Long Session Report

Session Title: New Impetus for Anti Corruption Institutions, Jakarta Principles and Beyond
Date & Time: October 23, 4.30pm-6.30pm
Report prepared by: Rukshana Nanayakara, Transparency International
Syafira P. Larasati, Cooperation Specialist, Corruption Eradication Commission (KPK), Indonesia

Session coordinated by: Putri Rahayu W, Cooperation Specialist, Corruption Eradication Commission (KPK), Indonesia

Moderated by: Tan Sri Abu Kassim, Director General, National Centre for Governance, Integrity and Anti-Corruption, Malaysia

Experts:

1. Emmanuel Farhat, Senior International Affairs Officer, Agence Française Anticorruption (AFA), France
2. Luc Marius Ibriga, Controller General of State, Autorité supérieure de contrôle d'Etat et de Lutte contre la corruption (ASCE-LC), Burkina Faso
3. Samuel de Jaegere, Anti-Corruption Advisor, United Nations Office on Drugs and Crime, Austria
4. Akharakit (Ryan) Keeratithanachaiyos, International Affairs Strategy Specialist, Office of the National Anti-Corruption Commission (NACC), Thailand
5. Agus Rahardjo, Chairman, Corruption Eradication Commission (KPK), Indonesia
6. Matthew Stephenson, Professor, Harvard University Law School, USA
7. Eka Tkeshelashvili, Head of Program, European Anti-Corruption Initiative (EUACI), Ukraine

What were the aims of the session and corruption risks?

The Jakarta Principles provide key elements that Anti-Corruption Agencies (ACAs) should have to be able to perform effectively. The Jakarta Principles recommend adequate powers and resources, accountability and transparency, and also cooperation and collaboration to ensure effective and independent ACAs.

This workshop aims to:
- define the practical steps to implement the Jakarta Principles as an accountability framework for ACAs in order to create independent and well-functioning ACAs.
- identify challenges in the application of these principles and also how collective action can contribute to strengthen the ACAs.
- explore the application of the Jakarta Principles as the prospective framework in implementing Article 6 and 36 of the UNCAC

Summary of panellists’ contributions & discussion points (please be as detailed as possible)

Agus Rahardjo
- KPK is an independent anti-corruption agency established in 2003. It has the authority to coordinate the institutions mandated to eradicate corruption, supervise the institutions mandated to eradicate corruption; conduct preliminary investigations; investigate and prosecute corruption, prevent
corruption; and monitor the governance of state institutions.

- In carrying out its tasks, KPK is led by five commissioners which are selected through an open recruitment process. A selection committee will appoint 10 qualified candidates and submit it to the President. The Parliament then conducts a fit and proper test to those 10 candidates and decides the 5 Commissioners.

- KPK has faced several challenges, notably from corrupt officials fighting back, particularly when it conducted investigations into high-level officials or politically exposed person. In 2009 and 2015, two of KPK’s Commissioners have been named as suspects allegedly due to the investigation of high level corruption cases. Although the support from the public is very high, the absence of immunity for KPK commissioners and officials remains a challenge for this agency in carrying out its duty.

- In 2012, KPK together with other anti-corruption agencies, UNODC, and UNDP developed the Jakarta Principles. This initiative was a response to the threat towards KPK’s independence and also demarcated the workings of an independent anti-corruption commission which is accountable to its constituency.

Emmanuel Farhat

- In the last two years, France has strengthened its anti-corruption legal framework, through:
  - Introducing a new preventive approach in the system
  - Establishing a new Anti Corruption Agency (AFA)

- Based on AFA’s experience, an ACA should be given sufficient mandate to engage with all actors including civil society and the private sector (businesses, associations, foundations). AFA also has the mandate to conduct inspection and control; give administrative sanctions; and provide technical assistance and specific/general guidance to private entities.

- It is also important to ensure collaborative capacity of an ACA, both international and national/domestic coordination. Ensuring collaboration among agencies is important to improve information sharing. At the national level, AFA is required to work with other agencies such as customs, judiciary authorities, the tax administration and the FIU. At the international level, AFA explores cooperation with other ACAs from other countries to share good practices in preventing corruption.

- France has launched a new initiative to set up a network for 20
ACAs. This network aims to work on how to address challenges in the anti-corruption movement, i.e: to discuss the question on how to address facilitation payments in different jurisdictions, to identify and to fill the gap in the domestic law.

Luc Marius Ibriga

- The ASCE was established in 2007 from the merger of the State Inspectorate General and the High Authority for the Coordination of the Fight against Corruption. During the transition period, the National Transitional Council (CNT) adopted on 03 March 2015, the law N° 04-2015 / CNT on prevention and repression of corruption. An evaluation was conducted under the auspices of UNODC, HALCIA Niger, OFNAC Senegal to see the gap between the law and the Jakarta principles. The review concluded that the ASCE constitutive texts should be re-written to be in line with international standards governing anti-corruption institutions.

- The application of Jakarta Principles to the new law:
  1. Mandate
     The mandate of ASCE: prevention, investigation, oversight over various audit departments, and coordination of the fight against corruption.
  2. Collaboration
     Establish an orientation council consist of representatives from the public sector, civil society and the private sector.
  3. Permanence
     ACA is a constitutional body.
  4. Appointment
     Open recruitment of the State Comptroller General for a single term of 5 years.
  5. Continuity
     Creation of a post of Deputy State Comptroller General.
  6. Revocation
     In the case of misconduct, the comptroller general can be removed only at the request of the orientation council.
  7. Exemplary conduct
     Implementation of a code of conduct for ASCE officials.
  8. Immunity
     The Comptroller General of State and State Controllers enjoy immunity in the performance of their duties.
  9. Remuneration
Salary has been lifted up to encourage people to work in the agency

10. Human resources
   Implementation of open and professional recruitment. The ASCE-LC will now be able to recruit investigators and audit assistants.

11. Financial resources
   The ASCE-LC budget cannot be less than 0.1% of the national budget

12. Internal and external accountability
   ASCE has an internal audit and control unit. This agency also audited by the court of auditors.
   • Implementation of the Jakarta principles has impacted the ASCE positively shown by the increased number of cases investigated and transmitted to the prosecutor’s office. However, there are several challenges faced by the ASCE in implementing the Jakarta Principles, i.e: mobilizing sufficient and reliable resources; ensuring honest and quality human resources, promoting anti-corruption culture and refusal of corruption.

Akharakit (Ryan) Keeratithanachaiyos
   • “With great responsibility comes great expectation”. This means that there is a high public expectation for ACAs to solve the problem of corruption.
   • An ACA should be autonomous, competent and accountable. Being autonomous means conducting duties without fear, being competent means given the sufficient amount of resources, investigative powers, as well as qualified persons to conduct ACA’s duties. ACA’s head and employees should implement the highest level of ethical standards to prevent abuse of power by their employees and deviance from ethical conduct.
   • NACC has 9 Commissioners and ±2800 staff across all provinces in Thailand. NACC is established in the constitutions and responsible to conduct investigation, prevention and asset examination as well as coordinate all anti-corruption measures in Thailand. NACC has special authority to initiate prosecution in the event that the prosecutor general refuse to bring a case to the court.
   • The first ACA in Thailand established under the Prime Minister Office in 1975. There were a lot of challenges faced by this ACA because this agency used to be less independent. In 1997,
Thailand changed its Constitution and mandated several agencies to be independent from the executive branch which includes NACC, the National Human Rights Commission, the auditor general, the ombudsman, etc.

- In terms of compliance with the Jakarta Principles, NACC establishment is guaranteed by the constitution. The executive branch do not have the power to appoint or select Commissioners. The Selection Committee is headed by the Supreme Court President. The member of the committee consists of the Administrative Board President, a designated member of the Constitution Court or other independent agencies, the Parliament President and the leaders from other organisations. NACC also has central authority of its human resource and budget management.

- In terms of accountability, there are several provisions within the NACC Law which passed in July 2018 related to this principles, including the removal of board members. Holders of political position and specified high level public officials should declare their asset to NACC. Asset declaration also applies to the NACC board members, investigators and asset examiners.

Matthew Stephenson

- Matthew wrote a blog which criticized the Jakarta Statement on Principles for Anti-Corruption Agencies in 2015. In this blog, he argued that several principles in the Jakarta Statement are articulated with high level of generality, too simplistic and consists of vacuous recommendations. It is a challenge to develop principles of ACAs that on one hand are not so general but at the same time not too specific so it can be properly applied to wide range of institutions or countries. Therefore, it will be difficult to translate it into practice when the level of generality is high.

- The most important value in designing ACA is sufficient independence and autonomy. At the same time, accountability is also important. There is a tension between the values of political independence and political accountability. There is a risk of an ACA to be manipulated by politicians to pursue his political agenda. The institutional arrangement which promotes independence may pose a threat to accountability.

- The United States do not have one ACA. Investigation of high level wrongdoing is handled through the Department of Justice.
Legal protection regulation of special counsel is very weak and inadequate. Internal regulation in DOJ can be changed and special counsel can be removed by the politically appointed attorney general. Currently, there is a concern for inadequate independence for the special counsel. However, in 1990, there was a stronger protection for the investigators of high level wrongdoing. It made it very easy to ask for a special counsel to investigate high level wrongdoing. The investigation of President Bill Clinton by the special counsel illustrates why it can be dangerous to have a prosecutor operating with extraordinary autonomy who seems to have his/her own political agenda. It is important when producing documents like Jakarta Principles, the drafter should think how to manage the inevitable tension between independence and accountability.

- Many of the proponents of the Jakarta Principles argue for an assessment or monitoring system on country compliance or how countries are achieving the objective of the Principles. There is a tension between criteria that are more objective and provisions that are more subjective or flexible. Countries will focus on the easiest criteria to achieve and less concern about addressing other issues because they can point on the A grade that they get in the evaluation system rather than making improvement. Evaluation system on the Jakarta principles should be a floor not a ceiling. There is a concern that in practice when we create this grading system, it becomes a de facto ceiling.

Samuel de Jaegere

- The Jakarta Statement has been endorsed by the International Association of Anti-Corruption Authorities at its 2013 meeting in Panama, and noted by the Conference of States Parties (COSP) to the UNCAC in its 2013 and 2017 Resolutions. However, there is a criticism from some academics to the Jakarta Principles that these Principles are too vague and do not provide sufficient guidelines for countries in seeking to establish strong ACAs.
- UNODC currently works with anti-corruption authorities and experts to clarify the meaning of the Jakarta principles. In its 7th COSP UNCAC Resolution 7/6 on the Follow-up to the Marrakech Declaration on the Prevention of Corruption, the COSP requested UNODC to develop knowledge products, guidance notes and technical tools on the implementation of article 6 of the Convention, among other preventive measures.
In the light of this request, UNODC, UNDP, and the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) hosted an Expert Group Meeting (EGM) to develop a “Commentary on the Jakarta Statement on Principles for Anti-Corruption Agencies” on 25-27 July 2018 in Colombo, Sri Lanka. The meeting brought together 30 international experts including representatives from various ACAs. Colombo Commentary is developed through a participatory process which engages anti-corruption agencies themselves to identify practices.

The commentary aims to assist States parties to the UNCAC to implement article 6 of the UNCAC. The commentary provides an overview of the 16 principles, background, and each principle is analysed and broken down in its constituent parts, so that ACAs can easily implement it. Specific country examples are provided on each constituent part drawn from national legislation and current practices.

A self-assessment questionnaire will also be included with key evaluation questions. The intention of the commentary is to provide guidance that allows each government and anti-corruption agency to self-assess its effectiveness and to identify priority areas of reform and improvement.

The draft commentary is currently under review in UNODC and will be disseminated to the experts of the Colombo expert group meeting for final endorsement.

Eka Tkeshelashvili

Many countries often think that establishing an ACA is the only solution to combat corruption. ACAs are not the entire solution, but a part of a holistic approach in conjunction with other integrity institutions and the political environment. The ACA effectiveness depends on collaborative action with other institutions at the national and international level.

One of the biggest challenges for ACA is how to manage public expectation. How to balance out between the result that we have achieved and at the same time managing the public expectation.

The government also needs to support the capacity development of ACAs, not only the human resources and institutional capacity development but also knowledge that can make their work qualitatively better such as case management systems, data
analysis centers, data storage, software and hardware. ACAs need constantly to be excellent and to be the best in investigating crime so that it is not easily attacked.

- As an external factor, collaboration with national and international institutions plays an important role in the working of ACAs. At the national level, collaboration with other agencies responsible for anti-money laundering, organized crime, asset tracing of the proceeds of organized crime and corruption, and agencies responsible for managing asset confiscation as a result of those activities is extremely important. It is also important for ACAs to be involved in international networks. In the modern era, corruption is not a national crime, without the help and partnership with other organisations it will be difficult to be effective. Last but not least, another important external factor is an independent, non-corrupt, well-functioning judiciary.

Main outcomes of session (include the highlights and interesting questions from the floor)

- Compliance to the Jakarta Principles does not guarantee the effectiveness of the ACAs in tackling corruption. Enabling environment such as strong political will, freedom of the press, support from the civil society and the independence of judiciary are key factors to support the fight against corruption.
- The essence of the Jakarta Principles can be applied not only to the ACAs, but also to other anti-corruption and judicial authorities.
- Collaboration with national and international institutions plays an important role in the working of ACAs. The international support is more so important when the mandate and space of the ACAs are threatened. For example, the struggle of the KPK to remain independent involved the work of not only civil society organizations but also the collaboration with international partners.
- The public perception of the ACAs is important and is accumulated through the effective delivery of its mandate. The better the public perception, the easier it is to mobilize public support. Especially when the independence of the ACA is being
threatened.

- A mandate of an ACA extending into the public, private and civil society sectors is important because allows the ACA to spread integrity values to all these three sectors, and provides capacity to detect corruption in all these sectors and build alliances.
- The ACA should have a high standard on ethics, transparency, and accountability to gain trust from its stakeholders.

Questions and Answer

1. Is the Madagascar ACA (BIANCO) following the Jakarta principles? If yes, why this agency is ineffective? In this sense, a country can have all principles in place and still not be effective if the enabling environment is not there, i.e the absence of political will and freedom of press, etc. This enabling environment has made KPK effective. KPK is not only implementing these principles but also has strong political will and support from the civil society and media. So is it possible to extend these principles into its enabling environment indicators?

   - Other elements we should look into are the independence of prosecutors and the judiciary. The independence of the ACA will be ineffective if the prosecutors and the judiciary are not independent.

   - BIANCO Madagascar is indeed largely compliant with the Jakarta principles. BIANCO is one of the well-functioning anti-corruption bodies in the world. However, if a country has a well-functioning ACA, while the prosecutor body and the judiciary are not independent, it will not achieve its goals. Therefore, it is important to apply the Jakarta principles not only to BIANCO but also to the prosecution and judiciary authorities.

2. When is the deadline for the Colombo Commentary or when we expect it to be finalized?

   - The deadline for the commentary is the next COSP in November 2019. The final draft will be available for comments in early 2019.

3. Albania has more than one ACA and the government is still
discussing whether we should have one with all powers or multiple agencies to handle corruption. Is there any discussion on this whether one, two or three agencies will be effective to combat corruption?

- In term of the one or multiple agencies discussion, the UNCAC convention states that a country can have one or multiple bodies and the Commentary on the Jakarta Principles leaves the choice open, suggesting one or the other approach.

- There is academic literature on single or multiple agencies. There is no short answer to that issue because each approach has advantages and disadvantages.

4. In Afghanistan, the new government is willing to fight corruption. Establishing an independent institution is important, the Integrity Watch Afghanistan uses the success story of KPK Indonesia to convince the government to establish an independent ACA. However, in the end the government changed the draft by changing the selection committee to only public official representatives and removing civil society from the selection committee for the Commissioners. How do we convince the government to have independence institutions? Is there any example where UNODC work with government and manage to convince them that is a good idea to have independent institutions to combat corruption?

- Often Governments are reluctant to establish independent ACAs fully in line with the Jakarta Principles. Sometimes, there is a political momentum, for example, after a revolution or during a transition period. Those are good times to push for reforms. This occurred successfully in Burkina Faso in 2015. The Jakarta Principles then provided an excellent framework in shaping the new legislation. It is hoped that the Colombo Commentary will provide more clarity to help policy-makers and law-makers adopt adequate legislation for ACAs.

5. Who is the audience of the Jakarta principles? These principles
are for governments or ACAs? Who is the audience of the Commentary? Governments or ACAs?

- Most of the time we think about typical anti-corruption agencies like KPK, MACC or NACC. We tend to forget the original meaning of anti-corruption bodies in UNCAC which is much larger. In the Colombo Commentary, we tried to address each of the functions whether it is prevention, investigation or prosecution. Ideally, the Jakarta Principles will be applied to each of these functions. If we talk about a specialized unit of prosecutors in corruption cases, this special unit also should apply the Jakarta principles. Where you have multiple bodies dealing with anti-corruption you also have to check whether these are compliant with the Jakarta Principles. Therefore, these principles should be applied by all bodies involved in the fight against corruption.

Key recommendations and concrete follow-up actions

- The Jakarta Principles should be regarded as the minimum standard and not the ceiling to measure the performance of an ACA regardless the existence of a single or multiple agencies;
- Opportunity to establish or to reform Anti-Corruption Authorities do not come very often. Whenever the opportunity come we do the best we can to establish independence and effective ACAs in line with the Jakarta Principles.
- The Jakarta Principles should be used as inspiration and the Colombo Commentary as a guidance to help countries to interpret the principles.

We value your assessment following the outputs of the session, if you need to, please get feedback from the session coordinator or the moderator for this component.

What can be done to create opportunities for scaling up the solutions discussed in the session? And by whom?
• The Jakarta principles provide a broader framework of different aspects of an ACA including its formation, mandate, leadership, accountability and operations among others. These 16 principles are inter-connected and inseparable, all principles should be fully implemented to achieve effective ACAs. Therefore, State Parties should apply these principles not only to the classic ACAs but also those entities prosecuting corruption in the Judiciary Sector.

• The International organisations and CSOs should continue the advocacy work in encouraging all State Parties to implement the Jakarta Principles and Colombo Commentary as a framework to assess current Anti-Corruption Authorities or assist the establishment of a new ACA. The Jakarta Principles should be regarded as the minimum standard and not the ceiling to measure the performance of an ACA.

• Academia and/or ACA associations should be encouraged to develop an index measuring compliance of ACAs with the Jakarta Principles.
Key Insights for the future of the anti-corruption agenda (including Game Changing ideas/ suggestions/ actions from the session)

- To implement Article 6 and 36 of the UNCAC, independent and effective ACAs are critical. Jakarta Principles are a means to an end in this regards.

- The Jakarta Principles and Colombo Commentary serve as guidance for governments and anti-corruption agencies to self-assess the ACAs effectiveness through the evaluation questions and to identify priority areas for reform and improvement.

- Once the Colombo Commentary is finalized, a workshop or a side event should be undertaken at the 2019 COSP to provide clear information to the State Parties on the content and best use of the Colombo Commentary for supporting the implementation of Article 6 and Article 36 of the UNCAC.

- Global advocacy work on the Jakarta Principles should continue and aim to elevate the Jakarta Principles globally to a higher level through a UN General Assembly resolution.

Rapporteur’s name and date submitted
Syafira P. Larasati
Rukshana Nanayakara

This Long Report needs to be submitted by 7 November