal is the online business licensing service (OBLS). With OBLS, anyone who wants to start a business can apply and get the relevant permits and licenses from one point of contact from his or her home or office without having to physically go to the various government departments. Before OBLS, when a business wished to apply for various licenses, it needed to go to different departments and some licenses required them to go to a few departments. For example, to get a hawker license, a person has to go to the Ministry of Environment and the Urban Redevelopment Authority as well. After the implementation of this system, the applicant only has to log onto this system and submit the applications on-line and the system will route it to the relevant departments, saving time for the applicant. Today members of the public can apply, renew or terminate different types of license though this online portal. The turnaround time to obtain all the licences was reduced from 21 days to just eight days.

Another electronic service is the Gebiz – the government procurement portal. Today, most Government procurement is done through the internet and it is open to all, including international businesses, who wish to take part. In Gebiz, the posting of the tender requirements is online, the submission of the bids is online, the deadline is controlled by the computer and the results at the end of tender are automatically published for all to see. This leaves little room for corruption or abuse compared to the manual system.

Although the motive behind our e-government action plan was not about corruption control, it does have such an important side benefit. It reduces the visit to government service counters, service turnaround time and cost of delivery. And this has minimized the chance for someone to step in between to ask for a bribe in return for helping in a transaction.

V. REGIONAL & INTERNATIONAL EFFORTS

A. Study Visits

As the sole anti-corruption agency in Singapore, CPIB has been the destination for various study visits and attachments for public officials and counterpart agencies, including countries in the Asia Pacific Region. The visitors are attracted to Singapore mainly because of its international reputation for being effective in controlling corruption. In the spirit of regional cooperation and networking, CPIB hosted official visits and attachments by Government officials from various countries. In recent years, officials have visited CPIB from countries such as China, Bangladesh, Brunei, Indonesia, India, Nepal, Bhutan, Cambodia, Thailand, Vietnam, Macau, Hong Kong, Australia, Kenya, Ghana, Zimbabwe, Kuwait, Jordan, Solomon Islands, Qatar, Russian Federation, Pakistan etc.

B. International Fora

To be aware of the latest international development in anti-corruption matters which could impact on Singapore, CPIB has increased its participation in various corruption-related overseas conferences/seminars.

It has also actively engaged in international fora and meetings that discuss corruption matters. It is a pioneer member of the ADB-OECD Anti Corruption Initiative, which meets twice a year. In 2008, Singapore hosted the 12th meeting as well as the 6th Regional Anti Corruption Conference where more than 120 participants took part. CPIB has joined the International Association of Anti Corruption Authorities (IAACA). It is a member of APEC Anti Corruption Task Force (ACT) and last year, we chaired the discussions of the ACT. Within the ASEAN region, there is a MOU on Preventing and Combating Corruption amongst anti corruption agencies of the ASEAN region which CPIB is involved in. CPIB is one of the first four agencies which signed the MOU in Dec 2004 in Jakarta, along with the agencies of Malaysia, Indonesia and Brunei. The objective of the MOU was to enhance mutual sharing, capacity building and strengthen collaborative efforts in anti-corruption matters.
C. International Co-operation

The global context of the fight against corruption is evolving. Transnational trade and investment have multiplied in the past years. This has significantly increased the likelihood of transnational crimes and corruption to occur. In addition, financial transactions across borders are done with greater ease. A domestic corruption, where the bribe or proceeds of the corrupt transaction obtained, could have been transferred to another foreign jurisdiction. These developments create new opportunities for transnational corruption and hiding of proceeds and, as such, it requires international co-operation to address this phenomenon and bring the offenders to justice.

CPIB has established good working relationship with its counterparts in the region and beyond. Assistance is also provided to foreign counterparts in the area of law enforcement, where appropriate, with the understanding of reciprocal assistance from them in the future.

I like to share on some cases to illustrate the positive outcome derived from collaborating with our foreign counterparts and the importance of working together in our fight against corruption.

1. Case 1

CPIB investigated a case involving a Customs Officer, a Malaysian and a Singapore Permanent Resident, who had received bribes of about $21,650/- on 13 occasions from two foreigners in return for not verifying their goods during their declarations to the Customs Department for purpose of claiming the Goods and Services Tax refunds. The Customs Officer was released on bail while investigations are being carried. However, he absconded and left Singapore. Upon completion of our investigations, we obtained consent from the Public Prosecutor to prosecute him in Court for 13 charges of corruption. Based on our intelligence, he had fled to a village of a remote area in Malaysia. We have obtained a warrant from the Courts to arrest him and we enlisted the assistance from our counterpart, the Malaysian Anti-Corruption Commission (MACC), to locate and apprehend him. With the help of the MACC, we arrested and brought him back to Singapore. He was charged in Court on 13 counts of corruption and was subsequently convicted and sentenced to 16 months’ imprisonment and ordered to pay a penalty of $21,650/-.

2. Case 2

In Jan 2010, the Bureau investigated a Director of a Singapore company, dealing in the Import-Export of used cars, for bribing an employee of a company based in New Zealand in return for ordering used cars from the local company. For every used car purchased by the New Zealand’s company, the Director will pay an amount of $1,000/- as bribe to the New Zealander employee. As the alleged corruption transactions involved a foreign company, we liaised with our counterpart in New Zealand, the Serious Fraud Office (SFO), to request for assistance. Our officers flew to New Zealand and with the SFO’s assistance, we managed to obtain information and evidence relating to the alleged corrupt transactions and interview various parties involved and staff, including the Chief Executive Officer, of the New Zealand’s company. Based on the documents and invoices recovered, there is another Singapore company which may have also bribed the New Zealander employee in return for business opportunities. Our investigations are still ongoing. The New Zealand’s SFO had investigated the matter and prosecuted the New Zealander employee. He was convicted and sentenced to six and a half years’ imprisonment.

3. Case 3

Another case, Macao’s Commission Against Corruption (CCAC) investigated a senior public official working in the Transport and Public Works for corruption offences. CCAC had sent a MLA request to CPIB through our Central Authority (AGC) seeking for assistance to retrieve remittance records on bank accounts belonging to few companies which have been used by the said senior public official to receive bribes. Upon CCAC’s request, CPIB obtained a production order from the High Court and retrieved the relevant information from the Bank concerned. The information was passed on to CCAC to assist in their investigation. The senior public official was subsequently prosecuted in Court and he was convicted of corruption charges and sentenced to several years of jail imprisonment.

4. Case 4

The last case which I like to share involved a joint operation by the Singapore CPIB and the Malaysian Anti-Corruption Commission. The MACC had informed CPIB that a senior officer in the Royal Malaysian
Police was found to be in possession of few million Malaysian Ringgits, which he claimed to be commissions received from a Singapore businessman for recommending business opportunities to him. Pursuant to the information received, CPIB mounted an operation and commenced investigation which revealed the Singapore businessman had assisted the senior officer by making a false statutory declaration that he had given him commissions, to help account for the unexplained wealth. In return for his assistance, the Singapore businessman was promised a bribe amount of few hundred thousand Malaysian Ringgits. Upon conclusion of the investigation, the Singapore businessman was prosecuted in Singapore Court for a corruption offence and he was convicted and fined $30,000/-. He is currently assisting the MACC in the case against the senior officer.

VI. CONCLUSION

Corruption is a problem that needs to be dealt with in both the public and private sectors. Singapore has adopted a comprehensive approach in tackling corruption in both sectors for a long time.

Today, CPIB has to a large extent, helped to curb corruption in Singapore. It has played an important role in keeping the country clean, and we have capitalized on the four pillars of anti corruption, namely strict laws, enforcement without fear or favour, tough punishment from the Courts and effective government administration to prevent and control corruption. The anti corruption measures must be applied consistently across the board, no matter whether it is petty corruption or involved high level corruption. Our past successes however is no guarantee for the future and we cannot be complacent but to be vigilant and we will continue to fight against corruption.

I hope my sharing has been useful to you. The experience of Singapore may not be replicated wholesale as each country has its unique character and circumstances. However, we recognize corruption is problem for all, be it a problem in Singapore or some other country. Therefore, we need to share and pick up learning points from each other. And we also need to join hands to fight corruption and make the society a better place to live in.
INVESTIGATION AND PROSECUTION OF CORRUPTION OFFENCES

Koh Teck Hin*

I. INTRODUCTION

In my first paper, I discussed the corruption control framework that has been put in place to combat and deal with corruption activities in Singapore. In this paper, I will touch on the strategies CPIB adopts with regard to the investigation of corruption-related offences and prosecution of offenders involved in such criminal activities. The Corrupt Practices Investigation Bureau (CPIB)’s mandate is to enforce and investigate all corruption offences. We must ensure that the corrupt offender feels that this is a high risk business and must feel that they will be caught and dealt with for their crimes. The law and the enforcement agency must combine to give bite to the anti-corruption efforts.

II. PURPOSE

We know that different anti-corruption agencies around the world adopt different approaches and strategies in their enforcement and investigation into corruption offences. My presentation has two purposes:

a) firstly, we like to share our experience with all participants so that we can have a means for mutual learning. We can learn from you and refine our system and, likewise, what we have experienced may provide learning pointers for you to reflect upon; and

b) secondly, an understanding of the investigation approaches and strategies can further enhance the basis for mutual cooperation and assistance. By understanding one another in investigation matters, we can facilitate support for one another.

III. A TOTAL APPROACH TO ENFORCEMENT & INVESTIGATION

A. Approaches & Strategies to Investigation

CPIB is under the Prime Minister’s Office. We report to the Prime Minister and not to any other Minister or government authority. This gives us functional independence so that no government body can question us or influence us in our enforcement and investigation efforts.

Our approach in investigation is a total approach. This ensures we have a good control over the situation and we can contain corruption cases as far as possible. What do I mean by ‘total approach’? It simply means:

a) Firstly, no case is too small to investigate. For example, a motorist is stopped for drunk driving and he tries to bribe the traffic police officer to get off the hook. He will be charged in court. If a foreign visitor is at our immigration control point at our border and he did not meet the entry requirements but tries to bribe the immigration officer, he will be charged in court. In short, corruption is not tolerated and all cases will be investigated and dealt with seriously.

b) Secondly, we deal with cases regardless of rank and status. Even serving Ministers had been charged and Chief Executive Officers of major companies have been dealt with too. There is no exemption for the ‘big fish’ or for anyone in high places. We have in the past investigated and prosecuted Ministers for indulging in corruption-related activities. In a case involving Wee Toon

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Boon, then Minister of State for Environment - he was charged for corruption involving a sum of about $840,000/-. He had used his ministerial status to make representation on behalf of a property developer in return for gratifications, which included a bungalow and free air travel tickets for his family. He was subsequently convicted and sentenced to imprisonment and also ordered to pay a penalty. And Teh Cheang Wan, another Minister for National Development, was investigated for accepting two bribes totaling $1 million in return for helping two property developers to retain and acquire pieces of land for development. However, Teh committed suicide before he could be formally charged in Court.

c) We are prepared to deal with both givers and receivers of bribes. Under our law, they are equally culpable. However, sometimes we may not charge the giver if he was under duress when he gave the bribe or there were some other compelling reasons which led to the offence.

d) We can deal with corruption in all areas, in any industry or business sector, in all branches of government, the judiciary, Parliament, political parties, non-government organizations. There is no area where the law does not permit the CPIB to investigate. The powers given to CPIB to do investigation also apply equally to all sectors. In this way, CPIB helps to keep government clean and ensures healthy economic activities in the private sector.

e) We don’t leave it to various government authorities to deal with the problem. For example, if there is an issue involving Immigration Department, we don’t just leave it to them. We will take over corruption investigation and, if necessary, the immigration investigation as well. In some cases, we may jointly investigate with them so that a complete resolution of the corruption and immigration offences can be achieved. We may also help government departments review their systems to remove or change those procedures which may be vulnerable to corruption.

f) We are prepared to investigate based on anonymous complaints. However, we need to be very careful so that we are not “used” by someone who is malicious and wants to cause harm to others. We will process the information and there is a weekly session where the Directorate members (comprising of Director and Heads of Operation Units) will meet to decide if investigation should be conducted on the complaints received.

CPIB is also empowered to investigate other offences, besides corruption. This is extremely important because corruption crime may not exist in isolation. It may occur and mixed with other crimes such as cheating, commercial crimes, etc. Therefore any anti-corruption agency must have the power to question suspects on the full range of offences, otherwise there will be severe limits placed on investigations and the accused persons will probably be able to get away from the punishment that he deserves.

CPIB can also refer non-corruption offences to other specialized enforcement agencies like the Singapore Police Force, Immigration Department etc. when these were detected during the course of our investigation.

We make it easy for anyone to report corruption offences. The CPIB is very accessible. The public can report by making phone calls to our hotline which is operated round the clock, or they can visit our office at any time. They can also send us letters by post or fax. They can also report from their homes via the CPIB internet website (www.cpib.gov.sg) or send us an email. By opening up all possible venues for reporting, we hope that those who have come across or are aware of corruption cases will have less difficulty and unwillingness to report.

B. Corruption in the Private Sector

As mentioned, CPIB is empowered to investigate corruption in both the public and private sectors. Our corruption control efforts in the private sector do not only confine to businesses. It also includes non-profit organizations and charity organization. In recent times in Singapore, charity organizations have come under investigations by the authorities. CPIB has also stepped in when there is corruption committed by personnel of charity organizations. This strict stance on corruption in charity organizations is necessary so as to deter offenders from taking advantage of kindhearted people to enrich themselves.
1. Why deal with Private Sector Corruption?

Some of you may ask why there is a need to deal with private sector corruption cases. There are good reasons why CPIB has to deal with them, namely:

a) **Corruption in the private sector affects public interest.** Some used to think that private sector corruption is a private affair between the giver and the taker. But consider the following. When a supermarket purchaser takes bribes from a supplier, the supplier will at the end of the day mark up its cost to cover the bribes. In doing so, the supermarket which purchased the goods at a higher price will eventually sell it an even higher price. In the end, it is the public who suffers.

b) **Singapore is a small nation without natural resources.** It has to depend on trade and foreign investment. To attract investment, we have to ensure that business cost is low and corruption whether, in the private or public sector, increases business cost.

c) **The private sector is a key pillar of the Singapore’s economy.** It drives national economic growth. We need to have a level playing field for all and the private sector must be clean in order for foreign businesses to want to work with us and to invest in Singapore.

d) **The private and public sectors are co-related,** which is why CPIB needs to watch over the private sector as well. As more and more government functions become outsourced to the private sector, many private companies are now performing functions once used to be performed by the government. Corruption in private sectors which are involved in strategic functions can also impact the key areas of government and the society at large.

e) **A lot of the private sector enterprises have huge public shareholdings as well.** If the enterprise is not well run and commits crimes, then its share price may be affected and this in turn affects the interests of the public.

2. Types of Private Sector Cases

Private Sector corruption cases can come in various forms –some of the cases we have seen in the private sector are:

a) Cases involving contracts or procurement of services or supplies. The corrupt offender receives kickbacks in return for awarding contracts.

   An example of a recent case involves a Managing Director of a BMW agent Performance Motors, who had received luxury watches and mobile phones from a car dealer in return for the appointment of her company as an authorized BMW dealer. The MD was convicted of corruption charges and he was fined $185,000/- and had to pay a penalty of $112,000/-, which was the amount of bribes he received.

   Another case involved a fresh and frozen food supplier giving a total sum of $761,000/- in bribes to a Food Services Manager of a Swedish furniture giant Ikea in return for ordering meatballs and fried chicken wings for the Ikea’s restaurant. The supplier was convicted of 12 charges of corruption. He was jailed for 4 months and fined $180,000/- Upon appeal by the Prosecution, the sentence was increased to 10 months’ imprisonment.

b) Cases involving corrupt offenders who supervise contractors or suppliers, for example, not checking on the quality of work or product delivered and overlooking deficiencies. This can result in serious repercussions.

   A recent example involved a Technical Officer employed by the Civil Aviation Authority of Singapore receiving a Tag Heuer watch worth $3,700/- from a contractor in return for approving a permit to work without delay and not finding fault with the upgrading work at the Changi Airport’s Terminal 1 undertaken by the said contractor. The Technical Officer was convicted of corruption and he was jailed for six months and ordered to pay a penalty of the total sum of bribes he received from several contractors.

c) There are those who are corrupt, and have access to sensitive data and divulge to unauthorized persons in return for some rewards. These cases involve people working in areas where they can access to data or information about customers and they abuse it by passing on to persons such as illegal moneylenders who were looking for their debtors and private investigators tracing
whereabouts of persons of interest.

We have a case involving an Executive working in the bank providing confidential details and customers’ identification numbers to third parties, including an illegal soccer bookie and an illegal moneylender in return for money. He was convicted and jailed 12 weeks and fined $27,000/- for accepting bribes and accessing the bank’s customer information system without authorization. Before passing the sentence, the presiding judge told the accused that he had committed a very serious offence. The judge underscored the importance of a bank’s tight security and the accused’s action could have had a detrimental effect on the banking system in Singapore.

d) There are those who are in positions of authority such as the CEO or General Manager, who took bribes and granted approval for various matters in favour of the bribe givers.

A General Manager of mobile phone giant Nokia had received bribe in the form of assistance from a CEO of a private company to acquire shares from three companies and she had subsequently profited from the sales of these shares. She had also received a sum of $8,864.48 from the said CEO. In return, she will give Nokia business to the CEO’s company. The Court has convicted her of corruption charges and fined her a total of $60,000/-. She was also ordered to pay a penalty of $8,864.48, the amount of bribe she took.

e) In some cases, corruption is mixed with other offences. For example, the corrupted may also “cook” the company’s books when they try to hide the corrupt transactions. They may manufacture false invoices to reflect fictitious transactions. Our officers are also empowered to investigate other crimes uncovered in the course of corruption investigations.

We have a case involving a Chief Financial Officer of a listed company who had helped to cover up more than $1 million kickbacks, authorized by the company’s Chairman and CEO, to the customers. She had falsified the company’s accounts by arranging for the fake invoices to cover up the trail of bribe payments to the representatives of client companies. She was convicted and sentenced to three months’ imprisonment for her role. The Chairman and CEO had also been dealt with in Court.

IV. INVESTIGATION STRATEGIES

So, what did CPIB do to sustain the good efforts of our government and to effectively fight corruption? In order to achieve this mission, we approach it through a framework of action which involves four linked competencies, that is Intelligence, Interview, Forensics and Field Operations. The success of solving corruption cases hinges on the interplay of these core competencies. Let me elaborate.

A. Intelligence

The first competency – Intelligence. Intelligence work is critical in the current landscape of constant threats and vulnerabilities. It involves the collation and processing of information for specific objectives, so you can say that intelligence work is really investigation in the covert sense. Intelligence work often provides the basis for successful investigation. CPIB’s many successes in cracking major corruption cases were largely attributed to the proactive approach and the efficiency of our exceptional intelligence capability. Our Intelligence Division adopts both a pro-active and re-active stance - we have projects which are intelligence-led operations, which involve ‘live’ cases where our Intelligence Division centralizes its efforts in collation, analysis and ‘live’ monitoring. We also have cases which are sent for intelligence enrichment. For such cases, Intelligence Division plays a supportive role to our Operations Units in their investigations, providing critical information such as establishing identities, relationships, housing targets etc during the pre-operation and operation phases.

To stay on top of the situation, we need to continue to build on its capabilities and strong expertise; expand on its current resources and established networks and relationships. Our Intelligence Division is in close liaison with our overseas counterparts such as Hong Kong ICAC (Independent Commission Against Corruption), Malaysia ACC (Anti-Corruption Commission), as well as our local intelligence agencies from the Singapore Police Force, Immigration & Checkpoints Authority and Central Narcotics Bureau, etc. Information and expertise are shared robustly amongst these agencies, resulting in mounting of joint ops or coordinated ops on some cases. Some examples include the investigations into Citiraya, a public listed company when CPIB and the Commercial Affairs Dept (CAD) of the Police Force, moved in to uncover
corruption and commercial offences. Another example is the coordinated operation in the National Kidney Foundation (NKF) saga, which involved CPIB and CAD looking into various aspects of the excesses by the former CEO of NKF and others. We know very well that law enforcement is effective only when we can deal with the problem in its totality and the need for collaboration is there.

B. Interview

It is often challenging to deal with corruption cases where more often than not, the complainant is as likely to be culpable of the corrupt act as the accused person. Lines are blurred, and our officers are hard pressed to find a clear-cut situation, where there is a distinct perpetrator and victim. In corruption cases, our officers are frequently confronted by complainants or witnesses who are not forthcoming, for fear that what they say may implicate them. Hence, it is imperative that our officers are equipped with all aspects of investigative work, particularly their ability to sieve out the truth from the witnesses, as well as to discern the innocent from the guilty. This brings us to the second competency - ‘Interview’.

An interview, simply put, involves the questioning of a person regarding his involvement or suspected involvement in a criminal offence. There are many reasons why people choose not to give the necessary information, or choose to mislead by giving false information. Hence, it is importance for our officers to be flexible enough to switch modes to tailor to the different situations or types of persons being interviewed.

Our judicial courts are quite stringent these days, increasing the weightage given to other admissible evidence, as opposed to merely just accepting positive statements given by accused persons. As a result, we have to emphasize greatly on developing the interview skills of our officers, which can be the determining element in reducing the time and resources devoted to highly complex investigations.

With regard to interview, we make use of polygraph machine and we find it very useful. However, we do not use the test result as evidence in Court but only as an aid to investigation.

C. Forensics

Another area which we pay much attention to these days is Forensics or specifically Computer Forensic – which is becoming indispensable in our investigation.

The sheer complexity of illicit transactions, whether it is at the individual, syndicate or corporate levels, requires an incredible level of expertise and capability from our officers. Criminals’ little black books have undergone a major facelift and have progressed to PDAs, smart mobile phones, and personal desktops to keep records of detailed corrupt transactions.

To overcome this challenge, CPIB sets up a Computer Forensic Branch with full-time staff, trained to handle the collection, preservation, analysis and court presentation of computer-related evidence. Our officers are in regular contact with our counterpart from the Criminal Investigation Department’s Technology Crime Forensic Branch to share experiences and pointers in this area.

There are various cases where forensic evidence played a big part in solving cases. I anticipate in the near future, with great advances in technological tools, software, and elaborate IT infrastructures, computer forensics will play an even more proactive role, in tandem with intelligence, as opposed to being a mere investigative support and response mechanism.

D. Field Operations

The last competency – is the field operations. By field operations, I refer to the range of investigative activities carried out in the field, such as search and seizure, field enquiries, raids and arrests. How the operations are being carried out and how much information security is exercised over it will determine the success of any operation. This cannot be overlooked and the capability needs to be developed and worked on continuously.

E. Interplay of Four Competencies

The synergy from the interplay of these four competencies – Intelligence, Interview, Forensics and Operations, is critical to the success of cracking some of our major cases. Operation Crossover is one of
such cases, showcasing the interplay of these elements. In this case, our Intel asset had given us sufficient
details on who were the main players of the syndicate in Citiyaya involved in the diversion of the computer
chips, who were the staffs from client companies that were bribed and their modus operandi. Our Intel asset
also told us the exact container, which was kept in the free trade zone, containing a shipment of computer
chips to be enroute to Hong Kong. With this information, an operation was mounted, resulting in the
seizure of that container. Subsequently, through intensive interrogations and interviews, the parties involved
had admitted to the corrupt activities. Forensic searches and analysis carried out on Ng ‘Teck Boon, one of
the main players’ computer note-book had also contributed to the cracking of this case – it revealed records
of shipments of computer chips fraudulently obtained through corrupt means and inflation of the company’s
accounts. This piece of evidence, together with other physical evidence such as uncrushed computer chips,
seized from Teck Boon’s company and warehouse had led to his confession and admissions of other parties
involved in the scam.

The four competencies interact and by extracting the appropriate value from each one and allow each to
leverage off the other for maximum results. At various junctures, any one of these pillars will play a more
significant role to provide the breaking point for successful solution of cases. For example, if crucial evidence
was hidden in computers and through computer forensics, investigators are able to retrieve the evidence,
then this may prove to be the key to solving the case in hand. Similarly, the interview competency may play
the bigger role when skilful interrogation of suspects led to confessions or the gathering of critical evidence
which are instrumental in solving the case.

V. EVIDENCE GATHERING AND PROSECUTION

We know that to be successful in getting positive investigation results, we need to emphasize evidence
gathering. This is always a challenge due to the following reasons:
a) Corruption offenders will hide and not tell the truth; and
b) There are increasingly sophisticated *modus operandi* used and methods to transact and hide bribe
monies.

When we make use of the four competencies of intelligence, interview, forensics and field operations, we
also focus on collecting and consolidating the evidence. From the evidence, we review the case. Sometimes,
we sit together and discuss in case conferences to go through these issues - Do we have the evidence to
charge anyone? What evidence is there when we proceed to charge? We make use of an evidence matrix
(see table attached below).

**OPS “X”**

<table>
<thead>
<tr>
<th>Evidence Analysis Framework (For Corruption Offences)</th>
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</thead>
<tbody>
<tr>
<td><strong>Evidence of Accepting/Obtaining/receiving</strong></td>
</tr>
<tr>
<td>Admitted by:</td>
</tr>
<tr>
<td>Implicated by:</td>
</tr>
<tr>
<td>Other Evidence:</td>
</tr>
<tr>
<td><strong>Evidence of Corrupt Intent</strong></td>
</tr>
<tr>
<td>Giver</td>
</tr>
</tbody>
</table>
### Evidence Analysis Framework (For Other Offences)

<table>
<thead>
<tr>
<th>Ingredients of the Offence</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Admission by accused:</td>
<td>Nature of Admission</td>
</tr>
<tr>
<td>Witnesses’ evidence:</td>
<td>Nature of evidence</td>
</tr>
<tr>
<td>Documentary evidence:</td>
<td>Nature of Documentary Evidence</td>
</tr>
<tr>
<td>2) Admission by accused:</td>
<td>Nature of Admission</td>
</tr>
<tr>
<td>Witnesses’ evidence:</td>
<td>Nature of evidence</td>
</tr>
<tr>
<td>Nature of evidence</td>
<td>Nature of Documentary Evidence</td>
</tr>
</tbody>
</table>

#### Follow-up Actions

<table>
<thead>
<tr>
<th>Subject/ Witnesses</th>
<th>Gaps identified</th>
<th>Follow-up actions</th>
<th>Action by</th>
<th>By when</th>
<th>Status Report</th>
</tr>
</thead>
</table>

This matrix has facilitated our case review and decision making process. Evidence of accepting/receiving/obtaining gratifications is reflected in the table, where officers document actus reas, inputting details of the corrupt transactions which the subject has admitted to in his statements, e.g. when did the transaction occur, who did he hand the gratification over to, what are the documentary evidence, etc. Next to the information, is the detailing of documentary or other evidence of giving/offering/promising of the corrupt transactions. Usually for easier reference, the evidence for giver and receiver involved in the same transaction are placed next to each other, quoting the exact paragraph of the subject’s statements where the information was extracted from. As for the evidence on corrupt intent, it is also recorded in the table, and it includes details such as what are the gratifications meant for.

In addition, we also need to address the legal aspects. In the Singapore system, CPIB does not have in-house legal experts. We understand that in some countries, the anti-corruption agency have their in-house legal experts and some agencies also conduct prosecution themselves. CPIB depends on the Attorney-General’s Chambers (AGC) for legal advice. Under our law, we cannot charge a person in court for corruption unless the Attorney-General gives his express consent. So there is a division of responsibilities and a check and balance. We in CPIB are the operational experts in investigating corruption offences. But we need the legal experts from AGC. Together, when both operational experts and legal experts agree that there is a case, we can then proceed to charge offender in court. Once prosecution is mounted, CPIB officers will work together with prosecutors to present the evidence in Court.

In terms of prosecution, as we are prepared to prosecute both the givers and receivers of bribes, we have to stage our prosecution of the accused persons in sequential order. Sometimes the receiver is prosecuted first and the giver is the prosecution witness. After the case is over, the giver is prosecuted and the receiver in turn becomes the witness. This can present some challenge especially when there is not much independent evidence apart from what the giver and receiver say about the crime. Therefore, as we adopt this tough stance against both sides of the corruption crime, it is the responsibility of CPIB to ensure that it gathers strong evidence on the case so as to be able to prosecute all parties involved. So far, our conviction rate is of above 95% each year and this bears testimony to the strength of cases brought to the Court.

There are instances where the only evidence we have is from the giver and the giver is not willing to testify unless he is given immunity from prosecution. As a rule, the Attorney General’s Chambers does not grant immunity easily. It will be under exceptional grounds if immunity is granted.
There may be cases in the public sector, where after investigation, there is no evidence of corruption but there is evidence that the public official had infringed some government rule or regulation. In such situations, CPIB will provide the information to the Public Service Commission or to the officer’s Department or Ministry for them to take departmental disciplinary proceedings against the said officer.

In some cases, besides dealing with the culprits, after the case is over, CPIB may identify flaws or loopholes in the system, work processes or procedures of the affected government departments and offer some recommendations or suggestions for them to consider as they work towards mending the flaws and loopholes.

VI. STRATEGIC THRUSTS

To discharge its role effectively, CPIB must stay on top of the situation at all times and its capability must be kept up to mark. To ensure this, CPIB embarks on three strategic thrusts, namely Strengthening Operational Capabilities, Forging Networks & Partnerships and Investing in Organisational Excellence.

In “Strengthening Operational Capabilities”, CPIB seeks to improve on investigation capabilities such as document examination, computer forensic and financial investigation. We need to hone our officers’ skills in these areas. CPIB has set up a Computer Forensic Branch to handle computer-related evidence and it has also set up a Financial Investigation Branch to deal with financial and money-laundering investigations.

In “Forging Networks & Partnerships”, CPIB forges partnerships with local and international entities. To ensure good governance and to combat corruption effectively, CPIB recognizes the need to strengthen international and regional cooperation and liaison. As such, CPIB actively participated in various anti-corruption initiatives and international fora, such as United Nations Convention Against Corruption (UNCAC) – Conference of State Parties, ADB/OECD Anti-Corruption Initiative, ACT Task Force (APEC Anti-Corruption and Transparency Task Force), MOU amongst anti corruption agencies of the ASEAN region and the International Association of Anti Corruption Authorities (IAACA).

In “Investing in Organisational Excellence”, CPIB invests heavily in training her people and encourages staff to do knowledge sharing and innovation. We regularly do in-house learning where we bring all operational staff together for training. We may invite experts from various government Ministries and from private industry to address the officers on issues of topical interest. When there are new areas of work, we will build new capabilities. For instance, with the opening of the two Integrated Resorts with casinos operations in Singapore, CPIB may have to tackle casino-related corruption cases. Therefore, CPIB has built up its capability to deal with this challenge. CPIB is also active in outreach programmes to raise public awareness through regular talks, especially for public officers in the enforcement agencies, on the pitfalls of corruption. Selective outreach is done with specific industry sectors.

VII. CONCLUSION

While Singapore has successfully controlled corruption, there is no guarantee that it is always easy to suppress corruption. There are various challenges we face in investigating corruption offences and I will touch on two areas.

• Firstly, the changing nature of corruption. While behaviour and motivation of the corrupted may be similar, the methods used have transformed greatly. There is more sophistication seen in corruption today. More complex methods are used. The corrupt transactions are more complicated, going through various loops and intermediaries. There are more methods used to hide the money trail such as bank transfers, false accounting, phantom workers, camouflage payments of various types. Computers are often used in the commission of the offence such that where we used to seize paper records in the past, today, we seize a lot of computers and electronic media. It is thus important for the enforcement agency to continually upgrade its capability and ensure its personnel are well trained and well skilled.

• Secondly, there is internationalization of the issue of corruption. Corruption offences can cross international borders. It is easy for corrupt offenders to move from one jurisdiction to another and corrupt proceeds can ‘cross’ borders within split seconds via the internet. This brings with it
challenges for law enforcement and where necessary, we need to work with foreign counterparts in investigating corruption cases. At the international level, there is also greater interest by governments around the world in dealing with corruption.

Corruption is a dynamic phenomenon and CPIB continues to have an important role to play in keeping Singapore clean. Our efforts to combat corruption and uphold a high standard of transparency would require the efforts and contributions of all parties involved in the whole of government. In addition, we also require our fellow law enforcement members, like all of you, to join in and help in the fight against corruption to make the world a better place to live in.
SUCCESSFUL ANTI-CORRUPTION STRATEGY & INTERNATIONAL GOOD PRACTICES

Tony Kwok Man-wai*

I. SHORT HISTORY AND THE ACHIEVEMENT OF THE ICAC

Hong Kong was definitely one of the most corrupt places on earth in the 1960s and early 70s. Corruption was widespread and regarded as a “way of life”. It existed “from womb to tomb”. Corruption in the public sector, particularly the law enforcement agencies were well organized and syndicated, hence making a mockery of the criminal justice system. As a taxi-driver, you could even buy a monthly label from the corrupt syndicate and stick on your taxi and it would guarantee you from any traffic prosecution during that month! Such was the scale of open corruption in Hong Kong. After the establishment of the Independent Commission Against Corruption, and within five years, all the overt and syndicated corruption were eradicated and now Hong Kong was regarded as one of the most corruption free societies in the world. The Hong Kong case was regarded as one of the very few successful model of turning a very corrupt place to a clean one. It demonstrates that corruption can be effectively controlled, no matter how serious and widespread the problem is.

In its 37 years of history, ICAC has achieved the following successes:

• Eradicated all the overt and syndicated type of corruption in the Government. Corruption now exists as a highly secretive crime, and often involved only satisfied parties. Citizens rarely suffered from extortion from government officials;
• Amongst the first in the world to effectively enforce private sector corruption, providing an excellent business environment for Hong Kong and a level playing field for all investors;
• Ensure that Hong Kong has a clean election in its transition from a British colony to a democracy;
• Pioneer solutions through corruption prevention studies in most corruption prone areas and promulgate best practice guidelines in areas such as public procurement, construction, financial sectors, staff management etc;
• Change the public’s attitude to no longer tolerating corruption as a way of life; and support the fight against corruption in not only willing to report corruption, but be prepared to identify themselves in the reports. Before ICAC was set up, most corruption reports are anonymous. Now more than 75% of the reports came from non anonymous sources;
• As an active partner in the international arena in promoting international co-operation. ICAC is the co-founder of the International Anti Corruption Conference (IACC).

II. ICAC’S SUCCESS FACTORS

As a result of the success of the Hong Kong model in fighting corruption, many countries followed Hong Kong’s example in setting up a dedicated anti-corruption agency. However, many of them are not effective and hence there are queries as to whether the Hong Kong model can be successfully applied to other countries. The point is whether there is a thorough understanding of the working of the Hong Kong model. From my experience, it consists of the following eleven indispensable components.

A. Three-Pronged Strategy

There is no single solution in fighting corruption. Hong Kong ICAC adopts a three pronged approach: deterrence, prevention and education. As a result, the Commission consists of three separate departments: the Operations Department to investigate corruption and to prosecute the offenders: the Corruption

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Prevention Department to examine the systems and procedures in the public sector, to identify the corruption opportunities and to make recommendations to plug the loopholes; and the Community Relations Department to educate the public against the evil of corruption and to enlist their support and partnership in fighting corruption.

B. Enforcement-Led

The three prongs are equally important, but unlike many anti-corruption agencies (ACA), ICAC places priority in resources on enforcement. It devotes over 70% of its resources in the Operations Department. The reason is that any initiatives in corruption prevention and education are doomed to fail in a corrupt country where the corrupt officials are still around and powerful. Any successful fight against corruption must start with effective enforcement on major targets, so as to get rid of the obstacles, and demonstrate to the public the political will and determination to fight corruption at all costs, as well as to demonstrate the effectiveness of the anti-corruption agencies. Without that, the ACA is unlikely to get the public support, which is a key to success. Successful enforcement also assists in identifying problem areas for corruption prevention review and can clear any human obstacle in the review. The successful enforcement stories also provide basis for public education and act as deterrence for the other corrupt officials.

C. Professional Staff

Fighting corruption is a very difficult task, because you are confronting with people who are probably very intelligent, knowledgeable and powerful. Thus the corruption fighters must be very professional in their jobs. The ICAC ensures that their staff are professionals in their diverse responsibilities – the Operations Department has professional investigators, intelligence experts, technical experts, accountants and lawyers as their staff. The Corruption Prevention Department has management experts and the Community Relations Department pools together education, ethics and public relations experts. Apart from professionalism, all ICAC staff are expected to uphold a high level of integrity and to possess a passion and sense of mission in carrying out their duties. ICAC strives to be highly professional in their investigation. ICAC is one of the first agencies in the world to introduce the interview of all suspects under video; they have a dedicated surveillance team with over 120 specially trained agents who took surveillance as their life-long career. They also have a number of specialized units such as witness protection, computer forensic and financial investigation.

D. Effective Deterrence Strategy

The ICAC’s strategy to ensure effective enforcement consists of the following components:

- An effective public complaint system to encourage reporting of corruption by members of the public and referrals from other institutions. ICAC has a report centre manned on 24 hours basis and there is a highly publicized telephone hotline to facilitate public reporting;
- Effective confidentiality system and protection of whistleblowers and witnesses;
- A quick response system to deal with complaints that require prompt action. At any time, there is an investigation team standing by, ready to be called into action;
- The ICAC adopts a zero-tolerance policy. So long as there is reasonable suspicion, all reports of corruption, irrespective of whether it is serious or relatively minor in nature, will be properly investigated;
- There is a review system for the purpose of check and balance to ensure all investigations are professionally and promptly investigated, free from political interference;
- Any successful enforcement will be publicized in the media to demonstrate effectiveness and to deter the corrupt.

E. Effective Prevention Strategy

The corruption prevention strategy aims at reducing the corruption opportunities in government departments and public institutions. The general principle is to ensure efficiency, transparency and accountability in all government businesses.

The priority areas are public procurement, public works, licensing, public services delivery, law enforcement and revenue collection.

Comprehensive corruption prevention strategy should include enhancement in the following management systems:
Examples of some of the corruption prevention practices are:

- Identify risk in vulnerable areas and risk management
- Streamline work procedure manual
- Enhance staff supervision through surprise check system
- Enhance internal audit
- Maintain proper documentation for accountability
- Information security policy
- Job rotation policy
- Performance indicators/performance pledges (service guarantee)
- E-government and e-procurement
- Exercise transparency & fairness in staff recruitment, appraisal & promotion.

**F. Effective Education Strategy**

The ICAC has a very wide range of public education strategies, in order to enlist the support of the entire community as partnership to fight corruption. It includes:

- Media publicity to ensure effective enforcement cases are well publicized, through press releases, press conferences and media interviews, as well as the making of TV drama series based on successful cases;
- Media education – use of mass media commercials to encourage public to report corruption; promote public awareness to the evil of corruption and the need for a fair and just society, and as deterrence to the corrupt;
- School ethics education programme, starting from kindergarten up to the universities;
- Establish ICAC Club to encourage public to join members who wish to perform voluntary work for the ICAC in community education;
- Promote code of ethics in government and business;
- Corruption prevention talks and ethics development seminars to public servants and business sectors;
- Publish corruption prevention best practices and guidelines;
- In partnership with the business sector, set up an Ethic Development Centre as a resource centre for the promotion of business code of ethics;
- Organize exhibitions, fun fairs, television variety shows to spread the message of clean society;
- Wide use of websites for publicity and reference, youth education and ethics development.

**G. Effective Legal Framework and Anti-Corruption Law**

Hong Kong has a comprehensive legislation to deal with corruption. In terms of offences, apart from the normal bribery offences, it created three unique offences:

(i) Offence for any civil servant to accept gifts, loans, discounts and passage over a certain limit, even if there is no directly related corrupt dealings, unless specific permission from senior official is given

(ii) Offence for any civil servant to be in possession of assets disproportionate to his official income; or living above means

(iii) Offence for conflict of interest. Any public officials abusing their authority for private gains, whether for himself or other persons. It includes a statutory requirement to report potential conflict of interest.

On investigative power, apart from the normal police power of search, arrest and detention, ICAC has power to check bank accounts, require witnesses to answer questions on oath, restrain properties suspected
to be derived from corruption, and hold the suspects’ travel documents to prevent them from fleeing the jurisdiction. If justified and in serious cases, they can apply proactive investigation technique such as telecommunication intercept, surveillance, undercover operations etc. Not only are they empowered to investigate corruption offences, both in the Government and private sectors, they can investigate all crimes which are connected with corruption.

The ICAC cases are prosecuted by a selected group of public prosecutors to ensure both the quality and integrity. The Judiciary of Hong Kong is the strong supporter of fighting corruption, who ensured that the ICAC cases are handled in courts by highly professional judges with fairness. The conviction rate for ICAC cases is very high, around 80%.

H. Review Mechanism

With the provision of wide investigative power, there is an elaborate check and balance system to prevent abuse of such wide power. One unique feature is the Operations Review Committee. It is a high powered committee, with majority of its members coming from the private sector, representing the citizens from all sectors to act as watchdog on ICAC. The committee reviews each and every report of corruption and investigation, to ensure all complaints are properly dealt with and there is no “whitewashing”. It publishes an annual report, to be tabled before the Legislature for debate, thus ensuring public transparency and accountability. In addition, there is an independent Complaint Committee where members of the public can lodge any complaint against the ICAC and/or its officers and there will be an independent investigation. It also publishes an annual report to be tabled before the Legislature for debate.

I. Equal Emphasis on Public & Private Sector Corruption

Hong Kong is amongst one of the earliest jurisdiction to criminalize private sector corruption. ICAC places equal emphasis on public and public section corruption. The rationale is that there should not be double standard in the society. Private sector employees vastly outnumber the public sector employees and unless they maintain the similar ethical standard, the society can never achieve corruption free status. Indeed private section corruption can cause as much damage to the society, if not more so than public sector corruption. Serious corruption in financial institution can cause market instability; corruption in construction sector can result in dangerous structure. Effective enforcement on private sector corruption can be seen as a safeguard for foreign investment and ensures Hong Kong maintains a level playing field in its business environment, thus a competitive advantage in attracting foreign investment.

J. Partnership Approach

You cannot rely on one single agency to fight corruption. Every one in the community and every institution have a role to play. ICAC adopts a partnership approach to mobilize all sectors to fight corruption together. The key strategic partner of ICAC is the government agencies. The head of government agency should appreciate that it is his solemn responsibility to clean his own house. Every government agency should have a tailor made anti-corruption strategy, translated into anti corruption action plan and should have a high power management committee to monitor the progress of the action plan, which should be subject to annual review and revision.

Other important partners of ICAC include:

- Civil Service Commission
- Business community
- Professional bodies
- Civil Societies & community organizations
- Educational institutions
- Mass media
- International networking.

K. Top Political Will, Independence and Adequate Resources

The most important factor in fighting corruption is “political will”. In Hong Kong, there is clearly a top political will to eradicate corruption, which enables the ICAC to be a truly independent agency. ICAC is directly responsible to the very top, the Chief Executive of Hong Kong. This ensures that the ICAC is free from any interference in conducting their investigation. The strong political support was translated into
financial support. The ICAC is probably one of the most well-resourced anti-corruption agencies in the world! In 2008, its annual budget amounted to US$90M, about US$15 per capita.

III. COMPARISON WITH OTHER ACAs

Some critics argue that the Hong Kong model can only work in Hong Kong because of the unique Hong Kong situation and cannot be applied to other countries. They usually give the following reasons:

1. Hong Kong is a small city, whilst most corrupt countries have a large geographical area. This argument cannot stand. Hong Kong is a large city with a population of over seven million. If any corrupt country can apply the Hong Kong model as a pilot scheme just in its capital city, and achieve equal success, it would have a tremendous impact on the whole country. If there is a central and powerful national anti-corruption agency, it can develop adequate sub-offices throughout the country (with centralized control, not subject to local government interference), there is no reason why the successful model cannot be applied throughout the country. The FBI in the US and the RCMP in Canada are national police agencies. Through the branches established all over the country, they are successful in law enforcement. Corruption enforcement should be no different.

2. The country does not have the resources like of Hong Kong ICAC. It is true that the HK ICAC has a large budget. But it merely accounts for 0.38% of the national budget. In most corrupt countries where the ACA are not seen to be effective, their budgets invariably are below 0.01% of the national budget; that speaks for the political will of these countries! If a corrupt country can raise its anti-corruption budget to 1% of the national budget, which clearly is justified, the budget should be more than adequate for any national anti-corruption agency.

3. The country has a unique cultural tradition of gift-giving and nepotism. Hong Kong had the same corruption-friendly culture in the past, if not more prevalent. The Chinese tradition of giving “Laisee” or “red packet” containing money to all children and business associates in the Chinese New Year was an open way of giving/receiving bribes in the past. The Hong Kong experience is that through effective public education campaigns and law enforcement, this cultural problem can be solved.

Hence the problem is not that the Hong Kong model is not applicable. It is more the case of the lack of political will to fully adopt the Hong Kong model.

IV. NEW APPROACH TO FIGHTING CORRUPTION

In order to properly assess the corruption problem in the country, thorough research should be carried out in the following areas:

- Public perception & attitude towards corruption - assessing the local public perception and attitude towards corruption;
- Political & Legislative Framework – assessing the political will, the role of the National Congress and political parties and the adequacy of anti-corruption legislation;
- Integrity Institutions and System - assessing the effectiveness of the integrity institutions, i.e. anti-corruption institutions, National Audit Office and Civil Service Commission etc;
- Rule of Law - assessing the integrity in the three key organizations in the upkeeping of rule of law, i.e. police, prosecution authority and judiciary;
- Administrative Quality - assessing the efficiency, transparency and accountability in the Government Ministries and their effort to fight corruption;
- Voice & Accountability- assessing the freedom of the media and the role of civil societies.

In most corruption-prevalent countries, they usually share the following major problems:
At the national level:
- Lack of or inadequate top political will and support to fight corruption;
- Inadequate resources in financing the work of the anti-corruption institutions;
- Lack of independence - corruption investigations are often subject to political interference;
• Frequent political interference in human resources management, licensing and public procurement;
• Inadequate investigative power given to anti-corruption institutions, often on the excuse of protecting human rights;
• There is general public apathy to corruption;
• Low salary of public servants;
• Lack of strategic partnership in fighting corruption;
• Lack of zero tolerance attitude toward corruption.

At the government institutions, the following problems are common:
• The heads of government institutions fail to accept their responsibility to combat inhouse corruption;
• Inadequate and ineffective in-house anti-corruption strategy and action plans;
• Lack of integrity and ethics among civil servants;
• Lack of enforcement of ethical conduct and ethical training;
• Human resources policy/management do not include adequate corruption prevention measures;
• Poor public service delivery due to bureaucracy;
• Outdated regulations and poor enforcement, resulting in a lack of transparency and accountability;
• Nepotism and conflict of interest are common, and rules are absent;
• Lack of effective mechanisms to check and balance abuse of power;
• Lack of adequate procurement procedures;
• Weak internal audit and monitoring systems.

I recommend that the government should take a step-by-step approach in formulating measures on how to combat corruption in the country.

A. National Anti-Corruption Strategy
   First the government should come up with a national strategy. The strategy should acknowledge that there is no single solution in combating corruption, and should identify how the country should combat corruption through enforcement, prevention and education, and which agency should be responsible for taking the fight, ideally an independent ACA.

B. Independence
   Anti-corruption agencies are subject to different forms of independence. Some are answerable to the Chief Executive (Prime Minister or President), such as in Singapore and Pakistan. Some are answerable to the Parliament or Congress, such as the Australian ICAC New South Wales. Some share the responsibilities with different agencies. Examples are in the Philippines (Office of the Ombudsman and the Presidential Anti Graft Commission), Nigeria (Independent Authority Against Corruption and Code of Conduct Bureau), and China (Procuratorate, Supervision Ministry and Central Party Discipline Committee).

C. Appointment of Head of Anti-corruption Agency
   The appointment of the head of anti-corruption agency is crucial to ensure independence of the agency. In Tanzania, the candidate is nominated by the President, but needs to be endorsed by the Parliament. In India, the appointment is made through a selection commission of the Parliament, members of which should include the opposition party. In the Philippines, once the head is approved, he cannot be removed during his term of office except through impeachment in Congress.

D. Authority to Prosecute
   Some anti-corruption agencies have full power to investigate and prosecute offenders, such as in the Philippines. Others maintain a check and balance system where the anti-corruption agency investigates and the Department of Justice authorize the prosecution, such as in Singapore and Hong Kong.

E. Special Court for Corruption Trial
   In countries where there is a corruption problem in the judiciary, a special court with new judges appointed is set up to deal with corruption trials, such as Pakistan and the Philippines.
F. Jurisdiction
There are varying degrees of jurisdiction of anti-corruption agencies. Some do not have the power to
investigate, such as South Korea’s KICAC. Other agencies can only investigate corruption in the public
sector, such as Tanzania. Some can only react to complaints under strict rules (eg. sworn affidavit), such
as in Timor Leste, others adopt a proactive strategy and can initiate investigation through intelligence
developed, such as in Hong Kong.

G. Effective Anti-Corruption Law
The law should provide adequate investigative power and a full range of corruption offences. Some
ACAs have very restricted power of investigation, have no access to bank accounts. Some do not even
have power of arrest and have to call upon police to assist in taking arrest action. They are doomed to fail.
It should be appreciated that corruption is a secret crime and extremely difficult to investigate. Hence, the
ACA should be given wide power, including telephone intercept, surveillance, undercovers capability etc. Of
course there should be a check and balance system built in to prevent abuse.

H. Resources for ACA
It would be reasonable to set a percentage of the government budget for the ACA, such as 0.3% as in
Hong Kong, ideally higher. In Mongolia, there is a law prohibiting any reduction of the budget of ACA,
compared with the year before. This is an effective guarantee for continued political will for ACA.

I. Professional ACA
This is the area where most ACAs fail. Whilst the ACA is established, even with good laws and
resources, the staff are unprofessional or incompetent to perform the difficult task of combating corruption.
Unless there is adequate capacity building effort put into the new ACAs, they have little chance of success.
The anti-corruption consultant recommending the establishment of the ACA should have the responsibility
to provide capacity building input to see through its success.

J. Role of Government Ministries
All government ministries should be ordered to take an active role in combating in-house corruption. I
assisted the President of the Philippines and the Prime Minister of Mongolia in conducting anti-corruption
summits for their heads of ministries. It was amazing to note that initially these heads did not consider
fighting corruption as their prime responsibilities. But it is interesting to note that after the workshop, they
then came to have a better understanding of their responsibilities to clean their own house and that they
agreed that there were indeed many things which they can or should do. In the Philippines, together with
the Philippines Development Academy, a model of the Ministry’s Action Plan was designed. It has four
pillars, namely:

1. Ethical Leadership
2. Staff Integrity
3. System Integrity

All government ministries and agencies should develop their own anti-corruption action plan based on
their unique circumstances. A specimen action plan can be illustrated as below:

1. Ethical Leadership
   a. Agency Heads should publicly pledge their commitment to combat corruption by issuing public
      statements on zero tolerance, values and ethics;
   b. Agency Heads should allocate a fixed percentage of the agency’s budget for anti-corruption
      activities;
   c. Set up a declaration system for conflict of interest, including relatives of senior management
      involved in business in the same sector;
   d. Establish a top level Steering Committee on an Anti-Corruption Action Plan to map out,
      coordinate and to monitor the agreed action.

2. Staff Integrity
   a. Every Agency should adopt an agency-specific Staff Code of Ethics including clear guidelines for
      gifts, loans and entertainment;
b. Staff recruitment will adopt principles that ensure transparency, openness and fairness;
c. Agencies will conduct staff ethics training and development activities, such as seminars, workshops, slogan competitions and promoting a healthy life style;
d. Integrity will be included in the job description of staff contracts, and in staff appraisal.

3. System Integrity
   a. Agencies will set up a risk management unit to assess corruption vulnerability in the organization, to review systems and procedures, making them more efficient, transparent and accountable;
   b. Agencies will examine possibilities to introduce e-Government and e-procurement;
   c. Agencies will conduct public service feedback survey on an ongoing basis;
   d. An anti-corruption clause will be included in all contracts of agencies;
   e. Contractors will be blacklisted, and their names will be published and will be open to the public;
   f. Job rotation systems will be implemented.

4. Monitoring and Deterrence
   a. Mandate that employees report corruption, suspected corruption, and attempted corruption;
   b. Set up a confidential hotline for receiving complaints;
   c. Formulate policies and procedures to protect the confidentiality of whistle-blowers;
   d. Set up internal audit and surprise check system;
   e. Set up an internal investigation section to investigate complaints.

K. Enabling Environment
   Even with the best strategy and law, it is necessary to build in the enabling environment of the country to support the fight against corruption. The civil servants salary and staff management structure should be reviewed and improved. The prosecution authority and judiciary should be free from corruption, the public administration should be required to become more efficient, transparent and accountable. The media should be given the freedom to expose corruption. The public and civil societies should be mobilized to support the fight against corruption.

L. Adopting International Best Practices
   Some international best practices in combating corruption can be adopted. The best guideline is the UN Convention Against Corruption. Having travelled to different countries as an international anti-corruption consultant, I have collected some examples of the international best practices, such as:

   • In South Korea, the public sector, the business sector and the civil societies joined hands in forming a coalition called Korea-PACT. Over 800 organizations signed the PACT and undertook to implement the agreed action plan. The progress was reviewed annually by an international evaluation team;
   • In the Philippines, an expert team is going through the government ministry one-by-one to carry out a comprehensive integrity audit check and to make recommendations on what measures the government ministry should implement to combat internal corruption problems;
   • New Zealand requires all heads of government agencies to submit an annual anti-corruption action plan;
   • In the Philippines, all public procurement in government ministries should be conducted through a “Bids and Award Committee”, and an independent observer should be appointed as a member to represent the public to monitor the decision making progress;
   • In Canada, all public officers have a legal obligation to report corruption;
   • In Pakistan, the Philippines and Indonesia, special anti-corruption courts were formed to hear corruption trials;
   • In Nigeria, government officials and politicians are not allowed to have overseas bank accounts;
   • In Singapore, civil servants cannot accumulate personal debts of more than three months’ salary;
   • Malaysia set up its own Malaysian National Integrity Index to monitor the integrity progress in the country.

After due consideration and consultation, a national anti-corruption action plan should be adopted. An example of a country action plan is as follows, which should be further improved after having taken consideration of all the above mentioned ideas:
### Corruption Risk Mitigation Plan – Corruption

<table>
<thead>
<tr>
<th>Major Corruption Risks</th>
<th>Action Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-corruption laws are not adequate</td>
<td>• National Congress to pass anti-corruption law based on the UN Convention Against Corruption, including criminalization of private sector corruption; illicit enrichment, criminal conflict of interest</td>
</tr>
</tbody>
</table>
| Conflict of interest amongst public officials in their private investment and interference with public procurement | • Enactment of criminal conflict of interest law  
• Introduce a declaration system for conflict of interest                                                                                                                                                                                                                       |
| Establishment of independent anti-corruption commission                                  | • Provide adequate resource & capacity building support in the three areas of enforcement, prevention & public education                                                                                                                                                        |
| Civil Service Commission is not effective in ensuring integrity in civil service appointment | • Set up open and fair recruitment, promotion and disciplinary system, with proper check & balance  
• Introduce integrity vetting system  
• Design code of ethics and staff ethical training                                                                                                                                                                                                                     |
| General Audit Office is not perceived to be effective                                   | • Provide resources, capacity building and independence  
• Improve public accountability of the Office through publication of annual report                                                                                                                                                                                           |
| Law enforcement agencies are perceived to be corrupt                                    | • Strengthen internal complaint and investigation                                                                                                                                                                                                                           |
| The Prosecutors Office and Judiciary are not perceived to be upholding justice          | • Dedicated team of selected prosecutors and judges to deal with corruption cases                                                                                                                                                                                          |
| Administrative Quality                                                                 | • Order for all ministries to submit Action Plan for 2009, including  
• Organizing centralized workshops and seminars on the following: staff ethical training, setting up public/internal complaint system, training for internal investigation technique, corruption prevention technique, internal audit technique, e-government, conflict of interest, media relations workshop, etc.  
• Formulate tailor made code of ethics for ministries  
• Establish a one stop enquiry service & hotline  
• Establish a declaration of conflict of interest system for all ministries  
• Establish a Certified Integrity Officer Scheme to train officers to act as the Ministry/Agency’s Integrity Officer  
• Launch annual ministries benchmarking survey on corruption and service delivery  
• Introduce independent assessor in the tender evaluation committees                                                                                                                                   |
**V. CONCLUSION**

There is no single solution in fighting corruption. Every country has to examine its unique circumstances and come up with a comprehensive strategy, but any strategy must embrace the three pronged approach - deterrence, prevention and education. Ideally there should be a dedicated and independent anti-corruption agency tasked to co-ordinate and implement such strategy, and to mobilize support from the community.

The Hong Kong experience offers hope to countries with serious corruption problems which appear to be insurmountable. Hong Kong’s experience proved that given a top political will, a dedicated anti-corruption agency and a correct strategy, even the most corrupt place, like Hong Kong, can be transformed to a clean society, within a rather short period of time.
ISSUES CONCERNING THE IMPLEMENTATION OF THE UNITED NATIONS
CONVENTION AGAINST CORRUPTION

Dimitri Vlassis*

The United Nations Office on Drugs and Crime (UNODC) is the guardian of the United Nations Convention against Corruption (UNCAC), the first legally binding global anti-corruption instrument. The Convention was adopted by the United Nations General Assembly in its resolution 58/4 of 31 October 2003. It entered into force in record time on 14 December 2005, ninety days after the date of deposit of the thirtieth instrument of ratification, pursuant to article 68 of the Convention.

UNCAC obliges States that have ratified or acceded to it to prevent and criminalize corruption, promote law enforcement and international cooperation, cooperate for the recovery of stolen assets, and enhance technical assistance and information exchange. UNODC facilitates the ratification or accession, and implementation of the Convention, as well as supports States parties in devising coherent responses to prevent and combat corruption in accordance with UNCAC. To date, the Convention has 154 States parties. The last country to accede was Vanuatu on 12 July 2011.

The Conference of the States Parties to UNCAC was established, pursuant to article 63 of the Convention, to improve the capacity of and cooperation between States parties to achieve the objectives of the Convention, and to promote and review its implementation. The Conference now meets every two years. Its first session was held in Amman, Jordan in December 2006; the second in Nusa Dua, Indonesia in January 2008; and the third in Doha, Qatar in November 2009. The fourth session has just taken place in Marrakesh, Morocco from 24 to 28 October 2011. The Rules of Procedure provide for the manner in which the Conference is to be carried out (i.e. representation of States parties, Secretariat, languages, conduct of business, decision-making). UNODC is the Secretariat of the Conference whose functions are specified in article 64 of the Convention.

Already at its first session, the Conference of the States Parties to UNCAC decided on the necessity to establish a mechanism or mechanisms to assist the Conference in reviewing the implementation of UNCAC. In order to determine the terms of reference for such a body, an Open-ended Intergovernmental Working Group on Review of the Implementation of UNCAC was established and held five meetings between 2007 and 2009. In its landmark resolution 3/1, the Conference adopted the Terms of Reference of the Mechanism for the Review of Implementation of UNCAC (UNCAC Review Mechanism). The Mechanism was established in accordance with article 63, paragraphs 1 and 7 of the Convention, which, inter alia, give a mandate to the Conference to promote and review the implementation of the Convention, and allow for the establishment of, if necessary, any appropriate mechanism or body to assist in such effective implementation.

The Implementation Review Group was established to have an overview of the review process in order to identify challenges and good practices, and to consider technical assistance requirements in order to ensure effective implementation of the Convention. At its first session, from 28 June to 2 July 2010, the Implementation Review Group adopted the Guidelines for Governmental Experts and the Secretariat in the Conduct of Country Reviews (Guidelines), including the Blueprint for Country Review Reports and Executive Summaries.

Pursuant to article 4, paragraph 1 of UNCAC, States parties are to carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of

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States, and non-intervention in the domestic affairs of other States. These principles apply, inter alia, to the UNCAC Review Mechanism, whereby it is to be conducted in a non-political and non-selective manner. The Mechanism, an intergovernmental process, is to: (a) be transparent, efficient, non-intrusive, inclusive and impartial; (b) not produce any form of ranking; (c) provide opportunities to share good practices and challenges; (d) assist States parties in the effective implementation of the Convention; (e) take into account a balanced geographical approach; (f) be non-adversarial and non-punitive, and to promote universal adherence to the Convention; (g) base its work on clear, established guidelines for the compilation, production and dissemination of information; (h) identify difficulties encountered by States parties in fulfilling their UNCAC obligations and good practices in implementing the Convention; (i) be of a technical nature and promote constructive collaboration, inter alia, in preventive measures, asset recovery and international cooperation; and (j) complement existing international and regional review mechanisms. The Mechanism takes into account the levels of development of States parties, as well as diverse judicial, legal, political, economic and social systems and differences in legal traditions.

The UNCAC reviews are to be conducted in a spirit of constructive collaboration, dialogue and mutual trust. The review process is ongoing and gradual, and applicable to all States parties. It consists of 2 review cycles of five years each. During the first cycle, chapter III (Criminalization and law enforcement) and chapter IV (International cooperation) are to be reviewed, and in the second cycle, to start in 2015, chapter II (Preventive measures) and chapter V (Asset recovery). The selection of States parties participating in the review process in a given year of a review cycle is to be carried out by the drawing of lots at the beginning of each review cycle. At its first session, from 28 June to 2 July 2010, the Implementation Review Group drew lots for countries under review for all four years in the first cycle of the UNCAC Review Mechanism in order to allow countries to plan for their reviews. In conducting the drawing of lots for the States parties under review, consideration was given to the proportionality of the number of States parties from each regional group participating in the review process in a given year to the size of that regional group and the number of its members that are States parties to the Convention. A State party selected for review in a given year may, with a reasonable justification, also defer participation to the following year of the review cycle. While in the first year of the current cycle of the UNCAC Review Mechanism, there were 27 States under review due to the decision of several States parties to make use of their right to defer their review, the second year is charged with 41 States under review.

Each State party is reviewed by two other States parties. The State party under review is to also be actively involved in the review. The Terms of Reference prescribe that one of the two reviewing States parties be from the same geographical region as the State party under review and if possible, to have a similar legal system. This selection is carried out at the beginning of each year of the review cycle, and by the end of a cycle, each State party must have undergone its own review and performed a minimum of one review and a maximum of three reviews. In order to coordinate the review process, each State party is to appoint up to 15 governmental experts and the State party under review needs to appoint a focal point.

Reviews can be broadly broken down into three phases. The first phase is where a State party under review is to complete its self assessment checklist (Omnibus software) through broad stakeholder participation. Rather than using paper-based questionnaires, UNODC developed a user-friendly computer-based application to gathering information on a country’s implementation of UNCAC. During this initial phase, an introductory conference call is also organized to introduce the review team and staff of the Secretariat assigned to the review, agree on a timetable, possible division of labour and the language(s) of the review. This phase concludes with the submission by the State party under review of their response to the self assessment checklist. Of the States parties under review in the first year, 26 responses to the checklist were received and one is pending due to the late confirmation of its readiness to undergo review. From the second year, two complete and one partial response to the checklist have been received. During the first year, several States indicated that they required longer to complete the checklist for reasons such as technical constraints and the need for inter-agency coordination. The average length of time required to complete the checklist was 19 weeks, which is longer than the envisaged eight weeks, and the length ranged between 250 and 300 pages.

The second phase starts with the distribution of the self assessment response to the reviewing experts who are to conduct a desk review. In the first year, many reviewing experts stated that they would need an extension of the foreseen one month to thoroughly review the information received. The average time taken was from one to two months.
The third phase is then a phase of active dialogue among the State party under review and the reviewing experts, including the Secretariat, based on the outcome of the desk review. This dialogue can be carried out in various ways, through a second conference call, and then either a joint meeting in Vienna or a country visit. In the first year, 21 country visits and one joint meeting in Vienna were held; one further country visit and three joint meetings are under consideration. In the second year, out of the 28 reviews where direct dialogue has been discussed, 21 country visits have been requested, six are under consideration and one State party under review has requested a joint meeting in Vienna. This phase culminates in an agreement among reviewing and reviewed States on the country report and executive summary. As of 14 October 2011, seven executive summaries were available for the Implementation Review Group.

Various UNCAC reviews are carried out in different languages of the United Nations and such language combinations have proven to be a challenge due to the time associated with translating the necessary information. In the first year, 13 country pairings were in one language, 13 in two languages and only 1 in three languages. In the second year, 15 country pairings are being carried out in one language, 21 in two languages and 5 in three languages. For example, the time required to translate the self assessment response was: from two to four weeks for 8 country reviews; from four to six weeks for 3; and from six to eight weeks for 2.

Ideally, the agreement of the country reports and executive summaries should be reached at 6 months. However, due to the delays encountered, as described above, at least within 9 to 10 months would be the ideal time-frame for the country reviews.

As stipulated in the Terms of Reference of the UNCAC Review Mechanism, the confidentiality of all the information received is of paramount importance. The executive summaries are available to the Implementation Review Group for information purposes only, and States parties under review are encouraged to publish their country reports.

The role of the Secretariat in the UNCAC Review Mechanism, as provided for in the Terms of Reference and Guidelines, is to perform all tasks required for the Mechanism to function efficiently, which can include providing technical and substantive support as required. The Guidelines further stated that the Secretariat is to also organized training workshops for reviewing and reviewed States parties. In the first year, eight training workshops were held with over 200 participants, while in the second year, nine training workshops were held with also over 200 experts. As mentioned above, staff members of the Secretariat are assigned to each country review, and the two staff members tend to be selected based on the agreed upon working languages of the review.

There are various lessons learned from the first year of the UNCAC Review Mechanism, which are highlighted in a note prepared by the Secretariat, entitled ‘Overview of the review process’ for the fourth session of the Conference of the States Parties. It touches upon the issues mentioned above, and states that the Conference may wish to provide guidance to the Implementation Review Group on how to effectively carry out its functions, in particular, in overseeing the review process and within the timeline prescribed by the Terms of Reference and Guidelines, as well as call on States parties involved in the review process to comply with such timelines, as well as prepare for their own reviews.

An area that has been integrally linked to the review process is also that of technical assistance. Already, the Convention in articles 60, 61 and 62 of chapter VI (Technical assistance and information exchange) emphasizes the crucial importance of technical assistance in order to ensure full implementation of UNCAC. The Terms of Reference of the UNCAC Review Mechanism also specify that it is to help States parties to identify and substantiate specific needs for technical assistance, and generally, promote the provision of technical assistance under the Convention. Furthermore, the decision of the Conference to merge the functions of the Open-ended Intergovernmental Working Group on Technical Assistance into the work of the UNCAC Review Mechanism has set the stage for ensuring that needs identified through the reviews are brought to the attention of the Implementation Review Group and to potential technical assistance providers.

The technical assistance needs identified by States parties under review in the first year, based on their response to the self assessment checklist were contained in a note prepared by the Secretariat, entitled ‘Integrating technical assistance in the review process’ and based on the country reports, in a note, entitled ‘Technical assistance needs of Chapters III and IV of the United Nations Convention against Corruption:'
Various priority areas of technical assistance have emerged. For chapter III (Criminalization and law enforcement), these areas enter around cooperating offenders, witnesses and reporting persons (article 32, 33 and 37), foreign bribery and bribery in the private sector (article 16 and 21), prosecution, adjudication and sanctions (article 30), and freezing, seizure and confiscation (article 31). For chapter IV, these are extradition (article 44), mutual legal assistance (article 46) and law enforcement cooperation (article 48).

Of interest were also the global technical assistance needs for both chapters III and IV. In order of priority, these were: (1) a summary of good practices and lessons learned; (2) model legislation, treaty, arrangement or agreement; (3) on-site assistance by an anticorruption or relevant expert; (4) legal advice; and (5) the development of an action plan for implementation. This is highlighted below in the figure. Therefore, an early conclusion might be that reporting States parties with technical assistance needs require the greatest assistance with examples (i.e. summary of good practices and lessons learned) and models on how to implement the chapters under review, which would ideally be supported through the guidance of a relevant advisor and legal advice that takes into account a long term strategy (i.e. action plan for implementation).

When addressing such technical assistance needs, the approach endorsed by the Conference of the States Parties to UNCAC in resolution 3/4, entitled ‘Technical assistance to implement the United Nations Convention against Corruption’ is of importance. The Conference endorsed a country-led and country-based, integrated and coordinated technical assistance programme of delivery.

The Secretariat has sought to provide the Implementation Review Group with guidance on how such needs might be addressed through a note it prepared on ‘Possible technical assistance activities to respond to needs identified by States Parties during the first year of the first cycle of the Implementation Review Mechanism’. This sets out a range of technical assistance initiatives envisaged to meet the needs identified through the UNCAC Review Mechanism. Based on the preliminary analysis on technical assistance needs, and on the recommendations of the Implementation Review Group, it appears that meeting the technical assistance needs of States in connection with the implementation of chapters III and IV might be accomplished through a three-tiered approach: at the global level; at the regional level; and at the country level. Such an approach offers considerable opportunity to maximize impact, effectiveness and coherence in programming. This approach would be in line with the endorsement by the Conference of a country-led and country-based technical assistance strategy, while taking into full account global and regional trends that require a broader perspective.

It is further to be noted that the two areas of asset recovery and prevention, for which the review of implementation will commence in 2015, are subject to two intergovernmental working groups of the Conference of the State Parties to UNCAC. States parties have given a mandate to these working groups to structure its work in a way which will best allow for the groups to assist States in implementing the chapter II (Preventive measures) and chapter V (Asset recovery), and in preparing the review of these chapters.
1. A GENERAL OVERVIEW OF THE WORK OF UNODC IN THE ANTI-CORRUPTION FIELD

The United Nations Convention against Corruption (UNCAC) provides a comprehensive and multi-disciplinary framework for the prevention of, and fight against, corruption at the national level, as well as for effective regional and international cooperation. The Conference of the States Parties to UNCAC aims to improve the capacity of, and cooperation between, States parties to achieve the objectives of the Convention and promote and review its implementation. The Convention itself, as well as resolutions by the Conference, the General Assembly and the Economic and Social Council have mandated UNODC to support Member States in the ratification and implementation of the provisions of the Convention, in particular in strengthening their legal, institutional, and operational capacities to implement the provisions of UNCAC at the domestic level, and to cooperate internationally towards the establishment of a functional universal legal regime against corruption.

UNODC, through its Thematic Programme on Action against Corruption and Economic Crime, acts as a catalyst and a resource to help States ratify and effectively implement the provisions of the Convention. A primary goal of the anti-corruption work done by UNODC is to provide States with practical assistance to build the technical capacity needed to ensure compliance with the requirements of the Convention. In 2010-2011, in the framework of the project entitled “Towards an effective global regime against corruption”, UNODC provided technical assistance in line with UNCAC to almost 50 countries (including assessments of domestic legal frameworks, legislative drafting, advice on institutional frameworks, capacity-building of anti-corruption bodies and criminal justice institutions), including through a large joint UNODC/UNDP project in Iraq.

In addition, assistance is regularly provided for the ratification/accession to UNCAC. In 2010-2011, ten additional countries ratified/acceded to UNCAC - Bahrain, Botswana, the Democratic Republic of Congo, Estonia, Liechtenstein, Iceland, India, Nepal, Thailand and Vanuatu. This brings the total to 154 States parties, as of 17 October 2011.

As a comprehensive framework for concerted action at the national and international levels to prevent and combat corruption, the Convention can be used as a benchmark for the design, implementation and evaluation of technical assistance programmes and projects geared towards enhancing the capacity of Member States to deal effectively with the challenges posed by corruption. Bearing this in mind, UNODC has been developing a series of technical assistance services to meet the growing demands of Member States in this field. An indicative list of such services includes, inter alia, the following:

- Provision of advice and expertise to support the development of a wide range of policies and programmes to ensure the effective implementation of the UNCAC provisions on the prevention of corruption, including national anti-corruption strategies and action plans, codes of conduct, asset declaration systems, conflict of interest policies and human resource management systems based on principles of efficiency, transparency and objective criteria;²

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² See Chapter II of the UNCAC.
• Provision of advice and expertise to support the development of domestic legislation aiming at ensuring full compliance with the provisions of UNCAC. In addition to legal advisory services, the development of such tools as legislative guides, model legislation and electronic libraries is another pillar of legal assistance provided by UNODC;
• Provision of specialized expertise and assistance to countries on the Convention’s innovative provisions on asset recovery;3
• Provision of advice and expertise to support States parties in setting up and strengthening the institutional framework required by UNCAC in the areas of investigation, prosecution and international cooperation to combat corruption, including asset recovery;
• Assistance in building training capacities and programmes, through the development of training curricula, training manuals, training of trainers and the design of cost-effective methods and tools for the conduct of training, including computer-based training, to ensure that countries can build a body of highly skilled anti-corruption practitioners;
• Provision of assistance to States parties in enhancing the integrity, accountability and oversight of their criminal justice and security institutions with a view to enhancing their capacities to effectively carry out their mandate, implement the provisions of UNCAC and reduce their vulnerability to corrupt practices;
• Facilitating the exchange of good practices in the various fields covered by the Convention through the support of international and regional associations of anti-corruption authorities as well as the organization or regional and sub-regional workshops, meetings, and training events;
• Conduct of corruption risk assessments and strengthening of national capacities to carry out these assessments, in order to acquire a profound knowledge and understanding of the challenges posed by corruption (scope, nature, causes and contributing factors) as well as of the weaknesses of the laws, institutions, and policies in any given country;4
• Provision of support to Governments in raising awareness about the negative impact of corruption through targeted information campaigns and effective work with the media;5
• Supporting elements of civil society in strengthening the demand for good governance through the International Anti-Corruption Day campaign, including raising awareness about the negative impact of corruption in daily life and encouraging a more active stand against corruption;
• Building and strengthening partnerships between the public and the private sector against corruption, and promoting, in this regard, the business community’s engagement in the prevention of corruption by, inter alia, developing initiatives to promote and implement public procurement reform and identifying elements of optimal self-regulation in the private sector.6

In addition, UNODC facilitates the Anti-Corruption Mentor Programme, which placed mentors in Bolivia, Cape Verde, Jordan, Kenya, Tajikistan, Thailand and Southern Sudan during a first phase that ended in 2010. The anti-corruption mentors provide a broad range of policy and technical advice and day-to-day support for the implementation of the Convention against Corruption, such as conducting gap assessments, assisting in establishing anti-corruption institutions and policies, providing training in investigation and prosecution of corruption offences, providing legislative assistance and advising on asset recovery strategies. They further prepare project proposals and raise funds for further activities. Recently, four advisers have been deployed to new target areas: one adviser to the Democratic Republic of Congo, to provide assistance at the country level, and three at the regional level – in Nairobi for East Africa, Bangkok for East Asia and in Panama to cover Central America and the Caribbean. As needs continue to emerge, UNODC will seek to place additional regional anti-corruption advisers elsewhere, provided that necessary extra-budgetary funds become available.

3 See Chapter V of the UNCAC.
4 The cornerstone of this work is the assistance to Member States in using the software-based comprehensive self-assessment checklist developed to assist States parties in reporting on their implementation of UNCAC and in identifying challenges in implementation and technical assistance needs. This also includes the support to the UNCAC Review of Implementation Mechanism, based on the self-assessments submitted by reviewed countries and on a peer review, which will identify technical assistance needs and ensure that the gaps identified will be filled by prioritizing the delivery of technical assistance as an integral part of the mechanism.
II. THE CONFERENCE OF THE STATES PARTIES TO THE UNCAC
AND ITS WORKING GROUPS

A. Role and Mandate

Pursuant to article 63 of the Convention, the Conference of the States Parties to the UNCAC was
established to improve the capacity of and cooperation between States parties to achieve the objectives set
forth in the Convention and to promote and review its implementation.

The Conference of the States Parties to the UNCAC is tasked with supporting States Parties and
signatories in their implementation of the Convention, and provides policy guidance to UNODC for the
development and execution of anti-corruption related activities. It has held three sessions to date (the last
one in November 2009) and established working groups to assist it in its work in the fields of review of
implementation, asset recovery, technical assistance and prevention. The next session was held 24 to 28
October 2011 in Marrakech.

The Conference has adopted far-reaching resolutions at each of its sessions and has mandated UNODC
to implement them, including through the development of technical assistance projects. The Conference at
its third session adopted landmark Resolution 3/1 on the review of the implementation of the Convention.
In that Resolution, the Conference established a review mechanism aimed at assisting countries to meet
the objectives of the Convention through a peer review process. In its capacity as the guardian of the
UNCAC and Secretariat of the Conference of the States Parties to the Convention, UNODC is mandated to
support the newly established mechanism for the review of implementation of the Convention and assist the
Conference in identifying technical assistance priorities and developing appropriate responses to corruption.
A more analytical overview of the mechanism is presented in a separate paper.

B. Working Group on Prevention

At its third session, the Conference of the States Parties to the UNCAC decided to establish an interim
open-ended intergovernmental working group to advise and assist it in the implementation of its mandate
on the prevention of corruption. The Conference also decided that the working group should perform the
following functions:

• Assist the Conference in developing and accumulating knowledge in the area of prevention of
corruption;
• Facilitate the exchange of information and experience among States on preventive measures and
practices;
• Facilitate the collection, dissemination and promotion of best practices in corruption prevention;
• Assist the Conference in encouraging cooperation among all stakeholders and sectors of society in
order to prevent corruption. 7

At its most recent meeting, held from 22 to 24 August 2011, the Working Group noted with appreciation
that many States parties had shared information on their initiatives and good practices on the key topics,
namely: awareness-raising policies and practices with special reference to articles 5, 7, 12 and 13 of
the Convention; and the public sector and prevention of corruption; codes of conduct (article 8 of the
Convention) and public reporting (article 10 of the Convention). The Working Group requested States
parties to continue to share with the secretariat updated information on initiatives and good practices related
to Chapter II of the Convention.

The Working Group further recommended that, at its future sessions, it should continue to focus on a
manageable number of specific substantive topics relevant to the implementation of the articles in Chapter
II of the Convention, and reiterated that the availability of adequate expertise on the topics being addressed
would benefit the discussions. At its future meetings, the Working Group may consider focusing its attention
on the following topics:

• Implementation of article 12 of the Convention, including the use of public-private partnerships;
• Conflicts of interest, reporting acts of corruption and asset declarations, particularly in the context of
articles 7-9 of the Convention.

The Working Group considered that its future meetings should follow a multi-year workplan for the period up to 2015, when the second cycle of the Mechanism for the Review of Implementation of the Convention should begin, and recommended that the Conference should discuss the matter at its next session. In advance of each meeting of the Working Group, States parties should be invited to share their experiences of implementing the provisions under consideration, preferably by using the self-assessment checklist and including, where possible, successes, challenges, technical assistance needs, and lessons learned in implementation. Also in advance of each meeting, the secretariat should prepare background papers for the topics under discussion, based on the input from States parties, in particular if they relate to initiatives and good practices. The background papers should synthesize the different approaches taken by States parties in their different contexts, presenting the broad options and typologies of approach used and drawing attention to any common issues arising or lessons identified by States parties. Panel discussions could also be held during the meetings of the Working Group, involving experts from countries that have provided written responses on the priority themes in question.

Finally, the Working Group reaffirmed that States parties should continue to strengthen awareness-raising and education throughout all sectors in society, and that special attention be devoted to work with young people and children as part of a strategy to prevent corruption.

C. Working Group on Asset Recovery

At its first session, the Conference of the States Parties to the UNCAC adopted resolution 1/4, in which it decided to establish an interim open-ended intergovernmental working group to advise and assist the Conference in implementing its mandate on the return of proceeds of corruption.\(^8\)

Reaffirming that Chapter V of the Convention presented a unique framework for asset recovery, the working group has devoted part of its discussions to challenges to the asset recovery process in practice. It has paid particular attention to a series of practical problems and obstacles hampering assistance and efficient cooperation in this field, including those related to divergences in legal systems. In addition, the working group placed emphasis on ways to address the lack of capacity of prosecutors, investigators and financial intelligence units to deal with asset recovery cases. It found that the exchange of information between investigative and prosecutorial authorities of requesting and requested States was often hindered by a deficit in trust between institutions at the national and international levels. Another challenge noted was the excessive length of proceedings.

The working group has further discussed positive examples, good practices and areas for action in the field of asset recovery. It has been stressed throughout its work that States should strive to have the most comprehensive legal frameworks in place and take all necessary steps to enable practitioners to make the best possible use of the legal tools in place. Moreover, particular attention was devoted to the need to develop a common understanding of standards for procedural and evidentiary requirements in requesting and requested States and to make use of modern information technology in evidentiary procedures and for the fast-tracking of information processing.

The working group has further discussed technical assistance approaches to supporting asset recovery such as capacity-building and training, gap analyses, the drafting of new laws where necessary, the facilitation of the mutual legal assistance process, knowledge dissemination and the provision of practical tools such as case management systems. In this vein, it was noted that urgent and concerted action was necessary to build or strengthen trust among cooperating States and to promote informal channels of communication through, inter alia, the establishment of a network of focal points. Those focal points would be designated officials with technical expertise in international cooperation and be in a position to assist their counterparts in effectively managing requests. Further, the establishment of regional networks similar to the Camden Asset Recovery Inter-Agency Network (CARIN) was encouraged.

The working group has noted with appreciation the work of the StAR initiative in developing practical guides and practitioners’ tools and the work of UNODC in establishing a knowledge management consortium and a legal library on anti-corruption issues. It further discussed the importance of adopting

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an operational, practical and analytical approach to developing knowledge products and of ensuring broad consultations with experts from States from all regions and representing all legal systems. Moreover, it underlined the importance of coordinating efforts between existing initiatives in order to maximize the use of expertise and resources, and forge further partnerships for asset recovery and technical assistance.

III. SUBSTANTIVE TOPICS OF RECENT INTEREST IN THE PROMOTION AND IMPLEMENTATION OF THE CONVENTION

A. Development of Anti-Corruption Educational Curriculum

Corruption is a complex phenomenon that affects societies around the globe by undermining democratic institutions, slowing economic development and perverting the rule of law. One effective way to prevent it is by educating future generations of leaders about the problem and the tools and mechanisms available to confront it. Promoting a culture of integrity and zero tolerance for corruption throughout society and across professions is an important element in the fight against corruption. By bringing anti-corruption education to universities and other academic institutions, a significant contribution of lasting effect can be made to combat it. Article 13 of the Convention requires States parties to take measures to promote the active participation of individuals and groups in the prevention of, and the fight against, corruption, including through public education programmes, including school and university curricula.

Upon invitation from Northeastern University and UNODC, a small group of approximately 30 experts in the field of anti-corruption and higher education gathered to initiate a consultative process for the development of an academic programme on anti-corruption for university students. As a first step, the group set itself the goal to develop a rough concept for further elaboration, defining the educational objectives, target audience, scope and structure of a programme designed to educate future leaders and professionals about corruption and mechanisms to combat it.

The backbone of the initiative is a comprehensive set of academic educational materials organized in modular form in a so-called ‘menu of courses’ (course topics). This structure is not intended to be a full-fledged curriculum per se, but rather a flexible compilation of teaching modules on different aspects of corruption, which can be taught separately or in sequence, and thus incorporated into existing curricula or syllabi as needed and as scope and teaching plans permit. The thematic outline or ‘menu’ would then be annotated with a detailed bibliography and ideally complemented by case studies and a teaching manual, taking into account the variety of legal systems and education models and traditions that exist in order to ensure utmost adaptability to teaching styles across the globe.

Finally, regarding delivery modalities, the material would be made available as an open source tool online, accessible free of charge and open to amendments and further elaboration by teachers who use the material in order to keep it a living document. Pilot testing for the curricula is scheduled to begin in Spring 2012 with the completion and roll-out of the final tools scheduled to take place in Autumn 2012.

B. Work with the Private Sector

The private sector and corporate community has a key role to play in enhancing integrity, accountability and transparency. The rapid development of rules of corporate governance around the world is prompting companies to focus on anti-corruption measures as part of their mechanisms to protect their reputations and interests of their shareholders. Internal checks and balances are increasingly being extended to a range of ethics and integrity issues. Article 12 of the Convention requires States parties to take measures to prevent corruption in the private sector, including through enhanced accounting and auditing standards. It also provides a menu of suggested measure to achieve these goals, including by promoting cooperation between the private sector and law enforcement agencies, promoting standards and procedures designed to safeguard the integrity of private entities (including codes of conduct and business integrity standards), promoting transparency among private entities, preventing conflicts of interest, and ensuring effective internal audit systems.

In the period 2010-2011, the United Nations Global Compact and UNODC together developed an e-learning tool for the private sector to enhance understanding of principle 10 of the Global Compact (anti-corruption), which states: “Business should work against corruption in any form, including bribery and
extortion,”9 and its underlying legal instrument, the Convention against Corruption, as it applies to actors operating in the business community. The e-learning tool consists of six short interactive learning modules developed for anyone who acts on behalf of a company. They are based on real-life scenarios designed to provide guidance on how to deal with potential risks of corruption that people working in business may face in their daily work. Issues covered include: (a) receiving gifts and hospitality; (b) gifts and hospitality towards others; (c) facilitation payments and corruption; (d) the use of intermediaries and lobbyists; (e) corruption and social investments; and (f) insider information. Each module lasts about five minutes, providing a quick and effective way of learning. The e-learning tool is publicly accessible and free of charge.10

In the first half of 2011, UNODC, with the support of the Siemens Integrity Initiative, launched three anti-corruption projects aimed at promoting the private sector’s engagement in anti-corruption efforts. UNODC is one of the first recipients of financing for anti-corruption projects though the Siemens Integrity Initiative. The US$100 million Initiative, which is part of the World Bank-Siemens AG comprehensive settlement agreed in 2009, will finance three UNODC projects over three years to work towards the following three crucial areas: reducing vulnerabilities in public procurement systems; creating legal incentives in line with the Convention against Corruption to encourage corporate integrity and cooperation; and educating current and future business and public leaders about the true costs of corruption and how compliance with the Convention can help to protect both the public good and business interests. This $3 million donation from Siemens to support anti-corruption programmes of UNODC is a minuscule amount in terms of the corporate bottom line, but it will have far-reaching ripple effects in combating corruption.

One of those technical assistance projects, entitled “Public-Private Partnership for Probit in Public Procurement”, is to reduce vulnerabilities to corruption in public procurement systems and to bridge knowledge and communication gaps between public procurement administrations and the private sector. The project will promote States’ implementation of article 9 of the Convention and support private actors’ efforts to comply with principle 10 of the United Nations Global Compact.

The second project with the Siemens Integrity Initiative, entitled “Incentives to Corporate Integrity and Cooperation in Accordance with the United Nations Convention against Corruption”, is intended to foster cooperation between the private sector and government authorities, especially law enforcement authorities. It aims to create systems of legal incentives for companies, thus encouraging business to report internal instances of corruption. This project aims to promote States’ implementation of articles 26 (Liability of legal persons), 32 (Protection of witnesses, experts and victims), 37 (Cooperation with law enforcement authorities) and 39 (Cooperation between national authorities and the private sector) of the Convention against Corruption and to facilitate private actors’ compliance with the Tenth Principle of the UN Global Compact. These first two projects are being piloted in India and Mexico and also encompass the compilation and dissemination of good practices and lessons learned.

The third project, entitled “Outreach and Communication Programme”, seeks to enhance companies’ knowledge of how the UNCAC can make a difference in their daily work both internally and in their interaction with public counterparts, and to encourage the business community to turn their anti-corruption commitments into action by bringing their integrity programmes in line with the universal principles of the Convention. The project also seeks to support learning institutions which have come to realize that they do have a role to play in preparing the next generation of public and business leaders to the challenge of making right and ethical decisions. This will be achieved by: (a) creating and disseminating a structured outreach and communication program that combines a global perspective with local contexts, reaching out to private companies, particularly the UN Global Compact business participants; and (b) developing a comprehensive academic learning course on the UNCAC and its implication for public administrators and private operators to be embedded in curricula of business, law and public administration schools.

9 There are ten principles in total, one of which relates to corruption. The full list can be found at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.  
10 This tool can be found at http://thefightagainstcorruption.unodc.org or http://thefightagainstcorruption.unglobalcompact.org.
C. Judicial Integrity and Capacity

The establishment of an independent and effective justice system that safeguards human rights, facilitates access to all and provides transparent and objective recourse is a core value held the world over. The centrality of a strong justice mechanism lies in its essential contribution to fostering economic stability and growth, and to enabling all manner of disputes to be resolved within a structured and orderly framework. As a result, judicial and legal reform is consistently a priority on the agendas of countries regardless of their state of development. Yet the complex and multifaceted nature of achieving the ends of justice has challenged efforts to identify a coherent set of issues warranting the time and attention of reformers, and slowed the subsequent formulation of specific prescriptions and guidelines on what can be done to improve the quality of justice delivery across the system.

Article 11 of the Convention requires each State party, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, to take measures to strengthen integrity and prevent opportunities for corruption among members of the judiciary. In addition, article 13 extends states that similar measures may be introduced and applied within the prosecution services where such entity operates in a posture of independence similar to that of the judicial service.

In 2011, UNODC completed a Resource Guide on Strengthening Judicial Integrity and Capacity, with the purpose to support and inform those who are tasked with reforming and strengthening the justice systems of their countries, as well as development partners, international organizations and other providers of technical assistance who provide support to this process. Work on this guide began following the United Nations Economic and Social Council Resolution 23/2006, which endorsed the Bangalore Principles on Judicial Conduct and requested UNODC to convene an open-ended intergovernmental expert group, in cooperation with the Judicial Group on Strengthening Judicial Integrity and other international and regional judicial forums, to develop a technical guide on approaches to the provision of technical assistance aimed at strengthening judicial integrity and capacity.

Thereafter, UNODC convened an Intergovernmental Expert Group Meeting on 1-2 March 2007 in Vienna, Austria, to provide guidance concerning the content of the guide. Participants recommended that the guide should address the following core themes: a) judicial recruitment, selection and evaluation; b) judicial ethics and discipline; c) assessment and evaluation of court performance; d) case management; e) consistency, coherence and equality in judicial decision-making; f) access to justice; g) function and management of court personnel; h) judicial resources and remuneration; and i) the promotion of public trust in the judiciary. They proposed that, in developing the guide, UNODC should collect and draw from existing best practices in strengthening judicial integrity and capacity. Participants were also of the opinion that the guide should not exclusively address the needs of the providers of technical assistance, but should rather present information that would benefit all stakeholders in the justice system, in particular judges and other justice-sector officials in managerial positions.

Following these recommendations, the mandate for the development of the guide was further specified in ECOSOC Res. 22/2007, which requested UNODC to continue its work to develop a guide on strengthening judicial integrity and capacity, leading to the final product. UNODC, in cooperation with the American Bar Association Rule of Law Initiative and the Research Institute on Judicial Systems (IRSIG-CNR), prepared a first draft of the guide. This draft was further enriched and improved upon by a group of experts on justice sector reform who gathered on 8-10 November 2009 in Bologna, Italy, at the offices of the IRSIG-CNR.

The guide draws together ideas, recommendations and strategies developed by contemporary experts on judicial and legal reform, and includes reference to successful measures taken in a range of countries to address particular challenges in strengthening the justice system. Applied researchers and seasoned practitioners have contributed to a large and growing literature addressing judicial reform efforts. Similarly, there are many valuable experiences and good practices from countries operating within a variety of legal contexts that are worthy of consideration across borders. As a result, the guide brings together a comprehensive set of topics for discussion and strategic thinking in a single volume.

At the same time, the guide does not seek to cover every aspect related to the reform and strengthening of a country’s justice system, nor does it intend to replace the vast array of complementary literature,
research and reports that already exist, including those addressing specialized issues such as juvenile justice, pre-trial detention and human rights. To cover every issue that arises in the transformation of a justice system would be an impossible task. Rather, the guide intends to contribute to the existing literature by providing a guide to target the core areas identified by the expert group as priorities in justice sector reform, and offer recommendations, core ideas and case studies for consideration in the development and implementation of national justice sector actions plans, strategies and reform programmes.

While the guide seeks to provide a holistic approach to judicial reform, it allows readers to select what parts of a larger agenda are most relevant to them and, at the same time, to see how similar aims have been achieved in other jurisdictions. In so doing, the guide aspires to avoid a doctrinaire or monolithic approach to justice sector reform based on a single “best” model. Instead, the goal is to contribute to the literature on justice sector reform a targeted and economic focus on the administration of justice from a systemic standpoint, rather then a focus on the quality of legal decisions themselves. An administration of justice led primarily by the courts affects all participants in the legal process, including members of the public and policy makers, through the application of various practices and procedures. These applications touch on a broad set of issues ranging from judicial recruitment and selection practices, to the timeliness of decisions, to the openness and transparency of the process, to the accessibility of these systems for those seeking justice and the protection of their rights. Ultimately, the guide aims to provide practical information on how to build and maintain an independent, impartial, transparent, effective, efficient and service-oriented justice system that enjoys the confidence of the public and lives up to the expectations contained in relevant international legal instruments, standards and norms.

In addition, UNODC has provided technical assistance to the justice sectors in several countries to help strengthen integrity mechanisms. In Indonesia, assistance was provided to the Supreme Court and other institutions in strengthening judicial integrity, capacity and professionalism; supporting the Corruption Eradication Commission and other institutions for the implementation of the anti-corruption strategy; and providing 15 grass-root NGOs with small grants to support their anti-corruption campaign. Assistance was also provided to strengthen the capacity of law enforcement and criminal justice officials to investigate, prosecute and adjudicate illegal logging and corruption cases linked to them, and UNODC worked with civil society organizations to support “barefoot investigators” who look for and expose forest crimes in their local communities.

In Nigeria, UNODC’s largest anti-corruption project to date was completed that provided support to strengthen the operational capacity of the Economic and Financial Crimes Commission (EFCC) and assisted the Nigerian judiciary in strengthening integrity and capacity of the justice system at the Federal level and within ten Nigerian States. In another ongoing project, assistance is being provided to the Nigerian private sector in the development of principles for the ethical conduct of business as well as the conduct of corruption risk assessments in the private-public sector interface. A new project assisting the Bayelsa State Government (in the Niger Delta region) was launched aiming to strengthen the integrity, transparency and accountability of its public finance management systems and its judiciary.

D. Protection of Whistle-blowers, Reporting Persons and Cooperating Offenders

In order for provisions of the Convention to be effective, they need to be supported by measures and mechanisms that strengthen key phases of corruption cases, particularly the detection, prosecution and punishment of perpetrators and asset recovery. As part of these measures, and in order to enhance detection of corruption, articles 32, 33 and 37 of the Convention mandate States parties to adopt or consider adopting measures relating to cooperating offenders, witnesses and reporting persons. These measures include providing effective witness protection from potential retaliation or intimidation, safeguarding persons reporting corruption in good faith and on reasonable grounds from any unjustified treatment, and encouraging cooperating offenders to supply useful information to investigatory authorities to recover proceeds of crime in exchange for potential mitigation of punishment. 11

11 Article 32 addresses the protection of witnesses, experts and victims. Article 33 addresses the protection of reporting persons, requiring States parties to “consider incorporating . . . appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competence authorities any facts concerning offences established in accordance” with the Convention. Article 37 addresses cases where individuals who have participated in the commission of a corruption-related offense agree to cooperate with law enforcement authorities.
Because of the recent attention directed by States parties to the challenges of protecting whistleblowers, reporting persons and cooperating offenders, UNODC has developed a concept note to provide technical assistance at the global, regional and country levels that would create tools and resource materials, including good practices, for practitioners, particularly law enforcement, investigators, prosecutors and judges involved in corruption cases. The tools, resource materials and training workshops would be approached from the standpoint of the practical implementation of the Convention, within the context of internationally recognized good practices and operational realization of articles 32, 33 and 37 of the Convention.

As corruption is often a sophisticated criminal activity, States parties do not always have the means to continually monitor compliance with anti-corruption laws, nor do they possess the inside information to spot corruption at very early stages. Thus, successful detection and prosecution of corruption in many cases requires the cooperation of reporting persons, witnesses or cooperating offenders who come forward with information about suspicions of wrongdoing or proceeds of crime.

In terms of reporting persons, in particular – commonly called “whistle-blowers” – there is no universally accepted definition of the term “whistle-blower” in international anti-corruption instruments. Nevertheless, it is generally agreed that the term encompasses individuals who in good faith report suspected acts of corruption. In essence, whistle-blowers are acting in the public interest by reporting acts of corruption and criminality. Corrupt activities are generally conducted in secret, so these are persons who reveal crimes that might otherwise go unnoticed. Thus, in many cases, whistle-blowers are employees and other actors within particular sectors with first-hand knowledge of processes and the work of the institution or enterprise concerned. They have the potential and are best placed to uncover misconduct by providing information, through either internal or external reporting mechanisms, to supervisors, regulatory authorities and agencies, as well as law enforcement bodies.

Whistle-blowers and reporting persons are particularly at risk of suffering negative consequences as a result of their actions to report corruption. These can range from social or workplace stigma to overt retaliation, such as failure to promote/retain, dismissal, or forced transfer, and can, in some cases, escalate to physical or material harm to themselves or their families. Such retaliation can result in witnesses and reporting persons becoming uncooperative with investigators, and the potential for such retaliation has a chilling effect on those who may report corruption in the future. Therefore, whistle-blower protection laws and policies support the rule of law and the observance of institutional values, social goals and public policies by providing reliable means of redress for retaliation.

Protection of witnesses is important in the context of many types of criminal investigations, and in particular, in investigations of corruption in both the public and private sectors. The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law. As such investigations become more serious and complex, it is essential that witnesses, as the cornerstones for successful investigation and prosecution, have trust in criminal justice systems. Witnesses – whether whistle-blowers or others who possess evidence related to corruption – therefore need to have the confidence to come forward to assist law enforcement and prosecutorial authorities. They require assurance that they will receive support and protection from intimidation and harm that may be inflicted upon them in attempts to discourage or punish them for cooperating.

Another important tool in the investigation and prosecution of corruption cases is the use of cooperating witnesses (also called “cooperating offenders”), who may operate as confidential informants or undercover operatives with some connection and criminal culpability relative to the corruption activity. In general, what distinguishes cooperating offenders from other types of witnesses is their criminal culpability, and agreement with the Government – in exchange for information and/or testimony – to reduced charges, more favourable sentencing terms, deferred prosecution or other benefit. Because such cooperating offenders

12 Guidance regarding various conceptualizations of the term “whistle-blower” can be found in the following instruments: African Union Convention on Preventing and Combating Corruption Article 5; Council of Europe Criminal Law Convention, Article 22; Council of Europe Civil Law Convention on Corruption, Article 9; Inter-American Convention Against Corruption Article III; Southern African Development Community Protocol Against Corruption Article 4.
often obtain relevant information and evidence through criminal associations and possible undercover operations supervised by law enforcement, they require protection measures similar to witnesses and whistle-blowers, and in some cases even greater. In addition, working with cooperating offenders involves a higher degree of coordination between law enforcement and prosecutors to ensure the integrity of the investigation and operation within the applicable legal context.

Considering the importance of information provided by reporting persons, witnesses and cooperating offenders, and the potential repercussions and safety risks they face, the Convention mandates and encourages States parties to take appropriate measures in accordance with the domestic legal system to adopt laws and policies necessary to protect and encourage witnesses, reporting persons, whistle-blowers and cooperating offenders who draw attention to corrupt activity or identify proceeds of crime. In practice, however, various gaps in domestic legal systems fail to protect such persons and allow retaliation to take place with little or no redress. For example, while laws may provide protection for employees who report corruption by their employers, they may not always cover non-workplace retaliation, such as may occur after the reporting person no longer has an employment relationship with the agency or entity in question. There is thus a range of retaliatory acts left uncovered that may dissuade persons from reporting corruption or cooperating with investigators. Inadequate protection, rigid procedural rules, unclear policies and inadequate institutional capacity may further contribute to dissuading a reasonable person from coming forward with key information.

E. Confiscation of Proceeds and Asset Recovery

In what has been recognized as a major breakthrough compared to existing international instruments against corruption, the UNCAC contains a comprehensive treatment of asset recovery in Chapter V. Beginning with the introductory article, which states that the return of assets pursuant to that chapter is a “fundamental principle” and that States parties shall afford one another the widest measure of cooperation and assistance in that regard (article 51), the Convention sets forth substantive provisions to address specific measures and mechanisms for cooperation with a view to facilitating the repatriation of assets derived from offences covered by the UNCAC to their country of origin.

Chapter V also provides mechanisms for direct recovery of property (article 53) and a comprehensive framework for international cooperation (articles 54-55), which incorporates, mutatis mutandis, the more general mutual legal assistance requirements of article 46 and sets forth procedures for international cooperation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds, instrumentalities and evidence of crime in more than one jurisdiction, in order to thwart efforts to locate and seize them.\(^{13}\)

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\(^{13}\) Article 55, paragraph 1, in particular, mandates a State party to provide assistance “to the greatest extent possible” in accordance with domestic law, when receiving a request from another State party having jurisdiction over an offence established in accordance with the UNCAC for confiscation of proceeds of crime, property, equipment or other instrumentalities, either by recognizing and enforcing a foreign confiscation order, or by bringing an application for a domestic order before the competent authorities on the basis of information provided by the other State party. Under article 54, paragraph 1(c), of the UNCAC, States parties, in order to provide mutual legal assistance pursuant to article 55 with respect to property acquired through or involved in the commission of an offence established in accordance with the Convention, must, in accordance with their domestic law, consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

While confiscation without a criminal conviction (“NCB confiscation”) should never be a substitute for criminal prosecution, in many instances, such confiscation may be the only way to recover the proceeds of corruption and to exact some measure of justice. Countries that do not have the ability to confiscate without a conviction are challenged because they lack one of the important tools available to recover stolen assets. NCB confiscation is valuable because the influence of corrupt officials and other practical realities may prevent criminal investigations entirely, or delay them until after the official has died or absconded. Alternatively, the corrupt official may have immunity from prosecution. Because an NCB confiscation regime is not dependent on a criminal conviction, it can proceed regardless of death, flight, or any immunity the corrupt official might enjoy. Although an increasing number of jurisdictions are adopting legislation which permits confiscation without a conviction, international cooperation in NCB confiscation cases remains quite challenging for a number of reasons. First, it is a growing area of law that is not yet universal; therefore not all jurisdictions have adopted legislation permitting NCB confiscation or enforcement of foreign NCB orders or both. Secondly, even where NCB confiscation exists, the systems vary significantly. Some jurisdictions conduct NCB confiscation as a separate proceeding in civil courts (also known as civil confiscation) with a lower standard of proof than in criminal cases (balance of probabilities); others use NCB confiscation in criminal courts and
With regard to the return and disposition of assets, Chapter V of the Convention incorporates a series of provisions that favour return to the requesting State party, depending on how closely the assets are linked to it in the first place. Thus, the Convention imposes the obligation for States parties to adopt such legislative and other measures that would enable their competent authorities, when acting on a request made by another State party, to return confiscated property, taking into account the rights of bona fide third parties and in accordance with the fundamental principles of their domestic law (article 57, paragraph 2). In particular, the Convention requires States parties that receive a relevant request in the case of embezzlement of public funds or of laundering of embezzled public funds to return the confiscated property to the requesting State on the condition of a final judgement in the latter State (although this condition can be waived) (article 57, paragraph 3(a)). In the case of any other offences covered by the Convention, two additional conditions for the return are recognized alternatively, i.e., that the requesting State reasonably establishes its prior ownership of such confiscated property or that the requested State recognizes damage to the requesting State as a basis for returning the confiscated property (article 57, paragraph 3(b)). In all other cases, the requested State shall give priority consideration to returning confiscated property to the requesting State, returning such property to its prior legitimate owners or compensating the victims (article 57, paragraph 3(c)).

In the framework of the joint UNODC/World Bank Stolen Asset Recovery (StAR) Initiative, practical tools and policy studies on asset recovery have been developed (Asset Recovery Handbook; Best practices guide on income and asset declarations; A Good Practice Guide for Non-conviction-based Asset Forfeiture). A number of basic and advanced training courses have also been conducted. In 2011, the StAR/INTERPOL Asset Recovery Focal Points Platform was launched and further developed. Assistance was provided to the League of Arab States for a regional workshop on asset recovery in June 2011.

As of October 2011, 27 States had submitted formal requests for technical assistance to the StAR Initiative. Another three States had submitted requests for further assistance to follow up on previous support provided. Of these, six requests relate to assets frozen; five to mutual legal assistance on ongoing cases; two to the work of countries as honest brokers in cooperation with financial centres; and four to the development and launching of asset recovery programmes. In addition, UNODC has provided assistance to one State relating to mutual legal assistance at the request of that State. The nature of the assistance offered varies and is fully tailored to the specific needs of the requesting State.

A number of asset recovery training courses have been conducted jointly with StAR as well, including regional events in the Pacific Islands, the Middle East and North Africa, South and Central America, South and Eastern Europe, East and Southern Africa and in South and East Asia. Training has been delivered on two levels: introductory workshops aimed at raising awareness about asset recovery; and more advanced training courses to address the technical aspects of asset recovery. The introductory workshops have generally been held at a regional level, to allow practitioners to share experiences and develop contacts, including contacts in regional financial centres. Those events are designed for higher-level decision-makers who do not require extensive training on hands-on asset recovery techniques and procedures. In addition, specialized training on specific topics or to specific groups has been provided. A pilot course is also being undertaken with the East African Association of Anti-Corruption Agencies to develop a pool of trainers, who would be able to transfer skills on asset recovery to counterparts in the region, as and when they are going to use those skills.

StAR has also helped push asset recovery to the top of the international agenda and to bring international organizations together around a common agenda. Key events attended by StAR/UNODC staff members included: Group of Twenty (G-20) Finance Ministers and Central Bank Governors Anti-Corruption Working Group; Financial Action Task Force/Egmont meetings; and OECD Working Group on Bribery. Asset recovery now figures prominently in commitments by the G20 and is an integral part of the G20 Anti-Corruption Strategy. In addition, and in cooperation with the Swiss Government, StAR also arranged “No Safe Havens: A Global Forum on Stolen Asset Recovery and Development” (8-9 June 2010) with 120 high-require the higher criminal standard of proof. Some jurisdictions will only pursue NCB confiscation after criminal proceedings were abandoned or unsuccessful, while others pursue NCB confiscation in proceedings parallel to the related criminal proceedings.
level participants, including 98 Cabinet Ministers from around the world, representatives of the financial and private sectors, civil society organizations and international and bilateral development agencies.

UNODC recently completed its project on Action against Economic Fraud and Identity-related Crime. The objective of the project was to develop new tools to assist Member States in strengthening their legal, institutional and operational capacities in order to combat economic fraud and identity-related crime at the domestic level, and to effectively engage in international cooperation against these crimes. Experience and knowledge accumulated in the past years strongly showed the growing needs of Member States for assistance aimed at upgrading domestic capabilities to both prevent and combat economic fraud and identity-related crime. It was paramount that the important research and policy groundwork accomplished by UNODC so far be sustained and followed-up to achieve in-depth and tailored national capacity-building support. This project was a first step to contribute to the priorities identified in relevant strategies and policies on identity-related crime.

In the framework of the project, a Handbook on Identity-related crime was finalized, which compiles a variety of tools, including: a manual to assist Member States in developing and drafting new identity offences and in reviewing and modernizing related existing offences, together with a compendium of examples of relevant legislation on identity-related crime (and fraudulent practices linked to it) to be made available for use by Member States; an inventory of best practices on public-private partnerships to prevent economic fraud and identity-related crime; and a training manual for use by investigators and prosecutors with emphasis on international cooperation aspects of the fight against identity-related crime.

F. International Cooperation

Corruption is no longer an issue confined within national boundaries, but a transnational phenomenon that affects different jurisdictions, thus rendering international cooperation essential.

The UNCAC incorporates detailed and extensive provisions on international cooperation, covering all its forms, including extradition (article 44), mutual legal assistance (article 46), transfer of sentenced persons (article 45), transfer of criminal proceedings (article 47), law enforcement cooperation (article 48), joint investigations (article 49) and cooperation for using special investigative techniques (article 50). These provisions are generally based on the precedent of the United Nations Convention on Transnational Organized Crime (UNTOC), and sometimes going beyond it, thereby providing a much more comprehensive legal framework.

In the framework of Corruption Knowledge Management and Legal Library Project, UNODC developed an anti-corruption portal entitled TRACK (Tools and Resources for Anti-Corruption Knowledge), a web-based platform, in cooperation with the World Bank, Microsoft and other TRACK partner institutions. The TRACK website has three main components: a Legal Library related to UNCAC which contains legislation and jurisprudence relevant to the Convention from over 175 States, systematized in accordance with the requirements of the Convention; an anti-corruption learning platform where analytical materials and tools generated by TRACK partner organizations can be searched and accessed; and a collaborative space for registered partner institutions and anti-corruption practitioners, where registered users can upload and exchange information. A non-exclusive list of TRACK partner institutions includes the African Development Bank; the Asian Development Bank; the Basel Institute of Governance / International Center for Asset Recovery; the International Association of Anti-Corruption Authorities (IAACA); Microsoft Corporation; the Organization for Economic Cooperation and Development; the U4 Anti-Corruption Resource Centre; UNDP; the United Nations Global Compact; the United Nations Interregional Crime Research Institute (UNICRI) and the UNODC/World Bank Stolen Asset Recovery Initiative (StAR).

CEB has provided guidance and expertise on substantive issues towards the establishment of the International Anti Corruption Academy (IACA), in partnership with the Government of Austria, with the support of the European Anti-Fraud Office. In particular, UNODC assisted IACA in finalizing the legal document for its establishment as an international organization; participated in the steering committee

14 It should be noted that one of the innovations of the UNCAC is that it foresees the provision of mutual legal assistance even in the absence of dual criminality, where this is consistent with the basic concepts of the domestic legal systems and such assistance involves non-coercive measures (article 46, paragraph 9(b)).
meetings; invited IACA to participate in a side event at the third session of the Conference of the States Parties to UNCAC; assisted in setting up the website for the Academy and contributed to the Inaugural Conference which took place in September 2010. The Academy currently offers its training and research activities, and its full programme, including academic degree courses, will commence in late 2011. IACA became officially an independent international organisation on 8 of March 2011.

Following the recent establishment of the Academy, the Government of Panama expressed interest in the establishment of a Regional Anti-Corruption Academy for Central America and the Caribbean, in Panama City, and it requested technical assistance from UNODC in order to develop a training curriculum, train anti-corruption officials, provide expertise, support the formal and informal networks and promote awareness activities in the region, which would include support to the improvement and strengthening of anti-corruption policies of Central America and the Caribbean States. The Academy will offer specialized courses in the training of prosecutors, judges, police officers and others responsible to prevent, detect and fight corruption in the public sector.

G. Mutual Legal Assistance

The increasingly international mobility of offenders and the use of advanced technology and international banking for the commission of offences make it more necessary than ever for law enforcement and judicial authorities to collaborate and assist each other in an effective manner in investigations, prosecutions and judicial proceedings related to such offences.

In order to achieve that goal, States have enacted laws to enable them to provide assistance to foreign jurisdictions and increasingly have resorted to treaties or agreements on mutual legal assistance in criminal matters. Such treaties or agreements usually list the kind of assistance to be provided, the requirements that need to be met for affording assistance, the obligations of the cooperating States, the rights of alleged offenders and the procedures to be followed for submitting and executing the relevant requests.

The UNCAC generally seeks ways to facilitate and enhance mutual legal assistance, encouraging States parties to engage in the conclusion of further agreements or arrangements in order to improve the efficiency of mutual legal assistance. In any case, article 46, paragraph 1, requires States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention.

In the absence of an applicable mutual legal assistance treaty, paragraphs 9-29 of article 46 apply in relation to requests made in accordance with the UNCAC. If a treaty is in force between the States parties concerned, the rules of the treaty will apply instead, unless the States parties agree to apply paragraphs 9-29. In any case, States parties are encouraged to apply those paragraphs if they facilitate cooperation. In some jurisdictions, this may require legislation to give full effect to the provisions.

From a practical point of view, it is also important for States parties to ensure the proper execution of a mutual legal assistance request made under article 46 of the UNCAC. Since the procedural laws of State parties differ considerably, the requesting State party may require special procedures (such as notarized affidavits) that are not recognized under the law of the requested State party. Traditionally, the almost immutable principle has been that the requested State party will give primacy to its own procedural law. That principle has led to difficulties, in particular when the requesting and the requested States parties represent different legal traditions.

According to article 46, paragraph 17, of the UNCAC, a request should be executed in accordance with the domestic law of the requested State party. However, the article also provides that, to the extent not contrary to the domestic law of the requested State party and where possible, the request should be executed in accordance with the procedures specified in the request.

Article 46, paragraph 8, specifically provides that States parties cannot refuse mutual legal assistance on the ground of bank secrecy. It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States parties are obliged to ensure that no such ground for refusal may be invoked under their legal regime.
In March 2011, UNODC requested States parties to the UNCAC that had not done so to designate central authorities responsible for requests for mutual legal assistance. As of 15 June 2011, 91 States parties had notified UNODC of their designated central authorities. UNODC has also compiled a database of asset recovery focal points designated by Member States. In March 2011, UNODC invited Member States to submit information on their designated asset recovery focal points in order to expand the database. As at 15 June 2011, forty Member States had notified UNODC of their designated focal points.

The focal point initiative was established by the StAR Initiative in partnership with the International Criminal Police Organization (INTERPOL) in January 2009. Its objective is to support investigations through informal assistance (i.e. prior to the submission of formal requests for mutual legal assistance) for the purpose of recovering the proceeds of corruption and economic crime. It achieves that function through a secure database containing the names of asset recovery focal points in participating countries who are available 24 hours a day, seven days a week. A communications platform to enable focal points to communicate on a secure basis is currently being developed. At present, 84 countries are participating in the initiative. A first meeting of the members of the network of focal points was held on 13 and 14 December 2010 in Vienna. A second meeting was held in Lyon from 11 to 13 July 2011.

CEB has also pursued efforts to expand the Mutual Legal Assistance Request Writer Tool, a user-friendly computer-based tool that helps States to prepare, transmit and receive requests for mutual legal assistance. An expanded version of the tool will offer additional features and possibilities, and is expected to be finalized before the end of 2011.

H. Joint Investigations

Article 49 of the UNCAC encourages States parties to enter into agreements or arrangements to conduct joint investigations, prosecutions and proceedings in more than one State, where a number of States parties may have jurisdiction over the offences involved.

Practical experience has shown that joint investigations raise issues related to the legal standing and powers of officials operating in another jurisdiction, the admissibility of evidence in a State party obtained in that jurisdiction by an official from another State party, the giving of evidence in court by officials from another jurisdiction, and the sharing of information between State parties before and during an investigation.

In planning joint investigations, and identifying issues to be addressed prior to undertaking any work, consideration may need to be given to the following factors:

• the criteria for deciding on a joint investigation, with priority being given to a strong and clearly defined case of serious transnational corruption;\(^{15}\)
• the criteria for choosing the location of a joint investigation (near the border, near the main suspects, etc.);
• the use of a coordination body to steer the investigation if several jurisdictions are involved;
• the designation of a lead investigator to direct and monitor the investigation;
• agreements on the collective aims and outcomes of joint operation, the intended contribution of each participating agency, as well as the relationship between each participating agency and other agencies from the same State party;
• addressing cultural differences between jurisdictions;
• assessing the pre-conditions of the investigation as the host State party should be responsible for organizing the infrastructure of the team;
• the liability of officers from a foreign agency who work under the auspices of a joint investigation;
• the level of control exerted by judges or investigators;
• financing and resourcing of joint investigations; and
• identifying the legal rules, regulations and procedures to determine emergent legal and practical matters.\(^{16}\)

\(^{15}\) The challenge, in this context, is to ensure that joint investigations are handled in a proportionate manner and with due respect to the suspect’s human rights.

\(^{16}\) Such matters may include: the pooling, storage and sharing of information; confidentiality of operational activities; the integrity and admissibility of evidence; disclosure issues (a particular concern in common law jurisdictions); implications of the use of covert operations; appropriate charges and the issue of retention of traffic data for law enforcement purposes.
I. Special Investigative Techniques

Article 50 of the UNCAC requires States parties to take measures to allow for the appropriate use of special investigative techniques for the investigation of corruption. It first advocates in paragraph 1 the use of controlled delivery and, where appropriate, electronic or other forms of surveillance and undercover operations on the understanding that such techniques may be an effective weapon in hands of law enforcement authorities to combat sophisticated criminal activities related to corruption. However, the deployment of such techniques must always be done to the extent permitted by the basic principles of domestic legal systems and in accordance with the conditions prescribed by domestic laws. Paragraph 1 also obliges States parties to take measures allowing for the admissibility in court of evidence derived from such techniques.

Paragraph 2 accords priority to the existence of the appropriate legal framework that authorizes the use of special investigative techniques and therefore encourages States parties to conclude bilateral or multilateral agreements or arrangements to foster cooperation in this field, with due respect for concerns of national sovereignty.

Paragraph 3 provides a pragmatic approach in that it offers the legal basis for the use of special investigative techniques on a case-by-case basis where relevant agreements or arrangements do not exist.

Paragraph 4 clarifies the methods of controlled delivery that may be applied at the international level and may include methods such as intercepting and allowing goods or funds to continue intact or be removed or replaced in whole or in part. The method to be used may depend on the circumstances of the particular case and may also be affected by national laws on evidence and its admissibility.

In general, the deployment of special investigative techniques requires the competent investigative authorities to seriously consider the legal and policy implications of their use, and a careful assessment of the appropriate and proportionate checks and balances to ensure protection of human rights.

IV. EPILOGUE

The UNCAC, as a powerful manifestation of the collective political will of the international community to put in place a framework and a target of aspiration in the fight against corruption, attaches great importance to the adoption and implementation of measures geared towards rendering criminal justice responses to corruption more efficient, both at the domestic and international levels.

Legislators of States parties need to establish an adequate and comprehensive legal framework to give practical effect to the relevant provisions of the UNCAC. However, the main challenge for States parties is to improve the capacities of criminal justice institutions to effectively combat corruption domestically, cooperate internationally in the investigation, prosecution, and adjudication of corruption-related offences, and further enhance asset recovery mechanisms to identify, seize and return the proceeds of crime.

In this regard, UNODC will continue to provide, upon request, specialized substantive and technical expertise to competent authorities and officials of Member States with specific emphasis on international cooperation and criminalization. The establishment of the Implementation Review Mechanism of the UNCAC provides the opportunity for collecting, systematizing and assessing valuable information on how technical assistance needs in the abovementioned fields can be identified and on possible ways and means to meet those needs in the context of reviewing the implementation of the Convention.
CORRUPTION IN AFGHANISTAN

Nader Mohseni*

I. OVERVIEW OF CORRUPTION IN AFGHANISTAN

Corruption is an essential issue in any State building policy and represents a major obstacle to its political, economic and social development. In the case of post-war countries such as Afghanistan, this issue is even more crucial in the context of the recovery of the rule of law and government institutions. Many surveys and documents have highlighted this problem since 2001, and the first part of this paper synthesizes the main points of this problem and the institutional response implemented by Afghan authorities.

Three main factors define the importance of corruption in Afghanistan:

• Three decades of war that led to an extreme erosion of the Afghan state and its administrative institutions in particular, correlated with a capture of the state by certain tribal groups or factions, in certain regions or provinces.
• An economy largely based on illicit cultivation of opium. According to recent surveys, Afghanistan remains the largest supplier to illicit international market for heroin, supplying 90% alone in the world market. As per some studies, the total revenues would represent $2.8 Billion, which is equivalent to almost one-third of GDP. Part of the income derived by the illicit cultivation primarily in regions classified high or extreme risk by the United Nations, would fuel the insurgent groups there.
• A massive inflow of international capital to rebuild the country and its institutions. This unprecedented scale of funding through international assistance for development and humanitarian assistance,² often engaged in emergencies and under pressure, can also be an important source of corruption, especially given the lack of transparency and accountability of many NGOs present on the ground, sometimes engaged in long-term projects with little positive effect for the remaining population.³ It can also be added to the precariousness of civil servants or members involved in international projects in the short or medium term may also be a source of corruption through kickbacks, conflict of interest, political patronage or nepotism, for example.

According to the High Office of Oversight against Corruption, the causes of corruption in Afghan public administration are deep-rooted and structural. Six important key drivers that produce huge wealth are sustaining grand corruption:

• seizure of natural wealth;
• subversion of public finance, particularly the customs and tariff regime;
• smuggling;
• forced appropriations of public land and other assets;
• contracting for delivery of goods and services;
• and most significantly the production, processing, and trafficking of narcotics.

Many other causes of administrative or petty corruption are affecting directly the day life of Afghan citizens and undermine their confidence in government bodies, such as:

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² More than $40 billion has been spent on aid to Afghanistan over the past nine years.
• complicated and bureaucratic procedures for service delivery;
• inadequate laws and regulations;
• limited public administration capacity at the national and sub-national levels;
• insufficiently trained and underpaid government staff;
• undue interference of influential powers in the work of government agencies;
• lack of attention and leadership to implement the National Anti-Corruption Strategy by ministries and other institutions;
• insufficient system of auditing and oversight.

A. Forms of Corruption

According to previous surveys on the corruption issue in Afghanistan, the forms of corruption are broadly similar to those found in other countries.

This corruption can be considered in petty and grand corruption. Petty corruption generally concerns the people in their daily administrative relations. Amounts of bribes, kickbacks and other forms of this common corruption are lower, but repetitive and endemic, this accrued corruption accounts for an enormous sum and gives a very bad perception of the integrity of government institutions to civil society.

Grand corruption concerns other higher levels of corruption, both in amounts and practices, such as corruptive networks, organized crime, elaborated embezzlements of public assets, political patronage, cartels between civil servants and contractors in biddings and procurement.

Forms of corruption in Afghanistan can be classified into six categories:

1. Queue Processing

This first category is very common, particularly in the case of lengthy, unclear or deficient administrative procedures. People pay bribes to speed up an administrative process to a service to which he or she has an existing right. A survey underlines that the most common practice of corrupt behavior of civil servants is to delay service delivery unless a bribe is paid.  

2. Service Delivery

This second category concerns the payment of bribes by the public to obtain unjustified administrative documents or services that the petitioner does not right. For example, to pay for a driving license, or other administrative authorization, or to obtain an educational certificate, generally in illicit circumstances. But it also can concern civil servants demanding money from the public for required services or documents (abuse of function), for example: to ask for a bribe to obtain an electricity connection, water and other power services, paying doctors for extra care; paying teachers for extra school time or for grade promotions. Corruption is also perceived to be prevalent in service delivery institutions (health, education, electricity).

3. Decision Saving

The citizen pays a bribe to avoid a charge or fine in a penalty, judicial sentence, investigation, taxes, witnesses (obstruction of justice), etc. This category includes extortion by law enforcement authorities. The justice sector, the security sector, and customs, are generally considered to be most corrupt institutions.

4. Procurement Colluding

This category concerns the corruptive deal between a civil servant in charge of bidding and procurement processes, and a candidate contractor. The objective is to advantage a candidate contractor in such processes. This kind of corruption generally accrues high benefits for the civil servant if the project has a large huge budget. At certain level, this kind of bribery needs a complicity with other persons (like certificators, accountants); the civil servant can also act for the benefit of a third/external party. Various cases involving high-level civil servants in biddings and procurements in past years show the vulnerability of this sector, despite the Procurement Law adopted in 2008.

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5. Asset Plundering
This category is particular, because at the opposite of the four previous categories, the proceeds of this kind of bribery are public funds and the objective is to make a fraud, an embezzlement or a theft against the assets of the institution. It can be realized by a single civil servant (outright theft of government assets, mere fraud) but generally it involves a criminal network of actors, internal and external at the victimized institution. It includes the theft of computerized data. In this category we can find patronage, nepotism and other forms of state capture, that refers to political elites manipulating state policies and structures, often for political as well as personal gain. In this level there are included various manifestations linked with a post-conflict situation, such as the appointment of heads of parties and political factions to public positions, the buying of support and votes during elections, and interception and retention of government income by regional commanders.

6. Drug and Related-Crimes Corruption
This category is very particular and only concerns countries with a huge drug problem (production or traffic) linked to organized crime groups engaging in many types of crimes linked to drug trafficking (e.g. human trafficking, extortion, kidnappings, counterfeiting, piracy, etc). In the case of Afghanistan, the enormous importance of the drug economy, close to one-third of its GDP, appears to be a dominant source of corruption, likely to undermine government institutions or political systems, particularly in the provincial areas of cultivation/traffic.5 “The opium economy by all accounts is a massive source of corruption and undermines public institutions especially in (but not limited to) the security and justice sectors. There are worrying signs of infiltration by the drug industry into higher levels of government and into the emergent politics of the country. Thus it is widely considered to be one of the greatest threats to state-building, reconstruction, and development in Afghanistan”.6

Drug money in Afghanistan is corrupting and capturing not only the economic legal sector where it is laundered through the commercial sector (trade, security), construction or banking services, but also it is likely to feudalize political representatives who can bias legal reforms to impede or give inoperative government measures against crime. Corrupt practices range from facilitating drug activities to benefiting from revenue streams that the drug trade produces. Corruption in the eradication process has severe negative side-effects. Wealthier opium producers pay bribes to avoid having their crops eradicated, greatly reducing the effectiveness of counter-narcotics measures. A strong correlation between lack of security and opium cultivation and the financing of insurgent groups by drug proceeds has been highlighted.

There are no official statistics on corruption cases, no more a scientific survey about the characteristics and real importance of the corruption in Afghanistan. Currently the amplitude of corruption in Afghanistan only results from perception indicators or from important cases denounced in the media.

B. Prevention of Corruption
Preventive policy and strategy is directed to the following themes:

1. Civil Servant Anti-Corruption Policy
This issue includes the environment of the civil service likely to reduce its motivations and opportunities for eventual corruption, and focuses on five elements:
   • abilities (adequacy of educational level and the work exigencies);
   • skill (gaining the required training of the work station);
   • equipment (having at disposal sufficient and appropriate tools to implement their duties within satisfactory conditions);
   • motivation (this motivation must include a balanced policy between rewards and sanctions, as well as other issues such decent salaries and pensions, work stability, social protection and career policy); and
   • control, that must permit an efficient dissuasion.

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Within this first category, the Afghan Government undertook projects to give a response to each of these five points, especially with the Service Civil Law (2005),\(^7\) the objectives of which are to establish sound administration through the planning and implementation of reform of the country’s administrative system; to determine the duties of civil service; to fill civil service posts on merit and competency, and to regulate personnel management arrangements and duties of civil servants. This essential law also created the Independent Administrative Reform and Civil Service Commission (IARCSC) that has charge of leading, regulating, reforming, formulating and implementing structure policies of public administration system. IARCSC depends directly of the President’s Office.\(^8\) The functions and duties of the IARCSC are elaborated within the organizational structure.

- \textit{The Civil Service Management Department}: Develops policies relating to the structure, management, appointment of civil servants, develop civil service law, civil service regulations and implement the P&G.
- \textit{The Civil Service Appointments Board}: Identifies and recommends the recruitment, appointment, promotion, transfer, retirement, pension payments and other personnel matters of civil servants for the approval of the President.
- \textit{The Civil Service Appeals Board}: Manage the appeals of civil servants who consider they have been disciplined unfairly or discriminated against.
- \textit{The Administrative Reform Secretariat}: Provides administrative and financial support to the Chairman and monitors the implementation of reform programs.
- \textit{The Programs’ Design and Management Department}: Leads the institutional capacity development of civil servants, donor relations and technical assistance management, management of development programs/projects and enhancing capacity through appointment of national and international experts for the ministries and government agencies.
- \textit{The Afghan Civil Service Institute}: Leads and manages all civil service training activities.

The Law of Civil Servants\(^9\) completes the main legal base on the civil servant policy.

2. \textbf{Asset Declarations}

This measure has been undertaken with the law on overseeing the implementation of the anti-corruption strategy (2008) and HOO is the office in charge of receipting and controlling them. This important tool in the AC preventive system is currently in a developing process.

3. \textbf{Codes of Conduct and Ethics}

Codes of conduct and ethics are essential to the civil servants of an organization, to define and regulate the rules, regarding the responsibilities and good practices, and to determine violations and sanctions in case of misbehaviour.

4. \textbf{Transparency Initiatives and Administrative Process Simplification}

Transparency and simplification of administrative procedures are essential to prevent petty corruption, and to avoid bribes to accelerate services and documents delivery. HOO has initiated reforms to simplify the vehicle registration process, a main source of such corruption, and to reduce the number of necessary steps from 51 to 5, and its delivery from two months to a couple of days. Many other reforms of simplifying administrative service delivery have to be enhanced in order to eliminate other sources of bribes for delay or delivery complexity.

5. \textbf{Citizen Awareness & Charter}

It is important for Afghanistan to face up to the fact that its administration is at a very low level of computerization, and that it has a certain culture of acceptance by citizens of bribe payments. The participation of the citizen and civil society in preventing corruption is crucial to assure a real efficiency. A strong awareness campaign has to be implemented, to inform them about corruption, and infuse a culture of non-tolerance. Recent indicators show that a good percentage of Afghan people consider bribing a normal way to do business with the state.\(^{10}\)

\(^8\) http://www.afghanexperts.gov.af/index.php
\(^9\) http://www.lexadin.nl/wlg/logic/notf/oeur/kweafg.htm#Administrative_Public_Law
\(^{10}\) Afghan Perceptions and Experiences of Corruption – a National Survey – Integrity Watch Afghanistan, 2010
“A kickback is so commonly sought (and paid) to speed up administrative procedures, that more than a third of the population (38 %) thinks that is the norm”.\footnote{Corruption in Afghanistan : bribery as reported by the victims – UNODC January 2010 http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf}

One of the main and priority challenges for the authorities will be to end this culture of acceptance and tolerance of daily corruption.

6. Detection of Corruption Cases

The Control and Audit Office (CAO), -that also is the Afghanistan’s Supreme Audit Institution (SAI)-, is a central agency that reports directly to the President, and should serve an important role for detecting corruption and helping to ensure the transparency of government operations. External auditing is the primary responsibility of the CAO. Currently, the CAO focuses on assessing the financial reporting ministries and compliance with laws and regulations. In each ministry a department of internal audit, linked with CAO, helps to control the internal operations regarding rules and laws. Its key objectives are:

- To protect public funds and take action against errors, irregularities, and misuse of public property;
- To prevent illegal expenditures;
- To review the systems of control over government receipts and payments;
- To identify fraud and ensure that accused individuals are brought to justice;
- To identify shortfalls in the government budget; and
- To guarantee the accuracy of aid and grants provided by donor countries.

Corrupt behaviours can be detected in different ways: inside the government institution through internal audit, or information from complaints or whistle-blowing. The difference between a complaint and whistle-blowing lies in the interest of the informant. A person who makes a complaint generally has a direct personal grievance in the illicit action, for example a victim of bribe solicitude. A whistle-blower is an informant, generally not directly concerned by the illicit act, who makes a voluntary disclosure, anonymously or not, about a suspected wrongdoing or a corrupt person within an institution. This information can result from a dysfunction of a civil servant or service, in its usual work duties, or from a sudden unexplained change of work behaviour. It also can result from a significant unjustified change in the personal lifestyle of a civil servant, or from an inadequacy between own assets and income of the civil servant. Colleagues and immediate superiors generally are aware of these “anomalies” of a civil servant.

Article 8(4) of the UNCAC requires the State to consider establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions. Article 33 of the Convention requires the State to consider incorporating into domestic law appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authority any facts concerning offences established in accordance with the Convention. Art. 14 of the Law on Monitoring the Implementation of the Anti-Corruption of the Anti-Administrative Corruption Strategy states protects the informant or witness in an investigation or trial, from any type of pressure, intimidation and ill-treatment and shall be rewarded. Disclosing their identity without their consent also is prohibited.

Afghan authorities currently are implementing a complaints system at a national level, managed by the HOO, or in some ministries (like in the Ministry of Finance), but no law exists to protect informants of corrupt behaviour by civil servants. Other sources of detection inside institutions is its own internal controls/audits. The fraud or corrupt wrongdoing is detected through such usual controls. In this context, the role of internal control/audit units of the institutional bodies is essential to detecting corruption.

The media also can uncover information that can bring suspicion on an employee, for example about a lifestyle or other behaviour, not in phase with the current work position or official source of income. Other sources of detection come from other institutional systems:

- Detection directly by law enforcement authorities, either through complaintants or whistle-blowers, either by detecting incidentally corrosive cases during a criminal/financial investigation for other

\textit{http://www.iwaweb.org/src/IWA\%20corruption\%20survey\%202010.pdf}
reasons;

• Through the HOO’s complaint system;

• From financial and banking information through the anti-money laundering system, including the recently operated Financial Intelligence Unit (FIU), called “FinTRACA” (Financial Transactions and Reports Analysis Center of Afghanistan). This is a semi-independent body administratively housed within the Central Bank of Afghanistan (Da Afghanistan Bank). The main objective of FinTRACA is to deny the use of the Afghan financial system to those who obtained funds as the result of illegal activity, and to those who would use it to support terrorist activities. In so doing, FinTRACA will make a significant contribution to the overall integrity of the Afghan financial environment, the ability of the Afghan financial system to integrate with the global financial system, and to future economic growth, investment, and prosperity in Afghanistan. The Afghan AML system is based on the 2004 Anti-Money Laundering and Proceeds of Crime Law, that applies to the proceeds of corruption (art 3 states that the offence of money laundering refers to proceeds from an offence against any law of the Islamic Republic of Afghanistan). FinTRACA will contribute to verifying and investigating the asset declarations of high-level civil servants, in agreement with HOO. FinTRACA is a signatory to a number of information exchange agreements with other foreign FIUs. Nevertheless, according to a 2010 report, money laundering and terrorist finance investigations in Afghanistan have been hampered by a lack of capacity, awareness, and political commitment.

7. Documentation/Investigation of Corruption Cases

Once corruption is suspected in a government institution, the internal control/audit unit comes in to document the case to confirm the corrupt act or omission. It can use usual techniques of control, internal fraud investigation, integrity testing or other licit techniques, analysing work documentation and the lifestyle of the suspect. In this administrative approach, the investigative administrative authorities do not have coercive measures against the suspect. If the case is proved, they refer the case to the Attorney General’s Office, to initiate the criminal process.

In the criminal process, law enforcement authorities (prosecutors and investigative police), conduct a penal investigation, using of all the usual investigative techniques, financial investigative techniques, and if need be, some special techniques permitted by the criminal procedure code, such as communication interceptions.

Art. 50 of the UNCAC requires the State to take necessary measures to allow for the appropriate use by the competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, and to allow for the admissibility in court of evidence derived therefrom. Current Afghan anti-corruption law does not permit these special investigative techniques; nevertheless, they are authorized in the Counter Narcotics Drug Law in respect of drug trafficking-related corruption, and also in the Anti-Money Laundering and Proceeds of Crime Law for the purpose of obtaining evidence of offences of the predicate offences, including corruption.

Tracking and seizing the proceeds of corruption is also the domain of Afghan prosecutors and FinTRACA, at the national and international levels. UNODC and World Bank are engaged in a training programme in this respect (the StAR Initiative) with Afghan authorities.

GIRoA has undertaken measures to specialize the law enforcement authorities in charge of investigating and prosecuting corruption cases. The main Afghan institutions involved in the right against corruption, particularly with a special anti-corruption unit within the Major Crime Task Force created to prosecute corruption cases involving high-level government officials, and including prosecutors and police investigators. This vetted task force is supported, equipped, trained and mentored by the US Bureau of International Narcotics and Law Enforcement Affairs (INL), the Federal Bureau of Investigation and the UK SOCA (Serious & Organized Crime Agency). EUPOL also are training investigative police in financial

12 http://www.fintraca.gov.af/about.asp
investigation. The Attorney General’s Anti-Corruption Unit (ACU) was created in May 2009, as a group of specially selected and vetted Afghan prosecutors dedicated to the prosecution of high level corruption cases. While the ACU is still relatively new, it has more than 40 active cases and obtained its first conviction in January 2010. Several investigations are underway and are expected to lead to prosecutions.

Nevertheless, despite ongoing efforts by the international community to build the capacity of Afghan police and customs forces, Afghanistan is questioning its low-level ability at this time to consistently uncover and disrupt sophisticated financial crimes, in part because of few resources, limited capacity, little expertise and insufficient political will to seriously combat financial crimes.15

C. Fighting Corruption: A Huge Challenge for the GIRoA

GIRoA is facing a double challenge: to reduce a very important level of corruption, and to restore the confidence of the society in its institutions.

For example, the International Transparency’s Corruption Perception Index classifies Afghanistan between the most corrupt countries. IPC evolution for Afghanistan suggests a pervasive increase and generalization of corruption since 2005:

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<th>IPC/TI</th>
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<th>2007</th>
<th>2008</th>
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<td>SCORE/10</td>
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Another survey published on January 2010, based on interviews with 7,600 people in 12 provincial capitals and more than 1,600 villages around Afghanistan, shows than for Afghan people, corruption is their biggest worry: for an overwhelming 59% of the population the daily experience of public dishonesty is a bigger concern than insecurity (54%) and unemployment (52%).

“According to this report, it is almost impossible to obtain a public service in Afghanistan without greasing a palm: bribing authorities is part of everyday life. During the past 12 months, one Afghan out of two, in both rural and urban communities, had to pay at least one kickback to a public official […]. The average amount was $160, in a country where GDP per capita is a mere $425 per year […]. The problem is enormous by any standards. In the aggregate, Afghans paid out $2.5 billion in bribes over the past 12 months—that’s equivalent to almost one quarter (23%) of Afghanistan’s GDP”.

This report also is comparing this amount with the revenue accrued by the opium trade in 2009 (estimated at $2.8 Billion), by concluding that “drugs and bribes are the two largest income generators in Afghanistan, together amounting to about half the country’s (licit) GDP”

The second survey produced by Integrity Watch Afghanistan, in 2010, which covered a research conducted at the end of 2009, from 6500 respondents in 32 provinces, assesses the impact of corruption on the relationship between Afghan citizens and the state, the trust in state and non-state institutions, and based on personal experiences of corruption. This survey focuses on petty and administrative corruption. It concludes that corruption is widespread, one adult in seven experienced direct bribery in 2009, and 28% of Afghan households paid a bribe to obtain at least one public service, and the total of bribes paid in 2009 were close to 1 billion USD, that is to say twice as much in 2009 as the Afghan population as a whole was likely to pay in 2007, date of the first survey. Security and judiciary institutions are perceived as the most corrupt institutions. However the survey notes that “corruption is now increasingly spreading to social public services such as health and education, in which the average amounts of the bribes have often been higher”.16

Without wanting to question these figures (which do not consider the totality of the various sources of corruption, particularly that of grand corruption, political corruption and organized crime), however, it is obvious that corruption is a major perceived issue for the people of Afghanistan.

II. AFGHAN ANTI-CORRUPTION MECHANISMS

Criminalization of corruption in Afghanistan is based on the following system:

A. Penal Code (1976)

Corruption offences in the Penal Code appear to be articles 254, 258 and 259. Article 254 addresses the active bribery and article 258 the passive bribery, of an official of the public services. Article 259 concerns a Member of Parliament, municipality, provincial or local council. The legal definition of bribery is “to request, receive of accept any money, good, gift or other benefit, for the purpose of performance of or abstention or disruption of a assigned duty, in his own or someone else’s name. Embezzlement is defined by Art. 3 of the Law Law on Campaign against Bribery and Official Corruption as well by Art 268 of the Penal Code that states that “any official of public services to whom the goods of State or persons have been given in the line of his duty, and he embezzles it or hides it” shall be sentenced to long imprisonment. Article 269 of the Penal Code states that any official of public services who turns into his own proprietorship State money, priced documents, goods or other articles, shall be sentenced to medium imprisonment, but does not criminalize diversion for the benefit of another person or entity. Public servant concept (official of public services) is defined by Art. 12 of the Penal Code. Art 4 of Civil Service Law (2005), defined the civil servant as a “person appointed by the Government to perform its executive and administrative duties based on the provisions in law”. A review of the Penal Code is ongoing to enhance penalties for administrative corruption, making the code compliant with the UN Convention against Corruption (UNCAC).

B. The Law of Campaign against Bribery and Official Corruption

The Law on Campaign against Bribery and Official Corruption (2004) was the first law against corruption.17 This law no defined the offence of “bribery”, and referenced only with the legal definition of article 254 to 267 of the Penal Code (see below). Only it defined the “official corruption” as “an illegal act committed by state employees and other public servants to attain to personal or group aims”, giving a list of behaviors considered as administrative corruption, in fact cover both criminal acts and work malpractices. None of these prohibited behaviors were defined. The law also created a central specialized organ, the Office for the Campaign against Bribery and Official Corruption, as the independent body under the supervision of the President, to implement this law. In fact, the functions of this office were in charge of the “General Independent Administration against Corruption” (GIAAC) that was created by Presidential Decree on December 2003. GIAAC was mandated to develop a foundation for fight against corruption by establishing regional offices in the country, drafting anti-corruption law and policies, investigating corruption cases in the government institutions and soliciting support from the Police and Attorney General Office to arrest and prosecute corrupt officials. GIAAC worked until 2008, focusing in fact only on the aspect of investigations and it seems it faced some problems of efficiency. Finally GIAAC was substituted by the High Office of Oversight Against Corruption, through the new law on overseeing the implementation of the anti-corruption strategy (2008-see below).


Art 75 item 3 of the Afghan Constitution (2004) states the Government is in charge of “eliminating every kind of administrative corruption”. Article 154 states that the wealth of the President, Vice-Presidents, Ministers, members of the Supreme Court as well as the Attorney General, shall be registered, reviewed and published prior to and after their term of office by an organ established by law.

D. United Nation Convention against Corruption (UNCAC)

The Government of Afghanistan signed the UN Convention against Corruption on February 2004 and ratified it on August 2007. On May 2008, an UNDP’s assessment reviewed the level of compliance of the existing national legislation and administrative procedures, and identified gaps and potentials incompatibilities, with a proposal of a legislative action plan for the Government and Parliament with suggested prioritization. This assessment concluded that at this date a very large gap existed in the legal system of Afghanistan in respect of the UNCAC obligations, and noted the absence of any effective institutional mechanism or the legal framework, essential to implement a credible anti-corruption strategy.

From 2008, the Afghan government is in process of adequacy with UNCAC obligations (see below).


From 2008, Afghanistan adopted a National Anti-Corruption Strategy, based on the following goals: i) enhancing government anti-corruption commitment and leadership; ii) raising awareness of corruption and evaluating the effectiveness of anticorruption measures; iii) mainstreaming anticorruption into government reforms and national development; and iv) strengthening the legal framework for fighting corruption and building an institutional capacity for effective implementation of the UNCAC.

In this National Development Strategy (ANDS) for 2008-2012, corruption issue was recognized as a significant and growing problem in Afghanistan, and GIRoA confirmed its fully commitment to controlling the corruption, promoting transparency and accountability through establishing new and effective mechanisms. Founded on a 2006 survey, developed by a joint informal product of staff of the Asian Development Bank, UK Department for International Development, United Nations Development Program, United Nations Office on Drugs and Crime, and the World Bank, on the corruption issue, ANDS provides summary background on corruption in Afghanistan and lessons from international experience, highlights some key policy issues, lays out a suggested roadmap for action, and proposes a programme of work by the Government with support of international partners.

This plan (National Anti Corruption Strategy – NACS) outlines all forms of corruption in the government (institutions and ministries at national and sub-national level) and suggests solutions and mechanisms in order to combat it, with timelines for its implementation by the different authorities. It focuses on six main points: i) administrative factors; ii) legislative factors; iii) corruption in the judicial system: iv) financial and budget factors; v) inspection factors and; vi) corruption in other areas.


On July 2008, consecutively at the National Anti Corruption Strategy, the new Law also updates the measures and definitions of the “administrative corruption”, regarding the first definitions of the 2004 Law on bribery and official corruption, and creates the present national organism to coordinate the anticorruption national strategy. This Law lists only “the administrative corruption” regarding the following acts and crimes by government officials or other authorities, without defining them:

- Bribery
- Embezzlement
- Stealing of documents
- Unauthorized destruction of official records
- Exceeding the limits of legal scope of authority
- Misusing of duty power
- Impeding the implementation of justice
- Using the government facilities and official works for personal affairs
- Refusing and abstention to perform duty without legal justification
- Concealing the truth
- Forgery of documents
- Misrepresentation of authority (falsely representing to have certain executive authority to grant or deny government approval
- Receiving any kind of gifts in order to perform or refrain from performing official actions
- Delaying the execution of assigned duties
- Violating the code of ethics of the related office
- Involving ethnic, regional, religious, party, gender and personal consideration in performing

entrusted duties

• Acting or refusing to act in violation of the Anti-administrative corruption strategy.

G. The High Office of Oversight Against Corruption

The Law on Overseeing the Implementation of the Anti-corruption Strategy, created in 2008 the High Office of Oversight and Anti-Corruption (HOO), as the national body in charge of overseeing and coordinating the implementation of the Anti-Corruption Strategy and to fulfill the requirement of Art 6 of the UNCAC.

This office is independent in carrying out its duties and shall report to the President (Art.4). The duties are defined by Art. 9 and principally they concern the overseeing of the implementation of the anti-corruption strategy and the procedure for administrative reform and combating administrative corruption. The government offices are obliged to cooperate with the HOO by providing necessary facilities for its officials (Art 11). The offices of Audit and Control, the Police, Prosecutors, Courts shall report their performance regarding the cases of corruption (Art 18).

HOO is in charge of the registration of the assets, and publication as and when required, of the President, Vice-Presidents, Ministers, members of the Supreme Court, Attorney General and president and members of lower and upper house of the national assembly, members of provincial and district councils, heads of independent commissions and offices, ambassadors, governors, prosecutors, Judges, Officers of the ministries of Defense and Interior, district administrators, Deputy ministers, Officers and staff working in second and higher grades, staff in finance, accounting and procurement sections of the offices prior to occupation of their positions and on an annual basis.

In March 2010 HOO was empowered to conduct preliminary investigations of corruption complaints, by Presidential Decree that also ordered the Ministry of Interior to cooperate with the HOO by assigning judicial police who will assist in these preliminary investigations, indicated that the HOO should refer cases where a corruption crime was identified to the Office of the Attorney General (AGO) for further investigation and prosecution. New HOO’s organizational chart and summary of the respective functions of its units is the following:

A current three-year Anti Corruption Strategic Plan (2011-2013) charges the HOO’s to implement measures emphasizing three objectives:22

• Pursue a multi-pronged approach to dealing with the problem of corruption in Afghanistan. This means operating with all agencies of government at national and local levels; interacting with civil society, the mass media and the private sector; and applying a range of techniques – involving enforcement, prevention and public education tools.

• Strengthen staff capacity and professionalism. The HOO is faced with a very sensitive and challenging assignment, but with few qualified professionals and minimal resources. The Plan promotes a major effort to strengthen technical capacity and professionalism of the staff.

• Focus on achieving anti-corruption impacts. The Plan encourages the accomplishment of early successes, even if small and incremental. By itself, the HOO can make some headway in the fight against corruption, but it is only when all key anti-corruption institutions are working together cooperatively that major results will be achieved. This Plan seeks to establish the foundations for this cooperative approach.

III. IMPLEMENTATION OF THE ANTI-CORRUPTION MECHANISMS

A. Highest-Level Political Willingness to Combat Corruption

President Karzai has recognized that corruption is destroying the country. At the inauguration of his second term in November 2009, he rightly identified “ending the culture of impunity and strengthening integrity as key priorities” for his new administration. “The Government of Afghanistan is committed to

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end the culture of impunity and violation of law and bring to justice those involved in spreading corruption and abuse of public property. To do this, will require effective and strong measures. Therefore, alongside an intensified judicial reform, all government anti-corruption efforts and agencies have to be strengthened and supported”.

In his inaugural speech during the London Conference, January 28, 2010, President Karzai reaffirmed its strong commitment in the fight against corruption, making even the corruption as the focal point of his second presidential term. “Fighting corruption will be the key focus of my second term in office. My government is committed to fighting corruption with all means possible, including punishing those who commit it and rewarding those who avoid it. Nevertheless, we must make sure that we do not stop at merely fighting symptoms of corruption; rather, we must take decisive action against its root causes. [...] We are determined to put an end to the culture of impunity as we move along the path of rule-of-law and democracy. We will stridently follow those who break the law and encourage and protect those who assist us in implementing the law”.

B. The 2010 London Conference

In January 2010, the Afghan Government and the international community met in London to reaffirm the goals of the Afghan leadership and development, to increase Regional Cooperation and more effective international Partnership.

In corruption domain, the Conference Participants welcomed the Government of Afghanistan’s whole-of-government approach to fighting corruption, and its ongoing work to mount a concerted effort to tackle the key drivers of corruption, through development of clear and objective benchmarks and implementation plans.

Conference Participants committed to helping the Government of Afghanistan’s anti-corruption efforts by providing assistance to the new institutions and committed to increase the transparency and effectiveness
of its own aid in line with the June 2008 Paris Conference Declaration and the United Nations Convention against Corruption.

C. Kabul Process: Anti-Corruption Action Plan

The following Kabul Conference (July 2010), reaffirmed the GIRoA commitment to improve security, governance and economic opportunity for its citizens, and the international community’s commitment to support this transition. In corruption matter, the Afghan Government pledged to improve governance in Afghanistan by implementing legislation to define a major crimes task force and an anti-corruption tribunal, combating cash smuggling, and improving financial audits of government ministries and lower-level government offices. The plan follows President Karzai’s decree prohibiting nepotism in the Afghan government.

Measures of the Anti Corruption Action Plan:

- Undertake all necessary measures to increase transparency and accountability and tackle corruption.
- Finalize by October 2010 the Framework of the Afghan Government’s National Priority Programs, including guidelines for clear goals, benchmarks and timelines;
- Establish, within twelve months, the statutory basis for the Major Crimes Task Force (MCTF) and the Anti-Corruption Tribunal (Special Courts);
- Submit an Audit Law within six months, meeting international standards, for external audits to ensure the strengthening and the independence of the Control and Audit Office, and to authorize the Ministry of Finance to carry out internal audits across government;
- Establish a legal review committee within six months to review Afghan laws for compliance with the United Nations Convention against Corruption (UNCAC) which the Government of Afghanistan has already signed into law and ratified. Laws found to be inconsistent are to be prioritized for revision;
- Adopt policies governing bulk cash transfer, including regulations or laws that are needed, and begin their implementation over the next twelve months;
- Establish the Joint Monitoring and Evaluation Committee with a permanent secretariat, to be fully operational in three months;
- Verify and publish the asset declarations of all senior officials required by the law, and update and publish these declarations on an annual basis, starting in 2010;
- Increase its efficiency and effectiveness by continuing to implement broad-based policy, legal, and structural reform in public administration. Over the next six months, the appointment procedures for senior civil servants are to be simplified and made transparent, merit-based procedures are to be introduced and salary reform accelerated;
- Strengthen civil service reform by enhancing complementarity between the Afghan Civilian Technical Assistance Program (CTAP) and the Management Capacity Program (MCP) in twelve months;
- Seek an understanding with donors, over the next six months, on a harmonized salary scale for donor-funded salaries of persons working within the Afghan Government;
- Introduce and implement a standardized methodology to assess public financial management of line ministries, and, within six months, design with donor support, capacity development programs to fulfill assessment recommendations;
- Implement over the next twelve months, in a phased and fiscally sustainable manner, the Sub-National Governance Policy, and strengthen local institutional capacity, including training of civil servants and development of training curricula, and develop sub-national regulatory, financing, and budgetary frameworks;
- Improve capacity in the judicial system through the design and implementation of a comprehensive human resources strategy that strengthens accountability mechanisms and provides adequate benefits for judicial employees within 12 months;
- In cooperation with civil society and the Afghan Independent Human Rights Commission (AIHRC), finalize and begin the implementation of the National Priority Program for Human Rights and Civic Responsibilities, and undertake human rights, legal awareness and civic education programs targeting communities across Afghanistan to foster a more informed public and civil society, and to increase Government accountability;
- Strive to ensure the necessary political and financial support for the AIHRC while guaranteeing its constitutional status, and initiate discussions with the AIHRC within six months to explore its budgetary status.
IV. PROGRESS IN THE AC IMPLEMENTATION AND INTERNATIONAL ASSISTANCE

In terms of instruments developed since 2004, several legal instruments were passed, including the Procurement Law, the Civil Service Law, and in particular the Law is Monitoring the Implementation of the Anti-Corruption Strategy Administrative, that Created The National High Office of Oversight Against Corruption. New Audit law, Penal Code and Corruption Law are pending.

At this date, several progresses were made in the implementation of the National Anti Corruption Strategy:
- Creation of the High Office of Oversight;
- Anti Corruption Units established within the AGO in order to investigate corruption cases;
- Anti-corruption tribunals established in Supreme Court in order to deal with crimes of corruption;
- Development of ministries anti-corruption strategies;
- Strengthening complaints and investigation capacity with MoF and MoI (Fraud Investigation Unit, Anti Corruption Unit);
- Launching implementation of asset registration policy and system;
- Launching review of anti-corruption laws and regulations (Penal Code);
- Launching public awareness campaign;
- Implementation of the anti money laundering system and creation of the Financial Intelligence Unit (FINTRACA).

Since its creation, the High Office of Oversight has undertaken a number of initiatives with varying degrees of progress, in particular in the domain of asset declarations of public officials, complaint system, simplification of the vehicle registration process, public awareness campaign on anti-corruption issues, review of the draft anti-corruption actions plans from the majority of Afghan government ministries, and in the definition of benchmarks for a monitoring system. Regarding the complaint channel and corruption case investigations, from March to December 2010, the HOO’s results are the following:

Regarding the legal obligation of asset declaration by government officials (approximately 3500), based on Art. 154 of the Constitution and Article 12 of the HOO Law, in December 2010, a total of 1905 had been collected. But only a few number have been verified (five ministers and 12 heads of independent agencies). The HOO is very understaffed (only nine staff of the requested 21) due to limitations (lack of skills and professional training) including low salaries. 23

In a general way, HOO’s capacity is considered no yet fully operational, in particular regarding its human and financial resources, and a yet weak general anti-corruption legal framework.

In the domain of prosecution and Justice, there have been very few prosecutions – and even fewer successful ones – of corruption cases in Afghanistan. A National Justice Program was undertaken in the Justice administration that permitted for example, in the Court Supreme, to have a total number of 246 civil servants detained and disciplined from 2007 to 2009 for corruption charges. (Including 37 judges detained on corruption charges in 2009.)24

A. An Holistic Anti-Corruption Approach
Fighting corruption must include a complete mechanism that has to correspond with the following cycle:

Any anti-corruption system must focus its actions and means on the following four-step cycle:
Prevention / Detection / Investigation / Sanction

Nevertheless, it is also important to know the true scale of corruption as well its characteristics and
the involved sectors of the administration, economy and civil society, in order to adopt appropriate tools.
A continuous system of monitoring and assessment (benchmarking) must cover this whole cycle, to
identify weaknesses and take the necessary corrective measures, in the sense of a progressive reduction of
corruption towards an accepted level of tolerance.

The Afghan anti-corruption model has a holistic approach, conforming to international standards. Part
of these measures is already in action, others are on drafting or ongoing implementation. Within the legal
domain, several important and adequate laws have been undertaken, to implement a holistic anti-corruption
approach, such as: anti money laundering law, law on overseeing the implementation of the anti-corruption
strategy, procurement law, civil servant law, and terrorist financing law. The following Afghan anti-corruption
model is based on the five traditional pillars: prevention, detection, investigation, sanction and monitoring.
B. Sanctions
Sanctions can be administrative or penal, or both, according to the case. The Afghan AC strategy includes specialized courts against corruption. During the Kabul Conference (July 2010), President Karzai pledged to the Anti-Corruption Tribunal (special courts).

C. Monitoring
An independent monitoring system (Monitoring and Evaluation Committee) has been implemented since the Kabul Conference. MEC should be operative in the next months and will be a joint team of national and international members with a permanent secretariat. President Karzai just has appointed the responsible to lead this Committee, who was before the HOO’s director general.

D. Stakeholders and International Assistance in AC Domain
HOO is receiving a strong assistance and funding from several foreign stakeholders and donors, especially from UNODC, UNDP, USAID, World Bank, UNAMA, ADB, EUPOL, United States of America, United Kingdom, Italy, Denmark, Canada, Norway and others European countries. Different AC programs sustained by international organizations, like USAID, UNDP, UNODC, World Bank, Asia Foundation, and different national and international NGOs, are involving in various projects to strengthened Afghan government institutions and civil society to build capacity in prevention and detection of fraud and corruption.

As we have seen before, UNDP in partnership with UNODC, and funded by international donors (Italy, Norway, the United Kingdom, Canada, Denmark), is implementing the Accountability and Transparency (ACT) project that has been designed to support the Government of Afghanistan and Afghan civil society networks in developing the necessary capacities to fight and prevent corruption. It is supporting the implementation of the National Anti-Corruption Strategy (NACS) and the capacity development of the High

Office of Oversight (HOO), supporting the strengthening of internal integrity frameworks/mechanisms in key government institutions – the Control and Audit Office (CAO), Ministry of Education (MoE), Ministry of Finance (MoF) and the Ministry of Interior (MoI), supporting the active engagement of civil society in the fight against corruption, and supporting efforts to increase awareness and understanding amongst civil servants and the Afghan public of their role in the fight against corruption. The ACT project takes the Afghanistan National Development Strategy (ANDS), the NACS and the United Nations Convention against Corruption (UNCAC) as its main framework, with the ANDS addressing anticorruption as a crosscutting issue. The project components have been developed in order to support the Government of Afghanistan in meeting the priorities and requirements set out in these key strategies and conventions.  

The new donor approach since January 2010, in the London Conference, consisting of increasing the percentage of reconstructive international assistance delivered through the Afghan government channels, is conditional upon the Afghan government’s progress, particularly in reducing corruption and strengthening its public financial management systems, with the commitment to: a) work with the proposed anti-corruption bodies to review existing procedures and investigate instances of corruption that involve internationals; and b) work with the Government to improve procurement processes, including establishing additional measures to ensure due diligence in international contracting procedures.

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I. CURRENT SITUATION OF INVESTIGATION AND PROSECUTION OF CORRUPTION

A. Introduction
Good governance is the most important prerequisite to ensure socio-economic development with sustainability, equity and social justice. Good governance has been continuously strengthened through a number of reforms in key sectors, including fighting corruption, legal and judicial reforms, public administration reform, and armed forces reform. The Royal Government of the third legislature has taken numerous practical measures to tackle corruption through the introduction of Governance Action Plan and the adoption and implementation of a number of measures such as Law on Public Financial System, Law on Customs, Sub-decree on Public Procurement, Order on the Management of Non-tax Revenues, and Code of Conduct and Ethics for Customs Officials.

More importantly, Law on Anti-Corruption was promulgated by Royal Kram on 17 April, 2010. This law has a purpose to promote effectiveness of all forms of service and strengthen good governance and rule of law as well as to maintain integrity and justice which is fundamental for social development and poverty reduction.1

B. Legal Framework
1. National Legal Framework
   (i) Law on Audit of the Kingdom of Cambodia
   The Law on Audit of the Kingdom of Cambodia was passed by the National Assembly on the 12 January 2000. The purpose of the Audit Law is to establish a National Audit Authority and Internal Audit Department within each institution, ministry and public enterprise, which is independent in its operations.2 This law also stipulated the provision regarding to the type of audit, the nominating of General, Deputy General Auditor, auditing report, the right to collect information, the confidential of report/information, and the punishment.

   (ii) Anti-Corruption Law
   The Anti-Corruption Law was promulgated by Royal Kram on 17 April, 2010. It is a substantive law that applicable to all forms of corruption in all sections and at all levels throughout the Kingdom of Cambodia, which occurs after the law comes into effect. It stipulated the General provisions, definition, the establishment of an Anti-Corruption Institution, asset and liability declaration, criminal procedure to conduct investigation, sanction, and strategies to fight corruption effectively.

   To effectively root out corruption, the Anti-Corruption Law provided four strategies:
   • education;
   • prevention;
   • law enforcement with participation and support from the public; and
   • International cooperation.3

* Assistant to the President of the National Anti-Corruption Council, Cambodia.
1 Anti-Corruption Law, Art. 1.
2 Law on Audit, Art. 1.
3 Anti-Corruption Law, Art. 3.
To comply with UNCAC, Anti-Corruption Law included more corrupt offences as it was not included in the Penal Code (2009). The offenses are listed at the Sanctioning and Prosecuting Corruption and Related Offenses Part.

The amendment of Anti-Corruption Law was promulgated by Royal Kram on 1 August, 2011 and turn all corruption offences stipulated in either penal code or Anti-Corruption law enter into force.

**(iii) Penal Code**

Most corruption offenses are stipulated in Penal Code (2009). The offences are listed at the Sanctioning and Prosecuting Corruption and Related Offenses Part.

**(iv) Criminal Procedure Code (CPC)**

The Criminal Procedure Code stipulates the investigating procedure of the judicial police, prosecutors, and investigating judge. It is also provides the procedure during trial at the court of first instance, appeals court, and supreme court, extradition, etc.

2. International Legal Framework

In the context of international cooperation, Cambodia is a party to multilateral instruments, namely UNCAC, UNTOC, OECD convention on Combating Bribery of Foreign Public Officials in International Business Transactions, South East Asia Memorandum of Understanding for Preventing and Combating Corruption, which is now renamed as South East Asia Parties Against Corruption (SEA-PAC). Bilateral extradition treaties are currently in force with P.R. of China, Thailand, Lao PDR and Korea. In addition, Cambodia has bilateral agreement with the Republic of India, Australia, and Thailand on the Transfer of Sentenced Persons as well as the government of the United States of America Regarding the Non-Surrender of Persons to the International Criminal Court. Cambodia is also a party to the ASEAN Treaty on MLA in criminal matters comprising ten members (Brunei Darussalam, Indonesia, Lao PDR, Malaysia, Philippine, Singapore Vietnam, Myanmar, and Thailand).

C. Detecting, Investigating, and Prosecuting Corruption

1. Law Enforcement Agencies

**(i) The National Audit Authority and Internal Audit Department**

The National Audit Authority is responsible for executing the external audit function of the Royal Government. The Auditor-General is empowered to conduct audits on accounting records, accounts, management systems, operation controls and programmes of government institutions in accordance with generally accepted auditing standards and Royal Government auditing standards. The National Audit Authority is one of the government mechanisms to prevent corruption and find out corruption.

The Auditor-General and the Deputy Auditor-Generals are appointed by royal decree on the recommendation of the Royal Government and approved by a two-thirds majority of all members of the National Assembly. The Auditor-General and the Deputy Auditor-Generals are appointed for a term of five years and may be reappointed for another five-year term only upon the completion of the first term.

To carry out its functions, the National Audit Authority has the power to:

- request documents from other ministries, and compel ministry officials to appear and answer questions; 4
- enter and remain on the auditee’s premises during working hours;
- fully and freely access to documents, reports or properties belonging to government ministries/institutions; 5
- examine, make copies or extract documents from any report.

The penalty for obstructing an audit is a fine of one to five million riel, imprisonment from one to three months, or both. Providing false information to the National Audit Authority is subjected for penalty as fine

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4 Law on Audit arts. 30.
5 Law on Audit Arts. 32.
from more than five million riel, or imprisonment from one to five years, or both.  

The Auditor-General is mandated to report National Assembly, Senate, Council of Ministers, Ministry of Economic and Finance, and the relevant ministries whenever there is irregularity in the account statement, financial management, and current asset. Furthermore, National Audit Authority’s report is considered as public report. However, the report is kept confidential in case of:

- Affected security, defense, and integrity; or international relation of Cambodia;
- Affected the commercial interest of legal entities or individual.

According to Global Integrity 2008, none of the reports made by the National Audit Authority have been made public and the legislature does not act on the findings of the National Audit Authority, partly due to the weak link between the National Audit Authority and the parliament, and the low quality of the audit reports. According to Global Integrity 2008, these problems are being addressed under the National Audit Authority’s Strategic Development Plan 2007 to 2011. Hence, Global Integrity 2008 evaluates the National Audit Authority as ‘weak’.

In addition to the establishment of the National Audit, the law on audit also established the Internal Audit Department within each government ministry, institution and public enterprise. Internal Audit Department independently monitors and evaluates the effectiveness of the implementation of internal audit of their institution, ministry and public enterprise. However, the internal audit report is reported to the head of institution, ministry and public enterprise for approval before it is sent to National Audit Authority. The independent of Internal Audit Department remain in question.

(ii) The Ministry of National Assembly and Senate Relations (MONASRI)

MONASRI was established by the Law on the Establishment of the Ministry of National Assembly Senate Relations and Inspection in 1999. MONASRI has two main functions: 1) coordinate the relations between the executive and legislative branches; and 2) inspecting all operations of the government in order to fight against corruption, abuse of power and other misconduct. In the inspection field, MONASRI is mandated to:

- Propose measures to prevent misconduct, and corruption among civil servants, military, and police
- Investigate, collecting evidence, and interview any relevant person in the corruption or misconduct case.
- Report the result of each inspection to the government and ask for further recommendations or measurement, for instance, refer the case to the court.

Due to the MONASRI’s report need to have checked and approved from the government before it is released to public, MONASRI was assumed by the public that it is not executed its assignment independently.

(iii) Anti-Corruption Unit (ACU)

In April 2010, National Anti-Corruption Council (NACC) and Anti-Corruption Unit (ACU) were established right after the adaptation of Anti-Corruption law. The National Anti-Corruption Council has a role to set forth the Strategic Plan and provide guidance, recommendations on anti-corruption work. It is composed of 11 members from different backgrounds, institutions and led by one President ranking as Deputy Prime Minister whereas the Anti-corruption Unit as an executive body to independently undertake its duties. The Anti-corruption Unit is led by one President with the rank of Senior Minister, and four Vice-Presidents with the rank of Minister and a number of Assistants, ranking as Secretary of State, Under Secretary of States and Director Generals respectively.

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6 Law on Audit Art. 44-45.
7 Law on Audit Art. 38.
9 Law on Audit, Arts. 41-43.
10 Law on Audit Arts. 41.
11 Sub-Decree on Organization and Functioning of the Ministry of National Assembly Senate Relations and Inspection at Art 2, No. 67/ANK/BK, dated 3 August 1999. Art. 2.
To be truly independent institution, Anti-Corruption law was amended and promulgated on 1 August 2011 to provide anti-corruption institution a separated budget from council of ministers to function its mandate effectively. It also provides the president of National Against Corruption Council the right to structure and nominate the staffs from deputy director level to bottom line.

Under anti-corruption law, the Anti-Corruption Unit is responsible for investigating corrupt offences as stipulated in both the penal code and anti-corruption law. Officials of the Anti-Corruption Unit who accredited as judicial police are empowered to investigate corruption offenses. In addition, other units that are aware of corruption offences shall make corruption complaints to the Anti-Corruption Unit or its branch offices in the Capital or provinces.\(^{12}\)

The prosecutors’ office is responsible for prosecuting Anti-Corruption Law and Penal Code corruption offences.

(a) Investigative power of Anti-corruption Unit

Officials of Anti-corruption Unit who are accredited as judicial police take charge of investigating corruption offences. If during the course of a corruption offence investigation different offenses are found whose facts are related to the offence being investigated by Anti-corruption Unit, officials of Anti-Corruption Unit may continue the investigation of the offences to the final stage. The Anti-Corruption Unit cannot investigate other offences except corruption ones unless the unit is ordered by the court to do so.

At the end of each investigation, the Anti-corruption Unit shall submit all facts to the prosecutor for further action in conformity with the provisions of the code of criminal procedures.

(b) Special Privileges of Anti-Corruption Unit

The president of the Anti-Corruption Unit can ask the concerned authority to suspend all functions of any individual who is substantially proven to be involved in a case of corruption offence. If the suspect flees to a foreign country, the president of the Anti-Corruption Unit can ask the competent authority to undertake an extradition in accordance with the provisions in force.

(c) Privileges of Anti-Corruption Unit related to investigation

In the case there is clear hint of corruption offence, the Anti-Corruption Unit can:

1. Check and put under observation the bank accounts or other accounts which are described to be the same as bank accounts;
2. Check and order the provision or copy of authentic documents or individual documents, or all bank, financial and commercial documents;
3. Monitor, oversee, eavesdrop, record sound and take photos, and engage in phone tapping;
4. Check documents and documents stored in the electronic system;
5. Conduct operations aimed at collecting real evidence.

The above measures will not be considered as violations of professional secrets. The secret of banks is not be served as justification for not providing evidence related to corruption offences in the provisions of this law.

(d) Privileges of Anti-Corruption Unit related to freezing an individual’s assets

Upon the request by the president of Anti-Corruption Unit, the Royal Government may order the General Prosecutor of the Appeals Court or Prosecutor of the Municipal/Provincial Court to freeze the assets of individuals who commit offences stated in Anti-Corruption Law and corruption offences stated in the Penal Code. The individual assets, stated in the above paragraph, includes the funds received or which forms to be an asset belonging to him or her.

(e) Privileges of Anti-Corruption Unit in Cooperation with Public Authority

The president of the Anti-Corruption Unit may order public authorities, government officials, citizens

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\(^{12}\) Anti-Corruption Law, art. 22.
who hold public office through election, as well as units concerned in private sector, namely financial institutions, to cooperate with officials of the Anti-Corruption Unit in the work of investigation. The president of the Anti-Corruption Unit may also ask the national and international institutions to cooperate in forensic examinations related to its investigation work.

2. Regulations relating to Forfeiture and repatriation of Proceeds of Corruption

(i) Forfeiture

When a person is found guilty of corruption, the court will confiscate all his/her corruption proceeds including property, material, instrument that is derived from corruption act and the proceeds will be transformed into state property. If the above seized asset is transferred/changed into different property from the original asset nature, this transformed asset will become the subject of seizure at the place where it locates. If the corruption proceeds make more benefits or other advantages, all of these benefits and advantages will be seized as well. If the corruption proceeds disappear or lose value, the court may order the settlement of the proceeds.

(ii) Repatriation of the proceeds of Corruption

In case assets and corruption proceeds are found kept in foreign states, the competent authority of the Kingdom of Cambodia shall take measure to claim that asset and proceeds back to Cambodia through means of international cooperation. The Kingdom of Cambodia shall cooperate with other countries who request to repatriate corruption proceeds that are kept in Cambodia.

A. Sanctioning and Prosecuting Corruption and Related Offences

1. Criminalizing Corruption Offences

Corruption offences are principally governed by the Penal Code (2009) and anti-corruption law (2010). Cambodia’s main domestic bribery offences are stipulated in Articles 594 and 605 of the Penal Code.

13 Anti-Corruption Law, art. 48.
14 Anti-Corruption Law, art. 49.
15 Article 594: (Bribe Taking by public official or a citizen entrusted with public mandates through an election) (Passive Bribery).

It is punishable by an imprisonment from 7 (seven) years to 15 (fifteen) years for any act committed by a public official or a citizen entrusted with public mandates through an election to directly or indirectly solicit or accept without authorization the donation, gift, promise, or any interest in order:

1. To perform any act of his/her functions or facilitate anything using his/her functions;
2. Not to perform any act of his/her functions or facilitate anything using his/her functions.

16 Article 605: (Bribe Offered to public official or a citizen entrusted with public mandates through an election) (Active Bribery).

It is punishable by an imprisonment from 7 (seven) years to 15 (fifteen) years for an unauthorized person who directly or indirectly delivers present or gift, make promise or give interests to a public official or a citizen entrusted with public mandates through an election so that the latter:

1. Perform any act of his/her functions or facilitate anything using his/her functions;
2. Not to perform any act of his/her functions or facilitate anything using his/her functions.
## Accepting Bribes (Passive Bribery)

<table>
<thead>
<tr>
<th>Penal Code (2009)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Article 278 (Bribe Taking By Employees)</td>
</tr>
<tr>
<td>2. Article 280 (Bribe Taking By Governor)</td>
</tr>
<tr>
<td>3. Article 517 (Bribe Taking By Judges)</td>
</tr>
<tr>
<td>4. Article 547 (Bribe Taking By Witnesses For False Testimony)</td>
</tr>
<tr>
<td>5. Article 553 (Bribe Taking By Interpreter)</td>
</tr>
<tr>
<td>6. Article 555 (Bribe Taking By Experts)</td>
</tr>
<tr>
<td>7. Article 594 (Bribe Taking by public official or a citizen entrusted with public mandates through an election)</td>
</tr>
<tr>
<td>8. Article 637 (Bribe Taking By A Person Who Has Competence To Issue False Certificate)</td>
</tr>
<tr>
<td>9. Article 639 (Bribe Taking By Member Of Professional Board Of Medicine To Issue False Certificate)</td>
</tr>
</tbody>
</table>

### Other related offences:
- Article 387 (Improper Bidding)
- Article 404 (Definition Of Money Laundering)
- Article 592 (Definition Of Misappropriation)
- Article 595 (Definition Of Passive trading in influence)
- Article 597 (Definition Of Embezzlement)
- Article 599 (Definition Of Favoritism)
- Article 601 (Intentional Destruction And Dishonest Embezzlement)
- Article 606 (Active trading in Influence)
- Article 607 (Extortion)
- Article 608 ( Destruction And Embezzlement)
- Article 641 (Execution Of Misdemeanor Of Articles 639 And 640 For All Medical Professions).

## Offering of Bribes (Active Bribery)

<table>
<thead>
<tr>
<th>Anti-Corruption Law (2010)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Article 279 (Bribe Offered To Employees)</td>
</tr>
<tr>
<td>2. Article 518 (Bribe Offered To Judges),</td>
</tr>
<tr>
<td>3. Article 548 (Bribe Offered To Witnesses)</td>
</tr>
<tr>
<td>4. Article 554 (Bribe Offered To Interpreter)</td>
</tr>
<tr>
<td>5. Article 556 (Bribe Offered To Experts)</td>
</tr>
<tr>
<td>6. Article 605 (Bribe Offered to public official or a citizen entrusted with public mandates through an election)</td>
</tr>
<tr>
<td>7. Article 638 (Bribe Offered To A Person Who Has Competence To Issue False Certificate)</td>
</tr>
<tr>
<td>8. Article 640 (Bribe Offered To Member Of Professional Board Of Medicine To Issue False Certificate)</td>
</tr>
</tbody>
</table>

### Other corruption offenses:
- Article 35: Abuse of function
- Article 36: Illicit Enrichment
- Article 37: Corruption proceeds offences
- Article 43: Petty corruption offences

### Liability of Legal Persons for Corruption Offences

The Penal Code expressly provides for liability of legal persons for specific offences such as:
- Article 279 (bribe offered to employees)
- Article 404 (definition of money laundering)
- Article 518 (bribe offered to judges)
- Article 548 (bribe offered to witnesses)
- Article 554 (bribe offered to interpreter)
- Article 556 (bribe offered to experts)
- Article 605 (Delivery of Bribes) (Active Bribery)
- Article 606 (active trading in influence)
- Article 607 (extortion)
- Article 638 (bribe offered to a person who has competence to issue false certificate)
- Article 640 (bribe offered to member of professional board of medicine to issue false certificate)
In this presentation paper, we would like to analyse the elements of bribery offence stipulated in article 594 and 605 of Penal Code as follows:

<table>
<thead>
<tr>
<th>Perpetrator</th>
<th>Article 594 (Bribe Taking by public official or a citizen entrusted with public mandates through an election)</th>
<th>Article 605 (Bribe Offered to public official or a citizen entrusted with public mandates through an election)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>public official</td>
<td>Briber</td>
</tr>
<tr>
<td></td>
<td>a citizen entrusted with public mandates through an election</td>
<td></td>
</tr>
<tr>
<td>Activities</td>
<td>Soliciting or accepting the bribe (the donation, gift, promise, or any interest) directly or indirectly without authorization</td>
<td>Offering, promising or giving bribe directly or indirectly without authorization</td>
</tr>
<tr>
<td></td>
<td>Perform or not to perform any act of his/her functions or facilitate anything using his/her functions</td>
<td>Perform or not to perform any act of his/her functions or facilitate anything using his/her functions</td>
</tr>
</tbody>
</table>

3. Other Offences

(i) Petty Corruption Offences and Punishment

The petty corruption offence shall meet the following criteria:

- Offences committed for daily survival;
- Offences committed in petty manner;
- Offences which is not harmful to society;
- defined by the Anti-Corruption Unit as petty corruption offences.

Any person who commits petty corruption will be sentenced to prison from seven days to five years. Up to date, Anti-Corruption Unit has not defined other petty offences. In actual practice, the suspects who commit petty offence will be subjected for warning by the Anti-Corruption Unit.

II. PROBLEMS

Prevention, education, law enforcement strategies and budget planning are currently envisaged in the five years Term of Strategic Plan (2011-2015) and a Two Years Term of Action Plan (2011-2012). It was planned to implement at the beginning of 2011. However, due to the amendment of Anti-Corruption Law, those strategies have been partly implemented in particular the dissemination of the Anti-Corruption Law.

III. CHALLENGES

It has been more than one year since the establishment of Anti-Corruption Unit. There are many challenges on the way to build its fundamental ground.

- The resources, budget supported by government is now in the administration process for this initial step;
- Participation, support and trust from the public are not widen due to the raising awareness is limited and the use of old practice has its popularity;
- Lack of professional, expert in the field of education, prevention, and law enforcement;
- Cooperation among relevant institutions has improved but cooperation with the Ministry of Interior, Police, Financial Investigation Unit (FIU) and courts is still required.

IV. CONCLUSION

Although the Anti-Corruption Law provides the Anti-Corruption Unit the power and privilege to investigate corruption offences and the independence to execute its duties, there are many obstacles along the way. Curbing corruption is a very difficult task as people involved in corruption are intelligent,
knowledgeable and powerful, and professional staff are required to deal with it. Experts in the field of investigation, forensic science, law, accounting, procurement, education, etc. are required to work in certain posts. It is also required to formulate a system of integrity that applies to all staff.

Second, the Anti-Corruption Unit requires adequate resources and budget from the government to implement its Five Year Strategic Plan (2011-2015) and Two Year Term of Action Plan (2011-2012) effectively. It is also requires the participation of the public, development partners and civil society.
I. INTRODUCTION

Corruption is a transnational phenomenon that affects all societies and economies. It is the enemy of rule of law, human rights and development. It hinders democratic institutions, civilization and social values. It adversely affects the justice system and equality and creates bias and prejudice. It jeopardizes transparency, accountability and good governance.

Nepal has introduced preventive and promotional measures along with punitive/correctional measures with respect to corruption control. But preventive and promotional measures are not entirely used. Punitive measures are concerned with criminal justice. In this paper, I try to explain and analyse the corruption scenario, anti-corruption laws and institutions, their drawbacks, United Nations Convention against Corruption (UNCAC) compliance, problems of criminal justice related to corruption and the way forward to curb corruption in a Nepalese perspective.

II. SITUATION OF CORRUPTION IN NEPAL

Corruption is a single word, but it has several forms. Corruption may be monetary or non-monetary. Bribery, embezzlement, fraud and extortion are main forms of corruption. All these forms of corruption are present in Nepal. Nepotism and favoritism are deeply-rooted in Nepalese culture. Not only petty but also grand political and bureaucratic corruption are being committed in Nepal. Similarly, the nature of systematic or state corruption along with isolation corruption is widespread. “There is no doubt that corruption is the main problem in Nepal”.1

DFID identifies fraud and corruption as one of the key risks in Nepal and says that corruption has been “endemic in Nepal for decades”. Professor Moore said "I have rarely seen as corrupt a country as Nepal";2 “Corruption is an old scourge in Nepal as anywhere else. Corruption in Nepal poses a complex challenge to its people and their leaders.”3

Almost all spheres i.e. the public, political and private sectors have been infected by corruption in Nepal. So, the cabinet, judiciary, civil service, politicians, police, army, non-governmental organizations, and the private sector etc. are seriously affected by the virus of corruption. It has been claimed that justice is being exchanged for money. The criminal investigation, prosecution and adjudication process are deeply affected by corruption. Nepal’s low score in the Corruption Perception Index is evidence of the above-mentioned facts.

3 Devendra Raj Pandeya, Corruption as a Problem in Nepal, www.tinepal.org
### III. ANTI-CORRUPTION LEGAL FRAMEWORK IN NEPAL

#### A. Constitutional Arrangement

The Interim Constitution of Nepal sets up the Commission for Investigation of Abuse of Authority (CIAA) as constitutional body. All arrangements for its independence and competency are also managed by the Constitution. CIAA consists of the Chief Commissioner and such number of other Commissioners as may be required. They are appointed by President on the recommendation of the Constitutional Council after a parliamentary hearing. The Commission is empowered to inquire into, and investigate, any abuse of authority committed through improper conduct or corruption by a person holding any public office. The Commission is entrusted with the power of prosecution too.

#### B. Anti-Corruption Law

The first legislative attempt to enact a specific counter-corruption law was made as early as 1864 A.D. as part of the *Muluki Ain* (Country Code), the first law of the code of Nepal. A section of this code, called the *Hakimko Nauma Karaune Ko Mahal* (Chapter on the complaints against officers) provided a mechanism for redress against a civil servant who collected bribes from among the people. A separate anti-corruption law was enacted in 1954. The present anti-corruption law was enacted in 2002, and replaced the previous law. It has more sophisticated provisions and a wider scope. Besides this law, other laws were also enacted in 2002. In fact, the enactment of these laws is an important and landmark step to create a competent anti-corruption legal regime. In addition to the above-mentioned, a series of anti-corruption laws have been passed. Let me briefly introduce the laws related to anti-corruption in Nepal.

1. **Corruption Prevention Act, 2002**

   It is the principal anti-corruption law of Nepal, which criminalizes the acts that have been defined as crimes. Both substantive and procedural matters are incorporated in this law. Moreover, roles, powers and procedures of investigation agencies and officers are also made responsible for some required jobs within the Act.

2. **Commission For Investigation of Abuse of Authority Act, 1991**

   This is procedural law related to CIAA procedure. The Act not only defines improper conduct but provides the CIAA with significant power. The Act categorically states that the CIAA has the power to investigate on the basis of a complaint of a particular person or information from any source. The CIAA may take the statement of the suspect or any person deemed necessary. Similarly, the Commission has also power to search and seize, suspend the suspect from his or her post of public responsibility and arrest/detain the suspect for a maximum of six months with the competent court’s consent.

   The CIAA Act has also given authority to the CIAA to access bank accounts and other financial transactions. In addition, it may seize the passport of a suspect and also order area restriction against suspect.

3. **Judicial Council Act, 1991**

   This Act relates to appointment and disciplinary action of judges. It also provides power to the Judicial Council to investigate and prosecute the judges of District Courts and Appellate Courts, on the charge of corruption.

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4 www.transparency.org

5 Bhimarjun Acharya (editor), Annual Survey Of Nepalese Law 2001, Nepal Bar Council, Kathmandu at 211.
4. **Special Court Act, 2002**

The Special Court Act has been enacted to deliver speedy and effective justice in special types of cases. The Special Court is empowered to exercise jurisdiction over cases related to the Corruption and Anti-Money Laundering Act.

5. **Revenue Leakage (Investigation and Control) Act, 1995**

This Act is related to tax leakage by taxpayers. The Act pertains to the role and procedure of Department of Revenue Investigation with regard to investigation and prosecution.

6. **Good Governance (Management and Operation) Act, 2007**

Good governance and corruption are opposite concepts. Good governance prevents corruption. This Act has made many provisions regarding good governance which are valuable in preventing corruption. It states that all civil servants and personnel of all public institutions have to follow a code of conduct. The Act also incorporates a provision regarding managing of conflicts of interest to some extent.

7. **Anti-Money Laundering Act, 2008**

The Act has provided measures to take comprehensive legal action against money laundering and financing of terrorism. The Act criminalizes the earning, acquiring, holding, possession, involvement or consumption of proceeds from tax evasion, terrorist activities and other crimes and provisions. Recently, it has been amended and incorporates various provisions for the control of money laundering.

8. **Rights to Information Act, 2007**

Transparency is the most important aspect to curb corruption. The said Act has made comprehensive provision with respect to rights to information. Detailed processes and ample provisions when information is denied are also included in the Act.

9. **Public Procurement Act, 2007**

The Act establishes appropriate systems of procurement, based on transparency, competition and objective criteria in decision making, that are effective, *inter alia*, in preventing corruption. This Act is enacted to prevent irregularities in the procurement process as well as setting standards in such proceedings. In fact, the Act is enacted in line with UNCAC provisions.

10. **Army Act, 2006**

As per this Act, any crime of corruption committed by army staff is investigated and prosecuted by a three-member committee headed by the Deputy Attorney General. Other members of the committee include an officer working at the Defense Ministry and member of legal department of Nepal Army. Such cases are adjudicated in a three-member Special Military Court which is headed by an Appellate Court Judge.

11. **Regulation**

Several regulations have been made as delegated legislation. Basically, these regulations have created comprehensive procedural matters. CIAA regulations and a regulations-related Vigilance Centre are prominent in this regard.

**C. Anti-Corruption Strategy**

Control of corruption is not possible without a systematic, strategic campaign against corruption. Several plans and policies have been made in Nepal at national and institutional level to curb corruption. I would like to outline briefly these strategic plans.

1. **Three Year Plan (2010/11-2012/13)**

The planned development was introduced in Nepal on 1956 has crossed five decades. Now Nepal has a three year plan. In this plan Nepal has made a strategy to strengthen and reform corruption-control-related legal systems and administrative structures in consonance with the commitment made by the international community through the UNCAC.6

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2. **Strategic Action Plan of Nepal Government**

The Nepal Government issued its strategic action plan in 2009. This plan has 13 point strategies and more than one hundred activities to curb corruption. Key points of the plan are: a competitive and accountable public service; the commercial and banking sector’s economic discipline; policy and law for private sector corruption; reform (law, policy, work style); a responsive, result-oriented anti-corruption movement through monitoring; usage reform (minimum cost in social usage); promotional activities; people-oriented local authorities; transparency in political parties’ expenditure; transparency; zero tolerance; independent public management; integrity; organizational capacity building; national interest in foreign investments; and transparent and accountable NGOs. In principle, these strategies are very sound, whereas their implementation is very poor.


The Nepal Government published its Institution-wise Action Plan to combat the corruption on the occasion of Anti-Corruption Day 2010. It is the additional and complementary action plan to the Strategic Action Plan of the Nepal Government. Basically it has focused on activities that should be taken by the major components and institutions of the Nepal government within a certain period of time.

4. **Three Year Strategic Plan of the CIAA (2010/11 - 2012/13)**

CIAA has also drafted a three year action plan to execute its responsibilities. Effective and reliable information collection and analysis regarding corruption; speedy and accurate investigation of corruption and improper cases; effective implementation of verdicts of the CIAA; coordination of anti-corruption agencies; transfer of Corruption Prone Zones into Islands of Integrity; monitoring the implementation of codes of conduct of the public sector; and effective conduct of anti-corruption awareness programmes are major strategies of the CIAA.

5. **Five Year Strategic Plan of the Office of teh Attorney General (OAG) (2011/12 - 2015/16)**

The Office of the Attorney General also has its own five year strategic plan. This strategic plan fully focuses on reforming and strengthening the criminal justice system. Several strategies are formulated, e.g. reform and development of investigation, prosecution, pleading, and capacity building of the OAG. In addition to the above-mentioned, the strategic plan also focuses on corruption control issues and has set up several strategies. The UNCAC and Nepal’s challenges for implementing it are critically and comprehensively analysed in the Strategic Plan of Action. Establishment of a separate anti-corruption department in the OAG for pleading and defending corruption cases, and posting experienced personnel in this department to lobby for the enactment of new laws which are essential to implementing the UNCAC are some examples of this strategic intervention related to corruption control.

6. **Five Year Strategic Plan of the Judiciary (2009/10 - 2013/14)**

The judiciary is the major component of criminal justice system. Corruption control is not possible without reforming the judiciary. In this juncture, the judiciary also has its own strategic plan. This plan has categorically set several strategies. Proper and effective implementation of codes of conduct for judges and court personnel; development of the mechanism to hear complaints of irregularities found in court; and maintaining financial discipline and transparency related to corruption control.

### IV. ANTI-CORRUPTION INSTITUTIONAL ARRANGEMENTS IN NEPAL

#### A. Commission for the Investigation of Abuse of Authority

The Commission for the Investigation of Abuse of Authority Nepal is an apex constitutional body to curb corruption and its tentacles in the country. Articles 119, 120 and 121 of the Interim Constitution of Nepal, 2006 have empowered the CIAA to investigate and probe cases against persons holding any public office and their associates who are indulged in the abuse of authority by way of corruption and/or improper conduct. The CIAA is the distinctive anti-corruption agency in South Asia, which plays the role of an ombudsman, investigator and prosecutor as well. It aims to crack down on corruption issues at a national level with a
system-based approach. It also focuses on detection and punishment of corrupt acts on one hand and social, cultural and institutional reform on the other.\textsuperscript{10}

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>CIAA Meetings</td>
<td>102</td>
<td>117</td>
<td>129</td>
<td>160</td>
<td>192</td>
<td>145</td>
<td>164</td>
<td>212</td>
<td>154</td>
</tr>
<tr>
<td>Nos. of Decisions</td>
<td>245</td>
<td>219</td>
<td>351</td>
<td>401</td>
<td>482</td>
<td>382</td>
<td>427</td>
<td>637</td>
<td>465</td>
</tr>
<tr>
<td>Total Complaints</td>
<td>2522</td>
<td>3966</td>
<td>3732</td>
<td>4759</td>
<td>4324</td>
<td>3564</td>
<td>2732</td>
<td>4149</td>
<td>4295</td>
</tr>
<tr>
<td>Resolved</td>
<td>2015</td>
<td>2481</td>
<td>3188</td>
<td>3709</td>
<td>3353</td>
<td>2976</td>
<td>2135</td>
<td>3303</td>
<td>3067</td>
</tr>
<tr>
<td>Total Cases Filed</td>
<td>61</td>
<td>147</td>
<td>93</td>
<td>113</td>
<td>114</td>
<td>115</td>
<td>70</td>
<td>50</td>
<td>27</td>
</tr>
<tr>
<td>Departmental Actions</td>
<td>18</td>
<td>25</td>
<td>38</td>
<td>39</td>
<td>45</td>
<td>26</td>
<td>28</td>
<td>29</td>
<td>13</td>
</tr>
<tr>
<td>Warning</td>
<td>15</td>
<td>25</td>
<td>24</td>
<td>42</td>
<td>19</td>
<td>16</td>
<td>19</td>
<td>22</td>
<td>11</td>
</tr>
<tr>
<td>Attention Drawn</td>
<td>27</td>
<td>9</td>
<td>3</td>
<td>6</td>
<td>6</td>
<td>13</td>
<td>13</td>
<td>17</td>
<td>18</td>
</tr>
<tr>
<td>Suggestions</td>
<td>50</td>
<td>22</td>
<td>20</td>
<td>22</td>
<td>13</td>
<td>96</td>
<td>13</td>
<td>107</td>
<td>75</td>
</tr>
</tbody>
</table>

Table 2. Facts and Figures on CIAA Activities\textsuperscript{11}

However, the Commission has some limitations to its jurisdiction. The Commission has no jurisdiction in following areas:

- Any official in relation to whom this Constitution itself separately provides for such action and to any official in relation to whom any other law provides for separate special provision. This Constitutional provision provides that the CIAA has no jurisdiction over chiefs and members of constitutional bodies, judges and armies.
- Policy decisions made by the cabinet.
- Issues of Parliamentary privileges.
- Private Sector Corruption.

B. Office of the Attorney General

The Attorney General is one of the most important constitutional bodies under the Constitution of Nepal and has been empowered to make the final decision whether or not to initiate proceedings in any case on behalf of the government in any court or judicial authority. The Attorney General is the chief legal adviser of the government and has the right to appear and present his or her legal opinion on any legal question in any meeting of the legislature-parliament, the constituent Assembly or any other committees. The Attorney General has been assigned for representing the government in a court of law in cases in which the State is party or in suits where in the rights, interest or concerns of the government of Nepal are involved. The cadres of the AG’s office have also been deputed at various government offices and constitutional bodies, viz. the Commission for the Investigation of Abuse of Authority, and the Election Commission. The government attorneys have been assigned to the CIAA to carry out investigation and prosecution of corruption cases. In this way, government attorneys and the OAG are not only leading agencies of the criminal justice system but also major agencies of corruption control. Similarly, the CIAA has delegated its power to 75 District Attorney Offices and 15 Appellate Attorney Offices.

\textsuperscript{10} www.ciaa.gov.np
\textsuperscript{11} Different Annual Reports (2001/02-2009/10) of Commission for the Investigation of Abuse of Authority.
C. Court

Corruption cases are adjudicated by the Special Court. The Special Court is empowered to adjudicate corruption cases filed by the CIAA at trial level. The Special Court is established under the Special Court Act. The Special Court has the status of an appellate court so appeal jurisdiction of corruption cases goes to the Supreme Court. Similarly, trial jurisdiction over the charge sheet of the Judicial Council against judges rests in appellate courts.

1. Special Court

The Special Court is entrusted with the jurisdiction to hear corruption cases filed by the CIAA. Special Court judges are deputed from the Judicial Council for a certain period.

<table>
<thead>
<tr>
<th>Year</th>
<th>Supreme Court</th>
<th>Special Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>005/06</td>
<td>190</td>
<td>332</td>
<td>522</td>
</tr>
<tr>
<td>006/07</td>
<td>187</td>
<td>344</td>
<td>531</td>
</tr>
<tr>
<td>007/08</td>
<td>158</td>
<td>249</td>
<td>407</td>
</tr>
<tr>
<td>008/09</td>
<td>193</td>
<td>250</td>
<td>443</td>
</tr>
<tr>
<td>009/10</td>
<td>260</td>
<td>181</td>
<td>441</td>
</tr>
</tbody>
</table>

Table 3. No. of cases pleaded/represented by Government in the Special and Supreme Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>Conviction rate in percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>004/05</td>
<td>84.49</td>
</tr>
<tr>
<td>005/06</td>
<td>91.5</td>
</tr>
<tr>
<td>006/07</td>
<td>81.85</td>
</tr>
<tr>
<td>007/08</td>
<td>86.95</td>
</tr>
<tr>
<td>008/09</td>
<td>67.4</td>
</tr>
<tr>
<td>009/10</td>
<td>52.9</td>
</tr>
</tbody>
</table>

Table 4. Conviction rate in corruption cases decided by the Special Court (in percentages)

<table>
<thead>
<tr>
<th>Disproportionate Property</th>
<th>Fake certificate</th>
<th>Forged Document</th>
<th>bank Fraudulent</th>
<th>Embezzlement</th>
<th>Vehicle related</th>
</tr>
</thead>
<tbody>
<tr>
<td>28.5</td>
<td>89.6</td>
<td>78.26</td>
<td>89.36</td>
<td>67.39</td>
<td>95</td>
</tr>
</tbody>
</table>

Table 5. Conviction rate verdict given by the Special Court according case nature period of 2002-2010

2. Supreme Court

The Supreme Court has appellate jurisdiction over the verdicts of the Special Court. The Supreme Court has laid down several precedents in corruption cases within appellate and writ jurisdiction.

D. Judicial Council

The Judicial Council is an independent constitutional body headed by the Chief Justice. The Council is responsible for recommendation and appointment of all the judges except the Chief Justice. It has also power to investigate and prosecute the judges of District Courts and Appellate Courts in the charge of corruption. The Council also monitors the observance of the Code of Conduct of Judges. In fact, the council has an important role in preventing judicial corruption and irregularities.

<table>
<thead>
<tr>
<th>No. of judges resignation during investigation</th>
<th>Removed no. of judges after investigation</th>
<th>No. of judges warned made by council</th>
<th>No. of judges charged the corruption cases</th>
<th>Recommended for impeachment</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>5</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>19</td>
</tr>
</tbody>
</table>

Table 6. Action against judges taken by the Judicial Council

E. National Vigilance Centre

The National Vigilance Centre is established under the Corruption Prevention Act. The Centre is under the Prime Minister and headed by secretary-level officials of the Nepal government. The Centre has no investigation authority regarding corruption. The Centre is empowered to take only preventive and

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12 Different Annual Reports (005/06-2009/10) of Office of the Attorney General.
14 This data are based on analysis of verdict of special court.
15 Data are presented according to the source of the Judicial Council.
promotional measures against corruption.

F. Army Investigation and Army Special Court
The CIAA has no jurisdiction over corruption cases related to the army. The Army Act provides that any crime of corruption committed by army staff is investigated and prosecuted by a three-member committee headed by the Deputy Attorney General. Such cases are adjudicated in a three-member Special Military Court which is headed by an Appellate Court Judge who is appointed by the government at the recommendation of the Judicial Council. Very few cases have been investigated and adjudicated within these mechanisms.

G. Other Anti-Corruption Institutions
In addition to the above-mentioned institutions, several other institutions are also related to curbing corruption to some extent. These institutions are as follows:
- Auditor general
- Revenue Leakage Investigation Department
- Anti-Money Laundering Department
- Parliamentary Committee
- Public Procurement Monitoring Office
- Appellate Government Attorney Office
- District Government Office
- Regional Administration Office
- District Administration Office.

V. INVESTIGATION, PROSECUTION & ADJUDICATION OF CORRUPTION OFFENCES IN NEPAL

A. Investigation
CIAA is responsible for investigation and prosecution regarding public sector corruption at large extent. However, CIAA jurisdiction of investigation and prosecution of judges and army is excluded and other mechanisms are established.

The complaints lodged with CIAA are settled in accordance with the procedures laid down in the CIAA Working Procedure, 2001. The investigation process is divided into two stages: (i) Preliminary Inquiry; (ii) Detailed Investigation.

During the preliminary inquiry, the complaints are analysed with regard to their merit and the first-hand available evidence. At this stage, the designated Investigation Division of the CIAA Secretariat works with to collect most of the possible evidence. If at this stage CIAA finds a prima facie case, it appoints an Investigation Officer for detailed investigation. While carrying out a detailed investigation, the Investigation Officer collects evidence, makes all necessary inquiries and analyses the findings. Upon the completion of the specified procedures, the Investigation Officer submits a report of his findings before the Commission. Such report shall be reviewed by the Commission and a decision to this effect shall be taken.

The CIAA has power to investigate on the basis of written, verbal, telephone and online complaints, media sources, its own intelligence, or information from any source. The CIAA is empowered to take statements of the suspect or any person deemed necessary; to search and seize as needed; to access bank accounts and other financial transactions; to withhold transactions in accounts, or the property of a suspect; to seize the passport of the suspect and also order area restriction against a suspect.

B. Prosecution
The CIAA is empowered to prosecute corruption offences. Based on the findings of its investigation, the Commission may prosecute cases against persons alleged to have committed corruption in the Special Court.

C. Adjudication
The Special Court is empowered to adjudicate corruption cases filed by CIAA in trial level. The Special court is established under the Special Court Act and it follows the special procedure laid down in the Special
VI. COMPLIANCE WITH THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 2003

A. General Introduction
The United Nations Convention against Corruption (UNCAC) is the most comprehensive international anti-corruption convention to date as it covers the broadest range of corruption offences, including the active and passive bribery of domestic and foreign public officials, obstruction of justice, illicit enrichment and embezzlement. This Convention incorporates crucial elements of the fight against corruption, such as preventive measures, criminalization, protection of sovereignty, sanctions and reparations, confiscation and seizure, the liability of legal persons, protection of witnesses and victims, international cooperation in extradition and in the repatriation of property and money, the transfer of funds derived from acts of corruption, assets and money, and the exchange of information between Governments and nations.

Nepal signed this convention on 10 December 2003, and ratified it on 24 February 2011. To properly implement the UNCAC, the Government formed a high-level steering committee under the chairmanship of Chief Secretary of the Nepal Government. Similarly, at working level, another working group has also been formed under the chairmanship of the Secretary of the Prime Minister’s Office. It is my pleasure to be a member of such taskforce.

B. Prevention
Corruption can be prosecuted after the fact, but first and foremost it requires prevention. An entire chapter of the United Nations Convention against Corruption is devoted to prevention, with measures directed at both public and private sectors.

Several policies have been taken for prevention of corruption. Three year strategic plan of country, anti-corruption strategic and action plan of Nepal government, institutional working plan of Nepal government, three year strategic plan of CIAA are major policy concerns to anti-corruption. Good Governance Act, Anti-Money Laundering Act, Rights to Information Act, Public Procurement Act etc. have already been enacted. Largely institutional arrangements have been made. CIAA, OAG, Courts, Army Special Court, Judicial Council, National Vigilance Centre, Auditor general, Public Service Commission, Revenue leakage Investigation department, Parliamentary Committee, Public Procurement Monitoring Office, Regional Administration Office, District Administration Office, Public Prosecutorial Office at district and appellate level are already set up.

However, provision incorporated in these documents need to be revised and properly implemented.

C. Criminalization
UNCAC has set international standards of criminalization. These are bribery of national public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of function, illicit enrichment, bribery in the private sector, embezzlement of property in the private sector, laundering of proceeds of crime, concealment, obstruction of justice, liability of legal persons.

Corruption Prevention Act, 2002 has largely defined corruption offences recommended in UNCAC to criminalize by domestic law. Following activities are defined as corruption crime and made punishable:

- Giving or receiving bribe to or by the public official or other person (active & passive bribery in public sector);
- Accepting goods or service free of cost or at lower price by the public official;
- Unlawfully receiving gift by the public official;
- Getting commission in public purchase by the public official;

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• Causing loss in revenue by the public official;
• Getting illegal benefit or causing illegal loss by the public official;
• Preparing of false documents by the public official;
• False translation of documents;
• Tampering with government documents;
• Causing damage to Government or public documents;
• Disclosing secrecy or question papers of examination;
• Engagement in illegal trade or business by public official;
• Claiming false designation;
• Submitting false information about oneself for getting or staying in a public post;
• Damaging public property;
• Pressure to commit crimes;
• Providing a false report;
• Attempts and assistance.

However, Nepalese law fails to define some acts as crimes. Bribery in the private sector, punishment of legal persons, embezzlement of property in the private sector, and bribery of foreign public officials and officials of public international organizations need to be criminalized.

D. International Cooperation

Under Chapter IV of the UNCAC, States Parties are obliged to assist one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Particular emphasis is laid on mutual legal assistance, in gathering and transferring evidence for use in court, and extradition of offenders.\textsuperscript{19}

Nepal has no proper legal and institutional mechanism for international cooperation. In fact, Nepal is in very lacking in this perspective. For international cooperation, Nepal needs to make bilateral and multilateral treaties and reciprocal activities as well as enactment of new laws. Laws related to mutual legal assistance, asset recovery, joint investigation, extradition, execution of verdicts of foreign courts, have to be immediately enacted for compliance with the UNCAC.

Moreover, central agencies for the purpose of mutual legal assistance and extradition should be established promptly.

E. Asset Recovery

The UNCAC is the first globally negotiated treaty which is universally applicable for fighting corruption and explicitly includes asset recovery as a fundamental principle.

Nepal has no legal or institutional mechanisms for the fulfillment of UNCAC provisions. Similarly, Nepal has no treaty in this regard. So Nepal needs to make bilateral and multilateral treaties and reciprocal activities to fully implement the UNCAC asset recovery provisions. Similarly Nepal has to enact legislation regarding asset recovery.

VII. BEST PRACTICES OF ANTI-CORRUPTION MEASURES IN NEPAL

Several provisions and mechanisms are attractive and persuasive. Such best provisions are listed out as below:

• Independent and competent Constitutional body (CIAA) for investigation and prosecution, along with ombudsman role as multifunctional anti-corruption agency;
• Establishment of several anti-corruption agencies, including the Vigilance Centre for preventive measures;
• Separate Special Court for adjudication of corruption cases at trial level;
• Criminalization of various activities as corruption, to a large extent;
• Burden of proof on defendant in illicit enrichment cases;

\textsuperscript{19} Highlights of the UN Convention against Corruption, http://www.unodc.org/unodc/en/treaties/cac/convention-highlight.html
Annual declaration of property by public officials;
Imprisonment is mandatory in most corruption cases;
Additional punishment for high-ranking officials;
Code of conduct for all public officials;
Enactment of several new laws that strengthen good governance and reduce corruption, viz; Good Governance Act, Public Procurement Act, Information Act, Anti-Money Laundering Act, etc;
Constitutionally independent Public Service Commission to recruit public officials;
Independent Constitutional Commission for public sector audit;
Anti-corruption strategic plan at government, CIAA and other institutional levels;
Establish of Procurement Monitoring Office;
Community education programme, radio programme for public awareness;
High level working group for the implementation of the UNCAC.

VIII. CORRUPTION-RELATED CRIMINAL JUSTICE PROBLEMS IN NEPAL

The Nepalese criminal justice system has been facing various problems; criminal justice related-corruption is no exception. Major weaknesses or drawbacks regarding corruption in the criminal justice system are listed below.

A. Problems Related to Investigation and Prosecution

Investigation and prosecution have been conducted by the CIAA in Nepal. However several limitations are found with respect to CIAA jurisdiction. Major problems regarding investigation and prosecution are as below:

• Inadequate laws;
• Lack of well-trained human resources and a traditional working style;
• Exclusion of CIAA jurisdiction for officials in relation to whom the Constitution and any other law separately provides for action; policy decisions made by the cabinet; issues of parliamentary privileges and private sector corruption;
• Absence of CIAA local level offices;
• Low level of public trust in the CIAA;
• The office of the CIAA Commissioner has long been vacant;
• Appointment practice of commissioner on the basis of political parties’ recommendation rather than qualifications;
• Raises the question of integrity and impartiality of investigative authorities;
• Political instability and lack of political commitment to corruption control;
• CIAA lacks a separate service law and its own staff;
• Non-existence of joint investigation legal mechanisms;
• Absence of special investigation techniques;
• Political criminal nexus.

B. Problems Related to Adjudication

The Special Court at trial level and the Supreme Court at appeal level are responsible for adjudication. Various problems are known in relation to adjudication. These are as below:

• Delay in adjudication;
• Absence of a preferential track in the Supreme Court;
• Motive of bench selection by defendant;
• Reluctance of judges to decide corruption cases;
• Unreasonably long pleading practice;
• Lengthy court procedure;
• Lack of most important legal provision, viz; mutual legal assistance, witness protection, implementation of foreign verdicts, etc.;
• Lack of well updated, skilled and expert court personnel, and a traditional working style as well;
• Questions are raised from time to time about the integrity of judges;
• Unsatisfactory conviction rate.
C. Inadequate Laws  
Laws are the main instrument of the criminal justice system. Various laws related to anti-corruption have been enacted but still these are not adequate. To bring the criminal justice system in accordance with international standards and to fully implement the UNCAC, various laws are to be enacted. Similarly, dozens of laws are not consistent with the UNCAC and they have to be amended.

D. Lack of Essential Anti-Corruption Agency  
Nepal has various anti-corruption agencies, but these are not sufficient to mitigate the requirements of the global era. A central mutual legal assistance agency, and an effective and competent separate financial intelligence unit are urgently needed.

E. Capacity Building  
Nepalese anti-corruption agencies are very much traditional in nature. Their working style and capacity as well as mindset are very traditional. Transfer of the investigation, prosecution and adjudication system is traditional and they are to be made more scientific, which is a major challenge.

F. Implementation of UNCAC and Fulfillment of its Basic Requirements  
Recently, Nepal ratified the UNCAC and UNTOC. Ratification is not sufficient, but it needs effective implementation. Implementation of these conventions is also an international obligation of Nepal. To fulfill implementation of this instrument, institutional, policy, legal and administrative requirement have to be fulfilled. But Nepal is facing absences of requirements in this regard.

G. Influence of Accused  
Corruption is considered a white-collar crime. It is transnational organized crime. So, those accused of corruption crime are often more powerful than other defendants and they can exert influence in the criminal justice system.

H. Problem related to Assets Recovery  
The asset recovery process needs several steps. Firstly, proceeds should be traced and identified by the requested state. The second step is to freeze and seize the assets to prevent their removal. Then the process may follow to confiscate the assets and finally to repatriate them to the requesting state. In the absence of any treaty and legal provisions governing the granting of mutual legal assistance and asset recovery, Nepal cannot render MLA relating to proceeds of corruption.

IX. THE WAY FORWARD

A. Enactment of Adequate Laws  
This is the era of globalization. In globalization, crimes are also becoming globalized and they must be curbed. Criminal justice should also be globalized. Laws relating to anti-corruption should be enacted and amended with this view.

Laws relating to private sector corruption, protection of witnesses, experts and victims, as well as protection of reporting persons, mutual legal assistance, liability of legal persons, asset recovery, transparency of political parties, income and expenditure, joint investigation, extradition, execution of verdicts of foreign courts and legislation related to conflict of interest should be enacted.

Similarly, some laws need to be amended, i.e. the Corruption Prevention Act, CIAA Act, acts related to insurance, bank and finance, laws related to local government, laws related to election, different service laws, etc.

B. Institutional Set Up and Reform  
The CIAA has no local offices and it very difficult to investigate corruption at local level. So establishment of CIAA offices at least at the regional level is imperative. Similarly, several institutions should be set up promptly, such as a central agency for the purpose of mutual legal assistance and extradition, and a specific and separate financial intelligence unit etc. In addition to new arrangements of institutions, institutional reform and capacity building of the CIAA, OAG and courts is imperative.
C. Speedy Justice
Speedy justice is guaranteed by several international human rights instruments. The Nepalese justice system is lagging behind. To overcome this obstacle, procedures relating to investigation and adjudication should be shorter. For this purpose, procedural law may need to be amended. Similarly, time frames given by law should be followed. Priorities to hearing corruption, discouragement of unnecessarily long pleadings and bench choices are other measures to speedy justice in corruption cases.

D. Proper Implementation of International Obligations
Nepal should take necessary arrangements to fulfill the international obligations. The UNCAC should be properly implemented and all requirements for full execution of it should be made. Nepal should give practice international cooperation and asset recovery.

E. Effective Investigation
Prosecution depends on investigation and adjudication depends on prosecution. So to ensure a high conviction rate, investigation should be effective, without any errors and based on facts as well as evidence.

F. Expansion of CIAA Jurisdiction
The CIAA has some limitations of jurisdiction. The CIAA should have jurisdiction to investigate and prosecute cabinet decisions. Similarly jurisdiction of CIAA over all public officials should be established in a new constitution.

G. Execution of Anti-Corruption Strategies
Anti-corruption strategies have to be properly implemented to systematically combat corruption.

X. CONCLUSIONS
Corruption in Nepal is chronic. Anti-corruption laws, institutions and policies have been set up to combat corruption, yet it increases day by day. Lows political commitment, low priority on corruption control, an ongoing transitional period, non-execution of anti-corruption strategies, a lack of strong stakeholders like civil society and media, and a lack of adequate awareness programmes are some causes of increasing corruption in Nepal.

There is no single measure to control corruption. New trends are emerging to combat the menace of corruption. A focus on preventive measures along with punitive and promotional measures; international cooperation; expansion of area of control into private sector; conviction of legal persons along with natural persons; focus on participation of stakeholders during anti-corruption activities and expansion of corruption control efforts in the international arena are the key emerging corruption control trends. At this juncture, it is worth mentioning that the preamble of the UNCAC states that “Corruption is no longer a local matter, but a transnational phenomenon that affects all societies and economics, making international cooperation to prevent and control it essential”.

Corruption in Nepal is rampant. We have to control it. Serious commitment and priority from political leadership is imperative. The Government of Nepal has issued an anti-corruption strategy and work plan, but its implementation has not been satisfactory. To combat corruption, this strategic plan should be fully implemented. Similarly, the UNCAC should also be fully implemented. A national integrity system should be built. The active participation of the OAG, Judicial Council, Special Court, and Army Special Court, along with the CIAA and cooperation of stake-holders alike, civil society, media and the general public is essential. We have to follow the emerging corruption control trends. Combating corruption is not possible in isolation; it requires an holistic approach. That is why to cure the infection of corruption, awareness programmes, reform of social values and culture, development of morality, accountability and integrity, promotion of good governance, adequate salaries, poverty reduction programmes and e-governance should be launched simultaneously and followed with other measures. Finally, the criminal justice system has to be effective and strong and meet international standard in corruption control mechanisms.
I. INTRODUCTION

From the Americas to Africa, Europe to Asia and elsewhere across the globe, corruption “the use of Public Office for private gain” is an embarrassingly ingrained societal phenomenon. In spite of its universal prevalence, corruption has proven to be particularly harmful on the African Continent. As the former United Nations Secretary-General, Kofi Annan, once said, “Corruption hurts the poor disproportionately by diverting fund intended for development, undermining government’s ability to provide basic services, and discouraging foreign investment. This social ill manifests itself among government officials, politicians, business leaders, journalists and the rest of the populace alike. It destroys national economies, undermines social stability and erodes public trust. Corruption is no doubt an anathema, a killer disease, a serious ailment that is capable of destroying not just individuals but nations. Various epithets have been used in describing it. And because of its rampageous and ravenous nature, some see it as a malady that is even more vicious than HIV/AIDS. Corruption has done a lot of havoc in Nigeria. It almost brought the country to the nadir of degradation and reduced it to a pariah state in recent past. The scourge of corruption was such that it was difficult to convince anyone that there was any single Nigerian that was not afflicted by it.

Unfortunately, corruption grew and permeated every fabric of the nation so much that it became accepted as a way of life and the acceptance of public office was seen by most Nigerians as an opportunity to ‘eat their share of the national cake’. Equally lethal in its impact is private sector corruption, including money laundering and tax evasion. Robert Klitgaard adds, “Although people tend to think of corruption as sin of government, it also exits in the private sector”.

Former President of Nigeria, Chief Olusegun Obasanjo, at the inauguration of the Chairman and members of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) on 29 September, 2000 described corruption as “Literally the antithesis of development and progress”.

II. GOVERNMENT POLICY AND LEGAL INTERVENSION AGAINST CORRUPTION

Nigeria was ruled by the military for a very long period of time, 1966 -1979, and then from 31 December 1983 to 1999. During these periods, corruption was entrenched and almost became institutionalized. Nigeria became a pariah state. Transparency International (TI) rated Nigeria the most corrupt country for several years and Financial Action Task Force (FATF) blacklisted Nigeria. Nigeria was also assessed by many risk rating agencies as too risky a jurisdiction for quality investment. And Foreign Direct Investment (FDI) took flight.

During the rule of the military, there were several Coups D’etat. And ironically, each successive government had wiping out corruption as one of its cardinal motives for taking over power from the previous government, military or civilian. However, the cankerworm continued to spread within the society rather than reduce. This negative result was largely because the efforts were undermined by crisis of credibility as the designers and the promoters themselves were poor specimen of the values and virtues, which they sought to propagate. A former military Head of State and his ‘circle’ looted and exported an estimated $2.2 billion. Through mutual legal assistance, some monies were recovered.

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A. Earlier Attempts at Curbing Corruption

- The Public Office Investigation of Assets Decree No. 5 of 1966: That decree led to the forfeiture of ill-gotten assets at that time.
- The Jaji Declaration of 1979.
- The “Ethical Revolution” of 1981-1983; (1981-1983 was under democratic rule.)
- The “War Against Indiscipline” of 1984.
- War Against Indiscipline and Corruption (WAIC) 1996.

None of these attempts succeeded in curbing corruption because they lacked the concerted effort and the political will to drive the programmes in addition to a credibility crisis.

B. Present Government Policy and Legal Position

For any fight against corruption to be meaningful, there must be express and apparent strong political will at the highest level. When the 4th Republic came into being in May 1999, the then President, Chief Olusegun Obasanjo declared zero tolerance for corruption. Late President Yar’adua and Dr. Goodluck Jonathan, then Vice President, followed suit and publicly declared their assets upon assumption of office in 2007. President Goodluck Jonathan has since continued to declare his zero-tolerance stance for corruption.

1. The Corrupt Practices and Other Related Offences Act, 2000

Before the enactment of specific legislation against corrupt practices, Nigeria had in its Criminal and Penal Codes provisions that dealt with corrupt conduct. However, these provisions were hardly used.

The Corrupt Practices and Other Related Offences Act 2000 (hereinafter referred to as “the ICPC Act”) was enacted on the 13 June, 2000. The ICPC Act seeks to prohibit and prescribe punishment for corrupt practices and other related offences. The Act also established an Independent Corrupt Practices and Other Related Offences Commission (the ICPC) vesting it with the responsibility for enforcement of the ICPC Act. The ICPC has a Chairman and twelve Members of Board and a Secretary. All appointed by the President and screened for confirmation (in a public hearing exercise) by the Senate.

The ICPC Act is the first main law for combating Corrupt Practices in Nigeria, its salient features, particularly as relate to the UNCAC are discussed below.

2. Offences and Penalties Under the ICPC Act and Other Criminal Legislations With Particular Regard to the UNCAC

Nigeria signed the UNCAC on 9 December, 2003 and ratified same on 14 December, 2004. Most of the articles of the Convention have been domesticated. This paper will focus on a few of the provisions.

Various acts of commission and omission defined as offences under the ICPC Act can be broadly divided into the following categories:

(i) Bribery of Public Officers; Punishable by Sections 8,9,10 & 18 of the ICPC Act (Article 15 of the UNCAC)

Section 8 punishes person who corruptly
(a) asks for, receives or obtains any property or benefit of any kind for himself/herself or for any other person; or (b) agrees or attempts to receive or obtains any property or benefit of any kind for himself/herself or for any other person, on account of (i) anything already done or omitted to be done... in the discharge of his/her official duties ...connected with the functions, affairs or business of a Government Department... in which he/she is serving as an official or (ii) anything to be afterwards done or omitted to be done or favour or disfavour to be afterwards shown ... is guilty of an offence.

Section 9 punishes corrupt offers to public officers and section 10 punishes corrupt demands. Section 18 deals with bribery of public officers with regard to voting at meetings of public body.

All these offences, with the exception of section 18 which is punishable with imprisonment for five years, are punishable with imprisonment for seven years. To make it difficult for such an officer to go free, it does
not matter whether he or she made the demand or was offered. As a matter of fact, the law makes it an
offence for a person to be offered and he or she fails to report such transaction (S. 23 of the ICPC Act).

(ii) Abus of position: Punishable by S.19 of the ICPC Act (Article 19, UNCAC)

Section 19 punishes a public officer who uses his office or position to gratify or confer any corrupt
advantage upon himself or herself or any relation or associate of the public officer.
This offence is punishable with imprisonment for five years without an option of fine.

(iii) Bribery from Contracts:

Section 22 of the ICPC Act deals extensively with contract offences. These include giving assistance,
inflating contract prices, transferring fund allocated for a particular project to another e.t.c. These offences
attract a prison term of seven years.

(iv) Witness Protection (Article 32 and 33 UNCAC)

Section 64 of the ICPC Act provides for protection of witnesses. However, the provision is not elaborate,
but the Commission has in place an effective programme for protecting informants and witnesses. Section
39 of the EFCC (Establishment) Act, 2004 also provides for protection of witnesses. All of the Anti-
Corruption agencies encourage anonymous reports. This method also protects the identity of informants.

(v) International Cooperation and Mutual Legal Assistance (Section 66 (3) ICPC Act

Section 66 (3) provides that the Commission shall have the power to engage the services of Interpol or
such local or international institution, body or persons possessing special knowledge or skill on tracing of
properties or detection of cross border crimes.

Nigeria has used the provisions of this law and its equivalent in the EFCC Act extensively both in
receiving and giving of assistance.

Section 20 of the ICPC Act is worthy of note; It provides thus: “without prejudice to any sentence of
imprisonment imposed under this Act, a public officer or any other person found guilty of soliciting, offering
or receiving gratification shall forfeit the gratification and pay a fine of not less than five times the sum of the
value of the gratification which is subject matter of the offence […].” This provision is intended to strip an
offender of every benefit of corrupt conduct and also make corrupt practices unattractive

3. Other Relevant Functions of the ICPC

One of the very unique functions of the ICPC is the statutory duty to examine practices, systems
and procedures of public bodies which may have the effect of facilitating corruption and in such cases,
supervise and review; as well as direct, instruct and assist officers of such agencies and parastatals on ways
of eliminating and or minimizing corruption by such officer, agency or parastatals. Apart from the duty of
enforcement and prevention, the Commission has the added duty of educating the public on and against
corruption, bribery and related offences and to enlist and foster public support in combating corruption.

4. Money Laundering Act, 2004 (Article 23, UNCAC)

This Act covers not just public officials, but also the private sector. Many public servants and others are
able to hold their ill-gotten wealth in foreign countries and they subsequently transfer it to their homeland
through money laundering, usually under various forms of disguises.

This Act empowers the Economic and Financial Crimes Commission (EFCC), a Commission established
to tackle financial crimes, to investigate and prosecute such persons under the said Act.

5. Illegal Enrichment

There is a bureau called the Code of Conduct Bureau. This Bureau is empowered to receive declaration
of assets of public officers for the purpose of ensuring transparency throughout their tenure as public
officers. It also entertains complaints of non-compliance with its provisions.

The mechanism to ensure compliance is vested in the Code of Conduct Tribunal which after investigation
tries complaints brought before it and makes appropriate pronouncement which may include but not
restricted to the following:
  a. Forfeiture of the assets illegally acquired;
  b. Sequestration of such assets where necessary;
  c. Such other disciplinary measures that will ensure purity in the public service.

Many politicians are caught by the provisions of this law. (A former governor of one of the states is currently standing trial allegedly for operating foreign accounts while serving as a governor. This is an offence under the said law.)

   This law is just recently passed by the Legislators. The Act aims at ensuring efficiency, transparency and accountability in public life.

III. INVESTIGATION, PROSECUTION AND ADJUDICATION

A. Investigation
   Corruption offences are handled under Federal laws and therefore there are Federal Agencies empowered to enforce the laws. These agencies discussed in chapter II above are: (a) The Independent Corrupt Practices and Other Related Offences Commission (ICPC), (b) The Economic and Financial Crimes Commission (EFCC) and (c) The Code of Conduct Bureau.

   These are special agencies established mainly for the investigation and prosecution of corruption cases.

   In addition to these agencies, the Police have statutory powers to investigate and prosecute crimes.

B. Prosecution
   The different Acts/Laws discussed in chapter II above empower the anti-corruption agencies to prosecute cases investigated by them. Such powers must be with the fiat of the Attorney General of the Federation. However, the ICPC Act in Section 61 (1) provides that every prosecution shall be deemed to be with the consent of the Attorney General. Therefore in practice, the anti-corruption agencies do not have to get the Attorney General’s express consent as all prosecutions are implied to be with his or her consent. Recently, (2011), the AG brought out a practice guideline that the EFCC must get express consent of his office before any prosecution.

C. Adjudication
   1. Trial by Designated Judges
      There are judges designated for the trial of corruption cases in Nigeria. This is to take corruption cases out of the usually overloaded work of a regular judge. By so doing, speed is given to trial of corruption cases (Section 61(3) ICPC Act). It must be noted that these designated judges still try other cases as what is required of them is just to give priority to corruption cases. Cases investigated by the Code of Conduct Bureau are prosecuted in the Code of Conduct Tribunal which has a retired judge as a Chairman of the Tribunal.

IV. MECHANISM FOR RECEIVING INFORMATION OF CORRUPTION
   The ICPC Act empowers the Commission to receive report relating to the Commission of an offence under the Act and such report could be made orally or in writing to an officer of the Commission. By implication, the Commission receives report relating to the commission of corruption offences by way of petition. Majorly, until a petition is received, the Commission is unable to act. However, some of these petitions come by way of directive from the seat of government or by information through another government agency. Petitions are also received through internet, through report of system studies of organizations and very recently, from media reports. Section 27 of the ICPC Act is relevant.
V. CHALLENGES

A. Independence

The first and perhaps the greatest challenge to the fight against corruption in Africa is how to secure the independence of institutions charged with implementation of the various anti-corruption laws.

Section 3(14) of the ICPC Act states that the Commission shall in the discharge of its function under this Act, not be subject to the direction or control of any person or authority. In spite of this provision, there are still interferences. However, in the case of the ICPC, since its inception in September, 2000, it has been chaired by eminent Justices; first, by a retired President of the Court of Appeal and then a retired Justice of the Supreme Court. These personalities have been able to limit interferences.

B. Funding

Funding of anti-corruption agencies is a huge challenge in Nigeria. To be able to make any meaningful impact, funds must be deployed for anti-corruption programmes. Without adequate funding, professional training of officers is limited which in turn affect the performance of the agencies. The Law requires the agency to have offices in all the states of the federation; this requires huge sums of money. Therefore allocation of funds can be an indicator of the seriousness or otherwise of government in the fight against corruption.

C. Section 52 of the ICPC Act and Section 308 of the Nigerian Constitution

Section 308 of the Nigerian Constitution provides immunity to certain political office holders.

Section 52 of the ICPC Act, in difference to the persons mentioned in Section 308 of the Nigerian Constitution provides for an independent Counsel to investigate certain office holders, the appointment of the said Independent Counsel shall be made only by the Chief Justice of the Federation, if he or she is satisfied that sufficient cause has been shown upon an application on notice supported by an affidavit setting out the facts on which the allegation is based. This procedure is very cumbersome.

D. Inherent Delay in the Criminal Justice System

The wheels of justice turn slowly. Frivolous motions and applications for adjournment are but few of ways of causing unnecessary delays.

E. Hostile Witnesses

Prosecution has to depend heavily on the testimony of witnesses who are usually within the same environment as the offenders. And for fear of victimization or intimation or even some other form of influences, the witnesses often are not willing to support the prosecution case. Section 64, ICPC Act has some form of protection for witnesses. The Commission also has in place, a programme for witness protection. Currently, the National Assembly (legislature) has before it a bill on witness protection.

VI. CONCLUSION

The laws in Nigeria are adequate to fight corruption both in the public sector and the private sector there are laws relating to tracking, seizure and confiscating proceeds of such crimes, both inside and outside the country.

However, it is the author’s humble opinion that some of the challenges highlighted above could be helped by the following suggestions:

A. Hostile Witnesses

A more comprehensive witness and whistle blower law would help. But in addition, all corruption cases should be tried by the Federal High Courts. This will take the trial of corruption cases from the locality of the offenders which will in turn limit his or her influence on the witnesses.

B. Delays in the Criminal Justice System

Practice direction with regard to settling all issues of preliminary objection should be dispensed with before the trial proper. The system could borrow the American practice in this regard.
C. Immunity Clause as Contained
The laws should be amended to remove immunity as far as criminal matters are concerned.

In addition to the above proposals, I am of the strong opinion that if the present programmes of the ICPC which have to do with re-orientation of attitude of Nigerians are well funded and properly executed in conjunction with enforcement, corruption will be reduced to the barest minimum if not entirely eliminated.

By its mandate under Section 6 of the Act, the ICPC is not only concerned with investigation and prosecution of offenders (enforcement), but also involved in facilitating the creation of a corruption-free society by institutionalizing integrity in the administrative machinery of government institutions through its system review mandate. This is targeted at making public service delivering more effective and result-oriented, less bureaucratic, but with greater and more capability to reduce incidences of corruption and corrupt practices. In furtherance of its mandate, the ICPC has put in place the following mechanisms:

(a) Anti-Corruption and Transparency Monitoring Units (ACTU) in Ministries, Department and Agencies of the government to function as Anti-corruption watchdogs of the Commission;
(b) The National Anti-corruption Volunteer Corps (NAVC) – foot soldiers to complement the Commission’s work;
(c) The National Anti-Corruption Coalition (NACC); and
(d) National Value Curriculum – to be included in educational system of the country.

The UNCAC is very important and it is imperative for all signatory countries to put to effective use its provisions as this will go a long way to achieving better results in the fight against corruption.

My Message
The fight against corruption is definitely not an easy one. However, with commitment, determination and collaboration, near zero level corruption can be achieved in our societies.
GROUP 1
IDENTIFYING AND PUNISHING CORRUPT OFFENDERS

Chairperson
Ms. Sharon Ogiri-Okpe (Nigeria)

Co-Chairperson
Mr. Motonori Kobayashi (Japan)

Rapporteur
Mr. Benard Twala (Kenya)

Co-Rapporteurs
Mr. Tong Heng (Cambodia)
Mr. Ryoichi Tanaka (Japan)

Members
Mr. Akhtar Hossain (Bangladesh)
Mr. Nader Mohseni (Afghanistan)
Mr. Khamphou Thirakul (Laos)
Ms. Erdenee Enkhtuya (Mongolia)
Mr. Mahesh Poudel (Nepal)
Mr. Akihito Fujii (Japan)

Advisers
Prof. Naoyuki Harada (UNAFEI)
Prof. Kumiko Izumi (UNAFEI)

I. INTRODUCTION

Group 1 started its deliberations on 24 October 2011. The group selected Ms. Sharon Ogiri-Okpe and Mr. Motonori Kobayashi as its chair and co-chair respectively. Mr. Benard Twala was selected as rapporteur and Mr. Tong Heng and Mr. Ryoichi Tanaka as co-rapporteurs.

Upon selection of a coordinating team, the group created the following agenda:

1. Criminalization; focusing on gaps between the mandatory requirements of the UNCAC and legislated offences of the respective countries.
2. Measures to encourage persons and bodies that have useful information on corruption, etc. to supply the information to, and cooperate with investigation and prosecution authorities.
3. Effective methods of investigation of corruption cases.
4. Adjudication of corruption offence.
5. Identifying and tracing the proceeds of corruption.
6. Seizure, freezing, and confiscation of the proceeds of corruption.
7. International cooperation and asset recovery.

The group also agreed discuss the agenda by first asking each group member to explain the situation in the respective countries and thereafter the group as a whole to propose or recommend best practices identified through the group work sessions, UNAFEI lectures, study tours and lectures from visiting experts, amongst others.

II. SUMMARY OF DISCUSSIONS

A. Criminalization: Focusing on the Gap Between Mandatory Requirements of the UNCAC and Legislated Offences of the Respective Countries

The group initiated discussions on the topic with each member describing the situation in the respective countries with regards to criminalization, focusing on the gap between mandatory requirements of UNCAC and legislated offences. The measures have been represented in a table attached to this report, marked as Appendix I.

The following are some of the observations derived from the table in Appendix I.

It was noted that amongst the nine countries represented, most had adopted UNCAC provisions in articles 15, 17, 23, and 25. However, only four countries have adopted article 16, which provides for the criminalization of bribery of foreign public officials and officials of public international organizations. In some
countries, provisions as stipulated in article 25 of UNCAC regarding the promise, offering or giving of an undue advantage to induce false statements are not adequate.

The group agreed that the provisions in article 16 would be of value in the respective countries because there have been instances of the bribery of foreign public officials and officials of public international organization in almost all the countries represented.

It was also noted that article 25 (Obstruction of Justice) of UNCAC should be implemented by the respective countries so as to preserve the integrity of investigation process and witnesses.

B. Measures to Encourage Persons or Bodies that have Useful Information on Corruption etc. to Supply the Information to, and Co-operate with Investigative and Prosecutorial Authorities

The group agreed to discuss the following four measures:

1. Reporter-friendly mechanisms;
2. Reporting obligations or mechanisms;
3. Witness and/or whistle blower protection;
4. Mitigation of punishment or grant of immunity from prosecution to cooperative persons.

The group first reviewed mechanisms deployed in the respective countries which are highlighted in the table marked as Appendix II.

The following are some of the observations derived from the table:

1. Most of the countries had adopted reporter friendly mechanisms such as complaint boxes, internet reporting, postal reporting, in-person reporting and hotlines.
2. Amongst the nine countries, only Mongolia, Japan and Nigeria had adopted a reporting obligation for public officials.
3. It was also noted that despite adopting the 24 hour hotline facility, in some countries the facility was not always functional. The facilities were in some cases not manned by professional staff that could encourage or advise complainants accordingly.

After deliberation the following were identified as ideal measures which the respective countries should consider adopting:

1. Establishing a 24 hour telephone facility manned by professional staff. If circumstances allow, countries can consider provision of toll free facilities.
2. Maintain a rapid response team to facilitate expeditious responses to reports that may require immediate action, such as in Hong Kong and Singapore.
3. Provide appropriate rooms in which to receive complaints, privacy being a guiding factor.
4. Open up branches that would serve as complaint receiving offices in rural areas.
5. Acceptance of anonymous complaints and acting on them accordingly.
6. Witness and/or whistle-blower protection:
   • There is need to legislate for witness/whistleblower protection that should ideally include an independent appeal channel, as is the case in Hong Kong;
   • Protection should be implemented by a professional witness protection unit;
   • There is need to provide for adequate funding e.g. procuring safe houses;
   • Development of a framework for international cooperation for relocation if necessary.
7. Mitigation of punishment or grant of immunity from prosecution to cooperative persons:
   • Develop mechanisms to give prosecutors authority to consider granting immunity and/or mitigation of punishment in return for full evidence in court against the major offenders (big fish);
   • Develop mechanisms for sentencing guidelines allowing reduction of sentences for offenders who cooperate during investigations;
   • Plea bargaining should preferably not include reduced forfeiture of proceeds of crime.
C. Effective Methods of Investigation of Corruption Cases

1. Investigation of Related Offences

The group discussed the investigation of related offences and it was noted that most countries undertake the investigation of related offences. However, it was observed that there was need for effective cooperation between ACAs and other law enforcement agencies with regard to investigation of related offences.

The group agreed that it is good practice for anti-corruption agencies to have the power to investigate other crimes apart from corruption-related offences.

It was also agreed that it would enhance discovery of corruption if it were made obligatory to refer corruption cases to anti-corruption agencies (ACAs).

2. Use of Publicly Available Information (e.g., Media Reports, NGO Reports, Financial Statements and Securities Reports of Listed Companies, Websites)

It was agreed that it is good practice for ACAs to be allowed to commence investigation from media reports, NGO reports etc. It was observed that in some countries there were restrictions on sources of information that can be used to commence investigations.

3. Search, Seizure and Other Traditional Measures

Most countries have adopted provisions for search and seizure with a warrant. However, it was noted in some countries, Members of Parliament, Prime Ministers and Presidents, amongst others, enjoy immunity during their term in office.

To enhance effectiveness of search and seizure operations it was agreed that confidentiality and surprise are important elements. Therefore, such operations should ideally be done simultaneously in various sites like in Hong Kong and Japan.

If possible, large scale arrest and interview of all suspects should be undertaken at the same time.

It was also noted in some instances interviewers lack interviewing skills which can compromise attainment of the greatest possible information from an interviewee. It was, therefore, recommended that interviews of suspects should be undertaken by well trained professional staff who can fully utilize well established interviewing techniques as is the case in Hong Kong, Singapore and Japan.

4. Special Investigative Techniques

Participants discussed the various special investigative techniques undertaken in respective countries.

In the case of Japan, various investigation techniques are employed e.g. wiretapping, electronic surveillance, and controlled delivery. Wiretapping is not used in corruption investigations but is restricted to investigations relating to drugs, firearms, murder by organized criminal groups and human trafficking. However, while investigating aforementioned crimes and they overhear conversation on corruption, wiretapping can be continued. Undercover and sting operations are not used in corruption cases.

Most of the countries undertake undercover and sting operations in corruption cases. However, wiretapping is not permitted in most countries during investigation of corruption cases.

Group members were of the opinion that deployment of special investigative techniques greatly enhances investigations. However, there were concerns that some of the investigative techniques may be considered intrusive and the general public or governments may be hesitant to permit techniques such as wiretapping in investigations relating to corruption. Countries should consider legislating appropriate laws for admitting special investigation techniques.

It was also noted that some of the techniques require sophisticated equipment which are prohibitively expensive. States should consider making adequate provisions in their budgets.

Concerns were also raised that some of the techniques make use of equipment that requires special
skills which may be lacking in some of the countries. It was agreed that each country should take measures to undertake capacity building in cooperation with countries/regions possessing expertise in special investigation techniques such as Hong Kong and Singapore.

5. Effective Structure/ Team of Investigators and ensuring Secrecy of Investigation

In the case of Japan, corruption cases are investigated by the police and also by public prosecutors. The police have units that investigate corruption and election offences, etc. They form special investigation teams for each case and additional investigators can be deployed on the case if the need arises.

Public Prosecutors also independently undertake corruption investigations in teams and can source additional public prosecutors from other jurisdictions if the need arises.

In Japan, in order to maintain secrecy, whenever possible, raids are undertaken simultaneously on all targets. Suspects are also interviewed simultaneously whenever possible.

There are also very strict rules for investigators on media contact. Information on ongoing investigations is shared on a need-to-know basis.

In Afghanistan, Laos, Nigeria and Bangladesh, complicated corruption cases are investigated in teams whereby one member is designated as the team leader. In some of the countries simple cases can be investigated by one investigator. In Nigeria, special teams are formed to investigate high profile cases.

In Japan, Nepal, Bangladesh and Kenya, a preliminary investigation is first undertaken to establish the veracity of an allegation; thereafter, if the allegation is verified, full or detailed investigation are initiated. Preliminary investigations require minimal resources and therefore it facilitates optimal utilization of limited resources.

In Cambodia investigations are undertaken jointly with the police and/or Financial Intelligence Unit. The number of investigators varies and is dictated mainly by the complexity of the investigation.

In Mongolia the Anti-Corruption Authority does not have branches; therefore, one investigator undertakes investigations in the countryside. However, at the headquarters complicated cases are investigated in teams.

It was observed that all the countries have strict rules with regards to contacting media and also observe the need-to-know principle as a guideline on sharing information.

After deliberations the group came up with the following best practices:

1. The need to observe the need-to-know principle on sharing information.
2. Undertaking simultaneous raids whenever possible so as to benefit from the element of surprise and maintenance of secrecy.
3. There is need for the investigation teams to include members with relevant skills.
4. Whenever possible it would be ideal for organizations to open branches which to facilitate effective investigation in rural areas.
5. The investigating teams should preferably have sufficient numbers to facilitate timely and comprehensive investigations.
6. The role of each member of an investigating team should be clearly established before undertaking the investigation.

D. Adjudication of Corruption Offences

1. Organized and Speedy Trial Procedure

In Japan, corruption offences are adjudicated through the ordinary judicial process. In the event of admission of the offence the process lasts approximately two or three months, whereas in the event of non-admission the process can last as long as one year. A pre-trial arrangement procedure that comprises a meeting of judges, prosecutors and defence lawyers was introduced in Japan in 2005 to streamline the process. In the pre-trial arrangement procedure, evidence is shared, witnesses are agreed upon and
argument issues are identified.

Bangladesh, Afghanistan, Kenya, Nepal, and Nigeria have established/appointed special judges and/or courts. However, there are challenges such as lack of expertise by judges and prosecutors. In most of the countries, the judges handling corruption cases handle other types of cases. They are, therefore, not in a position to prioritize corruption cases which was the logic behind the creation of the special courts in the first place. Mongolia, Laos and Cambodia have not designated special courts to handle corruption cases. The judges and prosecutors in most cases do not undergo any specialized training to enhance their handling corruption cases.

The participants from Bangladesh and Nepal indicated allowances are not provided to witnesses, thus, they are sometimes not inclined to testify.

Most participants indicated that the courts were facing challenges of frivolous adjournments by defense lawyers for the sole purpose of delaying cases. It was also indicated by some members that in some of the countries, the judges take unnecessary long if at all to pass judgments after conclusion of the hearing process. It was also noted in most countries that judges and prosecutors are overwhelmed by the number of cases they are assigned to handle. This leads to a lack of sufficient attention to corruption cases which are generally complicated.

It was also noted that the court diary (cause list) in some countries are full and, therefore, it is difficult to obtain hearing dates thus leading to unnecessary delays.

The following is a list of best practices that were identified by the group:

1. The pre-trial arrangement adopted by Japan facilitates a speedy trial process.
2. Respective countries need to develop regulations stipulating circumstances under which adjournments could be allowed. This would minimize unnecessary adjournments.
3. There is need for sensitization of all stakeholders in the trial process. This could be undertaken through workshops and seminars amongst other forums to enhance appreciation of the need for an organized and speedy trial process;
4. Whenever possible respective countries could consider establishing special courts to handle corruption related cases. This would afford corruption cases the necessary attention since it has been identified as a priority area due its impact on society especially in the developing world.
5. Prosecutors and Judges handling corruption cases need to undergo specialized training on anti-corruption laws and other relevant skills.
6. To address the issue of unnecessary delays by Judges to pass judgments after completion of the trial, courts need to develop guidelines stipulating timeframes for delivery of judgments.
7. It was observed that the court diary (cause list) was full in some countries and, therefore, difficult to obtain hearing dates. Regulations stipulating prioritization of corruption related cases may address the problem.
8. There is need also to employ a sufficient number of prosecutors, judges and court personnel since it had been noted that they were overwhelmed.
9. It is recommended that sufficient allowances should be paid to witnesses to secure their attendance at hearing.

2. Punishment Reflecting Gravity of the Offence
   
   It was noted that almost all countries had punishment reflecting the gravity of the offence. However, it was noted that in some countries the minimum sentence is issued. It is, therefore, recommended that there is need for sensitization to attach more weight to the gravity of the offence in deciding the punishment.

   It is also recommended that there is needed for increased passage of strong sentences so as to send a clear message to would-be offenders. This was found to be very effective in Hong Kong. There is also need for consistency in granting punishment.
E. Identifying and Tracing Proceeds of Crime

In Japan, access to bank information can be obtained without court order. Banks have generally been very cooperative in providing necessary information. The Financial Intelligence Unit also shares information with investigating organs by sending periodic reports and answering queries on specific issues. Civil servants are required to report extra income and substantial gifts but not assets.

As regards capacity, Japanese police and SESC employ accountants, computer experts etc. Public prosecutor’s assistant officers undergo training at accounting schools to enhance their skills. If the need arises investigating organs consult other institutions such as the National Tax Agency.

In Bangladesh, Nigeria and Kenya, it is a requirement to obtain a court order in order to obtain information from banks. In Laos, Mongolia, Nepal, Cambodia and Afghanistan, it is not necessary to obtain a court order.

Sharing of information with Financial Intelligence Units varied from country to country. In some countries, there are established mechanisms for sharing information e.g. through periodic distribution of suspicious transaction reports. Most of the countries indicated they obtain information on request and thus do not receive periodic reports.

Most of the countries require the reporting of assets and liabilities periodically. The period for reporting varied from annual, bi-annual etc.

Most of the countries are facing capacity challenges. In some countries, investigating agencies are inclined to seek assistance from other agencies/ministry’s which could lead to leakages of information. Some countries employ experts such as investigators, lawyers, accountants, engineers, and surveyors etc. However, it was noted that employing some of the experts require sufficient remuneration; therefore, they are not inclined to work for the civil service for long, if at all.

The group developed the following list of proposals which respective countries could consider adopting in order to address some of the inadequacies mentioned above:

1. There is need for adequate measures to ensure the confidentiality of asset/income/gift declaration documents. It was noted some of the reportees feared reporting all their assets due to fear the documents may land in the wrong hands.

2. It was recommended that a verification process of assets/income/gifts declared be undertaken. It was also appreciated that it was not possible to verify all documents and therefore there is need to develop a framework for flagging suspicious declaration documents. A random verification can also be undertaken occasionally. Verification would discourage false declarations.

3. There is need to provide for severe punishment for false declaration to serve as a deterrent.

4. There is need for countries to share experiences so as to identify best practices and also identify solutions to challenges that are being faced by some of the anti-corruption agencies in processing declaration documents.

5. There is need for declaration documents to require capturing of sufficient details of information so as to ease the verification process and also minimize the abuse/exploitation of loop holes therein.

6. There is urgent need for capacity building since most countries are facing challenges of lack of experts in computer forensic in order to analyze the declared documents. It is also recommended that electronic copy of documents be filled to facilitate analysis.

7. It was noted that some of the capacity building challenges can be addressed through increased consultation with the private sector which may possess the requisite expertise.

8. There is also need to develop frameworks to streamline coordination with financial intelligence units.

9. It was noted that gifts are an avenue for transmitting bribes, proceeds of corruption etc. It is good practice to include declaration of gifts upon receipt.

10. It was observed that training with relevant agencies can, to some extent, address capacity challenges.
11. Study tours were also identified as one of the avenues through which countries could benefit from experiences of other countries.

12. Universities and other training institutions could be approached to undertake training of some of the requisite expertise/courses in order to address some of the capacity challenges.

13. It is desirable in corruption cases to obtain bank information without necessarily obtaining court order so as to speed up investigation.

F. Seizure, Freezing and Confiscation of the Proceeds of Crime

Japan has provisions in legislation for the rapid seizure and freezing of proceeds of crime. However, there is a requirement to obtain a warrant/court order which is issued based on submission of sufficient evidence. Temporary freezing of a bank account can be obtained without court order if the bank consents. Japan also has a provision for the confiscation of seized property upon conviction. Japan, however, does not have shifting the burden proof in corruption cases and non-conviction based confiscation.

Most of the other countries represented have provisions in their legislations for seizure, freezing and confiscation of the proceeds of crime. In most cases, it requires a court order. Nepal, however, does not require court order for seizure and freezing.

All the countries do not have provisions for non-conviction based confiscation. Most of the countries had provisions for the shifting of the burden of proof in diverse circumstances. Laos and Japan were the only countries without the shifting burden of proof in all situations regarding seizure, freezing and confiscation of the proceeds of corruption.

The following are some of the proposals incorporating best practices that would facilitate the process of seizure, freezing and confiscation of the proceeds of corruption:

1. There is need for respective countries to adopt comprehensive legislations for the seizure, freezing and confiscation of the proceeds of corruption.

2. There is need for countries to consider provisions facilitating non-conviction based confiscation.

3. It was noted in some countries confiscated proceeds were being abused, therefore, there is need to develop regulations to guide disposal of confiscated proceeds.

4. The group appreciated the advantages of the shifting burden of proof in corruption cases because of its complexity and difficulty to investigate and establish. It was, therefore, recommended that it be adopted.

G. International Cooperation and Asset Recovery

1. Mutual Legal Assistance

Japan has entered into bilateral treaties with some countries for purposes of mutual legal assistance. Japan can provide mutual legal assistance to countries which it does not have treaties only in cases where there is reciprocity and dual criminality.

Most of the countries represented indicated that they make use of treaties, MOUs, and diplomatic channels to facilitate MLA. Some of the countries did not have specific legislation dealing with the issue of MLA, however, some of the countries such as Kenya and Nepal are developing bills specifically on MLA.

Almost all countries indicated having faced challenges when requesting for mutual legal assistance.

The following is a list of proposals to enhance MLA:

1. There is need for respective countries to streamline processes that would enhance prompt responses to requests for MLA.

2. Requested countries need to be sensitized to assist requesting countries whenever they encounter challenges.

3. The group also appreciated the advantages of informal networking in facilitating MLAs. There is need to expand informal networking through attending international fora e.g. UNAFEI training programmes.
4. The group also appreciated the advantages of using UNCAC as a framework for MLA. Countries shall endeavour to increase the use of UNCAC as the framework for MLA in situations where there is no bilateral treaty.

2. **Law Enforcement Co-operation**

   Group members indicated their respective countries undertake various forms of law enforcement co-operation. It was observed that all the countries utilize the Interpol channel. Most of the countries have also entered into bilateral treaties. Japan is a member of the Egmont Group, which facilitates law enforcement co-operation and information sharing between FIUs.

   All the group members were in agreement that there is need for respective countries to have in place effective legislative and administrative frameworks that will facilitate and enhance co-operation in terms of law enforcement action.

   To facilitate cooperation, it is also agreed that respective countries need to establish treaties and MOUs. The group also appreciated that the Interpol channel is a quicker way to obtain information from other countries.

3. **Extradition**

   Most of the countries have bilateral treaties to facilitate extradition e.g. Nepal with India, Japan with USA and Korea, Cambodia with Thailand, Korea, Laos and China. It was agreed that there is need for respective countries to develop policies on extradition to facilitate the enactment of such legislation which should include offences established by UNCAC. This will enable countries to be able to seek and provide extradition in respect to all extraditable offences covered by UNCAC.

4. **Asset Recovery**

   Japan, Kenya and Nigeria have enacted legislation incorporating provisions on asset recovery. Some of the countries had not experienced situations requiring asset recovery and they did not have legislation on asset recovery.

   It was agreed that there is need for respective countries to enact legislation on asset recovery as stipulated in Chapter V of UNCAC so as to be able to seek and provide asset recovery.
APPENDIX I

Criminalization, Focusing the Gap between Mandatory Requirements of the UNCAC and Legislated Offences of Respective Countries

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<td>Bangladesh</td>
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<td>Partial</td>
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<td>Y</td>
<td>Partial</td>
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<td>Y</td>
<td>Y</td>
<td>Y</td>
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<tr>
<td>Japan</td>
<td>Y</td>
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<td>Y</td>
<td>Y</td>
<td>Partial</td>
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## APPENDIX II

**Measures to Encourage Persons or Bodies that have Useful Information on Corruption to Supply the Information to, and Co-Operate with, Investigative and Prosecutorial Authorities**

<table>
<thead>
<tr>
<th>Countries</th>
<th>1. Reporter-friendly mechanisms to encourage reporting by citizens, raising public awareness of such measures</th>
<th>2. Reporting obligations or mechanisms of related investigative agencies and public officials</th>
<th>3. Witness and/or whistle-blower protection</th>
<th>4. Mitigation of punishment/grant of immunity from prosecution to a cooperative person</th>
</tr>
</thead>
</table>
| Bangladesh | - Complaint box  
- Via Internet  
- Post  
- In person  
- Tel. (No Hotline)  
- Education Programme via TV Radio  
- News | - Agency cooperation  
FIU  
Respective department will refer their corruption complaint to Anti-Corruption Unit | No  | No |
| Cambodia | - Complaint box  
- Via Internet  
- Post  
- In person  
- Tel. (24h Hotline)  
- Education Programme: Via TV Radio  
- News | - Financial Intelligence Unit  
Respective department will refer their corruption complaint to Anti-Corruption Unit | No  | No specific law (in practice, judge will consider mitigation) |
| Mongolia | - Complaint box  
- Via Internet  
- Post  
- In person  
- Tel. (24h Hotline)  
- Duty to report by civil servant  
24h police reporting centre (Not so effective)  
- Via Radio and TV | - Provision: duty to report by civil servants  
Focal person at each ministry  
Financial Information Unit (FInfoU) within Central Bank | No  
Anti-corruption law provides witness protection but ineffective | Yes (mitigation of punishment) |
| Laos | - Written Petition  
- Complaint box  
- No (Hotline) | - Agency cooperation  
Inspection agencies have been setup in every ministry and equivalent ministries. | No  | No specific law (discretion of prosecutor) |
| Nigeria | - Complaint box  
- Written petition  
- Oral petition  
- Via Internet  
- Duty to report by legislation  
- Tel. (Not so effective)  
- Directive  
- Desk officer (Located in each Govt. Dept.) | - Mandatory to report  
Cooperation between each agency  
Duty to report by police  
FIU  
Economic and Financial Commission (EFCC)  
Custom office | Yes, Legislation: Inadequate Problem: witness protection programme, whistle-blower protection | - Immunity grant (Subject to full disclosure, Prosecutor’s Discretion)  
Plea bargain |
<table>
<thead>
<tr>
<th><strong>Afghanistan</strong></th>
<th><strong>Nepal</strong></th>
<th><strong>Kenya</strong></th>
<th><strong>Japan</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Complaint box</td>
<td>- Complaint box</td>
<td>- Complaint box</td>
<td>- Tel.</td>
</tr>
<tr>
<td>- 24h hotline ACA and Police</td>
<td>- Online complaint</td>
<td>- Internet</td>
<td>- Written complaint</td>
</tr>
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<td>- In person</td>
<td>- Tel. complaint</td>
<td>- Written complaint</td>
<td>-</td>
</tr>
<tr>
<td>- Written petition</td>
<td>- Hotline</td>
<td>- Tel.</td>
<td>-</td>
</tr>
<tr>
<td>- Parliament commission</td>
<td>- Written/oral</td>
<td>- Report centre</td>
<td>-</td>
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<tr>
<td>- Presidential office</td>
<td>- Community education programme</td>
<td>- Road show</td>
<td>-</td>
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<tr>
<td>- Complaint Special office</td>
<td>- Radio programme</td>
<td>- Advertise via radio, TV</td>
<td>-</td>
</tr>
<tr>
<td>- Each Ministry has Internal Audit which links with Anti-Corruption unit</td>
<td>- Focal person at each ministry</td>
<td>- Discussion Forum</td>
<td>- Tel.</td>
</tr>
<tr>
<td>- Special Unit mandate to analyses the complaint</td>
<td>- Complaint boxes in govt. offices</td>
<td>- Focal person at each ministry</td>
<td>- Written complaint</td>
</tr>
<tr>
<td>- Currently include in the draft anti-corruption law</td>
<td>- Corruption complaint refer to CIAA</td>
<td>- Efficiency Monitoring Unit report irregularities to ACA</td>
<td>-</td>
</tr>
<tr>
<td>- Not specific law-</td>
<td>- No</td>
<td>- Yes</td>
<td>- Yes, if necessary</td>
</tr>
<tr>
<td></td>
<td>- In drafting</td>
<td>- Witness protection act</td>
<td>- Video conference in court at trail</td>
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<td>- Whistle-blower protection</td>
<td>- Whistle-blower protection law</td>
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<td></td>
<td>-</td>
<td>-</td>
<td>- Physical protection for witness (not so comprehensive)</td>
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<td>-</td>
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<td>- No plea bargain</td>
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<td>- Mitigation of punishment is practiced (discretion of prosecutors and judges)</td>
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I. INTRODUCTION

Group 2 began its work on 24 October 2011 by electing its Chairman, Co-Chairman, Rapporteur and Co-Rapporteur by group vote.

The topic assigned for the group is “Strengthening the Capacity and Integrity of Criminal Justice Authorities and their Personnel”. The group’s responsibility was to discuss, exchange views, share experiences, country situations and consider possible measures or solutions against the current problems faced by each country in terms of the following areas:

• Independence of the criminal justice authorities;
• Integrity of the personnel of criminal justice authorities;
• Impartiality, transparency and accountability in the relevant decisions in criminal proceedings;
• Mindset of the people; and
• Strengthening the capacity of the criminal justice system in dealing with corruption cases, including specialization.

II. SUMMARY OF THE DISCUSSIONS

The group identified the following as the major challenges facing the three branches (investigative, prosecutorial, judiciary) of the criminal justice authorities and discussed the possible solutions.

A. Independence of the Criminal Justice Authorities

In the group discussion all the members agreed, that in order to practice true independency effectively, as adopted by many countries, the major three powers (executive, legislative and judicial) must be separated from one another. Likewise, they also agreed that it is important that criminal justice authorities (investigative, prosecutorial and judicial) be made independent in order to give fair and equal justice to all. Members were in agreement that it’s not an easy goal to achieve unless there are proper and efficient mechanisms set in terms of the following areas:

1. Effective Laws

Members of the group were in agreement that in order to practice independency and make the officials of criminal justice authorities’ work independently, sufficient and effective laws should exist. Therefore members discussed to a level where the laws should lay down a mechanism of check and balance, where the

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1 Singaporean Visiting Expert: The law must provide sufficient teeth for law enforcement.
work and duties of these officials are monitored. It was noted that in some countries they adopt very strong systems of monitoring, such as segregation of duties within the authorities, while there are also independent bodies set-up to monitor their work.

2. **Appointment and Discharge**
   There should be a clear procedure in the appointment and removal of top level officials in the investigative authorities, public prosecutorial and adjudication. Some of the group members highlighted that the terms of appointment and removal of chief investigators, prosecutor general, and judges are laid down in their Constitution, while some members noted that in their countries still these powers are in the hands of the president. It was a concern for the group members that in many instances the officials who were appointed for the purpose of executing their duties with an independent motive are also politically influenced.

3. **Terms of Office**
   Length of appointment of chief investigators, prosecutors and judges are said to be an important factor in maintaining independency in executing their duties. Therefore, all the members were in agreement that there should be a fixed term of office for the above mentioned officials, either as laid down by the Constitution in the case of some countries, or a law governing the terms of their office.

4. **Remuneration**
   In the opinion of all the members, remuneration or the pay package was the single most influential factor in practicing independency. Therefore, it was believed that the officials of the criminal justice authorities be paid adequately up to a level where their decisions cannot be influenced by others.2

5. **Transfer**
   Some members noted that there was weaker punishment for the officials of criminal justice authorities in failing to perform their duties. It was discussed that if an official happened to be transferred to another branch or city, rather than being punished for his or her crime, it could be regarded as an advantage for the official and the same act can be repeated over and over again. The terms and conditions under which transfers can be affected should be clearly spelt out in the rules and regulations to avoid transfers being used as a punishment to an official who acts independently.

6. **Security**
   It was agreed that, the top officials of criminal justice authorities, especially for the judiciary, sufficient and proper security should be provided. Their decisions can sometimes be a threat to their own life; therefore in order for them to practice their duties independently without the influence of others, safety is regarded as a necessity. It was noted that, in some countries, the top officials of these authorities are provided with official cars and security guards, while in other countries they are not.

**B. Integrity of the Personnel of Criminal Justice Authorities**

   The integrity of the criminal justice authorities is crucial in fostering people’s confidence in the criminal justice system, for justice must not only be done but must be seen to have been done. Accordingly, the group members agreed that the following measures are essential in order to strengthen the integrity of criminal justice authorities and their personnel thereby fostering the confidence of the people in the system.

1. Members believed that in order to maintain integrity among the officials of criminal justice authorities, there should be a strong mechanism of appointment. They should also make sure that the appointed person holds adequate qualification and experience to meet the relevant requirement. Further, the persons to be appointed should be sufficiently vetted. All the appointments should strictly be merit based. Robust mechanisms be put in place to ensure that people who do not have merit, are not appointed.

2. Having written and approved Code of Conduct for the personnel within these authorities as the guidelines as to the conduct of the personnel, it was also noted that these authorities have a manual which the officials and subordinates have to follow as regards the performance of duties and

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2 Visiting Expert from Hong Kong: emphasized on the importance of reasonable pay for ensuring integrity.
3. In order to make sure that integrity is maintained within criminal justice authorities, just as for independency, the members considered having strong check and balance mechanism where work is delegated and segregated while the top management has a system to monitor the work carried out by the subordinates.

4. It was considered that in the judiciary, there should be an appeal procedure where lower court decisions can be appealed at higher courts. Many members agreed that already this system existed in their judiciary.

5. Members suggested that it is important to have an independent body or unit monitoring the level of integrity within the criminal justice authorities. For example, a Judicial Service Commission or a Judicial Intelligence Unit to monitor the integrity of the judicial officers. Likewise, it was agreed that there should be appeal tribunals set up to observe the work of investigative and prosecutorial authorities.

6. There should be constant and continuous ethical training on all the personnel in the criminal justice authorities. Further, there should be continuous integrity testing mechanism.

7. Strict disciplinary measures and impeachment for misconduct should be applied to any officer who is found to have breached the code of conduct or whose integrity is found wanting. This should apply to any officer regardless of his rank.3

8. Importance of having a mechanism where the members of the public can file complaints against judges, prosecutors and law enforcement officials, whereby these complaints can be reviewed and corrective measures or action is taken.

9. In the subject of establishing an independent body for investigation or prosecution of corruption cases, two different models were considered. The first model being the one followed in Japanese criminal justice system where the investigation is carried out either by the police or public prosecutors (no specialized independent body to investigate corruption cases), whereas the other model is to have an independent body such an anti-corruption agency or a commission to take care of corruption cases. Few members suggested that the success of Japanese system was because of the mindset and integrity of people and as long as the police had proper facilities, capacity and efficiency to handle corruption cases, it was not necessary to form an independent body for corruption cases. On the other hand, many members said that it is necessary for developing countries and large populations to have an independent authority, the advantage being to reduce the work load of police and to concentrate on the subject of corruption, as recommended by the United Nations Convention against Corruption (UNCAC).

C. Impartiality, Transparency and Accountability in the relevant Decisions in Criminal Proceedings

To enhance the aspect of impartiality, transparency and accountability, adequate laws and regulations need to be in place. Thus, the officials of the criminal justice authorities must strictly follow the laws. The investigative and prosecutorial authorities should be established under strong laws on carrying out their duties and dealing with corruption related cases. For example, there should be written justification for dropping cases, maximum length for completing a case, and also corrective action taken against personnel who violate the rules and regulations.

In terms of having strong and adequate laws for guidance, the judiciary is no exception. Courts verdict is the last resort in the process of investigation and prosecution; therefore it is necessary to make sure on the impartiality of their decisions and the transparency of judges. There should be appropriate laws in order to make the judiciary accountable for the decisions. Some members suggested that, in their respective countries, the Constitution itself guides the judiciary on their duties, responsibilities and also having an independent body (for example, a Judicial Service Commission) to monitor the judiciary and its personnel. It was also suggested to follow internationally accepted ethical codes for judiciary, such as Bangalore

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3 Visiting Expert from Hong Kong: Under strict disciplinary regulation highlighted “zero tolerance”.
Principles of Judicial Conduct. In addition to having effective and sufficient laws criminalizing corruption, the same should be strictly enforced. It was considered good practice to borrow laws from other countries, which can be useful in fighting corruption.

D. Mindset of the People

A mission without a vision is like a dream. Therefore the mindset of both the personnel of criminal justice authorities and the citizens at large in a country will be a major contributing factor to combat corruption. Consequently it was agreed that in order to win the war against corruption it is important to change the mind-set of the people, whose willingness work for their country’s betterment rather than personal benefit.4

Therefore, in order to change the attitude and mindset of the people civic education is said to be important.5 The citizens need to be educated and made aware of the danger of corruption with the help of continuous civic educational and awareness programmes with the help of media and other methods. Public officials and personnel of criminal justice authorities should continuously be trained on ethics and integrity. It is also important for the state to concentrate on the private sector in terms of methods to make it clean from corruption and add value to the nation in the right manner.

Some participants suggested including a subject related to moral and ethics in school curriculum. This can be a very useful tool to build a new generation, especially for nations fighting corruption at large scale.

A good mindset or honesty of politicians, top and managerial level employees of organizations, and senior employees of criminal justice authorities can play a significant role by being role models to their coworkers and employees in motivating them and minimizing corrupt behaviour. There should be a legal requirement for public servants to report any gifts they receive while executing their official duties and this could be an example of the law being used to change mindset. For instance, there is a requirement in Japan where public officials receive gifts of more than 5,000 yen, and incomes from personal businesses or investments, they have to report.6

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

One major area of the groups discussion was based on strengthening the capacity of the criminal justice system to a level where there is adequate resources to carry out their duties efficiently and effectively. In addition to acquiring the necessary resources in terms of technology, adequate human resource, and meeting the administrative requirement, the group also discussed the importance of specialization, delegation and segregation of duties within the authorities. The following areas were discussed.

- It is necessary to import expertise from outside the organization when required in order to improve the standard of output. This type of expertise is borrowed when it is necessary and is not a must to have within the organization. For example, very sophisticated forensic expertise or security of police can be borrowed by an Anti-Corruption agencies whenever is necessary. Some types of expertise can be built within the authorities such as fraud investigative techniques, and forensic auditing. It is also important that the personnel with the expertise be trained regularly for them to be up to date.

- It is necessary to have team work within and between institutions in order to facilitate and accelerate their activities and performance in terms of partnership, coordination and synergy. This will improve efficiency within the organizations themselves as well as in dispensing justice in general. For example, forming teams within an investigative authority, consisting of personnel with knowledge of law, audit and accountancy, can be very efficient, rather than delegating cases to individual investigators who may have limited knowledge to deal with the assigned case. The same kind of partnership and coordination can be built between organizations such as anti-corruption

4 Visiting Expert from Hong Kong: Under the topic of changing the public attitude said “no longer tolerating corruption as a way of life”.
5 Visiting Expert from Hong Kong: On public education and Communication Programme’s objective as to change the public attitude, enlist public support, encourage public report, promote a clean society and force “political will”.
6 Deputy Director, UNAFEI: In his lecture on “The Japanese Prosecution” highlighted on the requirement of reporting to the government on receiving gifts, income other than salaries, and of trading in stocks.
agencies and the police investigative unit.

Therefore effective structures or reliable teams of investigators are the solution for efficiency and also ensuring the secrecy of their investigations. In order to uphold the secrecy of investigations, the investigators should disclose information when it is necessary and only to the people necessary. Thus, for this mechanism to work effectively, it is important to recruit honest personnel with adequate education and experience. Management should have a strong in-built system to monitor their activities and the setup of work environment should be in such a way to help maintain the secrecy of investigations. There should also be effective sanctions against the personnel who disclose or leak secret information.

- Members agreed that it is not of paramount importance to distinguish whether the institutions carrying out investigation, prosecution or the courts handling corruption cases are specialized or within the normal justice system, rather what is of importance is that those bodies be independent, effective and efficient.

- To ensure proper case management and organized speedy trial procedures, a mechanism must be in place to achieve efficiency within authorities, for example by use of technology (free toll telephone number for public to file cases, email, etc). Members also agreed that adequate resources, intelligence collection, specific time frame to finish investigation are indispensable for ensuring proper case management.

- Mechanisms to be in place to report back and share knowledge in a wide range, from what participants learn from workshops within the country and overseas are recommended.

- Organized speedy trial procedure demands specific time framework, ample conclusive evidence, adequate judges and witness protection. For prosecutors there should be similar provisions in that there should be adequate personnel, investigations be completed within a given time framework.

- For minor cases where the defendant does not dispute the evidence, the summary procedure as is currently used in Japan is recommended.

III. CONCLUSION

To conclude the discussions of the group on strengthening the capacity and integrity of criminal justice authorities and their personnel, the participants are of the view that the most important overriding factor is political will and the mindset of the government and personnel within the criminal justice authorities. The importance of educating the public in terms of combating corruption, and finding ways of making the general public aware of getting rid of this intolerable disease was noted. Some other factors which seem necessary to strengthen the criminal justice authorities as a whole were identified: having proper and efficient facilities and technology requirements. Having efficient and adequate laws and mechanisms to manage the authorities themselves was identified as a high priority, keeping in mind that these personnel executing their duties should be paid adequately. By doing so, it was believed that we could go in the right direction in achieving independence and integrity within the criminal justice system.

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7 Visiting Expert from Singapore: Increased use of technology and sophistication of modus operandi. Example, computer forensic capability.

8 Visiting Expert from Singapore: Categorically mentioned that it is difficult to live up to this good intentions unless the leaders are strong and determined enough to deal with all transgressors, and without exceptions.
APPENDIX

COMMEMORATIVE PHOTOGRAPHS
• 149th International Training Course
• 14th UNAFEI UNCAC Training Programme

UNAFEI
The 149th International Training Course

Left to Right:
Above:
Ms. Kramer (UNODC)

4th Row:
Ms. Iwakata (Staff), Mr. Suzuki (Staff), Mr. Inoue (Staff), Mr. Miyazaki (Staff), Ms. Tani (Staff), Mr. Honda (Staff), Ms. Sasabe (Staff)

3rd Row:
Ms. Sakai (Chef), Mr. Kawai (Chef), Mr. Yamada (Japan), Mr. Samuel (St. Lucia), Mr. Cobbler (Barbados), Mr. Samaniego (Panama), Mr. Ascencio (El Salvador), Mr. Yamamoto (Staff), Mr. Okaniwa (Staff), Ms. Yamada (Staff), Ms. Tashima (Staff)

2nd Row:
Mr. Yokomaku (Japan), Mr. Mwakalukwa (Tanzania), Mr. Panthee (Nepal), Mr. Watanabe (Japan), Mr. Shiwakoti (Nepal), Ms. Nakagawa (Japan), Ms. Kariya (Japan), Mr. Suandika (Indonesia), Mr. Nakahata (Japan), Mr. Thakur (India), Mr. Mwenda (Tanzania), Ms. Hoshino (JICA)

1st Row:
Mr. Sugiyama (Staff), Mr. Hagiwara (Staff), Prof. Harada, Prof. Sakonji, Prof. Izumi, Deputy Director Ukawa, Mr. Courtney (USDOJ), Director Sakuma, Mr. Gaña (DOJ, Philippines), Prof. Yanaka, Prof. Wakimoto, Prof. Yoshida, Prof. Tada, Mr. Jimbo (Staff), Ms. Lord (LA)
The 14th UNAFEI UNCAC Training Programme

Left to Right:
Above:
Mr. Vlassis (UNODC)

4th Row:
Ms. Iwakata (Staff), Ms. Tani (Staff), Mr. Inoue (Staff), Ms. Yamada (Staff), Ms. Sasabe (Staff), Mr. Miyazaki (Staff), Mr. Honda (Staff), Mr. Okaniwa (Staff), Ms. Tashima (Staff)

3rd Row:
Ms. Sakai (Chef), Mr. Kawai (Chef), Mr. Hino (Japan), Mr. Sumitomo (Japan), Mr. Tanaka (Japan), Mr. Twala (Kenya), Mr. K.C.Manoh (Nepal), Mr. Kariuki (Kenya), Mr. Thirakul (Laos), Mr. Talib (Maldives), Ms. Shimoda (JICA), Mr. Yamamoto (Staff)

2nd Row:
Mr. Shinebaatar (Mongolia), Mr. Oshima (Japan), Mr. Fujii (Japan), Mr. Kobayashi (Japan), Mr. Zia (Bangladesh), Mr. Mohseni (Afghanistan), Mr. Akhtar (Bangladesh), Mr. Sensouvanh (Laos), Ms. Katala (D.R.Congo), Ms. Shalon (Nigeria), Mr. Mahesh (Nepal), Ms. Enkhtuya (Mongolia), Mr. Heng (Cambodia), Mr. Aweh (Nigeria)

1st Row:
Mr. Jimbo (Staff), Ms. Lord (LA), Prof. Yanaka, Prof. Yoshida, Prof. Wakimoto, Prof. Tada, Deputy Director Ukawa, Mr. Koh (CPIB), Director Sakuma, Mr. Kwok (Hong Kong), Prof. Harada, Prof. Tsunoda, Prof. Sakonji, Prof. Izumi, Mr. Hagiwara (Staff), Mr. Sugiyama (Staff)