



Peaceful strategies in the “War against Terror”

by Ben Brandon

The author reviews recent international initiatives against terrorist financing

INTERNATIONAL LAW AND INTERNATIONAL TERRORISM

Until recently, the collective response of the international community to the threat of international terrorism has been limited and largely ineffective. Individual states have regarded terrorism as either an internal security issue, or have responded by using force against other states believed to be responsible for harbouring or supporting terrorists. Coercive strategies to combat international terrorism are almost always controversial, and there is frequently an element of doubt as to whether such actions are lawful.

Having said this, it is not an easy task to identify strategic alternatives to the use of force in the fight against international terrorism before the mid 1990's. Political initiatives were few and far between. Peaceful strategies using the institutions and instruments of international law were visible, but of doubtful efficacy.

The lack of any coherent non-coercive international strategy to combat terrorism can be attributed to two factors. First, the paralysis of the international law making community during the Cold War. Secondly, armed struggles for national liberation in the developing world led to an ideological conflict between North and South over the legitimacy of independence movements, and the tactics they employed. These two factors inhibited the emergence of any shared concept of what terrorism meant, or who the terrorists were.

Despite these difficulties, the international community had made some effort to respond peacefully to the threat of terrorism. The first of a series of international conventions that sought to encourage international co-operation to deal with aircraft hi-jackings was concluded in 1963. This limited treaty making activity, which addressed specific terrorist acts whilst avoiding the need to agree upon a definition of terrorism, continued throughout the Cold War.

With the fall of the Soviet Union, and as the ideological conflicts of the national liberation era were replaced with more contemporary concerns, the obstacles to developing an effective and peaceful international response to counter terrorist activity began to fall away.

International lawmakers, already well versed in the instrumentalities of combating drug dealers and organised crime, saw advantages in using anti money laundering and anti-racketeering techniques developed by the law enforcement community in their fight against terrorism. Terrorist activity was increasingly regarded as being both an international crime, and linked to other kinds of criminal activity. Agreed definitions of terrorism, previously exclusive to domestic law, began to emerge from international institutions.

This article examines the record of international and regional law makers and the programme of the Financial Action Task Force both pre and post September 11. It will demonstrate that innovative criminal justice strategies previously used to attack the profits of criminal cartels are now an essential part of the international community's collective response to international terrorism. It concludes that although valuable, such strategies possess serious shortcomings, and should not be the only peaceful response deployed in the “war against terror”.

INTERNATIONAL RESPONSE PRE SEPTEMBER 11

Although the term terrorism has been part of our political vocabulary since the 1790's, attempts to reach an internationally agreed legal definition have consistently ended in failure. The first definition, approved by the League of Nations in 1937, was rejected by the international community. Only 24 states signed the relevant treaty and none ratified it.

The United Nations confined itself to concluding a series of treaties that addressed specific categories of

terrorist acts, such as attacks on civilian aircraft, the taking of hostages and attacks on ships.

These UN sponsored anti-terrorist treaties share a number of common features. They all require states to criminalise particular offences, and promote prosecution or extradition mechanisms to ensure that no person suspected of having committed an offence covered by a treaty can find refuge in the territory of another state party.

The pre-September 11 anti-terrorism conventions also share a number of weaknesses. They have no effective enforcement provisions. If a state refuses to abide by its obligations under a treaty, other states cannot enforce compliance. There is also no international court to try the offences created by the pre-September 11 treaties in the absence of domestic justice. Even the new International Criminal Court does not have jurisdiction over the specific offences created by these conventions.

There are other problems. Insufficient numbers of states are parties to the relevant treaties. Several states, which are considered by the West to harbour terrorists, have taken many years to ratify anti-terrorist conventions, or simply not signed up to them at all.

Prior to September 11, no international treaty in force contained a general definition of terrorism, or addressed the issue of the financial support given to terrorists or terrorist organisations. However, change was in the wind.

The seeds of this change appeared in two General Assembly Resolutions of 1994 (Res 49/60) and 1996 (Res 51/210). The latter Resolution calls upon all states;

“To take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations... [and] in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes.”

Following an initiative by the French Permanent Representative, The International Convention for the Suppression of the Financing of Terrorism opened for signature at the UN in January 2000. The Financing Convention contained, for the first time, an internationally agreed definition of terrorism. It also contained a range of provisions attacking the sources and means of financial support for terrorist organisations.

FINANCIAL ACTION TASK FORCE PRE SEPTEMBER 11

The link between terrorist and other criminal organisations whose success and longevity depends on financial support and laundering the proceeds of crime was not made explicit by the FATF before September 11. The FATF “Forty Recommendations” makes no mention of terrorist financing, and concerns itself with “provid[ing] a complete set of counter-measures against money

laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation”

THE REGIONAL RESPONSE (EU) PRE SEPTEMBER 11

The only regional treaty in force in Europe prior to September 11 was the 1977 European Convention on the Suppression of Terrorism. This Convention shares many of the weaknesses of its international counterparts. Crucially, it does not contain any definition of terrorism. The main purpose of the Convention appears to have been an attempt to strike out the effect of the political offence exception contained in most extradition arrangements between contracting states.

The European community’s initiatives against money laundering were more sophisticated. The principal source of European law on the subject before September 11 was the 1991 EU Money Laundering Directive. The Directive contains familiar measures to combat money laundering, including client identification, reporting, tipping off, and immunity from suit provisions.

European lawmakers clearly intended that whilst drug related crimes would constitute the majority of predicate offences in domestic law, terrorism would be included in the designation of criminal activity in domestic legislation, as the preamble to the Directive notes:

“since money laundering occurs not only in relation to the proceeds of drug related offences but also in relation to the proceeds of other criminal activities (such as organised crime and terrorism) the member states should, within the meaning of their legislation, extend the effects of the Directive to include the proceeds of such activities”.

SUMMARY OF RESPONSE PRE SEPTEMBER 11

Although it is important to understand the legal and political obstacles that have inhibited the international peaceful response to the threat of terrorism pre-September 11, the dynamism of international law making should not be underestimated.

Law enforcement strategies that sought to attack the profits of criminal enterprises are relatively recent arrivals on the domestic as well as the international scene. The FATF was created by the G7 in 1989. The first anti money laundering legislation in the UK was introduced in the same year. At that time drug trafficking, and to a lesser extent organised crime, were the primary targets. Yet only five years later, the UN General Assembly clearly saw the advantage of incorporating anti money laundering and funding strategies in the fight against international terrorism. The EU was also beginning to recognise the value of money laundering regulation in combating terrorist organisations by the mid 1990’s.

Tragically, it was the attacks on the WTC of September 11 that focused the attention of the international community on the importance of enhancing existing peaceful initiatives to combat terrorism. The fact that the attacks could not have taken place without significant financial support to train and maintain a large Al-Qa'ida cell within the US, added considerable momentum to the implementation of strategies that attack terrorist funding at source.

INTERNATIONAL RESPONSE POST SEPTEMBER 11

The UN Security Council acted with immediate effect shortly after the September 11 attacks, issuing a number of Resolutions dealing with both the peaceful and coercive international response to international terrorism.

Resolution 1373 targets those who finance terrorist acts. It requires all states to criminalise terrorist fund raising, freeze the financial of terrorists or terrorist organisations, and prohibit the provision of any form of economic assistance to terrorists, terrorist organisations or related entities. Domestic lawmakers are also required to ensure that the financing of terrorist acts are established as serious criminal offences in their respective jurisdictions.

The Security Council built in a novel enforcement mechanism into the resolution. It borrowed the state reporting and committee system from international human rights conventions and set up a Counter Terrorism Committee to monitor implementation of Resolution 1373. All states are obliged to report to it regularly on steps that they have taken to implement the resolution's provisions.

The Security Council also called upon all states to become a party to the 1999 Financing Convention. Prior to September 11, the Convention had only four of the 22 ratifications necessary for it to enter into force. It now has 52 parties, and has been in force since April 10 2002.

The innovations contained in the 1999 Financing Convention are too numerous to be discussed here. In summary it contains, for the first time, a workable definition of terrorism, and creates an international offence prohibiting the financing of terrorism. State parties are obliged to change their domestic laws to make the financing of terrorism criminal offences in their own jurisdictions, punishable by appropriate penalties.

The 1999 Financing Convention also provides for the freezing and forfeiture of terrorist funds, and requires that confiscated assets should be used to compensate the victims of terrorist acts. In addition, the 1999 Financing Convention requires state parties to co-operation in implementing financial regulations to include identification and reporting provisions similar to those that appear in anti money laundering instruments.

The success of the 1999 Financing Convention depends on its implementation. Nonetheless, the alacrity with

which states acceded to the Convention after September 11, the binding nature of Security Council Resolution 1373, and the newly established Committee on Counter Terrorism suggests that suppressing the finances of terrorism has rapidly become a permanent part of the international community's peaceful strategy to combat the threat of international terrorism.

THE FINANCIAL ACTION TASK FORCE POST SEPTEMBER 11

The response of the FATF to the September 11 attacks was equally swift.

The FATF responded by producing eight "Special Recommendations on Terrorist Financing" which in combination with the earlier "Forty Recommendations" are intended to provide an international standard for suppressing terrorist financing. The Special Recommendations cover familiar ground and include the criminalisation of terrorist financing and associated money laundering, the freezing and confiscating of terrorist assets, international co-operation, and the reporting of suspicious or complex transactions to national authorities.

The FATF also agreed a plan of action, in an attempt to ensure compliance with the new recommendations, which includes "naming and shaming" those states which fail to take appropriate measures to combat terrorist financing, and the provision of technical assistance to non-members.

THE REGIONAL (EU) RESPONSE POST SEPTEMBER 11

There have been a vast number of EU initiatives since September 11. These include political agreement on a common definition of terrorism, increased co-operation between member states and the EU and the United States, and initiatives to freeze and confiscate terrorist finances.

For present purposes, the most concrete development post September 11 is the amended money-laundering directive, which was finally agreed on 19 November 2001. The main changes which affect terrorist financing is the extension of the definition of predicate offences to include all serious crimes.

The extent of the inter-relationship between the sources of international law discussed in this paper can be seen in both the Amending Directive, which urges member states to consider the FATF "Forty Recommendations" as guidance in determining what can properly be considered predicate offences, and the European Council Meeting in Ghent of 19 October 2000 which urged all member states to ratify the 1999 Financing Convention.

SOME THOUGHTS AND CONCLUSIONS

Since September 11, the international community appears to have more or less agreed what terrorism is, and how to deal with it. An internationally agreed definition of

terrorism, or at least one accepted by 52 states, has appeared for the first time in the 1999 Financing Convention. The Ad-Hoc Terrorism Committee of the UN is close to producing a draft Anti-Terrorism Convention, which will be put before the General Assembly later this year. The European Council has adopted a common definition of terrorism in its Framework Decision of June 13 2002. The coincidence of terminology amongst many of the instruments, together with the exhortations emanating from international institutions to implement the latest conventions, suggests an unprecedented degree of unanimity as to the appropriate peaceful strategy to combat terrorism.

Responses to international terrorism that do not invariably result in the deaths of innocent civilians are popular, and certainly necessary. The strategies discussed here are also attractive because they are a legal response to the challenge of terrorism, expressing the collective will of the international community, as opposed to the legally disputed acts of individual states who use force against others.

Having said this, the appeal of the peaceful response discussed in this article should not blind us in any consideration of its appropriateness. Organised crime syndicates and drug trafficking cartels share many of the characteristics of international terrorist organisations, which is why innovative criminal justice strategies to combat the former were borrowed and adapted by international lawmakers to fight the latter. Organised criminals and international terrorists operate across borders, and are dependent on finance for their survival. Their funds move from one jurisdiction to another with bewildering speed. Their organisations are secretive, highly disciplined and notoriously difficult to infiltrate. They move personnel from state to state, and their impact on the safety and security of us all is devastating.

However, there is one clear difference between these two threats to our safety and security. Criminals are motivated by profit, which is why domestic law enforcement agencies believe that strategies that confiscate the principal benefit of crime are so effective. Terrorists are

motivated by ideology, whether political, religious or national. Those who provide financial support to terrorists are often motivated by ideology to contribute to a cause, but also by a sense of injustice, alienation and helplessness.

The actual sums of money involved in supporting terrorist organisations are relatively small in any event. Estimates vary, but it is thought that the September 11 attacks cost Al-Qa'ida less than \$300,000. The transfers were made in relatively small amounts. Making them more difficult to detect using traditional anti-money laundering techniques.

Also, many of the law enforcement strategies that appear in these instruments are untried against international terrorists, and unproven against drug traffickers and organised crime. Such strategies carry with them significant risks: not least the freezing and confiscation of assets on the basis of uncorroborated intelligence and undisclosed evidence. It may be that the real risk of relying exclusively on such strategies is yet to emerge – that in failing to understand and address why terrorists receive so much financial support, the international community fails to prevent future fund raising – which in turn facilitates the commission of further terrorist crimes.

Finally, whilst states are signing up in large numbers to recent conventions and initiatives to suppress terrorist financing and improve the regulation of their fiscal systems to prevent the laundering of terrorist funds, the real success of the peaceful strategy discussed here will be measured in criminal convictions and confiscated assets. To date, the record of states in not only implementing their international obligations, but also actually taking action against organisations and individuals is patchy at best. Achieving genuine international co-operation in the fight against organised crime and drug trafficking has proved elusive. Success in the campaign to halt the flow of funds to international terrorists may prove even more difficult to achieve. 

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