

Latin lessons

Counter-terrorism legislation in South America

The legacy of military rule in South America has left the citizens of many countries distrustful of seemingly authoritarian legislation. **Janet Tappin Coelho** and **Gideon Long** look at counter-terrorism legislation in Brazil and Chile.

► KEY POINTS

- Mistrust of authority, citizen activism, and fear of the misapplication of legislation mean counter-terrorism laws remain controversial and difficult to implement in South American countries such as Brazil and Chile.
- Brazil is struggling to enact any of three draft counter-terrorism bills ahead of its hosting of the 2014 FIFA World Cup and the 2016 Olympics, with many local commentators suggesting that existing legislation is sufficient to counter the threat.
- In Chile, a challenge to controversial 1984 counter-terrorism laws and the difficulty in securing convictions mean the use of current legislation is likely to wane and may cease altogether.

In late May 2013, Brazilian police arrested Hamzi Ahmad Barakat, a Lebanese businessman, in the southern Brazilian city of Curitiba, Paraná state. Barakat stood accused by United States intelligence agencies of having links to Lebanese militant group Hizbullah. A Brazilian government source subsequently told *IHS Jane's* that politicians were alarmed by the accusation, which had been made so close to the opening of the football Confederations Cup in June.

To defuse the situation, the Brazilian government chose to downplay the incident, declining to publicly comment on the affair, particularly to the US media. Instead of the matter being handled by the Brazilian Intelligence Agency (Agência Brasileira de Inteligência: ABIN), it was left to the federal police to

explain that Barakat was being charged with the lesser crimes of embezzlement, identity fraud, and swindling garment suppliers out of USD4.5 million. His case is still pending. Nevertheless, the arrest focused attention on a controversial gap in Brazil's legal framework.

Across South America, the shadow of military dictatorships from the 1960s to the 1980s continues to weigh on contemporary politics and society through widespread societal antipathy towards legislation perceived as authoritarian. The countries of the Southern Cone (Argentina, Chile, Paraguay, and Uruguay) endured particularly repressive military regimes, while Brazil's 1964–85 dictatorship also soured the public's relationship with the armed forces.

Part of the hangover from military rule has been a difficulty in defining and codifying the concept of 'terrorism', and thereby also in enacting or effectively deploying counter-terrorism legislation. Many currently senior politicians in the region – including Brazilian president Dilma Rousseff, Uruguayan president José Mujica, and former Chilean president Michelle Bachelet (2006–10) – were either active members of leftist insurgencies dubbed 'terrorist' by the military or were closely associated with leftist ideologies. For Brazil and Chile in particular, counter-terrorism legislation thus remains a divisive issue.

Preparing for big events

Brazil does not have a specific counter-terrorism law that typifies in clear and precise terms what constitutes an act of terrorism. As such, there is no set punishment to tackle such activities, as the term 'terrorism' has never

A demonstrator holds a Brazilian flag in front of a burning barricade during a protest in Rio de Janeiro, Brazil, on 17 June 2013. Critics are concerned that proposed counter-terrorism legislation in Brazil could be used against legitimate protests.

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been fully defined under the law, especially with the characteristics acquired after the 11 September 2001 attacks on the US.

As Brazil prepares to host two of the world's most prestigious sporting events – the FIFA World Cup in 2014 and the Olympics in 2016 – the pressure to institute a law in line with other countries is particularly intense. By mid-2013, there were three potential counter-terrorism laws progressing together through the Senate, Congress, and Chamber of Deputies that could expand what qualifies as terrorism and establish sentencing guidelines for offences. A detailed review and reform of Brazil's 1940 penal code is also being undertaken.

Despite the current intention to bring a counter-terrorism law into practice, Brazil has for years been inherently averse to dealing with the concept. In a series of diplomatic cables sent in October 2009, the former US deputy chief of mission in Brasilia, Lisa Kubiske, said: "In most of [my] planning with [my] Brazilian counterparts, the traditional mantra has been to avoid using the word 'terrorism' and instead use the less controversial term 'transnational crime' as a euphemism for all activity that involves organised violence

and threat."

She went on to say: "Despite publicly expressed sentiments of high-level officials denying the existence of proven terrorist activity on Brazilian soil, Brazil's intelligence and law enforcement services are rightly concerned that terrorists could exploit Brazilian territory to support and facilitate terrorist attacks, whether domestically or abroad."

Brazil emerged from military dictatorship in 1985 to form a democracy, yet the memory of military rule is still a vestige of the past for a generation of Brazilians who were part of the armed struggle for civil rights.

This legacy was evident when Rousseff and other members of her government displayed a reluctance to condemn the demonstrators during the recent social uprisings in June 2013, which disrupted FIFA's 'curtain-raiser' Confederations Cup, bringing more than 100 Brazilian cities to a standstill. As a former resistance leader, Rousseff was labelled a terrorist, and imprisoned and tortured under the military dictatorship.

In addition, one of the main obstacles to proceeding with this thorny issue for the government is the fear that social movements

that are historically bonded to the ruling Workers' Party (Partido dos Trabalhadores: PT), such as the Landless People's Movement (Movimento dos Trabalhadores Rurais Sem Terra: MST), could come to be depicted as terrorists.

There is also deep concern that counter-terrorism legislation could be used as a pretext to criminalise and persecute social movements, such as the Free Pass Movement (Movimento Passe Livre: MPL) – an activist movement petitioning for free public transport – as well as civilian protesters who participate in anti-government rallies that include widespread violence.

It is therefore under duress that Brazil is now working towards bringing in a counter-terrorism law with sentencing penalties of 15–30 years that could be in place before the beginning of the World Cup. Inevitably, placing one of the three draft laws onto the statute books is proving difficult. The process has generated heated disagreements among lawmakers, who believe a new counter-terrorism law could trigger even more social unrest.

It was for this reason that Senator Ana Amelia of the Progressive Party (Partido Progressista: PP) decided to withdraw her sponsorship from one of the three counter-terrorism bills at the end of June. At her suggestion, all 12 members of the Committee of Regional Development and Tourism voted against the bill in its present format.

The draft project, which was at the second stage of a five-committee process, had been drawn up specifically to deal with crimes and administrative violations affecting thousands of spectators attending the Confederations Cup and the World Cup. The bill, although late in its delivery, would have prohibited those who "provoke or strike terror or cause widespread panic, bodily offence or deprivation of a person's liberty, for ideological, religious, political or racial, ethnic or xenophobic reasons".

A clause banning public sector workers from striking three months before and during the 2014 tournament had already been withdrawn following protests from other committee members, who said it would have been unconstitutional and unenforceable.

"This bill drew a lot of criticism from those who claimed it would be used to ban them from protesting and would criminalise their right to strike and their right to demonstrate," Amelia told *IHS Jane's*. "This was never the intention. The objective was to create a real definition of terrorism at a time when we needed it most: during the World Cup. But





Riot police remove a man during clashes with participants of the People's Summit march in Santiago, Chile, on 25 January 2013. Protestors were demanding an end to Chile's use of a counter-terrorism law against Mapuche struggling to recover ancestral lands.

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right now the political climate in our country is not conducive to introducing this kind of initiative," she explained.

Despite Amelia's stance, the rejected bill will still continue through the Senate's committee stages, but with another sponsor. However, it could finally be halted when it reaches the last Committee of Constitution, Justice, and Citizenship, the members of which will decide whether it is viable or not.

Public security expert Eduardo Pazinato, a professor at the University of Santa Catarina, argues that Brazil does not need new laws to deal with extremist threats. Pazinato told *IHS Jane's*: "We have enough legislation in place that could be used to tackle international terrorism.

"We do not have a problem of terrorism in South America. But I believe that if we focus on this issue we will bring the problem to our shores. We should also remember that there is a wide divergence on the concept of international terrorism, and what works for America [the US] and the European Union is not necessarily right for South America."

Brazil's existing laws, to which Pazinato is referring, include the Constitution, which repudiates terrorism and racism in Article 4.8, and provides for the punishment of terrorism using a generically defined term in Article 5.43. Alongside this, Brazil has three other laws that could be interpreted for use against militant activity. The Heinous Crimes Law 1990, Article 2; the National Security Act 1983, Article 20; and the Political and Social Order Law 2003, Article 4 all mention the

crime of terrorism, but are all limited in their definition.

This is not the first time Brazil's legislature has tried to introduce a counter-terrorism law. The draft bill currently being proposed by Deputy Onyx Lorenzoni is an amalgamation of four previous ones on the subject, with the oldest dating back to 1991. The definition of terrorism in Lorenzoni's bill includes "acts of burning, looting, plundering public assets, exploding bombs, performing acts of sabotage that attempt to harm or endanger the physical integrity and freedom of movement". The bill also establishes penalties of between six and 30 years, depending on the severity of the act.

In late July, as demonstrators took to Rio de Janeiro's streets to protest against Pope Francis's visit and the high level of public money spent by the government on the July World Catholic Youth Day festival, Pazinato warned: "If this law was already in force and protesters were being arrested today, they would be classified as terrorists because some of the excessive practices listed in this law could be criminalised."

Lorenzoni's bill went to the plenary in the Chamber of Deputies in early July, and a motion to create a special committee to discuss and vote on it was scheduled for August. Lorenzoni remains optimistic that the draft proposal will be active before the World Cup, but explained to *IHS Jane's* that because of the lengthy time it takes for a bill to traverse the committee systems in the Chamber and the Senate, there are likely to be delays caused by amendments and discussions. Lorenzoni said:

"I believe it will take at least a year and a half before it becomes law. I will try to push for it to happen before the World Cup but realistically it may only be ready for the Olympics."

The draft counter-terrorism law most likely to succeed is currently being guided through Congress by Senator Romero Jucá of the Democratic Movement Party, vice-president of the Senate. PT deputy Cândido Vaccarezza, who is working closely with Jucá, predicts that the proposal could be ready for voting in mid-to-late 2013, after which the bill will be sent to either the plenary in the Senate or the Chamber of Deputies, depending on the scheduling process.

However, there are still no certainties. Speaking to *IHS Jane's*, Salo de Carvalho, a criminal lawyer and assistant professor at the University of Santa Maria, said: "The national legislative process is quite complex, and it is impossible to predict which of the projects will or will not be approved."

Only one out of the three bills can become law, as the others will have to be abandoned upon the stamp of approval to avoid conflicting provisions. The bill's success will be dependent on a number of factors, including how influential the promoter is. He or she will need to negotiate the smooth and swift transaction of the bill in both the Senate and the Chamber, and consult closely with the government to reduce the risk of the proposal being vetoed by Rousseff.

Meanwhile, outside everyone's control is the public's reaction to a counter-terrorism law. This could manifest itself in protests against the bill if private citizens decide to challenge its introduction. Jucá's draft proposal is already facing stiff opposition from committee members angered by the wording that defines the practice of terrorism as an act that "causes or strikes terror or panic for ideological reasons, religious, political, racial, or ethnic prejudice".

Miro Teixeira of the Democratic Labour Party (Partido Democrático Trabalhista: PDT) requested the withdrawal of the section "for ideological reasons, religious, political, or racial or ethnic prejudice" at the last Special Joint Committee of Congress hearing in June, saying: "This wording doesn't allow for differentiation between social movements demanding civil justice and those carrying out acts of terrorism." He went on to say: "If you leave the text in it will generate 7,000 interpretations."

In response, Jucá insisted that the definition of the practice of terrorism must appear on the

bill in this given wording in order to meet the international demand related to Brazil holding the World Cup and the Olympics. In July, following members' concerns, he appended an exclusionary clause exempting the actions of civilians "driven by a social purpose aimed at seeking rights, freedoms and constitutional guarantees" from being characterised as terrorism.

"We are taking great care to build a law to combat terrorism that will not be confused with repression of social movements," Jucá said. The plan is now to ask for urgency – 'pedido urgência' – in the process.

De Carvalho told *IHS Jane's*: "The problem with passing criminal laws without giving them sufficient time to be debated with the professional and judicial community means that no real analysis of the impact of the law and the implications of how it will be applied will happen. This could have serious repercussions in society at large."

For years, Brazil has faced a range of domestic security threats on a daily basis. The most pressing comes from violent drug cartels and organised crime. If a new counter-terrorism law is passed, many will be eager to see if the Primeiro Comando da Capital (PCC) will be categorised as terrorists. The PCC is Brazil's most powerful criminal gang, and was responsible for São Paulo's bloodiest assault in May 2006, when an outbreak of prison violence left nearly 200 people dead and brought the city to a standstill.

As it stands, all of the counter-terrorism bills recommend sentences of up to 30 years for committing terrorist attacks in the country, and address financial terrorism and the incitement to terrorism as stand-alone crimes.

In 2012, Brazil adopted a more comprehensive and all-encompassing law combating money laundering. If the legal definition of financial terrorism is inserted into the judicial framework, it will mean that Brazil will have finally met the Financial Action Task Force's 2010 recommendation to criminalise the activity of financial terrorism in a manner consistent with international requirements.

Moreover, the characterisation of terrorism in legislation will facilitate and strengthen a bill approved in the Senate in July that defines the concept of criminal organisations. The text identifies criminal organisations as those consisting of four or more participants. The law was sanctioned by Rousseff on 2 August.

Controversy in Chile

Chile is another South American country with

Mapuche activism

The Mapuche are Chile's largest indigenous minority, making up around 5% of the population. Since the 1990s, some of them have waged an occasionally violent campaign to win back what they regard as their ancestral lands in what are now the southern Chilean regions of Bío Bío, Araucanía, and Los Ríos. Protests have ranged from marches, hunger strikes, and the occupation of public buildings to the blocking of roads, occupation of disputed land, felling of trees, arson, and the sabotage of machinery and equipment.

In two extreme cases, armed Mapuche activists opened fire on a state prosecutor in 2009, and in January 2013 a group of assailants set fire to a farmhouse belonging to an elderly couple whose family were in dispute with their Mapuche neighbours. The couple died in the blaze. In response to the violence, the state has invoked Pinochet's counter-terrorism law on a dozen or so occasions in the past decade. The first convictions of Mapuche activists under the law – which has attracted both domestic and international criticism – came in 2003.

a painful legacy of military rule, yet unlike Brazil it has counter-terrorism legislation in place.

During the 17-year dictatorship of General Augusto Pinochet (1973–90), more than 3,000 people were killed in political violence, 38,000 were tortured, and many thousands more driven into exile. Given that history, some Chileans are extremely wary of any attempt by the state to invoke counter-terrorism legislation dating from the dictatorship. In practice, however, attitudes vary greatly depending on who the legislation is used against.

The country's current counter-terrorism law was drafted in 1984 by the Pinochet regime in response to increasing opposition. It is regarded as the harshest law in the Chilean statute book: it doubles the sentences for some offences, makes pre-trial release more difficult, permits the prosecution to withhold evidence from the defence for up to six months, and allows for the conviction of defendants on the basis of testimony from anonymous witnesses.

Those charged under the law lose the right to vote until they are acquitted and may only be released on bail on the orders of a higher court. Those convicted are barred from holding public office for 15 years and stripped of their citizenship. Even after completing their sentences, citizenship can only be restored by parliamentary decree.

Pinochet used the law against armed leftist groups in the late 1980s, but with the return to democracy in 1990 it largely fell into disuse. However, it was revived under the government of President Ricardo Lagos (2000–06) in response to the Mapuche conflict, an indigenous rights dispute in southern Chile.

The conviction rate in these cases has been low. According to the Citizens' Observatory (Observatorio Ciudadano), a human rights

non-governmental organisation based in the south-central region of Araucanía, 77 Mapuche have been charged under the law since 2000. Of those, nine have been convicted of terrorist offences and a further 15 of common crimes. Most of the rest have been acquitted.

During the same period, the state has used the law in a handful of non-Mapuche cases, notably to prosecute anarchists blamed for bomb attacks in the capital Santiago. In 2012, for example, prosecutors charged young anarchist Luciano Pitronello under the counter-terrorism law after he tried to plant a bomb in a bank in Santiago. At his trial, Pitronello was cleared of terrorist offences but convicted of lesser crimes, including carrying explosives.

The 1984 law has been reformed several times. In 1991, the centre-left government introduced major amendments as part of an effort to bring public security into line with international human rights standards following the return to democracy. In 2002, the law was again modified to harmonise its provisions with the new criminal code. In 2010, under the current government of Sebastián Piñera, parliament passed a separate law to end the jurisdiction of military courts over civilians in counter-terrorism cases.

Also in 2010, the Piñera government reformed the 1984 law in response to criticism from the United Nations and regional human rights bodies. According to Human Rights Watch (HRW), as a result of that reform, "some due process guarantees were strengthened, such as allowing witnesses whose identity can be concealed to be cross-examined by defence attorneys, and children could no longer be tried under the law".

However, much of Pinochet's law remains intact. "Police accused of human rights abuses continue to be tried by military courts that are

not independent,” a spokesman from HRW said. “Investigations are secret, criminal proceedings are conducted mainly in writing, and lawyers representing victims of police abuse have limited opportunities to cross-examine witnesses.”

Indeed, the law may put too much emphasis on terrorist intent and not enough on the definition of acts of terrorism. The law defines a terrorist act as one carried out “with the intention of producing in the population, or in part of it, a well-founded fear of falling victim to the same type of crime”. In many cases, prosecutors have struggled and usually failed to definitively prove terrorist intent.

Attitudes towards the use of the law against the Mapuche vary greatly. In Santiago, there appears to be a growing solidarity with the Mapuche cause, fuelled in part by the arrival of Mapuche migrants from the south. The

that has resulted in real injustice”.

Outlook

Without a counter-terrorism law in place, Brazil will continue to have a controversial gap in its legislation. “If Brazil becomes the target of terrorism as in the case of the bombing of the Boston Marathon and we do not have specific legislation in place that acknowledges and deals with the complexities of the crime, the police and judiciary will not be able to bring the appropriate charges,” said Lorenzoni. He added: “Article 5 of our Constitution states that there is no crime without a previous law and no punishment without a previous legal provision.”

One consequence of the violent anti-government protests in June has been the introduction of Brazil’s first terrorism insurance policies, and this is a sector likely to see

Bachelet said that “under no circumstances” would she seek to use the law to prosecute the Mapuche, describing the prosecution of Mapuche defendants under the 1984 law during her first government as “a mistake”.

Senior figures from Bachelet’s centre-left coalition have echoed those sentiments, and having made such unequivocal assertions, it would be difficult for Bachelet and her ministers to resort to the law.

The other factor that could determine future policy towards use of the law (and, indeed, could force the Chilean state to reform it again) is an ongoing case at the Inter-American Court of Human Rights (IACHR). Several former Mapuche prisoners, all convicted between 2003 and 2005, have claimed that their convictions under the counter-terrorism legislation were unlawful.

The IACHR is expected to rule on the Mapuche claimants’ case later in 2013. On the basis of previous verdicts, it seems highly likely that the court will rule against the Chilean state and will urge it to desist in using the 1984 counter-terrorism law against the Mapuche. The Chilean state has a good track record of compliance with the rulings of international tribunals. It has complied with previous IACHR verdicts, and would be likely to do so in this case.

More broadly, Chile’s use of the 1984 counter-terrorism law against the Mapuche is likely to wane and could even cease altogether. This is partly because the law has simply proved ineffective, with the state struggling to secure convictions, and there is a growing acceptance that many of the crimes committed by Mapuche activists (notably arson) could and should be prosecuted in ordinary criminal proceedings. ■

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‘Part of the hangover from military rule has been a difficulty in defining and codifying the concept of ‘terrorism’

capital’s large and increasingly radical student population has embraced the Mapuche campaign for land transfers and greater political autonomy, with Mapuche flags and banners often seen at student protests. Leftist activists have demonstrated in support of Mapuche political prisoners and campaigned for an end to the use of the counter-terrorism law.

In the rural south, where most of the incidents of arson, theft, and trespassing occur, attitudes tend to be harder. The farmers and foresters whose land has been occupied and whose property has been destroyed have few qualms with the state’s use of the counter-terrorism law against the Mapuche, even to prosecute crimes like arson, which, under most internationally accepted definitions, is not a terrorist offence.

“People have short memories, despite our recent legacy of military rule,” says Myrna Villegas, a lawyer and expert in Chile’s use of counter-terrorism laws against the Mapuche.

Meanwhile, international criticism of Chile’s treatment of the Mapuche is also growing. On 31 July, UN Special Rapporteur on Human Rights and Counter-Terrorism Ben Emmerson accused Chilean police of “excessive force” and use of counter-terrorism legislation “in a confused and arbitrary fashion

future growth. Twelve major companies have already requested quotations ranging from BRL25 million (USD11.5 million) to BRL1 billion (USD450 million).

However, the terms of the insurance contract are predicated on the government’s willingness to recognise the protesters’ actions as terrorism. Without that, the insurers will not compensate for the damages caused.

Brazil’s foreign affairs policy employs soft and smart power politics that have their basis in the promotion of a peaceful agenda. This has served the country well for decades as it has never been the subject of an international extremist attack.

Brazil could nevertheless continue to rely on this approach in the absence of an counter-terrorism law and follow the advice of Ambassador Maria Viotti, the permanent representative of Brazil to the UN, who claims that the key tools to combating terrorism include promoting democratic values, as well as inclusiveness through political, ethnic, and religious tolerance.

In Chile, much depends on the outcome of the November presidential election. Socialist former president Bachelet looks likely to win, and her victory could well signal an end to the use of the law against the Mapuche. In April,

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