Terrorism and the Financial Sector: Are the Right Prosecutorial Tools Being Used?

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INTRODUCTION

There are currently few more important issues than protecting citizens from terrorist attack, and cutting off terrorist financing is one way to do that. The US Congress has given federal prosecutors in the USA a variety of prosecutorial tools that can be used in terrorist financing cases — tools for gaining criminal convictions and tools for confiscating assets as well. Some of these existed before 11th September, 2001, and others were enacted as part of the USA Patriot Act immediately thereafter. All of these tools can be applied in one situation or another to those who finance terrorist acts and who use the financial system to do it.

The purpose of this paper is to make some observations about the range of tools that prosecutors in the USA have been given to track down the people financing terrorism and to confiscate their money. All of them have their place, and all have their uses. Of the many tools that can be used, however, some are easier to use than others, and in fact some of the provisions enacted to deal exclusively with terrorist financing apply in such narrow circumstances that they are unlikely to be of practical value in most cases. So, as will be shown, this paper will propose a back-to-basics approach that focuses on some of the more pedestrian criminal offences that are easier to investigate and easier to prove than some of the more state-of-the-art terrorism offences. This may be the way to achieve the ultimate aim of depriving terrorists of their money more quickly and more effectively.

METHODS OF FINANCING

First, the context must be established: what is 'terrorist financing'? What problems does law enforcement encounter in such cases?

In some cases the problem is money coming into a country to finance a specific terrorist act. That money, of course, is notoriously hard to spot. The attacks of 11th September only cost about $500,000. Wire transfers of that size occur hourly. In fact, small amounts do not have to be wired into the country at all. A deposit into a foreign bank that is on the US automated teller machine (ATM) network will allow someone in the USA to withdraw whatever he needs from the foreign bank with his ATM card, just as an American tourist or business traveller uses an ATM card when he is travelling overseas.

In terms of substantial sums, funds are increasingly going to organisations in the USA that are not terrorist organisations *per se,* but those that hold and promote views that terrorist organisations share. Those are organisations, of course, whose members constitute a pool of likely recruits for terrorist causes. For example, someone might receive funds overseas and attempt to transfer that money into the USA to support an Islamic organisation purportedly engaged in charitable, humanitarian, religious or political activities. Given First Amendment concerns and a host of other issues, there is not much that can be done about this type of terrorist financing — if it can even be called that — under a 'terrorist financing' statute. If law enforcement is to intervene at all in such cases, it must do so pursuant to a statute that is content neutral.

Outbound money

On the outbound side, money is being contributed to so-called charitable or humanitarian organisations and then being sent overseas by those organisations where it may be intended to do no good. A lot of proceeds of petty crime are also going overseas (as cash, bearer instruments and wire transfers) to places where one has to be suspicious of its intended use.

The author personally handled a case some time ago where the cash proceeds of pseudoephedrine diversion were being stuffed into Lady Clairol hair colour boxes and shipped to Yemen. Those in the money laundering enforcement business are used to seeing criminal proceeds being laundered in offshore banks in the Caribbean or on an island such as Vanuatu in the Pacific. When the money is going to Yemen, they wonder if there is not more to the case than just a desire to hide the proceeds of crime from the law enforcers.

The problem with all of these outbound financing scenarios — whether the money constitutes charitable contributions or proceeds of petty crime being sent

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overseas — is that it is difficult to prove that the money was intended specifically for terrorist purposes. It may have been intended for some other criminal purpose; it may be legitimate; or it may be money involved in garden variety money laundering, currency smuggling or tax evasion.

Moreover, it is difficult to prove the intent because it is terribly hard to tell where the money ends up. If the money clearly went to a terrorist group, that would be one thing; but more often it is not that obvious. Suppose the money went to a Middle Eastern bank, or to the account of a Middle Eastern money broker. Who makes withdrawals from that account? To whom is the broker selling or distributing the money? Is the money simply going into the account of a wealthy person or business which then distributes it in ways that cannot be detected? Is it simply converted into cash? Is this just one-half of a parallel transaction whereby the money being tracked goes into account A, and then other money comes out of account B which we know nothing about?

TRADITIONAL FORENSIC ACCOUNTING TECHNIQUES

Traditional forensic accounting techniques of following money do not work very well in this context. More often than not, these cases are not simple wire transfers from one bank to another. Frequently, the person receiving the money sent to a terrorist organisation overseas is not found out until military forces seize records in a cave in Afghanistan, someone is captured abroad and he starts to cooperate, or someone is prosecuted in the USA on some other criminal offence and he agrees to cooperate on fear of being denaturalised and deported.

In other words, the most success is achieved when good police work — when an undercover investigation, an informant, or surveillance of one kind or another — identifies a particular target and his financial transactions can then be monitored.

Some examples of this will be given later in the paper. But the principal point is that, given the difficulties in proving where the money goes — that is, in proving the link to terrorism — it is very difficult to use the new terrorism financing statutes that were enacted to help in attacking this problem.

STATUTES

What are the statutory tools and why are some easier to use than others? All kinds of statutes exist in the USA that are aimed specifically at terrorist financing, and there is a suite of older, more generic tools that can be used in the more mundane cases. It transpires that, while the terrorism-specific statutes have proven useful in a number of cases, because of the investigative difficulties already described, the more prosaic tools can often be more helpful that those that are not terrorism specific at all. This concept is discussed below.

Section 981(a)(1)(G)

The new statute, 18 USC §981(a)(1)(G), enacted by the Patriot Act, says that all assets of a terrorist organisation can be forfeited, whether or not those assets were derived from or used to commit a terrorism offence. This is obviously an important tool. If Osama bin Laden chooses to place al-Qaeda's assets in a New York bank, the government can seize them without having to show what the organisation planned to do with that money. The problem is that assets are rarely found in the USA or anywhere else labelled 'assets of a terrorist organisation'. This statute can be used at the appropriate time, but it is not something the prosecutor is likely to employ on a daily basis.

Section 2339A

There is also a set of terrorist financing offences in title 18, such as §2339A and §2339B. Section 2339A makes it a crime to send money to someone else, knowing that it is going to be used to finance a terrorist act. In August 2003, this was the statute that the US government used to charge Hemant Lakhani, the arms dealer who was arrested for trying to arrange to import shoulder-fired surface-to-air missiles into the USA so that they could be used to shoot down commercial airliners in New Jersey.

Section 2339A offences are hard to prove, however, because they require proof that the accused knew that he was sending money to or on behalf of a terrorist group. Because Lakhani was tape-recorded saying that he knew who and what he was dealing with, the US government could allege that he knowingly violated this statute. But in general, if someone simply sends money through the financial system to someone else, or makes a charitable contribution, it may be difficult to prove that he knew he was financing terrorism. In fact, the financing scheme may be set up to make it appear that the participants were, at most, engaged in routine fraud.

Lakhani, for example, attempted to disguise the

financing of his scheme to sell missiles by giving the person he thought was the buyer (but who was really an informant) a false invoice from a company in Cyprus that was supposedly selling medical supplies originating in Russia. He then directed the 'buyer' (the informant) to send the payment for these supplies ($60,000) to a Swiss bank account. Take away the fact that an informant was involved and that the discussions revealing the true motives behind this transaction are recorded on tape, and this looks like any one of thousands of commercial transactions occurring every day. In other words, if all that existed were false invoices for non-existent medical supplies, the prosecutors might have a fraud case or a money laundering case but might not have proof of intent to engage in financing terrorism, which is what §2339A requires.

Section 2339B

Section 2339B is another terrorism-specific statute that makes it an offence to give money or other material support to any one of 36 listed terrorist organisations.[1] The theory behind this statute is that it eliminates the requirement that the government prove that the money was to be used for terrorism, or that the defendant was aware of that intended use. On the contrary, it is a crime simply to give money to Hamas or al-Qaeda or anyone else on the list of foreign terrorist organisations (FTOs). That the accused thought the money would be used for a charitable purpose is not a defence.

The problem is that the 36 FTOs do not raise money in their own names; they use fronts with names like 'Help the Needy' or "'Global Relief'. Thus the government still has to prove that the organisation was really a front for one of the 36 listed groups, and most importantly, that the donor knew it. The bottom line is that, while §2339B has been used successfully on some occasions,[2] like §2339A it is very difficult to use in the routine case.

BACK TO BASICS

Reverse money laundering

A much simpler device is the international money laundering statute. Under 18 USC §1956(a)(2)(A), it is a crime simply to send money out of the USA with the intent of promoting another crime, such as any foreign crime of violence. Because this is a 'reverse money laundering' statute — the only one in current federal law[3] — the money does not have to be 'dirty money' that was derived from another criminal offence. On the contrary, it is enough to show that the purpose of the transaction was to promote an illegal act in the future.

Moreover, there is no need to show that the defendant acted with any political or ideological motive. That is, the US government would not have to prove that the defendant intended to finance terrorism (a term of art with a lengthy definition), or prove that the money was going to a designated terrorist organisation (FTO). It would be enough to show that the defendant intended to promote one of the 250 US and foreign crimes listed in the money laundering statute.[4]

In other words, just sending the money out of the country with the intent to commit arson, murder, bribery, bank fraud, etc would be enough, and all of the property 'involved in' the §1956(a)(2)(A) violation, not just the 'proceeds', would be subject to forfeiture. Thus, in many cases, the government might be better off considering §1956(a)(2)(A), not §2339A or §2339B, as the tool for prosecuting a defendant suspected of being engaged in financing foreign terrorism, and confiscating his money.

Domestic transactions: §1960

The international money laundering statute, of course, only works for international transfers. Another statute that works both internationally and domestically is 18 USC §1960, which was substantially amended by the Patriot Act. This only applies to money remitters — persons and organisations that transfer funds on behalf of others — but, as will be shown, the term is broadly defined and is not limited to formal, licensed, bricks-and-mortar operations.[5]

To prove a violation of §1960, all the prosecutor has to show is that the defendants were in the business of moving money and that they did not have a money remitter's licence, *or* that they knew that the money they were moving was derived from a criminal offence or was intended for an unlawful purpose. The second part of this needs to be emphasised: *any unlawful purpose* will suffice. It could be tax evasion or violating the currency control laws of a foreign country.

In other words, if someone is operating as a money remitter, sending money within the USA or overseas without a licence *or* knowing that the money is intended to be used to commit an unlawful act — *any* unlawful act — there is an offence that does not

require proof of any terrorism nexus. Thus, violations of §1960 may be easier to prove than some violations of the terrorism-specific statutes.

The Case of Abraham

The following is an example of a recent use of §1960. Lakhani thought he was procuring missiles from Russia for a terrorist in the USA and he arranged for the buyer send $60,000 to a Swiss bank account. As it turns out, that was only one of the payments. There was an earlier down-payment of $30,000 in cash paid in New Jersey. As alleged in the government's complaint, it worked thus: Lakhani told the informant that he wanted him to pay $30,000 in cash (all in $100 bills) to his colleague, Yehuda Abraham, a merchant in the New York diamond district, who would transmit the money to the supplier of the missiles in Russia using his *hawala*. The informant gave the $30,000 in cash to Abraham who said he was very experienced in sending money overseas in ways that cannot be traced. Abraham received a $1,500 commission for his efforts.

What could the government charge Abraham with? It could try to prove that he knew the money was being used to aid a terrorist cause (§2339A). It could try to prove that he knew he was sending money overseas to promote some other criminal act (§1956(a)(2)(A)). But the simplest offence was to prove was a violation of §1960.

Abraham said he was experienced at sending money overseas, he sent this money overseas and he accepted a $1,500 commission. In fact, after the first transaction was completed he agreed to transmit another $500,000 for 50 more missiles (but was arrested before that could happen). That made him a money remitter for the purposes of §1960 and, as it transpired, he did not have a money remitter's licence in the State of New York. So the crime with which Abraham and another co-defendant were charged was conspiracy to violate §1960 by operating a money remitting business without a licence.

It is hardly a glamorous offence, but it carries a five-year prison sentence and the forfeiture of any property involved in the offence, including Abraham's business, if he is convicted.

CURRENCY REPORTING STATUTES

There is one other set of unsung statutes that can be extremely useful in terrorist financing cases. The following tactic comes from the author's experience in combating money launderers who deal almost exclusively in cash in drug cases.

When people who do not want to create a paper trail have to move money, they keep it in cash, and use couriers to move it in bulk from one place to another. In doing so they often fail to comply with the currency reporting requirements, ie the requirements whereby banks must report cash transactions exceeding $10,000 to the government and travellers must report to the Customs Service whenever they take more $10,000 out of the country.

For more than two decades, the currency reporting requirements have been used against drug dealers and money launderers who try to structure cash transactions to avoid the $10,000 requirement or who simply smuggle currency out of the country. Those offences are easy to prove: they do not require proof of any criminal intent beyond their aim to evade the reporting requirement, and they can result in substantial jail sentences and the confiscation of the money.

The point is that when the elements of a terrorist financing offence cannot be established — when it cannot be determined where the money went and thus intent cannot be proved, or when the jurisdictional elements otherwise are lacking — the currency reporting statutes serve as alternative vehicles for prosecution and the confiscation of the money. A person who breaks more than $10,000 in cash into smaller amounts for deposit, or who buys numerous money orders with cash that totals more than $10,000, is violating 31USC §5324(a)(3), the anti-structuring statute. And a person who conceals more than $10,000 in cash (or instruments in bearer form) and tries to smuggle them into or out of the country without filing a Customs form — in luggage, in a concealed compartment in a trailer, in a FedEx box, in the back seat of an aeroplane, or stuffed in his shoe[6] — is guilty of the new bulk cash smuggling offence in 31 USC §5332. Again, in such cases there is no need to prove any motive or intent, other than the intent to evade the reporting requirements.

This is the type of activity in which the terrorist financiers are involved. If they can be prosecuted on one of these offences, the threat of prosecution, deportation or confiscation of the money might generate cooperation and lead to bigger discoveries.

CONCLUSION

As mentioned earlier, the sophisticated tools that Congress has given federal law enforcement are to

be welcomed, as are the numbers of people working on tracing the money flow and watching transactions through international financial networks. All of this is important. But the easy ways to prove currency reporting crimes cannot and should not be overlooked as the world is scoured for terrorist financiers. Charging a Yehuda Abraham with operating a money remitting business without a licence, or uncovering several hundreds of thousands of dollars stuffed into Lady Clairol boxes bound for Yemen — not because it can be proved that it was intended to be used to finance terrorism, but because it was involved in a currency smuggling offence — is important too. Those cases may not be glamorous, but they are effective.

References

(1) *See* Breinholt, (2003) 'What is Terrorist Financing?', *USA Bulletin*, Vol. 51, No. 4, July, at p. 7.

(2) In *United States v Mohamed Hammoud*, 3:00 CR 147-MU (WDNC), the lead defendant was convicted by a jury in 2002 and sentenced in 2003 to 155 years in prison.

(3) *See* Cassella, S. (2003) 'Reverse Money Laundering', *Journal of Money Laundering Control*, Vol. 7, No. 1, pp. 92–94 (paper presented at the 20th Cambridge International Symposium on Economic Crime).

(4) See 18 USC §1956(c)(7).

(5) See Cassella, S. (2003) 'Application of 18 USC §1960 to Informal Money Service Businesses', ___ *Criminal Law Bulletin* ___.

(6) See *United States v Garcia Gaxiola*, No.CR-02–1668-TUC-JMR (D. Ariz. 24th July, 2003).

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