THE IMPORTANCE OF LEGISLATION IN DEALING WITH EXTREMISM AND TERRORISM: THE EXPERIENCE OF TRINIDAD AND TOBAGO

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Background and Context

While there are vast disparities in size and population between Canada and Trinidad and Tobago (T&T), there are important commonalities between the two, including ethnic and religious diversity and adherence to strong democratic principles. T&T's Muslim community represents approximately 5% of the population and has been a strong fiber in the social fabric since 1845. The actions of a small number of citizens have however led to T&T being labelled as having the highest foreign terrorist fighters (FTFs) per capita in the Western world. Trinidadians have also been victims of international terrorism including 9/11 and the Westgate Shopping Mall attack in Kenya. These issues together with the evolving tactics of terror organizations such as ISIL, coupled with T&T being a target-rich environment, places terrorism high on the national security agenda.

T&T's domestic security situation and increasing compliance with international standards have both driven legislative strengthening. As seen in other countries, T&T is subject to the Financial Action Task Force (FATF) system, which evaluates the strength of a country's laws for combating money laundering, terrorist financing, the proliferation of WMDs, and the overall effectiveness of those systems. T&T was among the first countries in the world to undergo the 4_{th} round of mutual evaluations between 2014 and 2015 and was re-rated in 2019. T&T's technical compliance ratings are at the time of publication, among the highest in the world with 35 compliant or largely compliant ratings and no non-compliant ratings (CFATF, 2019). This includes fully compliant ratings in Recommendations 5 and 6 which relate directly to terrorism and terrorist financing. T&T's Anti-Terrorism Act, Chap. 12:07, as amended in 2018, now forms model legislation for the Caribbean Community (CARICOM).

Major Takeaways

T&T's situation and experience are not unique but, does provide precedence for legislative reform and development of implementation frameworks for other countries, regardless of size. Some of the major takeaways from T&T's experience are as follows:

Violent Extremism vs Extremist Violence

Similarly, to Canada[1], T&T essentially has two categories of "terrorist act" under the law:

a. Offences which include motivation by a political, religious, or ideological cause (i.e., violent extremism); and
b. actions which are deemed terrorist acts irrespective of motive, such as bombing offences (i.e., extremist violence).

While dealing with offences, motive is an invaluable ingredient in forming an important political statement, it goes beyond traditional *mens rea* and poses a particularly challenging element which the State must prove. Extremist violence offences can, therefore, often be much easier to pursue, allowing the law to cover violent acts the motives of which might not have been contemplated when the law was first drafted (e.g., the Incel issue). It also helps to navigate some challenging definitional issues about whether domestic acts can be strictly termed "terrorism" by placing the focus on the violent act itself as opposed to the motive of the actor.

Plugging All the Gaps

Legislative amendments can address two broad categories of gaps:

a. Firstly, where the law does not squarely cover certain activities (e.g., receiving terrorist training on-line). It should be noted that while the law often includes broad provisions, such as "providing support for the commission of a terrorist act" (AntiTerrorism (Amendment) Act, 2018, Chap. 12:07, section 9), principles of statutory construction (e.g., the *ejusdem generis* rule[2]) could still be raised to narrow the scope of such provisions, particularly when dealing with new and emerging threats.
b. Secondly, practical limitations faced by law enforcement. One clear example surrounds travel to conflict zones and obtaining evidence of the activities of suspected FTFs once they had crossed the border from Turkey to Syria. T&T's amended AntiTerrorism Act modifies the

[1] The offence of committing a Terrorist act under section 3 of the Anti-Terrorism (Amendment) Act (2018), Chap. 12:07 is very similar to the definition of "terrorist activity" in Section 83:01(1) of the Canadian Criminal Code (2019).
[2] A rule of interpretation that where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted things of the same type as the listed items. See more at Duhaime's Law Dictionary (n.d.).

> Australian precedent and allows for the designation of a geographical area which is part of a country where a listed entity is engaged in hostile activity. Such designation creates a rebuttable presumption that any person travelling to that area is travelling for a terrorist purpose (AntiTerrorism (Amendment) Act, 2018, Chap. 12:07, section 15B (10)). Subject to the requirements of the Act, once law enforcement proves travel to the designated area, the burden shifts to the accused to prove the legitimacy of his reasons for travel.

Using All Available Tools in the Fight Against Terrorism

Countries around the world have been taking a more pragmatic view of law enforcement in light of challenges in detection, investigation, prosecution and conviction. Reliance on conviction as the only means of thwarting crime, including terrorism, is not an effective strategy. T&T has placed increased emphasis on the use of disruptive tools such as listing and asset freezing where the standard of proof is lower than for criminal prosecution, particularly in light of challenges faced in obtaining evidence from conflict zones. In countries such as T&T, where such measures are applied by judicial process (relying on the same elements of the offence as in prosecution but to a lower standard of proof), this also provides an opportunity to build the credibility of law enforcement in the eyes of the judiciary in a novel area which impacts on fundamental rights.

Disruptive Tools can be Used for P/CVE

Many of these tools also have a role to play in the "prevent" aspect of P/CVE. Listing and asset freezing measures have, for example, been imposed in jurisdictions such as France in cases of teenagers attempting to travel to conflict zones and were later lifted when they lost their interest in joining the Caliphate. It is thus important to consider all the options available in the State's arsenal to both prevent and respond to violent extremism.

Target All Players

While the need to target all members of the FTF support network is widely recognized, intermediaries require special consideration. Many of the financial or other transactions by which FTFs get support can be funneled through intermediaries far from conflict zones. It is much easier for law enforcement and intelligence agencies in the country where the intermediary is operating to identify them as being engaged in these activities. Taking steps such as listing

and asset freezing under UNSCR 1373 (2001) or proposing names for inclusion on the UN ISIL, Da'esh and Al Qaida List or the Taliban List can greatly assist other countries in identifying these intermediaries and tracing transactions to identify FTFs and other members of their network.

Companies and non-profit organizations have also long been targets for abuse for terrorism and terrorist financing. It is therefore, important to have legal mechanisms to attach personal liability to the individuals ultimately responsible for such abuse as has been done by T&T[3].

All Intelligence Agencies & LEAs Have a Role to Play

Intelligence suggests that there is a strong possibility of crosspollination between terrorist risks and organized crime even if only in the supply of arms and ammunition, the illegal movement of terrorists across borders and financing terrorist operations through criminal activity. This demonstrates the importance of not getting blinkered by the concept of "terrorism" and that there is merit in an all-crimes approach to coordinating intelligence, evidence gathering and operations. Any one of several agencies may be the first to receive some intelligence that points towards terrorism even while investigating some other offence. This makes diagonal cooperation and information sharing at all key levels.

Protection of the Evidence Gathering Process

Protection of the evidence gathering process is one step in aiding cooperation, building trust that the mandate of one agency will not be sacrificed or compromised for the success of another. That sometimes means withdrawing the case instead of pursuing prosecution. Failure to do this can prejudice the lives of intelligence officers and law enforcement assets, as well as the ability to conduct similar operations in the future. Legislation can also include mechanisms for the protection of such processes including intelligence provided by international partners[4].

[3] See generally the penal provisions of the Anti-Terrorism (Amendment) Act (2018), Chap. 12:07 and the Non-Profit Organizations Act (2019).

[4] Section 22B of the Anti-Terrorism (Amendment) Act (2018) contains examples of such protective provisions in the context of civil remedies including redacting of information provided to Appellants and otherwise sealing court files.

Mechanisms for International Cooperation

It is also important to think outside the box regarding international cooperation. Mutual legal assistance (MLAT) requests are indispensable in the transfer of evidence for criminal prosecution but are also fraught with procedural hurdles. INTERPOL and the Egmont Secure Web provide alternative mechanisms for timely intelligence sharing. UNSCR 1373 (2001) also contemplates listing of terrorists and freezing their assets at the request of another country. As discussed above, the standard of proof is lower than required for criminal prosecution and there is greater flexibility regarding what supporting evidence can be provided. Such requests and intelligence sharing need not take place via MLAT.

Fundamental Rights & Benchmarking Law Enforcement Measures

No discussion on legislation can be complete without having regard to fundamental rights. The Constitution should be the starting point as it provides an important litmus test not only for policies but also whether actions taken by intelligence, law enforcement and the military can be justified or excused. Like many other countries, T&T is grappling with the issue of how to treat with citizens seeking to return from conflict zones, and in particular children of FTFs. Just like Canada, the laws of T&T provide that a citizen may not be refused entry though there is arguably no legal responsibility to take measures to bring the citizen home. This is not a simple question but does go to our core values as a country and civilization. How we respond to this issue can either feed or counter the narrative terrorists are crafting. Conversely, gaps in the law and procedures can leave an opening for *habeas corpus* applications and legal challenges to the constitutional validity of actions taken by law enforcement.

Dealing with such matters also eats into law enforcement time as officers have to attend court and prepare to give evidence. Taking away time that could be spent on investigations as time is a scarce commodity in the counter-terrorism sphere. This is another reason why it is so important to anticipate and plug those gaps as far as possible.

LEAs & the Legislative Process

The final point is how important law enforcement and intelligence agencies are to legislative development. LEAs are critical to identifying those threats, gaps in the law and finding workable solutions. It is therefore, of paramount importance that there be a clear line of communication and feedback spanning from working

level operators on the ground all the way up to the policy makers if the law is to provide a framework for effectiveness.

Conclusion

The rule of law is a hallmark of jurisdictions such as Canada and Trinidad and Tobago. While laws are interpreted as being forward looking, this has practical limits. In the dynamic realm of counterterrorism there is a critical need for laws to keep ahead of or at least maintain pace with emerging terrorist threats. Legislators and policy makers must recognize that law enforcement and intelligence agencies are at the tip of that spear, identifying legislative gaps to be plugged and strengths to be built on.

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