

FURTHER INITIATIVES IN CAPACITY BUILDING TO COMBAT TERRORISM

Paper by the Commonwealth Secretariat

BACKGROUND

1. At their Meeting in St. Vincent and the Grenadines, Law Ministers had mandated the Commonwealth Secretariat to assist member countries in the implementation of the United Nations Security Council Resolution 1373 (UNSCR 1373) in carrying on with its programme of developing legislative provisions on Counter Terrorism and the training of prosecutors and law enforcement officers. They specifically identified the need to develop law enforcement networks for exchange of information and co-operation and asked the Commonwealth Secretariat to arrange relevant training programmes. In response to this mandate, training programmes for prosecutors and law enforcement officials have been carried out over the past year.

2. Law Ministers had highlighted some critical issues concerning: (i) abuse of technology; (ii) tracking and disrupting the movement of terrorists and preventing abuse of travel documents; and (iii) the abuse of refugee systems. They asked the Commonwealth Secretariat to undertake further work in this area. They had also mandated Senior Officials to consider how member countries could be assisted with training and capacity building in enforcement contexts such as border control and the prevention of counterfeiting of identity papers and travel documents and to look into appropriate measures that may be put in place for preventing the abuse of refugee systems by terrorists and persons planning terrorist activities.

3. Senior Officials recalled the relevant recommendations of the Commonwealth Expert Group on the implementation of UNSCR 1373 including those on the abuse of refugee systems and border control but noted that many small and developing countries lacked the means to meet the heightened technological requirements, for example for machine-readable passports. They agreed to recommend to Law Ministers that the Commonwealth Secretariat should seek to take initiatives in this field including work to develop programmes for training relevant personnel and best practice guidelines and to assist in the development of co-operation, regionally and sub-regionally, on the sharing of information. The importance of ensuring appropriate co-ordination and avoiding duplication with existing initiatives was also noted.

4. At their meeting in London, Senior Officials considered these issues and recommended placing the initiatives before Law Ministers.

INITIATIVES

Abuse of Technology

5. There can be little doubt of the serious threat posed by possible acts of terrorism involving the abuse of technology or aimed at the disruption or destruction of technology systems. There are several examples of how technology such as cellular phones, computers and computer systems and other electronic devices can be employed to carry out terrorist acts. Also, there is a very real danger that terrorists may carry out acts aimed at crippling essential services, infrastructures or communications systems by attacking the underlying technology that supports these systems and structures.

6. At their Meeting in 2002, Law Ministers had commended the Commonwealth Model Law on Computer and Computer-Related Crime (MLCCRC) to member states for use in developing domestic laws in this area. At the same time they had also mandated Senior Officials to keep the MLCCRC under review to ensure that it was kept up to date with regard to emerging technology and investigative techniques.

7. While the adoption of a solid legislative base is important, there is an equally important need to enhance the capacity of law enforcement and prosecution authorities through training programmes in this field.

8. Similar considerations arise with respect to preventing acts of terrorism aimed at technology. The Commonwealth Model Legislative provisions on Measures to Combat Terrorism address this issue by including the following language in the definition of a “terrorist act”:

“an act or threat of action in or outside (name of country) which –

- (a) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;”

Action Sought

A1. Law Ministers may wish to consider further work that can be undertaken by the Secretariat to enhance the capacity of member countries to combat the abuse of technology and to prevent terrorist acts aimed at such technology and may also wish to consider that further work be undertaken to review the content of this model law in terms of any recent changes or developments. They may also consider if any additional legislation is required to address the broader issue of abuse of technology generally.

A2. Some possible areas for consideration are highlighted below.

- (i) To organise workshops for legislative drafters to help those countries that do not have the relevant legislation.
- (ii) To organise workshops for law enforcement officers and prosecutors to enhance their capacity to investigate and prosecute these crimes, in tune with international best practices.

Tracking and Disrupting the Movement of Terrorists and Preventing Abuse of Travel Documents

9. Terrorist activities are mostly clandestine. International terrorism has a wide transnational reach which necessitates travel to target countries to carry out terrorist operations and escape from those countries after acts have been committed. There is also a need for members of terrorist groups to meet and plan their activities which also involves international travel. Terrorists can use illegal means to facilitate their movements across borders and within states or, as in the case of the 11 September hijackers, they may travel legally as ordinary passengers. The use of both legal and illegal methods creates particular challenges for law enforcement authorities attempting to track their movements. To effectively prevent and combat terrorism, particularly international terrorism, the importance of tracking and disrupting the movement of terrorists cannot be over emphasised. If travel plans can be detected and disrupted, this can successfully thwart a terrorist attack.

10. Alien terrorists are adept at identifying and taking advantage of weaknesses in immigration and refugee systems to gain entry into other states and as such they can easily “slip the net”, without alerting the law enforcement system. Similarly, there are many countries where flaws in travel

documentation and the review systems allow for easy forgery of papers or the undetected use of fraudulent documents. These failings can be exploited by terrorists to facilitate their activities.

11. The necessity for countries to have effective border controls to prevent free movement of terrorists was highlighted in the UN Security Council when they considered Resolution 1373. Article 2(g) of the Resolution provides:

“Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;”

12. In the development of model legislative provisions, aimed at assisting countries with the implementation of the Resolution, a Commonwealth Expert Group meeting was held to consider the relevant issues and to prepare drafting instructions for that model. The Expert Group issued a report which contained, *inter alia*, recommendations for measures to effectively implement the Resolution.

13. In considering the obligation in Article 2(g), the Commonwealth Expert Group recommended various measures that could be adopted. These included providing for the transmission of passenger information from private industry, in particular airline companies, to relevant government authorities, ensuring adequate powers for the sharing of information by border control officers and reviewing existing laws relating to:

- (i) the counterfeiting or forging travel or identity documents;
- (ii) the fraudulent use of travel or identity documents;

to ensure that they are sufficient and that all of the offences carry appropriate penalties.

14. They were of the view that each country would have to adopt an approach that was most appropriate, within the particular context of the country and region and taking into account resource and capacity restrictions. The Group also noted that careful consideration would have to be given to the relationship between these provisions and any applicable privacy/data protection laws and an appropriate balance be struck in that regard.

15. With respect to any legislation allowing for the dissemination of information, particularly information held by private industry, the Group highlighted the need for legislative protection in terms of use, limitations, confidentiality and the scope of information available. The Secretariat has captured this recommendation in the model legislative provisions that it has prepared and made available to member countries. The Secretariat has also taken steps through its workshop programme and specific technical assistance to help member countries adopt the legislative provisions or adapt them to their needs, as part of capacity building in this area.

16. However, the obligations arising from Article 2(g) of UNSCR 1373 are not met only through legislative enactments. There is more, outside the legislative framework, that countries need to do to achieve their goals. The Group also recognised this and made the following additional recommendations to member countries.

- Review and enhance procedures for border checks and the issuance and examination of travel documents, including, if possible, using centralised data bases for checks by immigration, customs and law enforcement authorities and improving the quality of immigration documents such that it is more difficult to forge them.
- Adopt, or improve, arrangements with other countries for exchange of information relating to border checks.

Action sought

A3. To assist member countries in realising these objectives, Law Ministers may wish to consider action that could be undertaken by the Secretariat. Some possible areas for consideration are highlighted below.

- To develop training programmes directed at enhanced capacity to provide adequate security at border posts.
- To train immigration officials to detect counterfeit documents.
- To train airport security personnel in detecting counterfeit documents and in identifying travellers.
- To facilitate the transfer of technology and technical assistance for sophisticated equipments to enable verification of authenticity of travel documents.
- To undertake a review of immigration laws in the Commonwealth and to make model legislative provisions aimed at rationalising and harmonising laws and procedures to make them in tune with the requirement of modern times. This may be undertaken jointly with the International Organisation for Migration (IOM) and the UNHCR.
- To undertake a review of laws governing the movement of cash and other instruments across borders and to make model legislative provisions aimed at rationalising and harmonising laws and procedures to make them in tune with the requirement of modern times, particularly Special Recommendation IX of the Financial Action Task Force (FATF) relating to the Financing of Terrorism.
- To train customs and other law enforcement officials in the detection of illegal movements of cash and other instruments across international borders.
- To facilitate, as part of the Criminal Law Section's programme of attachments and secondments, the inclusion of immigration officers.

Abuse of Refugee Systems

17. It is clear that refugee systems can be misused by terrorists seeking to gain entry to a country. At the same time, there are sensitive and difficult issues that need to be considered in the development of measures to prevent such abuse. There is an understandable need for countries to enhance security safeguards against the abuse of international asylum regimes, but it would be a terrible irony if those who flee terror become the unwitting victims of the fight against terrorism.

18. It must be recognised that the overwhelming majority of asylum seekers have nothing to do with terrorism and terrorists acts. It is essential to maintain and strengthen the international protection regime that has long existed to protect genuine refugees and the fight against terrorism should not result in the weakening of that system. But it is equally clear that terrorists can use refugee systems and a claim of refugee status to facilitate cross border movements. The perpetrators of terrorism can join refugees fleeing into neighbouring countries. A claim of refugee status can be orchestrated to gain access to a target country. There is also the very real danger that persons who are granted asylum from political persecution may continue to organise terrorist activities from the country of asylum and use their status as a shield against any efforts to bring them to justice.

19. Therefore, in addressing concerns regarding the refugee system, a balance needs to be achieved between effective and fair protection for refugees and safeguards against abuse and misuse.

20. UNSCR 1373 raises the issue of abuse of refugee/asylum systems by terrorists and recognises the need for a balanced approach that takes into account the mandates of national and international law and human rights standards as well as security concerns. Articles 3(f) and (g):

“Calls upon all States to:

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts.....”

21. The Group also considered this issue in their deliberations and highlighted as well the need to strike a balance between the various important interests and obligations involved. Member countries needed to respect and fulfil obligations to refugee claimants under applicable international conventions, while at the same time ensuring that the refugee process was not misused by individuals involved in terrorist activities to obtain safe haven.

22. The Group went on to consider and recommend some possible legislative provisions that would better safeguard the process against abuse, including an executive power to preclude consideration of a refugee claim where the authority was of the view that the individual had, is, or would be involved in terrorist activity. This power would serve to protect the public and prevent safe havens. At the same time, judicial review could be employed to protect the rights of the individual in such cases. A legislative provision to this effect has been incorporated into the Commonwealth model.

23. The Group also recommended that, if applicable, member countries:

- review and, where necessary, enhance procedures for the consideration and determination of refugee status;
- enhance the training of personnel responsible to process and consider refugee applications.

24. These recommendations identify some practical measures that can be undertaken by the Secretariat to advance the mandate of Law Ministers.

- Consideration could be given to the development of tools such as a best practice guide that would assist member countries in the review and enhancement of refugee status provisions.
- To implement the recommendations on training, a wide, holistic approach would probably be the most effective. Training of persons involved in vetting asylum seekers, though central to the point, is not the only solution. Other personnel involved in the administration of asylum applications and control of borders should also receive the training.
- Relationships with neighbouring countries from which or through which asylum seekers enter applicant countries could also be looked at. Methods for effective sharing of information, particularly on a regional basis, could be examined. This work could be carried out in partnership with relevant regional and sub-regional bodies.

Action sought

A4. Law Ministers may wish to consider action that can be undertaken by the Secretariat to assist countries in preventing the abuse of refugee systems possibly including:

- the development of best practice guidelines for refugee system procedures;
- the training of immigration and related personnel on the application of refugee conventions and laws;
- facilitating co-operation, regionally and sub-regionally, on the sharing of information to assist in the identification and tracing of persons suspected of involvement in terrorist activities or groups or the movement of terrorist funds;
- establishing and/or strengthening channels of communication between competent authorities and agencies to facilitate rapid exchange of information.

Abuse of Charities or Non-Profit/Non-Governmental Organisations

25. The NGO sector, comprising Charities or Non-Profit/Non-Governmental Organisations, has been identified as the most vulnerable sector that may be abused by criminals and terrorist organisations. This concern has been articulated in such documents as FATF Special Recommendation VIII. Charities or Non-Profit/Non-Governmental Organisations may be used by terrorists or terrorist organisations for the movement of funds or for funding terrorist activities in the guise of legitimate entities. Many countries do not have any regulatory framework in place and many of those who have, are not clear as to how a regulator should behave. There is also a lack of understanding relating to supportive activities that ensure that the NGO sector is positively developed and not inhibited by excessive regulation. It is, therefore, essential that a proper Code of Conduct, for regulating both the Charities/NP/NGOs and also the Regulators, is framed for Commonwealth countries.

Action Sought

A5. Law Ministers may consider asking the Secretariat to undertake a programme to develop a Code of Conduct, based on international best practices. The Code should aim at improving the capacity of states to effectively regulate NGOs whilst at the same time ensuring that the growth of this sector is not adversely affected.