Open briefing of the Counter-Terrorism Committee

"Denying safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens, and preventing terrorists from abusing the asylum system, in conformity with international law"

Session I: Denying safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens

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Denying terrorists safe havens is key for undermining their capacity to operate and should be an important component of any counter-terrorism strategy.

Eliminating safe havens and, what is more important, preventing their establishment require a comprehensive cross-sectoral approach and tailored strategies with strong legal and operational elements.

Security Council Resolution 1373 of 2001 is a milestone document in strengthening the legal framework against terrorism, including in "denying safe havens to those who finance, plan, support, or commit terrorist acts, or provide safe havens", quoting para 2 (c), S/RES/1373. Other resolutions and the United Nations Global Counter-Terrorism Strategy echo resolution 1373. In the Strategy, Member States express the international community's resolve to cooperate fully, including in order to deny safe havens to terrorists and their supports and bring them to justice. But many are still facing challenges that prevent Member States from fully implementing the principle of denying safe havens to terrorists. Allow me to focus on the three main challenges.

First, the lack of criminalization of terrorist offences.

Terrorists, in particular their leaders, remain focused on finding legal loopholes. It is necessary to establish criminal offences providing a legal ground for the investigation, prosecution and adjudication of a wide range of terrorist offences as early as possible.

Resolution 1373 (2001) requires Member States to take a number of steps, including enacting effective counter-terrorism criminal legislation to criminalize all terrorist acts, including those specified in the universal legal instruments against terrorism.

National laws should also criminalize harbouring, concealing, or preventing the arrest of any person who has carried out or is planning to carry out a terrorist act or is a member of a terrorist group.

It is worth noting that support offences are also distinct from the attempt to commit offences and shall be criminalized regardless of whether or not they lead to the actual commission of a terrorist act. Also, the perpetrator of the support offences should be distinguished from the accomplice.

States may also choose to penalize the conspiracy between persons intending to carry out a terrorist act, also providing a useful tool in prosecuting, when applicable, participation in an organized criminal group set forth in the United Nations Convention against Transnational Organized Crime.

Throughout the years, States have been progressively shifting from reactive to preventative approaches to counter terrorism. National laws have been adopted to prevent support and preparations

for the commission of terrorist offences within or outside their borders, making terrorists subject to prosecution without a geographical connection to the charging jurisdiction or the presence of the accused in the charging jurisdiction.

Designating individual terrorists, terrorist groups and associated individuals and entities to national and international sanctions lists is another very effective measure of eliminating terrorist safe havens, in particular the travel ban.

However, CTED assessments, to which UNODC regularly participates, show how Member States are still distant from having a full implementation of the universal legal regime against terrorism, and that there are still too many countries that lack adequate criminalization of terrorist conduct. Only with the full range of terrorist acts duly criminalized in national legislation States can prevent their countries from becoming safe havens, also as a consequence of the requirement posed by the dual criminality principle.

This leads to the second point, which is the establishment of jurisdiction and the application of the principle “aut dedere aut judicare”

Pursuant to the 19 counter-terrorism conventions and protocols, a State should establish its jurisdiction over terrorist offences committed on its territory, vessels flying its flag and aircrafts registered in it, in accordance with national laws.

Counter-terrorism instruments also go further and request States to establish their active personal jurisdiction and be therefore capable of prosecuting their nationals who are suspected of committing certain offences outside their borders.

In some cases, passive personal jurisdiction can also be established so that the State of which the victim is a national is capable of prosecuting the offender.

Finally, some conventions establish an optional criterion of jurisdiction in case the alleged offender is stateless but has his or her habitual residence in the territory of that State. The conventions and protocols, therefore, purposefully foresee a number of different mechanisms for the establishment of jurisdiction with an aim at ensuring that no safe havens be tolerated for terrorist acts.

The principle “extradite or prosecute”, “aut dedere aut judicare”, is in parallel a fundamental element of the counter-terrorism conventions and protocols. Pursuant to this principle, if a State decides not to extradite the offender who is present on its territory, it must exercise its jurisdiction. The case shall be submitted to the competent authority for further prosecution without exception whatsoever or undue delay, whenever the alleged perpetrator is present on the territory of the State and irrespective of whether he or she is a national of that State or a stateless person, and whether or not the offence was committed on its territory.

But while countries have an obligation to extradite or to prosecute it is evident that if there is no solid cooperation on criminal matters, and no robust mechanisms are set for the sharing of evidence and proceedings, the “aut dedere aut judicare” principle remains inapplicable, thus leaving room for safe havens for terrorists.

International cooperation

This brings me to the third point on international cooperation. A country’s capacity to establish jurisdiction and ensure the presence of an alleged offender in its territory for reasons of extradition is certainly a significant step. It is nevertheless insufficient.

Criminals' international mobility and knowledge of technology are two factors which more than ever impose a need for cooperation between law enforcement and judicial authorities and for assistance to the States that have established jurisdiction in the matter.

The ability of States to assist one another quickly and successfully is an absolute necessity also for eliminating and preventing the creation of terrorists' safe havens.

The 19 international conventions and protocols related to counter-terrorism provide the essential legal tools for national authorities to carry out cross-border investigations, limiting opportunities for finding safe havens for suspected terrorists. Security Council Resolution 1373, as well as other resolutions, also calls upon Member States to become party to those important legal instruments. The introduction of the offences provided for in those conventions and protocols into the national law makes it possible to identify similar offences in other State parties and thus to avoid obstacles in inter-state cooperation. More importantly, offences become extraditable ones. Furthermore, the conventions and protocols can themselves be used as the legal basis to request extradition and mutual legal assistance. Several of these counter-terrorism instruments even go further, in so far they see that any provision contained in a bilateral treaty, which is contrary to the instrument, would need to be deemed as automatically amended by the fact that both States have become a party to such an instrument.

Security Council resolution 1373 (2001) requests all States to 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."[3]

Information-sharing in counter-terrorism is also part of States' specific duty of cooperation, and is one of the key tools of international cooperation as highlighted in resolution 2322 (2016). This milestone resolution adopted just in December last year underlines, inter alia, the importance of strengthening international cooperation by investigators, prosecutors and judges, in order to prevent, investigate and prosecute terrorist acts. It calls upon States to share, where appropriate, information about foreign terrorist fighters and other individual terrorist and terrorist organizations.

The conclusion of bilateral and multilateral agreements on information exchange and the establishment of communication procedures have proved their efficiency for allowing the broadest possible inter-state cooperation, thus denying safe haven.

Challenges in international cooperation

Criminal justice authorities still face several practical challenges due to the fact that suspected participants in terrorist activities, victims, evidence, witnesses, experts or proceeds of crime may be located outside their country's jurisdiction.

These challenges relate to weak and outdated laws and treaties; differences between judicial systems; to lack of communication and coordination mechanisms, both between domestic agencies and between States.

Other challenges also include the identification of the appropriate authorities responsible for handling international requests; the lack of trust among States regarding the integrity of the justice systems of other countries; and issues relating to the form and content of requests, particularly the omission of critical information.

One of the good practices for facilitating mutual legal assistance and extradition requests, and thus avoiding the provision of safe haven to terrorists, is the designation of national focal points or central authorities for terrorist cases for international cooperation, even though this measure is not explicitly

[3] res 1373, para 2 (g)

required by the international counter-terrorism instruments. The existence of a central authority or a network of focal points also facilitates inter-agency cooperation at the national level by clarifying the roles and responsibilities of the various national authorities involved in the requests for cooperation.

Conclusion

In concluding, Mr. Chair, allow me to reiterate that for more than a decade, the United Nations Office on Drugs and Crime has been providing technical assistance and robust capacity building to Member States to more effectively counter terrorism, to foster international cooperation in criminal matters and to ensure the effectiveness of investigation, prosecution and adjudication of terrorist cases, thus avoiding safe havens.

Terrorism continues to represent the main security challenge to many States. There is a need to further strengthen capabilities of such States, in particular those in vulnerable regions with weak governance and criminal justice systems, that facilitate the harbouring of terrorists and create terrorist safe havens. We stand ready as ever to support all of the Member States.

Many thanks for your attention.