Fourth regional workshop for police officers, prosecutors and judges of South Asia on effectively countering terrorism
(Thimphu, Bhutan, 24-26 May 2011. Jointly hosted by the Kingdom of Bhutan and the United Nations Counter-Terrorism Committee Executive Directorate (CTED), and organized by the Center on Global Counterterrorism Cooperation, with the support of the Governments of Australia and Denmark.)

Key observations of organizers

I. Working group session for police officers

Interview and interrogation techniques

1. In this context, participants discussed the need to distinguish between interview and interrogation, as well as the need to apply specific skills and techniques in accordance with the method used.

   • Participants stressed that, in order for interviews and interrogations to be effective, it was essential to build a rapport with the interviewee, whether by developing an understanding of his or her culture and environment; using interview teams; carefully matching interviewers and interviewees; or exercising patience.

   • Participants shared interviewing and interrogation techniques that had proven to be useful in the past and stressed, in this context, the need to identify the motivation of the interviewee; to provide interviewees with an opportunity to explain themselves; to ascertain how the interviewee conceptualized “good” and “evil”; to use decoys; and to apply a range of deception techniques. All participants agreed on the need to ensure that all such measures were conducted in a manner that ensured fair treatment and respected international human rights obligations.

   • In determining which interview/interrogation technique to apply, it was important to use techniques that were compatible with each specific legal regime and each specific context. A wide variety of techniques was available. Interrogation was not a static art, and it was important to incorporate a multidisciplinary approach. Techniques were constantly modified and recycled and continued to evolve. The use of tangible incentives and offers of amnesty were effective tools. Effective interrogations always involved creativity and required “mind over muscle.”

   • No State exercised a monopoly on effective interviewing/interrogation techniques, and all States could learn from other States, regardless of the sophistication of the police system in place. In this regard, it was important to identify good practices.

   • One difficulty in upholding human rights laws in the context of counter-terrorism was the enactment of legislation that failed to take into account either the capacities of, and resources available to law enforcement officers at the time of enactment or the extent of the demands placed upon them. Legislative processes that allowed for consultation with law enforcement agencies during the drafting stages were therefore important. Another difficulty arose from the need to balance practical police work with human rights requirements (with respect in particular to the above-mentioned capacities, resources and demands). Police work should not be conducted out in such a way that it served as a catalyst for the recruitment of terrorists.
II. Working group session for prosecutors

A. Challenge of using sensitive evidence that raises national security concerns

2. The prosecutors considered the handling of sensitive material and recognised that the distinction sometimes employed between ‘intelligence’ and ‘evidence’ is usually not a helpful one (on the basis, for instance, that what starts off as a piece of intelligence may go to a significant issue in a case and become evidential). A better categorisation of material is ‘used material’ (i.e. evidence that will form part of the prosecution case) and ‘unused material’ (i.e. material that might be in a form that can be adduced without more before the court or in a form that is intended for information purposes, such as an intelligence docket or source contact sheet).

3. A piece of evidence that is intended to be adduced may be sensitive in that it goes to an issue of, for instance, national security. However, in practice, such material should cause little difficulty as the relevant part of the evidence can be heard in camera (without the public or media having access). If a piece of evidence is too sensitive for even the defendant to hear/have sight of, then, again, the answer is straightforward: it cannot be used in evidence.

4. However, although the above is recognised as the position in principle, the prosecutors were at pains to point out that there is little practical experience in the region of the intricacies of disclosure/handling sensitivity.

5. With respect to the handling of sensitive material (both intelligence and evidence), it was important to establish, at the outset, the role of the prosecutor in providing advice and guidance to investigators. In this region, the role of the prosecutor during the investigative stage was limited. This role could be enhanced in complex cases but a State might need to enact new laws or introduce amendments to existing laws in order to reflect the constitutional position.

6. Participants felt that many practices employed by States of the region (including the use of informants or undercover agents, covert surveillance, and interception of materials/information) might handicap prosecutors in their efforts to prosecute serious crimes.

7. The working group therefore considered a fictitious case study with a view to exploring the following issues:

B. Legal basis for covert operations of intelligence or law enforcement agencies

- Some States had established no statutory framework for conducting covert operations, and those frameworks that did exist were limited to serious crimes such as terrorism. States made limited use of materials/information intercepted through covert operations.
- The authorization regime must be consistent with international human rights law and with national constitutions.
C. Role of prosecutor

- Early involvement of the prosecutor at the investigation stage of a sensitive case held several advantages, but was not common in the region. The advice of the prosecutor could be vital.
- Specialist investigative teams involving police, prosecutors and intelligence officers could facilitate the timely investigation of cases and the effective preparation of evidence. However, there was a need to maintain a clear division between the respective roles of the police and the prosecution.

D. Storage and handling of sensitive material

8. There was a need to protect sources and intelligence collection methods that might be used in criminal proceedings and to ensure the “equality of arms” in such cases.

- Where the prosecution relied upon sensitive information (e.g. informants), the practice in the region was not to place any reliance on such material, but to seek to evidence the material through the use of non-sensitive techniques.
- Material generated by investigations was considered solely for the purpose of defining an evidentiary platform for the prosecution. Any other material was returned to the investigating agency concerned, and no further use was made of it. There was no requirement for the prosecution to consider and provide any material that might either undermine the prosecution case or assist the defence.
- States of the region used various methods to make use of sensitive material (evidence) during the proceedings and to serve it on the court and the defence. An application might be made to the court in the presence of the accused and his or her legal representative, or the material might be sealed in an envelope and the application supported by an affidavit from the prosecutor. Such practices might prevent the court from conducting its own review of the credibility or otherwise of such materials. The court might have no alternative but simply to rely upon the accompanying affidavit.
- Wherever informants were used, provision was made for the use of pseudonyms or aliases. However, this practice was limited, since the States of the region had not established comprehensive witness-protection programmes.

E. Issues surrounding witnesses

- With respect to witnesses that were called by the prosecution in order to advance the case against the accused, but who then gave testimony that was adverse to the prosecution case, the practice in the region was to declare the evidence as being of either little or no value in advancing the case.
- The present absence of established witness anonymity in some States of the region and the lack of witness-protection programmes might increase the reluctance of witnesses to provide testimony that was adverse to the accused. The combination of witnesses’ failing to “come up to proof” and the lack of a procedure for introducing into evidence the original statement of the witness could place the prosecution at a considerable disadvantage.
F. Handling of foreign intelligence

- The general rule was that intelligence agencies in the region were never called upon to give evidence. The practice in jurisdictions outside the region cast doubt on that approach.
- The owner of the information was responsible for classification. This created practical difficulties wherever information was classified at a level higher than that which would have been used by the receiving State.
- There is a balance to be struck between two conflicting interests, prejudicing national security on the one hand, and the rights of the accused on the other. The group recognised that this was one of the most challenging aspects when handling sensitive information.

III. Working group session for judges

Effective implementation of domestic counter-terrorism legislation; international standards for counter-terrorism legislation

- The participants (many of whom had considerable experience in dealing with terrorism, whether in their professional or personally capacities) shared their experiences and the practices of their respective courts. (Some sat in conventional courts, while others sat in special terrorism courts or in courts specialized in other terrorism-related areas.)
- Participants discussed aspects of the role of judges in countering terrorism in general, including their practical role of trying terrorism suspects, their role in strengthening cross-border cooperation and their broader role as people of influence within society. Those roles required, among other things, the application of domestic legislation; the interpretation of domestic legislation consistent with international standards; ensuring a fair trial; guaranteeing the rule of law; protecting the rights of the accused; and facilitating mutual legal assistance and extradition.
- The discussions focused in particular on effective implementation of domestic counter-terrorism legislation and the related international standards. Participants shared information relating to the legislation in their respective jurisdictions. Many jurisdictions had established specific counter-terrorism legislation that had subsequently been refined, revised or, in some cases, repealed over time; while others have established no specific legislation and had no immediate plans to do so. Many participants felt that counter-terrorism-specific legislation was required in order to mount an effective criminal justice response to the threat of terrorism. Others felt either that their existing laws were sufficient or that the threat of terrorism did not imply the need to introduce counter-terrorism-specific legislation.
- Much of the discussion related to procedural issues and to the sequencing of terrorism trials under different legislative frameworks. Participants shared their respective jurisdictions’ approaches to the timing of the initial court appearance; to the remand periods permitted; to the time within which an indictment must be presented; and to the time within which a case must be brought to trial. They also discussed the handling of
bail and the process by which confessions were received, the weight given to confessions in criminal proceedings and the protections that might be imposed.

- Many participants indicated a need for assistance with respect to building capacities in counter-terrorism-related areas of AML and CFT and to links with transnational organized crime, as well as a need to address the issues of victim and witness protection and the underlying conditions conducive to terrorist recruitment.
- Participants stressed the need to improve international cooperation in counter-terrorism cases, including by introducing strengthen mechanisms for mutual legal assistance and extradition and by establishing informal channels for cooperation between judges. Welcoming the opportunity afforded by the workshop to interact with, and share experiences with their counterparts, they expressed the desire to conduct similar exercises in the future.