

Measures to eliminate international terrorism

Oral report of the Chairman of the Working Group

Chairman: Mr. Rohan Perera (Sri Lanka)

I. Introduction

1. On the recommendation of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, the Sixth Committee decided, at its 1st meeting, on 6 October 2008, to establish a working group with a view to finalizing the draft comprehensive convention on international terrorism and continue to discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations.
2. At the same meeting, the Sixth Committee elected Mr. Rohan Perera (Sri Lanka) as Chairman of the Working Group. The Committee also decided to open the Working Group to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.
3. In keeping with its established practice, the Working Group decided that members of the Bureau of the Ad Hoc Committee would continue to act as Friends of the Chairman during the meetings of the Working Group. Therefore, Ms. Maria Telalian (Greece) and Mr. Sabelo Sivuyile Maqungo, (South Africa) continued to serve as Friends of the Chairman. Mr. Diego Malpede (Argentina) and Mr. Lublin Dilja (Albania) were no longer available to serve in this capacity and the Group of Latin American and Caribbean States and the Eastern European States Group were invited to consult and nominate a representative of their respective group to join as Friends of the Chairman.
4. The Working Group held two meetings, on 9 and 16 October 2008, as well as one meeting of informal consultations on 9 October. It had before it the reports of the Ad Hoc Committee on its twelfth session (A/63/37). The oral report made by the Chairman of the Working Group during the sixty-second session of the General Assembly (A/C.6/62/SR.16) was made available, as well as the report of the Ad Hoc Committee on its eleventh session (A/62/37). It also had before it the letter from the Permanent Representative of Egypt to the Secretary-General, dated 1 September 2005 (A/60/329), and the letter dated 30 September 2005 from the Permanent Representative of Egypt addressed to the Chairperson of the Sixth Committee (A/C.6/60/2).

II. Proceedings of the Working Group

5. At its 1st meeting, on 9 October, the Working Group adopted its work programme and decided to proceed with discussions on the outstanding issues relating to the draft

comprehensive convention and, thereafter, consider the question of convening a high-level conference under the auspices of the United Nations, to formulate a joint organized response of the international community to terrorism in all its forms and manifestations. The Chairman, together with the Coordinator of the draft comprehensive convention, Ms. Maria Telalian, also held bilateral contacts with interested delegations on 13 and 14 October on the outstanding issues relating to the draft comprehensive convention. The Coordinator had also held one round of intersessional bilateral contacts on 1 October 2008.

6. At its 2nd meeting, on 16 October, the Working Group received a report on the results of the bilateral contacts held during the current session. At the same meeting, the Working Group also undertook a discussion on the question of convening a high-level conference.

7. The following section of the present report constitutes an informal summary for reference purpose only, not an official record of the proceedings, of the exchange of views, starting with the exchange of views in the Working Group.

III. Informal summaries by the Chairman of the Working Group concerning the draft comprehensive convention and the question of the convening of a high-level conference

A. Draft comprehensive convention on international terrorism

1. Exchange of views in the Working Group

8. As regards the draft comprehensive convention, delegations reiterated their commitment to continue the ongoing efforts aimed at finalizing the draft comprehensive convention on international terrorism. In this context, several delegations noted that the proposal made by the Coordinator during the 2007 session of the Ad Hoc Committee was a good basis for negotiations with the view of reaching a compromise solution and continued to consider the proposal positively. Some other delegations stated that they considered the text proposed by the Coordinator acceptable if taken as a package. The view was also held that draft article 18 as proposed by the Coordinator had a constructive ambiguity that could be helpful to solve the outstanding issues on this article. It was further observed that the current drafting of article 18 was intended to achieve a good balance between the scope of the comprehensive convention and the scope of application of international humanitarian law, without leaving open the possibility to interpret this draft article to the detriment of international humanitarian law.

9. Some other delegations emphasized that all proposals should remain on the table and be considered along with the proposal of the Coordinator. It was observed that the Coordinator's proposal did not sufficiently address all concerns of Member States and that it contained some uncertainties that needed to be further clarified. In this regard, it was suggested that the text of draft article 18 should be considered as a whole and also along with the text of draft article 2 on the scope of offences, as the two articles were interrelated.

10. Furthermore, some delegations reiterated that a clear definition of terrorism should be included in the draft convention, as well as a clear distinction between acts of terrorism and the legitimate struggle of peoples against foreign occupation. Some speakers underlined that acts of military forces of States not regulated by international law, as may be the case in some instances during peace time, should not be excluded from the scope of the convention. It was nevertheless reaffirmed that notwithstanding the difficult elements, delegations remained committed to the on-going process and supported the efforts towards the early conclusion of the draft comprehensive convention.

2. Summary of the briefing on the results of the informal bilateral contacts held during the current session

11. In her statement to the Working Group on 16 October, Ms. Telalian, the Coordinator, noted that the purpose of the bilateral contacts and informal meetings had been to provide delegations with an opportunity to remain engaged in the process and to help advance the negotiations, in particular in light of the proposal made during the 2007 session of the Ad Hoc Committee following numerous contacts with delegations. It had also been hoped to ascertain whether delegations were ready to make a decision as to whether or not the elements of the proposal could form the basis of an overall package which would help to move the process forward.

12. While recalling that explanations on the elements of the proposed package had been previously made (A/62/37, A/63/37 and A/C.6/62/SR.16), Ms. Telalian reported that more and more delegations had indicated their readiness to work on the basis of that proposal.

13. In light of the discussions during the bilateral contacts and informal meetings, as well as the statements made during the debate in the Sixth Committee, which in some respects tended to refer back to proposals that had been the subject of consideration before in the context of the Committee's work, the Coordinator recalled the underlying approaches that had characterized the work on the draft convention from the outset. Those approaches had also underpinned the elaboration of the previous three instruments concluded by the Ad Hoc Committee, namely, the 1997 Terrorist Bombings Convention, the 1999 Financing of Terrorism Convention and the 2005 Nuclear Terrorism Convention.

14. It was recalled that the focus throughout the work had been on elaborating a law enforcement instrument for individual criminal responsibility, strengthening international cooperation in that regard on the basis of an extradite or prosecute regime. In other words, the individual rather than the State had been at the centre of the elaboration efforts. The core rationale for focusing on the individual had been that other fields of law, in particular the Charter of the United Nations, international humanitarian law and the law relating to the responsibility of States for internationally wrongful acts, adequately covered the obligations of States in situations where acts of violence were perpetrated by

States or their agents and such laws continued to apply to situations pertaining to particular cases.

15. Since States act through the conduct of individuals acting on their behalf, there had nevertheless been an attempt to address the conduct of such agents during armed conflict and during peace time. The general tendency in the Committee in that regard had been to take an exclusionary rather than an inclusionary approach. Thus, in proscribing certain specific acts as acts of terrorism, attempts had been made to identify certain particular activities as excluded on account that such particular activities were governed by other fields of law.

16. In the case of the Terrorist Bombings Convention particular attention had been focused on carving out from the scope of the Convention activities of peacekeepers, activities of armed forces and activities of military forces of a State. The technique of excluding what constitutes the embodiment of the State and its property was not novel. The 1963 Convention on Offences and Certain other Acts committed on Board Aircraft expressly provides that the Convention shall not apply to aircraft used in military, customs or police services. The overall assumption in that case, like in the case of the State itself, had been that other rules of international law covered such instances and that it was therefore not a total exclusion of criminal responsibility, but rather a qualification as to the applicable law. It was also recalled that during the earlier part of the negotiations on the draft comprehensive convention there had been proposals to follow the model of some regional instruments that expressly exclude particular conduct from the scope of the defined proscribed activity, namely to define what is not considered to be acts of terrorism within the article that defines the acts prohibited. However, this approach had not found general resonance in the context of the work of the Ad Hoc Committee. Instead, an exclusionary approach taken in article 19 of the Terrorist Bombings Convention had consistently been followed.

17. Ms. Telalian emphasized that it was in this spirit that draft article 18 of the draft comprehensive convention detailed the exclusionary provisions that applied to certain activities undertaken by the armed and military forces of a State. At the same time, it also sought to close any loopholes that might invite possibilities for impunity for certain categories of persons. In order to obtain this balance, she reiterated that it was imperative that the draft article be read as a whole, and together with draft article 2. Paragraph 1 of draft article 18 sets out the overarching principles that underpin what is excluded from the scope of the draft convention. The draft paragraph states that nothing in the convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter and international humanitarian law. It was recalled that this was negotiated language that built upon the text of the Terrorist Bombings Convention. Draft paragraph 5 of article 18, which contains a "without prejudice clause" had been added to further emphasize this premise.

18. Ms. Telalian further reported that during the bilateral contacts and informal meetings, a number of delegations had expressed their wish to harness the work already

done. In the discussions, they had stressed what seemed to be a number of basic principles on which there was general agreement.

19. There seemed to be a general agreement to the proposition that civilians could under no circumstances constitute a legitimate target of the use of force, whether during armed conflict or during peacetime. She noted that there also seemed to be agreement that international humanitarian law as applicable in a specific situation could not and should not be prejudiced by the draft convention. The integrity of international humanitarian law should be respected and preserved and the draft convention should not attempt to modify existing provisions. She further pointed out that, in the same vein, it could be underlined that the draft convention would not impose on States parties obligations under international humanitarian law by which they were not already bound.

20. The 2007 elements of the proposed package attempted to consolidate those understandings by clarifying the relationship between the draft convention and international humanitarian law. The Coordinator noted that paragraph 2 of draft article 18 already established a demarcation between what was covered by the draft convention and activities of armed forces during armed conflict, "as those terms are understood under international humanitarian law". The new general "without prejudice" clause in paragraph 5 had been added to further clarify this point. It was explained that the term "lawful" in this context should, from an international humanitarian law perspective, properly be understood with its double negative connotation, i.e., "not unlawful acts" since international humanitarian law did not in a literal sense define which acts were "lawful", but which acts were prohibited. Ms. Telalian reiterated that, in view of the need to distinguish those acts that were "unlawful" under paragraph 1 of draft article 2, which provides that the convention only covers "unlawful activities", the term "lawful" in paragraph 5 was used as being more appropriate in the circumstances. The essential aspect of this element was the principle that international humanitarian law was not prejudiced by the convention.

21. Ms. Telalian further reported that the issue of "State terrorism" continued to be raised in the bilateral contacts. In this context, she considered it important to recall that despite the exclusionary provisions relating to activities attributable to the State or its agents, the Ad Hoc Committee had not been oblivious to particular situations in which the State might play a role in suppressing international terrorism, such as passing and enforcing legislation that proscribes acts of terrorism within its jurisdiction that might be undertaken by any person, including its own agents. First, she explained that there had been some inroads in addressing questions of general impunity in the various instruments that had been elaborated. Already in the Terrorist Bombings Convention, it had been recognized that the activities of armed forces during armed conflict as those terms were understood in international humanitarian law were governed by that law. It had also been recognized that although the activities of military forces of States were governed by other rules of international law the exclusion of certain actions from the coverage of the Convention did not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws. Since then, those principles had appeared in various forms of detail in the Nuclear Terrorism Convention, and then in the draft comprehensive

convention. It was recalled that draft article 2 was concerned with "unlawful" conduct by "any person" and in reading draft article 2 together with draft article 18, the latter only carved out from the scope of the convention certain activities that were regulated by other fields of law. Paragraph 3 of draft article 18, read with paragraph 4, simply recognized that other laws would apply and did not preclude prosecution under such laws. The addition to paragraph 4, together with the new preambular language based on the Nuclear Terrorism Convention, sought to reinforce that understanding. Then again, activities that were not regulated by other fields of law and that constituted an offence within the meaning of draft article 2 could conceivably fall under the scope of the convention.

22. Secondly, Ms. Telalian noted that there had been an effort to include specific obligations for States. The draft comprehensive convention, for example, imposed a variety of obligations on the State, including (a) to prevent and counter preparations of terrorist activities in its territory; (b) to prohibit activities by persons or groups of persons that encourage, instigate, organize, knowingly finance or engage in the commission of terrorist activities; (c) to prohibit the establishment and operation of installations and training camps for terrorist activities; and (d) to cooperate with each other in the prevention of terrorist offences.

23. In large measure these obligations contained language that tracked some provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), 24 October 1970), which the International Court of Justice in the Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) has said were declaratory of customary international law.

24. These points underscored that the draft convention should not be seen in isolation of other rules of international law. It was a building block to an already existing edifice of law that governed the conduct of relations among States. The fact that it focused on criminal responsibility of the individual did not of itself mean that international law was silent on the obligations of States.

25. Ms. Telalian further stated that, in view of the overall structure and the approach chosen in the elaboration of the draft convention as a law enforcement instrument on the criminal responsibility of the individual, it seemed that an explicit inclusion of elements of "State terrorism" other than the considerations mentioned earlier would imply revisiting the entire premise on which the Committee had proceeded in the development of those instruments. She stressed that the negotiating process had come a long way and that it was essential that the *acquis* of the draft convention as a law enforcement instrument for ensuring individual criminal responsibility on the basis of an extradite or prosecute regime was preserved. That was the approach that had been followed in the various multilateral counter-terrorism instruments.

26. While she found it understandable that there was need to carefully study the 2007 proposal and reflect upon whether it addressed the various concerns expressed in a

satisfactory way, she also noted that delegations were constantly intimating that the moment might have been reached when it was time to decide where to go from here. It was stressed that this could not be an endless process. While most of the remaining outstanding issues were of a political nature, she considered it important that delegations constantly keep in mind that they were elaborating a legal instrument and should try to address the issues from that perspective.

27. Ms. Telalian concluded by noting that she was encouraged by the fact that more and more delegations had indicated a readiness to continue negotiations in a more open and transparent manner in order to resolve the outstanding issues on the basis of the existing package. She stressed that as the sunset was approaching, there might be a need to reflect further on what the overall package would look like. In this regard, she recalled that there had been discussions on the possibility of changing the title of the draft convention to avoid the word "comprehensive", if that would help, among other elements, to overcome the impasse. It had also been suggested that certain questions could be answered or additional explanations provided in the resolution accompanying the convention. It would not be the first time such an approach had been used to solve politically or legally difficult issues. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, and the United Nations Convention on Jurisdictional Immunities of States and Their Property were offered as examples.

B. Question of the convening of a high-level conference

28. The representative of Egypt reiterated the proposal made by the Government of Egypt to convene the high level conference, as well as the continuous support that this initiative received within the framework of various regional meetings. She recalled the need to study the phenomenon of terrorism in all its aspects, including its economic, social and political causes, as well as the importance of agreeing on a comprehensive definition of terrorism.

29. Underlining the necessity to coordinate the efforts of the international community towards a global approach, the representative of Egypt also stated that the convening of a high-level conference would not be an end in itself, but a way to strengthen cooperation among States. While there is no linkage between the convening of a conference and the completion of the United Nations Global Counter-Terrorism Strategy, such a conference would nevertheless help to achieve the goals determined by the latter, as the Strategy alone would not be sufficient to combat terrorism.

30. Some delegations expressed their support for the proposal and recalled that the convening of a high-level conference would represent an opportunity to draw a structured response to terrorism, analyze its root causes, and resolve outstanding issues such as the definition of terrorism. It could also provide the necessary impetus to conclude the draft comprehensive convention. In this context, it was also suggested that the conference

should be organized as soon as possible, even before reaching an agreement on the draft convention.

31. On the other hand, some other delegations, while not opposed in principle to the proposal, recalled that the priority should remain focused on the conclusion of a comprehensive convention. While agreeing on the particular importance of a definition of terrorism, those delegations expressed doubt that this goal could be reached within the framework of a high-level conference. Furthermore, the view was reiterated that the convening of such a conference should only be discussed once the comprehensive convention is concluded.

32. Finally, Mr. Chairman, let me conclude my report by stating that I am encouraged by the discussions we have had this session on the draft convention, and by the willingness of delegations to continue to consider the current Coordinator's proposal with flexibility and an open mind and to remain engaged in the process. I continue to believe that the Coordinator's proposal, together with the additional clarifications that have been offered, contains the elements of a carefully balanced package addressing the diverse issues that have been raised in the negotiating process and could provide a sound basis for compromise. I am also certain that the background context that Ms. Telalian provided us with on 16 October will enable us to have a better understanding of where we have been in this negotiating process and how to proceed from here. In her report to the Working Group, Ms. Telalian indicated some useful suggestions made by delegations during the bilateral contacts and informal meetings to solve the remaining difficult issues. I urge delegations to take advantage of the intersessional period to seriously reflect on these suggestions and to earnestly consider whether they, together with the Coordinator's elements of an overall package, could help us overcome the last few hurdles. Demonstration of the requisite political will would enable us to reach our shared goal of the speedy conclusion of the draft Comprehensive Convention on International Terrorism, and thus discharge our collective responsibility as a body of legal experts in elaborating an effective legal regime for combating the scourge of terrorism.

Thank you.