REPORTS OF THE SEMINAR

GROUP 1

STRENGTHENING THE LEGAL REGIME, IN PARTICULAR, THE ISSUES OF CRIMINALIZATION AND INTERNATIONAL COOPERATION

Chairperson	Mr. Laercio Rossetto	(Brazil)
Co-Chairpersons	Mr. Harishchandra Dhungana	(Nepal)
	Mr. Kazuo Sasaki	(Japan)
Rapporteur	Ms. Fortune Chimbaru	(Zimbabwe)
Co-Rapporteur	Mr. Ryuji Kuwayama	(Japan)
Members	Mr. Souphy Norintha	(Laos)
	Mr. Jirawoot Techapun	(Thailand)
	Ms. Le Thi Van Anh	(Vietnam)
Advisers	Deputy Director Keisuke Senta	(UNAFEI)
	Prof. Kayo Ishihara	(UNAFEI)
	Prof. Iichiro Sakata	(UNAFEI)
	Prof. Tae Sugiyama	(UNAFEI)

I. INTRODUCTION

Group 1 started discussion on 18 January 2006 and selected the board members as listed above. Then the Group adopted the agenda as follows:

A. Criminalization

1. Importance of criminalizing acts required by the 11 Universal Conventions and analysis of the existing domestic laws in its coverage
   (i) Offences related to civil aviation
   (ii) Offences related to vessels and fixed platforms
   (iii) Offences related to the status of victims
   (iv) Offences related to dangerous materials
   (v) Offences related to the financing of terrorism
   (vi) Offences of attempt and participation
2. Legal and non-legal obstacles to the criminalization of such acts and their possible solutions
3. Availability of exceptions and defences or immunities to prosecution for these offences and their conformity to the Conventions
4. Legal and non-legal obstacles to establishing territorial and extraterritorial jurisdiction over these offences as required by the Conventions, and their possible solutions
5. Legal and non-legal obstacles to making these offences punishable by appropriate penalties taking into account their grave nature and their possible solutions

B. Mutual Assistance and Extradition

1. Legal and non-legal obstacles to the provision of mutual assistance and extradition of terrorism offenders and their possible solutions
2. Legal and non-legal obstacles to the provision of mutual assistance and extradition where the offence is committed by political motivation and their possible solutions
3. Legal and non-legal obstacles to the compliance to the obligation to extradite or prosecute (*"aut dedere aut judicare"*)

II. SUMMARY OF DISCUSSION

Regarding the status of ratification, acceptance, approval and accession of the 13 universal counter-terrorism Conventions/Protocols, we found the number of Conventions/Protocols to which the countries are Parties varies from country to country. Japan is a Party to 12 Conventions/Protocols. The only one still to be ratified is the International Convention for the Suppression of Acts of Nuclear Terrorism, which has been open for signature since 14 September 2005. Some countries such as Brazil and Vietnam are Parties to almost all. Some countries such as Laos, Nepal and Thailand are Parties to several of the 13 Conventions/Protocols. Zimbabwe is a Party to only three of them (Convention on Offences and Certain Other Acts

Committed on Board Aircraft (Tokyo Convention), Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention 1970) and Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)). However, Zimbabwe has already criminalized most terrorist offences.

Being a party to the universal Conventions/Protocols against terrorism is one of the most important steps to criminalize terrorist activities or attacks against a country's legal democratic state, rule of law, sovereignty, social values, and to life itself.

A. Criminalization

1. Importance of Criminalizing Acts Required by the 11 Universal Conventions and Analysis of the Existing Domestic Laws in its Coverage

The discussion was focused on 11 out of the 13 universal terrorism-related Conventions/Protocols. The other two (Convention on Offences and Certain Other Acts Committed on Board Aircraft and the Convention on the Marking of Plastic Explosives for the Purpose of Detection) do not necessarily require the criminalization of defined acts.

It is important to criminalize acts required by the 11 universal Conventions/Protocols even for such countries which have never been exposed to the threat of terrorism, since they may not be free from terrorist attacks in the future, and their nationals may commit terrorism offences against other countries.

Also, taking into consideration such terrorism threats with global effects, no country is allowed to be indifferent to the criminalization of acts required by the Convention/Protocols. In case such acts are not criminalized by one country, it will be an obstacle to extradition and mutual legal assistance requested by other countries victimized by terrorists. Such situation will let terrorists go unpunished, and is of course, against Conventions/Protocols' requirements on international cooperation, and is not acceptable as it may lead to turning such countries into a safe haven for terrorists.

2. Legal and Non-Legal Obstacles to the Criminalization of Such Acts and their Possible Solutions

Most of the participating countries have already criminalized all the terrorism acts as required by the Conventions/Protocols, although most of them have not become a Party to some of these Conventions/Protocols. Some countries have been, however, behind in domestic legislation. Some still need to amend their existing laws even where the Conventions/Protocols are ratified/acceded. One member stated that hijacking is not directly covered by any of the offences under the laws in the member's country. Most of the countries have not criminalized the financing of terrorism. However, Japan has a special law criminalizing the financing of terrorism. Laos is now working on a draft which addresses the offences of the financing of terrorism. In Brazil, the law on money laundering can be applied to acts of financing of terrorism.

It was also suggested that in the process of criminalizing terrorist offences in domestic laws, both technical and financial support, including training for legal draftsmen, should be available to the countries that had problems in doing so.

A few members stated that although such acts were covered as "terrorism" offences by their countries' criminal laws, the definition of the offences is unclear. An observation was made that this could lead to a misuse, by applying it to thwart opposition parties, and be an infringement of basic human rights. Moreover, such lack of clarity could contribute to the situation that the same act is considered to be a terrorism offence in one country, but not in another.

It was pointed out that partly due to the geographical position and the current terrorism situation in some countries there was a lack of political will to be party to and implement the Conventions/Protocols. For instance, a land-locked country has little to no interest in becoming a Party to and implementing maritime agreements, namely the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. And some countries which have never been exposed to the threat of terrorist attacks have little interest in doing so.

However, a national of a land-locked country may commit a terrorism offence over which that country must establish its jurisdiction. Furthermore, failing to meet the requirement of dual criminality could be an obstacle to international cooperation in terms of extradition or mutual legal assistance. Regarding the countries not exposed to terrorist attacks, no country will be guaranteed to be free from terrorist attacks forever, and they might face the same problems as identified above.

We agreed that we shall accelerate ratifying/accepting/approving/acceding to and implementing the Conventions/Protocols by inspiring political will and raising public awareness through such discussions, and have legislation regarding necessary provisions.

A few members stated that a terrorism act is punishable only if committed against their own states. The group agreed that this presents a huge gap in the law, not in conformity with the requirements of the Conventions/Protocols, and that a swift amendment to the criminal law would be desirable.

One member pointed out that the process of ratification, etc. and the enactment of implementing legislation is too long, as it is a game of politicians who would not give priority to the implementation, and the amendment of the Constitution would be required in order to solve the problem.

3. Availability of Exceptions and Defences or Immunities to Prosecution for these Offences and their Conformity to the Convention

We agreed that countries should give political asylum when needed. However, if it is related to any terrorist activities, such an asylum seeker should not be accepted. We did not find any exceptions and defences or immunities to prosecution for terrorism offences.

Any reference to an exception based on political grounds was omitted from recent Conventions/Protocols. In particular, it should be noted that the International Convention for the Suppression of Terrorist Bombings (Article 5), International Convention for the Suppression of the Financing of Terrorism (Article 6) and International Convention for the Suppression of Acts of Nuclear Terrorism (Article 6) have the provision to require the State Parties to deny any validity, in their domestic political and legal institutions, to any political offence, defence or justification for the acts of terrorism defined in those Conventions.

4. Legal and Non-legal Obstacles to Establishing Territorial and Extraterritorial Jurisdiction over these Offences as Required by the Conventions, and their Possible Solutions

The group started the discussion by clarifying the notion of territorial and extraterritorial jurisdiction. What is firstly required by most of the Conventions/Protocols under their jurisdiction clauses is to establish territorial and nationality jurisdiction over the terrorism offences. In addition, most of the Conventions/Protocols require State Parties to take such measures as may be necessary to establish jurisdiction over terrorism offences in cases where the offender is present in their territories and they do not extradite him/her.

Most of terrorism offences are punished by the domestic laws of members' countries. Therefore, we do not find any problems regarding establishing territorial jurisdiction over terrorism offences.

Regarding extraterritorial jurisdiction, most of the countries do not have any problems in establishing extraterritorial jurisdiction as long as they are Parties to the Conventions/Protocols. In this regard, Japan does not have any problems in establishing extraterritorial jurisdiction because it is provided as such in the domestic legislation.

One of the legal obstacles to establishing extraterritorial jurisdiction is non-ratification/accession to the Conventions/Protocols by some countries. The primary solution to the above problem is that many countries be party to the Conventions/Protocols. However, where they may consider some provisions of the Conventions/Protocols to be against their Constitutions or the States' domestic legislation, in being party to the Conventions/Protocols, the secondary solution may be the ratification/acceptance/approval/accession with reservation; for it is better to have some universal Conventions/Protocols than not to have anything at all.

5. Legal and Non-legal Obstacles to Making these Offences punishable by Appropriate Penalties Taking into Account their Grave Nature, and their Possible Solutions

There was a discussion whether to standardize the range of penalties to be applied to these offences for the gravity of terrorism offences differs from country to country. For instance, the death penalty may be regarded as being appropriate for terrorism offences in one country yet it is outlawed in another. However, it was pointed out that requiring specific criminal penalties might infringe the sovereignty of each country. Moreover, none of the Conventions/Protocols in their requirements refers to the standardization of the penalties to be applied to the offences, but just stipulates that Conventions/Protocols' offences should be treated as grave.

We thus agreed that the gravity of the penalties should be evaluated within the parameters of each Party's criminal law.

In this regard, for instance, in Brazil, all terrorism offences are classified as heinous offences in criminal law. And they are also non-bailable and not subject to grace or amnesty. Likewise, others stated that terrorism offences are treated as grave ones.

Also, as discussed below in 2 (1) "Extradition", the Group agreed that the penalties should be severe enough for the offences to be qualified as extraditable ones.

B. Mutual Assistance and Extradition

1. Legal and Non-legal Obstacles to the Provision of Mutual Assistance and Extradition of Terrorism Offenders, and their Possible Solutions

(i) Mutual assistance

Most Conventions/Protocols require State Parties to afford one another the greatest measure of assistance in connection with the investigation or criminal proceedings in respect of terrorism offences. The group first focused on the existence of a treaty or an agreement as the prerequisite for the provision of mutual assistance.

Most countries do not make the provision of mutual assistance conditional on the existence of a treaty or an agreement, and provide assistance even in the absence of a treaty on the basis of reciprocity. In one country, a treaty or an agreement is required to provide mutual assistance. Thus requiring the existence of a treaty or an agreement can be an obstacle to the provision of mutual assistance. It should be noted that even countries, other than the country which requires a prior treaty or agreements for mutual assistance, could not provide assistance to that country due to the principle of reciprocity.

The assistance is not uniformly provided by the countries. The collection of evidence, examination of a witnesses, search and seizure, the service of documents are included in assistance by most countries. Some countries can transfer a sentenced person for testimony to the requesting country. In one country, the only assistance that can be provided is to summon a witness. However, no country can compel its nationals to go and testify in the requesting country. Under such circumstances, one solution would be to persuade the witness to do so, and in doing so, to make use of "safe conduct", i.e., guaranteeing that the witness would not be prosecuted in the requesting country for whatever offence he committed prior to the request. Conducting testimony through the use of a video link system in the requested country may be used.

As the conditions for providing assistance, dual criminality is required by all countries. It was pointed out that in considering this condition we should decide whether the act itself constitutes an offence in the requested State, but not stick to the similarity of the provisions of offences. In connection with this, the law in Thailand stipulates that assistance shall not be related to a military offence.

Most countries can provide assistance by following the procedure as done in the requesting country unless it is against the laws in the requested country. However, one member stated it can not provide assistance in a way deviating from the procedure in the member's country. Such non-compliance by the requested country might cause the problem of admissibility in the criminal procedure in a requesting country. Such a problem could be solved by concluding a bilateral treaty accommodating specific proceedings required in the requesting country.

The International Convention for the Suppression of the Financing of Terrorism has a provision that explicitly denies State Parties a refusal of the request for mutual legal assistance on the ground of bank secrecy. In this regard, the investigation authorities can obtain bank information in countries except Brazil and Zimbabwe, both of which require a judicial order to do so. However, in Brazil, for administrative purposes, exchange of bank information is possible between central banks. It depends on each country's bank secrecy law that provides for conditions to allow banks to release their customer's information whether or not the authorities are able to get bank information. However, such differences will not cause any difficulties in relation to the requirements of the Convention. Ideally, the bank information should be accessed without court order to meet the requirements of the Conventions/Protocols as that is usually very cumbersome and slow.

(ii) Extradition

The group first focused on the existence of a treaty or an agreement as the prerequisite for extradition. One country makes extradition conditional on the existence of a treaty or an agreement. Other countries can extradite in the absence of a treaty on the basis of reciprocity as done with mutual legal assistance. The possible solutions to the problem of a refusal of a request for extradition in the absence of a Treaty are: (a) such country endeavours to enact the law to make extradition possible on the basis of reciprocity; or (b) it deems the universal Convention/Protocols as a legal basis when a request is made from another country with which it has no extradition treaty.

The Conventions/Protocols require that the offences defined therein shall be recognized as extraditable offences. In this regard, Brazil, Vietnam and Thailand require that such offences shall be punishable with imprisonment of at least one year in the requested country. However, in Zimbabwe, extraditable offences are those that are punishable with at least one year in the requesting country. In Laos, such offences are those that are punishable with imprisonment of at least six months. Only Japan requires that such offences be those that are punishable with imprisonment of at least three years in both the requesting country and Japan.

Most countries require dual criminality regarding extraditable offences. In this point, Zimbabwe does not require dual criminality for extradition. Thailand can exclude this requirement by a treaty. We should not interpret this requirement restrictively, as discussed above in the issues of mutual legal assistance.

All countries have the principle of non-extradition of their nationals. However, in this regard, some countries can extradite their nationals under certain conditions. For example, Brazil can extradite their nationals when the offences were committed before his/her naturalization. Both Thailand and Japan can extradite their nationals in accordance with a treaty. Zimbabwe can extradite its own nationals where there is consent from the offender.

There were some other refusal grounds for a request of extradition. For example, Brazil does not extradite an alleged offender to a country that retains the death penalty (except in case of declared war), life imprisonment, hard labour or cruel physical punishment. In this connection, Thailand is now working on drafting an amendment to cope with such countries which will refuse a request from a country that retains the death penalty.

(iii) Practical obstacles

As a practical obstacle to effective mutual legal assistance/extradition, the problem of a lengthy procedure was discussed.

It was indicated that there is sometimes no information on which agencies/ministries a request for mutual legal assistance/extradition should be sent to when several ministries/agencies were involved in the procedures in some requested countries. In this regard, it is necessary to decide a contact point in the beginning.

Since there is insufficient knowledge on the procedures or systems in the requested countries, the request form is sent back and forth due to petty mistakes. It is encouraged that competent authorities of State Parties have relevant laws and procedures on their websites.

Often it takes a long time because a request will be processed through a number of

ministries/agencies. A possible solution to this problem is to streamline the procedure by amending the existing laws or treaties.

In case requested countries do not necessarily respond quickly, informal personal relationships with contact persons should be utilized.

2. Legal and Non-Legal Obstacles to the Provision of Mutual Assistance and Extradition Where the Offence is Committed by Political Motivation, and their Possible Solutions

Some Conventions/Protocols such as the International Convention for the Suppression of Acts of Nuclear Terrorism have a provision that explicitly stipulates a request for extradition or for mutual legal assistance based on a political offence may not be refused on the sole ground that it concerns a "political offence" or an offence connected with a "political offence" or an offence inspired by political motives. However, most countries do not provide mutual assistance or extradition when the offence for which assistance or extradition is requested is a "political offence" under their laws. Therefore, it was discussed whether this provision in their laws was applicable to terrorism offences. In this regard, it is difficult to clearly define what a political offence is. We should be cautious to regard the offence for which mutual assistance or extradition is requested as a political one, taking into consideration the serious threat or result caused by terrorism offences.

3. Legal and Non-Legal Obstacles to the Compliance to the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)

Conventions/Protocols require that State Parties shall either extradite or submit the case to the competent authorities for prosecution.

In this connection, most Conventions/Protocols require State Parties not only to establish territorial and nationality jurisdiction over the terrorism offences, but also to take such measures as may be necessary to establish jurisdiction over terrorism offences in cases where the offender is present in their territories and they do not extradite him/her as stated above. Thus each State Party can fulfil the obligation to extradite or prosecute and to deny terrorists a safe haven.

First, it was pointed out whether or not a request for extradition is enough for the authorities to initiate investigation of the alleged offence. In this regard, most countries found no problems in regarding the request as the basis for the investigation.

Next, it was pointed out that even the compliance to the obligation to extradite or prosecute does not necessarily result in the conviction of the alleged offender and that he/she will be left free in the end. Therefore, it is necessary for the requested country refusing the extradition to do its best to collect sufficient evidence to convict the offender. In turn, the requesting country should provide evidence at its disposal.

Further, one of the obstacles in gathering evidence in the country where the trial is carried out is the presence of a specific procedure on how evidence is to be collected. A possible solution would be for the requesting country to be as accommodating as possible in providing evidence to the extent that the evidence is admissible in the requested country.

III. RECOMMENDATIONS

In conclusion, we decided to make the following recommendations:

1. No country in the world is free from a terrorist attack. It is a global menace and therefore no country should be a safe haven for terrorists. All countries should complete the ratification, acceptance, approval and accession of the 13 universal Conventions/Protocols as soon as possible.

2. Becoming a Party to the Conventions/Protocols alone is not enough. There is a need to criminalize terrorist offences and establish jurisdiction over them to achieve the implementation of the Convention/Protocols. There is a need to raise public awareness and inspire political will in all countries to become a Party to and to implement the Conventions/Protocols.

3. There is also a need to for all countries to allocate appropriate resources to ensure the implementation of the requirements of the Conventions/Protocols. In this regard, technical assistance in such areas as drafting implementing laws and training for law enforcement officers by the United Nations or other donors should be available where necessary.

4. In regard to appropriate penalties for terrorism offences, it is necessary for all countries to make penalties sufficiently severe as to qualify as extraditable offences.

5. All countries should offer mutual assistance as wide as possible, as long as it is not against the law in regard to the collection of evidence, examination of witnesses, search and seizure, the service of documents, and so on.

6. There is a need for cooperation among countries, criminal justice agencies such as law enforcement, prosecution and the judiciary in order to eliminate red-tape and shorten the procedure for mutual assistance and extradition. Enacting or reviewing the law giving priority to extradition decisions might be effective in hastening the review to some extent in some countries. There is a need to make full use of personal relations in shortening the process of mutual assistance and extradition.

7. There is a need to raise the awareness of the judiciary on the subject of terrorism and the requirements of the Conventions/Protocols so that they are able to interpret their law in order to distinguish "political offences" from terrorism acts as defined in the Conventions/Protocols, and establish jurisprudence on that subject.

8. There is a need for all countries to fulfil the obligation of *aut dedere aut juducare*. The countries that refuse extradition should cooperate with the requesting country in gathering requisite evidence to the greatest extent possible.