Ad Hoc Committee on measures to eliminate international terrorism | 12 April 2010 1st meeting

Statement by Ms. Maria Telalian (Greece) on the intersessional bilateral contacts concerning outstanding issues relating to the draft comprehensive convention on international terrorism

I thank you very much Mr. Chairman.

Since our last meeting in the context of the Working Group of the Sixth Committee last autumn, I have continued to exchange views informally with interested delegations on matters relating to the draft comprehensive convention on international terrorism. I must say that I was encouraged by an increase in the number of delegations who sought to touch base with me inter-sessionally compared to previous years. I also held one round of bilateral contacts last Friday, 9 April, which was announced in the Journal of the United Nations. The aim of these contacts was to get a clearer picture of where we stand on the outstanding issues, and on the negotiation process as a whole. As usual, the contacts also provided an opportunity to brief new delegations on the state of play in our negotiations.

I have had several opportunities in the past to offer the background and rationale for the elements of a possible package that was presented in 2007, as well as to make additional clarifications. These remain valid. Accordingly, I once more draw attention to the 2007 report of the Ad Hoc Committee (A/62/37), as well as subsequent reports, of this Committee and of the Working Group on measures to eliminate international terrorism.

It will be recalled that at the last meeting in the context of the working group of the Sixth Committee, I made some suggestions for consideration which I thought might advance our work as we seek to conclude. First, it was suggested to place article 18 closer to article 2. This would faithfully reflect the link between the inclusionary elements in article 2 and the exclusionary elements, by way of applicable law and "without prejudice" clauses, as currently reflected in draft article 18. Second, as a way of managing expectations, it was suggested that the title of our efforts could be changed, including the suggestion that the title be "United Nations Convention for the Prevention and Suppression of International Terrorism". Third, it was suggested to capture some of the concerns that have been raised during our negotiations in an accompanying resolution. Of course it is premature at this stage to deal with the exact content, which would be negotiated depending on the final outcome on the outstanding issues. As I have said in the past, there are cases where an accompanying resolution has incorporated understandings aimed at clarifying some unresolved issues in the context of the relevant negotiations.

During my contacts with delegations, they have all affirmed the importance that they attached to the conclusion of the draft convention. Since 2007, we have moved forward in the course of our negotiations in the sense that there is a text on which views of delegations have been sought. But in order to properly understand how far we have come, it seems to me that it is important to remind ourselves where we were before. As delegations have continued to reiterate their concerns and positions with regard to draft article 18, also expressed during my contacts, I have become convinced that the positions, from a legal perspective, are not that far apart

as it might appear. Let us retrace where we were in 2002. In my view, there seems to be two key differences and these differences are best reflected in the text of draft article 18 proposed by the former Coordinator and the text by the Organization of the Islamic Conference, found in the 2002 report of the Ad Hoc Committee. These differences relate to the terms used in paragraphs 2 and 3:

The first relates to the use of the term in one case "the activities of armed forces during an armed conflict" and, in another case, the terms "the activities of the parties during and armed conflict, including in situations of foreign occupation".

The second relates to the terms found in paragraph 3 "inasmuch as they are governed by other rules of international law" in one instance and "inasmuch as they are in conformity with international law" in another.

Let me start with the first point of difference. It has always been understood that the draft convention would co-exist, in particular, with three already established international legal regimes, namely, the law of the Charter, international humanitarian law and the law relating to national and international security. The challenge for the negotiators has always been to elaborate a legal framework for combating international terrorism in a way that will not adversely affect the already existing regimes. If there is any agreement at all on the approach that ought to be taken it is the fact that it is essential not to encroach upon any of these regimes. Indeed, the necessity to preserve the integrity of international humanitarian law has been reiterated

throughout our discussions by many delegations and we should not try to rectify what some of us might consider gaps or deficiencies in that regime.

The language of the exclusionary clauses of present draft article 18 was carefully negotiated over a period of time, starting with the Terrorist Bombings Convention. The key terms "armed forces" and "armed conflict", as paragraph 2 reminds us, are terms that are governed by international humanitarian law and have, in that context, taken on very specific meanings. The discussions we have been having on these issues, to some extent, mirror the debates that occurred when these terms were negotiated in the context, in particular, of the Geneva Conventions and the two Additional Protocols. As we all know, both the term "armed forces" and the term "armed conflict", have been well discussed during the various conferences. The Commentaries to the 1949 Geneva Conventions, and in particular with regard to common articles 2 and 3, as well as the Commentaries to the two 1977 Additional Protocols, especially article 1, paragraph 4, and article 43 of Protocol I, reveal the extent to which these terms have developed and progressed in the context of international humanitarian law. The usage of the phrase "armed forces of a Party to a conflict" in Protocol I exemplifies a transition from a purely statist construction. Accordingly, when the terms "the activities of armed forces during an armed conflict" or "the activities of the parties during an armed conflict" are used, we ought to bear in mind this rich history in international humanitarian law.

While we might continue to have differences regarding the interpretation of these terms and their scope, these differences, if at all, cannot and should not be resolved here. If we were to attempt to give a new

meaning to them, we would be doing injustice to ourselves and to the integrity of international humanitarian law.

I believe that if we apply a good faith understanding of the development of these terms, as can be seen from the Commentaries, we will understand the direction the negotiators intended to point us to. Such an understanding ought to assist us avoid tilting the balance for or against past views, or to reinterpret the scope and meaning of these terms. That is why the negotiators elected to use a convoluted but nevertheless important phrase "as those terms are understood under international humanitarian law, which are governed by that law". It seems to me that this is as far as we can go. To the extent that we have agreed on the principle that international humanitarian law will govern, going any further in this convention would have an effect on this very principle. The New York law would be amending Geneva law.

I shall now turn to the <u>second</u> point of difference. The contours of national and international security law are broad. There are certain areas where the position is clear. This may be the case where, under military law, jurisdiction follows the soldier. This is practically the case in all States. It is no secret that the vast majority of States would object to the idea of placing members of their military forces under the jurisdiction of another State. During the recent discussions on criminal accountability of United Nations officials and experts on mission, this position was being reiterated in different ways. Another clear situation is where immunity *ratione personae* or immunity *ratione materiae* would be implicated.

In some other cases, the scope of national and international security law may be obscure. This is not because impunity is considered desirable. Indeed, paragraph 4 points to the opposite conclusion. Rather, it is because the law might still be developing. The phrase "inasmuch as they are governed by other rules of international law" was carefully chosen by the negotiators to capture these considerations.

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As will be recalled, the 2007 elements of an overall package were developed following extensive consultations among delegations to clarify further the general approach of the principles on which we have proceeded as just outlined. They are not intended to provide any additional obligations to the 2002 proposals, nor do they seek to modify obligations of States that they already have under international humanitarian law.

As the Chairman mentioned earlier, this is the tenth year of our negotiation of the draft comprehensive convention. During this past year, several delegations have increasingly emphasized the necessity to take decisive steps forward on the draft convention and bring the long-standing negotiation process to a closure. With the elements of a compromise package and the suggestions that I put forward during last year's Working Group, I believe that we have the necessary tools in front of us to fulfill our mandate.

Thank you.