



NATIONAL CASE STUDY

ANTIGUA AND BARBUDA AND THE HUMAN RIGHTS
IMPACT OF ANTI-TERROR LEGISLATION IN THE
AFTERMATH OF SEPTEMBER 11TH

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AT

COMMONWEALTH HUMAN RIGHTS INITIATIVE SEMINAR
INSTITUTE OF COMMONWEALTH STUDIES
LONDON

5th June 2003

This seminar is concerned with anti-terrorism legislation and its affect on human rights in Commonwealth countries.

States' rights eroded in small countries

In this paper, I will go beyond the affect of anti-terrorism legislation on human rights to discuss the affect on the rights of States. By this, I mean that many Commonwealth countries, particularly the smaller ones, have been forced by powerful governments and multinational organizations to adopt legislation and introduce enforcement machinery in the name of the global war against terror.

The principal organ that has been utilized by powerful governments to compel small Commonwealth countries to abrogate their rights as sovereign states is the Financial Action Task Force on money laundering (FATF), a body, established in 1989 by a G7 Summit in Paris, on the basis that money laundering posed a threat to the international banking system and to financial institutions.

At the time the FATF was made-up of 16 countries, which, for the most part, are the wealthier countries of the world. Since then the organisation has grown to 27 members, and in the wake of the terrorist atrocities of September 11th, 2001 in the United States, it has added terrorism-financing to its remit.

The FATF is not an international body. It has no authority under international law to set standards and norms for countering money laundering. Its power derives from the coercive stance of its member countries who decided that their economic and military strength in the world gave them the right to usurp global governance, and to insist that the rest of the world dance to their tune or suffer the consequences of sanctions.

It should be noted, however, that international organizations, such as the International Monetary Fund and the World Bank, have also been used to coerce small Commonwealth countries to comply with requirements of the FATF, and to a lesser extent its sister body, the Organization for Economic Cooperation and Development (OECD).

In 1998, the OECD, which is also not an international body and which also has no authority in international law, launched its so-called 'harmful tax competition initiative' – the purpose was two-fold. First, to dictate tax policies to the rest of the world, and second, to compel jurisdictions to provide financial information on OECD citizens and corporations to OECD tax authorities upon request and without recourse to the judicial system.

In 1999, the OECD published a blacklist of 41 small jurisdictions, mostly in the Commonwealth Caribbean and the Commonwealth Pacific, and declared categorically that if they did not change their tax policies and provide information to the tax authorities of the OECD, sanctions would be imposed against them.

But coercion was not limited to these two powerful multinational organisations. The boards of the IMF and World Bank are comprised, with a weighted voting majority, of the very countries that make up the FATF and the OECD. On these decision-making bodies, directors included in their assessment of applications for loan funds or programme support whether or not an applying country had been blacklisted by the FATF or the OECD. If countries appeared on the blacklist of either of these two bodies, they were simply denied financing.

More recently, the FATF and the IMF have struck a bargain under which the IMF is now conducting Financial Sector Appraisal Programmes of countries based on an expanded version of the FATF's 40 directives on money laundering and its 8 directives on counter terrorism financing. Caribbean countries were not consulted directly about the transfer of this matter to the IMF/World Bank or on the content and scope of the methodology that would be applied.

Caribbean Ministers took the most strenuous objection to the procedures followed in relation to the purported 'transfer' and the methodology contemplated by the IMF in furtherance of it. These concerns were conveyed directly to the staff of the Fund at a Ministerial Meeting in The Bahamas on 17th October 2002 and again, more recently, and more vigorously, at a similar encounter with IMF representatives in Barbados on 15th January 2003.

The Caribbean has taken the view that the fight against money laundering and terrorism financing is firmly rooted in the criminal justice system of all countries based on the original requirements of the Vienna Convention. They consider that the current IMF/World Bank initiative goes beyond the mandate of the Bank and Fund and should be a matter for full discussion at the annual meeting of the IMF/World Bank group later this year when all member countries are present.

In that context they called for a truly global forum on money laundering convened under the auspices of the United Nations with a view to concluding an international convention that would set agreed standards to be applied equally to all jurisdictions.

However, they have been comprehensively ignored, and the IMF has made it clear that countries will either subject themselves to assessments by the new methodology or suffer yet to be disclosed consequences.

I suspect that in the vast majority of Commonwealth countries, the rights of States have been eroded in this way far more than human rights. The Commonwealth countries that are the exception to this observation are the United Kingdom, Australia, Zimbabwe, Bangladesh, Pakistan and a lesser extent Tonga. In these countries, it is arguable that the spectre of terrorism has been utilized by Governments to introduce laws and implement machinery that serve domestic political purposes rather than to counter international terrorism. This is discussed in Dominic Bascombe's Briefing Paper for this seminar, *Anti Terrorism Legislation in the Commonwealth*.

Money laundering, Drug Trafficking, Terrorism: Genuine concerns in small countries

This is not to suggest that small Commonwealth countries were not concerned about the adverse affects of money laundering and drug trafficking. Many were, and had taken vigorous steps within their limited capacities to address both problems even before the events of September 11th.

After September 11th, when it became clear that terrorism could be linked to both money laundering and drug trafficking, many small Commonwealth countries intensified their efforts to tackle both problems and specifically targeted terrorism and terrorism financing. In the case of the Caribbean, as one commentator put it:

The Caribbean Community States expressed their sympathy with the United States, and readily joined in the widespread expression of the view that the “fight against terrorism” would have to become, for the immediate future a, if the not, the significant priority of global relations”¹.

Not that this wholehearted commitment to the fight against terrorism resulted in a softening of the United States or the FATF and OECD toward Commonwealth Caribbean Sates. If anything, US support of the coercive tactics of the FATF in money laundering intensified and the US Treasury was the key player in adding counter terrorism financing to the remit of the FATF.

The case of Antigua and Barbuda

Before I begin a detailed discussion of the key issues involved in anti-terrorist measures in Antigua and Barbuda and any impact they might have on human rights, I should place the country in proper perspective.

Antigua and Barbuda is small island State whose resident population is about 100,000 and whose economy is almost entirely dependent on tourism. In the early 1980's, before money laundering and 'harmful tax competition' became concerns of the G7 countries, the Government decided to diversify its reliance on tourism by establishing an off-shore industry comprising banks, insurance companies, trusts, international business corporations, Internet gaming and the registration of ships under the Antigua and Barbuda flag.

For almost a decade, these services thrived earning millions of dollars in revenue for the Government from license fees and providing hundreds of well-paid jobs for our well-educated, computer literate, young population.

¹ Lewis, Vaughan A, “The Caribbean in International Relations May 2001-May 2002: Some Aspects”, Institute of International Affairs, University of the West Indies, Trinidad, 30th April 2002

In addition, the industry bolstered the economy against the vagaries of the tourist industry which was subject both to economic conditions in North America and Europe, from which most of our tourists come, and to the adverse effects of hurricanes. Between 1996 and 2000, for instance, Antigua and Barbuda suffered six hurricanes, two of them in one year, 1995, that together destroyed three years of the country's gross domestic product in less than 36 hours.

In the aftermath of each of these hurricanes, hotels that were devastated were forced to close, laying-off hundreds of people, and reducing government's revenues from taxes. Were it not for the offshore industry in this critical five year period, the level of unemployment would have been much higher, and it would have been almost impossible for the government to continue to provide normal goods and services to its people.

Then, in 1990, without consultation with any other States, the FATF issued a report containing what it called "Forty Recommendations" on countering money laundering.

In fact, what the so-called recommendations amounted to were a set of directives with which States all over the world were required to comply. Their failure to comply attracted counter-measures from the FATF members. These measures included black-listing the non-compliant countries which were described as "non-cooperative jurisdictions", and the application of sanctions against them. These sanctions included directives by FATF governments to their banks to carefully examine all transactions originating from the countries identified as "non-cooperative".

The requirement for banks to examine these transactions placed a financial burden on them since extra resources and time became necessary. Consequently, many of the banks either ended their correspondent relations with banks in the so-called non-cooperative jurisdictions or charged them additional fees to cover their new costs. In any event, simple transactions – even a parent sending money to a dependent child at school in an FATF country – became excessively burdensome on the banks and their clients in the targeted jurisdictions.

Three things were significant about this operation:

First, FATF countries established teams from amongst themselves to assess the compliance of non-FATF jurisdictions with these so-called recommendations that the FATF had alone devised. In other words, non-FATF countries were judged by the FATF according to rules established by the FATF.

Second, the FATF countries were first allowed to assess themselves, and then they were subject to a peer-review. That is, no non-FATF jurisdictions were allowed to judge the FATF countries for their compliance.

Significantly, while several non-FATF countries were placed on a blacklist, no FATF countries were.

Yet, their own statistics indicate that the volume of money laundered in FATF countries far exceeded the amount of money laundered in non-FATF jurisdictions. What is more, the FATF's own analysis showed non-compliance with the 40 recommendations by some of its own member-states.

This is still the case today.

Of the 23 jurisdictions that were blacklisted by the FATF in 2000 and 2001, ten countries presently remain on the list.

In order to be removed from the FATF list, the 13 affected countries were required to introduce tough legislation – among which is the presumption of guilt rather than the presumption of innocence for anyone charged with money laundering including the owners, directors and employees of financial institutions. They were also required to establish regulatory and supervisory machinery as well as Financial Intelligence Units for the investigating money laundering and machinery for exchanging information with foreign authorities. In many cases, exchange of information does not require the permission of a Court; indeed the necessity for Court permission was regarded as an impediment.

The significant anti money laundering legislation that has been instituted in the Caribbean Region has resulted in the virtual collapse of the offshore sector in one jurisdiction. In all of them, there has been a significant reduction in the number of businesses, revenue and employment.

In the case of one country, The Bahamas, US\$36 Million were spent setting-up machinery demanded by the FATF. Every other country spent amounts that, in relation to their Budgets, were similar in size to The Bahamas.

In Antigua and Barbuda, for instance, where our register for offshore banks numbered over 50 in 1998, we have only 15 today.

Over the years since 1993, Antigua and Barbuda has established a framework of legislation and enforcement machinery designed to address money laundering, drug trafficking, terrorism, and terrorism financing. The Government has also established machinery for enforcing the laws and for cooperation with foreign authorities including exchange of information on criminal matters.

The relevant legislation and treaties are:

- The Suppression of Terrorism Act 1993
- The Proceeds of Crime Act 1993
- The Mutual Assistance in Criminal Matters Act 1993
- The Money Laundering (Prevention) Act first introduced in 1996 and amended several times since then to make it tougher and to broaden its scope

- The Money Laundering (Prevention) Regulations first introduced in 1999 and revised in 2002 to strengthen its provisions;
- The Prevention of Terrorism Act 2001
- The Ratification by Parliament of United Nations Security Council Resolution 1373 on counter terrorism

In addition, Antigua and Barbuda has agreements with the United States and the United Kingdom for both the Exchange of Information on Tax matters and for mutual legal assistance on criminal matters.

In 1998, an Independent Statutory Commission was established to regulate the country's offshore financial services sector. Two years before an Office of National Drug Control and Money Laundering Policy had been established with a Financial Intelligence Unit empowered to investigate money laundering and drug trafficking offences, freeze assets from such activities and upon conviction forfeit such assets. The Office also has the authority to gather information and to share information on criminal matters with foreign authorities.

The legislation and enforcement machinery is comprehensive and far exceeds, in many cases, the standards applicable in many FATF and OECD countries which have unilaterally set norms for the world, and who are enforcing them by threat of sanctions against States that are not compliant.

Key considerations for small countries

I come now to the key considerations for Antigua and Barbuda when measures were contemplated on dealing with terrorism.

The first of these considerations arose after September 11th, and it was the need for greater counter-terrorism measures as a precaution against possible attempts to target the interests of the United Kingdom and the United States. These interests, included especially, the many hundreds of thousands of US and UK citizens who holiday in Antigua and Barbuda every year.

The nightmare scenario for us was the possibility of an attack on the several mega cruise ships that call at our Harbour several times a week. On one day there could be four cruise ships in the port with as many as 16,000 people, mostly US and European visitors on board.

Bolstering Port security, therefore, became a primary concern. This has been achieved as far as we are able, given our limited resources, by increased surveillance at the Port, more rigid restrictions on persons who have access to it, and tighter scrutiny of the material that goes into it..

Additionally, we had to be concerned about foreign persons who are given entry to the country. Consequently, we have imposed more careful checks on persons who are given visitors visas, and our immigration authorities at border controls are exercising greater vigilance. However, because we are a tourist-reliant country, there are very few countries in the world upon whom we apply visa restrictions. We are, therefore, dependent on countries such as the United States and the United Kingdom to provide us with the names of terrorists and with any information on their movement to Antigua and Barbuda. Immigration officers maintain and consult a list of such terrorists at our border control points.

Antigua and Barbuda has also strengthened security at its International Airport through increased security staff, computerization, and expensive new scanning machines.

While we have implemented these measures to protect the lives of innocent people and the interests of the US and UK governments, we are also keenly aware that because we are highly dependent on tourism, it would take only one terrorist incident to cripple our tourist industry, ruin our economy and impoverish our people. Therefore doing all that we can to prevent a terrorist incident is as much in our interest as it is in the interest of the UK and the US.

Unlike some other countries, we have not passed legislation to increase border controls and the movement of goods and people, nor have we introduced legislation to detain persons without charge or trial.

With regard to our key considerations in adopting legislation and implementing machinery for enhanced measures against money laundering, these were three-fold:

First, whether we liked it or not, the world's powerful nations under the umbrella of the OECD and FATF had established directives which they insisted should be implemented under threat of sanctions against non-compliant countries. Small States, such as Antigua and Barbuda, lack the military and economic strength to resist the coercion of larger and more powerful States. Through diplomatic efforts, we did manage to put greater balance in some of the demands of the FATF and the OECD, but at the end of the day, we could not withstand the enormous pressures placed on our jurisdictions, including our demonization by accommodating media in major world capitals.

Second, we were aware that the systems and methodology utilized by money launderers and drug traffickers could be used by terrorists both to finance their activities and to smuggle material into and out of countries. There was therefore need for greater, more detailed and careful attention to be paid to these activities.

Third, Antigua and Barbuda recognised that if its offshore financial services industry was to survive and make a much needed contribution to the economy, it was important that the jurisdiction be above reproach by even the severest antagonist. Therefore, the government implemented the FATF's 40 directives on money laundering and its 8 recommendations on counter terrorism financing, and even went beyond them. The

result was that Antigua and Barbuda is today recognised as a model “co-operative” jurisdiction by the FATF, but it has lost considerable business, revenue and jobs.

No human rights violations

In adopting the legislation and putting the machinery for enforcement and international cooperation in place, human rights have not been violated. Significantly, the Courts of Antigua and Barbuda remain open for judicial review of decisions, and also for redress against any actions taken against an offender or a suspected offender. This includes the right to challenge an order to freeze or to forfeit assets.

On the matter of drug trafficking, I have already mentioned that the methodology and systems utilized by drug traffickers could be used by terrorists for the movement of material in and out of countries. Additionally, drug trafficking could be a source of financing for terrorist activity. Increased vigilance, tougher laws and heightened intelligence, therefore, became very necessary.

It should also be noted that drug trafficking has spawned a series of related crimes in the Caribbean including illegal firearms, murders – some of them executions, robberies with violence, kidnappings and corruption in both the public and private sectors. Already the rise in crime poses a serious threat to the security of many small Caribbean countries. If terrorist activity were to become intertwined with the already overwhelming problem of crime, small Caribbean countries such as Antigua and Barbuda would be unable to cope, and could find themselves embroiled in conflicts not of their own making with deleterious effects to their own well-being.

Since the events of September 11th 2001, apart from toughening anti-money laundering and drug trafficking legislation, Antigua and Barbuda has passed only one law directed at terrorism and that is the Prevention of Terrorism Act. The Act was passed into law within 3 months of September 11th. At that time the focus was on the interdiction of terrorist property, therefore it did not criminalize the wilful collection and provision of funds and other assets if they were intended to be used for the financing of terrorism.

In the context of the United Nations Security Resolution 1373 on counter terrorism, Antigua and Barbuda is now in process of drafting a new comprehensive Act. The Act will be based on the Commonwealth Model Legislative Provisions on Measures to Combat Terrorism

It is proposed that the Act will include provisions for exchanging information relating to terrorist groups and terrorist acts. It will also criminalise many activities including:

- actions by persons who provide property or financial or other services to be used in full or in part to carry out a terrorist act;
- the recruitment of persons for terrorist activity;
- the training of persons for terrorist activity;
- the arranging of meetings in support of terrorist groups;

The law will also prohibit the granting of asylum to terrorists.

Further, it will provide for the freezing of assets of terrorists or those who assist them, and, upon conviction, for the forfeiture of such assets even though offenders can now be charged under the existing Proceeds of Crime Act and the Money Laundering Prevention Act.

The new comprehensive Act will be debated in Parliament later this year, and may well not be passed into Law in the form in which it is drafted. Parliamentarians will debate the law paying attention to any aspects of it that pose a danger to civil liberties, as they have done with legislation relating to money laundering, drug trafficking and other crimes.

Little or no assistance for small countries

The requirements to comply with the anti-terrorism requirements of UN Security Council Resolution 1373 as well as the demands for increased security arrangements at our ports by civil aviation authorities, particularly in the United States, are extremely costly for small Commonwealth countries.

In the Commonwealth Caribbean, these new requirements come at a time when, as I have argued elsewhere, Caribbean economies are in decline. Economic growth rates have fallen between 2% and 4% per annum, some into the negative zone, unemployment rates have increased in all countries, vulnerability to economic shocks and natural disasters have not lessened, and the main industries of all but one of the countries face formidable challenges with a loss of preferential markets in the EU, a fall in other commodity prices, the likelihood that they will all have to open their markets to free trade arrangements with the European Union and the Americas, and the loss of considerable business in the financial services sector as a result of the adverse activities of the OECD and the FATF.² The additional costs of these requirements, when government revenues are reducing, place an excessive burden on small Commonwealth countries.

Commonwealth Caribbean countries are already beset with crime that is beyond the capacity of their individual police forces. Drug trafficking has become the pillar of criminal activity resulting in an exponential increase in corruption and violent crime.³

In this extremely troubling situation, the international community was less than forthcoming in supporting the efforts of Caribbean government to tackle the problem of crime. Elsewhere, I have detailed the reduction in support to the Commonwealth

² See Sanders, Sir Ronald, "Crime in the Caribbean: An overwhelming phenomenon", London, 2003 (Hansib)

³ Ibid

Caribbean at a time when it urgently needs help to cope with crime that threatens to engulf the area.⁴

Similarly, while the Commonwealth Caribbean Region has witnessed increased demands on their very limited resources to counter terrorism, the international community has provided very little assistance to help them to cope. In Antigua and Barbuda's case, we could not even access a soft loan from the World Bank to purchase scanning equipment for the Airport because we are considered a middle income country and therefore we are denied concessionary financing from the World Bank.

Conclusion

In summary then, in the case of Antigua and Barbuda the anti-terrorism legislation that we have introduced, and that we propose to introduce, does not erode the human rights of the individual. Further, the Constitution and the laws of Antigua and Barbuda continue to provide the individual with redress through our Courts and for judicial review of judgements.

It may very well be that, in the future, it will become a requirement of larger and more powerful States and their multi-national organisations that a condition of trade in goods and services, of official development assistance, even of access to their banking and other commercial systems, will depend upon the adoption of legislation that significantly erodes human rights including detention without charge or trial and maybe even extradition without Court proceedings.

We have seen such abusive detentions within some powerful States already. Just last week, the inspector-general of the US Justice Department criticised an array of practices within the US. These included:

- detention of 762 non-citizens in connection with terrorism inquiries, many on charges of entering the country illegally or overstaying visas;
- holding detainees for a month or more without being told why they were being held;
- innocent people were held for months while the FBI took longer than it should have to investigate and clear them;
- some were subject to physical abuse which included being held in lockdowns for 23 hours a day and then taken outside for one hour in leg irons, heavy chains and handcuffs.⁵

If these abuses can be allowed, if not encouraged, in powerful countries where adherence to, and respect for, democracy is said to be the foundation of their domestic societies, then I fear that, if the present dispensation prevails, they may not only become a norm within these societies, but they may also become a requirement in international society.

⁴ Ibid

⁵ Cited in The New York Times, on 3rd June 2002, "The Abusive Detentions of Sept. 11"

This fear may sound far fetched, but the coercive tactics of the FATF and the OECD on money laundering, terrorism financing and so-called 'harmful tax competition' indicate that there are some who now believe that world governance, including rules setting and enforcement, are their exclusive domain, and they are unhesitant in imposing them on others.

How this will unfold is left to be seen.