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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. 71.

This volume contains the work produced in the 132nd International Senior Seminar that was conducted from 10 January to 9 February 2006 and the Eighth International Training Course on Corruption Control in Criminal Justice that was conducted from 24 October to 17 November 2005. The main theme of the 132nd Seminar was, “Strengthening the Legal Regime for Combating Terrorism”.

The threat terrorism poses to international peace and security has long been recognised by the international community. Prior to the attacks on the United States on 11 September 2001 the international community had already promulgated 12 of the current 13 international counter-terrorism instruments. However, many countries had either failed to accede to these instruments or failed to incorporate the provisions into their legislation and implement them.

In order for a country to effectively combat terrorism it needs an anti-terrorism legal regime which will help prevent, detect and punish such offenders. It is also necessary that countries have in place legal instruments to combat transnational organized crimes and a financial system that isn't vulnerable to abuse by terrorists. Strengthening anti-terrorism legislation in accordance with the Conventions and Protocols and implementing anti-terrorism measures in cooperation with other countries should have a significant impact on the prevalence of major terrorist attacks.

The attacks of 11 September prompted the Security Council of the United Nations to adopt Resolution 1373 (2001) [SCR 1373] calling upon all States to become parties to the relevant international conventions and protocols. As a result 121 Member States have either ratified or acceded to at least 10 of the 13 instruments, and there is no longer any country that has neither signed nor become a party to at least one of them. Nevertheless, recently a number of major terrorist attacks have occurred including those in Indonesia, Madrid, Russia, London and India.

In order to fight terrorism effectively it is necessary that all countries become parties to and implement the universal instruments against terrorism, as called upon by SCR 1373 and more recently by the Bangkok Declaration of 2005, in order that there is no safe haven in which terrorist can operate and hide. The aim of the 132nd International Senior Seminar was to assist efforts by Member States in the fight against terrorism, in particular those efforts towards accession to and implementation of the relevant legal instruments.

Corruption imposes a wide range of harmful effects on society. In particular, corruption by public officials seriously undermines their integrity and neutrality in performing their official duties. This can lead to the public's distrust in the government and its institutions and may lead to its eventual collapse. Corruption is a problem that constantly needs to be challenged and the reason UNAFEI holds an international training course specifically on corruption control every year.

In recognition of the harm corruption can cause, especially in developing countries, and the fact that it can transcend national borders, the General Assembly of the United Nations adopted the UN Convention against Corruption in 2003. 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 cooperation, and asset recovery. It is hoped that all countries, including our participants' countries, will become party to this Convention and fully implement it, thereby taking a closer step towards freeing the world from the grip of corruption.

In this issue, in regard to the 132nd Seminar, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the Reports of the Seminar are published. I regret that not all the papers submitted by the Seminar participants could be published. In regard to the Eighth International Corruption Course the papers contributed by the visiting experts are 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. 71, Mr. Simon Cornell.

March 2007

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PART ONE

Work Product of the 132nd International Senior Seminar
“Strengthening the Legal Regime for Combating Terrorism”

UNAFEI

VISITING EXPERTS' PAPERS

THE ROLE OF THE UNITED NATIONS AND UNITED NATIONS OFFICE ON DRUGS AND CRIME IN THE FACILITATION, ACCESSION AND IMPLEMENTATION OF THE 13 UNIVERSAL LEGAL INSTRUMENTS AGAINST TERRORISM

*Jean-Paul Laborde**



I. GLOBAL THREAT

On 10 March 2005, at the International Summit on Democracy, Terrorism and Security, that was organized in the memory of the tragic events of 3/11 (as the terrorist attack that happened on 11 March 2004 is often referred to) in Madrid, UN Secretary-General Mr. Annan highlighted once again that

... terrorism is a threat to all states and to all peoples, which can strike anytime, anywhere. It is a direct attack on the core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflict... the United Nations must be at the forefront in fighting against it, and first of all in proclaiming, loud and clear, that terrorism can never be accepted or justified, in any cause whatsoever.¹

And indeed, recent developments clearly show that terrorism has become indiscriminate² and global in nature. Therefore, it is natural that, as *the only truly global organization with the goals and means of preserving peace and security*, the UN is expected to be at the forefront of the global action against terrorism. However, due to the sensitive nature of the phenomenon under scrutiny, many countries have taken steps to fight terrorism either through regional forums, bilateral arrangements and/or through their national agencies. Despite these options, it has to be highlighted again and again that as the only global organization, UN has a unique comparative advantage - its multilateral tools that are crucial and indispensable to fight terrorism. It cannot be overstated that *a global threat requires a global response*. And indeed as it will be seen later on, the UN has several important functions that it is fit to do better than anyone else.

Table 1: Role of the UN in the Fight against Terrorism:

- Establishing a universal legal framework against terrorism (international conventions and protocols, General assembly and Security Council resolutions including those adopted under Chapter VII);
- Reinforcing international co-operation in criminal matters against terrorism (universal legal instruments at work);
- Fostering international co-ordination against terrorism (Counter Terrorism Committee, Al-Qaida/Taliban Committee, 1540 Committee, 6th Committee of GA);
- Strengthening the capacity of Member States to comply with their international obligations (Terrorism Prevention Branch of the United Nations Office on Drugs and Crime and several other UN agencies).

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¹ Kofi Annan. Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security. Accessible at: <http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html>.

² If before terrorists targeted heads of States and governments and other VIPs, nowadays, ordinary civilians are targeted to produce an atmosphere of fear and panic among the population. If before members of a terrorist group usually came from one country, today a national of one country can recruit members of his terrorist organization in another, train them in a third, receive funds from a fourth, carry out an attack in a fifth and seek safe haven in a sixth.

II. THE UNITED NATIONS OFFICE ON DRUGS AND CRIME AND ITS TERRORISM PREVENTION BRANCH

A. The Branch

The United Nations Office on Drugs and Crime, a specialized office that belongs to the Secretariat of the UN, is stationed in Vienna and carries out the work of the Secretariat on drugs, crime and terrorism. The General Assembly as well as Economic and Social Council (ECOSOC) and its Commissions on Narcotic Drugs (CND) and on Crime Prevention and Criminal Justice (CCPCJ) provide the relevant mandate to the office in the respective fields. The draft resolutions of the Crime Commission are either adopted by the commission (rarely) or brought to the ECOSOC, which adopts them or approves those resolutions for adoption by the General Assembly. In recent years, in addition to its two original areas of work – drugs and crime, the UNODC has developed a third pillar of its work - delivering legislative technical assistance on counter-terrorism. It is done through its Terrorism Prevention Branch of the Division for Treaty Affairs (TPB).

The TPB also became an important executing partner for the UN Security Council Counter-Terrorism Committee (CTC) to implement a criminal justice response to international terrorism. More in particular, it focuses on the promotion of the ratification and implementation of the thirteen Conventions and Protocols against terrorism, which were adopted by the international community between 1963 and 2005.³ The technical assistance programme, which functions on a request only principle, covers basically the following tasks:

Table 2: Main Activities of the Terrorism Prevention Branch of UNODC

- Promote the ratification and implementation of anti-terrorist conventions and protocols
- Explain requirements and benefits of these international instruments
- Analyze national legislation related to countering terrorism, advise on what is needed to implement conventions and protocols
- Provide sample laws from other countries or model laws
- Assist in legislative drafting of anti-terrorist legislation when national resources or experience is limited
- Train criminal justice and law enforcement officials in the implementation of new laws and international criminal justice cooperation, including extradition and mutual legal assistance
- Organize national and (sub-) regional workshops, usually in cooperation with a requesting government or other international and regional organizations

Source: UN Office on Drugs and Crime. Terrorism Prevention Branch. Delivering Counter-Terrorism Assistance. Vienna, TPB, April 2005, p.3.

The strengthening of the international legal regime against international terrorism is the main objective of TPB. It is done so through the conventions and protocols in order for States which are parties to these legal instruments to possess common definitions of certain terrorist offences and so they can exercise jurisdiction over the offences so defined. By creating extraterritorial jurisdiction (especially in the case of aircraft and ships) and by being obliged to either bring the terrorists to trial at home or extradite them to a requesting other State, a legal regime is created which leaves no sanctuary to terrorists once all States have become parties to all of these treaties – provided they have the capacity to monitor the whereabouts and movements of suspected terrorists. We are still some distance from having a seamless international regime, despite a notable increase in ratifications of the instruments in recent years⁴ (Table 3):

³ See its website: www.unodc.org/terrorism.html – For more information on the thirteen conventions, see: www.un.org/Depts/dhl/resources/terrorism/index.html.

⁴ The thirteenth instrument, International Convention for the Suppression of Acts of Nuclear Terrorism, was opened for signatures at the UN World Summit on 14 September 2005 in New York. So far, there are only two ratifications.

Table 3: Number of Member States, which are Parties to the Twelve Universal Anti-Terrorism Conventions and Protocols.

	Mid-2000	June 2006
1. Tokyo Convention (1963)	169	182
2. Hague Convention (1970)	171	182
3. Montreal Convention (1971)	174	185
4. Int. Protected Persons Convention (1973)	102	162
5. Hostage Convention (1979)	89	153
6. Nuclear Material Convention (1979)	64	117
6a. Amendment to the Nuclear Material Convention (1980)	—	3
7. Airports Protocol (1988)	99	158
8. Maritime Navigation Convention (1988)	39	135
8a. Protocol to the Maritime Nuclear Material Convention (2005)	n/a	0
9. Fixed Platform Protocol (1988)	35	124
9a. Protocol to the Fixed Platform Protocol (2005)	n/a	0
10. Plastic Explosives Convention (1991)	56	125
11. Terrorist Bombing Convention (1997)	8	146
12. Terrorist Financing Convention (1999)	0	153
13. Nuclear Terrorism Convention (2005)	n/a	2

Source: Data from UN Office of Legal Affairs; updates by Terrorism Prevention Branch (20/05/2005).

Once all States are parties, the challenge is full implementation, followed by flawless international judicial cooperation.

B. The Mandate

In the context of the UN's efforts to prevent and combat terrorism, since 2002 the United Nations Office on Drugs and Crime (UNODC) has set up an expanded programme of work on technical assistance to counter terrorism that is based on mandates approved by the UN Commission on Crime Prevention and Criminal Justice and adopted by the General Assembly.

This mandate, carried out by TPB focuses on the *provision of assistance to countries, upon request, for ratifying and implementing the universal legal instruments against terrorism*. Since 2002, the General Assembly, the Economic and Social Council and the Commission on Crime Prevention and Criminal Justice have reiterated the mandates of TPB. For example, upon the recommendation of the Commission on Crime Prevention and Criminal Justice and the Economic and Social Council, the General Assembly, in December 2004, adopted resolution 59/153, entitled "Strengthening international cooperation and technical assistance in promoting the implementation of the universal conventions and protocols related to terrorism within the framework of the activities of the United Nations Office on Drugs and Crime". In that resolution, the Assembly requested the TPB "to intensify its efforts to provide technical assistance in preventing and combating terrorism, including training judicial and prosecutorial personnel, where appropriate, in the proper implementation of the universal anti-terrorism instruments".

Particular characteristics of the UNODC are its experience in promoting and facilitating international cooperation in criminal matters, especially extradition and mutual legal assistance; its operational capacities and field presence; its programmatic synergy of efforts for dealing with drug control, transnational organized crime, money-laundering and corruption.

The Eleventh Congress on Crime Prevention and Criminal Justice, held in Bangkok from 18 to 25 April 2005, further acknowledged the importance of the technical assistance to the UN Member States and in its

outcome document “Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice” commonly known as the Bangkok Declaration.

Table 4: Extract from the Bangkok Declaration:

We call upon States that have not yet done so to become parties to and implement the universal instruments against terrorism. In order to enhance the capacity of States to become parties to and implement those instruments and to comply with the relevant Security Council resolutions against terrorism, we express our support for the continuing efforts of the United Nations Office on Drugs and Crime, within its mandate and in coordination with the Counter-Terrorism Committee and the Counter-Terrorism Executive Directorate of the Security Council, to assist States in their efforts to ratify and implement those instruments, through the provision of technical assistance upon request. This might include assistance to criminal justice systems to facilitate the effective implementation of those instruments.

The latest mandate TPB got from the GA 6th Committee in January 2006 when the Committee, in its resolution A/RES/60/43, requested the TPB/UNODC “to continue its efforts to enhance, through its mandate, the capabilities of the United Nations in the prevention of terrorism, and recognizes, in the context of Security Council resolution 1372(2001), its role in assisting States in becoming parties to and implementing the relevant international conventions and protocols relating to terrorism, including the International Convention on Suppressing of Acts of Nuclear Terrorism, and in strengthening international cooperation in criminal matters related to terrorism, including through national capacity building”.

C. Cooperation with other UN Bodies

The technical assistance activities of the Terrorism Prevention Branch are undertaken in full compliance with the decisions and policy guidance of the Security Council’s Counter-Terrorism Committee and in close coordination with the work of the Counter-Terrorism Committee Executive Directorate (CTED). There is full complementarity between the normative, policy and monitoring functions of the CTC/CTED and the technical assistance provision/delivery functions of UNODC. In its communications with those countries requiring assistance for reviewing anti-terrorism legislation, CTC makes specific reference to the specialized assistance available from UNODC, which delivers legislative and advisory services, drawing on its specialized substantive expertise.

The Branch also works in close coordination with the United Nations Office of Legal Affairs (OLA), the Department for Political Affairs and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in order to insure compliance with the relevant parts of their work.

D. Strategy

The objective of the technical assistance activities of the Terrorism Prevention Branch is to strengthen the legal regime against terrorism. It means providing legal advice to countries on becoming parties to the universal legal instruments against terrorism, by assisting countries incorporate these provisions into their national penal codes, by providing training to criminal justice officials on the new laws and by assisting countries in strengthening national institutions dealing with terrorism. When requested, assistance is also given for preparing the country reports to the Security Council’s Counter Terrorism Committee.

E. Legal Advisory Services to Countries on Becoming Parties to the UN Conventions and Protocols

In order to perform its task of encouraging the adoption and implementation of the universal agreements, the Terrorism Prevention Branch has to support the countries to continue their efforts to assume these international obligations.

It is therefore the responsibility of the TPB to indicate to the Member States the added value of the universal conventions and protocols; and the arguments are the following:

- the conventions *establish a definition of a particular type of terrorist activity* and require that the States Parties *criminalize that conduct according to the definition* agreed upon in the convention or protocol
- they contribute to *establish widespread legal recognition of the defined terrorist offences*. This is essential to *fulfill the requirement of dual criminality, which is a basic principle of international*

cooperation and may be jeopardized if a legal system defines an offence in a way that is not punishable in other countries.

- There are other aspects of international cooperation in criminal matters related to terrorism in particular for the investigative and prosecution phase that depend upon the existence of applicable agreements. Many countries cannot use compulsory process, such as a search warrant or an order to secure bank records, to assist a foreign police or prosecutorial office except pursuant to legal authority based on applicable bilateral, multi-lateral or universal agreement. Consequently, it is clear that *international cooperation in criminal matters, particularly extradition, mutual legal assistance and law enforcement cooperation, is a prerequisite for countering terrorism effectively.*

Another facet of the added value of the universal conventions and protocols is the obligation to establish jurisdiction to sue a suspected offender and to refer the offender for prosecution if he or she is found in the State and extradition is refused under the provisions of an applicable convention. This dominant principle, known juridically as *aut dedere aut judicare*, was embodied in all of the criminal conventions and subsequently made mandatory by Security Council Resolution 1373 which force countries to bring to justice the penetrator of the terrorist acts, so that there will be no place where an accused terrorist is safe from extradition or prosecution.

By doing so, the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime is able to fulfill its advocacy role for promoting the universal conventions and protocols against terrorism.

Harmonization of national laws is easiest when laws refer to new crimes for which only a few nations already have national laws. Money-laundering, for instance, was not, until quite recently, a crime in many jurisdictions. A country is usually not willing to extradite a person – especially when he or she is a citizen – to another country if the offence for which that person is sought is only a crime in the requesting country and not at home. Dual criminality in the existence of laws against an offence in both requesting and hosting country of a criminal is necessary to make extradition possible.

Criminalizing certain harmful acts in all jurisdictions is therefore important if one wants to create a seamless international legal regime against harmful activity such as the financing of terrorism. However, when crimes are planned in one country but executed in another, the planning and preparation for a crime must also be subject to common international standards. The latest terrorist conventions on bombing and the suppression of the financing of terrorism also criminalize, next to planning and preparation, participation in a criminal association that has as its goal the preparation and execution of such acts. Also included is the knowing of financial support for the commission of terrorist acts. The newer conventions also extend the jurisdiction beyond the territory where the offence occurs, taking the nationality of the perpetrator or the victims into account in the decision to prosecute someone accused of terrorist acts.⁵ The goal behind these 13 universal legal instruments against terrorism is simple and I mentioned it before but it is worth re-iterating it: to create an overarching international legal regime in which there are “no safe havens for terrorists”.

F. Providing Legal Advice to Countries on Incorporating the Conventions and Protocols in their Legal System

The task does not end with the ratification of the conventions and protocols. An important part of the work of the *UNODC/TPB* is to assist countries in incorporating their dispositions into their own legal system. To do this, the Terrorism Prevention Branch analyzes national legislation related to counter-terrorism and examines the periodic reports of the countries to the Counter Terrorism Committee of the Security Council. It informs the relevant agencies of any discrepancies between their existing statutory scheme or proposed legislation and the requirements of the relevant conventions, protocols and Security Council resolutions, as well as identifies legislative needs together with relevant national authorities.

The creation of an offence of terrorist financing can be used as an example of the approach followed by the UNODC/TPB when providing advice on the implementation of the universal conventions and protocols.

⁵ *Idem*, p. 6.

The most common difficulty with respect to establishing a crime of financing of terrorism results from a belief that the general offence of participation in a crime can be used to punish terrorist financing without the need to create a separate offence or to amend those definitions in the general part of the code. Very often, countries say that they do not need a new or amended law to cover the financing of terrorism because they will simply punish it as a form of participation in the resulting terrorist bombing, murder or other violent offence or attempt, as supplemented by their anti-money laundering laws.

However, while administrative anti-money laundering structures and methods can contribute as useful information for the fight against terrorism, the financing of terrorism will almost never constitute an offence under a money laundering law which was not drafted or amended to specifically address the provision or collection of funds for the purposes of terrorism. Obviously, money-laundering statutes almost always require proof that the funds laundered are the proceeds of crime. Funds for terrorist financing may derive from ordinary crime, such as fraud offences, but more commonly they come from legitimate sources.

Another element to point out is that criminalizing the financing of terrorism only as a form of participation in the principal offences requires that the main offence be completed or attempted. Such a limited definition does not satisfy the Financing Convention, and does not enable the preventive strategy of investigating, prosecuting and punishing terrorist preparations before actual violence occurs.

G. Field Presence

Special efforts have been made to achieve increased field level presence and input, through assigning regional and sub-regional experts. This has already been done for North Africa and the Middle East, South and Central America, the Commonwealth of Independent States (CIS), Central Asia, South-East Asia and the Pacific. These experts provide specialized national and sub-regional input and perspectives and facilitate effective follow-up to the activities of the Branch. An important parallel objective of this initiative is to build-up sub-regional expertise on counter-terrorism issues. This field presence is necessary to insure proper practical expertise and experience as well as relevant follow-up to the advisory services provided.

H. Operational Partnerships

Efforts have also been made to maximize impact through operational partnerships and complementarity of efforts. In this regard, technical assistance activities are undertaken in close partnership and cooperation with numerous international, regional and sub-regional organizations. These include, but are not limited to, the United Nations High Commissioner for Refugees (UNHCR), Organization of American States (OAS), the Organization for Security and Cooperation in Europe (OSCE), the Commonwealth Secretariat, the International Monetary Fund, the African Union (AU), the International Organization of la Francophonie, the North Atlantic Treaty Organization (NATO), the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), the League of Arab States, Interpol, the International Civil Aviation Organization (ICAO), the Counter-Terrorism Working Group of the European Union (COTER), the Financial Action Task Force (FATF) and the Counter Terrorism Action Group (CTAG) of the G-8.

I. The Global Project on “Strengthening the Legal Regime against Terrorism”

In order to realize the activities, a global project on “Strengthening the Legal Regime against Terrorism” provides the overall framework for delivering technical assistance to countries. It functions as an on-going ‘rolling’ project, with global, sub-regional and national components and activities. It is regularly revised and up-dated, to determine continued relevance of all elements, discontinue those components which are no longer essential and to integrate new initiatives in response to new requirements.

Through the project, assistance was provided to 112 countries between October 2002 and March 2005. Of those 112 countries, more than 60 received direct assistance and the others received indirect assistance through sub-regional and regional activities. Over 600 national officials have been trained on the ratification and implementation requirements. They were familiarized with the provisions of the 12 universal legal instruments against terrorism and the requirements of Security Council resolution 1373 (2001).

During the period October 2002 to December 2004 the Branch achieved a project implementation rate of close to 100 per cent in relation to funds made available, thus meeting the Branch’s goal of utilization of

provided funds within a period of 12 months.⁶ This was accomplished through advance planning and initiation of project activities in anticipation of receipt of pledged voluntary contributions.

The scope of assistance provided through this project has been broadening, in terms of its geographical reach, the numbers of countries receiving assistance, and the substantive content of the assistance provided. In the future, increased attention will be given to implementation assistance, as more countries ratify the universal instruments.

J. Perspectives

As the universal legal instruments against terrorism will be achieving a universal level of ratification, new project activities will be given priority:

- *Legislative drafting assistance* to incorporate universal provisions into national legislation
- *Strengthening institutional judicial structures necessary for anti-terrorism cooperation*
- *Providing on-line technical assistance on extradition and mutual legal assistance requests*
- *Providing support for establishing international cooperation mechanisms* through mentorship, both to speed the process and achieve compliance with international standards
- *Training national criminal justice officials*, on the basis of the universal legal instruments and in accordance with criminal justice standards

Moreover, continued attention will be given to follow-up measures. The Branch will also undertake evaluations and impact assessment of its technical assistance.

After this overview of the role of UNODC/TPB, we can now proceed to other UN bodies involved in the fight against terrorism.

⁶ The 2005 activities are currently under review and evaluation.

COUNTERING TERRORISM: NEW INTERNATIONAL CRIMINAL LAW PERSPECTIVES

*Jean Paul Laborde**

I. BACKGROUND

In 1994 the United Nations General Assembly established that terrorism was “criminal and unjustifiable, wherever and by whomever committed”... “what ever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”.¹ By defining terrorism as a crime rather than as an international security issue, the General Assembly has chosen a *criminal law approach* rather than a war model of fighting terrorism.² While the General Assembly categorized international terrorism in 1994 in terms of a criminal justice model as a serious crime, the United Nations Security Council categorized it, on 12 September 2001, in resolution 1368, “like any act of international terrorism, as a threat to international peace and security”, thereby applying a security rather than a crime model to such acts. It is widely accepted that a number of countries are strongly supporting the Security Council approach while other members of the international community feel more comfortable with the General Assembly method. Nevertheless, as we will see, with the passage of its resolutions 1267 (1999), 1373 (2001), 1624 (2004) and several others, the United Nations Security Council (UNSC or just SC) has put unprecedented obligations on Member States to implement its decisions through their national criminal justice systems. Taking into account that UNSC resolutions are usually not written by international criminal law specialists, it leaves States under a heavy burden of finding their own ways to live up to their commitments under the UN Charter. We, at the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime, stand readily to *provide assistance to countries, upon request, for ratifying and implementing the universal legal instruments against terrorism, strengthening their national legislative base for complying with their international obligations on developing a robust international legal regime against terrorism* (please refer to the Appendix). It is widely accepted that a working international legal regime against terrorism will help us to bring terrorists to justice and prevent future possible attacks. Therefore, more and more accent is put not on punishing terrorists for the acts already committed (although it does remain an extremely important function of a criminal justice system) but rather on preventing new attacks from happening.

II. NEW APPROACH

In one of the TPB working papers it is explained that “‘Proactive law enforcement’ is a phrase used to convey a contrast with ‘reactive law enforcement’. The proper grammatical usage may simply be “active” or “activist”, but the adjective “proactive” has become accepted in both popular and criminological writing. Proactive law enforcement emphasizes preventing and interrupting crime, rather than reacting to crimes already committed, and its novelty is often overstated. Public safety authorities have always attempted both to prevent crime and to solve offences already committed, although the two functions have sometimes been inefficiently separated and characterized by a lack of communication. Nevertheless, the label “proactive” is now used for almost every initiative to reduce crime, having been expanded far beyond its original reference to police patrolling (emphasis added)”³

Terrorism is one of the gravest crimes. Therefore, it would be logical to conclude that a great deal of attention should be paid to preventing possible terrorist attacks. Referring to the above-mentioned paper a successful proactive criminal justice approach to terrorism prevention would need ‘*a strategy to permit intervention against terrorist planning and preparations before they mature into action*. The goal is to

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¹ Declaration on Measures to Eliminate International Terrorism. General Assembly resolution 49/60 of 9 December 1999. Annex; repr. in United Nations. International Instruments related to the Prevention and Suppression of International Terrorism. New York, UN Office of Legal Affairs, 2001, p. 233.

² M. J. Peterson. Using the General Assembly. In: J. Boulden & Th. G. Weiss, op .cit., p. 183.

³ Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments. Terrorism Prevention Branch Technical Assistance Working Paper. P.2.

proactively integrate substantive and procedural mechanisms to reduce the incidence and severity of terrorist violence and to *do so within the strict constraints and protections of the civilian criminal justice system and the rule of law*⁴ (emphasis added).

Thus, countering terrorism through penal prevention would mean *criminalizing acts that are committed BEFORE any terrorist acts take place*. And indeed in recent years, the international community has moved in this direction. Most importantly there were efforts made to criminalize recruitment, training, supplying weapons to, support, financing, conspiracy, incitement, and glorification of terrorism.

Thus UNSC resolution 1373 (2001) “*Decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; Decides also that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;...*”. Ideally these provisions of the Resolution should be incorporated into criminal codes of the countries in order to insure that they become separate criminal offences punishable under national laws.

The UNSC in its Resolution 1624(2005) further expanded this list of offences to incitement when it decided to “*Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:*

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”⁵

III. CHALLENGES TO NATIONAL CRIMINAL JUSTICE SYSTEMS

As we all have read and heard in recent years, this trend to outlaw the preparatory and supporting acts committed before or even regardless of whether actual terrorist attacks take place have attracted a lot of criticism from human rights activists. The concern is that new legislation is contradictory to the human rights standards and obligations under international human rights norms.

On the one hand, these concerns are very understandable in the countries with weak criminal justice systems where there is a certain risk that these offences will be used for political reasons.

On the other hand, the argument that these new proposed offences are contradictory to the international legal human rights norms is not correct.

Let us go back to the cornerstone of international human rights law – the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the Covenant, from which no derogation is permitted, provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

As the TPB working paper quoted above explains this provision:

To the average person, protecting the right to life means preventing its loss, not punishing those responsible for a successful or attempted deprivation. Protection by law thus demands

⁴ Ibid.

⁵ UNSC resolution 1624 (2005). P.3. par 1.

*legal measures to **interrupt and interdict preparations for terrorist violence**, not merely the identification and punishment of the perpetrators after a fatal event. (emphasis added).⁶*

We can therefore conclude that all the recent criminal justice initiatives to criminalize the conduct that facilitates the possibility of commission of terrorist acts, regardless of whether or not actual attacks take place, *are not only in full compliance with but are aimed at safeguarding a fundamental human right - the right to life!*

IV. NEW INTERNATIONAL CRIMINAL JUSTICE POLICY

With its recent move to criminalize conduct facilitating the commission of terrorist attacks and imposing legal obligations on the UN Member States to strengthen their criminal justice systems to be better equipped to prevent the terrorist attacks from happening, the Security Council moved into *domaine reserve* of sovereign States - their criminal justice system and policy. It has done so on the basis of the United Nations Charter-document that all countries have to agree to when they are becoming a member of the United Nations.

The following Articles of the Charter will help us to better understand the authority of the Security Council in these matters.

Article 24

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

V. CONCLUDING REMARKS

The UN is often criticized for its action (or more accurately lack of action) on terrorism. “Lack of the definition” of terrorism, not addressing its “root causes”, “victims” and other issues are often cited by the critics to highlight UN impotence in dealing with this gravest manifestation of crime. But the critics often fail to acknowledge that these accusations do not reflect the reality adequately and present only a one-sided picture of the problem.

The UN effectively addresses various issues related to the fight against terrorism through its different departments and agencies. For example, on the “root causes of terrorism front” the UNDP deals with poverty and UNHCHR deals with the issues of human rights. UNODC supports countries in their efforts to promote the rule of law. And finally, the International Criminal Court, although it does not deal with terrorism directly does have a victims’ fund that could be applicable to the victims of taking hostages which is under its jurisdiction according to the Statute. And most importantly, although a comprehensive definition of terrorism would be extremely useful, *the international legal regime against terrorism exists and if allowed to work properly (especially with regard to the provisions of international cooperation in criminal matters) could contribute greatly to the work of the nations of the world on the counter-terrorism front.*

⁶ Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments. Terrorism Prevention Branch Technical Assistance Working Paper. P.1.

APPENDIX

Number of Member States, which are Parties to the Twelve Universal Anti-Terrorism Conventions and Protocols.

	Mid-2000	November 2006
1. Tokyo Convention (1963)	169	182
2. Hague Convention (1970)	171	183
3. Montreal Convention (1971)	174	184
4. Int. Protected Persons Convention (1973)	102	163
5. Hostage Convention (1979)	89	156
6. Nuclear Material Convention (1980)	64	120
6a. Amendment to the Nuclear Material Convention (2005)	—	6
7. Airports Protocol (1988)	99	160
8. Maritime Navigation Convention (1988)	39	141
8a. Protocol to the Maritime Convention (2005)	n/a	0
9. Fixed Platform Protocol (1988)	35	130
9a. Protocol to the Fixed Platform Protocol (2005)	n/a	0
10. Plastic Explosives Convention (1991)	56	129
11. Terrorist Bombing Convention (1997)	8	150
12. Terrorist Financing Convention (1999)	0	154
13. Nuclear Terrorism Convention (2005)	n/a	8

Source: Data from UN Office of Legal Affairs; updates by Terrorism Prevention Branch (20/05/2005).

THE UNITED NATIONS IN THE FIGHT AGAINST TERRORISM

*Javier Rupérez**



I. INTRODUCTION

International efforts to eliminate terrorism started years before the United Nations was established. Terrorism was of concern to the international community as early as 1937, when the League of Nations prepared a draft convention for the prevention and punishment of terrorism. The draft convention defined terrorism as:

“All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”¹

Although this convention never came into existence and the definition ignores acts against civilians, rather than against the State *per se*, it did serve as a point of reference for later discussion of terrorism when the United Nations and regional intergovernmental organizations dealt with the issue from a legal and political perspective.

II. THE GENERAL ASSEMBLY

Despite many years of debate, the General Assembly has thus far been unable to agree on a definition of terrorism. But lack of agreement on a definition does not mean that the international community has made no progress in combating the problem.

The United Nations and other international organizations have managed to formulate ad hoc conventions dealing with specific forms of terrorism. Since 1963, the international community has elaborated 13 legal instruments related to the prevention and suppression of international terrorism². The most recent, the International Convention for the Suppression of Acts of Nuclear Terrorism, was opened for signature on 14 September 2005.

Over the years, levels of awareness of the phenomenon of terrorism has depended on the experience of the international community as a whole at any given time. Following the attack on Lod airport, near Tel Aviv, and the kidnapping and killing of 11 Israeli athletes during the Olympic Games at Munich in 1972, the issue of terrorism became the epicenter of attention and contention in the General Assembly when, by note dated 8 September 1972, then Secretary-General Kurt Waldheim requested the General Assembly to include in the agenda of its twenty-seventh session an additional item of an important and urgent character, entitled “Measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms”³.

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The views expressed in this paper are not necessarily those of the United Nations Counter-Terrorism Committee.

¹ 19 League of Nations O. J. 23 (1938) (never entered into force).

² These are:

- The Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963);
- The Convention for the Suppression of the Unlawful Seizure of Aircraft (1970);
- The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971);
- The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973);
- The Convention against the Taking of Hostages (1979);
- The Convention on the Physical Protection of Nuclear Material (1980);
- The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988);
- The Protocol for the Suppression of Unlawful acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988);
- The Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988);
- The Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991);
- The International Convention for the Suppression of Terrorist Bombings (1997);
- The Convention for the Suppression of Terrorist Financing (1999); and
- The International Convention for the Suppression of Acts of Nuclear Terrorism (2005).

³ See document A/8791 of 8 September 1972.

The General Assembly, as is logical given its membership and decision-making norms, accurately mirrors the global view of terrorism over the past three decades. Three different periods may be distinguished: the first, from 1972 to 1991, is characterized by the terms used in resolutions of the period: proposals of "measures to prevent terrorism". From 1972 to 1989, consideration of terrorism as a general problem was assigned primarily to the Sixth Committee of the General Assembly under an agenda item entitled "Measures to prevent international terrorism". At that time, there was a clear disagreement within the membership as to whether terrorism should be prevented through cooperation in suppressing its manifestations or removal of its root causes.

A second period covers the period 1993 to 2001. During this period, the basic considerations were human rights and terrorism and measures to eliminate international terrorism, reflecting broader agreement that the existence of root causes did not justify terrorist acts. Since then, the General Assembly has issued numerous resolutions condemning acts of terrorism and calling on Member States to cooperate with each other in order to prevent and eliminate terrorism.

The events of 2001 did much to change the orientation of the General Assembly's counter-terrorism policy. In the third (and current) period, the concept and terminology are evolving towards discussion of measures to eliminate terrorism. The disappearance of the former bipolar confrontation has had a favorable impact on the Organization and its ability to act. This development is a reminder that it is the standard-setting activity of the General Assembly that has given rise to the international conventions and protocols on terrorism whose implementation the Security Council upholds today as fundamental in the global counter-terrorism effort.

What is widely recognized, however - sometimes with a hint of reproach - is that the United Nations and, more specifically, the General Assembly has thus far been unable to establish a commonly accepted definition of terrorism. Nor has it been capable of concluding a global counter-terrorism convention, of which a definition should be a fundamental part. Indeed, since 1996, the General Assembly has been considering a draft which had its origin in a proposal by India and which, in practice, would be close to finalization were it not for continuing disagreement over this issue. The difficulties are well known: for a significant number of Member States, recourse to terrorism cannot be justified under any reason or circumstance. That position has been reiterated in United Nations documents and in statements by the Secretary-General, the Security Council and the General Assembly, including the Summit Declaration of September 2005.⁴

⁴ The Outcome Document of the World Summit includes the following paragraphs on terrorism:

Terrorism

81. We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.
82. We welcome the Secretary-General's identification of elements of a counterterrorism strategy. These elements should be developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism. In this context, we commend the various initiatives to promote dialogue, tolerance and understanding among civilizations.
83. We stress the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly.
84. We acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered.
85. We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.
86. We reiterate our call upon States to refrain from organizing, financing, encouraging, providing training for or otherwise supporting terrorist activities and to take appropriate measures to ensure that their territories are not used for such activities.
87. We acknowledge the important role played by the United Nations in combating terrorism and also stress the vital contribution of regional and bilateral cooperation, particularly at the practical level of law enforcement cooperation and technical exchange.
88. We urge the international community, including the United Nations, to assist States in building national and regional capacity to combat terrorism. We invite the Secretary-General to submit proposals to the General Assembly and the Security Council, within their respective mandates, to strengthen the capacity of the United Nations system to assist States in combating terrorism and to enhance the coordination of United Nations activities in this regard.
89. We stress the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief.
90. We encourage the Security Council to consider ways to strengthen its monitoring and enforcement role in counter-terrorism, including by consolidating State reporting requirements, taking into account and respecting the different mandates of its counter-terrorism subsidiary bodies. We are committed to cooperating fully with the three competent subsidiary bodies in the fulfillment of their tasks, recognizing that many States continue to require assistance in implementing relevant Security Council resolutions.
91. We support efforts for the early entry into force of the International Convention for the Suppression of Acts of Nuclear Terrorism and strongly encourage States to consider becoming parties to it expeditiously and acceding without delay to the twelve other international conventions and protocols against terrorism and implementing them.

However, other Member States maintain that in certain circumstances – such as the fight against foreign occupation – the use of violence does not constitute terrorism. That divergence has been further deepened by disagreement on the legal status of the armed forces in conflicts involving non-State actors: should the Geneva Conventions on humanitarian law or international counter-terrorism norms prevail?

Both the report of the High Level Panel on Threats, Challenges and Change and the Secretary-General, in his Madrid address, were very precise in this respect. The High Level Panel concluded as follows:

“158. Since 1945, an ever stronger set of norms and laws - including the Charter of the United Nations, the Geneva Conventions and the Rome Statute for the International Criminal Court - has regulated and constrained States’ decisions to use force and their conduct in war - for example in the requirement to distinguish between combatants and civilians, to use force proportionally and to live up to basic humanitarian principles. Violations of these obligations should continue to be met with widespread condemnation and war crimes should be prosecuted.

“159. The norms governing the use of force by non-State actors have not kept pace with those pertaining to States. This is not so much a legal question as a political one. Legally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes. . .

“160. The search for an agreed definition usually stumbles on two issues. The first is the argument that any definition should include States’ use of armed forces against civilians. We believe that the legal and normative framework against State violations is far stronger than in the case of non-State actors and we do not find this objection to be compelling. The second objection is that peoples under foreign occupation have a right to resistance and a definition of terrorism should not override this right. The right to resistance is contested by some. But it is not the central point: the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians.”

Similarly, in his Madrid address, the Secretary-General argued that:

“The report of the High-Level Panel offers us a way to end these arguments. We do not need to argue whether States can be guilty of terrorism, because deliberate use of armed force by States against civilians is already clearly prohibited under international law. As for the right to resist occupation, it must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. The Panel calls for a definition of terrorism which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act. I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it.”

Indeed, in order to conclude the accelerating effort to develop a global counter-terrorist policy led by the United Nations, it would be helpful to have both the convention and the definition.

At this point, an observation of a general nature should be made. In this field, as in others which receive the attention and concern of the United Nations, the inability to reach agreement is often attributed to the faults and problems of the Organization, as distinct from its Member States. But while the Organization as such is not without its shortcomings, we cannot forget the responsibility of Member States, whose will made possible the existence of the United Nations and today continues to dictate what the Organization, can and cannot do. This is particularly true with respect to the General Assembly’s efforts to agree on the text of the draft comprehensive convention on terrorism.

This observation should not be understood as a criticism of the Member States in general, or of any of them in particular. It is simply a reminder of where the power of the United Nations is vested - in the sovereignty of Member States - and of the way in which the Organization is a mirror of changing, and not always positive, developments in international relations. However, it would be malicious and incorrect to say that the Organization cannot do anything to help States in the fight against terrorism or, still more radically, that nothing can be done in the absence of a definition. These self-serving assertions, however tempting, are belied by reality.

On one hand, the absence of a definition of terrorism has not prevented the General Assembly from preparing the counter-terrorism conventions and protocols which the international community has adopted in the past and which contain descriptions of all the elements associated with the perpetration of terrorist acts. On the other hand, the international community's heightened awareness of terrorism, as reflected in the decisions of the General Assembly, is proof that tolerance of terrorism and its manifestations is minimal if not non-existent. Apart from the terrorists themselves and their sympathizers, it is extremely rare to hear words of praise or justification of terrorist acts. Mention of the "root causes" of terrorism, often a smokescreen for justification, is made today in more discreet and cautious tones and it has become more possible to approach this aspect of the problem – the extent to which political, social or economic circumstances might explain the recourse to terrorist methods or, alternatively, the attempt by terrorists to use these conditions in an attempt to justify their actions – in a reasonable and accurate manner.

Thus, the General Assembly has addressed international terrorism by developing a normative framework that identifies terrorism as a problem common to all Member States and by encouraging concerted governmental action to develop more specific national and international instruments to address it. The solutions proposed, always within the framework of respect for international law and cooperation between States which is the cornerstone of the Charter, have been gradually strengthened to the point that they have become obligatory as the scope and deadliness of terrorism continue to grow. The package of counter-terrorism measures that the United Nations now imposes on its 191 Member States constitutes a strong, solid and reasonable bulwark. Despite initial hesitation and some remaining reticence, United Nations counter-terrorism policies and doctrines are today a critical point of reference when confronting one of the most serious and visible threats to the security of mankind at the dawn of the twenty-first century.

III. THE SECURITY COUNCIL

The Security Council is the United Nations organ that has borne most of the responsibility for addressing the problem of terrorism. And, contrary to widespread belief, it has been doing so since the early 1990s, nearly 10 years before the terrorist attacks of 11 September 2001. In the late 1980s, a number of shocking terrorist acts jolted the conscience of mankind. In December 1988, Pan-Am flight 103 crashed in the Scottish village of Lockerbie when a bomb placed on board the aircraft exploded. The 259 passengers on board and 11 persons on the ground were killed. In September 1989, the French UTA flight 772 crashed in the Niger after a device on board the aircraft exploded; a total of 171 persons died. In both cases, the Libyan Arab Jamahiriya was alleged to have been involved in the attacks. On 26 June 1995, a group of terrorists made an unsuccessful attempt on the life of President Hosni Mubarak of Egypt, who was attending a meeting of the Organization of African Unity in Addis Ababa. Three of the suspects sought refuge in the Sudan, whose Government declined to grant Egypt's request for their extradition.

In January 1992, Security Council resolution 731 (1992) warned the Libyan Arab Jamahiriya of the consequences if it failed to hand over the suspects. In March of that year, resolution 748 (1992), which characterized the Libyan actions as a threat to international peace and security and invoked Chapter VII of the Charter of the United Nations in imposing a broad range of sanctions, was adopted. It was later reinforced by resolutions 883 (1993) and 1192 (1998). As a result of the sanctions imposed by the Security Council, France obtained from Libya partial satisfaction of its demands in 1996 and six Libyan nationals were tried and convicted of participation in the attacks on the UTA plane. The two Libyan citizens suspected of having organized the attacks on the Pan-Am flight were handed over to the Netherlands on 5 January 1999 to be tried by Scottish judges under Scottish law. One defendant, Abdel Basset al-Megrahi, was convicted of murder in 2001 and sentenced to life in a Scottish prison. On 12 September 2003, after the Libyan Arab Jamahiriya formally stated that it accepted responsibility for the actions of its officials and agreed to pay billions of dollars to the victims' families, the Security Council lifted the sanctions imposed on it.

Following the Sudan's refusal to grant extradition of the individuals suspected of carrying out the attacks on the life of President Mubarak, the Security Council imposed economic sanctions and a ban on commercial flights. The sanctions, which had a marked effect on the conduct of the Sudanese authorities, were lifted on 28 September 2001 after the Government decided to expel various individuals suspected of terrorism, including Osama Bin Laden himself.

IV. THE 1267 COMMITTEE

On 7 August 1998, two powerful bombs exploded simultaneously in the American embassies in Kenya and Tanzania. The attacks caused a total of 263 deaths, including 12 Americans, and injured more than 5,000 people. In Security Council resolution 1189 (1998), adopted immediately after the attacks, a vigorous condemnation was accompanied by a demand for Member States' cooperation in the investigation. The perpetrators were gradually identified as followers of Bin Laden and members of the Al Qaida network, which was then based in Afghanistan under the protection of the Taliban Government. The Council imposed a range of economic sanctions on the Government of Afghanistan and demanded that the Taliban cease its support for international terrorism and extradite Bin Laden. The sanctions regime was reinforced in December 2000 and again in 2001. In paragraph 6 of its resolution 1267 (1999) on Al Qaida and the Taliban and related persons and entities, the Security Council established a committee to monitor compliance with the sanctions, known as the Al Qaida and Taliban Sanctions Committee or the 1267 Committee, in order to help the Council verify Member States' compliance with the sanctions regime.

V. THE COUNTER-TERRORISM COMMITTEE

The terrorist attacks of 11 September 2001 in New York, Washington and Pennsylvania caused a shock felt and remembered by all. The United Nations' response to the attacks was prompt and decisive. On 12 September 2001, the Security Council unanimously adopted resolution 1368 (2001), whose main and novel feature lay in its invocation of the right to individual or collective self-defense under the terms of Article 51 of the Charter and which solemnly called upon all Member States to work together "to bring to justice the perpetrators, organizers and sponsors" of terrorists acts and to "redouble their efforts to prevent and suppress" them. This resolution is considered a turning point as it legitimized the use of force to fight terrorism.

A few days later, on 28 September 2001, the Security Council invoked Chapter VII of the Charter and unanimously adopted resolution 1373 (2001), which represented a major qualitative and quantitative advance in the new approach to terrorism that the United Nations was seeking to impose. The resolution, which is binding on all Member States, imposes a wide range of legal, financial, police and cooperation measures. It also requires all Member States to ratify and implement the provisions of the international counter-terrorism instruments. Resolution 1373 (2001) also established the Counter-Terrorism Committee, a subsidiary organ of the Security Council comprising all 15 of its members and charged with monitoring compliance with the resolution. The Committee was instructed to begin its work by requesting all Member States to submit reports on the measures that they had adopted in implementation of the Council's decisions.

In adopting resolution 1373 (2001), the Security Council was entering a virtually new area of the Organization's political and legal life by requiring, inter alia, the criminalization of terrorism and the acts of perpetrators, accomplices and financiers. At the same time, the resolution calls upon States to ratify the international counter-terrorism conventions and incorporate them into domestic law. Resolution 1373 (2001), unlike those referred to previously, does not impose penalties on States which are responsible for acts considered reprehensible by the Council or which collaborate with such States; instead, it represents a decision on the measures that all Member States should adopt in the fight against terrorism.

In the four years of its existence, the Counter-Terrorism Committee has maintained an active, rigorous correspondence with Member States. It is clear that Resolution 1373 (2001) has contributed to the development of an environment in which no one dares any longer to question the obligation of all States to cooperate in the effort to isolate terrorists and terrorism.

VI. THE COUNTER-TERRORISM COMMITTEE EXECUTIVE DIRECTORATE

In the early days of its work, the Committee had only a small number of experts and support personnel. In late 2003, some of its members drew attention to the inadequacy of these resources and to the need to "revitalize" the Committee. A report on this topic (S/2004/124), adopted by the Committee on 19 February 2004, proposed the establishment of a Counter-Terrorism Committee Executive Directorate (CTED), headed by an Executive Director who would be appointed at the level of Assistant Secretary-General and would work under the policy guidance of the Committee. The document was unanimously endorsed by the

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Council in its resolution 1535 (2004) of 26 March 2004.

On 18 May 2004, in compliance with the provisions of resolution 1535 (2004) and with the approval of the Security Council, the Secretary-General appointed an Executive Director who took up his functions on 28 June. Since then, I have focused my activities on what is, in fact, the core and ongoing aspect of his mandate – to propose working frameworks to the Committee, implement its decisions, develop frameworks for cooperation with States and international organizations, undertake the urgent and immediate task of obtaining budgetary approval for the expenditures of the new entity, and proceed with the recruitment of staff. With a staff of carefully chosen experts responsible for assisting the Committee in its work, CTED was declared fully staffed in September 2005 and fully operational in December 2005.

CTED represents a shift into a new phase of the United Nations' efforts to eradicate terrorism; the experts of its primary counter-terrorism body maintain an intensive dialogue with Member States concerning their implementation of resolution 1373 (2001). This dialogue involves, in the first phase, collecting from States written reports on their implementation of the counter-terrorism obligations set forth in the resolution. All Member States are required to submit such reports, which serve as the basis for an active dialogue with the Committee and CTED. A more thorough dialogue occurs in the context of country visits, which are a more focused, practical follow-up with the national authorities responsible for implementing the various provisions of the resolution. The visits are conducted with the consent of the host country and in full cooperation with its authorities. Following each visit, the counter-terrorism experts compile a report based on their on-site observations in order to assist the State in its implementation of the resolution and to identify the State's assistance needs. On that basis, and in full cooperation with the Member State, CTED then works with donor countries and international organizations to facilitate provision of the necessary assistance.

One of CTED's tasks is that of coordination. In order to avoid duplication of effort and to achieve the best results, CTED cooperates and coordinates its work with international and regional organizations and implements some of the best practices and guidelines developed by these organizations in its assessment methodology.

Cooperation is also achieved in the on-site visits; experts from these organizations participate in CTED's visits and share with its experts their views on the best ways to assist Member States in implementing resolution 1373 (2001).

VII. THE 1540 COMMITTEE

Other recent resolutions of the Council also deserve mention. In resolution 1540 (2004) of 28 April 2004, the Council notes with concern the possibility that terrorists might use chemical, biological and nuclear weapons of mass destruction. The text of the resolution, which falls under Chapter VII of the Charter of the United Nations, imposes a detailed set of obligations on Member States in order to ensure that terrorists, here characterized as "non-State agents", do not come into possession of such weapons. The resolution states that the agents to which it refers are those described in resolution 1267 (1999) (on Al Qaida and the Taliban and related persons and entities) and 1373 (2001) (on counter-terrorism) and establishes, for a period of no more than two years, a Committee as a subsidiary organ of the Security Council responsible for monitoring compliance with its requirements.

Thus, through these key resolutions, the Security Council has established three subordinate bodies to deal with terrorism: the 1267 Committee, created in the late 1990s in order to monitor compliance with the sanctions on the Taliban and Al-Qaida and to maintain a list of internationally designated terrorists to be apprehended and brought to justice; the Counter-Terrorism Committee, with its Executive Directorate; and the 1540 Committee, which is responsible for keeping weapons of mass destruction out of the hands of non-State actors.

VIII. SECURITY COUNCIL RESOLUTION 1566 (2004)

Among the measures taken by the Security Council in its development of a global counter-terrorism strategy, mention should be made of the recent adoption of two resolutions.

Resolution 1566 (2004), unanimously adopted on 8 October 2004 under Chapter VII of the Charter of the United Nations, has its origin in a draft presented by the Russian Federation following the terrorist attacks on Beslan, in the Russian republic of North Ossetia, in September 2004. The attack took the lives of some 350 persons, 11 of them members of the Russian security forces, and 172 children who were students at the school in which the terrorists carried out their attack. The resolution is similar to resolution 1373 (2001) but contains the outline of a definition of terrorism and an unambiguous condemnation of terrorism and of any attempt to justify it. Paragraphs 9 and 10 of the resolution establish a working group “to consider and submit recommendations to the Council on practical measures to be imposed on individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee. . .” and to consider “the possibility of establishing an international fund to compensate victims of terrorist acts and their families. . .” Thus, this resolution opened new areas in the Organization’s counter-terrorism package.

On 16 December 2005, the working group submitted its report to the Security Council.⁵ Some may find this document disappointing; although the working group made recommendations on the future work of the Security Council in the area of counter-terrorism, there was no agreement to expand the list of individuals, groups and entities involved in or associated with terrorist activities established under the Al-Qaida/Taliban Sanctions Committee. With respect to the compensation of victims, the working group concluded that the best approach, for the time being, was to encourage individual States to determine ways and means to extend assistance to the victims of terrorist acts and that the establishment of a compensation fund for victims of terrorist acts at the international level was still premature.

IX. SECURITY COUNCIL RESOLUTION 1624 (2005)

Initially proposed by the United Kingdom and based on Chapter Six of the Charter of the United Nations, resolution 1624 (2005) was adopted unanimously on 14 September 2005 at the World Summit, soon after the attacks of 7 July and 21 July 2005 on London’s public transport system that killed 56 people and injured some 700.

This resolution condemns “in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security”. It further calls upon Member States to adopt measures to prohibit by law incitement to commit a terrorist act or acts, to prevent such conduct and to deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct. Like resolution 1373 (2001), resolution 1624 (2005) calls on States to report to the Counter-Terrorism Committee as part of their ongoing dialogue on counterterrorism and directs the Committee to continue to help Governments strengthen their capacities.

One of the important elements of this resolution is its establishment of links between incitement to terrorism, attempts to justify or glorify terrorist acts (*apologie*) and furthering of such acts.

X. THE SECRETARY-GENERAL OF THE UNITED NATIONS

The contributions of the Security Council and the General Assembly to United Nations policy on the issue of terrorism have been supported by those of Secretary-General Kofi Annan, who clearly wishes to play an active role in the development of a United Nations stance against terrorism. In October 2001, shortly after the attacks of 11 September and the Security Council’s adoption of resolution 1373 (2001), the Secretary-General decided to establish a Policy Working Group on the United Nations and Terrorism. The Group made 31 recommendations in August 2002 under a “tripartite strategy” that sought to:

- a) Dissuade groups of discontents from adopting terrorism;
- b) Deny groups or individuals the means to carry out terrorist acts; and
- c) Promote broad cooperation in the fight against terrorism.⁶

⁵ See document S/2005/789.

⁶ Identical letters dated 1 August 2002 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council (A/57/273 and S/2002/875, respectively).

These recommendations reflect an institutional sense of the Organization as subtly different from Member States in that it offers an order of priorities which, without altering the fundamental direction imparted by the Security Council and the General Assembly, focuses on different areas. The Policy Working Group considered that the United Nations should concentrate its direct role in counter-terrorism on the areas in which the Organization has a comparative advantage.⁷

Lately, the Policy Working Group's guidelines have been superseded by the recommendations of the High Level Panel on Threats, Challenges and Change, the ideas set forth in the Secretary-General's Madrid speech and the work of the Counter-Terrorism Implementation Task-Force. In its report "A More Secure World: Our Shared Responsibility", the High-level Panel on Threats, Challenges and Change recommended that the United Nations should develop a comprehensive strategy, respectful of human rights, to respond to the threat of terrorism.

The High Level Panel, on behalf of the United Nations, also offered a definition of terrorism that could be adopted by Member States and called for a definition of terrorism which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international Organization to do or abstain from any act.

In his Madrid address on 19 March 2005, the Secretary-General presented a comprehensive, concrete strategy for the United Nations to the participants in the International Summit on Democracy, Terrorism and Security. He began by saying that:

"Terrorism is a threat to all States, to all peoples, which can strike anytime, anywhere. It is a direct attack on the core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflicts".

The Secretary-General identified five key elements of a United Nations strategy in the fight against terrorism:

"First, to dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals;
Second, to deny terrorists the means to carry out their attacks;
Third, to deter States from supporting terrorists;
Fourth, to develop State capacity to prevent terrorism; and
Fifth, to defend human rights in the struggle against terrorism".

He announced that all departments and agencies of the United Nations would contribute to the implementation of this strategy and established an Implementation Task Force, under his Office, which will meet regularly to review the handling of terrorism and related issues throughout the United Nations system.

The Secretary-General went on to urge world leaders to unite behind the High Level Panel's definition of terrorism in an instrument which had clear moral force and stressed that:

"It should be clearly stated, by all possible moral and political authorities, that terrorism is unacceptable under any circumstances and in any culture".

XI. COUNTER-TERRORISM AND HUMAN RIGHTS

As indicated by the Secretary-General, one of the main roles of the United Nations in the counter-terrorism effort is to seek to ensure that States respect human rights while countering terrorism. This task is carried out principally by the United Nations human rights bodies based in Geneva, Switzerland, under the coordination of the Office of the High Commissioner for Human Rights (OHCHR). At its sixty-first session in April 2005, the Commission decided to appoint a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The United Nations human rights

⁷ See the report of the Policy Working Group on the United Nations and Terrorism in annex to document A/57/273/S/2002/875.

treaty bodies and special procedures based in Geneva continue to pay close attention to the issue of human rights and counter-terrorism within their relevant mandates and resources.

In fact, however, all United Nations bodies are called upon to take the human rights dimension into account. The Counter-Terrorism Committee recognizes that it does not, strictly speaking, have a human rights monitoring role under the mandate conferred by resolution 1373 (2001). Nonetheless, the Committee has acknowledged that human rights need to be taken into account in its work and that of CTED. This follows from clear pronouncements by the Security Council; for example, in paragraph 6, of the annex to its resolution 1456 (2003), the Council affirms that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.” This position is also expressed in the 2005 World Summit Outcome Document, adopted in New York in September 2005.

Generally speaking, the position of the United Nations is that effective action against terrorism and respect for human rights are not incompatible objectives. The international human rights instruments, as well as some of the regional instruments, contain provisions allowing for limited restrictions on some rights in exceptional situations of “public emergency which threatens the life of the nation” (see, for example, article 4 of the International Covenant on Civil and Political Rights). The threat of international terrorism may, under certain circumstances, meet this threshold although all actions taken in such situations must be strictly necessary and proportionate to the intended aim. At the same time, certain rights, such as the right to life and to freedom from torture and cruel, inhuman or degrading treatment or punishment, are never subject to suspension or restriction. The Executive Directorate has on its staff a human rights officer whose primary responsibility is to advise the Executive Director on all aspects of international human rights, humanitarian and refugee law that are relevant to the Committee’s mandate.

The basic principle guiding the United Nations in this area is that the struggle against terrorism is not served by compromising human rights; on the contrary, respect for human rights is not only compatible with a successful counter-terrorism strategy; it is an essential element of it.⁸

It might be pointed out that although the General Assembly continues to debate the question of whether terrorism itself violates human rights, there is broad agreement that terrorism has a grave impact on individuals’ ability to enjoy their human rights. Indeed, the United Nations system is paying increasing attention to the issue of the human rights of victims of terrorism. The issue was addressed specifically in the Outcome Document of the 2005 World Summit and in Security Council resolution 1566 (2004), which called for the creation of a working group to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families. In Security Council resolution 1624 (2005), the Council expressed “its profound solidarity with the victims of terrorism and their families” and stressed “the importance of assisting victims of terrorism and providing them and their families with support to cope with their loss and grief”.⁹ In addition, the question of the rights of victims was raised by the Secretary-General as a key concern in a comprehensive counter-terrorism strategy.

There is no doubt that assisting the victims of terrorism and their families is one of the challenges to be faced by the United Nations in the future.

XII. A LOOK INTO THE FUTURE

The United Nations has become a key player in the global effort to eradicate terrorism. All the Organization’s bodies and departments, and the Secretary-General himself, are dedicated to this task.

The dilemma faced by the United Nations, and indeed by mankind as a whole, is how to respond to this challenge without abandoning or setting aside the characteristics of our common civilization, which gave

⁸ See the report of the Secretary-General entitled “Protecting human rights and fundamental freedoms, while countering terrorism” (A/60/374).

⁹ S/RES/1624, ninth preambular paragraph; similar language is used in the Outcome Document of the 2005 World Summit (A/RES/60/1, para. 89).

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birth to the United Nations and has maintained it over time as the most perfect - or, if you will, the least imperfect - of the organizations that mankind has known in its long and troubled history. The goal is to overcome the dark forces of totalitarianism and it is to be hoped that with clarity of judgement, resolute will and a sense of history, the United Nations will rise to the challenge by meeting the international community's expectations. The preliminary results offered here give us reason to believe that we will succeed.

THE CONVERGENCE OF TELECOM AND FINANCIAL SERVICES AND ITS EFFECTS ON AML/CFT WIRE REMITTANCE OPERATIONS

*John Forbes**



Fast-moving technology that is bringing about the convergence of telecom and financial services is challenging the cash-based premise of current anti-money laundering (AML) efforts. The cellular phone value transfer system is one of these convergence areas. In the Philippines this transfer system is currently very well controlled and deemed greatly beneficial to consumers as it greatly facilitates remittance flows from migrant workers, reduces cost to the poor, and is convenient to use. Careful thought however should be given to the effects of this fast growing phenomenon on AML operations and legal regimes.

In this presentation we will review a typical cash-based remittance money laundering operation; examine how it was brought to successful fruition and how the use of small payments technology may provide beneficial and possibly not so beneficial outcomes for the future.

I. MONEY LAUNDERING THE OLD-FASHIONED WAY

A. The Simple Drug-Trade Model

The simple drug-trade business model calls for drug-producing organizations in the home country to focus on product development and packaging, to develop ways to nullify or limit regulatory and security efforts, and to develop a culture of corruption, including systems of drug transportation. In the target country they need to focus on market penetration in the target country through development of sales networks, and revenue collection mechanisms which may include both direct and outsourced collections — via brokering, profit repatriation and investment.

B. Cash Is Heavy but Still King

Drugs and terror financing at the street level generally involve cash collections and, in the USA, most street drug sales generate cash in small denominations of under \$100. Booming drug sales mean booming volumes of cash. Each kilo of cocaine sold generates 3 kilos of cash in street collections of \$10s and \$20s. Five million dollars in \$100 bills is a stack 20 feet high.

The quantity and velocity of drug money is high risk to the criminal organizations. It invites competitors and law enforcement to target the collection and consolidation points—known as “stash houses”. Bulk cash movements are risky and even though heavily used, the organizations are always looking to find a safer way to move the cash around.

C. How to Launder a Million the Old Fashioned Pot Smuggler’s Way

The most basic of these schemes, as outlined in the attached diagram (compliments of the Rolling Stone magazine and author Robert Sabbag), is the use of bulk cash movements where the cash is flown out of the collection country, moved via cargo or mail to an off-the-shelf company in a haven country. The off-the-shelf company is only a shell, with merely a bank account opened under a corporate name. Money is “borrowed” from the corporation in the haven country and wired to a subsidiary company of the drug organization to open a front business that is cash-based (for example a retail store) to cover the illegal funds being supplied by the offshore account. The money is reported to tax authorities as revenues to keep the authorities happy and the resulting net funds are successfully “cleaned”.

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D. How to Launder A Million Dollars—the Government-Destabilizing Colombian Drug Lord Way— Compliments of Rolling Stone Magazine¹

Mr. A is a Colombian drug lord. A million dollars he has made from cocaine sales sits in New York in need of deodorizing. Mr. B is a legitimate Colombian businessman who wants to buy a million dollars worth of American computers but his government wants 21 cents on every American dollar he buys with pesos. As a solution they both contact a money broker who takes care of their needs for a nominal fee, following these steps: 1) the million dollars is smurfed (transferred in tiny amounts) or hauled overland to an account in a Mexican bank; 2) the broker writes a check for \$1 million at a New York correspondent bank and gives it to XYZ computers; 3) XYZ computers ships Mr. B his machines from its Panamanian free-trade zone warehouse; 4) Mr. B gives the broker a million dollars worth of pesos; and 5) the pesos become squeaky-clean pocket change for Mr. A. This results in a \$6 to \$8 billion annual loss in revenues to the Colombian government.

E. The New York City Situation

In the year 1995, over \$900 million flowed through 23 licensed money remitters to Colombia based on payment order data. Census figures show there are only 25,521 Colombian households with incomes of approximately \$27,000 or \$689,067,000 in total. Even given a significant allowance for undercounting, \$900 million is a suspiciously large amount of remittances. A street survey by the “El Dorado²” Task Force indicated that an average remittance was valued at \$250-\$300 per transaction. The El Dorado study focused on wire transfers and not other forms of remittances like checks, money orders or cash in the mail. US Treasury estimated, based on the flow patterns, that about \$400 million was being laundered. Operation Wire Drill had as its mission the behaviour modification of the wire remittance industry in New York City (NYC).

F. Things Get Out of Hand

Things got out of hand and the El Dorado Money Laundering Task Force and Department of Justice requested the US Treasury Department to issue a Geographical Targeting Order (GTO) to examine NYC remittance flows to Colombia. The GTO is used to impose stricter reporting and record keeping requirements on specified financial service providers in a certain geographical area for a limited time. At first, 12 remittance license holders were involved but then it was expanded to 23 covering approximately 3,200 store fronts. The Order required a special remittance form to be filled out and ID presented for transactions in excess of \$750 going to Colombia.

The EL Dorado Task Force coordinated with DIAN, an investigative agency under the Colombia Treasury Department, and with local law enforcement in New York as the Order took effect. Disruption in the laundered funds chain in NYC caused the drug organizations to turn to other methods, primarily bulk cash movements. Undercover operations, highway, and outbound port seizures saw dramatic increases in activity. There was an increase of \$63 million in cash seizures at ports of Miami, Boston, and NYC over the seizures made during the previous year.

G. Aftermath

The aftermath of the Geographical Targeting Order and Operation Wire Drill was a drop in remittance costs in NYC from 7% to 3.5%. Drug money was forced out of the marketplace causing wire remitters, who relied on the drug trade, to drop their fees for legitimate customers. There was also an increase in bulk cash seizures in USA and Colombia. Remittance cells were hit in NYC with more than 100 arrests and resulting convictions and approximately \$13 million seized. Anti-Money Laundering requirements for Money Services Businesses were enhanced in USA and Colombia. Crackdowns on unlicensed remitters in Colombia and USA took effect. Creative use of a trade-based targeting system used to identify trade anomalies proved effective in tracking the displacement for payment orders and remittances. Money laundering patterns in NYC then shifted to commodities, bank drafts, and other transfer methods.

H. The Indispensable Money Broker

Money brokers are very active and important actors in the drug trade. They serve as intermediaries

¹ Sabbag, Robert. Rolling Stone Magazine, August 21, 1997 pages 82 and 86.

² The El Dorado Money Laundering Task Force was a multi-agency law enforcement entity operating as an integral part of the New York New Jersey High Intensity Drug Trafficking Area Task Force.

between drug, cash, and domestic importers. They operate fairly openly where importers shop for US Dollars. Why? A surplus of cash from the drug trade reduces the exchange rate on the black market, plus no taxes and tariffs are paid. Buyers could save as much as 21% on a foreign exchange transaction. Brokers' commissions are based on the location and type of financial instrument used to transfer value, and a wire transfer is the lowest risk - highest value instrument.

I. Smurfs - the Money Launderer's Army

Smurfs are workers in the money launderer's army. Smurfs fan out and spread small denomination drug deposits at remittance centres, open multiple bank accounts, and purchase money orders and traveller's checks at the direction of money brokers. Detection systems spurred on by government oversight and penalties have slowed this option down in recent years.

J. Wire Remittance Payment Orders—the Crown Jewel

Criminals constantly look for ways to infiltrate or establish wire remittance outlets to convert cash into the prized wire transfer orders. The payment order is the primary accounting document and serves two purposes: as an invoice to account for cash received and as a receipt for the customer. Because Payment Orders are required under law to have specific information (including: names of sender and recipient, telephone numbers, transferred amount and the fees charged) generating false payment orders became a cottage industry for money laundering in NYC. Phone books were used to create fictitious senders and recipients, other customers' information was used, and various combinations of individuals' information were used to cover the placement of drug cash.

K. Remittance Industry Vulnerabilities

1. Franchisees/License Holders

Franchisees and license holders need to be vigilant for instructions to transfer funds that are inconsistent with the other details of the payment order. If franchisees or license holders choose to be "wilfully blind" to criminal activity, they can be prosecuted. Some franchisees were in fact operated by criminals.

2. Store-Front Outlets

Store-front outlets that are used as remittance centres are usually working for multiple license holders making it hard to detect money laundering patterns. There are usually many locations giving smurfs easy access. Large cash deposits, night depository drops, and armoured cars make it easy to cover money laundering activities. The storefronts are authorized to validate identity documents making it easy to assist the smurfs. They create the payment order—easy to launder or structure transactions for smurfs. They are usually connected to paying agents in foreign countries making it easier to use codes or other methods to launder. They also are usually involved in marketing other products making it easy to cover lack of real remittances.

L. The Tools Used By Law Enforcement

The tools used by law enforcement to track down these types of operations include the Bank Secrecy Act which required the reporting of cash and provided the capability to bring into effect the Geographical Targeting Order, the Money Laundering Act of 1986 and the "sting provisions" of the Act, which were the legal provisions for a certified undercover operation with on-hand cash and operational flexibility.

Most importantly, the criminal and civil forfeiture laws were enacted and an Asset Forfeiture Fund created which permitted law enforcers to share and use a portion of the forfeited criminal funds for operational purposes. This was one of the key elements that held the various law enforcement agencies together under the El Dorado Money Laundering Task Force.

The purpose of the undercover operation was to place the government between the street cash and the money broker/launder in an attempt to understand the process, identify the conspirators and build criminal and civil investigations against the criminals for money laundering or other crimes. Operation Wire Drill was one such investigation that focused on modifying the behaviour of the wire remittance industry in NYC.

M. Lessons Learned From the NYC/GTO and Operation Wire Drill

Lack of effective AML supervision can cost money-service businesses money and destabilize the

economy of the target country. Taking criminal funds out of the transfer system will help to drive down remittance costs to the legitimate customer as we have seen above. The use of new technology to address old problems still brings us back to the basic question—who is the sender and receiver? Consider the use of an AML monitor for noncompliant firms. Some firms were cleaned up using this method. Use non-law enforcement data to help identify the size of the problem. And team agency members from various disciplines to pursue launderers. Focus on systemic money laundering issues, try to modify bad behaviour and continue until the job is done.

N. The Wire Drill Group

The Wire Drill group continued on spinning off significant cases from the remitter activity. One was the use of gold items such as screws and belt buckles, to laundering based on undercover operations, and the trade-based money targeting systems. In one case, developed as a GTO investigation, seven years led to the arrest of four Colombian North Valley cartel kingpins smuggling one million pounds of cocaine into the United States, laundering \$10 billion dollars using bribery, murder, and wiretaps on rival drug traffickers. One group member, previously arrested for GTO-related money laundering investigations, also committed more than 34 homicides at the same time he was laundering cartel money through three remittance store fronts he owned in NYC.

Secretary Rubin's Question

More visionary than the Wire Drill team, in July 1996 then US Secretary Rubin asked, "What do you and your team think about the electronic wallet idea? Will it affect your operations?"

The Wire Drill team responded, "Well, Mr. Secretary, until the day comes that a drug dealer and the buyer can find a safe and easy way to exchange dollars for drugs it won't affect our anti-money laundering operations. It will be still cash-centred".

II. MONEY-LAUNDERING INNOVATIONS

A. The Electronic Wallet (1996-2002)

Secretary Rubin was referring to the electronic wallet of Europe, which did not catch on for a number of reasons. The inconvenient technology made the devices cumbersome to use. After the Atlanta Olympics, the electronic wallet designers went back to the drawing board to work out problems but some technical glitches remained and more importantly, people's preference was for cash. To make matters worse, banks viewed the new technology effort as competitive pressure that would cost the bank clients and they were not happy to lose business. A lot was said about the authentication protocols, a possible digital "know-your-customer". In sum, these efforts were ahead of their time, the technology infrastructure to support them was not ready, and user acceptance was low.

B. The Convergence of Financial Services and Telecommunications

Secretary Rubin's question resonates in 2004

In November 2004, Secretary Rubin's question resonated during a presentation at the Asian Development Bank (ADB) in Manila, Philippines, where representatives of Globe Telecom, a cellular phone operator, explained their G-Cash product, and its myriad applications, to an interested audience. What was discussed was peer-to-peer cash transfer in an easy, safe, convenient manner, among other things. Would this be the system that would replace cash in drug sales or other criminal activity, would it cause a paradigm shift in law enforcement operations? Or would it provide a sea change for the good guys and deny the cover of legitimate remittance to the drug trade and terror financing, helping to close this avenue of abuse? Which of these alternative futures will prevail is not yet clear, but the story in the Philippines is a good one and bodes well for the future. The question is whether or not continued progress in technology and market forces will eventually overtake that well-designed system as well. Let's see.

C. The Wireless Situation in the Philippines November 2004

In November 2004 there were three wireless providers in the Philippines. Sun Telecom was very small and still emerging - it had not developed a value transfer programme at that time. The Philippine Long Distance Telephone (PLDT), the largest telecommunications company in the Philippines was the parent company of Smart Telecoms who started Smart Padala, a bank-based remittance system in conjunction with local bank Banco de Oro.

Globe Telecom rounds the field out as the second largest wireless provider, and the only one at that time with peer-to-peer (P2P) value transfer. Globe is a good solid firm and was awarded a prize from an international technology panel in France for the G-cash technology. In November 2004, Globe's G-Cash had 20,000 subscribers and by March 2005, it grew to 320,000 subscribers. By January 2006, the total registered users had grown to 1.2 million.

D. Philippine Cellular Phone Facts

The Philippine wireless market is somewhat unique. It has the largest population of Short Message Service (SMS) users in the world and has a very mature market for SMS services, as the "texting" capital of the world. Ninety five percent (95%) of the market is prepaid rather than post-paid. This is for a lot of reasons—lack of credit, convenience for operator and user, extensive infrastructure to support prepaid cards. Thirty five percent (35%) of the population has a cell phone; while 95% of the remaining has access to a cell phone through friends or family members. Even geographically inaccessible locations normally have cell phone coverage.

E. Why it Works

The Philippine wireless value transfer system works well for a number of reasons: there is a convergence of technologies and services at low cost that is easily understood by the market, and uses the most accessible device in the Philippines - the cell phone.

Overseas remittances from the Middle East, other parts of Asia, USA, and to a lesser degree Europe, account for an estimated value inflow of \$7 to \$8 billion a year. Most experts consider it most likely to be 25% more. The figures are vague and amorphous due to statistical collection methods and the variety of transfer methods. One thing certain is that, as in the NYC scenario, remittances are normally in small amounts, usually \$200-\$300. Remittance volume spikes on holidays, as expected.

From a remittance standpoint, the Philippine system also responds to first and last mile issues. The "first mile" is that time a person has to take to get the remittance or value into the system in one location and the "last mile" represents the efforts needed to deliver the value/money to the recipient. Near-universal cellular site coverage in the Philippines eliminates the last mile.

Other features like the SMS direct transfers and the salutations that can accompany the value transfer, line notations of an event like "Happy Birthday", "Happy Anniversary" or "Study harder or I won't send any more money", make the system more appealing. In the end, the system reduces or eliminates the first and last mile in most cases. The value transfers of very small permitted amounts puts the system in the realm of most people and does not give rise to money laundering concerns. The system is also inexpensive for small businesses since they need no special equipment other than a cell phone.

F. Who Benefits

It benefits many sectors, mainly those with no bank accounts, since there is no need to maintain an account balance even with Smart. Also, the poor on limited incomes and those remotely located now can conduct limited financial transactions. The overseas foreign workers remittances, from where a major percentage of the country's incoming cash flow is generated, are a major support for the Philippine economy. The Government also benefits - from more accurate remittance flows, better view of transfers and overseas connectivity; petty corruption in government is eliminated when citizens can pay for its services directly. Businesses are happy about fast settlement of accounts. As mentioned earlier, there are no requirements for major systems purchases at points of sale (POS). Money launderers do not have a significant entree at current Philippine standards - CFT? That could and will change within the next year as the technology evolves.

G. How Does It Work?

Figure 1: G-Cash Phone-to-Phone Remittance

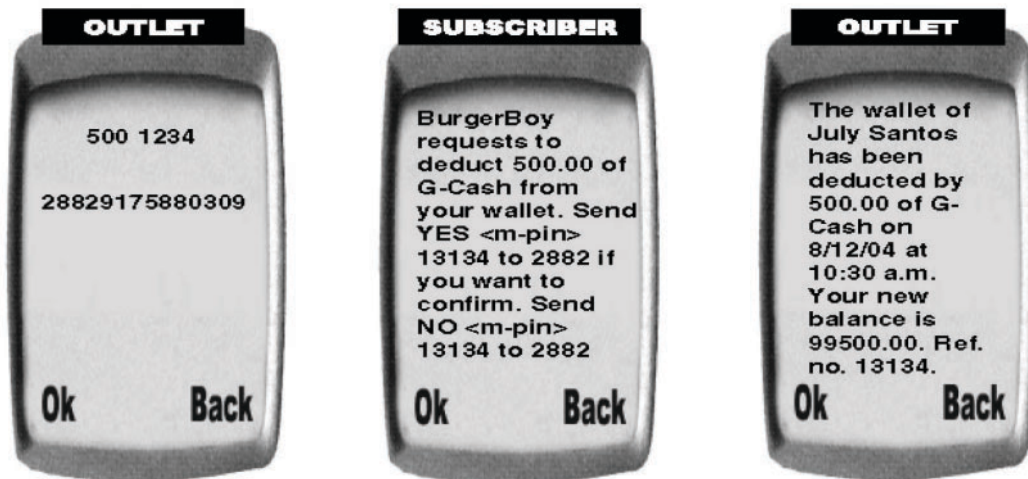


Sender enters amount and PIN, then sends to mobile number of recipient.

Sender and recipient receive an SMS advisory message, with a corresponding trace number.

Source: Gartner Research (February 2005)

Figure 2: G-Cash Purchase at a Registered Outlet



Merchant keys in sell command, amount, PIN and mobile number of recipient.

Subscriber receives SMS, requesting confirmation, and replies with yes, PIN and reference number to confirm.

Merchant and subscriber receive SMS confirmation of the deduction; merchant releases product.

Source: Gartner Research (February 2005)

H. How is the G-Cash Regulated?

G-Cash is regulated by Bangko Sentral ng Pilipinas (BSP) and the Anti-Money Laundering Council

(AMLC) of the Philippines as a money services business. The AMLC set strict limits agreed to by Globe - a maximum per transaction value of PhP10, 000 (\$182), a maximum per day of PhP40, 000 (\$750) and a maximum per month of PhP100, 000 (\$1,825). In addition, G-Cash remains a closed system - you must be a Globe subscriber and register with Globe to receive value - thereby fulfilling the AML "Know Your Customer" requirements. Customers can load cash into G-Cash in the form of prepaid cards, Globe e-Load website, bank accounts or Globe sales stores. They can withdraw cash by filling out a withdrawal form at the point of sale (POS), at G-Cash ATM's (wireless, card-less), Globe outlets and participating banks. All withdrawals require a form to be completed. The system worked out by Globe and the BSP/AMLC is a good model: it has controls on cash in and cash out, it is a closed system and the amounts transferred are reasonable and small.

I. Smart Telecom

G-Cash is not alone in the market. Its big brother is Smart Communications, a subsidiary of the Philippine Long Distance Telephone Company (PLDT), a long established firm, and the dominant fixed-line telephone operator in the Philippines. Smart is the leading wireless provider in the Philippines with 12.5 million subscribers, of which 98% are prepaid users. Together Globe and Smart control 98% of all the GSM phones which account for 92% of the market. Like Globe, Smart is an innovative and dynamic company. It offered the world's first electronic cash card linked to mobile phones back in 2000. In this effort it has teamed with Banco de Oro, a large commercial bank. In August 2004, it offered the first text-based remittance system - Smart Padala - which focused on overseas Philippine workers and tied to a large number of retail and service locations.

J. How is Smart Money/Padala Regulated?

Smart differs widely from Globe from a Philippine regulatory perspective. The BSP regulates Smart as a bank (as opposed to regulating Globe as a money-service business) due to the existing partnership with Banco de Oro. It is viewed as a bank-centric model because all value transfer subscribers need to have accounts/access cards and have customer due diligence preformed by Banco de Oro or other banking partners. Because of its banking status the limits are higher; 10 transactions per day with a PhP100, 000 a day limit (\$1785).

K. Philippine Regulatory Regime in Sum

There are two models in the Philippines: Globe, as a telecommunications company is viewed as Money Service Business (MSB)³ - telecom centric. Smart, since it is tied to Banco de Oro, is viewed as bank-centric. Each firm is compliant with BSP AML requirements relative to ID for subscriber and beneficiary as well as valid ID required for both parties to obtain services of cash in cash out. Globe and Smart both use pattern recognition systems, which is a necessary and complementary part of both anti-fraud and AML to monitor account/subscriber activity. Both are required to report any suspicious activity to the AMLC. Both are also subject to AML compliance examinations by regulators. At this time everything looks good from a regulatory perspective but what does it all mean going forward?

III. CONCLUSION

A. What Does it Mean for Law Enforcement?

Is this a paradigm shift from cash to digital money? The easy peer-to-peer funds transfer makes Secretary Rubin's far-sighted question more relevant today than in 1996 when it was first posed. Wireless transfers through international roaming opens up new possibilities for abuse by money launderers if the systems are opened up and value transfer limits are increased. These developments will create a need for increased international cooperation and data sharing of data analysis on suspect accounts. Thought will also have to be given to KYC requirements in this digital age; perhaps a digital KYC needs to be explored on an international level. SIMs can be easily compromised, retrieved from stolen phones, and with the advent of third generation (3G) phone technology, can carry more than one phone number, possibly acting as a "digital smurf".

Anti-money laundering law enforcement operations will need to be more visionary. They need to plan to move beyond traditional pick-up and surveillance operations to other more pro-active strategies - these will

³ MSBs are those firms that fall outside of the traditional banking system but provide regulated financial services.

require a high level of technical skills. To support these initiatives, mobile commerce (M-commerce)/M-AML legislation relative to search, arrest and seizure may need to be enacted. There will need to be more emphasis on "cyber-AML" capacity-building and tools. If open system between providers is allowed, then AML controls will need to be rethought.

B. Other Things to Think About

As I mentioned, SIMs can be easily compromised, duplicated, retrieved from stolen phones, and - with the advent of 3G, cellular phones can carry more than one phone number, possibly acting as "digital smurfs" or "bots". Street operations groups will need to think about the phones as much as (or instead of) the cash. The key question is: Where does the value lie and who controls the transactions? The answer to this is not easily obtained through mere observation.

Current forfeiture, also laws, may not fit the coming environment, which will affect asset-sharing arrangements. Undercover operations of the future need to consider and plan for these eventualities.

Are you ready for the end of cash? In a cashless crime world, who investigates? How do they do it? How do you prepare?

C. Can This Wireless Train Be Slowed Down? – Not Likely

The likelihood that the G-Cash wireless value transfer model will remain an exclusively Philippine model or meet with only limited success - like the electronic wallet of the late 1990's - is not likely. It is a well thought-out award winning programme that helps the overseas workers get money home efficiently. It is also being used for direct payment for government and business services, charities, microfinance, and others. A cell phone now means access to a wide variety of financial services with more to come with the advent of the 3G (third generation cell phone). G-Cash, started in 11/2004 started with only 20,000 subscribers, has taken the Philippines by storm and by 01/2006 had in excess of 1.2 million subscribers.

There is also significant international interest in M-Commerce within Asia. Globe partners include Bridge Mobile Alliance - Airtel (India), CSL (Hong Kong), Globe Telecom (Philippines), Maxis (Malaysia), Optus (Australia), SingTel (Singapore) Taiwan Mobile (Taiwan) and Telkomsel (Indonesia). Together, the operators have almost 70 million mobile subscribers. We can expect more major regional efforts soon.

Smart is not standing still either; they are currently rolling out 3G phones. According to Smart, 3G is shorthand for the next generation of mobile communications networks running on the WCDMA (Wireless Code Division Multiple Access) platform. This technology allows for faster data transmission speeds from 114 kbps up to 2 Mbps, making possible high-speed data communications and mobile multimedia services such as video conferencing, audio streaming and mobile internet. All those changes will support mobile banking of which Smart is the Philippine leader.

Some other efforts include Japan's NTT-DoCoMo recently launched i-mode FeliCa (TM) Mobile wallet which is also a closed system but with Radio Frequency Identification Device (RFID) swipe capability. Korea's SK Telecom MONETA has m-financial services via internet and the MONETA card. Sun Java programmes and Microsoft's new m-commerce applications for cell phones will speed up m-commerce applications. If the system operates on a peer-to-peer transfer basis, then the drug money laundering model described above could be easily adapted using the wireless transfer systems.

D. Where Does That Leave Us?

Back in Manila. What do these changes mean to law enforcement and AML/CFT specifically? The AMLC asked ADB to do a study on possible international cell phone value transfer standards for submission to the Asian Pacific Group on Money Laundering (APG). A first draft of the report was submitted and is undergoing finalization. The report will not be a definitive work but a seminal work in M-Commerce/AML. The purpose is to open the dialogue to prepare us for the fast moving wireless digital world effects on AML. Let's hope it does its job

I would like to thank the Philippine Government, in particular the BSP and the AMLC for permitting ADB to examine their process. I wish you all luck and good fortune pursuing the money launderers in your countries.

ISLAM, GLOBALIZATION AND COUNTER TERRORISM

Juhaya S. Praja*



I. ISLAM AND GLOBALIZATION

A. Islamic Universality

The Quran states that Islam is the universal religion and is a mercy to all creatures.¹ Islam is a religion of peace. As a universal faith, that has been subject to diverse interpretations, Islam offers a living demonstration of qualities to which all human beings can relate: compassion, mercy, tolerance, and love. Bearing the label “Muslim” is no guarantee of living by its teaching since Muslims are not a single, homogeneous entity. Grave risks arise from thinking that they are.

Islam is more than a system of theology, it’s a complete civilization.² The classical history of Islam proved the Islamic universality: Islam rejects discrimination, racism, and teaches men and women to disperse within the land and seek the bounty of God.³ More clearly the tradition of the Prophet Muhammad instructs his followers to seek knowledge, even to China.⁴ Indeed, this hadith calls for globalization at doctrinal and practical levels.

Islam became the global power when the peoples of Arabia, Africa, Europe and Asia admired and followed the Islamic civilization and culture. The presence of Islam has contributed to the welfare and the prosperity of the peoples. The civilized peoples closely related to the basics of Islamic doctrine, ethics, values, morals, law, and their customs. Islam and its history have taught globalization at the most general level, that refers to a process of change which affects all regions of the world in a variety of sectors including the economy, science and technology and to some extent – politics, the media, culture and the environment.

The characterization of globalization may be thought of initially as the widening, deepening and speeding up of worldwide interconnectedness in all aspects of social life, from the cultural to the criminal, the financial to the spiritual.⁵ The 12th Century was “The Golden Age of Islamic Globalization”.

The majority of Muslims are not located in the motherland of Islam, but Indonesia, India and Pakistan. The faces of Islam in these geopolitical locations are more moderate than what has developed in the Middle East. However, the global interaction among the people of Muslim countries does not only introduce moderate Islam, but also militant ideas and practices as the resistance to the common enemy, namely the West. With this in mind, this paper attempts to explain the nature of Islam, its interaction with the West and its responses to the Western global economy and military as part of the triggering factors of how global resistance towards the West is expressed in the most inhumane form, such as terrorism. This is not to say

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¹ Q.S.21: 107, “And we sent thee not [O, Muhammad], except as a mercy for all creatures”.

² H.A.R Gibb, *Muhammadanism*, p. 1.

³ Q.S.62: 10, “And when the prayer has been concluded, disperse through the land and seek of the bounty of Allah, and Celebrate the Praises of Allah often that you may succeed”.

⁴ When the Prophet Muhammad spoke, China was the furthest country from Mekkah.

⁵ Held and associates. *Global Transformations*. 1999, 2.

that terrorism is acceptable in Islam and to Muslims. Terrorism is not Islamic at all and will never become part of the Islamic teaching.

B. Islam: Unity in Diversity

Although Muslims maintain that there is one divinely revealed and mandated Islam, there are many Muslim interpretations of Islam. There are two major branches of opinion about political and religious leadership after the death of Muhammad: Sunnis (85 percent of the World's Muslims) and Shi'is (15%). There are diverse school of theology, law and mystical tradition that includes many Sufi orders or brotherhoods. Islam represents a basic unity of beliefs within rich cultural diversity. Islam practices itself in different ways within a vast array of cultures that extend from North Africa to Southeast Asia, as well as Europe and America.⁶

As a world religion, Islam is practiced in diverse cultures in Africa, the Middle East, Asia, Europe, and America. Differences in religious and cultural practices are therefore wide-ranging. Like all faiths, Islam has developed divisions, sects, and school of thought over various issues. Islamic law provides one of the clearest and most important examples of diversities of opinion. While many law schools existed, only a few endured and were recognized as authoritative.⁷

While all Muslims share certain beliefs and practices, such as a belief in God, the Quran, Muhammad, and the Five Pillars of Islam, divisions have arisen over questions of political and religious leadership, theology, interpretations of Islamic law, and responses to modernity and the West.

Perhaps nowhere are differences in Islam more visible than in responses to modernity. Since the nineteenth century, Muslims have struggled with the relationship of their religious tradition developed in pre-modern time to the new demands of the modern world (viz. religious, political, economic, and social demands). The issues are not only about Islam's accommodation to change but also about the relationship of Islam to the West, since much of modern change is associated with Western ideas, institutions, and values. Muslim responses to the issues of reform and modernization have spanned the spectrum from secularists⁸ and Islamic modernists⁹ to religious conservatives¹⁰ or traditionalists, "fundamentalists"¹¹, and Islamic reformists.¹² The other groups are more "Islamically" oriented but have different opinions as to the role Islam should play in public life.

II. ISLAM AND THE WEST

The highest tide of Islamic culture, 800-1100A.D., was coincident with the lowest ebb of European culture. While the Muslims enjoyed general standards of living equal to, if not surpassing those of the preceding Graeco-Roman civilization, the Europeans were living in the semi-barbarous squalor and restricted regime of feudalism – a pattern unalleviated by comforts and luxuries. One of the strangest dramas of history is that at the very moment when Europe, prodded by contacts with the Islamic culture in Sicily and Spain and by the Crusades, began to recover from its prolonged descent towards darkness, Islam entered a decline that was to carry it down into the very fog of obscurantism from which it had helped to rescue Europe.¹³ "The spirit" of Islamic civilization developed more rapidly in the West synergized by the

⁶ John L. Esposito, *What Everyone Needs to Know about Islam*, Oxford University Press, 2002, p. 39-58.

⁷ Today they are four major Sunni schools of law (Maliki, Syafi'i, Hanafi, and Hanbali) and two Shiite major schools (Ja'fari and Zaidis), besides Itsna' Ashriya (The Twelvers) and Sab'iyyah (The Seveners).

⁸ Modern secularists are Western oriented in nature and advocate a separation between religion and the rest of society, including politics. They believe that religion is and should be strictly a private matter.

⁹ Islamic modernists believe that Islam and modernity, particularly science and technology, are compatible, so that Islam should inform public life without necessarily dominating it.

¹⁰ Conservatives or traditionalists, emphasize the authority of the past and tend to call for reimplementing of Islamic laws and norms as they existed in the past.

¹¹ Fundamentalists emphasize going back to the earliest period and teaching of Islam, believing that the Islamic tradition needs to be purified of popular, cultural, and Western beliefs and practices that have "corrupted" Islam.

¹² There are significant numbers of Islamic reformers, intellectuals, and religious leaders who also emphasize the critical need for an Islamic reformation, a wide ranging programme of reinterpretation (*ijtihad*) and reform urging fresh approaches to Quranic interpretation as well as to issues of gender, human rights, democratization and legal reform.

¹³ Stanwood Cobb, *Islamic Contributions to Civilization*, Avalon Press, Washington, DC., 1963, p. 22.

philosophy of capitalism in economy and secularism in the politics. Both capitalism and secularism supported by sciences, technology and the military had created the Superpower State, especially after the Cold War.¹⁴ The Islamic civilization has a significant contribution to drive the Enlightenment in the West and the modern world. The immenseness of the Arab-Islam contribution can best realized by recapitulating the most significant of her activities, considering at the same time their impact to a Europe struggling upward through the barbarism of the Dark Ages. The Arabic-Islamic science and technology,¹⁵ reaching Europe via Sicily and Spain, awoke her from the Dark Ages in which she was slumbering. The detailed elaboration of the actual routes by which this transference took place have only recently been outlined by historians. A hundred years ago a statement of the full influence of the Arabic culture on Europe would have been incredible. But modern research has firmly established its incontestability.

The principles of Western political systems typically are democracy and the rule of law. Together democracy and the rule of law save people from arbitrary whims of dictators and tyrants, and make all people politically equal. Democracy was pioneered by ancient Athens. The rule of law is to a great degree a product of Islam. Democracy in the words of Abraham Lincoln is similar to the *syura'* in the Islamic concept derived from the Quran by Fuqaha.¹⁶

The West learned the scientific method from Islam and has used that method to develop, amongst many other things, technologies for communication that have shrunk the world. The global civilization may be regarded as the joint legacy of Islam and the West.¹⁷ The three most influential thinkers of the Western civilization represented the three Abrahamic faiths: Ibn Rusyd (Averroes) the Muslim, Maimonides the Jew, and Thomas Aquinas the Christian.

Rationalism initiated the new modern world and ignited the secularism that only takes the Christian's ethic; meanwhile, ethics are a changeable point of view on what is good or bad. Conceptually, Islam and the West were born within the tradition of monotheistic religion, - Jews and Christianity - referred to the Abrahamic faith. In the spheres of politics and economics Islam and the West are often in conflict, where as in knowledge and ideas they are often in harmony. When there is a rivalry between Islam and the West (Christianity) or between capitalism and Islam, one of the solutions is military power and war. Therefore, there is a significant relationship between the economy and politics on one side and belief and religion on the other.

The only superpower State nowadays is the United States (U.S.) that has become the "World Cop" who always monitors and unashamedly forces the other State or States to be under its control. This condition is globalization or hegemony. The Western world as a whole previously clashed with other civilizations long before the Cold War of Ideology. Firstly, there was genocide against the native ancient civilization of the Americans. Secondly, there was later enslavement of millions of Africans for use in the so-called New World. Thirdly, there was the phase of European imperialism and colonialization of most of the world. Is the fourth phase the United States as an imperial superpower? America has now become a new form of empire, controlling millions of people through a variety of inducements and intimidations.

In addition, the global development that began after the Cold War left a vacuum from the influence of the two Super Powers or West and East Block represented by the USSR and the U.S. This area is well-known as the Middle East. The victory of the West pioneered by the USA, soon followed by founding the Israel State in the middle of the Middle East countries. The State, in the eyes of the world, inflicts injustice on the Palestinians. Muslims around the world consider the invasion of the Palestinian land as the core problem that creates the rebellion of the oppressed people (Palestinians) by the powerful and unjust state institution and government (Israel). Such rebellion is called "terrorism".

¹⁴ *Ibid.*

¹⁵ According to Stanwood Cobb, the most significant of the Islamic activities in science and technology were as follows: medical science, chemistry, astronomy, geography and navigation, the decimal system, algebra, paper, gunpowder, textiles, agricultural products, the rise of the university and machinery. *ibid.*, p. 47-60.

¹⁶ *Fuqaha* is a plural of the singular Arabic word *faqih* which means legalist. (Lincoln: Democracy ensures that government is "of the people, by the people, and for the people".)

¹⁷ Van de Weyer, *Islam and the West*, p. 48-9.

III. WAR ON TERRORISM - IS WAR ON TERRORISM WAR ON ISLAM?

The lack of information and deeper misunderstanding of Islam may lead some to think that the war on terrorism is a war on Islam. That's why most Americans and Europeans think of Muslims as strange, foreign, and frightening, inevitably linked to headlines of terrorist events. This is not true since the war on terrorism is not a war on Islam.

Islam and Islamic law have consistently condemned terrorism (the killing of non-combatants). Like the members of all religious faiths, Muslims have had to deal with religious extremism and terrorism from their earliest days. The responses of the mainstream majority to groups like the Kharijites and the Assassins and more contemporary groups like Islamic Jihad in Egypt or al-Qaeda have been to condemn, combat, and marginalize them.

From the origins, the Islamic community faced rebellion and civil wars, violence and terrorism, epitomized by groups like the Kharijites and Assassins. The Kharijites were a pious but puritanical and militant extremist group that broke with the Calip Ali and later assassinated him. The Assassins lived apart in secret communities from which they were guided by a series of Grand Masters, who ruled from the mountain fortress of Alamut in northern Persia. The Assassins' jihad against the Seljuk Dynasty terrorized the princes, generals, and *ulama* (scholars), whom they murdered in the name of the Hidden *Imam*. They struck such terror in the hearts of their Muslim and Crusader enemies that their exploits in Persia and Syria earned them a name and memory in history long after they were overrun and the Mongols executed their last Grand Master in 1256.

The response of Sunni Islam and Islamic law was to marginalize extremist and develop a political theory that emphasized stability over chaos and anarchy. This, of course, did not dissuade all from the extremist path. In more recent decades, alongside mainstream Islamic political opposition, terrorist groups have risen up to challenge the regime and terrorize their populations and attack foreign interests. Often they portray themselves as the "true believers" struggling against repressive regimes and in the midst of a "pagan" society of unbelief. They attempt to impose their ideological brand of Islam and "hijack" Islamic doctrines such as jihad, claiming to be defending true Islam, to legitimate their illegitimate use of violence and acts of terrorism.

In Egypt, groups like Egypt's Islamic Jihad and other extremist groups assassinated President Anwar Sadat and government officials, slaughtered tourists in Luxor, burned churches, and killed Christians. In Algeria, the Armed Islamic Group has engaged in a campaign of terror against the Algerian government. Osama bin Laden and al-Qaeda undertook a global war of terror against Muslim governments and America, distorting Islam and countering Islamic law in issuing their own *fatwas* (legal opinions) in an attempt to legitimate their war and call for an attack on civilians (non-combatants).

The Suicide Bombing in Jakarta, Bali and Poso by Indonesians terrorists under their commander of Malaysian citizenship "the late Dr. Azahari" and his close companion and successor Nordin Top. They have distorted the true Islam and seemed to endorse the mistaken view so common in the West that Islam is essentially a fanatical and violent faith.

Terrorism has multiple faces and may be hiding under the name of a religion, philosophy, politics, or any other name. Terrorism is a way of life. It may be a part of the history of human civilization and culture. Defining terrorism is most important in order not to be changeable between "terrorism" and "the warrior of freedom".¹⁸ The scholars have their own definition of terrorism based on their point of view and field, or they define it as the ruler's outlook.¹⁹ Anyway, how diverse those definitions, but the might is the rulers'

¹⁸ Michael Kinsley, *Washington Post*, 5 October 2001, Definition of terrorism in many cases, such as Osama bin Laden is often absurd. Eg., USA supported the gurella movement against the Nicaraguan government, but at the same time does the opposite to the same movement of Salvador. Is terrorism a crime to achieve the political goal? Is it an exception if terrorism is carried out by the government?

¹⁹ The operational definition of terrorism according to the rulers: "terrorism is a premediated threat or use of violence by sub-national groups or cladenstine individuals intended to intimidate and coerce governments, to promote political, religious or ideological outcomes, and to inculcate fear among the public at large". Terrorism defined by the FBI, "The unlawful use of force or violence against person or property to intimidate or to coerce a government, the civilian population, or any segment thereof, in furtherance of political or social goals".

definition who enforce their definition to be accepted by the people either using military, political, economic, technology or cultural power. Terrorism may be derived from religious doctrine or motivated by any other beliefs. Terrorism may be come to the true when the terrorists regard themselves as the victim of a repressive and hypocritical regime that never takes care of them, for instance: the IRA, EPTA, and some groups of terrorists in Latin America, and the *intifada* movement of the Palestinians.

The beginning of the terrorist's movement seems to be Hassan Bin Sabbah (1057 AD), the leader of the impressive movement in the Middle East, Hashashiyyin or Assassins as mentioned above.²⁰ Meanwhile, Maximilien Robespierre of France was the father of modern terrorism, as claimed by the scholars. Vladimir Lenin (b.1870-1924) is the modern terrorist. His ideas and theories of terrorism are followed by his successor as Vladimir Lenin (Vladimir Ulyanov) said. Joseph Stalin (d. 1953) is the master executive of terror.²¹ Furthermore, the greatest terrorist of the East was Mao Tse-Tung. Mao led a world class of terror. Mao believed that the government needed to be a dictatorship to remain in control; using terrorism as a means to oppress the people to obey all the government's will. Mao modernized terrorism and made it more effective, more powerful and more horrific than before.²² America has been described as "conceived and born in violence". Noam Chomsky has stated that the USA is a rich and powerful country that practices international terrorism on smaller States. Noam Chomsky stated that Osama bin Laden has caused the USA to bomb poor countries, such as Afghanistan. Osama bin Laden is the creation of the U.S.

For Kuwait, the U.S. is the savior and the defender against Saddam's aggression. For Egypt, the U.S. is the donor of millions of dollars in order to take Egypt out of alignment with countries against Israel. For Saddam Hussein, the U.S. is the big enemy who removed him from his crown. For many countries of the world, the U.S. is a never ending Superpower State. There is no state in history that has made more progress in economics, the military, science, technology and politics, than the U.S. In both good and bad, the U.S. is an incomparable State.

Globalization or hegemony is a new phase of the U.S. as an imperium having global power, including economic power and power over, information such as the internet. After the Cold War, the U.S. was the winner. Recently this State successfully brought freedom and democracy for peace. The U.S. seems to pull the rest of the world to follow its system. Unfortunately, the U.S. is trapped in imperializing other States. It represented the Jew-Christian ethic that created the capitalist system in economics and secularism system in politics.

Anti-Americanism (along with anti-Europeanism) is a broad based phenomenon that cuts across Arab and Muslim societies. It is driven not only by blind hatred of religious zealotry of extremists but also by frustration and anger with U.S. foreign policy among the mainstream in the Muslim world. The West's espousal of self-determination, democratization and human rights is often seen as a hypocritical "double standard" when compared to its policies, what is actually does – for instance, imposing sanctions upon Pakistan for its development of nuclear weapons while failing to press Israel and India on their nuclear development. The moral is so evident in America's helping Kosovo is seen by many Muslims totally absent in the U.S. policy of permissive neglect in the Chechnyan and Kashmiri conflicts. The impact of sanctions on more than a half million Iraqi children does not seem to have been considered when they were imposed.

Another inflammatory issue involves the significant presence of U.S. military and arms in the Gulf, which critics perceive as a neo-colonialist military influence. The American presence is equated with support for unpopular authoritarian regimes and pressure of Arab governments to comply with U.S. foreign policy objectives, especially with respect to Israel and Palestine. This long litany of grievances stretching over

²⁰ Hashashiyyin is derived from the word *hashis* means something that makes you drunk. The followers of Hashashiyyin always consumed hashish to get intoxicated so they would be brave to kill. The word Hashashiyyin transferred into English assassin or assassination.

²¹ In 1924 Stalin received the legacy of Lenin, and shaped and intensified the terror. He governed Russia by terror and his iron hand until he died in 1953.

²² The most effective terror introduced by Mao was his most important innovation: breaking the family institution and religion. He broke the long life tradition of Asia, eg. loyalty to the family; turning people from the trust of the family to the trust of the State.

many years feed the anger of many mainstream Arabs and Muslims, as well as extremists.²³

Globalization of communications has created a situation in which Arabs (Muslims and Christians) and Muslims around the world often see more than before. Unlike the past, today international Arab and Muslim media are no longer solely dependent on Western reporters and channels. While America's overseas media presence (reporters and overseas posts) and coverage have waned over the past decade, television stations like al-Jazeera and others provide daily coverage of the violence in many Muslim countries. They show, for example, the violence and acts of terror committed by both sides as well as the disproportionate firepower used against Palestinians by Israelis armed with American-supplied weapons, F-16s, and Apache helicopters. America's record of overwhelming support of Israel-witnessed in its levels of aid to Israel, the U.S. voting record in the United Nations, and official statements by the administration and State Department - has proved to be a powerful lightning rod for Muslim anger over injustice.²⁴

IV. TERRORISM AND MISCONCEPTION OF JIHAD IN ISLAM

Osama Bin Laden is the only terrorist leader to have formally declared a jihad- holy war – against the United States. This declaration of holy war is not an empty gesture. Laden's objective was the establishment of a "true" Islamic State under the Sharia. The realization of his objective would require confrontation with the United States because Saudi Arabia had been turned into "an American colony". Asked if he was declaring war on the West, he replied, "It is not a declaration of war – its a real description of the situation. This doesn't mean declaring war against the West and Western people – but against the American regime which is against every Muslim". He hates the United States passionately and considers it his principle enemy. He accuses the U.S. – the locus of Westernization and modernity – of being the source of all crises and trouble afflicting the Muslim world. Bin Laden is convinced that U.S. presence in the Muslim world, particularly in his home country of Saudi Arabia, prevents the establishment of real Islamic governments and the realization of the Islamic revivalism to which he and other Islamists aspire. Since a frontal assault is out of the question, the U.S. must be terrorized into withdrawing from the Muslim world.

While the atrocities and acts of terrorism committed by violent extremists have connected Islam with terrorism, the Islamic tradition places limits on the use of violence and rejects terrorism, hijacking, and hostage taking. As with other faiths, mainstream and normative doctrines and laws are ignored, distorted, or hijacked by a radical fringe. Islamic law, drawing on the Quran, sets out clear guidelines for the conduct of war and rejects acts of terrorism.

Islam, like all world religions, neither supports nor requires illegitimate violence. The Quran does not advocate or condone terrorism. However, Quranic verses also underscore that peace and warfare are the norm. Permission to fight the enemy is balanced by a strong mandate for making peace. (Q.S.8: 61, 4: 90). The root of terrorism within the Muslim community refers to the misconception and misinterpretation of the jihad as the Quran's command. Jihad (to strive or struggle) is sometimes referred to as the Sixth Pillar of Islam. The Quranic teaching of jihad have been of essential significance of Muslim self-understanding, piety, mobilization, expansion, and defence. Jihad as struggle pertains to the difficulty and complexity of living a good life; struggling against the evil in oneself-to be virtuous and moral, making a serious effort to do good works and to help to reform society. Depending on the circumstances which one lives, it also can mean fighting injustice and oppression, spreading and defending Islam, and creating a just society through preaching, teaching, and if necessary, armed struggle or holy war.

The two broad meanings of jihad, non-violent and violent, are contrasted in a well-known Prophetic tradition. It's said that when Muhammad returned from battle he told his followers: "We return from the lesser jihad (warfare) to the greater jihad". The greater jihad is the more difficult and more important struggle against one's ego, selfness, greed, and evil.

Jihad is a concept with multiple meanings, used and abused throughout Islamic history. Although jihad has always been an important part of the Islamic tradition, in recent years some have maintained that it is a universal religious obligation for all true Muslims to join the jihad to promote Islamic reform or revolution.

²³ John L Esposito, *Islam.*, p., 135.

²⁴ *Ibid.*

Some look around them and see a world dominated by corrupt authoritarian regimes and a wealthy elite minority concerned solely with its own economic prosperity and awash in Western culture and values. Western governments are perceived as propping up oppressive regimes and exploiting the region's human and natural resources, robbing Muslims of their culture and their option to be governed according to their own choice and to live in a more just society.

Better understanding and a comprehensive study of Islamic teaching in respect of relations between Islam and the West, both by Muslims and the others (Westerners) will eliminate the misconception of a jihad in one side; and misconception of Islam and the Muslims in the other one. Understanding Islam and Muslim peoples will be one of eliminating terrorism. But the most importance is how Muslims all over the world have a good understanding of how the Prophet explained what really jihad is.

Jihad is not "holy war", but "struggle" and "effort". This is a very important religious principle. The term jihad reminds all Muslims that Islam as a religion (*al-din*) is never something achieved or finished. The revelation is given, but those who follow it have to make an effort, day by day, year after year, to put it into practice in a flawed and tragic world.

V. ISLAM POST 911

Within hours of the planes hurtling into the World Trade Center of New York and Pentagon on 911, Americans were crying out in anguish: "Why do they hate us"? The question was echoed throughout Europe, since no doubt the attack was directed not just at America, but at the whole of Western civilization.²⁵ However, the tragic events of 911 and the fear and paranoia they have generated have set Muslims back. America before 911 was on the verge of accepting Islam as one of its own, but after the attack of 911 it has paused to once again reassess Islam and Muslims.²⁶

What happened on 911 and afterward has had significant and mostly negative consequences for the Muslim communities in Europe, and has set back the process of mutual accommodation between Muslims and European populations and the integration of both Islam and Muslims into Europe's social, cultural and political landscape.²⁷

In the aftermath of 911, people of goodwill on both sides of the divide between the Judeo-Christian and Muslim worlds were filled with deep anxieties. For Westerners, it seemed that a dreadful clash of civilizations had become imminent and unavoidable. For Muslims, it was clear that serious injury had been done to the most powerful nation on earth – a wound that could only call for terrible retaliation. Many Jews and Christians seized on the belief that something feral and evil in the faith of Muhammad had made 911 inevitable. Many Muslims feared that a new "crusade" against Islam would ensue, expressing deeply ingrained impulses in the West.²⁸

Indonesia has the biggest Muslim population in the world. Some Western educated or Western civilized leaders (Prime Ministers or Presidents) regarded Indonesia as a heaven and paradise for terrorists. They saw Baasyir as an example of the Indonesian terrorist and that this was proven by some of the Islamic doctrines taught at Pondok Pesantren Ngruki where Baasyir typically teaches his students. The popular words of wisdom among the Santri that says "be alive honourable or die as a martyr" are regarded by Westerners as the doctrine of Islamic extremism and terrorism. Meanwhile, the well-known words of wisdom among Indonesian Muslims are just a motivation of achievement and teaches the students how to live in dignity. This prejudice was supported by the fact that some actors involved in suicide bombings were the alumni of Pesantren or Islamic institutions.

²⁵ Robert Van de Weyer, *Islam and the West*, p., ix.

²⁶ Muqtadir Khan, *American Muslims*, p. 2.

²⁷ Shireen T. Hunter (ed), *Islam Europe's Second Religion*, p. 277.

²⁸ Steephen Schwartz, *The Two Faces of Islam: The House of Sa'ud From Tradition to Terror*, Doubleday, New York, 2002, p. xi.

Suicide bombing was introduced as a new type of warfare in the Palestinian-Israeli conflict as a response to the brutal aggression by the Israelis. On February 25, 1994, Dr. Baruch Goldstein, a Jewish settler who emigrated to Israel from the United States, walked into the Mosque of the Patriarch in Hebron and opened fire, killing twenty-nine Muslim worshipers during their Friday congregational prayer. In response, Hamas (Islamic Resistance Movement) introduced suicide bombing promising swift revenge for the Hebron massacre. The Hamas militia, the Qassem Brigade, undertook operations within Israel itself, in Galilee, Jerusalem, and Tel Aviv. In Israel-Palestine, the use of suicide bombing increased exponentially during the second (al-Aqsha) *intifada* (uprising), which began in September 2000. The most horrific example of suicide bombings or attacks was seen in the attacks of 911.

Traditionally, Muslims are unconditionally forbidden to commit suicide, because only God has the right to take the life he has granted. There is only one verse that appears relevant to suicide in the Holy Quran, Q, 4:29.²⁹

VI. CONCLUSION AND RECOMMENDATIONS

Could we have the globalized world with no discrimination and aggression? Such view of globalization requires all citizens of the world to have mutual understanding of their similarity with other humans and their need for safety. As humans of different races, religions and civilizations, it is important that we continue to learn from one another our glorious past as well as our pain. In the process of this mutual dialogue, all religious leaders and policy makers should attempt to carry on responsibility for the creation of a peaceful world.

Muslims certainly carry the heaviest load since Islam has been consistently described as the epitome of radicalism, terrorism and evil religion. Such a hijacked portrayal of Islam does not accord with Islamic teaching that promulgates tolerance and understanding of other religious beliefs, languages and civilizations. In the process, it is important for Muslims to reinterpret Islamic teaching so that Muslims combat the misuse of the Quran and Hadith in the name of religion as has been done by the global terrorists. Along with this attempt, the changes in the foreign policy and public opinion of the rest of the world would decrease the prejudices against Islam and Muslims.

²⁹ Q, 4:29 “O, you who believe! Do not consume your wealth in the wrong way – rather only through trade mutually agreed to, and do not kill yourselves, surely God is merciful toward you”.

ISLAM POST 9-11: INDONESIA'S EXPERIENCE

*Juhaya S. Praja**

I. INTRODUCTION

As the world's fourth largest country and the most populous Muslim nation on earth, Indonesia hosts an array of Muslim groups ranging from traditional Islam to highly liberal. The vast majority of Indonesian Muslims are moderate and tolerant, but several radical groups have emerged. The assumption of emerging Indonesian Muslim extremists became clearer when al-Qaeda was introduced to the region by Abdullah Sungkar.¹ The first indications of al-Qaeda's plan to infiltrate Indonesia became known to Indonesian intelligence in 1998, a few months before Sungkar left Malaysia and returned to Indonesia. Letters sent by those who are prominent Islamic figures in Indonesia were intercepted. They contained a message from Osama bin Laden: "that the most important obligation for Muslims nowadays was to work hard in order to free Arabian lands from the grip of the enemy of Allah, especially pointing to American Christians and the Jews". Reflecting their relationship to the al-Qaeda leader, Sungkar also stated in the letter that "they were willing to show the most secure way to visit Osama whenever the Islamic prominent figures would like to do so". In response, Al-Qaeda dispatched a high-powered delegation to the region to enhance ideological influence and operational commitment. Foreign intelligence agencies reported that Ayman al-Zawahiri and Muhammad Atef visited Moluccas and Irian Jaya in 2000, both areas affected by long-running conflict, thus conforming with Al-Qaeda's preference for regrouping in areas where the rule of law is weak.² Many operations conducted by Al-Qaeda in Indonesia, the millennium bombings on Christmas Eve 2000, are very instructive of their tactics. The campaign of bombings against thirty churches in Jakarta, West Java, North Sumatera, Riau, Bandung, East Java and West Nusa Tenggara was coordinated with Al-Qaeda'. The Manila attacks and investigation revealed they were authorized from Malaysia and Afghanistan.³

It was no doubt that the tragic events of 911 were the responsibility of Al-Qaeda's network. The 19 terrorists were identified as Muslims and they have set American Muslims back. America before 911 was on the verge of accepting Islam as one of its own, but after the attack of 911 it has paused to once again reassess Islam and Muslims.⁴ Americans were crying out in anguish: "Why do they hate us"? The question was echoed throughout Europe, since no doubt the attack was directed not just at America, but at the whole of Western civilization.⁵

What happened on 911 and afterwards has had significant and mostly negative consequences for the Muslim communities in Europe, and has set back the process of mutual accommodation between Muslims and European populations and the integration of both Islam and Muslims into Europe's social, cultural and political landscape.⁶ In the aftermath of 911, people of goodwill on both sides of the divide between the Judeo-Christian and Muslim worlds were filled with deep anxieties. For Westerners, it seemed that a dreadful clash of civilizations had become imminent and unavoidable. For Muslims, it was clear that serious injury had been done to the most powerful nation on earth – a wound that could only call for terrible retaliation. Many Jews and Christians seized on the belief that something feral and evil in the faith of Muhammad had made 911 inevitable. Many Muslims feared that a new "crusade" against Islam would ensue, expressing deeply ingrained impulses in the West.⁷

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¹ Rohan Gunaratna, *Inside Al-Qaeda Global Network Terror*, Columbia University Press, New York-London-Toronto-Auckland, 2002, pp. 198-200.

² *Ibid.*

³ *Ibid.*

⁴ Muqtadir Khan, *American Muslims*, p. 2.

⁵ Robert Van de Weyer, *Islam and the West*, p., ix.

⁶ Shireen T. Hunter (ed), *Islam Europe's Second Religion*, p. 277.

⁷ Stephen Schwartz, *The Two Faces of Islam: The House of Sa'ud From Tradition to Terror*, Doubleday, New York, 2002, p. xi.

Fortunately, on September 17, 2001, President George W. Bush stood in the Islamic Centre of Washington DC, the capital's most important mosque. Following the events six days before, he sought to calm the fears of Americans about terrorism. "The face of terror is not the true face of Islam", he said "Acts of violence against innocents violate the fundamental tenets of the Islamic faith and it's important for my fellow Americans to understand that".⁸

In the light of the Tragedy of 911, Indonesia's mainstream Islamic groups, Muhammadiyah and Nahdlatul Ulama immediately denounced the bombings as cruel and uncivilized crimes against humanity. Further they stated that the recurrence of such cruel and uncivilized action depict the need to further strengthen the capacity of the security officials to disclose the terrorist's network of their efforts in combating terrorism in Indonesia.

II. INDONESIA'S CRIMINAL POLICY ON TERRORISM

One year after the 911 tragedy, Indonesia was challenged by the Bali suicide bombing I of October 12, 2003, the JJ Marriott Hotel bombing of August 5, 2005 and the Bali suicide bombing II of October 1, 2005. The Indonesian government had to respond to these terrorist challenges within a difficult economic environment. The choice to actively join or not join in the fight against terrorism carried the weight of serious economic consequences. The decision to respond positively, if tentatively at first, to the call to combat global terrorism was welcomed by the U.S. and generally by the international community.

The following highlights Indonesia's efforts so far to create a foundation on which Indonesia continues to build the strength and capacity to counter terrorism.

Indonesia recognizes the urgent need to mount a universal and concerted response to rid societies of criminal acts of terrorism. Indonesia adopted Law No.15/2003 and 16/2003 as needs arise to crackdown on terrorism following the terrorist bombing attack in Bali on 12 October 2002. The first law serves as the general guideline for combating terrorists. The second law is specially drawn up to deal with the terrorist attacks against tourists in Bali on 12 October 2002, which left nearly 200 dead. It stipulates the law enforcers' powers to investigate and prosecute the perpetrators of the attack.

Two Presidential Instructions were also issued in the aftermath of the Bali tragedy, namely Presidential Instruction No. 4/2002 instructing the Coordinating Minister for Political and Security Affairs to formulate a comprehensive policy in combating terrorism, and Presidential Instruction No. 5/2002 instructing the Head of the National Intelligence Agency to coordinate the activities of all the other intelligence agencies. As a follow up to Presidential Instruction No. 4/2002, the Desk for Coordination of Eradicating Terrorism (DCET) was established within the Office of the Coordinating Minister for Political and Security Affairs. The Desk, composed of representatives from the relevant governmental agencies, is tasked to formulate Government policies in combating and eradicating terrorism in a coordinated manner.

The Law 16/2003 is drawn up to allow for the principle of retroactivity to be applied in the case of the 12 October 2002 terrorist attacks. Opposition to this principle of retroactivity maintains that it goes against both general legal principles and the 1945 Constitution. Critics also fear human rights violations resulting from the enforcement of such principle. However, terrorist attacks are not ordinary crimes. Terrorism has an indiscriminate, non-selective or random target. Terrorist attacks are extraordinary crimes intended to create a state of terror. Such crimes demand an extraordinary response. Nevertheless, the principle of retroactivity will strictly apply only for the purposes of investigation and prosecution against the perpetrators of the 12 October 2002 terrorist attacks.

The legislation on terrorism provides the death penalty for natural persons and a one trillion Rupiah maximum fine for a corporation convicted of committing or threatening to commit acts of terrorism. It allows the authorities to detain people for seven days in the absence of strong legal evidence that the person may have committed terrorist acts. Intelligence reports can be used as *prima facie* evidence after being approved by a court of law with the approval process taking no longer than three days.

⁸ *Ibid.*, p. 226.

For investigation purposes, a suspect may be detained for six months. In implementing these regulations on terrorism, the government will do its utmost to avoid excesses for a better cause, which is to prevent violations of human rights and to protect its citizens from threats to their safety and security.

Following the 5 August 2003 bomb blast in Jakarta, the government of Indonesia revised Law No.15/2003 with a view to ensuring its effectiveness in efforts to eliminate the criminal acts of terrorism.

It is widely identified that terrorism activities may be funded from other kinds of crime, such as money laundering. Pursuant to Law No. 15/2002 pertaining to the Crime of Money Laundering, the government of Indonesia has also established an independent financial intelligence unit, the Indonesia Financial Transaction Report and Analysis Centre (INTRAC), the main task of which is to prevent and eradicate the crime of money laundering.

The Indonesian legislation on combating criminal acts of terrorism is a specific one, as it contains new provisions that are not found in prevailing legislation, and are deviating from the general provision of the Criminal Code and the Criminal Procedural Code.

This legislation also specifically contains the provision on the scope of international and transnational jurisdiction and special provisions on criminal acts of terrorism that relate to international terrorism activities. These special provisions are not discriminative in nature. Instead, they are the government's commitment to exercise *Article 3 of the Convention for the Suppression of Terrorist Bombing (1997) and the Convention for the Suppression of the Financing of Terrorism (1999)*.

More detailed specifications of this legislation are as follows:

1. The umbrella for other legislation relating to the elimination of criminal acts of terrorism;
2. This legislation is strengthened by criminal sanctions and simultaneously a coordinating act that strengthens the provisions of other legislation; and
 - (i) Special provisions *on the protection of the rights of the suspects/defendants, referred to as the "safeguarding rules"*. The provisions introduce among others a new legal institution in the criminal procedural code referred to as a 'hearing' that functions as an institution for 'legal audit' to all intelligence reports and documents submitted by the investigators to determine whether or not to proceed with the investigation on alleged acts of terrorism;
 - (ii) Affirming that criminal acts of terrorism are neither political crimes nor politically motivated crimes nor crimes with political objectives. Thereby allowing for the more effective implementation of bilateral and multilateral cooperation;
 - (iii) Contains *provisions that enable the President to establish a special ad hoc institution on the advice of the National Police Chief*. The existence of the force is based on the principles of transparency and public accountability (sunshine principle) and/or the principle of effective time limit (sunset principle) so as to avoid abuse of power by the institution;
 - (iv) Contains *provisions on jurisdiction based on the territorial, extra-territorial and national-active principles, thus it is expected that this legislation can effectively reach criminal acts of terrorism as stipulated in this legislation beyond the national territorial boundaries of the Republic of Indonesia*. In order to strengthen the jurisdiction, this legislation also contains provisions on international cooperation;
 - (v) Contains *provisions on the financing of terrorist activities as criminal acts of terrorism, simultaneously strengthening the law on Criminal Acts of Money Laundering; (8) The legislative provisions do not apply to the freedom of expression before the public through demonstrations, protests or other activities of advocacy*. If in the freedom of expression there are acts with criminal elements, the Criminal Code and the Criminal procedural Law shall apply;
3. Maintaining the application of special minimum criminal sanctions to discourage and deter the perpetrators of criminal acts of terrorism.

III. COUNTER TERRORISM: CULTURAL AND RELIGIOUS APPROACH

The elimination of criminal acts of terrorism in Indonesia is not only a question of law and law enforcement but also a social, cultural, economic and religious issue that is closely-related to the security of the nation. Therefore, the policies and measures to prevent and eliminate it should also be aimed at maintaining the equilibrium in the obligation to protect the state's sovereignty, the human rights of the victims, the witnesses and the suspects or defendants.

The unprecedented attack of 9/11 in the U.S. had a strong negative impact on the culture, politics, economy and beliefs of Indonesian Muslims as a whole. This negative impact became more seriously after the Bali tragedy on 12 October 2002 which appeared to be the second largest loss of life after 9/11 (killed over 200 and wounded a few hundred); again a shocking tragedy took place at the JW Marriott Hotel Jakarta on August 5, 2003 and Bali II, October 1, 2005. Buyers of Indonesian products have reportedly been unwilling to travel to Indonesia and have begun to source purchases elsewhere in the region. In part, this is a result of the perception that foreigners, particularly Americans, may be targets of extremists and the issuance of threats against American interests has reinforced this negative image of Indonesia. Indirect evidence of the negative impact of the September 11 attacks is seen in the fact that growth rates of US imports of nine of the ten top labour-intensive product groups from Indonesia were negative in the fourth quarter of 2001. In seven of nine cases, growth became negative, or if already negative, worsened in the fourth quarter compared with the third quarter of the year. These products include apparel items (5 SITC 3-digit product groups) footwear, and toys and sporting goods. The downside of the terrorist attacks of September 11 is likely to be magnified should Indonesia be unable to respond effectively to reverse these negative perceptions in the US.⁹

The defendant in the suicide bombing Bali I, Amrozi, described his Islamic opinions to his family which were covered by the local daily newspaper *Pikiran Rakyat* in regard to the Holy Day of Islam, Idul Fitri 1426 H in his Jail at Nusakambangan. He stated that he is an Islamic martyr and is proud to be sentenced to death. He believes that he will go to heaven as God's reward for his act of terrorism which he regarded as Jihad in accordance with the Quran's command. Undoubtedly, such an opinion is really wrong and depicts little knowledge of Islamic doctrine, but distorts and hijacks the meaning of jihad. Therefore, eliminating such acts of terrorism based on the right understanding of Islamic doctrine, especially on the meaning of jihad, must be a priority action of the government. Meanwhile the late suspected suicide bombers of Bali II (R. Aja's Café Kuta Bali), Aip Hidayat, Misno and Salik Firdaus came from poor families and they have little knowledge of Islam which allows them to be easily influenced by the misused concept of jihad and Islam. This is to say that economic factors and a lack of knowledge of the true meaning of jihad play a role in triggering someone to be involved in acts of terrorism. Therefore, dissemination of the true meaning of jihad and the danger of misusing its concept is greatly needed as a way to eliminate terrorism among the Muslims.

Eliminating terrorism within Muslim society, considering a religious approach, highly suggested disseminating the real meaning of jihad and "sword verses" and the abused ones as well. A short description on the meaning of true and abused Islamic jihad may be summarized as follows: The two broad meanings of jihad, non-violent and violent, are contrasted in a well-known Prophetic tradition. It's said that when Muhammad returned from battle he told his followers: "We return from the lesser jihad (warfare) to the greater jihad". The greater jihad is the more difficult and more important struggle against one's ego, selfishness, greed, and evil.

Jihad is a concept with multiple meanings, used and abused throughout Islamic history. Although jihad has always been an important part of the Islamic tradition, in recent years some have maintained that it is a universal religious obligation for all true Muslims to join the jihad to promote Islamic reform or revolution. Some look around them and see a world dominated by corrupt authoritarian regimes and a wealthy elite minority concerned solely with its own economic prosperity and awash in Western culture and values. Western governments are perceived as propping up oppressive regimes and exploiting the region's human and natural resources, robbing Muslims of their culture and their option to be governed according to their own choice and to live in a more just society.

The defensive nature of jihad is clearly emphasized in Q.2:190, "And fight in the way of God with those who fight you, but agrees not: God loves not the aggressors". The Quran provided detailed guidelines and regulations regarding the conduct of war: who is to fight and who is exempted (Q 48:17, 9:91), when hostilities must cease (Q 2:192) and how prisoners should be treated (Q 47:4). The most important verses such as Q 2:294 emphasized that warfare and the response to violence and aggression must be proportional: "Whoever transgresses against you, respond in kind".

⁹ William E. James. *Indonesia's External Trade and Competitiveness: Assessing the Economic Costs of Terror* presented at the conference on The Economic Cost of Terrorism: Indonesia's Responses, Shangri-La Hotel, Jakarta, 7 May, 2003.

However, Quranic verses also underscore that peace, not violence and warfare is the norm. Permission to fight the enemy balanced by a strong mandate for making peace; “If your enemy inclines toward peace, then you too should seek peace and put your trust in God” (Q 8:61) and “Had Allah wished, he would have made them dominate you, and so if they leave you alone and do not fight you and offer you peace, then Allah allows you no way against them” (4:90). From the earliest time, it was forbidden in Islam to kill non-combatants as well as women and children and monks and rabbis, who were given the promise of immunity unless they took part in fighting.

But what of those verses, sometimes referred to as the “sword verses” that call for killing unbelievers, such as, “When the sacred months have passed, slay the idolaters wherever you find them, and lie in wait for them, at every place of ambush” (Q 9:5). These same verses have also been selectively used or abused by religious extremist to develop a theology of hate and intolerance and to legitimate unconditional warfare against unbelievers. The Ulama (religious scholar) said that “sword verses” abrogated or overrode the earlier Quranic verses that limited jihad to defensive war: in fact, however, the full intent of “When the sacred months have passed, slay the idolaters wherever you find them” is missed or distorted when quoted in isolation. For it is followed and qualified by: “But if they repent and fulfil their devotional obligations and pay zakat (charitable tax on Muslims), then let them go their way, for God is forgiving and kind” Q.9:5. The same is true of another often quoted verse: “Fight those who believe not in God nor Last Day, nor hold that forbidden which had been forbidden by God and His Apostle, nor hold the religion of truth [even if they are] of the People of the Book,” which is often cited without the line that follows “Until they pay the tax with willing submission, and feel themselves subdued” Q 9:29.

Terrorists like Osama bin Laden as well as Indonesian terrorists go beyond classical Islam’ criteria for a just jihad and recognize no limits but their own, employing weapons or means. They reject Islamic law’s regulations regarding the goals and legitimate means for a valid jihad: that violence must be proportional and that only the necessary amount of force should be used to repel the enemy, that innocent civilians should not be targeted, and that jihad must be declared by the ruler or head of state. Today, individuals and groups, religious and lay, seize the right to declare and legitimate an unholy war of terrorism in the name of Islam.

Although most Indonesians are Sunni and follow the Islamic school of law response to marginalize extremists and develop a political theory that emphasizes stability over chaos and anarchy, this does not dissuade all from an extremist path. After 911 and a couple of years before, extremist groups have risen up to challenge the Indonesian government and terrorized their population and attack foreign interests. As stated by “an Indonesian suspected terrorist” that he is the true believer struggling against a pagan society of unbelief or the acts of idolaters in the country. The terrorists attempt to impose their ideological brand of Islam and “hijacked” Islamic doctrines such as jihad, claiming to be defending true Islam, to legitimate their illegitimate use of violence and acts of terrorism.

IV. CONCLUSION AND RECOMMENDATION

Combating terrorism and securing the nation and the people from future terrorist attacks are the top priority of the Indonesian government.

Indonesian Muslims denounced the terrorist attacks as cruel and uncivilized crimes against humanity. However, this most populous Muslim nation on earth, Indonesia, hosts an array of Muslim groups ranging from traditionalist to highly liberal.

The early combating of terrorism will be more effective through the reformation of an Islamic curriculum for all levels of education endorsed by the Government and the Ulama (Muslim Scholars), individually and institutionally.

PARTICIPANTS' PAPERS

COUNTRY REPORT: BRAZIL

*Laercio Rossetto**

I. INTRODUCTION

The present essay has been prepared with the most up-to-date material expounding the current position of the Federative Republic of Brazil against all acts of global terrorism and the domestic legal regime for combating this international threat. In this regard studies were made accordingly to the Constitution promulgated on October 5, 1988 and on well-grounded laws, decrees, international conventions and protocols pertaining to the guiding principles for fighting terrorism, which Brazil has ratified and introduced into its legal system.

In order to enrich the information made available through this paper, factual analyses concerning Brazil's situation in reference to eventual terrorist threats have been included, along with some data relating to the neighbouring countries in South America, such as Colombia and the tri-border region involving Brazil, Argentina and Paraguay, without the presumption of exhausting the subject.

Brazil is committed, with the international community and its own citizens, in being vigilant towards the rule of law, respect for human rights, liberty, equality and the right to life itself, without any distinction whatsoever, under the terms of Article 5 of the Federal Constitution. Through the usage of strong and effective anti-terrorism legislation, combined with appropriate strategic, national, police and military intelligence accompanied by efficient law enforcement and government agencies, terrorist threats can be diminished at their root.

II. INTERNATIONAL TERRORISM IS A WORLDWIDE MENACE

There isn't the slightest doubt that international terrorism represents a threat to every country in the world, for terrorist attacks have been of global reach in the international community. To create an international environment inhospitable to terrorists and all those who support them, will be of great effectiveness in the struggle against this worldwide menace. Terrorists share the misguided belief that killing, kidnapping, extorting, robbing, bombing, and wreaking havoc to terrorize countries and entire populations are legitimate forms of political or religious action.

The Federative Republic of Brazil Condemns Any Form of Terrorism

As the former President of the Federative Republic of Brazil, Fernando Henrique Cardoso, once stated during a press release related to the United States military operations against strategic targets in Afghanistan, addressing President George W. Bush on October 7, 2001, straight from the "Planalto" Palace, his office in Brasilia, the Capital of Brazil:

"The Brazilian people's peaceful inclination and repudiation of terrorism are constitutional tenets that govern our country's foreign policy. Our position is clear. By repudiating terrorism in any form, regardless of its perpetrators, we are siding with reason and wisdom. This conflict is not being engaged against a people, a State or a religion. The objective is solely to contain and eliminate the scourge of terrorism. I hope – and I am sure that this hope is shared by all – that the operations launched today will entail no tragic consequences, and that they will seek to prevent the loss of innocent lives and preserve the civilian population."

The current President of Brazil Luiz Inácio Lula da Silva at the United Nations Security Summit in New York, September 14, 2005 presented a statement entitled "Threats to International Peace and Security", expressing his indignity towards barbaric acts of terrorism perpetrated against innocent and defenceless people affirming the need to eradicate terror around the world.

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Brazil's seventh Constitution – promulgated on October 5, 1998 – was established by a convened National Constituent Assembly in order to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded in social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, being promulgated on October 5, 1988.

As established in Article 4 of the Brazilian Constitution the country's international relations are governed by the following principles:

- (i) National independence
- (ii) Prevalence of human rights
- (iii) Self-determination of the people
- (iv) Non-intervention
- (v) Equality among states
- (vi) Defence of peace
- (vii) Peaceful settlement of conflicts
- (viii) Repudiation of terrorism and racism
- (ix) Cooperation among peoples for the progress of mankind
- (x) Granting of political asylum.

Of all of these principles it's important to emphasize Brazil's repudiation of terrorism for the purpose of this paper, which has been stated at a constitutional level, in the means that this principle must be obeyed and honoured by all powers of the Federal, State and District Governments of Brazil, comprising the Executive, Legislative and Judicial Branches, that are independent and harmonious among themselves. Article 5, item XLIII of the Constitution also determines that the practice of torture, illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty, and their principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable. Brazil is definitely a nation that rejects all forms of criminal, social or political violence.

III. FACTS REGARDING BRAZIL'S SITUATION ON TERRORISM

A. The Cabinet of Institutional Security of the Presidency of the Republic (GSI) and Brazil's Intelligence Agency (ABIN)

According to Federal Law No. 10,683 of May 28, 2003 (Article 6), the Cabinet of Institutional Security of the Presidency of the Republic is in charge of personally advising the President in all matters of security and military affairs, whose Minister in Chief is an Army General. The Brazilian Intelligence Agency (ABIN) established by Federal Law No. 9,883 of December 7, 1999 and regulated by Federal Decrees Nos. 3,448 of May 7, 2000; 3,493 of May 29, 2000; 3,695 of December 21, 2000; and 4,376 of September 15, 2002, which is the equivalent of the Central Intelligence Agency (CIA) in the United States of America, is responsible for the planning, execution, coordination, supervision and control of all intelligence activities and information systems in Brazil, always furnishing precise and reliable data to the President of the Republic. These government agencies are of extreme importance in monitoring and preventing eventual terrorist activity in the country.

B. Intelligence Monitoring in the Tri-Border Region of Brazil, Argentina and Paraguay

After the terrorist attacks in the United States on September 11, 2001, the suggestion that radical groups are installed and supported by Arab-Palestinian communities in South America has been raised from time to time. Suspicion of involvement with extremist activities, especially those connected to financing terrorism, have constantly been levelled against Southern Cone countries, particularly those that form the tri-national border at the city of "Foz do Iguassu", in the South region of Brazil, bordering Argentina and Paraguay.

1. Terrorists Attacks on Argentina

Nonetheless, since the 1990s, and because of the deadly attacks that took place in 1992 and 1994 in Argentina, where two bombs devastated the Argentinean Jewish Community and marked the arrival, for the first time, of Middle East terrorism in South America, Brazil has been developing intelligence and information exchange strategies with the other tri-border nations. Argentina's Israeli Embassy in Buenos

Aires was the sight of the first explosion, a car bomb, on March 17, 1992, killing 29 and injuring over 250, where the Islamic Jihad claimed responsibility immediately after it happened. On July 18, 1994 the AMIA Jewish Community Centre in Argentina's capital was bombed causing the death of 87 people. Later in 1994 came the first of several breakthroughs in the embassy bombing case, where six Lebanese and one Brazilian, arrested for operating a drug cache, were found to be members of Hezbollah, the Iranian-backed Lebanese terrorist organization, and the Argentine Government announced that they were tied to that bombing.

2. Extremist Groups in the Tri-Border Region

The Tri-Border region continues to present a series of interdependent factors that in the whole may provide a stimulus for extremist organizations to become active in the area. Monitoring suspicious activities there is challenging due to the hermetically sealed nature of Islamic communities, which display a great desire to preserve values and cultural identity, for it is known that al-Qaeda recruits Muslim men from around the world. Many recruits have come from Saudi Arabia, Egypt, and Yemen, but al-Qaeda has also succeeded in attracting Muslims living in the West.

Al-Qaeda is an international terrorist network led by Osama bin Laden seeking to rid Muslim countries of what it sees as the profane influence of the West, and replace their governments with fundamentalist Islamic regimes. The al-Qaeda organization is apparently connected to other terrorist factions, such as the following:

- (i) Egyptian Islamic Jihad
- (ii) The Libyan Islamic Fighting Group
- (iii) Islamic Army of Aden (Yemen)
- (iv) Jama'at al-Tawhid wal Jihad (Iraq)
- (v) Lashkar-e-Taiba and Jaish-e-Muhammand (Kashmir)
- (vi) Islamic Movement of Uzbekistan
- (vii) Salafist Group for Call and Combat and the Armed Islamic Group (Algeria)
- (viii) Abu Sayyaf Group (Malaysia, Philippines)
- (ix) Jemaah Islamiya (Southeast Asia)

There is also the varying manner in which these activities are looked upon by the specific legislation of each country. Although these communities do integrate and adopt local habits and customs, they retain their social, political and cultural identity, as well as strong links to their origins.

The Tri-Border region has been the target of an ongoing surveillance effort that dates back more than a decade and pools the resources of Brazil, Paraguay, and Argentina. Following the attacks of September 11, 2001 this effort has even been strengthened by the creation of the "Mercosul" Common Market of the South Working Group on Terrorism and the "3+1 mechanism", which combines intelligence-gathering capabilities and promotes information sharing among Brazil, Argentina, Paraguay and the United States of America as a guest participant. New conclusions were announced and agreed to by the four delegations. The statement read as follows:

"No operational activities linked to terrorism have been detected in the Tri-Border region by radicalized groups such as Hezbollah, Hamas or al-Qaeda, be they terrorist activities or efforts to develop or train new members for terrorist organizations, or so-called sleeper cells. It is agreed that no location on the planet is exempt from this possibility, making it necessary to maintain vigilance and strengthen policing, immigration and passport control efforts in the region."

No concrete evidence has proven the presence of terrorist organizations or even the existence of fund-raising activities in the area. This has been confirmed and publicly recognized by the Executive Secretary of the Inter-American Committee against Terrorism (CICTE) of the Organization of American States (OAS), who visited the region in August 2003. Brazil has been an active participant of the committee and on June 3, 2002 the OAS General Assembly approved CICTE Resolution No. 1840 as an updated instrument to prevent, combat and eradicate terrorism, which it has signed on.

The threat of terrorists cells being installed in a particular region or country has to do with the fact that activities that provide logistical or recruitment support for terrorism can be carried out in just about any part of the world, owing to their transnational dissemination.

As a result of policing and intelligence operations, although sympathizers of organizations such as Hezbollah and Hamas were identified, no cells or training camps connected to terrorist organizations were located in the region, nor have any signs or connections to terrorism been found in Brazil according to the Brazilian Intelligence Agency (ABIN).

3. Possible Terrorist Threat in the Amazon Region of Brazil by the Revolutionary Armed Forces of Colombia (FARC)

Brazil is also maintaining surveillance in the Amazon region nearby Colombia where the two leftist insurgent groups not only wage guerrilla warfare but also carry out kidnappings, hijackings, attacks on civilians, and political assassinations. In that region there's the Revolutionary Armed Forces of Colombia, know by its Spanish acronym – “FARC” and the National Liberation Army – “ELN”, considered by Brazil as typical guerrilla groups, despite the fact that The United States State Department includes them on its list of foreign terrorist organizations. Although ELN is more ideological than FARC, the two groups have similar programmes, both say that they represent the rural poor against Colombia's wealthy classes and oppose American influence in Colombia, the privatization of natural resources, multinational corporations, and rightist violence.

The Revolutionary Armed Forces of Colombia are the largest and best-equipped rebel group in the region, with some 18,000 members operating in about half the country, mostly in the jungle of the southeast plains at the base of the Andes Mountains. FARC is responsible for most of the ransom kidnappings in Colombia and they target wealthy landowners, foreign tourists, and prominent international and domestic officials, stepping up its terrorists activities against infrastructure in Colombian cities and promoting the illegal cocaine drug trade.

IV. BRAZIL'S LEGAL REGIME FOR COMBATING TERRORISM

A. Universal Conventions and Protocols Pertaining to Terrorism that Brazil has Ratified and Implemented into its Legal Regime

- (i) Convention on Offences and Certain Other Acts Committed On Board Aircraft (“Tokyo Convention”, 1963) – promulgated in Brazil by Federal Decree No. 66,520 of April 14, 1970.
- (ii) Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”, 1970) – promulgated in Brazil by Federal Decree No. 70,201 of February 14, 1972.
- (iii) Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes against Persons and Related Extortion that are of International Significance (Washington D.C., 1971) – promulgated in Brazil by Federal Decree No. 3,018 of February 5, 1999.
- (iv) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (“Montreal Convention”, 1971) – promulgated in Brazil by Federal Decree No. 72,383 of January 26, 1973.
- (v) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973) – promulgated in Brazil by Federal Decree No. 3,167 of June 7, 1999.
- (vi) International Convention against the Tacking of Hostages (“Hostages Convention”, 1979) – promulgated in Brazil by Federal Decree No. 3,517 of April 7, 2000.
- (vii) Convention on the Physical Protection of Nuclear Material (“Nuclear Materials Convention”, 1980) – promulgated in Brazil by Federal Decree No. 95 of February 8, 1987.
- (viii) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1988) – promulgated in Brazil by Federal Decree No. 2,611 of June 8, 1997.
- (ix) Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1991) – promulgated in Brazil by Federal Decree No. 4,021 of December 3, 2001.
- (x) International Convention for the Suppression of Terrorist Bombing (New York, 1998) – promulgated in Brazil by Federal Decree No. 4,394 of September 22, 2002.
- (xi) United Nations Security Council Resolution No. 1373 of September 28, 2001 (declared that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations, and called upon all States to become parties as soon as possible to relevant international conventions and protocols relating to terrorism, and fully implement them) – which Brazil is signatory in accordance to Federal Decree No. 3,976 of October 18, 2001.

Under the terms of Resolution 1373 (2001) Brazil will prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts, and of persons and entities acting on behalf of terrorists should also be frozen without delay. It also has prohibited nationals, persons or entities in their territories providing funds, financial assets, economic resources, financial or other related services to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts. Also by the text, the Council called on all States to intensify and accelerate the exchange of information regarding:

- (i) Terrorist actions or movements
- (ii) Forged or falsified documents
- (iii) Traffic in arms and sensitive material
- (iv) Use of communications technologies by terrorist groups
- (v) The threat posed by the possession of weapons of mass destruction

The Adoption of International Conventions and Protocols by Brazil's Legal System

It is exclusively the competence of Brazil's National Congress to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property (Article 49, I of the Constitution) through a legislative decree. The President of the Republic has exclusive power to sanction, promulgate and order the publications of law, as well as to issue presidential decrees and regulations for the true enforcement thereof (Article 84, IV of the Constitution). The President may also conclude international treaties, conventions and acts, *ad referendum*, of the National Congress (Article 84, VIII of the Constitution).

B. Brazil's Domestic Legislation for Combating Terrorism

1. The 1988 Constitution of the Federative Republic of Brazil

The most important written document in Brazil's legal regime is the 1988 Constitution of the Federative Republic containing 250 Articles with dozens of paragraphs, sections and hundreds of items; 48 amendments and 6 revision amendments, regulating the country's entire legal system and guaranteeing the free exercise of the Executive Power, the Legislative Power, the Judicial Power, the Public Prosecution and the constitutional Powers of the units of the Federation.

As explained before, acts of terrorism are treated as heinous crimes, but whenever any type of legislation or international convention is to be introduced into Brazil's legal system they must obey and respect constitutional commands such as the following:

- (i) The law shall not exclude any injury or threat to a right from the consideration of the Judicial Power (Article 5, XXXV)
- (ii) The law shall not injure the vested right, the perfect juridical act and the *res judicata* (Article 5, XXXVI)
- (iii) There shall be no exceptional tribunal or court (Article 5, XXXVII)
- (iv) There is no crime without a previous law to define it, nor a punishment without a previous legal commination (Article 5, XXXIX)
- (v) Penal law shall not be retroactive, except to benefit the defendant (Article 5, XL)
- (vi) The law shall punish any discrimination which may attempt against fundamental rights and liberties (Article 5, XLI)
- (vii) The practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty, and the principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable (Article 5, XLIII)
- (viii) The action of armed groups, either civil or military, against the constitutional order and the democratic state is a non-bailable crime, with no limitation (Article 5, XLIV)
- (ix) No punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and be executed against them, up to the limit of the value of the assets transferred (Article 5, XLV)
- (x) The law shall regulate the individualization of punishment and shall adopt the following, among others (Article 5, XLVI):

- Deprivation or restriction of freedom
 - Loss of assets
 - Fine
 - Alternative rendering of social service
 - Suspension of deprivation of rights
- (xi) There shall be no punishment (Article 5, XLVII)
- Of death, save in the case of declared war, under the terms of Article 84, XIX
 - Of life imprisonment
 - Of hard labour
 - Of banishment
 - Which is cruel
- (xii) The sentence shall be served in separate establishments, according to the nature of the offence, the age and the sex of the convict (Article 5, XLVIII)
- (xiii) Prisoners are ensured respect of their physical and moral integrity (Article 5, XLIX)
- (xiv) Female prisoners shall be ensured of adequate conditions to stay with their children during the nursing period (Article 5, L)
- (xv) No Brazilian shall be extradited, except the naturalized ones in the case of a common crime committed before naturalization, or in the case where there is sufficient evidence of participation in the illicit traffic of narcotics and related drugs, under the terms of law (Article 5, LI)
- (xvi) Extradition of a foreigner on the basis of a political or ideological crime shall not be granted (Article 5, LII)
- (xvii) No one shall undergo legal proceeding or sentencing save by the competent authority (Article 5, LVIII)
- (xviii) No one shall be deprived of freedom or of his assets without the due process of law (Article 5, LIV)
- (xix) Litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary systems and of full defence, with the means and resources inherent to it (Article 5, LV)
- (xx) Evidence obtained through illicit means are unacceptable in the process (Article 5, LVI)
- (xxi) No one should be considered guilty before the issuing of a final and un-appealable penal sentence (Article 5, LVII)
- (xxii) No one who has undergone civil identification shall be submitted to criminal identification, save in the cases provided by law (Article 5, LVIII)
- (xxiii) Private prosecution in the cases subject to public prosecution shall be admitted, whenever the latter is not filed within the period established by law (Article 5, LIX)
- (xxiv) The law may only restrict the publicity of procedural acts when the defence of privacy or the social interest require it (Article 5, LX)
- (xxv) No one shall be arrested unless in *flagrante delicto* or by written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law (Article 5, LXI)
- (xxvi) The arrest of any person as well as the place where he is being held shall be immediately informed to the competent judge and to the family of the person arrested or to the person indicated by him (Article 5, LXII)
- (xxvii) The arrested person shall be informed of his rights, among which the right to remain silent, and he shall be ensured of assistance by his family and a lawyer (Article 5, LXIII)
- (xxviii) The arrested person is entitled to identification of those responsible for his arrest or for his police questioning (Article 5, LXIV)
- (xxix) Illegal arrest shall be immediately remitted by the judicial authority (Article 5, LXV)
- (xxx) No one shall be taken to prison or held therein, when the law admits release on own recognizance, subject or not to bail (Article 5, LXVI)
- (xxxi) *Habeas corpus* shall be granted whenever a person suffers or is in danger of suffering violence or coercion against his freedom of locomotion, on account of illegal actions or abuse of power (Article 5, XLVIII)
- (xxxii) A *writ of mandamus* shall be issued to protect a clear and perfect right, not covered by *habeas corpus*, whenever the party responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising duties of the Government (Article 5, LXIX)

Article 5, paragraph 2 of the Constitution also states that the rights and guarantees expressed in the Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.

2. The Council of the Republic and the National Defence Council

As defined in Article 89 and 91 of Brazil's Constitution the Council of the Republic is a higher body for consultation by the President of the Republic, and its members are the Vice President of the Republic; the President of the Chamber of Deputies; the President of the Federal Senate; the majority and the minority leaders in the Chamber of Deputies; the majority and the minority leaders in the Federal Senate; the Minister of Justice; and six born Brazilian citizens, over thirty-five years of age, two of which are appointed by the President of the Republic, two elected by the Federal Senate and two elected by the Chamber of Deputies, all with a term of office of three years.

The Council of the Republic has the competence to express opinion on federal intervention, state of defence and stage of siege, and on matters relevant to the stability of the democratic institutions (regulated by Federal Law No. 8,041 of June 5, 1990).

The National Defence Council is a consultation body of the President of the Republic on matters related to national sovereignty and the defence of the democratic state, having as permanent members: the Vice-President of the Republic; the President of the Chamber of Deputies; the President of the Federal Senate; the Minister of Justice; the Minister of Defence; the Minister of External Relations; the Minister of Planning; the Commanders of the Navy, the Army, and the Air Force (regulated by Federal Law No. 8,183 of April 11, 1991 and Federal Decree No. 893 of August 12, 1993).

It has the mission to express opinion in the event of declaration of war and making peace, as established in the Constitution, and on decreeing a state of defence, state of siege and federal intervention. The Council may also propose the criteria and conditions for the use of areas which are indispensable to the security of the national territory and to express opinion on their actual use, especially on the boundary zone and on those related to the preservation and exploitation of natural resources of any kind.

The President of the Republic may, after hearing the Council of the Republic and the National Defence Council, request authorization from the National Congress to decree a state of siege in the event of serious disturbance with nationwide effects or occurrence of facts that evidence the ineffectiveness of measures taken during the state of defence.

3. The Armed Forces and Public Safety Institutions

As established in Article 142 of the Constitution, the Armed Forces, comprised of the Navy, the Army and the Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and are intended for the defence of the country, for the guarantee of the constitutional powers, and on the initiate of any of these, of law and order.

Under Article 144 of the Federal Constitution, Public safety is the duty of the State and the right and responsibility of all, being exercised to preserve public order and the safety of persons and property, by means of the following institutions:

- (i) Federal police
- (ii) Federal highway police
- (iii) Federal railway police
- (iv) Civil police
- (v) Military police and military fire brigades

Complementary Laws Nos. 97 of June 9, 1999 and 117 of September 2, 2004 allows that both the Armed Forces and the Public Safety Institutions work together when necessary to re-establish the rule of law and public order.

4. Complementary and Ordinary Laws for Combating Terrorism

- (i) Complementary Law No. 105, of January 10, 2001 allows the disregard of privacy of financial and bank transactions in the interest of criminal investigations or criminal proceedings relating to financing or support of terrorist acts, money laundering, illicit drug trafficking, organized crime and other unlawful acts, as well as the exchange of financial information with other countries (Article 1, paragraph 2, Article 2, paragraph 4, II, b).

- (ii) Federal Law No. 6,815 of August 19, 1980 defines the juridical situation and entrance of foreigners in Brazil, in Article 77 paragraph 3, which allows the Supreme Federal Court to extradite perpetrators of terrorism and terrorists without infringing Article 5, LII of the Federal Constitution, making it possible to disregard the prohibition of turning criminals that commit ideological crimes to a jurisdiction of another country.
- (iii) Federal Law No. 7,170 of December 14, 1983 defines crimes against national security, social and political order, and establishes procedures for investigation and trial of its offenders. In Article 19 there is a penalty of 2 to 10 years imprisonment against perpetrators that commit unlawful seizure of aircraft, vessels or any transportation vehicle. Article 20 imposes 3 to 10 years imprisonment on those that commit acts of terrorism or politically motivated violence for the maintenance of sub-national groups or clandestine agents.
- (iv) Federal Law No. 9,474 of July 22, 1997 Article 3, I and IV, forbids asylum to refugees that have committed crimes against peace, war crimes, crime against humanity, heinous crimes involving terrorist acts or illegal drug trafficking, and also those that are guilty of going against the principles of the United Nations.
- (v) Federal Law No. 9,034 of May 3, 1995 altered by Federal Law No. 10,217 of April 11, 2001 regulates the obtaining of evidence against all kinds of criminal organizations, including terrorist organizations, for the purpose of criminal investigations and proceedings in court, allowing police infiltration and intelligence operations.
- (vi) Federal Law No. 9,296 of July 24, 1996 regulates the interception of telephone, computer and any sort of means of communication for the purpose of criminal investigation and proceedings in court.
- (vii) Federal Law No. 9,613 of March 3, 1998 defines crimes of money laundering, illegal financial assets or economic resources and creates the Control Council of Financial Operations (COAF) regulated by Federal Decree No. 2.799 of October 8, 1998 which operates with the Central Bank of Brazil.
- (viii) Law Decree No. 2,848 of December 7, 1940 – Brazil’s Penal Code, Articles 250 (cause arson); 251 (cause explosion); 252 and 253 (usage, fabrication or transportation of toxic gas); 254 and 256 (cause flooding and collapse of buildings or constructions) among many other crimes.
- (ix) Law Decree No. 3,689 of October 3, 1941 (Brazil’s Penal Code of Procedure)

The Executive Branch submitted bill No. 6,764/2002 to Brazil’s National Congress for appreciation and approval. The proposed law describes a series of acts that are considered as the practice of terrorism, but it is still under discussion and awaits deliberation in order to be voted on.

V. CONCLUSION

An improved and stronger legal regime is probably the first and most important step in the fight against terrorism, but it demands a combination of many factors. The process of achieving legislative change can itself be difficult and require considerable political will. New laws themselves may only achieve symbolic change so that people can be reassured that the problem has been dealt with. If they are not matched by even greater efforts in implementing those laws then little that is real may change.

Nations must use every measure of power to diminish the scourge of terrorism – diplomatic, economic, law enforcement, financial, intelligence and especially mutual cooperation with the United Nations, its Member States, Organization of American States, and other international and regional organizations.

The Federative Republic of Brazil until now hasn’t detected or encountered any terrorist cell, activity or attack, but will always remain watchful and alert to this threat. Brazil’s legal regime for combating terrorism has expanded, yet it can still be improved to be more effective, especially on the part of carrying out criminal sentences and punishment and avoiding impunity, for they are lax.

The country’s most daring challenge at the moment is to make politicians in the National Congress aware of the menace that terrorism represents, as well as the importance of a budget increase for the armed forces, intelligence agencies, national security and public safety institutions, by the executive branch of the Federal Government, eliminating bureaucratic inertia.

Finally, to urge public prosecutors to work with law enforcement organizations, and that members of the judiciary apply the rules of law against criminals to their full extent transforming jurisprudence so that it is more rigorous against perpetrators, for judges are also of the utmost significance in implementing the legal regime.

COUNTRY REPORT: INDIA

*D. K. Pathak**

I. TERRORISM DEFINED

Before we proceed on any deliberation on the subject it would be desirable to know what is terrorism. It is believed that social scientists are yet to agree on a clear cut definition of terrorism. However, the so called academic consensus definition written by A. P. Schmid and widely used by social scientists and within the UN itself is -

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi) clandestine individuals, groups or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence based communication processes between terrorists (organisation), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion or propaganda is primarily sought.

In India section 15 of the Unlawful Activities (Prevention) Amendment Ordinance, 2004 defines terrorist act as “whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause or likely to cause death of or injuries to any person or persons or loss of or damage to or destruction of property or disruption of any supplies or services essential to the life of the community in India or causes damage or destruction of any property or equipment used or intended to be used for the defence of India, any State government or any of their agencies or detains any person or threatens to kill or injure such person in order to compel the government of India or any other person to do so or abstain from doing any act, commits a Terrorist act”.

II. TERRORISM IN INDIA

India has been among the major victims of terrorism – mostly cross border state sponsored Terrorism - for over two decades. Despite the intolerably high cost in terms of human lives, people and material, India has steadfastly pursued a counter strategy which gives primacy to dialogue, democratic political processes and the rule of law.

Armed counter actions are based on the doctrine of “minimum use of force” within the framework of the constitution which guarantees human rights. The magnitude of the problem of terrorism in India could be gauged by the violence statistics as given in *Appendix A*.

III. INDIAN INITIATIVES

To deal with the problems of terrorism India has taken several initiatives at various levels.

A. At the International Level

- India has been supportive of all efforts, particularly in the UN to combat terrorism and has played a leading role in shaping international opinion and urging the international community to prioritize the fight against terror. Its consistent and basic stand before the international community has been that-
- There could be no justification for terrorism on any grounds: religious, political, ideological or any other.
- The fight against terrorism must be given the highest priority
- To be effective, the fight against terrorism has to be long term, comprehensive and sustained.

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- Strengthening of international cooperation is vital to ensure that action is not restricted simply to the perpetrators but also encompassed states, which sponsor, support, or provide safe haven to terrorists.
- Ad hoc and selective actions have limited chances of success and compartmentalization of actions in terms of regions, religions or organizations is bound to be counterproductive.

B. Multi-Lateral Arrangements and Agreements

- It welcomed UN Security Council Resolution 1373 and is fully committed to implement it. It has submitted its national report on measures taken to implement UN Security Council Resolution 1373 in December 2001 and also submitted a supplementary report on specific queries by the Counter Terrorism Committee under the Security Council.
- It is signatory to all the thirteen UN Sectoral Conventions on Terrorism. It has been supportive of all measures within the UN General Assembly, the sixth Committee and the UN Security Council. It has supported UN Security Council Resolution 1269 and 1368, which clearly identify terrorism as a threat to international peace and security. In addition, India has supported and fully implemented Resolutions 1267, 1333 and 1363 relating to terrorism by the Taliban Regime in Afghanistan.
- It has piloted the comprehensive Convention on International Terrorism (CCIT) in the UN with the objective of providing a comprehensive legal framework to combat terrorism.

C. Regional Arrangements

- At the regional level, India is a party to the SAARC Regional Convention on Suppression of Terrorism 1987 and has enacted the enabling legislation in the form of the SAARC Conventions (Suppression of Terrorism Act) 1993.
- The ASEAN Regional Forum (ARF) was set up in 1994 as a regional security dialogue platform with ten ASEAN countries of which India is also a member.

D. Bilateral Arrangements

India has entered into three types of bilateral treaties to combat international terrorism

- **Agreements** to combat terrorism and organized crimes, drug related offences, etc. such agreements are essentially framework agreements to facilitate the exchange of operational information and development of joint programmes to counter organized crimes and terrorism
- **Extradition Treaties** to facilitate transfer of fugitive offenders and suspected terrorists. Such treaties have been signed with seventeen countries, signed but not exchanged with eight countries in addition to extradition arrangements with eleven countries.
- **Bilateral Treaties on Mutual Legal Assistance (MLATs)** in criminal matters to facilitate investigation, collection of evidence, transport of witnesses, location and action against proceeds of crime, etc. Such MLATs have been signed with ten countries in addition to those signed but not exchanged with nine countries.

E. Mechanism of Interpol

- In addition to the above, cooperation on matters relating to terrorism is also effected through the mechanism of Interpol, of which India has been a member since 1946; there is an Indian member on secondment to Interpol. The nodal point for coordination with Interpol at the central level is the CBI

IV. LEGAL REGIME IN INDIA

In keeping with the requirement of dealing with the menace of terrorism, India has put in place a comprehensive legal infrastructure. There are several pieces of legislation, of which some of them are listed below-

- (i) The Unlawful Activities (Prevention) Act, 1967
- (ii) The Armed Forces (Special) Powers Act, 1967

- (iii) The National Security Act, 1980
- (iv) The Arms Act, 1959
- (v) The Explosives Act, 1884
- (vi) The Explosives Substance Act, 1908
- (vii) The Indian Penal Code, 1860
- (viii) The Code of Criminal Procedures, 1973
- (ix) The Anti-Hijacking Act, 1982
- (x) The Prevention of Money Laundering Act, 2002

It would be relevant to highlight some of the penal provisions of one or two pieces of legislation dealing with the acts of terrorism.

A. The Unlawful Activities (Prevention) Act, 1967

This Act was enunciated by the Indian Parliament in 1967 to make powers available to the law enforcement agencies for dealing with unlawful activities directed against the integrity and sovereignty of India. It provides for effective prevention of certain unlawful activities of individuals and associations including terrorist organizations. It extends to the whole of India.

- Sec. 3 - Power of the Government of India to declare an association as unlawful.
(The list of the terrorist organizations banned under this Act is given under Appendix B)
- Sec. 16 - Punishment for terrorist acts – death or imprisonment for life as the case may be and liable to a fine.
- Sec. 17 - Punishment for raising funds for terrorist acts – imprisonment for life and also liable to a fine.
- Sec. 18 - Punishment for conspiracy – imprisonment from five years to imprisonment for life and liable to a fine.
- Sec. 19 - Punishment for harbouring, etc. – imprisonment from 3 years to imprisonment for life and liable to a fine.
- Sec. 33 - Forfeiture of property of certain persons during trial and conviction.
- Sec. 40 - Offence of raising funds for a terrorist organization - imprisonment up to fourteen years or with a fine or both.

B. The National Security Act, 1980

The Act came into force in 1980 with a view to providing power to the Central Government and State Governments to make orders to detain certain persons including foreigners whose action may be prejudicial to the defence of India, security of India, prejudicial to the maintenance of public order and maintenance of supplies and services essential to the community.

- Sec. 3 –(3) Detention period – in the first instance exceed three months but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.
- Sec. 9 - Constitution of Advisory Boards.
- Sec. 11 - Procedure of Advisory Boards.
- Sec. 13 - Maximum period of detention: 12 months.

C. Prevention of Money Laundering Act, 2002

- Sec. 2 - Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of the offence of money laundering.
- Sec. 4 - Punishment for money laundering.
- Sec.5&8 - Deals with provisional attachment and confiscation.
- Sec. 19 - Power of arrest.
- Sec. 24 - Puts the burden of proof on the accused.
- Sec. 45 - Offences cognizable, non-bailable and limitation on granting bail.
- Sec. 72 - Provides for continuance of proceedings in the event of death or insolvency.

D. Armed Forces (Special) Powers Act, 1967

(Salient features – without replicating the wording in the Act)

- Sec. 3 - The whole or any part of the country/state can be declared as a disturbed area by the central government or the governor of the state
- Sec 4 -
- * Special powers can be utilized by any commissioned officers, non-commissioned officers, warrant officers or any other person of the equivalent rank
 - * Authorizes use of force, even causing death against any person who is acting in contravention of law or carrying weapons
 - * Authorizes the destruction of any arms dumps, prepared or fortified positions from which armed attacks are made or likely to be made
 - * Authorizes arrest without warrant of any person who is suspected to have committed or likely to commit any cognizable offence. May even use such force as necessary to effect the arrest
 - * Enter and search without warrant any premises suspected to be used for any illegal purposes as defined under the Act
 - * Arrested person to be handed over to the officer in charge of the nearest police station with the least possible delay

The above provisions confer sweeping powers on the members of the armed forces and since they are likely to be misused the Supreme Court of India has issued eleven commandments regulating the exercise of powers under this Act.

V. SUGGESTED MEASURES TO COMBAT TERRORISM

- A. It must be understood fully that while anti-terrorism is a philosophical anti-thesis that emerges from a painstaking examination of the concept of terrorism as well as an attempt to understand and articulate what constitutes terrorism, counter terrorism refers to the practices, tactics, and strategies that governments, the military and other groups adopt in order to combat terrorism. A few of the strategies, apart from the legal recourse, which may be adapted to combat insurgency are:
1. A clearly defined policy and no compromise with terrorism
 2. Dialogue with insurgents only within the ambit of the Constitution
 3. Pro-active measures, including (if necessary) pre-emptive strikes on anti-terrorist camps and bases
 4. Strengthening of existing anti-terror laws
 5. Punitive action against sympathizers, beneficiaries of terrorism and funding sources
 6. Strengthening of mechanisms such as psychological warfare in order to combat terror. Such mechanisms must be decidedly pro-active
 7. Creation of and the joining in anti-terror cooperative groups in the region such as Shanghai Cooperation Organisation
 8. Spearhead a global denouncement and alienation of states sponsoring or not acting against terror. Non-distinction of terror perpetrated by religious groups
- B. Talking of the legal regime to combat insurgency, a decision needs to be taken at all levels, including under the UN mandate, as to the extent to which the personal liberties of citizens can be compromised vis-à-vis the implementation of the various legal provisions already in vogue. Most of the time the war on the legal count against the *Ultras* is lost because of extreme sensitivity of our system to the alleged violation of personal liberties. A balance has to be arrived at between both aspects.
- C. At the end, what is required is a will to win the war over terrorism backed up by strict enforcement of existing laws at the National and International level. Any system as it marches ahead reveals certain lacunae and loopholes, which in the instant case affords the terrorists an advantage and ultimately in getting away rather mildly. There should be parity in the norms to be adopted by different countries at the international level when it comes to protecting the national interest.

APPENDIX A

Violence Statistics (2001 -2005)

• Total Number of Incidents

J & K	16394
LWE	7290
NE	6294
Punjab	4
Total	29982

• Attacks on Security Forces

J & K	3439
LWE	830
NE	1728
Punjab	Nil
Total	2879

• Total Persons Killed

J & K	13404
LWE	2752
NE	5387
Punjab	5
Total	21548

• Civilians Killed

J & K	4253
LWE	1457
NE	2345
Punjab	5
Total	8060

• Security Forces Killed

J & K	2098
LWE	545
NE	612
Punjab	Nil
Total	3255

• Terrorists Killed

J & K	7053
LWE	750
NE	2430
Punjab	Nil
Total	10233

• Weapons Recovered

J & K	9427
LWE	2765
NE	2640
<u>Punjab</u>	<u>256</u>
Total	15088

Abbreviations used:

J & K	Jammu and Kashmir
LWE	Left Wing Extremism
NE	North Eastern States of India

Note: The above statistics are not complete for 2005 and hence, they are only indicative.

APPENDIX B

TERRORIST ORGANISATIONS BANNED IN INDIA

1. Babbar Khalsa International
2. Khalistan Commando Force
3. Khalistan Zindabad Force
4. International Sikh Youth Federation
5. Lashkar – E – Taiba/Pasban- E- Ahle Hadis
6. Jaish-E-Mohammad
7. Harkat-Ul-Mujahideen/Harkat-Ul-Ansar/Harkat Ul-Jehad-E-Islami
8. Hizb-Ul-Kujahideen
9. Al-Umar-Mujahideen
10. Jammu and Kashmir Islamik Front
11. United Liberation Front of Assam (ULFA)
12. National Democratic Front of Bodoland (NDFB)
13. Peoples Liberation Army (PLA)
14. United National Liberation Front (UNLF)
15. Peoples Revolutionary Party of Kangleipak (PREPAK)
16. Kangleipak Communist Party (KCP)
17. Kanglei Yaol Kanba Lup (KYKL)
18. Manipur Peoples Liberation Front (MPLF)
19. All Tripura Tiger Force
20. National Liberation Front of Tripura
21. Liberation Tigers of Tamil Elam (LTTE)
22. Students Islamic Movement of India
23. Deendar Anjuman
24. Communist Party of India (M-L)- Peoples War Group and all its formations and front organizations
25. Maoist Communist Centre (MCC) and all its formations and front organizations
26. Albadr
27. Jamiat-Ul-Mujahideen
28. Al-qaida
29. Dukhtaran-E-Millat (DEM)
30. Tamil Nadu Liberation Army (TNLA)
31. Tamil National retrieval Troops (TNRT)
32. Akhil Bharat Nepali Ekta Samaj (ABNES)

APPENDIX C

**SUMMARY OF COUNTER-INSURGENCY OPERATIONS IN ASSAM
FROM 1 JANUARY 2000 TO 2005 (UP TO 25 DECEMBER)**

Year	Insurgent Killed	Insurgent Captured	Arms/Ammn./ Cash Recovered		Security Personnel Killed	Civilians Killed	No. of Incidents	Surrendered
2000	328	1535	Arms	371	80	412	643	1834
			Ammn.	5266				
			Rs.	17,70,256				
2001	308	912	Arms	410	86	261	485	438
			Ammn.	6842				
			Rs.	4,36,664				
2002	322	715	Arms	365	36	218	454	139
			Ammn.	6686				
			Rs.	9,07,138				
2003	276	1024	Arms	456	15	260	474	3067
			Ammn.	20488				
			Rs.	11,21,184				
2004	135	1080	Arms	349	25	202	349	1050
			Ammn.	9623				
			Rs.	8,92,494				
2005 (up to 25. Dec)	75	784	Arms	196	9	63	294	217
			Ammn.	6150				
			Rs.	10,92,544				
TOTAL	1444	6050	Arms	2147	251	1416	2699	6745
			Ammn.	55055				
			Rs.	6219270				

VIETNAMESE LAW AND ASSESSMENT OF THE LEGAL SYSTEM IN VIETNAM IN COMPARISON TO THE UNITED NATIONS CONVENTION AGAINST TERRORISM

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I. GENERAL INTRODUCTION

Terrorism is a transnational organized action against the UN's principles and purposes which are to maintain international peace and security and settle international disputes by peaceful means. In recent years, terrorism has increasingly become an urgent global issue. Beside the great loss of people and property, terrorist activities also cause a permanent alarmed and fearful state for the world community. Therefore, preventing and suppressing terrorism is the common task of nations worldwide, of which the UN plays the central role. With its roles and responsibilities, since its establishment, the UN and other international organizations have issued 13 multilateral conventions and protocols related to the prevention and suppression of terrorism in relation to different areas of international affairs.

Along with many other countries worldwide, the Government of Vietnam has been actively participating in the fight against terrorism. This is shown in the persistent policies of the State and the Government in fighting crime in general and terrorism in particular. Vietnam considers terrorism as indefensible and strongly condemns and suppresses it, especially when this crime is used against ordinary people. Vietnam has acceded to and fully implemented 8 of the 13 Universal Conventions/Protocols on combating terrorism. Vietnam is actively considering the possibility of acceding to the remaining treaties. Vietnam has issued many legislative regulations related to the prevention of terrorism. Additionally, new documents on preventing international terrorism are being considered, amended and affixed in order to enhance the effectiveness of terrorism prevention and suppression in Vietnam and to cooperate with other countries in combating international terrorism in the region and all over the world.

Presently, Vietnam has some legislative regulations related to preventing terrorism including the Common law and the Procedural law. The most important ones are the Penal Code and Criminal Procedure Code. The present Penal Code of Vietnam has articles related to preventing terrorism. These articles can be divided into two kinds: the first one directly relates to terrorist acts and the second one refers to acts which are not for the purpose of terrorist prevention but can be applied to examine penal liability of those committing terrorist acts according to Vietnamese law and international conventions on terrorism prevention.

II. VIETNAMESE LAW ON TERRORISM

A. Penal Code of the Socialist Republic of Vietnam

1. Crimes Directly Related to Terrorism are Defined in the Penal Code as Terrorism (Article 84) as follows:

- “1. *Those who intend to oppose the people's administration and infringe upon the life of officials public employees or citizens shall be sentenced to between twelve and twenty years imprisonment, life imprisonment or capital punishment.*
2. *In the case of committing crimes by infringing upon physical freedom and/or health, the offenders shall be sentenced to between five and fifteen years of imprisonment.*
3. *In the case of committing crimes by threatening to infringe upon life or committing other acts of moral intimidation, the offenders shall be sentenced to between two and seven years of imprisonment.*
4. *Those who terrorise foreigners in order to cause difficulties to the international relations of the Socialist Republic of Vietnam shall also be penalized according to this Article.”*
Pursuant to the Penal Code of Vietnam, terrorism includes one of four following acts:

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- Infringing upon the life of officials, public employees or citizens;
- Infringing upon physical freedom and/or health of officials, public employees or citizens;
- Threatening to infringe upon life of officials, public employees or citizens;
- Intimidating the morale of officials, public employees or citizens.

Also, pursuant to paragraph 4 of this article, when the above acts are taken against foreigners in order to cause difficulties to the international relations of the Socialist Republic of Vietnam, offenders shall be penalized according to this Article. However, the said-above acts are considered as terrorism pursuant to the Penal Code of Vietnam if they are taken with the aim of opposing the people's administration or causing difficulties to the international relations of the Socialist Republic of Vietnam. Therefore, if acts of murder, inflicting injury, threatening to murder or inflicting injury or intimidating morale of Vietnamese officials, citizens or foreigners are taken but not for the two above purposes, they do not commit the crime of terrorism but other correlative crimes provided in the Penal Code such as murder (Art. 93), threatening to murder (Art. 103), intentionally inflicting injury on or causing harm to the health of other persons (Art. 104), illegal arrest, custody or detention of people (Art. 123). The Penal Code of Vietnam also has an article on conducting bandit activities (Art. 83) with some similarities to terrorism in Article 84. It has acts of murder in order to oppose the people's administration, but the difference is that these acts are taken by armed groups in mountainous, marine and other difficult to access areas.

2. Crimes Which are Not for Terrorism Prevention Purposes but can be Applied to Examine the Penal Liability of Those Who Commit Terrorism are Regulated in the Penal Code as Follows:

- (i) Hijacking aircraft, ships (Art. 221). This crime relates to terrorism, especially to the current situation when international terrorists hijack aircraft or ships to attack targets on land. The content of this article is as follows:
1. *Those who use force, threaten to use force or use other tricks to appropriate aircraft or ships shall be sentenced to between seven and fifteen years of imprisonment.*
 2. *Committing the crime in one of the following circumstances, the offenders shall be sentenced to between twelve years and twenty years of imprisonment:*
 - a) *In an organized manner;*
 - b) *Using weapons or dangerous means;*
 - c) *Inflicting injury on or causing harm to the health of other persons;*
 - d) *Dangerous recidivism.*
 3. *Committing the crime and causing human death or other particularly serious consequences, the offenders shall be sentenced to twenty years of imprisonment, life imprisonment or capital punishment.*
 4. *The offenders may also be subject to probation or a residence ban for between one and five years."*

Hence, if a person commits acts of using force, threatens to use force or uses other tricks to appropriate aircraft or ships they are considered as committing this crime, regardless of whether they appropriate aircraft or ships for any purpose. If terrorists use the above tricks to appropriate aircraft and ships for terrorist purposes, they will be sentenced pursuant to this article, not to Article 84. Therefore, Article 221 can be applied to punish terrorists with strict penalties even though it is not called terrorism.

- (ii) Illegally manufacturing, stockpiling, transporting, using, trading in or appropriating military weapons and/or technical means (Art. 230) and Illegally manufacturing, stockpiling, transporting, using, trading in or appropriating rudimentary weapons or support devices (Art. 233) are two crimes related to arms control, military weapons and technical means. These crimes punish acts of violating the system of controlling military weapons, civil weapons and technical means which terrorists often use to commit crimes in general and terrorist crime in particular. Vietnamese law does not allow people to trade in weapons and does not allow normal people to use weapons. Thus, all acts from illegal manufacturing, stockpiling, transporting, using, trading or appropriating weapons are considered as crimes, pursuant to the Penal Code. In fact, people using weapons to commit a certain crime (usually violent crimes such as murder, intentionally inflicting injury,

plundering property) shall be examined for penal liability for two crimes: the main crime and the crime of illegally using weapons.

- (iii) Illegally manufacturing, stockpiling, transporting, using, trading or appropriating explosive materials (Art. 232) and illegally producing, stockpiling, transporting, using or trading in inflammables, toxins (Art. 238) are two crimes related to controlling explosive materials, inflammables and toxins. These materials are controlled and used under strict procedures because if terrorists seize them, they can threaten the community's safety.
- (iv) Laundering money and/or property obtained through the commission of crime (Art. 251) is the crime provided in order to prevent money laundering. Accordingly, those who, through financial and/or banking operations or other transactions, legalize money, property obtained through the commission of crime or use such money and/or property to conduct business activities and other economic activities are liable to between one and five years of imprisonment. If they commit the crime in particular circumstances, the offenders are liable to between 8 to 15 years of imprisonment.

Besides, the Penal Code also regulates some other crimes which can be applied to examined penal liabilities of those committing acts of terrorism, such crimes as amending and/or using certificates and papers issued by agencies and/or organizations (Art. 266); forging seals and/or documents of agencies and/or organizations (Art. 267); and illegally leaving or entering the country (Art. 274). Apart from that, the Penal Code of Vietnam also defines other cases such as the preparation for the commission of a crime, incomplete commission of a crime and complicity. These can be applied to offenders who commit crimes in general and terrorist crime in particular.

B. The Penal Procedure Code of the Socialist Republic of Vietnam

The Penal Procedure Code (2003) has one part (Part 8) which regulates some matters of international cooperation in criminal proceedings. This part has two chapters: chapter 36 regulates mutual legal assistance and chapter 37 defines criminal extradition. This part provides provisions which are common principles for international cooperation in criminal proceedings; for the implementation of mutual legal assistance in criminal matters; for criminal extradition in order to examine penal liabilities or execute judgments; cases of denying extradition, exchanging criminal files, material evidence, property and money related to the case.

III. ASSESSMENT ON THE COMPATIBILITY BETWEEN VIETNAMESE LAW AND THE UNITED NATIONS CONVENTIONS AGAINST TERRORISM

A. International Treaties that Vietnam has Acceded

As said above, preventing terrorism is the central task of the United Nations. The purpose of this organization is to maintain international peace and security. Therefore, to fully implement its purpose, the United Nations may carry out activities in order to eliminate the risks threatening peace, prevent invasion/war, enhance human rights and help develop economies.

In recent times, the United Nations has carried out many activities in order to confront threats of terrorism. One of the remarkable achievements is issuing the system of international treaties related to the prevention and suppression of terrorism.

As with many other countries worldwide, Vietnam is actively preventing and suppressing terrorism. Thus, Vietnam has acceded to 8 of 13 Universal conventions/protocols related to terrorism.

1. The United Nations Conventions that Vietnam has Acceded

- (i) Convention of Offences and Certain Other Acts Committed on Board Aircraft, 1963;
- (ii) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970;
- (iii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971;
- (iv) Conventions on the Prevention and Punishment of Crimes against International Protected Persons including Diplomatic Agents, 1973;
- (v) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Unlawful Acts against the Safety of Civil Aviation, 1988;

- (vi) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988.
- (vii) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;
- (viii) International Convention for the Suppression of the Financing of Terrorism, 1999.

2. The United Nations Conventions/Protocols that Vietnam is Considering Acceding to

- (i) Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991;
- (ii) International Convention for the Suppression of Terrorist Bombings, 1997;
- (iii) International Convention against the Taking of Hostages, 1979;
- (iv) Convention on the Physical Protection of Nuclear Material, 1979;
- (v) Security Council Resolution 1373 (2001).

Thus it can be said that the Government of Vietnam is making great efforts in cooperation with the world community to combat international terrorism.

B. Assessment of the Legal System in Vietnam in Comparison with the UN Convention against Terrorism

1. The Definition of ‘Terrorism’

The world community has not had a common and acceptable definition of ‘terrorism’ even though great efforts have been made to define this crime. However, the content of international legal documents refer to ‘terrorism’ as a criminal act in order to cause a fearful state in the public, a group of people or certain people for political purposes.

The current Penal Code of Vietnam does not have any articles which define ‘terrorism’ or ‘terrorist crime’. However, according to Article 84 of the Penal Code (1984), terrorism is considered as the act of infringing upon the life of other people; threatening to infringe on the life of other people or other acts of moral intimidation in order to oppose the people’s administration or to cause difficulties to the international relations of Vietnam.

2. Obligations Regulated in International Documents of Preventing Terrorism

Each international treaty related to preventing terrorism has its own object and scope of adjustment. However, the common purposes of these documents are preventing international terrorism and preserving peace and security. Therefore, some common obligations that these international documents require of States Parties are as follows:

- (i) Making a list of organizations and individuals performing acts of terrorism
Relating to this obligation, it is possible to say that Vietnam has not discovered any group involved in terrorist activities like Al-Qaeda or Taliban. However, this does not mean that Vietnam will never have such kinds of organizations and organizations or individuals that indulge and finance international terrorist organizations in the future. Vietnamese law does not allow any person to establish an organization with the aim of committing criminal acts. Although there is no article in the Penal Code regulating the crime of establishing a criminal organization, but any member of that organization who commits crime will be prosecuted for their crimes with the aggravating circumstance of it being an organized commission of a crime. Vietnam has been in cooperation with the international community in making and supplementing lists of organizations and individuals involved in acts of terrorism, preventing terrorists arriving and leaving Vietnam.
- (ii) Criminalizing acts of terrorism and other acts related to terrorism
Normally, in order to implement international treaties, the States Parties need to incorporate the regulations of those conventions into their national law. Many international treaties related to preventing terrorism state that States Parties have obligations to criminalize acts of terrorism. These are compulsory obligations that States Parties have no choice but to criminalize acts of terrorism. The Penal Code of Vietnam was issued in 1999, two years before the terrorist attack on September 11 in the USA. At that time, Vietnam’s law makers did not have in mind international and brutal terrorist attacks. Thus, international terrorism is not regulated in the Penal Code. Article 84 regulates terrorism in order to defend national security but not to prevent international terrorism as in related international legal documents. These international documents state that the purpose of preventing terrorism is preserving not only one’s national security but also regional and international peace and security. As stated above, Article 84 only applies to acts of terrorism which are against the people’s administration or cause difficulties to the international relations of the

Socialist Republic of Vietnam. Therefore, acts of collecting money, formulating plans, inciting, assisting by other means terrorists which are carried out in Vietnam but for terrorist targets in other countries and are not directed against Vietnam or intended to cause difficulties for international relations of Vietnam, have not been proceeded because Vietnam lacks the legal basis to examine penal liabilities pursuant to Article 84. The penal liabilities examination in the above case is in contrast to the basic content of the Penal Code of Vietnam which is "a crime is an act dangerous to the society prescribed in the Penal Code" (Art. 8). This principle is very close because the crime is regulated by the law and in the Penal Code, not in another legal document. Presently, the penal law of Vietnam does not allow any correlative law principle to examine anyone.

As for criminalizing the act of financing for terrorism, the Penal Code of Vietnam does not have any article regulating this crime. Those who finance for act of terrorism defined in Article 84 are prosecuted pursuant to this article as helpers (pursuant to Art. 20). However, they are only prosecuted if there is enough evidence that the act constitutes terrorism as in Article 84 of the Penal Code. Therefore, the act of financing international terrorism in other cases cannot be examined according to the present provisions in the Penal Code of Vietnam.

Relating to the obligations of criminalizing act of laundering money, the present Penal Code of Vietnam has appended one article (Art. 251) which regulates the crime of legalizing money and/or property obtained through the commission of crime. Accordingly, those who through financial and/or banking operations or other transactions, legalize money and/or property obtained through the commission of crime or use such money and/or property to conduct business activities or other economic activities shall be punished. At present, the Government of Vietnam has issued a Decree on the prevention of laundering money in order to strictly control financial transactions through the banking system and to report suspicious transactions to authorized agencies like the Police and Institute of Procuracy. These are the basis for investigation and examination of acts of laundering money pursuant to Article 251 in the Penal Code. The act of laundering money is an independent crime, therefore, it can be applied to examine anyone, including terrorists, providing that the person commits the crime described in Article 251 and money and/or property are obtained through the commission of crimes regulated in the Penal Code of Vietnam.

Terrorists often use forged certificates, paper or passports when moving from one country to another in order to avoid the control of authorized agencies. From that fact, international Conventions require States Parties to have measures against forging public certificates and papers and using them for terrorism purposes. To meet this demand, the Penal Code of Vietnam has three articles that regulate this. They are Article 266 – amending and/or using certificates and papers issued by agencies and/or organizations, Article 267 – forging seals and/or documents of agencies and/or organizations and Article 268 – Appropriating, trading in, destroying seals and/or documents issued by State agencies and/or social organizations. These articles prevent and restrain acts of using forged certificates to trick authorized agencies. Thus, Vietnam now has legislative tools to prevent acts related to forging State certificates. These can be applied to combat terrorism. Though, in comparison with related international conventions, these articles in Vietnam have one basic difference relating to whether a person commits a crime or not. International conventions do not require the users of forged certificates to commit a crime and to cause serious consequences. Whereas, the Penal Code of Vietnam regulates those who commit crime when they use forged documents, certificates to commit illegal acts, causing serious consequences or they have already been administratively sanctioned for such acts but continue to commit them. It is possible to say that, international conventions are stricter than the Penal Code of Vietnam.

(iii) Establishing jurisdiction over terrorist offences

Relating to this matter, Vietnam's current legal documents in general have met demands of international conventions on the prevention of terrorism. The Penal Code of Vietnam regulates jurisdiction to criminal acts in Article 5 and 6 of the Penal Code.

According to Article 5, all criminal offences committed in the territory of the Socialist Republic of Vietnam are subject to Vietnam's jurisdiction. For foreigners who commit offences in the territory of Vietnam but are entitled to diplomatic immunity or consular immunities under Vietnamese laws, international treaties which Vietnam has signed or acceded to or international practices, their criminal liability shall be settled through diplomatic channels. Article 6 of the Penal Code regulates Vietnamese citizens who commit offences outside the territory of Vietnam and states they may be

examined for penal liability in Vietnam according to the Penal Code. This provision also applies to stateless persons who permanently reside in Vietnam. Foreigners who commit offences outside the territory of Vietnam may be examined for penal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties which Vietnam has signed or acceded to.

(iv) International cooperation in preventing terrorism

Terrorism is a transnational crime; therefore, no single nation can prevent terrorism effectively if it does not have close cooperation with other states. Hence, international cooperation is important and has been defined in relevant international terrorism prevention documents.

Defining the importance of international cooperation in combating international crime in general and terrorism crime in particular, Part 8 of the Penal Procedure Code of Vietnam (Chapter 36 and Chapter 37) regulates international cooperation in criminal proceedings. This part provides the basic principles for international cooperation's between Vietnam and foreign countries in criminal proceedings. This is the legal basis for Vietnam's competent authorities to carry out mutual legal assistance in criminal issues, extradition of criminals and extradition of offenders to foreign countries. Pursuant to the provisions in the Penal Procedure Code of Vietnam, mutual legal assistance in criminal matters between Vietnam and other countries is implemented on the basis of international conventions that Vietnam is a contracting party, on the principle of reciprocity and international practices. Therefore, the competent authorities of Vietnam can implement a request of mutual legal assistance in criminal matters with states that Vietnam has not signed a convention on the principle of reciprocity but in contravention of the laws of the Socialist Republic of Vietnam, international laws and international practices. Relating to criminal extradition, Article 344 in the Criminal Procedure Code does not allow extradition in some cases in which the extradited person is Vietnamese, the person has been examined and sentenced pursuant to Vietnam's law or the extradition may lead to restrictions on that person due to reasons of nationality, ethnicity, race, religion, social background or political viewpoints.

Also, at this moment, Vietnam has signed 14 bilateral treaties of mutual legal assistance of criminal cases, of which 13 treaties contain provisions of mutual legal assistance and criminal extradition. Moreover, apart from 8 international conventions related to the prevention of terrorism, Vietnam has signed the UN Convention for fighting against transnational organized criminals and the UN Convention for fighting corruption, which have many provisions on mutual legal assistance and criminal extradition.

IV. CONCLUSION

Vietnam is fully aware of the potential dangers and consequences of terrorism acts in all areas of life in all states. In that spirit, Vietnam stresses that states need to maintain consistent positions on terrorism, in particular "not supporting, harbouring and indulging terrorists or terrorist attempts against international peace and security". However, to combat terrorism effectively and thoroughly, Vietnam is making efforts with the following activities:

- First, amending and appending the Penal Code, in particular Article 84, with the intention of widening the scope of its application towards international terrorism in the spirit of international conventions and protocols and Resolutions of the UN General Assembly and the Security Council. Moreover, it is necessary to append to Vietnam's Penal Code the crime of financing terrorism. This will regulate those who finance or raise funds or property for terrorists. It also amends and appends crimes of amending and/or using certificates and papers issued by agencies and/or organizations on the direction that only using such certificates with the purpose of crime is enough to penalize, even if it hasn't led to any serious consequences.
- Second, Vietnam is on the way to compiling a law on mutual legal assistance and shall issue a law or ordinance on the extradition of criminals in the near future to have a basis in implementing international obligations related to mutual legal assistance in criminal matters and criminal extradition.
- Third, Vietnam is actively concentrating great efforts to research the content and consider the possibilities of acceding to the last four international conventions related to the prevention and suppression of terrorism that Vietnam has not been a member.

COUNTRY REPORT: ZIMBABWE

*Fortune Chimbaru**

I. INTRODUCTION

Zimbabwe is in the southern part of Africa. It is a former British Colony which gained its independence on 18 April 1980 after a protracted war of liberation.

II. DEFINITION OF TERRORISM

The term terrorism has come to mean different things to different people over different times. Those once called terrorists can easily be legitimized and may as is the situation in Zimbabwe be called liberation fighters. The dictionary³ meaning of the word terrorism is “*the use of violence for political aims or to force a government to act*”. International law, and in particular international humanitarian law, recognizes acts committed in accordance with such international law during an armed struggle in the exercise or furtherance of their legitimate right to national liberation, self determination by alien or foreign forces, as being excluded from terrorist activities.

The 2002 Report of the UN Policy Working Group on the UN and Terrorism⁴ offers some guidance.

“Without attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality. To overcome the problem of terrorism it is necessary to understand its political nature as well as its basic criminality and psychology.”

In Zimbabwe what constitutes terrorism is defined mainly in the Public Order and Security Act [Chapter 11:17] as follows:

- (1) Any person, who for the purpose of:
 - (a) causing or furthering an insurrection in Zimbabwe; or
 - (b) causing forcible resistance to the Government or the defence forces or any law enforcement agency; orprocuring by force the alteration of any law or policy of the government; commits any act accompanied by the use or threatened use of weaponry with the intention or realizing that there is a risk or possibility of:-
 - i) killing or injuring any other person; or
 - ii) damaging or destroying any property; or
 - iii) inflicting financial loss upon any other person; or
 - iv) obstructing or endangering the free movement in Zimbabwe of any traffic on land or water or in air; or
 - v) disrupting or interfering with an essential service.

Since the attacks on the United States on 11 September 2001, terrorism has become the new global enemy to be eradicated no matter the cost to domestic civil liberties. Though much of the world now stands united against terrorism and catching the perpetrators of terrorist acts, the task of defining terrorism still successfully evades us.

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¹ Oxford Advanced Learners Dictionary 5th Edition.

² 2002 Report of the UN Policy Working Group on the UN and Terrorism.
<http://www.un.org/terrorism/957273.htm>.

III. ACCESSION BY ZIMBABWE TO THE UNIVERSAL CONVENTIONS ON TERRORISM

This paper attempts to provide an overview of the range of anti-terrorism measures taken by Zimbabwe and the aims and scope of such legislation. Realizing the need for every country to be equipped with an effective legal regime for anti-terrorism the Republic of Zimbabwe has always made efforts to adopt measures to prevent and combat terrorism and related activities. The Government of the Republic of Zimbabwe has committed itself in International fora, such as the United Nations and the African Union, to the prevention and combating of terrorists and related activities. Whereas the United Nations Security Council Resolution 1373/2001 which is binding on all Member States of the United Nations as well as the Convention for the Prevention and Combating of Terrorism adopted by the Organisation of African Unity requires Member States to become party to instruments dealing with terrorist and related activities as soon as possible, Zimbabwe has already become party to the following instruments of the United Nations:

- a) The Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo on 14 September 1963. The Republic of Zimbabwe became a party thereto by ratification on the 8 March 1989.
- b) The Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The Republic became a party thereto by ratification on the 16 February 1989.
- c) The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation concluded at Montreal on 23 September 1971. The Republic became a party thereto by ratification on the 16 February 1989.

The Republic is also a signatory to the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations General Assembly on the 9 December 1999 but has not yet ratified it. The Republic has also become a party by ratification to the Convention on the Prevention and Combating of Terrorism adopted by the Organisation of African Unity at Algiers on 14 July 1999. In 1992 Zimbabwe signed and ratified the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa.

However Zimbabwe is yet to become a party to the following remaining Instruments of the United Nations:

- a) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973)
- b) International Convention against the Taking of Hostages (Hostages Convention; 1979)
- c) Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention; 1980)
- d) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)
- e) Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation (1988)
- f) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (1988)
- g) Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)
- h) International Convention of the Suppression of Terrorist Bombing (1999)
- i) International Convention for the Suppression of the Financing of Terrorism.

IV. EXISTING DOMESTIC LAWS TO COMBAT TERRORISM

The legislation that assists in combating terrorism in Zimbabwe:

- (i) The Public Order and Security Act [Chapter 17] (P.O.S.A)
- (ii) Foreign Subversive Organisation Act [Chapter 11:05]
- (iii) Extradition Act [Chapter 9:08]
- (iv) Criminal Matters (Mutual Assistance) Act [Chapter 9:06]
- (v) Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24]
- (vi) Aircraft Offences Act
- (vii) Civil Aviation Act.

The main piece of legislation that deals with terrorism is the Public Order and Security Act (P.O.S.A). Sections 6 – 13 of the Act criminalize various acts of terrorism and related activities such as:

- (i) Recruiting or training insurgents, bandits, saboteurs or terrorists inside or outside Zimbabwe in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe.
- (ii) Providing training to any person inside or outside Zimbabwe in order to commit any act of insurgency banditry, sabotage or terrorism in Zimbabwe.
- (iii) Training as an insurgent, bandit, saboteur or terrorist inside or outside Zimbabwe for purposes of committing any act of insurgency, banditry, sabotage or terrorism in Zimbabwe.
- (iv) Supplying weaponry to insurgents, bandits, saboteurs or terrorists whether inside or outside Zimbabwe knowing that the person to whom such weaponry is supplied is an insurgent, bandit, saboteur or terrorist or realizing that there is a risk or possibility that such person is an insurgent, bandit, saboteur or terrorist.
- (v) Possessing weaponry for insurgency, banditry, sabotage or terrorism.
- (vi) Harboursing, concealing or failing to report insurgents, bandits, saboteurs or terrorists within a reasonably practicable time after becoming aware of the presence in Zimbabwe of the insurgent bandit saboteur or terrorist and in any event within seventy two (72) hours of becoming so aware.

The main thrust of the Public Order and Security Act is to combat acts of terrorism within Zimbabwe and to make provision for the maintenance of public order and security in Zimbabwe.

The Foreign Subversive Organisation Act [Chapter 11:05] makes provisions for the punishment of certain acts hostile to other states or territories as follows:

Any person who organizes or sets up or helps to organize or set up, or advocates, urges or suggests the organization or setting up of any group or body with a view to that group or body:

- a) *overthrowing or taking over the government of any state by unlawful means or usurping the functions of such government; or*
- b) *conducting a campaign or assisting any campaign against the lawfully established government of any state with a view of securing any of the objects or purposes described above – shall be guilty of an offence and liable to imprisonment for a period not exceeding five years.*

V. CRIMINAL MATTERS (MUTUAL ASSISTANCE) ACT [CHAPTER 9:06]

To provide mutual assistance in criminal matters between Zimbabwe and Commonwealth countries and other foreign countries, to facilitate the provision and obtaining by Zimbabwe of such assistance, and to provide for matters connected therewith or incidental thereto. In terms of the Act, mutual assistance in criminal matters include:

- a) the obtaining of evidence, documents or other articles;
- b) the provision of documents and other records;

- c) the location and identification of witnesses or suspects;
- d) the execution of requests for search and seizure;
- e) the making of arrangements for persons to give evidence or assist in investigations;
- f) the forfeiture or confiscation of property in respect of offences;
- g) the recovery of pecuniary penalties in respect of offences;
- h) the interdicting of dealings in property or the freezing of assets that may be forfeited or confiscated or that may be needed to satisfy pecuniary penalties imposed in respect of offences;
- i) the location of property that may be forfeited or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and
- j) the service of documents.

Assistance may be refused where:

- a) offence in question is not an offence in Zimbabwe;
- b) where the person could no longer be prosecuted in terms of Zimbabwe law due to lapse of time or any other reason;
- c) the provision of assistance could prejudice an investigation in Zimbabwe; and
- d) assistance would impose an excessive burden on the resources of Zimbabwe.

The Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24] is to promote the use and suppress the abuse of the banking system, to enable the unlawful proceeds of all serious crimes including drug trafficking to be identified, traced, frozen, seized and eventually confiscated; to establish a Bank Use Promotion and Suppression of Money Laundering Unit to require financial institutions and cash dealers to take prudential measures to help combat money laundering and to provide for matters connected with or incidental to the foregoing.

VI. EXTRADITION ACT

The Extradition Act provides for the extradition of persons between Zimbabwe and other countries and for matters incidental to or concerned with extradition.

In terms of the said Act the Minister of Home Affairs may enter into an agreement with the government of any foreign country providing, whether on a basis of reciprocity or otherwise, but subject to this Act and to the obligations of Zimbabwe in terms of any international convention, treaty or agreement for:

- (a) the extradition of persons accused or convicted of any offence within Zimbabwe or that foreign country; and
- (b) the transit through Zimbabwe of persons who are being extradited to or from any foreign country; and
- (c) any matter which in the opinion of the Minister is incidental to the matters referred to above.

An extradition agreement may relate to:

- (a) any offence whatsoever, whether or not they are offences in both Zimbabwe and the foreign country concerned and whether they were committed before, on or after the date of commencement of the extradition agreement; and
- (b) any person whomsoever, whether or not they are nationals of both Zimbabwe and the foreign country concerned.

The Aircraft Offences Act provides for the suppression and punishment of certain offences in relation to certain aircraft and provides for matters incidental to or connected with the foregoing. The Act has extra-territorial operation.

In terms of the Act:

- (i) any person who without lawful excuse takes or exercises control of an aircraft shall be guilty of an

offence and liable to imprisonment for a period not exceeding seven years;

- (ii) any person who, without lawful excuse, takes or exercises control of an aircraft while any person other than his accomplices is on board shall be guilty of an offence and liable to imprisonment for a period not exceeding fourteen years;
- (iii) any person who without lawful excuse takes or exercises control of an aircraft by force or violence or by threat thereof, while another person not his accomplice is on board shall be guilty of an offence and liable to imprisonment for a period not exceeding twenty years; and
- (iv) any person who without lawful excuse takes or exercises control of an aircraft and at anytime before or during the taking or exercising control of that aircraft does or omits to do any act or thing with intent to kill any person, shall be guilty of an offence and liable to imprisonment for life.

Damaging, destroying or prejudicing the safe operation of an aircraft is also criminalized under the said Act and carries a maximum penalty of life imprisonment. Assaulting, intimidating or threatening a person on an aircraft is equally criminalized in terms of this Act and has a maximum penalty of fourteen years. The carrying of dangerous goods on aircraft is also criminalized and has a maximum prison penalty of seven years. Equally criminalized is the threatening damage or destruction of an aircraft without lawful excuse and the making of false statements, in relation to an aircraft from which it could be reasonably inferred that there has been or is to be a plan, proposal, attempt, conspiracy or threat to unlawfully take control, destroy, damage or kill any person on an aircraft.

The Civil Aviation Act enables effect to be given to the International Convention on Civil Aviation and to make provision for control, regulation and orderly development of aviation within Zimbabwe. In terms of this Act the Minister of Transport and Energy can make regulations relating to any matters including securing the safety, efficiency and regularity of air navigation and the safety of aircraft and persons and property carried therein.

VII. TERRORISM AND RELATED CRIMES IN ZIMBABWE

Whilst Zimbabwe has laws that deal with terrorism at the domestic level, there are none to deal with international terrorism. In 1983 the country had to deal with a case involving some South African agents who came to Zimbabwe with the sole intention of killing members of the military wing of the African National Congress who were residing in Zimbabwe. The killing was to be by means of a bomb or other explosive devices. They had no intention of sabotaging or injuring Zimbabwe, what they perpetrated were acts of terrorism on Zimbabwean soil with the intention of eliminating members of the A.N.C. who had been offered sanctuary in Zimbabwe, which resulted in the death of a Zimbabwean.

The three namely Kevin Woods, Phillip Conjwayo and Michael A. Smith were charged with murder and sentenced to death. Murder was the only charge that could apply to them as the country did not have provision for dealing with terrorism which is not specifically targeted against Zimbabwe.

The legal system of Zimbabwe was also recently found wanting by the events of the 7 March 2004 when a Boeing 727-100 aircraft with a total of sixty seven persons, landed at Harare International Airport. The flight crew consisted of three persons, the pilot Jaap Neil Steyl, his co-pilot Hamman and a flight engineer Kenneth Fred Pain. There were sixty four other passengers on board this aircraft. The aircraft was supposed to refuel and take on board, by prior arrangement, a consignment of arms and ammunition. The final destination was Equatorial Guinea where they intended to forcefully remove the lawful government of that country. Their leader Simon Mann had been contracted by Severo Moto, an exiled opposition political leader of the Equatorial Guinea, to assist him in toppling the President of that country by a violent *coup-detat*.

When the crew contacted the control tower at the Harare International Airport seeking permission to land, they misrepresented to the controller that there were only three crew members on board. However, when the plane reached Manyame intending to collect arms and ammunition which had been purchased by Simon Mann, it was discovered after a search that apart from the crew members there were sixty four other passengers aboard the aircraft. The passengers had been given specific instructions to switch off the lights of the aircraft upon landing, remain still to avoid detection and not to allow anyone to leave or enter the

aircraft. A document detailing the action plan authored by Simon Mann was recovered from the aircraft. Also recovered from the aircraft was an assortment of material.

Although it was apparent that these were mercenaries out to carry out terrorist activities due to the gap in our law they got away with very minor charges under the Immigration Act. The allegations were that they unlawfully and fraudulently made a false representation by conduct, statement or otherwise for the purpose of facilitating or assisting the entry or departure from Zimbabwe of themselves or some other persons that is to say the persons told the Aviation Authorities at Harare International Airport that a Boeing 727-100 aircraft registration number N4610 had on board only three crew members and no other passengers. Had it not been for the declaration that there were only three crew members on board - the aircraft would not have been allowed to land at Manyame Air Base and thereby enter Zimbabwe.

At the trial it was not in dispute that the mercenaries did not intend to disembark in Zimbabwe as their final destination. They were in transit to another country.

The two pilots were each sentenced to sixteen months imprisonment and the rest of the members to twelve months imprisonment each. On appeal to the High Court they each had four months of their sentences suspended for five years on condition of good conduct. The Attorney-General appealed to the Supreme Court of Zimbabwe against the suspension and all of them finally served the original sentences.

The terrorist leader Simon Francis Mann was also charged with one count of contravening section 4(2)(b) of the Firearms Act [Chapter 10:09] (Attempting to purchase weapons without a certificate) and one count of contravening section 13(1)(e) of *The Public Order and Security Act [Chapter 11:17] as read with section 360(2)(a) of The Criminal Procedure and Evidence Act [Chapter 9:07]* that is for attempting to possess dangerous weapons. He was sentenced to a total of four years imprisonment and is still serving and yet to be extradited to Equatorial Guinea where he is likely to face other charges.

This case exposed the weaknesses of Zimbabwe's legal system in combating terrorism. Having realized that the phenomenon of terrorism that is waged on an international scale is not adequately addressed by our existing laws, the legislature is currently working on a law to provide for the suppression of foreign and international terrorism including mercenary activity. Currently it is still a bill titled the *Suppression of Foreign and International Terrorism Bill*.

The Bill is not yet law, it is yet to be tabled in Parliament. The Bill specifically provides for the suppression of foreign and international terrorism including mercenary activities and to provide for matters connected therewith or incidental thereto. If passed into law the Bill would repeal the Foreign Subversive Organisation Act [Chapter 11:05]. In terms of the Bill, the Minister of Home Affairs may make a regulation implementing measures adopted by the United Nations Security Council for the suppression of Foreign or Internal terrorism.

This thus shows that the Republic realized that it is necessary to make a provision in the domestic law of Zimbabwe to combat terrorism and is making an effort to conform to the Universal Conventions and Protocols and thus avoid the country becoming a safe haven for terrorists.

VIII. PROBLEMS AND CHALLENGES

The United Nations Security Council from time to time passes resolutions under Chapter VII of the United Nations Charter, requiring Member States to combat terrorist and related activities, including taking effective measures to prevent and combat the financing of terrorist and related activities and freezing of funds, assets or economic resources of persons who commit terrorist and related activities. Our national laws do not meet all the international requirements relating to the prevention and combating of terrorist and related activities.

The definition of terrorism, as it exists in Zimbabwean law, is limited only to acts affecting only Zimbabwe. The definition needs to be extended to include acts of terrorism even those not specifically targeting Zimbabwe. It should be expanded to cover acts which may seriously damage a country or an international organization.

The courts should have extra-territorial jurisdiction to try any terrorist offence and impose the penalties where the acts have been done or completed outside Zimbabwe. Necessary steps need be taken to bring the national system into conformity with the Universal Conventions and Protocols.

The prohibition of acts of terrorism need to be expanded to include any person who:

- a) does or threatens to do or does an act preparatory to or in furtherance of an act of terrorism; or
- b) omits to do anything that is reasonably necessary to prevent an act of terrorism.

The acts of terrorism ought not to be limited to acts only targeting the Republic of Zimbabwe. Terrorism should mean an act which:

- (a) may seriously damage a country or an international organization; and
- (b) is intended or can reasonably be regarded as having been intended to:
 - i) seriously intimidate a population;
 - ii) unduly compel a government or an international organisation to perform or abstain from performing any act;
 - iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization; or
 - iv) otherwise influence such government or international organization.

Training, supporting, harbouring and obstructing a terrorist investigation and withholding of any information on terrorist activities should be criminalized.

There is need for the country to enact appropriate domestic legislation necessary to implement the provisions of relevant international instruments dealing with terrorist and related activities to ensure that the jurisdiction of the courts of the Republic of Zimbabwe enables them to bring to trial perpetrators of terrorist and related activities and to cooperate with and provide support and assistance to other states and relevant international and regional organization to that end.

The Republic is committed to bringing to justice persons who commit such terrorist and related activities and to carrying out its obligations in terms of the international instruments dealing with terrorist and related activities.

The major challenge for the country is for it to accede to the thirteen Universal Conventions and Protocols. It so far has only ratified three of the thirteen conventions and is only a signatory to the International Convention for the Suppression of the Financing of Terrorism (1999).

Our courts do not have extra-territorial jurisdiction to try any terrorist offence and impose the penalties where the acts have been done or completed outside Zimbabwe. Necessary steps need to be taken to bring about a national system for combating terrorist financing and to effectively implement these measures, for example there is need to adopt the Financial Action Task Force (FATF) Recommendations. These Recommendations contain a set of measures aimed at combating the funding of terrorist acts and terrorist organizations. They have been recognized by the International Monetary Fund and the World Bank as the International Standards for combating money laundering and financing of terrorism. Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF recommendations.

In Zimbabwe, the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:23] which came into effect in 2004 was designed along the FATF recommendations in regard to customer due diligence and keeping of records. The designated financial institutions are also required to report suspicious transactions.

In terms of the said Act, the banks are required to take the following measures:

- i) Identify the customer and verify that customer's identity using reliable, independent source

documents, data or information.

- ii) Identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.
- iii) Obtain information on the purpose and intended nature of the business relationship.
- iv) Conduct ongoing due diligence on the business relationship and scrutiny of transactions undertaken through the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile including, where necessary, the source of funds.

However, the said Act only relates to money laundering and other serious crimes. It does not specifically mention terrorism and related activities. Zimbabwe is only a signatory to the International Convention for the Suppression of the Financing of Terrorism, 1999; it is yet to ratify it. A key element in the fight against financing of terrorism is the need for countries' systems to be monitored and evaluated, with respect to the international standards.

There is a need for the country to rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to terrorist financing investigations, prosecutions and related proceedings.

In line with the UN Security Council resolution 1373 adopted on 28 September 2001, Zimbabwe has taken necessary steps to prevent the commission of terrorist acts including suppressing the recruitment of members of terrorist groups, preventing those who finance, plan, facilitate or commit terrorist acts from using its territory, preventing the movement of terrorists and measures to prevent counterfeiting, forgery or fraudulent use of identity papers and travel documents. Having realized the lacuna in our law Zimbabwe has promulgated a bill to cover terrorism on an international scale namely: '*Suppression of Foreign and International Terrorism Bill 2004*'. The Bill is to provide for the suppression of foreign and international terrorism, including mercenary activity. When this Bill becomes law it will criminalize:

1. Engaging or participating in foreign or international terrorist activity.
2. Training as a foreign or international terrorist.
3. Recruiting or training foreign or international terrorists.
4. Possessing weaponry for the purposes of foreign or international terrorist activity.
5. Harboring, concealing or failing to report foreign or international terrorists.
6. Promoting, directing or belonging to foreign or international terrorist organizations.
7. Soliciting support for foreign or international terrorist organizations.
8. Supplying weaponry to foreign or international terrorists or terrorist organizations.
9. Materially assisting foreign or international terrorists or terrorist organizations.

In terms of the Bill, all sections criminalizing terrorist activities shall have extra territorial operation. The Bill is yet to be passed by Parliament into law. All things being equal it should sail through Parliament in the first quarter of 2006.

The Zimbabwean law development committee has finished working on a Criminal Law Code which will codify all the common law offences in the country. It is meant to consolidate and amend the criminal law of

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Zimbabwe and various other Acts.

This Code also has Provisions relating to terrorism but as in the P.O.S.A they are limited to terrorist acts targeting Zimbabwe only, not on an international level. This code is also likely to become operative before the middle of 2006.

Efforts have always been made to bring our laws in line with international requirements. The main problem has been lack of skilled personnel in the field of drafting and that being a third world economy which is currently undergoing economic challenges, the financing of such technical training has not been easy. There is a need for legislative assistance to the country which would enable it to become party to and implement the universal anti-terrorism conventions and protocols as well as to implement Security Council Resolutions. Zimbabwe is a landlocked country, this could probably be one reason why it has not yet become party to the conventions relating to Marine Navigation and Fixed Platforms on the Continental shelf. Secondly since the country is in a generally peaceful part of Africa it has not faced any serious threat of terrorism hence Government efforts were focused elsewhere.

REPORTS OF THE SEMINAR

GROUP 1

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

<i>Chairperson</i>	Mr. Laercio Rossetto	(Brazil)
<i>Co-Chairpersons</i>	Mr. Harishchandra Dhungana	(Nepal)
	Mr. Kazuo Sasaki	(Japan)
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	Prof. Tae Sugiyama	(UNAFED)

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 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 judicare*. The countries that refuse extradition should cooperate with the requesting country in gathering requisite evidence to the greatest extent possible.

GROUP 2

FINANCING OF TERRORISM

Chairperson	Mr. Devendra Kumar Pathak	(India)
Co-Chairpersons	Mr. Ali Mohammed Alshali	(Saudi Arabia)
	Mr. Koichi Endo	(Japan)
Rapporteur	Mr. Hodges Api Ette	(Papua New Guinea)
Co-Rapporteurs	Mr. Aldrin Enrique Lainez Cruz	(Honduras)
	Mr. Makoto Uemura	(Japan)
Members	Mr. Prima Idwan Mariza	(Indonesia)
	Mr. Thet Lwin	(Myanmar)
Advisers	Prof. Motoo Noguchi	(UNAFEI)
	Prof. Masato Uchida	(UNAFEI)
	Prof. Megumi Uryu	(UNAFEI)

I. INTRODUCTION

Group 2 began its discussions on the 18 January 2006. In its first meeting, by consensus the above mentioned board members were elected. The group then discussed the guidelines for the topics provided and decided on the agenda as follows:

1. Financing of Terrorism
 - (i) Definition
 - (ii) Distinguishing between money laundering and financing of terrorism
2. Country Experiences
 - (i) Legislation and legal regimes
 - (ii) Agencies involved in detection and investigation
 - (iii) Inter-agency administration and cooperation
3. Measures against Financing of Terrorism
 - (i) Generation of finance
 - (ii) Method of transfer
 - (iii) Obligation for reporting
4. International Cooperation for Investigation
 - (i) Generation of finance
 - (ii) Method of transfer
 - (iii) Obligation for reporting
5. Preventing and Detecting Measures
6. Recommendations

II. SUMMARY OF DISCUSSION

A. Introduction

Terrorism involves the participation of people and the use of logistical support to advance their beliefs, ideologies or dreams whether they are cultural, economic, philosophical or religious. Ostensibly, to maintain the subsistence of its members and acquisition of logistics necessary to enhance the perpetration of the terrorist's unlawful activities, terrorist organizations require financial resources.

At the international level, the United Nations has taken measures to coordinate, and as much as possible synchronize, the actions taken at the domestic level by propagating necessary international instruments. Without undertaking an elaborate discussion of the relevant respective instruments, it is considered important to mention them briefly.

- (i) *The thirteen universal legal instruments including the Convention for the Suppression of Terrorist Financing 1998*
- (ii) *The FATF Forty Recommendations on Money Laundering*
- (iii) *The FATF Nine Special Recommendations for Financing Terrorism*
- (iv) *The Security Council Resolution 1267*
- (v) *The Security Council Resolution 1373*

Especially, Security Council Resolution 1373 calls for all Member States to take drastic measures to curtail the sources of funding and any opportunities that may present itself as an avenue of abuse to generate funding for terrorist related activities. In respect of financing of terrorism the general framework entrenched in the Nine Special Recommendations of the FATF/GAFI provide the basic guidelines for all Member States to follow in their efforts to establish a vibrant domestic democratic legal regime against the financing of terrorism. The Nine Special recommendations call for:

- *Criminalization of acts of financing terrorism*
- *Effective sanctions for legal persons for the acts of financing terrorism*
- *Freezing and Confiscating terrorist assets*
- *Obligations of suspicious transactions reporting involving terrorist acts or organizations*
- *International cooperation for investigations, inquiries, and proceedings related to the financing of terrorism*
- *Other important preventive and detective measures*
 - *Control of alternative remittance*
 - *Control of wire transfers*
 - *Control of non-profit organizations*
 - *Control of cash couriers*
- *Inter-agency coordination among relevant agencies (e.g. FIU, Law Enforcement, Intelligence) in the investigation of terrorist financing offences.*

Governments, legislators and agencies tasked with the responsibility of establishing a legal regime against terrorism must be strongly urged to adhere to the Nine Special Recommendations of the FATF/GAFI.

III. FINANCING OF TERRORISM

A. Definition

Terrorism has not been accorded a specific definition under international law. In retrospect, the international community cannot stand aside and await such definition to be formulated first before taking measures to criminalize all the actions that constitute the crime of financing of terrorism. Essentially, because within the realm of criminal law, whether domestic or international, the various acts perceived to constitute an act of terrorism are commonly agreed upon even without a definition. This in our view provides the platform on which respective countries can proceed to establish a competent legal regime to deal with the menace in its entirety.

This is made possible by the notion that the thirteen United Nations instruments that relate to terrorism promulgate the various acts that constitute the offences of terrorism. More so, *the International Convention for Suppression of the Financing of Terrorism states that financing of terrorism refers to:*

1. Any conduct by any person that directly or indirectly, whether lawfully or unlawfully and wilfully provide or collect funds with the intention that they should be used, or in the knowledge that they should be used, to carry out an act that constitutes an offence under any one of the thirteen United Nations Conventions.
2. It also relates to any act intended to cause death or serious bodily injury to a civilian, or to any other person not actively involved in a situation of armed conflict, when the purpose of such act is to intimidate a population, or to compel a government or an international organization to either do or abstain from doing a specific act. Moreover it also includes the act of attempting to participate, organize, contribute or directing the provision or collections of such funds.
3. It is not necessary that the funds are actually used to commit an offence.

B. Distinguishing Money Laundering and Financing of Terrorism

The financing of terrorism takes many forms. It epitomizes an economic arrangement which reflects many, if not all, of the same traits of an international organized crime. It is undeniable that terrorist organizations to some extent do engage in money laundering and other general criminal activities to supplement their source of finance. The crucial distinction between financing of terrorism and organized crime, particularly money laundering, is that in contrast, organized crime syndicates launder proceeds of crime as a covert technique to legalize the proceeds and create a false impression of the legitimacy of its sources. More so for monetary profit, while terrorist organizations are more interested in the disbursement of the money and at the most, some if not all of the sources of these funds are legitimate.

US\$400 Billion is circulated worldwide annually in money laundering activities. However, money laundering is quite a different sphere of crime to that of financing of terrorism. It deals with revenue derived from an act of crime. In contrast, financing of terrorism relates to activities undertaken to facilitate funding of the commission of a crime of terrorism. In this regard, financing terrorism relates to actions undertaken prior to the commission of the principal offence of terrorism. They fall into the category of direct financing, conspiracy, perpetration, aiding, averting and/or incitement to contribute to the raising of funds to enable the commission of the principal offence of terrorism.

Irrespectively, analysis of the economics of terrorism demonstrates to a certain extent that international organized crime syndicates generally have a motive quite different from those of terrorist organizations. In this respect, terrorism related organized crime is believed to constitute a small and difficult to detect portion of millions of dollars in the global formal established financial systems.

Hence, it is necessary to make the distinction so that the legal regimes that are established are able to deal with both types of crimes adequately. That they are not confused into being the same or similar criminal acts which may result in the establishment of a domestic legal regime that is unable to deal with either offence or their associate offences comprehensively.

IV. COUNTRY EXPERIENCES

As the basis for further development of the legal regime against terrorism both at the domestic and international level a coordinated effort requires all countries to share their experience and learn from each other, identify issues and develop synthesized strategies to enhance the existing regime. Therefore, apart from country experiences shed during the group sessions, we also drew from the individual presentations by participants from the twenty countries represented at this seminar.

A. Legislation and Legal Regimes

Members of the group were accorded an opportunity to briefly provide an overview of their countries situation. Most countries if not all have ratified the UN Convention on Suppression of Financing of Terrorism and approved the (GAFI) FATF Forty Recommendations. Not only that but also enacted legislation to deal with money laundering and also approved the (GAFI) FATF Nine Special Recommendations on Terrorist Financing for which most countries have encoded the relevant offences under their money laundering laws.

Notwithstanding these measures, it is understood that some countries, to fully criminalize the financing of terrorism, need to enact specific legislation on the financing of terrorism as the current regime under their money laundering legislation does not fully embrace all possible avenues for the commission of offences relating to the financing of terrorism. Not the least, most countries have yet to enact laws on cyber space management to regulate the use of cyber space. Furthermore, it is also perceived that further legislative actions are required at the domestic level to amend existing legislation such as that dealing with evidence and searches so that they are compatible with the international standards required to effectively criminalize the financing of terrorism.

Another common feature we have observed is that most countries have various agencies assigned with the task of administration and enforcement of different aspects relating to terrorism specific to their sphere of responsibility. Hence, activities by these domestic agencies, departments and/or institutions is at most uncoordinated. As a consequence, the development of a coordinated domestic legal regime to combat terrorism is staggered and slow. Needless to say many Member States of the United Nations have been compelled to at least take these measures in a rush to avert sanctions that may be applied under Security Council Resolution 1276 for non-compliance.

B. Agencies Involved in Detection and Investigations

In line with Security Council Resolutions 1373 countries of most of the participants have established Financial Intelligence Units (FIU). However, it must also be acknowledged that FIUs are not investigative bodies. They are only administrative agencies which receive, analyze and disseminate information on suspicious transactions. Thus by themselves they are weak institutions in that their effectiveness and efficiency is widely dependent upon:

- (a) Goodwill of the relevant financial institutions providing suspicious transaction reports at the first instance.

- (b) Technical expertise of the employees of the bank in intercepting and identifying such suspicious transactions in the first instance; and
- (c) Technical expertise of the staff of the FIU to properly and prudently receive, analyze and disseminate the information to law enforcement agencies to investigate any purported commission of any offences in that respect.

Therefore, some of the participants felt that it is necessary to establish a framework to criminalize any failure to comply with the requirement to report suspicious transactions in the form of penalties against the financial institution per se and also the responsible staff, particularly where gross intentional negligence is established. However, some of the participants opposed the idea because of its vagueness and difficulty of defining suspicious transaction reports and therefore, we believe criminal punishment against non-compliance is not appropriate.

Currently there is already in existence a forum for the international association of FIUs under an informal organization known as the Egmont Group. The group has more than 100 members but does not have any formal structure wherein it operates in as much as on an ad hoc basis. Perhaps it is necessary for those Member States who have yet to affiliate to consider membership and also endeavour to promulgate efforts to formalize the constitution, administration and operational capacity of the organization to provide an effective forum at the international level for cooperation on FIU related matters.

C. Inter-agency Administrative Cooperation

It is also acknowledged that some countries have a multi-agency approach in dealing with various aspects of financing terrorism at the domestic level. In such situations information collated is shared between agencies at a common platform and taken up for execution of relevant measures by the respective agencies concerned so that financing of terrorist acts could be preferably prevented or minimized, and if not then the perpetrators detected after the commission of the terrorist act. For example Saudi Arabia established a permanent committee for anti-money laundering and terrorist financing represented by many agencies and security services with a vested interest in terms of their respective organizational responsibilities in related issues.

Similar cooperation must be encouraged between respective member countries of the United Nations and between international agencies that have different charters but are also striving to curb the menace of terrorism within their respective sphere of interest. Sharing of information, reciprocity in judicial and criminal investigation and mutual assistance in criminal matters are identified as some areas in which much cooperation is required. One must also recognize the diversity of cultural, political and legal regimes of each country. To this extent, possible solutions may lie in enacting or amending domestic laws with due observance of such diversity but in accordance with the requisite international standards so that the intended legal regime is functionally effective and efficient in terms of criminalizing all acts of financing of terrorism, detection, investigation and prosecution and also rendering such cooperative services between friendly nations lawfully and quickly.

V. MEASURES AGAINST FINANCING TERRORISM

In line with the Security Council Resolution 1373, domestic measures taken against the financing of terrorism must encompass actions to prevent and suppress the financing of terrorist acts by criminalization in domestic laws and regulations and with penal provisions that duly reflect the seriousness of terrorist acts such as the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. In addition be flexible enough to freeze, without delay, the funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. Not least prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

The legal regimes of all States shall legislate against providing any form of support, active or passive, to entities or persons involved in terrorist acts, including collaboration in the provision of early warnings to other States by the exchange of information, denial of safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens, prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens, ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or supports terrorist acts is brought to justice.

In addition, afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, find ways of intensifying and accelerating the exchange of operational information. Enhance the possibility of such cooperation by becoming parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism (1999).

A. Generation of Finance

The inflow of financial resources of a terrorist organization more or less derives from legitimate sources, illegal revenue and criminal activities.

- (i) Legitimate sources include activities which are not considered illegal such as formal business enterprises and donations from charity and private individuals. Such businesses and charity organizations or individuals must be regulated by law. For instance, Saudi Arabia spares no effort in drafting regulations and taking measures that cope with changes to ensure the continuing monitoring of Saudi local and foreign charitable and relief organizations, while in Japan business operations of the Aum Shinrikyo organization are subjected to regular inspections.
- (ii) Illegal revenues originate from the diversion of legal funds and at times covert aid from foreign governments. On the other hand criminal sources, to name some, range from theft, fraud, money laundering and extortion. Hence, it is of paramount importance that within the framework of achieving the objectives of countering terrorism, as set forth in the international instruments, the efforts at both domestic and international fronts must be absolutely comprehensive by way of legislation and enforcement of law and order, and must be consistent and continuous. It is also important to note that any action to criminalize such actions must comprehend not only the means currently used or abused but any means that promote any possibility of being used or abused to further such criminal activities.

B. Method of Transfer

Wire transfers pose a major problem and therefore comprehensive action is necessary by way of new legislation or amendments to existing laws to regulate their use. In addition, informal money transfer systems known by different names around the world such as *hawala* in the Middle East, *hundi* in India, *phoei* in Thailand, *fei chien* in Hong Kong, *padala* in the Philippines, in common request very little information from users. Other possible mediums of money transfers include the gate keepers such as law firms, accounting firms, real estate agents, insurance brokers and doctors whose records are protected by stringent privacy laws. To comprehensively deal with all financial transfer actions, such institutions must also be regulated and required by law to also implement *know your customer* policies and report suspicious transactions to their FIU. Needless to say, domestic legal regimes must be implemented to regulate privacy policies in the interest of enhancing public safety standards.

Development of possible alternative methods of transfer by sale of individual bank accounts must be regulated. More so the use of mobile, email and other internet facilities to make such transfers must be regulated. For instance, companies involved in the sale and connection of mobile phones must be required to keep records of their customers, including maintaining a record of serial numbers of the mobile phones sold to ensure tracing by law enforcement agencies where such items are used or abused in relation to terrorism. Hence new legislation may be required to effectively manage cyber space.

C. Obligations for Reporting

It is common among many countries that respective money laundering laws obligate banks and other

financial institutions to report suspicious transactions. However, it is perceived that similar policies, including registration and licensing, must be applied to operators of alternative remittance systems, cash couriers, gate keepers and also businesses that deal with cyber space technology.

A common practice among countries is that respective domestic laws set transaction limitations on the amount to be transferred at any one time. Most jurisdictions have standardized limitations at US\$10,000. However, reporting of suspicious transactions must not only apply to transactions over such set thresholds but must include reporting of any transaction below the threshold which for one reason or other is suspicious.

VI. INTERNATIONAL COOPERATION FOR INVESTIGATION

United Nations Security Council Resolutions 1373 and 1267 establish the basis for interagency cooperation at national and international level. We identified four pillars of international cooperation

1. Legislation
2. Information gathering
3. Investigation
4. Extradition

Some Member States of the United Nations have laws on international cooperation such as *the Law for International Assistance in Investigation* and *The Law Relating to Reciprocal Judicial Aid to be Given at the Request of Foreign Courts* which allows for investigation upon request by the requesting country even though there is no treaty between the receiving state and the requesting country. Comprehensive international efforts must adopt similar practices to enhance international cooperation. Other measures outside of formal arrangements such as direct contact between agencies of countries must be facilitated bilaterally or at regional levels to advance expeditious actions in investigation, prosecution and seizure or confiscation of tainted or suspicious property and freezing of accounts whereby formal bureaucratic and political red tape do not become an impediment to prudent law enforcement.

Indeed major and sensitive matters may take time. The process is slow where it relates to formal legal procedures. While lengthy formal procedures pose a problem it is compounded by the attitude of the respective countries in providing such assistance and cooperation. Nearly all countries identify with the problem. Thus it is necessary that arrangements be implemented to allow, for example, for direct police to police contact for cooperation and networking.

Some things are for sure. Terrorist organisations use various numbers of systems. For example, Money brokers or financing in the form of commodities such as gold and donations. Hence, direct contact between the police/intelligence agencies is dependent on mutual arrangements at the international level through consultations at international forums, or direct bilateral liaison may be able to assist in removing divergent interests of each country for the common interest. Perhaps also the use of existing forums such as Interpol and the Egmont Group are also encouraged instead of establishing new forums and agencies with a view to improving efficiency at minimal cost.

Because of its international nature, training is an integral part of enhancing a vibrant, efficient and effective legal regime in all aspects within the four pillars of cooperation. Countries who possess methods, technology and the expertise that meet the set international standards need to cooperate by extending their hand in assistance towards states which need assistance to curb not only the existing avenues and means of financing terrorism but also avenues that pose the potential to be abused for such criminal purposes.

VII. PREVENTIVE AND DETECTING MEASURES

Japan has domestic legislation and an action plan put in place by the government for counterterrorism and in particular measures on border surveillance and control measures. The current legal regime also allows site inspection of such known groups in particular. Many jurisdictions, in their determination to combat terrorism, are improvising methods to improve their capacity.

There is no one way of preventing and detecting international criminals, and more so effectively stopping them, before they even attempt to commit such offences which have a wider global impact on society in

terms of related costs and incidental effects. For example, Saudi Arabia has been subjected to more than 23 acts of terrorism at the domestic level. Hence it has established agencies to implement counter measures against terrorism, regulated charity donations and legislated severe punishment for offenders including the death penalty and long term prison terms with stricter parole and probation procedures. Special mention was made that in Saudi Arabia terrorist funds worth US\$ 11 million were frozen in compliance with Security Council Resolution 1267. These examples demonstrate that measures must be taken at both the domestic and international level to educate and promote awareness among citizens of the menace of terrorism.

Terrorism is a global threat by its assumed nature. Combating it requires global cooperation in the establishment of a legal regime through, sharing of experience, intelligence and information, collaborative legislation of stronger laws and cooperation in the detection, investigation and prosecution of acts of financing terrorism both at the domestic and international level.

VIII. RECOMMENDATIONS

- A. To ratify and implement the International Convention for the Suppression of the Financing of Terrorism;
- B. To adopt and implement the FATF Forty Recommendations and Nine Special Recommendations;
- C. In particular, the following measures should be prioritized:
 1. To establish the necessary legal framework to detect and investigate terrorist financing including measures to freeze, seize, and confiscate terrorist assets.
 2. To criminalize all acts of terrorist financing and bring all perpetrators to justice.
 3. To ensure that legal persons are subjected to appropriate civil, criminal, or administrative sanctions for non-compliance.
 4. To ensure that all banks and financial institutions are properly licensed or registered including alternative remittance service providers.
 5. To issue regulations for financial institutions with respect to terrorist financing obligations under the international standards and relevant domestic laws.
 6. To ensure the compliance by financial institutions and others that are subject to financing of terrorism regulations such as the *know your customer rule and suspicious transaction reports*.
 7. To regulate 'gate keepers' properly with respect to the obligation of making suspicious transaction reports.
 8. To enhance information sharing at the regional and international levels, e.g., by becoming a Member State of the Egmont Group for financial intelligence units.
 9. To enhance inter-agency cooperation among relevant ministries and agencies.
 10. To augment intelligence agencies.
 11. To hold training programmes locally and internationally for the concerned government officials to increase their knowledge and skill and familiarize them with the latest methods in combating terrorist financing.
 12. To conduct awareness-raising programmes for the general public.

GROUP 3

PREVENTION, DETECTION, INVESTIGATION AND PROSECUTION OF TERRORISM ACTS

Chairperson	Mr. Eddy Sigfrido De Los Sansos Perez	(Dominican Rep.)
Co-Chairpersons	Ms. Mari Miyoshi	(Japan)
	Mr. Viliami 'Unga Afuha'amango Fa'aoa	(Tonga)
Rapporteur	Mr. Mohammad Mohd Yaacob Supian	(Malaysia)
Co-Rapporteurs	Mr. Tadashi Imai	(Japan)
	Mr. Hugo Rodolfo Gamarra Atencio	(Venezuela)
Members	Mr. Sonam	(Bhutan)
	Ms. Masayo Doi	(Japan)
	Mr. Odelon Garrido Ramoneda	(Philippines)
Advisers	Prof. Tomoyuki Noge	(UNAFEI)
	Prof. Satoko Ikeda	(UNAFEI)
	Prof. Hiroyuki Shinkai	(UNAFEI)
	Prof. Haruhiko Higuchi	(UNAFEI)

I. INTRODUCTION

Group 3 started its discussion on Jan 18, 2006 and elected the members of the board as listed above. The chairperson then, with the agreement of the group members, gave to each group member the respective topics to be prepared for further discussion as follow:

1. measures to control entry of terrorists and dangerous materials. (Ms. Miyoshi and Mr. Supian)
2. Effective measures to prevent and suppress terrorism acts within its own territory. (Mr. Odey and Mr. Imai)
3. Specific issues related to investigation and prosecution of terrorism offences. (Mr. Unga)
 - (i) Use of special investigative techniques. (e.g. Electronic surveillance, undercover operations). (Mr. Odey and Mr. Imai)
 - (ii) Witness protection. (Mr. Unga)
 - (iii) Use and protection of intelligence information in criminal proceedings. (Mr. Unga)
4. Coordination and cooperation among relevant authorities. (Mr. Sonam and Ms. Doi)
 - (i) Inter-agency coordination between relevant agencies. (Mr. Sonam and Ms. Doi)
 - (ii) Law enforcement cooperation between states. (Mr. Unga)

II. SUMMARY OF DISCUSSION

A. Effective Measures to Control Entry of Terrorists and Dangerous Materials

1. General Discussion

The discussion started with a brief explanation by two members of the group regarding the entry of persons and goods including dangerous materials into the country. They explained that there are basically two ways of entry of persons and goods: either through legal or illegal means.

The legal entry of persons and goods is made through legal entry points such as through the seaports, airports and border entry points where they must have relevant documents to be submitted for inspection and approval by either the immigration officers or the customs officers prior to their entry. Whereas the illegal entry/smuggling of persons and goods can be done by getting them into the country through an illegal entry/landing place where there are no enforcement officers manning the area; or the persons or goods are taken into the country through the border checkpoints without any proper documents or without declaring them/it by hiding them/it in a secret compartment of a vehicles or container entering into the country.

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The discussion continued with suggestions for effective measures to be taken for controlling the entry of terrorists and dangerous materials. The chairperson then opened the discussion to the other group members for further comments and suggestions that would benefit the group in tackling this issue.

2. Proposed Measures

The group came to a consensus of opinion that effective measures to control the entry of terrorists and dangerous materials such as weapons, firearms, explosives and hazardous chemicals are of crucial importance to any nation state in the world. The group also made a reservation that measures taken, however, should depend upon the resources and capability of each country in implementing them due to economic, political and other reasons.

The group then unanimously agreed to propose the following measures to control entry of terrorists and dangerous materials into a country as follows:-

- (i) Use of very high performance detection equipment for easy detection of terrorists and dangerous materials trying to be smuggled into the country through clandestine means and also to trace the use of forged travel documents. In some countries this measure has already been applied and has proven to be very helpful. A group member said that in his country, more than 15 scanner machines have been placed in major ports, airports and at border entry/exit points to help the customs officers detect the smuggling of goods into the country. With the help of this technology, they managed to get many cases, however so far no case of smuggling of persons and dangerous materials have been detected. In response to a question raised by one member, he then explained that not all the containers or vehicles which entered into the country are scanned. Due to the high volume of containers and passengers' vehicles entering into the country everyday, only selected containers and vehicles were scanned. He then agreed with the observation made by the member that some containers or vehicles which contained dangerous materials or persons may have entered the country without being detected.
- (ii) Introduction of a biometrics identification system which can help the immigration officers to identify the actual holder of the passports through their facial images and fingerprints. This measure was proposed by one member. According to her, her administration is facing the problem of the use of forged passports where the pictures of the actual holder of the passports were replaced by the pictures of the carriers. Therefore, by the use of this system, as some countries have implemented, this problem can be tackled.
- (iii) Use of an Advanced Passenger Information System (APIS) which helps the immigration officers to identify high risk or black-listed persons in advance prior to their arrival by receiving information on passengers in an electronic form from the country from which the airplane departed.

Since the measures suggested in paragraph (i) and (ii) above are directly related to the issue of immigration, the group did not discuss them in detail but agreed with the proposals since they seem to be very useful in preventing the entry of terrorists.

The group also unanimously agreed that the measures suggested in paragraph (i), (ii) and (iii) above are advanced technology systems in which not necessarily all the countries are planning to introduce in the near future. However, all countries represented here have the same goal which is to strengthen all measures in order to combat terrorism. Nonetheless most of these countries economies do not allow them to implement such measures because of the high cost involved. Since there are some countries which have tentative strategies of implementing these systems within their borders or nationally, gradual assistance to other countries to implement such systems would be highly appreciated.

- (iv) One member then suggested other measures which can help prevent the entry of dangerous materials into the country by creating a specific provision in the laws, especially the customs laws of each country to prohibit the importation of dangerous materials which can be used for terrorist purposes with a condition which requires the issuance of an approval permit from the relevant authorities, such as the police, prior to the importation. A member agreed with the proposal and explained that in his country, the Customs Act 1967 provides a power to the Finance Minister to

issue a directive to totally prohibit, or conditionally prohibit subject to a license, the importation and exportation of certain goods prescribed under the Customs (Prohibition of Imports) Order 1988 and Customs (Prohibition of Exports) Order 1988. Therefore, if the goods imported are subject to a license and the importer cannot produce it, the goods can be seized and forfeited to Customs and the importer can be charged in court. One group member then informed the group that his country also has this provision in their law and it helps to control the importation of goods, especially weapons and chemicals.

- (v) To impose severe penalties/punishment in the relevant laws on those who commit the offence of smuggling or aiding the illegal entry of terrorists and dangerous materials. There were different suggestions given by the members of the type of penalty/punishment that should be imposed. One member suggested that the offender should receive capital punishment or life imprisonment if convicted while others believed that 30 years imprisonment should be the maximum penalty imposed.

One member also suggested that besides punishing those who commit the offence of smuggling dangerous materials or aiding the illegal entry of terrorists, the captain of a ship who carries the dangerous materials or terrorists must also be punished as he is also criminally liable for not checking the type of goods or people that he is carrying. This suggestion got a mixed reaction from other members. Most of them are against this proposal on the grounds that it is impossible for the ship's captain to check all the goods that he is carrying where all the containers are locked and the information that he has is only based on the documents submitted by the owner/exporter of the goods. One member then said that under the immigration law of her country, the pilot and the airline company are liable if it is found that a passenger is on board their aircraft without a valid passport. However, it is only an administrative sanction with a fine and not a crime.

- (vi) To encourage people to provide information on illegal entry of terrorists and dangerous materials, for example by establishing a monetary reward system for any information which leads to a successful arrest and seizure case and put a specific provision in the law which guarantees the secrecy of the identity of the informer. This proposal is supported by all members since their countries are implementing this measure where the agencies concerned such as the police, customs or immigration have a system of encouraging people to come forward to give information and they will be rewarded afterwards and their identity also will be kept secret.
- (vii) To put a specific provision in the law to give sufficient power to the immigration and customs officers for inspection and investigation purposes. One member made an observation that it is important for these agencies to have the powers to inspect, seize, investigate and prosecute those who commit the offence. Without these powers, prevention will be difficult.
- (viii) Develop cooperation with other enforcement agencies, inter and intra, for joint operations, exchange and sharing of information and other relevant activities which can tackle the problem of illegal entry of people and goods into the country. One member gave an example where its administration used the assistance of the army that has advanced radar controlling equipment to trace any suspicious ships or boats entering into the country by sea. The information is then relayed to its administration for immediate action. One member also shared his country's experience where there are regular joint operations at the land border of the country consisting of police, immigration and customs to prevent the entry of illegal immigrants and goods; and through this joint operation, many attempts to smuggle persons and goods have been foiled.
- (ix) Use of sniffing dogs to detect dangerous materials coming into the country through a clandestine manner. This proposal was raised by a member where in his country, these K-9 dogs were not only used to detect narcotics but also to detect any explosives which were attempted to be smuggled into the country. Another member said that his customs administration did not use sniffing dogs to detect explosives coming into the country but the police did use them to detect any explosives which were put in a building, etc. Other members also used this method to detect drugs and explosives in their respective countries.
- (x) Enhancing patrolling activities at sea, air and land to detect and prevent the illegal entrance of terrorists and dangerous materials into the country. According to one member, he was of the

opinion that one country cannot stress only the problem of illegal entry of persons and goods through the airports, seaports and entry/exit points at the land borders; but emphasis must also be given to prevent the illegal entry of persons and goods directly through the illegal entry points at the sea and land borders. His opinion was supported by other members and one of the members further explained that in his country, his administration created a prevention system called a 'firewall' where patrolling of areas classified as high risk areas is carried out simultaneously at the sea and land during stipulated periods of time and it was further strengthened by building camps at those high risk areas so that prevention can be done effectively. Other member also suggested that the patrolling can also be carried out through the air where the cooperation from the police and the army can be requested. There was also a proposal from one member to put surveillance cameras at certain strategic locations to monitor and trace any attempt to smuggle persons and goods into the country. However, his suggestion was considered by other members as too costly and not practical for most countries.

- (xi) Having good and efficient immigration and customs officers to tackle the illegal entry of terrorists and dangerous materials by establishing an effective recruitment system and continuous training system and capacity building programme was another measure proposed by a member. She stated that without good and efficient officers, the enforcement of the laws cannot be done efficiently. Her views was supported by other members who were of the opinion that we usually emphasis legal provisions but do not take into consideration the ability of the officers to enforce the law. So the group agreed that strengthening the legal regime to combat terrorism must go hand in hand with equipping the enforcement agencies with good, knowledgeable, experienced and competent officers.
- (xii) To develop a database of all suspected terrorists so that the entry of terrorists into any country can be prevented at the entry point. However the group was informed by one member that the identification of terrorists is very difficult to be make and some of the information given by some countries is not so reliable because their definition of a terrorist maybe different from other countries which makes a terrorist in one country not a terrorist in another. Therefore, the group agreed to suggest that the United Nations should offer a solution to this problem and create a mechanism to gather and disseminate information on terrorists.

III. EFFECTIVE MEASURES TO PREVENT AND SUPPRESS TERRORISM ACTS WITHIN EACH COUNTRY

A. General Discussion

One member started the discussion by explaining the approach taken by his government in preventing and suppressing terrorism acts by way of knowing the terrorists activities, criminalizing terrorist activities and arresting them, outlawing or dissolving terrorists organizations, preventing terrorists from getting materials potentially used for terrorism, suppressing terrorist financing and finally strengthening security measures at possible terrorist targets.

Anther member then added to the points made earlier by conveying the approach taken by his country which uses the doctrine of reciprocal responsibility where the public have to cooperate and work hand in hand with the authorities in fighting crime and terrorism by not committing or supporting these activities. He further stressed that his country is also adopting a programme known as the 'Three-Tiered Defence System' which utilizes the synergy of partnerships among the government agencies at all levels, the police and all other concerned sectors in taking counter-terrorism measures. According to him, this system has three distinct components: intelligence gathering, target hardening and incident management. The use of this system has so far helped his government in tackling the problems of terrorism in his country.

Other members responded to the discussion on this issue by suggesting building strong inter-government agency cooperation to trace and apprehend suspected terrorists and their groups in order to make them feel that they are not accepted in the country by the people and the government.

The proposal was further elaborated by another member who suggested that inter agency coordination is very important especially to prevent terrorist attacks on certain areas or places which are vulnerable to terrorist attack. She cited an example such as facilities which use nuclear power to generate electricity. With

the coordination between the ministries concerned and other enforcement agencies, the task to create a plan or programme to protect these places will be much easier.

B. Proposed Measures

The chairperson continued the discussion with the proposed effective measures to prevent and suppress terrorism acts within each country as follows.

1. To gain a better understanding of terrorist activities by identifying who are the terrorists, when they will act, where they operate, why they are involved in terrorism, how they conduct their activities, who are their targets and all other relevant information relating to them. One member said this is a very important measure to take into consideration first before we proceed with other actions. another member supported this opinion by saying that this information is vital since no war can be won unless we know who the enemy is.
2. To criminalize terrorist activities and outlaw terrorist organizations. In doing so, a member suggested that a clear provision in the laws such as in the penal code, anti-terrorism laws, explosives control laws and so on must make every terrorist act a crime and punishable. Another member suggested in order to make it more clear, the act must list all the actions which are considered by that country as terrorist acts. Another member told the group that his country is in the process of amending its penal code in order to criminalize and punish the act of terrorism and the proposed amendment also specifies all action which his country considers a terrorist act.
3. To prevent the terrorists from getting materials that have the potential to be used for terrorism. One member suggested that ownership of weapons should be licensed and it should be a criminal offence to be in possession of weapons, such as pistols and rifles without a license. Another suggestion was to control the importation and storage of dangerous chemicals, precursor chemicals and explosives which can be used for a NBC attack or bombing, and to monitor the transactions of these materials for easy detection if they have been used in terrorist activities. One member of the group reiterated his earlier comments that under his country's customs legislation the finance minister can make an order to totally prohibit, or conditionally prohibit subject to a license, the importation and exportation of certain goods prescribed under the Customs (Prohibition of Imports) Order 1988 and Customs (Prohibition of Exports) Order 1988. Through this provision, the government can control the importation of these kind of goods and can punish those who are importing them or in the possession of goods without the required license.
4. To suppress terrorist financing by individuals or organizations which sympathize with them or support their mission by obliging financial institutions to identify their customers and to report any suspicious transactions. And to have a legal system which gives the power to the authority concerned to confiscate and freeze terrorist assets, to punish those who provide financial support to the terrorists, to license the activity of donation collection for whatever purposes, etc. The group was informed that most of the group members' countries already have Anti Money Laundering and Terrorist Financing provisions with the purpose of preventing terrorists from benefiting from their criminal actions or unjust enrichment and also to prevent the property from being used for other terrorist actions.
5. To strengthen security measures on any possible terrorism target such as military bases, nuclear power facilities and embassies of the countries which have been the target of certain terrorist groups. One member gave his view that intelligence agencies in one country must have good communications and good relationships with other intelligence agencies outside their country in order to get reliable information on the suspected terrorists, their organizations, their targets and other relevant information that could help the country in preventing and capturing the terrorists before they can commit their plan.
6. To educate the public on the dangers and impact caused by terrorist activities in order to prevent them from supporting terrorists and to get their cooperation in giving information of any terrorist activities known to them.
7. To build strong inter-government agency cooperation by exchanging and sharing information and making a joint effort in whatever activities and actions are taken in tackling the problem of terrorism.

8. Military action should be the last alternative after other preventive action has been taken since military action will only cause the reproduction of other terrorists as has happened in Iraq. The chairperson observed that every country has their own policy in this regard. One member explained that his country has to use this measure since other diplomatic measures cannot prevent and eliminate the terrorist threat in his country. Therefore, the group agreed that military action should be used as a last resort taking into consideration that terrorism itself is a threat to our respective countries. In some countries this threat has grown to the point where normal life is affected by it. So the authorities have the right to use all means necessary to stop, minimize or neutralize such threats as to maintain their integrity and sovereignty. Therefore, the use of military force as a final option will be determined by each country based on their own particular situation.

IV. SPECIFIC ISSUES RELATED TO THE INVESTIGATION AND PROSECUTION OF TERRORISM OFFENCES

A. Investigation

The discussion started with a brief overview of the process of investigation by one member based on his country's experience. He explained that the aim, or the primary purpose, of carrying out an investigation is to search for the truth in a way which is fair for the accused and also admissible in court. The most important thing which must be done by the investigator is to gather the evidence. In doing so, he has to answer these five important questions that are first, who committed the offence. For this he must know the identity of the accused, the co-accused and also the accomplice. The second question is why he/she committed the offence. Therefore, the investigator must know the motives and the *mens rea* of the offender. The third question is to know when he/she committed the offence. In the search for the answer, the investigator must find the whereabouts of the suspect before, during and after the offence was committed or the alibi of each suspect.

He then raised the fourth question, that is to know where the offence was committed by establishing the scene of the crime and the final question is to know how he/she committed the offence that is the *modus operandi* used by the accused. According to him, the answer to all these five questions can be obtained from the statement of the witnesses and evidence which can be in the form of oral evidence, documentary evidence, real evidence, that is the exhibits, the statements of the accused and digital evidence.

On the issue of digital evidence, the member made an observation that in most countries including his, digital evidence is not admissible in court. Therefore, he suggested that the evidence laws of these countries be amended to include a definition of digital evidence and to allow the admissibility of digital evidence in court. One adviser informed the group that in Japan's Criminal Procedure Code, the admissibility of digital evidence is stated in the provisions. However, the law does not specify the type of digital evidence. Furthermore, the Japanese Government is in the process of amending its Evidence Act for the purpose of enhancing the admissibility of digital evidence in court. He further suggested that the laws regarding investigation also need to be amended to enhance our ability to investigate e-crime.

A member then made an observation on the admissibility of oral evidence in court. According to him, in his country, oral evidence is not admissible unless it is put in writing - that is in a statement form.

The discussion related to how to carry out an investigation so as to acquire reliable admissible evidence which could be sustained in court. The following specific issues were discussed.

1. Search Warrants

One member of the group explained that in his country, every search must be done with a warrant issued by the court. The law stated that any police officer of the rank of sergeant or above or officer in charge of the police station may apply for it from the court. However, in the case of terrorism, an application for a search warrant can be made through phone, fax or any other electronic device and the court may issue the warrant as a matter of urgency but the applicant must complete the formalities of the application within 48 hours after the warrant has been issued. He further explained that the warrant should be valid for one month and can be executed at any time. He further stated that in an urgent case, a search warrant is not needed.

According to another member, in his country every search must be accompanied with a search warrant issued by the court. However, there is an exception with regard to cases where the crime is flagrant - where the criminal is caught in the act. In this situation, the police need not have a search warrant to search around the crime scene. Another member also mentioned that the same procedure applies in his country where offences are divided into two categories: cognizable offences where a search warrant is not needed and non-cognizable offences where the police must have a search warrant before doing any search. While another member told the group that in his country, a search cannot be carried out on any establishment like a hotel or shopping complex without a search warrant. And in some other countries, no search warrant is needed if the search was done in the presence of a prosecutor.

Another member gave an example of his country where the Customs Act provides a power to the Customs officer to search any premises or vehicles either with a warrant or without a warrant. The reason for allowing the authority to search without a warrant is to avoid the possibility that the evidence will be destroyed or removed if the action is delayed due to the process of getting the warrant.

2. Arrest of the Suspect

In most group members' countries, the authorities can arrest a suspect either with a warrant issued by the court or arrest without a warrant depending on the seriousness of the offence and the high possibility of the suspect escaping if the agency has to apply for a warrant first. In one member's country, there are two kinds of arrest - that is a warrant arrest by the authorities and secondly, a citizen's arrest whereby a citizen can arrest any suspected criminal without the need for a warrant from the court. One group member then raised the question of whether there is a provision in any country which allows the authorities to arrest any person who the authorities have reasonable grounds to believe that he/she will commit an offence, or in other words, to arrest a person before the incident or before a criminal act is committed. One member gave his country's experience where the authorities can only arrest a person if there is enough evidence that he/she has committed a crime. However, in some cases, preparation for crime is also a crime, and this condition also applies in the case of terrorism. In this case, the authorities can arrest the person before the actual crime is committed.

3. Use of Special Investigative Techniques

A member of the group emphasized the importance of collecting information on terrorism. Through the information, an act of preventing a terrorist attack can be taken, a suspected terrorist can be arrested or deported and the terrorist assets can be frozen or confiscated. He further elaborated that in order to get or collect this information, various methods can be used such as wiretapping, use of equipment such as bugs, tailing and guarding the suspect, etc. However, he observed that even though collecting information is a must in preventing terrorism, the process of collecting it sometimes influences or breaches the human rights of the suspects, such as the right of privacy. The authorities must strike a balance between the degree of terrorist threat and the effect on human rights before deciding to allow this kind of information gathering in the law.

One member gave his opinion that in order to allow the authorities to obtain information through wiretapping, there must be a legal provision which allows them to do so and the authorities must furnish very good grounds to justify their actions. And he also emphasized the importance of the constitutional rights of the citizen before deciding to take this kind of approach to getting information for the purpose of their investigation.

Another member said that in his country, the police have the power to install tracking devices, listening devices or any other electronic device for the purpose of gathering information which is required for their investigation. This is subject to a condition that there must be reasonable grounds to believe that the occupants or any persons that visit the place are suspected of committing an act of terrorism. He further added that any information collected by such device may be admissible as evidence in court and subject to challenge by the accused.

While according to one member, his country does not have any electronic devices to help them collect information. They only use plainclothes policeman to work undercover and pretend to be beggars, cleaners or vendors to collect and gather information from the public.

Another member stated that in his country, the use of an electric shock device on a suspected criminal to get information or his cooperation is allowed by the law and the admission of the suspect is admissible as evidence in court. He, however, mentioned that this method will only be used when there is reasonable evidence to believe that the suspect is involved in a criminal action. The majority of the members stated that in their respective countries, this method of getting information or an admission is not allowed by the law because it is considered torture and an admission obtained through torture or duress is not admissible as evidence in court.

B. Prosecution

The discussion relating to prosecution has been divided into the following specific issues.

1. Witness Protection

One member voiced his view that in every prosecution, the accused has the constitutional right to cross-examine all the witnesses who give evidence against him/her. In order to judge the credibility of the witness, the court is entitled to judge the demeanour of the witness. Due to this, sometimes it is very hard to convince the witness to give evidence because they fear for their safety. Therefore, it is necessary to consider the legal framework which aims to protect witnesses in order to encourage them to provide important evidence. He then gave his recommendation for the legal framework such as to protect the identity of the witness, even before court. In this instance, the prosecutor has the privilege of not disclosing any information which may lead the recipient to identify the witness.

He also suggested that the courtroom also should be structured in a way which allows the accused to hear the witness's voice only and not to see his/her face. And for the purpose of cross-examination, the process can be conducted over the phone. The group took the example of the practice in some countries, where there is a special court procedure allowing witnesses to give evidence by video conferencing and the identity of the witness can be hidden from the accused and the public.

The group then discussed the issue of protecting the witness after the court's proceedings end. Most participants stated that there was no procedure in their country to protect the identity and security of the witness, such as to provide them with a new identity as some countries do. However, one member stated that in his country, the authorities will give an assurance to the witness that he/she will be protected before he/she agrees to be a witness. During the trial, the witness will be put in a protected house. After the trial ends, the authorities will give him/her some money so that he can settle down somewhere far from his/her previous residence.

2. Use and Protection of Intelligence Information in Criminal Proceedings

One member was of the view that information gathered through the use of 'HUMINT', that is human intelligence or an informer, is not fit to be used in criminal proceedings. This is because in many cases their identities have to be kept secret for security reasons. He further explained that without producing the informer in court and without revealing his name, their information will be regarded as hearsay evidence which has only a limited capacity as evidence. Therefore, the HUMINT should be mainly used for prevention and investigation purposes and not for criminal proceedings. On the use of other intelligence means, such as wiretapping, he said that it can be used for criminal proceedings as long as it was obtained through legitimate means.

On discussing the same issue, one member stated that the common law, which is the foundation of law in his country, has seen some developments. Before this, if the evidence collected by the police was proved to be in breach of criminal procedure, the evidence will be inadmissible. However, the law now gives discretion to the court to decide whether the evidence can be admissible or not depending on its probative value and prejudicial value. If the prejudicial value is more than the probative value, then the evidence will not be admissible.

One adviser stated that in some countries, there is a firewall between criminal proceedings and intelligence activities. He said that in these countries, information gained through intelligence activities cannot be used in criminal proceedings. However, after the 9/11 incidents, the law in some countries allows the use of such information in criminal proceedings. Therefore, he wants to know whether other countries in

this group have adopted the same approach, and if the answer is affirmative, what are the requirements for the information to be admissible.

In replying to this question, most members said that their countries do not accept information gained through intelligence activities as evidence in court. The information will only be used for investigation purposes. While one member of the group repeated his earlier statement that in his country the police can wiretap any person suspected to be a terrorist and any information collected by such device will be admissible as evidence in court. However, it is subject to the condition that the evidence is relevant to the fact in issue and also its probative value must be greater than its prejudicial value.

V. COORDINATION AND COOPERATION AMONG RELEVANT AUTHORITIES

A. Inter-agency Coordination between Relevant Agencies

One of the group members opened the discussion by talking about the importance of intelligence information in fighting terrorism and mentioned that each country has a different approach in gathering intelligence information such as the use of wiretapping, where in some countries it is permitted whereas prohibited in others. She is also of the opinion that it is necessary for every agency or organization in each country to share the information that they have among each other to prevent terrorist acts and also the information will be useless if it does not reach the target user immediately after it is gained. However, she observed that it is a problem faced by most countries where the agency or organizations concerned in preventing terrorism are reluctant to share the information that they have. Therefore, we must find ways to solve this problem. She also mentioned the importance of examining closely any information received because the information may not be important to one agency but might be to another.

Another member then related the situation in his country where there are two levels of committee which monitor and control the security of the nation, namely a district level committee and a national level committee. The task of the district level committee is to gather all information, disseminate instructions and submit a report or feedback to the national level committee. The committee members consist of the department heads such as immigration, police, customs and also the army. Business community leaders are also members of this community. While the function of the national level committee, which is chaired by the Prime Minister, is mainly to draft policy on security matters. He also mentioned that in his country, the police have the privilege to relay any information directly to the highest authority.

Before the discussion continued, one adviser expressed his view that the revelation of intelligence information obtained must be carefully done so that the information will only go to the actual person who needs it and not to any other person that will prejudice the security of the information and the security of the nation. He further explained that it is not necessary that we immediately pass any intelligence information that we get to the authorities concerned. What we can do is to develop more on that information. He gave an example where there is information that someone is a member of a terrorist group. Instead of giving that information immediately to the authorities to arrest the suspect, we can build more on that information by following him until we can get more information on him/her and his/her organization.

One member told the group that he agrees with the formation of a committee to tackle the issue of terrorism, but it must be done at the highest level and the representatives must be the head of each department who can make a decision on behalf of their departments. He also voiced his opinion that intelligence information can be shared but we must know how, when and to whom the intelligence information can be disseminated.

One member of the group then reminded us that the sharing of intelligence information cannot be done if there is no trust and a give and take principle among the agencies. Therefore, each agency concerned with security issues must build trust with other agencies and realize that the sharing of information is for the benefit of the nation. His opinion was shared by another group member who observed that almost all intelligence agencies or those who work to gather intelligence information, irrespective of their agency or organization, will always try to protect the confidentiality of the information. This makes them feel insecure if they have to share the information with others. But on the other hand, if we focus too much on protecting the confidentiality of the information and do not want to share it, the information will die and be useless as it cannot be developed more. Therefore, as that member said, trust among agencies concerned must be built and developed.

He further added that based on his experience, the reason why the agencies concerned do not want to share information that they have is due to bureaucratic sectionalism. He felt that this reason cannot be accepted. But if the reason for not sharing the information is to protect the confidentiality of the sources of the information, then it can be accepted. However, by sharing information, he feels that it does not have to compromise the informant. Therefore, a lot of effort needs to be made to solve this issue.

This problem of sharing of information may be different from one country to another and maybe other countries have had this kind of problem. One member told the group that in his country, all agencies concerned are working hand in hand to fight any problem or issues which will affect the stability of the nation politically, economically and socially. This includes the sharing of information. One member also said that his country has cooperation among the agencies concerned.

One member raised a question on the proper channel to disseminate information especially among police around the world. According to her, immigration and customs agencies have their own international agency which deals with this matter. One member replied that Interpol performs this function. And in answer to another question raised by the member, he said that if a country knows that a wanted terrorist worldwide is hiding in one country, the authorities in that country can either channel the information to Interpol or arrest that person immediately for further action. Another member informed the group that he had visited Interpol once and found that they had insufficient staff. He also found that the exchange of intelligence information on terrorists is normally done bilaterally among countries and not multilaterally.

According to another member, one way to solve the problem of the sharing of information is by having an intensive and strong police-community partnership where they work hand-in-hand to eradicate this problem. This partnership is important because most of the time, the criminals are hiding among the community. So the community will have direct information on that criminal, and without their help in passing on the relevant information, the criminal cannot be traced and arrested easily. He further elaborated that his country's criminal justice system, which consists of the community, the police, the prosecution, the courts and the corrections agencies, really help and are effective towards the attainment of a healthy and peaceful society.

At the end of the discussion the group agreed that one of the coordination and cooperation measures needed to fight terrorism is information sharing and when we have enough information, to carry out an investigation and then to prosecute the offender. The group also agreed that in order to minimize the risk of potential terrorist attacks, all agencies and organizations concerned must always discuss regularly the action to be taken to prevent the action, and what action to take if an incident occurs. One of the methods is to conduct drills or exercises in specific areas which are vulnerable to terrorist attack.

B. Law Enforcement Cooperation between States

With regard to the issue of law enforcement cooperation between states, all the group members are of the same opinion that all the 13 Conventions of the United Nations have laid down the necessary measures on the issues of mutual assistance in criminal matters and extradition to be adopted by all countries that acceded to it. Therefore, it is up to the each country, according to their capability and situation, to adopt the measures suggested in those conventions.

When discussing more on the issue of cooperation between states, one member mentioned that in his country, the government has formed a special agency known as the Transnational Crime Centre with the main purpose of sharing information between states that have diplomatic relations with his country. He gave one recent example where a national of a foreign country was arrested in his country based on information that he was involved in a criminal activity in that country. The information was obtained from that country's authorities through this centre. That criminal is now waiting to be extradited to that country.

Another member told the group that his administration is a member of a World Customs Organization where one of its missions is to assist members in their efforts to meet the challenges of the modern business environment and adapt to changing circumstances (including the terrorism threat), by promoting communication and co-operation among members and with other international organizations, and by fostering integrity, human resource development, transparency, improvements in the management and working methods and the sharing of best practices. Through this organization, his administration cooperates

and coordinates with other member countries in the sharing and exchange of information and assistance in customs matters. He further informed us that this organization has also established regional intelligence liaison offices with the purpose of cooperation in regard to intelligence, and his administration is a member for the Asia-Pacific region.

VI. CONCLUSION

The group agreed, respecting each country's legal regime, and the process of prevention, detection, investigation and prosecution of terrorist acts, there is a clear determination to face this crime. Moreover, the cooperation and exchange of information among each country's agencies will help assure the prevention of these terrorist activities. Therefore, the trust among local agencies to share such information should also be fostered among agencies of different states by co-operating both bilaterally and at a regional level, so that the threat of terrorism will be reduced to a minimum.

The group also reflected on the existing Conventions which obliged countries to implement the necessary measures in order to combat terrorist activities. At the same time the group understands that there are countries that have economic resources to implement these measures. Whereas other countries limited resources inhibit them implementing these measures to the fullest extent. Yet they are aware of the importance of these measures and are willing to cooperate in this regard.

Therefore, we should go back and look at the *aut dedere aut judicare* principle which is stated in all the 12 Conventions of the United Nations. This means in simple words that the signatory countries are obliged either to extradite or prosecute the offender. If this is applied among the states as a sign of cooperation and solidarity, then we will all contribute to live in a peaceful and more prosperous society in our respected countries and also in the world.

PART TWO

**Work Product of the Eighth International Training Course on Corruption
Control in Criminal Justice**

UNAFEI

COUNTRY REPORT: BANGLADESH

*Golam Shahriar Chowdhury**

I. HISTORICAL BACKGROUND

A. Corruption and Early Measures

1. Formation of Enforcement Branch

Corruption is not a new problem for Bangladesh as it was officially recognized many years before the country's independence in 1971. During the British rule, corrupt practices were detected in the Food Department and as such, in 1944, the *Enforcement Branch* was formed in the Police Department to fight such corruption.

2. The First Act against Corruption

Enactment of the first Act against corruption was made in 1947 under the title the *Prevention of Corruption Act*. As there was no investigating agency other than the police, under the Act, certain offences were declared as offences of corruption and those were made cognizable for the police to investigate. The Police Department was entrusted to investigate such corruption cases until the establishment of the *Bureau of Anti-Corruption*.

3. Establishment of the Bureau of Anti-Corruption

As the Police Department failed to handle corruption properly, the then Government felt the need to establish a separate agency to fight corruption. For that purpose the *Anti-Corruption Act* was passed in 1957 and the Bureau of Anti-Corruption was established under the Act. The Bureau continued to function even after 32 years of independence of Bangladesh. Despite the continuous existence of the Bureau, corrupt practices were never under control, rather, widespread corruption turned into the single biggest roadblock towards economic development. The failure of the Bureau is the ultimate result of a lack of commitment to fight corruption. In addition to that, the Bureau used to follow a primitive approach in its fight against corruption. The Agency did not have modern facilities. Practically, there was no facility for the training of investigators. There was very little scope for their promotion. To start an enquiry or a case they had to get prior approval from the authority. Thus the authority had total control over the functioning of the Bureau. The investigators could investigate only those cases that the authority desired.

B. Rampant Corruption and Establishment of Anti-Corruption Commission

Rampant corruption had a very adverse effect on the economy and badly affected the general people and therefore, they wanted to get rid of the evil of corruption. As such they raised their voice against it.

In such a situation, the major political parties were compelled to make political pledges before the general election of 2001 to establish an independent anti-corruption commission/council. The Bangladesh Nationalist Party won the general election and formed the government.

According to its election pledge the government established the independent Anti-Corruption Commission under the Anti-Corruption Act of 2004. The Commission consists of three Commissioners. One of them has been made Chairman who acts as the Chief Executive. The Commission is independent in executing its duties and responsibilities. But the Government is to provide the organogram (organizational structure) and the budget. As the Government has not yet provided the organogram, the Commission is yet to get a good start.

II. THE OFFENCES OF CORRUPTION

A. Offences under the Anti-Corruption Commission Act, 2004

Section 19 of the Anti-Corruption Commission Act, 2004

Special powers of the Commission in respect of inquiry or investigation

- (i) In respect of any inquiry or investigation into allegations of corruption the Commission shall

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have the following powers, namely: -

- a) Summons witnesses, ensure their appearance and interrogate them under oath.
 - b) Discover and present any document.
 - c) Take evidence under oath.
 - d) Call for public records or its certified copies from any court office.
 - e) Issue warrants for the interrogation of witnesses and the examination of documents.
 - f) Any other matter required for realizing and fulfilling the aims and objectives of this law.
- (ii) The commission may require any person to furnish information in matters relating to any inquiry or investigation and any person so directed is obliged to furnish information available to him.
- (iii) Any person obstructing an official legally empowered by the commission or a commissioner in the exercise of his powers under this sub-section (1) or any person deliberately violating any order given under that sub-section commits a punishable offence is liable to a term of imprisonment of not more than three (3) years or a fine or both.

Section 26 of the Anti-Corruption Act, 2004

Declaration of Properties

- (i) If the Commission is satisfied on the basis of its own information and after necessary investigation that any person or any other person on his behalf is in possession or has obtained ownership of property not consistent with his legal sources of income then the commission through an order in writing shall ask that person to submit a statement of assets and liabilities in the manner determined by the commission and to furnish any other information mentioned in that order.
- (ii) If any person -
- a) after having received an order mentioned in sub-section (1) fails to submit the written statement or furnish the information accordingly or submits any written statement or provides any information that is false or baseless or there are sufficient grounds to doubt their veracity or
 - b) submits any book, account, record, declaration, return or any document under sub-section (1) or gives any statement that is false or baseless or there are sufficient grounds to doubt its veracity, then that person will be sentenced to a prison term of up to three (3) years or a fine or both.

Section 27 of Anti-Corruption Commission Act, 2004

Possession of Property in Excess of Known Sources of Income

- (i) If there are sufficient and reasonable grounds to believe that a person in his/her own name or any other person on his/her behalf is in possession and has obtained ownership of moveable or immovable property through dishonest means and the property is not consistent with the known sources of his/her income and if he/she fails to submit to the court during trial a satisfactory explanation for possessing that property, then that person shall be sentenced to a prison term ranging from a minimum of three years to a maximum of ten years imprisonment, and these properties shall be confiscated.

B. Offences under the Prevention of Corruption Act, 1947

Section 5, Subsection (2)

Any public servant who commits or attempts to commit *criminal misconduct** shall be punishable with imprisonment for a term which may extend to seven years, or with a fine or with both.

*Criminal Misconduct (Section 5, subsection (1) of the Prevention of Corruption Act)

A public servant is said to commit the offence of criminal misconduct:

- a) if he (habitually) accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Penal Code, or
- b) if he (habitually) accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

- c) if he dishonestly or fraudulently misappropriate or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or
- d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains or attempts to obtain for himself or for any other person any valuable thing or pecuniary advantage, or
- e) if he, or any of his dependents, is in possession, for which the public servant cannot reasonably account, of pecuniary resources or of property disproportionate to his known sources of income.

C. Offences Under Sections 161-169, 217, 218, 408, 409, 477A and Sections 109, 120(B) and 511 of the Penal Code, 1860 (Act XLV of 1860)

Section 161

Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the government or legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.

Section 162

Whoever, accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person, with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.

Section 163

Whoever, accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person, with the Government or Legislature, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with a fine, or with both.

Section 164

Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.

Section 165

Whoever being a public servant, accepts or obtains, or agrees to accept, or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official function, for himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.

Section 165A

Whoever abets any offence punishable under section 161 or section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided with the offence.

Section 165B

A person shall be deemed not to abet an offence punishable under section 161 or section 165 if he is induced, compelled, coerced, or intimidated to offer or give any such gratification as is referred to in

section 161 for any of the purposes mentioned therein, or any valuable thing without consideration, or for an inadequate consideration, to any such public servant as is referred to in section 165.

Section 166

Whoever being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with a fine, or with both.

Section 167

Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.

Section 168

Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year or with a fine, or with both.

Section 169

Whoever, being a public servant, and being legally bound as such public servant not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years or with a fine, or with both; and the property if purchased shall be confiscated.

Section 217

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with a fine, or with both.

Section 218

Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.

Section 408

Whoever, being a clerk or servant or employed as a clerk or as a servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine.

Section 409

Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to a fine.

Section 477A

Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intend to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or have been received by him for or on behalf of his employer, or wilfully, and with intend to defraud, makes or abets, the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with a fine, or with both.

Section 109

Whoever, abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Section 120B

- (i) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
- (ii) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with a fine or with both.

Section 511

Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made in this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the longest term of imprisonment provided for that offence or with such fine as is provided for the offence, or with both.

III. INVESTIGATIVE METHOD

A. Relevant Laws

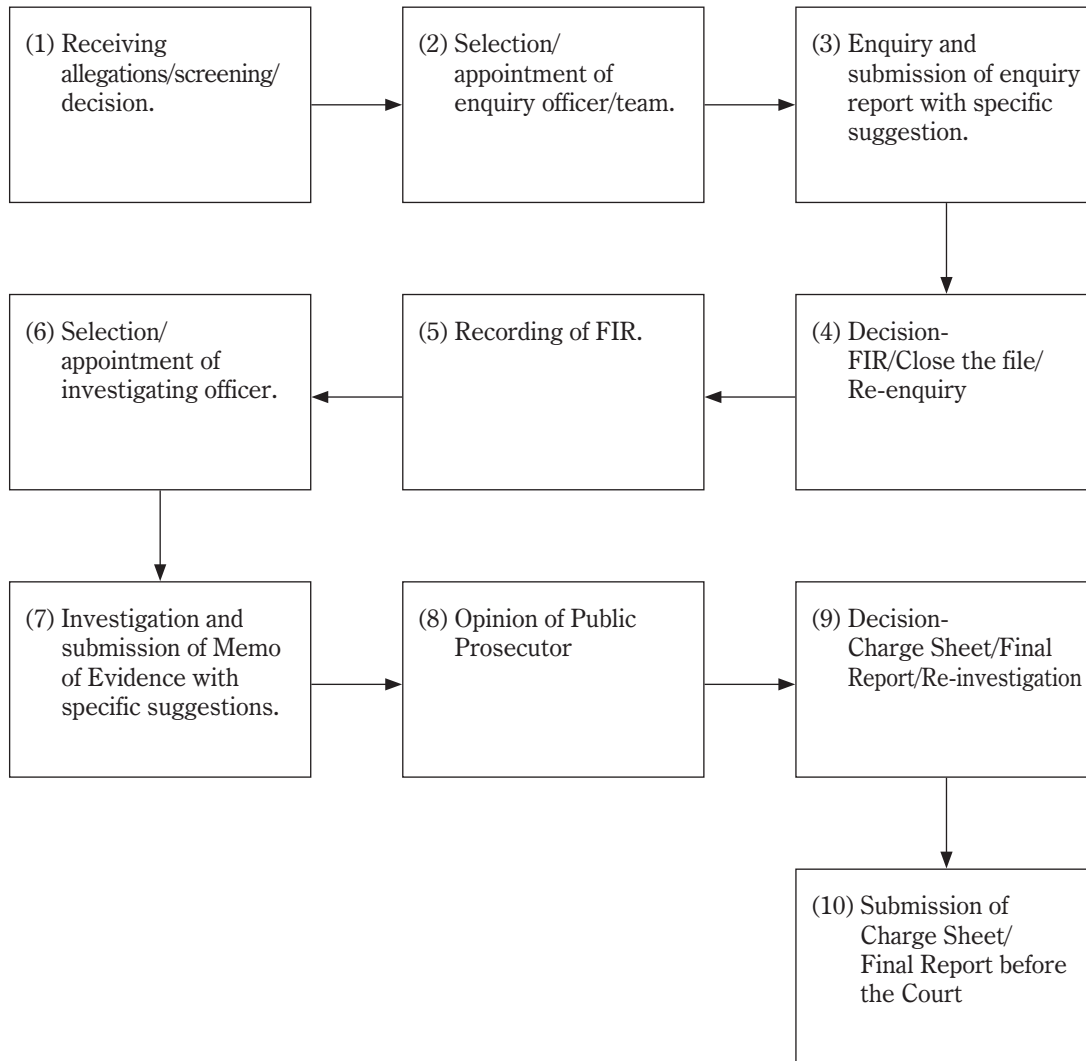
The relevant laws for investigation of corruption cases are the Criminal Procedure Code (Cr PC), 1898 and the Anti-Corruption Commission Act (ACC Act), 2004. The former one is the general procedural law for investigation and trial of criminal cases. The latter one is the special law against corruption. As far as investigations of corruption cases are concerned, if any conflict between the provisions of the aforesaid Acts is found, the provision of the latter Act will prevail. The Cr PC describes under sections 154 to 173 how offences are registered with police stations, investigations are made and the reports of investigations are submitted before the court for trial. The Anti-Corruption Commission Act dictates an investigator to conduct an enquiry before lodging/registering a First Information Report (FIR) stating the offence(s) committed. If prima facie evidence is established in enquiry, an FIR is lodged with the police station and thereafter the formal investigation starts under the provisions of the Cr PC. An investigation ends with submission of an Investigation Report before the court.

B. Functions of an Investigator During Investigation

The functions performed in an enquiry and an investigation are identical. The following functions are performed during an enquiry and an investigation:

- (i) Collection and seizure of relevant records.
- (ii) Search for relevant records, if not collected through the normal process.
- (iii) Perusal/examination of the records.
- (iv) Recording deposition of the witnesses.
- (v) Recording statement of the accused.
- (vi) Obtaining the opinion of a handwriting expert, if required.
- (vii) Obtaining an assessment of the value of properties by third parties, if required.
- (viii) Arresting the accused, if required.
- (ix) Visiting the places of occurrence, if required.

C. Sequence of Investigation



D. Investigating Agencies and their Jurisdictions

Prior to the enactment of the Anti-Corruption Commission Act, apart from the Bureau of Anti-Corruption, the police could investigate certain corruption cases. But the provision of section 20 sub-section (1) of the aforesaid Act has made the Commission the only investigating authority having jurisdiction over all of Bangladesh to investigate offences of corruption.

IV. THE JUDICIARY AND THE SPECIAL ANTI-CORRUPTION COURTS

A. The Supreme Court

1. The Appellate Division

The Appellate Division has jurisdiction to hear and determine appeals from judgements of the High Court Division. The Appellate Division can make rules of procedure of each division and any subordinate court.

2. The High Court Division

This is an independent court with both appellate and original jurisdiction. It hears and determines appeals from judgements of the subordinate courts. It has original jurisdiction to hear Writ Petitions under Article 102 of the Constitution. It has further original jurisdiction in respect of company and admiralty matters under statutes.

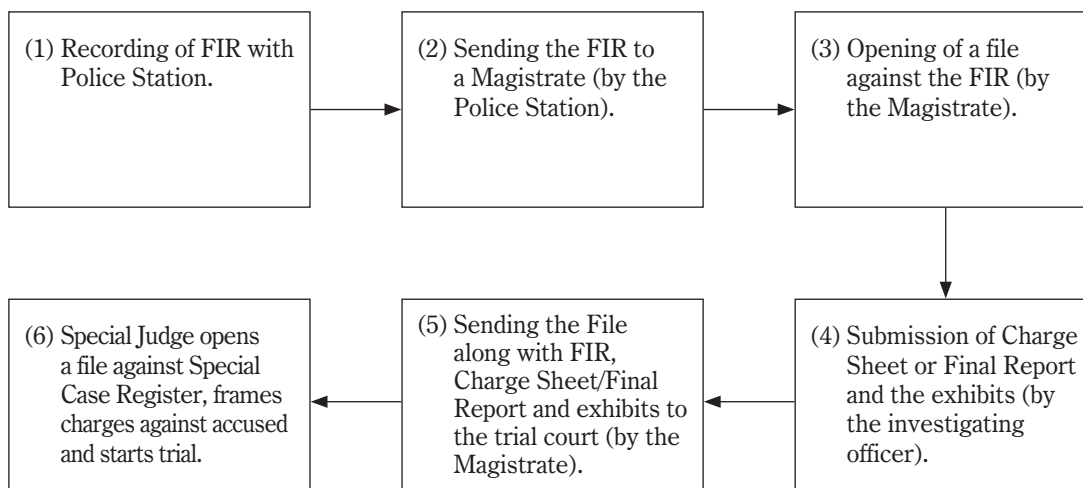
B. The Subordinate Courts and Tribunals

1. Civil Courts
2. Criminal Courts
 - (i) The Courts of Session
 - (ii) Courts of Metropolitan Session
 - (iii) Special Courts/Tribunals (Criminal)
 - (iv) Court of Metropolitan Magistrate
 - (v) Court of Magistrate

C. Special Judges/Courts to Try Corruption Cases

Under the provisions of the Criminal Law Amendment Act, 1958 corruption cases are triable by Special Judges only. A Session Judge, an Additional Session Judge and an Assistant Session Judge could be appointed as Special Judges. The Session Judges, the Additional Session Judges and the Assistant Session Judge of all districts and metropolitan areas have the authority to try corruption cases within their territorial jurisdictions in addition to their original jurisdictions as Judges of Civil Courts and Criminal Courts. Besides, there are twenty-one Special Courts established exclusively for the trial of corruption cases.

D. The Sequence of Trial System



V. CURRENT PROBLEMS

A. Problems at the Investigative Stage

1. Lack of Training Opportunities for the Investigators

Proper investigation requires knowledge and skill. The knowledge about the relevant Act, rules, regulations, procedure and other mechanics is essential. Such knowledge improves the skill. Anti-Corruption investigators have to investigate alleged corruption of officials of different offices, functions of which are different also. They should also know the technologies used by these offices. The investigators are always overburdened. As such training would develop their knowledge & skill as well as provide some time to analyze their performance compared with other participants and help them find the areas in which improvement is needed. The Bureau did not have its own training institute and the budget for training was insufficient to arrange appropriate training for its investigators.

2. Insufficient Logistical Support

Efficient investigation calls for a timely response. The Bureau could seldom provide transport facilities at the time of urgent need. The investigators had to make their own arrangements. Such arrangements would add to the expenses of the poorly paid investigators. Naturally, they could not always give their timely attention. In addition, modern equipment is needed for efficient investigation. The Bureau could not provide

such equipment to its investigators due to a paucity of funds. The Government is the provider of the budget to the Commission. If the Government fails to provide an adequate budget to the Commission, such problems will continue.

3. Lack of Promotional Opportunities for the Investigators

A good career plan encourages people to work efficiently. The Bureau had no career plan for its investigators. Most of the investigators worked in the same post for ten years or more. That was discouraging for them and made them indifferent to performing well which ultimately hampered the performance of the Bureau. If the Commission fails to devise a good career plan for its investigators, a similar situation will prevail again.

4. Non-cooperation from Different Government Offices

Most of the Offices did not provide proper cooperation to the investigators while collecting records or information related to the alleged corruption. They used to delay in providing such records or information which would hamper timely investigation.

5. Appointment of Inexperienced People as Supervising Officers to the Investigators

One of the major problems the Bureau faced was the control by the civil bureaucrats who used to be appointed in the key posts without having first-hand experience of investigation of corruption cases. To keep the key posts earmarked for them, they were never interested in formulating a career plan for the investigators.

6. Dishonesty and Compromising Attitude of some Investigators and Supervising Officials

Some investigators and their supervising officials were found to be dishonest in performing their duties. They used to compromise with the accused of different cases and distort the reports in their favour.

7. No Reward and No Punishment

The dishonest investigators and supervising officials were seldom given punishment for their alleged dishonesty and compromising attitude. On the other hand, those investigators or supervising officials who performed honestly and efficiently were hardly ever rewarded for their sincerity. As the investigators' pay was very low, such recognition would have encouraged them.

8. Problems Related with Legal Provisions

- (i) Due to the provision of the existing criminal procedural law, the anti-corruption investigators have to lodge an FIR with the police station and submit the charge sheet or the final report before a magistrate who do not have any active role as far as anti-corruption activities are concerned. Such unnecessary involvement of the police station and magistrate only delays the process.
- (ii) According to the existing provisions of the criminal procedural law, in order to collect bank related records, the investigators are compelled to get prior approval of the District Judge. Such provision delays investigation.
- (iii) The provisions of the Anti-Corruption Commission Act do not allow an investigator to arrest a bribe-taker during the enquiry period. Such provision would not help curb corruption.

B. Problems at the Trial Stage

1. Lack of Training Opportunities for Judges and Prosecutors

The special judges and the prosecutors are not properly trained in anti-corruption matters. Such lack of training sometimes creates problems in the process of trial.

2. Lack of Coordination between the Investigators and the Prosecutors

The investigators and prosecutors do not have a good understanding due to a lack of coordination and as such the prosecution team does not achieve the desired success in many cases.

3. Overburden of Duty and Delayed Decisions

The same judge has to perform as a District Judge, a Sessions Judge, and Special Judge of other special

criminal courts/tribunals, including a Special Judge of corruption cases. Therefore, he is always overburdened. Despite all his sincerity he cannot ensure a timely trial of the cases. As such the decisions are normally delayed.

4. Stay Orders and Delayed Decisions

The High Court has the authority to make a stay order against the proceedings of an anti-corruption case if an accused files a writ petition or criminal miscellaneous case stating violation of his/her constitutional rights. However, the judges of the High Court are also overburdened. Hence, once the proceedings of a case are stayed, it takes a long time to get the judgment on the writ petition. Ultimately, the judgment of the case is delayed.

5. Irregular Service for Public Prosecutors

There is no regular prosecutorial service for the public prosecutors. The Attorney General (chief public prosecutor of the country) and other public prosecutors are appointed according to the desire of the party in power. Therefore, each time the opposition comes to power, the old set of public prosecutors does not generally get reappointed and a new set of public prosecutors are appointed. Such changes disturb the proceedings of anti-corruption cases.

VI. PROBABLE SOLUTIONS TO THE PROBLEMS IDENTIFIED

A. At the Investigative Stage

1. Arrangement of proper and regular training.
2. Adequate supply of logistical support.
3. Creation of promotion opportunities under a career plan for the investigators.
4. Strict application of legal provisions against the offices found to be non-cooperative.
5. Appointment of experienced officers as supervisors of the investigators.
6. Strict application of the provisions of the service rules.
7. Arrangements for the reward of excellent performance.
8. Amendment of legal provisions.

B. At the Trial Stage

1. Arrangement of proper and regular training for the Judges and the Prosecutors.
2. Arrangement for coordination between the investigators and the prosecutors.
3. Establishment of more special courts to try corruption cases and quick trial courts.
4. Amendment of legal provisions regarding acceptance and settlement of writ petitions and criminal miscellaneous cases against corruption cases.
5. Regular prosecutorial service.

VII. GLOBAL FIGHT AGAINST CORRUPTION AND BANGLADESH

Bangladesh is not a signatory to the United Nations Convention against Corruption. It should join the Convention for its own interest, particularly in order to fight money laundering offences. Money laundering has not been defined as an offence against corruption. There is a separate Act for money laundering offences titled the Anti-Money Laundering Act, 2002.

VIII. GENERAL MEASURES FOR PREVENTION OF CORRUPTION

A. Prevention through Research/Review

Under the provisions of section 17 clause (e) of the Anti-Corruption Commission Act, 2004 the Commission would review the legally accepted measures for preventing corruption and under clause (f) it would carry out research as to how corruption can be prevented.

B. Prevention through Promoting Values and Building up Mass Awareness

Under the provisions of section 17 clause (g) of the Anti-Corruption Commission Act, 2004 the Commission would promote the values of honesty and integrity in order to prevent corruption. It would also take measures to build up mass awareness against corruption.

C. Seminars, Symposiums and Workshops, etc.

Under the provisions of sections 17 clause (h) of the Anti-Corruption Commission Act, 2004 the Commission would arrange seminars, symposiums, workshops etc. that would help prevent corruption.

IX. CONCLUSION

The problems related to investigation and trial can be addressed if proper measures are taken. Nevertheless, it is almost impossible to fight corruption properly, if adequate support from the government and its agencies are not provided. Such support should go on uninterrupted. And that is why political goodwill is pivotal in order to properly address corruption. For the greater interest of the country and the people, the political parties must reach a gentlemen's agreement as to whoever the accused is/are, he/she/they must be brought to book irrespective of his/her/their political affiliation and they must provide all required support towards the fight against corruption.

COUNTRY REPORT: THE REPUBLIC OF THE FIJI ISLANDS

*Aliti Kiji Choi Bavou**

I. INTRODUCTION

The seriousness of a country's desire to eradicate corruption can be judged by the laws it passes and the actions of its government in implementing them. It has been suggested that the fight against corruption is composed of three elements – an effective anti-corruption legal infrastructure, international partnerships for mutual legal assistance and the political will to make it work.

Fighting corruption in an effective and sustainable manner firstly requires a country to look inwards at the fundamental causes of corruption in its society. This will allow the design and implementation of a national anti-corruption programme that is tailored to suit the circumstances of a particular country and that is sufficiently flexible to cover and deal with the full range of corruption occurring or likely to occur within its society. Secondly the implementation of anti-corruption measures will need a firm commitment from government, the private sector and civil society.

II. TREND, CRIMINAL SITUATION OF CORRUPTION

Over the past two decades Fiji has had a spate of instances of mismanagement of public funds highlighted by the media. Allegations of government corruption and of judicial impropriety went to the very heart of transparency and good governance in Fiji.

Although Fiji has long felt the impact of corruption since independence, the political will to address it has been a more recent development largely due to the high incidences of bribery and corruption in the public sector in recent times.

In the late 1980s the National Bank of Fiji (NBF) saga set the tone for the number of ministerial investigations, inquiries or audits, which highlighted bribery and corruption in what was one of Fiji's largest financial scandals in decades.

The NBF was established as a government-owned commercial bank in 1976. Four years after the 1987 Coup, the NBF introduced new services, trebled staff (mainly indigenous) and quadrupled advances mainly to indigenous Fijians, where the lending criteria favoured privileged groups. By 1996 NBF's bad and doubtful debts were estimated to cost the country about \$200 million dollars - a debt that was taken over by the government of Fiji causing much bitterness in a small ethnically divided nation. Those who carried the tax burden were not necessarily the same persons who benefited from the poor quality of lending.

More recently the Ministry of Agriculture lost thousands of dollars under its Agricultural Affirmative Action Plan for indigenous Fijians and Rotumans. The Ministry implemented the affirmative action plan in 2000 for indigenous Fijians and Rotumans to enhance their participation in agriculture. The audit investigation revealed that there was no system of authorization, lack of forecasting and planning, poor channels of communication and co-ordination and no means of performance monitoring and control. The audit noted that there were no standard selection criteria or documented procedures for selecting farmers for assistance and for monitoring them after assistance was provided. In the majority of cases, the Permanent Secretary, the Deputy Secretary and/or the Principal Accounts Officer approved the applications without any technical assessment and evaluation by experts in the field located in various districts. There was much evidence of uneconomic purchases by the Ministry. No quotations were obtained and the investigation revealed that the majority of purchases were made from a single supplier whose prices on average were twice as much as in other hardware shops. The audit found that the Ministry acquired goods and services without issuing local purchase orders requiring authorization/approvals at different levels, and liabilities committed through such irregular practices ran in millions of dollars. This irregular practice is viewed as a deliberate attempt by the Ministry, particularly the Principal Accounts Officer, to violate standard Government procurement procedures, thereby opening avenues for abuses. The special audit further revealed that some local purchase orders issued to suppliers were open, leaving room for

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manipulation by the supplier and/or the farmer, a practice contrary to the accepted procedures. The audit further noted that no stock registers were maintained for receipts books, cheque books, purchase orders and requisitions as they were sent direct to the divisions and centres by the printer, thus escalating misuse of funds. Finally, evidence exists to support purchases of items not covered by the plan (for example the purchase of lap top computers, fax machines, generators, air compressors, spray guns, etc.). Investigations are continuing with four senior civil servants and a businessman charged with fraud and corruption related offences.

III. POLITICAL WILL

In 1999 the People's Coalition Government was elected into office. Their manifesto promised a government that would be clean, open, accountable and just.

Several measures were proposed in this manifesto, which included;

- (i) Legislating a code of conduct for politicians, government ministers and other holders of high public office to ensure accountability and transparency
- (ii) Enacting a Freedom of Information Act, a requirement of the Constitution and
- (iii) Establishing an independent anti-corruption commission

The Attorney General at that time Hon. Anand Singh instituted the Fiji Law Reform Commission, which was referenced to inquire into fraud, bribery and corruption. The main aim of the reference was firstly to gauge the nature, extent and scale of corruption in Fiji through wide consultations with various levels of the community, institutions, non-governmental organizations (NGOs) and private individuals, and secondly to review the current laws on corruption and the role of the "watchdog" institutions with a view to making appropriate recommendations to better prevent and combat incidents of corruption.

This paper will reflect on the findings of the Fiji Law Reform Commission's Bribery and Corruption Report 2003, which was tabled in Parliament in November 2004.

IV. PERCEPTIONS OF CORRUPTION IN FIJI

The Law Reform Commission relied heavily on a report compiled by the Fiji Chapter of Transparency International (TI - Fiji Chapter- Report), which highlighted perceptions of corruption in Fiji. These reports were independently confirmed by the numerous submissions received by the Commission during its public and private hearings.

The following are a summary of incidents of corruption highlighted in the TI (Fiji Chapter) Report.

1. Kickbacks

In the Immigration Department in the issuance of passports and work and residency permits.

2. Greasing the Palms

In the Land Transport Authority (LTA) involving the issuance of driving, minibus and taxi licenses and in the certification of motor vehicles for roadworthiness; and in the Fiji Islands Revenue and Customs Authority (FIRCA), in tax assessments and its enforcement.

3. Nepotism

In the appointment, recruitment and promotion of public officers within the public service and executives of state owned entities.

4. Rank Pulling and Queue Jumping

By well connected businessmen, traditional leaders and politicians

5. Unethical Decisions on Public Procurement and Government Contracts

Such as hiring of transportation and earth moving equipment for major public projects.

6. Misuse/Abuse of Public Funds

In the claiming of allowances and in the issuance of Local Purchase Order (LPOs). As highlighted in the Auditor General's reports to Parliament.

7. Organizational Values

These include shared assumptions, beliefs and attitudes held by staff towards corruption and corrupt activities which affect and influence the degree and extent, to which such illegal practices are tolerated and exposed

Bribery and corruption by their very nature are activities that occur in secret. Access to official information is also limited and there is strong reluctance in Fiji to report such instances that individuals may have witnessed. Furthermore, mechanisms or legislation to protect "whistleblowers" (i.e. those who have alerted authorities) are non-existent in Fiji thereby reinforcing the culture of silence.

V. RELEVANT AGENCIES AND INSTITUTIONS, AND THEIR JURISDICTIONS

Fiji currently does not have an anti-corruption agency. All criminal investigations are carried out by the Fiji Police Force through its Criminal Investigation Department. Within the department an Anti-Fraud Unit has been established which investigates fraud and corruption related offences.

The Director of Public Prosecutions Office

The office of the Director of Public Prosecutions has been in existence for over 35 years. In Fiji, unlike most other similar jurisdictions, the Office enjoys a constitutional guarantee of independence. This is a reflection of the importance of the Office in the maintenance of law and order and the achievement of good governance in the State.

The office of the DPP, where appropriate, prosecutes criminal cases following an investigation by the police or other prosecution agencies.

Under the Constitution the DPP may:

- (i) institute and conduct criminal proceedings;
- (ii) take over criminal proceedings that have been instituted by another person or authority; and
- (iii) discontinue at any stage before judgment is delivered, criminal proceedings instated or conducted by the DPP or another person or authority.

Sanction of the Director of Public Prosecutions is required pursuant to section 379 of the Penal Code for the prosecution of a corruption related offence.

VI. EXISTING LEGISLATION & ASSOCIATED PROBLEMS

The primary source of criminal law in Fiji is found in the Penal Code. The rules that apply to issues of criminal procedure are contained in the Criminal Procedure Code

In the absence of a stand-alone legislation for corruption, the key statutory provisions are contained in two chapters of the *Penal Code*. *Chapter 11* titled *Corruption and Abuse of Office* and *Chapter 40* titled *Secret Commissions and Corrupt Practices*.

In its enquiries the Commission received numerous generalized submissions that anti-corruption provisions contained in the Penal Code were deficient and outdated. After careful consideration the Commission formed the view that with the exception of two offences namely Abuse of Office and Official Corruption, the other offences in the Penal Code were rarely, if ever, investigated or charged by the police or DPP's office.

The most widely known section is section 106 of the Penal Code, which relates to persons employed in the public service

Section 106 states:

Any person who

- (a) Being employed in the public service and being charged with the performance of any duty by virtue of such employment corruptly asks for, solicits, receives or obtains or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
- (b) Corruptly gives, confers or procures or promises or offers to give or confer or to procure or attempts to procure to upon or for any person employed in the public service, or to upon or for any person or property or benefit of any kind on account of any such act or omission on the part of the person so employed,

Is guilty of a felony and is liable to imprisonment for seven years.

In State v Humphrey Chang HAC No 8/91 Jesuratnum J. stated that the prosecution must prove two elements to establish an offence of official corruption; These are

1. That the accused being employed in the public service received some “property” or “benefit” from some person; and
2. That the “benefit” or property was received “on account of” or in consideration for something done or omitted to be done by the accused in the discharge of his duties

In State v Seruveveli Aisake Criminal Appeal No 6 of 1993 Fatiaki J. stated

“It is not merely enough to prove that a favour had been shown by a civil servant in the discharge of his duties or that a benefit or property had been received by the civil servant, additionally it must be shown that the two elements are so linked in time and circumstances as to give rise to an irresistible inference that the transactions was a corrupt one.... Needless to say it does not in my view necessarily follow that every payment or benefit conferred on a civil servant outside office hours is unlawful per se. It is only unlawful, if there is a link between the payment and him doing something in pursuance of his public duty. The reward must relate to something done or omitted to be done in respect of a matter in which his employer is concerned. In other words the offence of official corruption lies not in showing favour to someone but rather in accepting a reward for doing so.”

Section 107

“Any person who being employed in the public service, takes or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward is guilty of a misdemeanour and liable to imprisonment for three years.”

This section criminalizes the mere acceptance of any reward for the performance of his duty without requiring proof of the existence of any official connection between the civil servant and the person giving the reward.

Section 375 of the Penal Code

375(1) For the purpose of this Chapter, the expression consideration includes valuable consideration of any kind; the expression “agent” includes any person employed by or acting for another; and the expression “principle” includes an employer.

- (2) A person serving under the [State] or under any town council or under any other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants, and a member of any such town council or other public body, is an agent within the meaning of this Chapter.

Section 376 If-

- (a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement for reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal’s affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principals affairs or business; or
- (b) Any person corruptly gives or agrees to give or offers any gift or consideration to any agent as

an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

- (c) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular and which to his knowledge is intended to mislead the principal,

He is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of six hundred dollars.

Section 378

Presumption as to Corrupt Practices

378. Where in any proceedings against a person for an offence under this Chapter it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of the State or any Government department or a town council... or other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants, by or from a person or agent of a person holding or seeking to obtain a contract from the State or any Government department or town council or other public body having power to impose rates, the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in this Chapter unless the contrary is proved

Chapter 40 offences have a wider scope, which extends to the private sector as well as statutory bodies and local government officials

VII. CURRENT PROBLEMS AND MOVES RELATING TO CORRUPTION IN FIJI

A. Legislation

- (i) The drafting style is complex, difficult to understand and analyze. Provisions are scattered in the Penal Code.
- (ii) There is a clear identify between section 376 offence and s.106 offences which could give rise to duplicity.
- (iii) The broad concept of corruption should be the key issue borne in mind rather than the narrow manifestation of bribery.
- (iv) Section 106 is limited to bribery situations and does not cover nepotism, queue jumping and "kerekere" (Fijian term for borrowing or asking).
- (v) The scope of corruption in s.106 is limited in that an act which does not link the benefit to the official act is not corrupt. The core of section 106 is the link between the "benefit", "reward" and the "act" the requested mens rea must relate to the receivers knowledge or belief as to the existence of the link.
- (vi) The distinction between public officer and non-government officer should be abolished and the legislation should adopt a more neutral description such as agent or person.
- (vii) There should be a single generic term or expression to replace the variety of expressions to be found in the Penal Code, which refer to the corrupt transaction. Section 106 uses the expression "any property or benefit of any kind" Section 107 uses the expression "reward beyond his proper pay and emoluments"; and Section 376 uses the expressions "gift" and "considerations". Arguably these definitions do not include sexual favours or future promises to process favourable tax returns, for example.
- (viii) Cultural exceptions. The giving of and receiving of gifts and valuable benefits is a common occurrence in many areas of business and arguably is traditional to Fijian culture and protocol. Queue jumping the "who you know" syndrome and helping people from your own family or province are all real problems in Fiji. There is a strong public interest in enacting laws which prevent public officials from showing any kind of favour at all whether it is for personal gain or not.

B. Problems and Solutions at the Investigative Stages

In Fiji the police are primarily responsible for all criminal investigations but the consent of the Director of

Public Prosecutions is required for the prosecution of certain criminal offences, including corruption. The DPP may request the police to investigate suspected criminal offences but it cannot order the police to do so. The Director of Public Prosecutions has no authority to direct or supervise police investigations because the independence of the Police Commissioner in operational matters is constitutionally protected. Even in those cases where the decision to charge an accused person requires the prior consent of the DPP the decision is inevitably coloured by the quality of the police investigation.

Financial scams over the years have undoubtedly shaken public confidence in the police and other regulatory institutions to effectively investigate and punish those at fault. Apart from the difficulties with the legislation, there are concerns about the lack of skills and resources in the police force for investigating crimes of serious fraud and corruption

The very nature of the crime of corruption makes any investigation very difficult.

1. A Secret Crime

Each corrupt transaction involves at least two parties. The person who offers the bribe and the person who accepts the bribe. Both derive mutual benefit. Corruption therefore involves secrecy and concealment making it difficult to detect.

2. A Crime that Leaves No Trace

Unlike other crimes there is no obvious crime scene where the perpetrators of corruption effect the commission of an offence. With new technology there is no need for the corrupt to meet.

3. A Victimless Crime

There is usually no identifiable victim.

4. A Culture of Silence

A further aspect making it difficult to investigate is the pervasive ‘culture of silence’ in Fiji. Where patronage is tied to family race and culture, silence is said to be the golden rule. A culture of silence provides a perfect medium for corruption to take hold and flourish.

5. Gathering Evidence

Government must be willing to consider granting special powers to investigating authorities to enhance their operational effectiveness. However, granting special powers of investigation can be a sensitive issue in Fiji due to certain constitutional provisions e.g. electronic surveillance may encounter problems with s. 37(1) of the Constitution “the right to privacy of personal communications”.

Society must decide where the right balance lies between competing interests.

6. Undercover Operations

With the relatively small population of Fiji with almost limitless extended relationships and acquaintances amongst its people, there seems to be little opportunity to undertake undercover operations with any guarantee of success.

7. No Whistleblower Legislation

The investigation of corruption and fraud related matters are greatly assisted with two pieces of legislation The *Proceeds of Crime Act 1997* which allows for restraint and confiscation proceedings to be taken against a person accused of a serious crime who has fled Fiji. The Act also allows us to assist another country by restraining the disposal of a criminal’s property found here and to enforce an order made by the foreign country for the confiscation of the property or to take proceedings in our courts against such property. *The Mutual Assistance Act* is generally resorted to in an effort to obtain admissible evidence of a crime that has been committed and facilitates the enforcement of a forfeiture order made under the Proceeds of Crime Act in a foreign country with whom we have an agreement and vice versa. It is carried out under legislation and bilateral or multilateral treaty.

C. Problems and Solutions at the Trial Stage

1. Impediments to prosecution include procedural delays as well as evidential hurdles during the trial.

Recently the Criminal Procedure Code has been amended effectively removing the need for Preliminary Inquiries, which was seen to be the cause of inordinate delay in proceedings.

2. There are several evidential problems relating to these sections. The use of the word “corruptly” in section 106 and 376 is not defined by statute. It is suggested by the Law Reform Commission that rather than attempting to define the word corrupt, the law would be better served by presuming that certain types of behaviour are presumptively corrupt and thereby shifting the onus to disprove it on the accused who would be the best person able to discharge the evidential burden.
3. In most cases the main witness in a corruption case is an accomplice, who either took or received the bribe. As a rule of practice, a corroboration warning must be given. In many jurisdictions this rule has been abolished in favour of a general judicial discretion to warn the assessor about the lack of reliability of evidence in a particular case.
4. One of the most prominent hurdles to successful prosecution is the reluctance of witnesses to testify; this could be due to the “culture of silence” or the misguided sense of loyalty not to the institution but to employers.
5. Lack of expertise of prosecutors dealing with corruption cases.

VIII. SOLUTION? ESTABLISHMENT OF AN INDEPENDENT ANTI-CORRUPTION AUTHORITY

The difficulties in investigating and proving corruption have led many jurisdictions to create special independent bodies to investigate and in some instances, to prosecute corruption and fraud.

The Commission recommended that an Independent Anti-Corruption Authority be established by separate legislation and that such legislation include the following minimum features.

- Be multifunctional, investigating, educating and prosecuting
- Be subject to independent review
- In the exercise of its investigative powers the Authority should be subject to the sanction of the DPP
- Legislative provisions include comprehensive powers of investigation and aids to prosecution
- That there be legislative protection of informants and whistleblowers
- That the legislation contains offence provisions.

IX. OTHER INITIATIVES BY THE GOVERNMENT

In the Asia-Pacific region, twenty one countries, including Fiji, expressed their commitment to fight corruption by endorsing an anti-corruption action plan within the framework of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. The Action Plan comprehensively promotes the regions objectives and needs for reform to develop effective and transparent systems for public service to strengthen anti-bribery initiatives, to promote integrity in business operations, and to support citizen’s involvement.

Since 2003 the following anti-corruption policies have reportedly been in place in the Fiji Islands.

- (i) Reform of the public service, which is currently taking place in Fiji by establishing a system of government hiring of public officials that assure openness, equity and efficiency and promotes hiring of individuals at the highest level.

Establishing ethical and administrative codes of conduct that prescribe conflicts of interest, ensure the proper use of public resources, and promote the highest levels of professionalism. Includes the requirement for public officers and other employees to disclose annually their earnings on investment, properties and from any other source.

Safeguard accountability of public service through effective frameworks, management practices, and auditing procedures. Ministries and departments are required to prepare corporate plans, submit their annual budget estimates for approval by Parliament through the Minister of Finance and to compile their annual reports at the end of the year.

- (ii) A Financial Intelligence Unit (FIU) has been formed under the Financial Transactions Reporting Act. The Ministry of Justice, the Reserve Bank of Fiji, the Director of Public Prosecutions and the Fiji Police Force signed a memorandum of agreement (MOA) on 14/06/03 to establish a formal Unit. This was done in response to Fiji's obligation under the UN Special Resolution and recommendations of the Financial Action Task Force (FATF), the international standard setting body in the area of countering money laundering and the financing of terrorism. The FIU is responsible for receiving, analysis and disseminating to the relevant law enforcement authorities suspicious transaction reports and other financial information concerning suspected proceeds of crime and other related serious offences. This year there were 100 suspicious transactions report.
- (iii) The Ministry of Justice is currently reviewing legislation to strengthen and effectively combat the offence of bribery of public officials. Under review are The Charitable Trust Act, The Companies Act and the Religious Body's Registration Act.
- (iv) Encouraging public discussion of corruption. There has been increasing public awareness of corruption evident by media reports and the support of non-governmental organisations, including Christian denominations. The commercial banks have made an undertaking with the Reserve Bank of Fiji that they will inform them of any unusual or suspected transaction.

X. CONCLUSION

Although corruption as a legal concept is usually limited to situations of the exchange of gifts for favours, the real dilemma is to create a society which is hostile to a wide range of politically improper conduct. The abuse of office, nepotism, the acceptance of gifts or sexual favours are examples of corrupt behaviour in the wider sense.

The challenge for Fiji is to provide a climate, which is intolerant of this wider definition of corruption. The tools for this challenge are a strong political will, firm leadership, the development of codes of conduct, establishment of an independent commission against corruption, a free and fair media and good accounting practices. Together these measures and institutions can help to create a social and cultural will to combat corruption.

CORRUPTION CONTROL IN CRIMINAL JUSTICE: THE MADAGASCAR SITUATION, PROBLEMS AND SOLUTIONS AND CORRUPTION CASES

*H. Thierry Ravalomanda**

I. INTRODUCTION

As in many other countries, corruption is a daily part of life in Madagascar as it occurs at all levels of public institutions.

Madagascar being one of the poorest countries in the world, poverty is often considered as the main cause of corruption. Low salaries earned by public servants make it easy for them to be corrupted. Another approach though considers corruption as the cause of poverty. This vicious circle sounds almost impossible to overcome and for a while, corruption was encouraged by public compliance, fatalism being one aspect of Malagasy mentality.

Nevertheless, under the impetus of the international donors' standards and an increasing public consciousness, a wind of change has started to blow in Madagascar these last few years.

The fight against corruption has become one of the most important tasks of the current Malagasy Government in order to comply with the requirements of good governance and to enhance the economy of the country which is severely affected by the plague. It has become a pressing concern at the highest levels of policy making.

II. THE PRESENT SITUATION

According to the 2005 Transparency International Corruption Perception Index, Madagascar scores 2.8/10 and is ranked 99 out of 159 countries in the world. This shows that some efforts have been put forward to increase that score. In fact, in the August 28, 2002 Transparency International Corruption Perception Index Rankings, Madagascar received a score of 1.8/10 and was ranked 98 out of 120 countries. The impact of the score and the rank led the Malagasy Officials to implement drastic measures to improve the situation.

Therefore, the Malagasy government decided to establish an Anti-Corruption National Council. Its mission was to establish a national anti-corruption strategy, prepare the creation of an independent anti-corruption agency and draft a new anti-corruption law leading to legislative reforms addressing the issue.

A. The Anti-Corruption Law

Madagascar signed the United Nations Convention against Corruption in Merida, Mexico on December 10, 2003. It was therefore ratified on September 22, 2004 without reservations. The Convention recommended countries to criminalize behaviours that are considered acts of corruption.

This led the Anti-Corruption National Council to draft the Anti-Corruption Law which was adopted September 9, 2004.

A major part of the Law deals with the renewing of existing laws criminalizing the giving, offer or promise of bribes by any party and the receipt or solicitation by any official of a bribe, and laws prohibiting improper use of official power or position for personal enrichment. In addition to that, new offences have been instituted. The law now criminalizes the giving or receiving of an improper gratuity or improper gift, the fact of not revealing to the proper authority conflict of interest and unjustified enrichment. Officials are required to disclose their assets. Failure to do so may lead to prosecution.

Most of these measures are aimed at promoting integrity amongst public servants and officials but bribes in the private sector are also prohibited.

Measures to ensure the protection of the perpetrators of corruption acts who before prosecution report

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the offence to the authorities have been instituted in order to encourage denunciation.

Before the Law was passed, there was much controversy about the penalization of public officials receiving improper gifts, as it appears to be a Malagasy custom to give gifts. Also, criminalizing illicit enrichment seemed to derogate from the principle of presumption of innocence as the burden of proof is reversed.

The Anti-Corruption Law also instituted the Anti-Corruption Independent Bureau or BIANCO.

Some efforts have been put forward lately to elaborate new laws in application of international conventions but the change is occurring at a very slow pace.

The other Laws that are used in the fight against corruption are mainly the Penal Code and the Money Laundering Law.

B. Anti-Corruption Institutions

1. The Anti-Corruption National Council (CSLCC)

The Anti-corruption National council was created by Presidential Decree in September 2002. According to its mission statement it has to focus mainly on setting up the National Anti-Corruption Strategy, preparing the creation of an independent anti-corruption agency and drafting an anti-corruption law.

The CSLCC works in partnership with various institutions including governmental departments and the civil society. It has launched many observatory missions throughout the country to evaluate the scale of corruption in different sectors.

Its main mission was accomplished when the Anti-Corruption Law was passed, the law which among others measures created the BIANCO. The CSLCC's mission now consists of supervising and counselling the BIANCO, monitoring and evaluating the implementation of the policy and national anti-corruption strategy.

2. The Anti-Corruption Independent Bureau (BIANCO)

According to the Anti-Corruption Law of September 9, 2004, BIANCO has three main missions: Prevention, Education and Investigation. It is also responsible for the implementation of the Anti-corruption National Strategy.

In its prevention activities, the Bureau needs to identify in the legislation, rules and administrative processes that are factors of corruption and submit reforms to address those factors. It also counsels public institutions or officials and recommends measures to prevent corruption.

In its education activities, it holds campaigns of sensitization for the general public on the dangers of corruption and the need to fight against it.

Finally, BIANCO investigate allegations of corruption that they are made aware of through complaints or denunciations.

To accomplish that task, it has been invested of important powers that regular police officers do not have. Immunities cannot be invoked against them and they can issue their own search warrant without court approval.

They are also independent meaning that the Head of Prosecution or any other judicial or political authority does not have any control over them.

The BIANCO then hands those cases over to the prosecution or drops them if they consider that there is not enough ground for prosecution.

Up until June 2005, BIANCO has received 3823 complaints and denunciations from all over the country.

3. The Anti-corruption Judiciary Unit (CPAC)

In Madagascar, the Judiciary is one of the sectors severely affected by corruption, hence a loss of trust from the general public. Also, this undermines the application of law and the implementation of public policy.

For this reason, the CPAC was put in place in May 2004. It is composed of Magistrates from the Tribunal and Court of Appeal of Antananarivo including public prosecutors, investigating judges and judges. They have been selected for their high level of competence and integrity. They have been trained in matters pertaining to corruption and financial crimes. Also, some police and gendarme officers and secretaries are working with those magistrates.

Their task is to prosecute, investigate and judge cases of corruption that are referred to them, mainly by the BIANCO. They are set apart in their own offices, away from the Court in order to reduce the pressure from other colleagues and are provided with facilities such as cars and computers which have been funded by the Government of Japan. They are required to work efficiently and with speed, in contrast to the way regular cases are being processed in regular courts.

The CPAC actually started to be operational in August 2004 and about 100 cases so far have been submitted to its prosecution office, mainly cases from the BIANCO and the CPAC police officers. Twenty-three of those cases have been dropped mainly because of lack of evidence but also because the acts being investigated were not offences. Many public officers starting from the basic civil servant to Mayors and Ministerial high officials have been sentenced and jailed on corruption charges.

The CPAC is still experimental and is only competent for the Antananarivo area. For the other provinces, corruption cases are handed over to regular courts.

III. PROBLEMS AND SOLUTIONS RELATED TO THE LEGAL SYSTEM IN REGARD TO CORRUPTION CONTROL

Despite all the aforementioned deterrent measures, the fight against corruption still has many challenges to face in Madagascar. Ownership of the strategy by many sectors is not satisfactory. Legislative anti-corruption measures are important, but they may not be effective in the absence of honest, efficient investigative and judicial bodies.

A. Corruption in the Judiciary

The perception of corruption within the judiciary is very high in Madagascar despite the efforts put forward by the Ministry of Justice.

The causes of such corruption are multiple:

1. Low Salaries

Prosecutors and judges as they are endowed with discretionary powers may be particularly vulnerable to attempts by powerful litigants to influence the outcome of cases where large funds are involved. Thus, it would be important to ensure their financial security through adequate remuneration. Measures aiming at enhancing their career development opportunities need to be considered. These equally apply to judicial clerks and other administrative staff.

2. Lack of Training

Maintaining the professionalism in the service is an important key. Objective systems of recruitment and promotion based on qualifications and performance, continuous training and promotion of ethics in the civil service are some ways to do so. Efforts have been put forward to follow those standards.

In the context of the fight against corruption, prosecutors need to be highly competent. They need to learn to be proactive and modernize their practice and methodology.

Judges need to be trained in judicial reasoning and in the exercise of judicial discretion. A system of accountability should exist in the application of law.

Efforts need to be put forward to understand the new anti-corruption law and specifically the offences in order to avoid different interpretations by the anti-corruption institutions.

3. Complex Judicial Procedures

The Malagasy legal system is an inheritance from the French colonization. Unfortunately, only a few updates have been made and some legal texts do not fit in our modern context.

Outdated court procedures supported by archaic texts increase opportunities of corruption. Way too many formal prerequisites decrease the accessibility of justice and in order to come to a fast resolution of a case, bribes are solicited and offered.

Effective measures would be judicial reforms aiming at increasing the accessibility of the public to legal information, and making judicial procedures clearer and less complicated to encourage a speedy resolution of disputes.

Alternative sources of dispute resolution should be promoted. In Madagascar, the public tend to view the judicial system as the only way to resolve any disputes they may have and courts are crowded with many minor cases.

B. Immunity of Some Public Officials

One of the issues in the Malagasy legal system that hinders the fight against corruption is the system of immunity protecting some public officials.

This includes the police, the judiciary and state officials at all levels.

For example, unless he/she is caught committing a flagrant act of corruption, a policeman can only be prosecuted with the consent of the Police Minister. Experience has shown that this consent is very rarely given. This system is also applied within other bodies of civil servants.

Only the Head of Prosecution in the Court of Appeal can prosecute some administrative authorities like heads of provinces or prefects or members of the judiciary. Higher Magistrates need the consent of the Justice Minister.

Members of Parliament are also highly protected.

As for the President, the Prime Minister, members of the government and presidents of legislative institutions, only the High Court of Justice is competent to hear their cases.

In order to fight efficiently against corruption, all these procedures need to be simplified in order to reduce impunity. In Madagascar, The High Court of Justice only exists in the Constitution. As for now, it has not yet been established.

Some encouraging steps have been taken as the BIANCO is not bound by those limitations. It can hear anyone, regardless of his/her position. The problem lays at the prosecution stage. Empowering sufficiently and appropriately prosecutors in charge of fighting corruption is definitely an important condition.

C. Independence of Anti-Corruption Investigators, Prosecutors and Judges

One of the feelings that prevail among the general public is the impunity of corruption perpetrators, even those that are notorious in the matter. Such impunity can be interpreted as the existence of interference of politicians to protect those perpetrators from investigations or prosecution. The Judiciary then appears to be a mere executor of state policies, regardless of the interests of litigants.

In the Malagasy legal system, prosecutors are part of the Judiciary. Because they represent the society, they are directly under the authority of the Ministry of Justice. Their actions are strictly supervised and can be guided by that authority. Those principles are stipulated in the Constitution. Only judges are independent.

The BIANCO is totally independent in its actions. But as they refer cases for prosecution, the context is different, hence the need to ensure the independence of prosecutorial services.

When the CPAC was created, in order to promote transparency in the prosecutorial process, instructions from superiors were required to be in writing. In practice though, it appears difficult if not impossible for a prosecutor to ignore verbal instructions given the risk that it may engender for his/her career.

IV. CORRUPTION CASES IN MADAGASCAR

One of the reasons why such emphasis has been put lately on the fight against corruption is the negative effects on the country's economy.

Since the creation of the BIANCO and the CPAC, many corruption cases have been uncovered, prosecuted and the perpetrators have been sentenced with imprisonment and fines. Nevertheless the great majority of these cases are related to petty corruption.

A. Petty Corruption

It is standard practice to pay bribes for the transportation of goods, a new permit, traffic violations, and even a high school diploma in Madagascar. All fields of the public service are severely affected. Some cases though are more recurrent than others.

1. Within the Police

Within the last ten months about seven Antananarivo police officers have been prosecuted by the CPAC on corruption charges. Abuse of power, solicitation of bribes and extortion have been reported. Actually, the BIANCO acts according to complaints and denunciations, and evidence is gathered mainly through a system of "traps" that is actually admissible as evidence by the Court, as long as the willingness of the perpetrator to commit the offence is proved.

2. Corruption in the Judiciary

Corruption acts in the Judiciary are committed by judicial clerks and Magistrates. Usually, the bribes that are being paid are relatively small unless powerful litigants are involved. Only a few magistrates have been officially prosecuted for corruption charges. Still, many have been sanctioned by the discipline board of the Magistrates' Superior Council. In 2003, twelve of them were suspended for corrupt practices. More magistrates have since been sanctioned.

B. Serious Corruption

High level corruption involves high-ranking officials and the interests involved can be huge. It undermines the State's economy as public funds are being used in a personal and improper way. Although rare, a few cases have been uncovered and successfully prosecuted and this had a great impact on public opinion and politicians

1. Corruption During Public Procurement Procedures

In the last few months, a couple of mayors and other administrative officials in charge of public procurement procedures have been charged with embezzlement, corruption and favouritism. The information came from anonymous denunciation or complaints. Some efforts need to be carried out in this matter for the prosecution to be proactive and collaborate with commissions checking public procurement procedures to detect irregularities deserving investigation.

2. Corruption Within Public Enterprises

In April 2005, the Administration Board of the Malagasy Post was prosecuted and found guilty of corruption acts as they improperly used their official position to the detriment of the Post for personal enrichment. This engendered a lot of controversies about the extent of the power of the Public Enterprises' Administration Board.

3. Corruption Among Tax and Customs Officials

Important cases are currently underway involving high-ranking tax and customs officers charged with

corruption acts, falsification of public documents and embezzlement. These kinds of behaviour have a deep impact on the country's economy because funds that should be for the State's reserve are either embezzled or not collected efficiently because of corruption.

V. CONCLUSION

After the recent Anti-Corruption National Convention organized by the CSLCC, the motto that has been adopted is "Free the Economy from Corruption". The strategy for 2005-2007 has been renewed, after the progress made during the first two years of the implementation of the strategy, the long term goal is to achieve a score of 7/10 in the Transparency International Corruption Perception Index. Emphasis has been put on the judiciary and its major role in the fight against corruption. Plans have been made to dismantle the ramparts of corruption within the judiciary in order accomplish the objectives of a clean and efficient justice system, respectful of human rights and safe for investors.

The anti-corruption institutions cannot eradicate corruption by themselves. They need the support of a strong political will, the help of international agencies and NGOs and the adherence of every single citizen. Also, since corruption related crimes tend to be transnational, international judicial cooperation seems to be a key issue in order to efficiently fight against corruption. But as of now, only a very few cases, if no cases at all, have required such cooperation.

APPENDIX

ANTI-CORRUPTION INDEPENDENT BUREAU
Investigation DepartmentInvestigation Department Statistics
As to Sept, 28 2005

I. INVESTIGATION GROUP (IG)

September 2005

Number of Cases		Current		Processed				
Received	Last month left over	In Antananarivo	Outside Antananarivo	Procedures transmitted to courts				Reports
				Number	Arrests	Suspects in custody	Suspects not in custody	
40	146	75	96	6	09	03	06	08

Overall Statistics

	Number of Cases Received	Procedures transmitted to courts				Reports
		Number	Arrests	Suspects detained	Suspects not detained	
2005	350	74	145	63	76	84
2004	56	8	12	2	10	4
TOTAL	406	82	157	65	86	88

Kind of Complaints Received

Sector	Number	%
Justice	9	22.50
State Institutions	6	15.00
National Gendarmerie	5	12.50
Financial Institutions	4	10.00
Administrative Services	3	7.50
National Police	2	5.00
Education	2	5.00
Internal Affairs Department	2	5.00
Decentralized Collectives	2	5.00
Health	1	2.50
Land Administration	1	2.50
Public Construction	1	2.50
Private Sector	1	2.50
Public Procurement	1	2.50
TOTAL	40	100.00

II. OPERATIONAL SUPPORT GROUP

A. Reception and Process of Complaints

Complaints Received

	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
Complaints Received	546	5250	813	6 063
Processed Complaints	242	4946	813	5 759
Complaints being Processed	304	304	0	304

Receivable Complaints

Filing	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
For Investigation	12	350	56	406
For Information	8	242	35	277
TOTAL	20	592	91	683

Reported Complaints

Object of Complaints	<i>Sept. 2005</i>	<i>2005</i>
1. Land Conflict	52	863
2. Judiciary	44	554
3. Police Officers	36	592
4. Administrative Officers	32	525
5. Health and Education Field	15	273
6. Family and Social Matters	27	697
7. Customs and Ports Fields	4	44
8. Crime Commission	24	418
9. Others	8	738

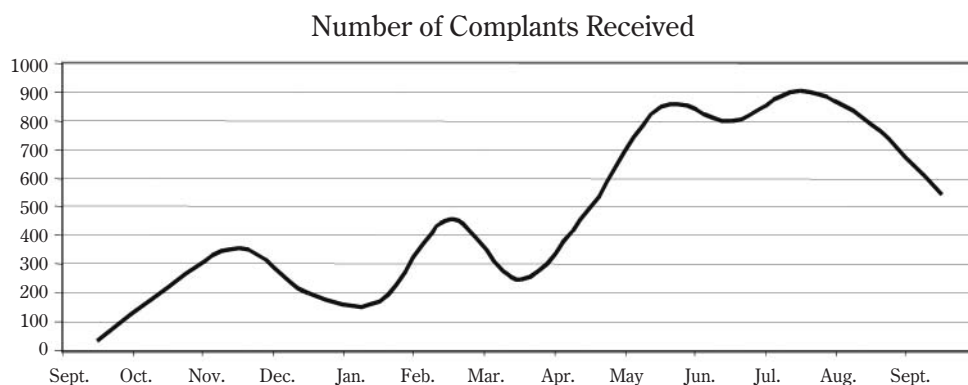
Geographical Origin of Complaints

Province	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
Antananarivo	128	2 992	572	3 564
Mahajanga	22	524	75	599
Toamasina	22	372	75	447
Toliara	21	523	23	546
Fianarantsoa	32	318	46	364
Antsiranana	17	217	22	239

Complaints Received (17 September 2004 - 28 September 2005)

2004	<i>Sept.</i>	<i>Oct.</i>	<i>Nov.</i>	<i>Dec.</i>
Number of Complaints	37	221	355	200

2005	<i>Jan.</i>	<i>Feb.</i>	<i>Mar.</i>	<i>April</i>	<i>May</i>	<i>Jun.</i>	<i>Jul.</i>	<i>Aug.</i>	<i>Sept.</i>
Number of Complaints	170	455	245	496	847	799	906	788	545



B. Information Collection Activities

September 2005

Number of Cases Received	Current		Left Overs		Treated	
	In Tana	Outside Tana	In Tana	Outside Tana	Filed in database	Transmitted
33	12	37	42	27	-	23

Overall Statistics

	Number of Cases Received	Output	
		Filed in Database	Transmitted
2005	328	76	123
2004	16		14
TOTAL	344	76	137

Declaration of Assets

Declaration of Assets Received up to 04/24/05	1 813
Declaration of Assets Received Since 04/24/05	4 423
Total	6 236

C. Visitors

<i>Visitors</i>	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
Plaintiffs	310	2 726	301	3 027
Summoned	50	1 074	55	1 129
Others	313	3 650	390	4 040
TOTAL	673	7 450	746	8 196

D. Complaints Box

Number of Complaints	82
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PRESENT SITUATION, PROBLEMS AND SOLUTIONS IN THE LEGAL SYSTEM RELATED TO CORRUPTION CONTROL IN UGANDA

*Vincent Wagona**

I. INTRODUCTION

There is no universal definition of corruption, but it is generally agreed that corruption is the illegal use of public power by a public official for private gain.

While corruption may manifest itself in a simple and straightforward manner, in many cases it is carried out through complex methods involving cross-border transactions.

Delivery of justice and other services by Government to the population can be negatively affected by corruption. Its effects are more devastating on the poor who are not capable of seeking private services such as medical and legal aid. Corruption also hinders investment, proper trade and genuine economic activities. It creates unfair competition whereby genuine performers in the economy fail to survive.

The anti-corruption agencies in Uganda have together developed and are spearheading the implementation of a National Anti-Corruption Strategy and working to bring all other stakeholders on board to help its implementation.

II. CURRENT SITUATION OF CORRUPTION IN UGANDA

This part of the paper presents the trend and criminal situation of corruption, legal framework including elements of offences and investigative methods, relevant agencies and institutions and their jurisdiction, and, the practice of the criminal justice system in Uganda.

A. Trend and Criminal Situation

Uganda has designed the National Strategy to fight corruption 2004 – 2007 which is a policy document on operations of anti-corruption agencies. The document, citing the second National Integrity Survey report of 2003 (the first was in 1998) indicates that a significant number of cases of grand corruption have emerged in recent years leading to significant losses of public funds through mishandled procurements and outright embezzlement. Further, that there has been petty corruption associated with low morale and indiscipline among poorly paid civil servants.

Where corruption has gone unpunished, or sanctions have been delayed due to weak systems and difficulties of obtaining evidence to prove court cases, parts of society have developed the perception that corruption is condoned, and tended to tolerate and participate in petty corruption due to sympathy regarding poor pay and the belief that there are those who are involved in more serious corruption but have not faced serious sanctions because they were not successfully prosecuted.

The surveys also note that government bureaucracy in providing certain services like issuance of licenses and permits involving several approval stages provides fertile ground for extracting bribes, while financial pressure on politicians to recover heavy election expenses leads them into corruption.

According to the surveys, sectors that have featured in incidences of corruption unfortunately have included the anti-corruption agencies such as the lower levels of the police and the judiciary. Others have been the health services, tax collection and local councils

However on a positive note, the 2003 survey report also indicates that anti-corruption efforts have yielded positive results. Since the 1998 survey, there has been a marked reduction in the reported incidences of bribery relating to the police, revenue services and magistrates courts. There has also been reported general satisfaction with improvements of services in health, education and agriculture.

* Ag. Senior Principal State Attorney, In Charge of the Fraud Unit, Directorate of Public Prosecutions, Uganda.

B. Legal Framework and Investigative Methods

The major anti-corruption legislation in Uganda today is the 1970 Prevention of Corruption Act. Under this law, corruption as an offence involves the participation of a public official. The law criminalizes corruption where a public official corruptly solicits or receives or agrees to receive a gratification as an inducement to, or reward for doing or omitting to do anything in which the public official is concerned. The said law also criminalizes the act of corruptly withdrawing a tender which has been awarded. Both the public official and the other party involved are treated as offenders. The law further criminalizes similar corrupt transactions involving an agent when conducting the principal's affairs or business and bribing any public official in order to vote or not to vote in any matter.

Other corruption related offences are found in the Penal Code and include embezzlement, causing financial loss, abuse of office, and false accounting. Embezzlement is theft by any employee, and also covers directors of companies or corporations and members of associations or religious organizations. Causing financial loss is where the acts or omissions of a public official or employee of a bank, credit institution, or insurance company cause financial loss to the employer or a customer. In abuse of office, a public official's arbitrary acts or acts done under his/her direction must be found to be prejudicial to the employer's interests. False accounting is where a public officer knowingly furnishes false statements or returns relating to public property, revenue or balance of public funds.

The above offences are investigated by mainly a specialized fraud squad of the Criminal Investigations Department (CID) based at the Police Headquarters or the investigators of the Inspector General of Government (IGG). The investigators come from various backgrounds of training.

The investigations involve obtaining relevant documents and statements of witnesses in the affected organization. Inputs are sought from experts in the affected organizations and others, especially auditors from the Office of the Auditor General, and document analysts or handwriting experts from the Government Analytical Laboratory.

The auditors are useful in unearthing financial irregularities or malpractices while document examiners mainly deal with the identification and analysis of handwriting, signatures, alterations, erasures, embossments and stamp impressions. In some cases the input of the Public Procurement and Disposal of Assets Authority (PPDA) may be required to identify procurement irregularities and malpractices.

C. Uganda's Anti-Corruption Agencies and their Jurisdiction

Uganda's main anti-corruption institutions are the Directorate of Public Prosecutions (DPP), Inspector General of Government (IGG), Criminal Investigations Department (CID), Auditor General and the Public Procurement and Disposal of Assets (PPDA).

The office of the DPP is established by Article 120(1) of the Constitution of Uganda. The DPP has the mandate over all criminal prosecutions in the country, including corruption cases. The DPP is independent in the sense that in the exercise of his/her Constitutional functions the DPP is not subject to the direction or control of any person or authority. Under Article 120(3) of the Constitution the major functions of the DPP include directing the police to investigate any information of a criminal nature and instituting criminal proceedings against any person in any court with competent jurisdiction other than a court martial.

Under Article 120(4) of the Constitution the powers of the DPP can be exercised by the DPP personally or by officers authorized by the DPP who are State Attorneys and State Prosecutors. However, the law requires the consent of the DPP personally in writing before commencing prosecution in corruption cases under the Prevention of Corruption Act and other corruption related offences like abuse of office under the Penal Code Act.

The DPP does not carry out investigation of cases. This is the function of the police. The role of the DPP is to guide and advise the police in the conduct of the investigations. The cases are reported to the police who carry out investigations and refer the case to the DPP for legal advice and to conduct the prosecution. The prosecutions are done in the Magistrates courts, although the DPP has powers to commit any case to the High Court for trial.

Under Article 230(1) of the Constitution of Uganda, the IGG has powers to investigate, cause investigation, arrest, cause arrest, prosecute, or cause prosecution in respect of cases involving corruption, abuse of authority or of public office. The major difference in the roles of the DPP and IGG are that while the IGG has powers to investigate, arrest and prosecute offenders, as already stated, the DPP does not investigate or arrest but relies on the police for investigations and arrest. Secondly, while the DPP has powers to control and handle all criminal prosecutions in the country, IGG handles investigations and prosecutions only in corruption cases, and cases of abuse of authority or public office. Corruption cases are defined in the IGG Act to include embezzlement, bribery, nepotism, influence peddling, theft of public funds or assets, fraud, forgery, causing financial or property loss and false accounting in public affairs.

In investigation of corruption, Uganda's Prevention of Corruption Act gives the DPP powers to: cause the investigation of any bank account, share account or purchase account; apply to court for orders restricting disposal of assets or bank accounts of accused persons; order the inspection of documents and obtaining of copies thereof; and, to obtain information. The same powers apply to the offences of embezzlement and causing financial loss under the Penal Code. Under the proposed amendment of the law, similar powers will specifically be extended to the IGG. However, under the IGG Act, the IGG generally has powers to make any such orders as are necessary in the circumstances.

D. Practice of the Criminal Justice System

Our criminal justice system is an adversary one based on the English law. The accused is presumed to be innocent until proved guilty. The burden is on the prosecution to prove the guilt of the accused beyond a reasonable doubt. The accused has no duty to prove his/her innocence.

Because of our rules of evidence, courts tend to require the production of original documents in evidence during trial. This makes matters difficult for the prosecution, where the accused may have caused disappearance of important documents.

III. CURRENT PROBLEMS AND MOVES RELATING TO CORRUPTION IN UGANDA

This part of the presentation highlights the current problems and moves relating to the investigation, prosecution and adjudication of fraud and corruption cases in Uganda.

A. Weaknesses in the Law

As already indicated, the scope of our Prevention of Corruption Act is limited mainly to bribery and the involvement of public officials. Therefore, the Act is being amended to define and broaden the offence of corruption to include diversion of public funds, influence peddling, conflict of interest and illicit enrichment, and, to cover employees in the private sector.

Economic gain is the major motivation for engaging in corruption. Therefore, the fight against it should involve targeting the proceeds of corruption. Uganda, however, lacks various laws in this area. Therefore, in addition to amending the Prevention of Corruption Act to cater for this situation we are currently working on new laws to help in the fight against crime generally by targeting crime proceeds, including money laundering. Other laws to be enacted in the fight against crime, including corruption are Qui-tam and a law to protect whistleblowers.

B. Lack of Sufficient Public and Victim Participation and Awareness

Fighting corruption requires effective public involvement. Yet many people do not seem to be alive to the fact that corruption involves and affects everybody and that the strategy to fight and eliminate it, therefore, should involve everybody. Many people seem to be indifferent or to lack knowledge of their role in fighting corruption by reporting, providing evidence and serving as witnesses. Many people do not feel obliged to play any direct role in preventing corruption or as witnesses in corruption cases. The public do not view corruption and corrupt public officials with the same intolerance as those who steal their personal property and commit other crimes of a personal nature. Consequently, the public and the relevant officials are rather reluctant to assist the investigators and prosecutors in a number of cases.

There is also lack of cooperation from witnesses who are approached by investigators to provide evidence or serve as witnesses, for fear of reprisals from accused persons, or they do not want to implicate relatives,

friends, their employer or those with influence.

Some victims such as banks and embassies do not want exposure and as such, are reluctant to report or participate actively in cases when they get to court. In some cases, they have no confidence in the criminal justice system to handle their cases.

In view of the above state of affairs, there are efforts in Uganda to ensure that Government institutions, donors and civil society strategically work together to raise public awareness against corruption. Investigations, prosecutions and the fight against corruption generally will greatly improve with improved public awareness and participation in the reporting of corruption, giving of evidence and general public intolerance of corruption.

C. Lack of Specialization in Handling Corruption Cases

Presently in Uganda, corruption cases are prosecuted in the magistrates courts, regardless of the complexity and magnitude. Although the DPP has powers to take any case to the high court, the said court, like the magistrates courts, suffers from a high degree of backlog.

There are no specialized criminal courts for corruption cases or any other crime categories in the magistrates courts. The magistrates courts handle corruption cases, in addition to all other crime case categories. They also handle civil cases, except only one city court which handles only criminal cases. This arrangement contributes to delays in concluding corruption cases, which frustrate witnesses.

There have been no specialized prosecutors for fraud or any other crime category. State prosecutors handle all case types in the magistrates courts while state attorneys do the same in the magistrates courts as well as the higher courts. Those who are assigned complex fraud corruption cases must grapple with them in addition to other pressing casework and yet many corruption cases are difficult and time consuming. Concerned parties become impatient and urge courts to impose measures which may be unfavourable to the prosecution.

At the beginning of 2004, the DPP set up a small fraud unit for a start, which is now operational having attached and trained its officers in the UK and South Africa. The Police have a serious fraud squad that is also operational. The two have now started working together on serious fraud and corruption cases from early investigation stages and continue contact throughout the trial. It is being proposed that serious fraud and corruption cases could be handled under scheduled special sessions, which would help improve on the speed and rate of disposal as well as benefit from a specially funded programme which is already in place to handle a backlog of capital cases in the high court.

The DPP is planning to carry out a baseline survey on corruption cases in the country. This will help us to understand the types, nature, number and status of corruption cases in the country. In addition, members of the fraud unit undertaking further studies are encouraged to do their research in the country in the area of fraud and corruption.

The anti-corruption agencies are pushing for the establishment of a specialized court for fraud and corruption cases and the idea has been passed in the constitutional amendment bill soon to become law.

D. Insufficient Capacity

The anti-corruption institutions lack sufficient well trained and experienced staff to handle fraud and corruption cases. There is great need to continually train and upgrade staff in investigation, prosecution and adjudication of corruption cases that are increasingly becoming sophisticated and highly technical. The fraud unit of the DPP and the National Fraud Squad of the police need specialized training both locally and internationally to be able to cope with the task.

Uganda also suffers an acute shortage of handwriting experts (document examiners) and it is a big problem when it comes to analysis of questioned documents. These experts also lack modern equipment for their work.

Tied to the issue of capacity building through training, is the question of low staff remuneration, which affects staff retention. Our experience has been that well trained skilled prosecutors have performed better, raised their profiles, become marketable and are targeted by other employers, who take them up for better terms and conditions of service. In this way, we have lost many good prosecutors. We seem to be investing in people who we are failing to retain in our institutions.

E. Complexity of the Cases

Most corruption cases involve complicated patterns of fraud. Such cases are more difficult for the investigators, prosecutors and magistrates than the capital cases of murder, rape and robbery.

The people who get involved in acts of corruption are well educated. They are the specialists in their areas of training and work. They use modern equipment, technology and skills. Public institutions and government departments and agencies are starting to suffer from acts of well trained officials whose corruption can be difficult to detect and fight unless there are well trained officials in the anti-corruption agencies.

F. Lack of Co-ordination Among Anti-Corruption Agencies

In the past, because of lack of knowledge and information on how the criminal justice system worked, some among the anti-corruption agencies found it difficult to appreciate the unsatisfactory features of the process and outcome. This led to accusations and counter accusations among anti-corruption agencies.

In view of the above and other factors and in order to improve effectiveness and efficiency in the fight against corruption Uganda has realized the need for increased coordination among institutions of the Justice Law and Order Sector (JLOS) and with other anti-corruption institutions. In this regard, Uganda has put in place the Anti-corruption Agencies Forum (IAF) to which some JLOS institutions are active participants. The Forum is chaired by the Minister of Ethics and Integrity and comprises of the Inspector General of Government (IGG), the Director of Public Prosecutions (DPP), the judiciary, the police, Public Procurement and Disposal of Public Assets Authority, the Auditor General and other institutions. Through the forum the anti-corruption agencies have been working together in the design and implementation of a national strategy to fight corruption, promoting publicity and advancing legal reforms.

Through a programme called the 'Chain Linked' Initiative, close co-ordination, communication and cooperation among criminal justice institutions has been emphasized in streamlining operations that impact on the fight against corruption. Under the programme, performance standards for all our institutions have been designed. These standards, among other things, set time limits for activities by all the institutions. How long certain investigations should be conducted by the police, the periods for perusal of files by state attorneys, the periods for writing of judgments by judicial officers and other performance time limits are set and are used in evaluating performance.

The DPP and Police have in place a joint coordination committee which meets monthly to ensure that Police/DPP operations remain coordinated. Further, the DPP/police attend joint annual workshops to share experiences, discuss common shortcomings and agree on the way forward. We plan to include the judiciary in this arrangement.

Uganda's anti-corruption agencies have set as one of their strategies the sharing of information and experiences. For this to be achieved all the agencies need to improve on their record of data management. We have to computerize our records and data to be able to easily retrieve and share information. Good records and reliable data can tell a good story about our performance. Our records currently are not in a proper state for us to tell what we have done and achieved. It may not be easy to share such data, records and information. Computerization, registry management, case management and data collection and analysis from different stations are activities the anti-corruption agencies are working to upgrade and modernize in Uganda.

IV. GLOBAL FIGHT AGAINST CORRUPTION

A. International Conventions

Uganda is a signatory to both the UN and AU Conventions against corruption. The conventions have not yet been domesticated into our domestic laws.

However, the provisions of the conventions are being considered in our amendments and new laws with a view to domesticating the international law in respect of corruption. The proposals for the amendment of Uganda's Prevention of Corruption Act include a number of provisions of the UN Convention that are not yet part of our current law. The provisions in the UN Convention that relate to Money Laundering and Bank Secrecy are being handled in the Money Laundering Bill.

B. International Cooperation

The global fight against corruption requires effective international cooperation through extradition and mutual legal assistance. Uganda has extradition treaties with only about 35 countries and corruption is not specifically listed among extraditable offences. These issues will have to be addressed when domesticating international conventions into our domestic legislation.

V. CONCLUSION

Corruption has increasingly become complicated and difficult to handle. The fight against it is a continuous process. A lot more will be achieved when issues are addressed in countries, relating to problems like public participation and awareness, legal reform, coordination of efforts and capacity building; and, when there is effective international cooperation.

As a country and as an individual participant, we are willing to learn from everyone who has ideas, proposals or any other forms of assistance that will enable us to achieve more in the anti-corruption struggle.

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

- *132nd International Senior Seminar*
 - *Eighth International Training Course on Corruption Control in Criminal Justice*
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The 132nd International Senior Seminar



Left to Right:

Above:

Mr. Laborde (UNODC), Prof. Yokochi

4th Row:

Ms. Ida (Staff), Mr. Saito (Chef), Mr. Arakawa (Staff), Mr. Tatsuda (Staff), Mr. Tanuma (Staff), Mr. Aizawa (Staff), Ms. Yanagisawa (Staff), Ms. Matsuoka (Staff), Ms. Inamasu (Staff), Mr. Kuwayama (Japan)

3rd Row:

Mr. Tanaka (JICE), Ms. Ishikawa (Staff), Mr. Atencio Gamarra (Venezuela), Mr. Souphy Norintha (Laos), Mr. Techapun (Thailand), Mr. Endo (Japan), Ms. Miyoshi (Japan), Mr. Mohd Yaacob (Malaysia), Mr. Fa'aoa (Tonga), Mr. Thet Lwin (Myanmar), Mr. Alsahli (Saudi Arabia), Mr. Lainez Cruz (Honduras), Mr. Scharia (CTED), Ms. Cercós (CTED)

2nd Row:

Mr. Tada (Staff), Ms. Tanaka (Staff), Mr. Inoue (Staff), Mr. Imai (Japan), Mr. Uemura (Japan), Ms. Van Anh (Viet Nam), Mrs. Chimbaru (Zimbabwe), Mr. Hodges Api Ette (P.N.G), Ms. Doi (Japan), Mr. Rossetto (Brazil), Mr. Sonam (Bhutan), Mr. Santos Perez (Dominican Republic), Mr. Dhungana (Nepal), Mr. Sasaki (Japan), Mr. Prima Idwan Mariza (Indonesia), Mr. Pathak (India), Mr. Ramoneda (Philippines)

1st Row:

Mr. Nishimura (Staff), Prof. Ikeda, Prof. Noge, Prof. Shinkai, Prof. Higuchi, Prof. Noguchi, Dep. Director Senta, Mr. Forbes (ADB), Director Tauchi, Mr. Ruperez (CTED), Prof. Praja (Indonesia), Prof. Sakata, Prof. Ishihara, Prof. Sugiyama, Prof. Uchida, Prof. Uryu, Mr. Ebara (Staff)

Eighth International Training Course on Corruption Control in Criminal Justice



Left to Right:

Above:

Mr. Wagona (Uganda), Prof. Shinkai, Prof. Yokochi

4th Row:

Mr. Tada (Staff), Ms. Tanaka (Staff), Ms. Ishikawa (Staff)

3rd Row:

Mr. Inoue (Staff), Mr. Dai (Staff), Mr. Saito (Chef), Mr. Sano (Staff), Mr. Yamagami (Staff), Mr. Tanuma (Staff), Mr. Iwamura (Japan), Ms. Nakamura (JICA), Ms. Yanagisawa (Staff), Ms. Inamasu (Staff), Mr. Matsuoka (Staff), Mr. Aizawa (Staff), Mr. Arakawa (Staff)

2nd Row:

Mr. Adhikari (Nepal), Mr. Maruta (Japan), Mr. Vixayalai (Laos), Mr. Hassan (Nigeria), Mr. Rodriguez (Philippines), Mr. Chowdhury (Bangladesh), Mr. Myint (Myanmar), Ms. Pen (Cambodia), Ms. Jamsran (Mongolia), Ms. Choi (Fiji), Ms. Kharatyan (Armenia), Ms. Dube (Botswana), Mr. Mochizuki (Japan), Mr. Ravalomanda (Madagascar), Mr. Sudihar (Indonesia)

1st Row:

Mr. Nishimura, Prof. Ikeda, Prof. Uryu, Prof. Sugiyama, Prof. Noguchi, Prof. Sakata, Ms. Buhlmann-Eliseeva, Mr. Gossin (Switzerland), Director Tauchi, Mr. Stevens (USA), Dep. Director Senta, Prof. Noge, Prof. Higuchi, Prof. Uchida, Prof. Ishihara, Mr. Ebara (Staff)