

Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror'

Jude McCulloch & Bree Carlton*

Introduction

This article sets out to describe and analyse a shift to preemptive criminal (in)justice frameworks. Preemptive criminal justice frameworks impose penalties in anticipation of future crimes. We look particularly at legislation and other measures implemented in the context of the 'war on terror' and the increased emphasis on national security in what is deemed to be a changed security environment, and briefly at the dynamics driving the move to preemption in criminal justice systems. We locate this analysis in the broader context of the international 'war on terror' and the development and implementation of a preemptive military doctrine globally. For the purposes of this article, suppression of financing of terrorism legislation and measures are used as a case study.

Suppression of financing of terrorism legislation and measures post-9/11, have been subject to relatively little scrutiny by critical scholars (see, however, Ricketts 2002; Binning 2002; De Goede 2004) and the critical analytic work that has occurred is generally outside the framework of the broader critiques of the 'war on terror' (see, however, McCulloch & Pickering 2005). This relative lack of critical attention that suppression of financing of terrorism legislation has received may result from a perception that financing of terrorism measures are relatively benign compared to, for example, interrogation/detention regimes that have become more commonplace and intense in putative democracies post-9/11, and less spectacular and deadly than the military invasions of Afghanistan and Iraq. Another possible reason for the absence of critical attention is that the world of financing is seen as unconnected to traditional criminal justice or global justice concerns. On the other hand, money laundering legislation and assets confiscation powers have become embedded in the criminal law over the past two decades and are the subject of some critical scrutiny (see, for example, Naylor 2001). It is also possible that the sheer volume of national and international security measures and legislation passed post-9/11 has meant that the suppression of financing of terrorism measures have passed relatively undetected in the camouflage of the many other measures that add to the arsenal of the state's coercive powers.

* Dr Jude McCulloch (jude.mcculloch@arts.monash.edu.au) is a Senior Lecturer in Criminal Justice and Criminology, School of Political and Social Inquiry, Monash University. Dr Bree Carlton is a Research Assistant in Criminal Justice and Criminology, School of Political and Social Inquiry, Monash University. The authors would like to acknowledge funding from the Australian Research Council Project ID DP0557023.

Measures, including legislation, aimed at combating the financing of terrorism warrant close critical attention because they are both a key plank in the 'war on terror' and because they represent a major shift in the balance of power between the state and subjects in liberal democracies. This article argues that by eroding, even sometimes reversing, the presumption of innocence, preemptive criminal justice frameworks set the scene for radical injustice. In addition to eroding or reversing the presumption of innocence, the move towards preemptive criminal justice frameworks reverses the democratic ideal of a transparent state accountable to subjects that are shielded from arbitrary state power by the due process protections embedded in the criminal justice system and replaces it with what Henry Giroux calls the 'garrison state' (2002:143).

Preemption and the 'war on/of terror'

Since the announcement of what Zillah Eisenstein (2004) terms the 'war on/of terror'— a term adopted henceforth throughout this article — and particularly the invasion of Iraq, the term preemption has become part of the lexicon of international relations, defence and foreign policy. There is now a vast body of literature devoted to analysing and critiquing the notion of military preemption in the post 9/11 environment (see, for example, Bowring 2002; Crawford 2003; Byers 2003; Brown 2003; Betts 2003; Arend 2003; Freedman 2003; Ellis 2003; Shultz & Vogt 2003). A detailed review of this literature is beyond the scope of this article. For the purposes of this article the word preemption used in a military context is given its dictionary meaning; 'the act of attacking first to forestall hostile action' (Chambers 1977:1057). While this definition lacks the detail and nuance that is found in the international law literature it does nevertheless capture the trend towards self-defence taken in advance of hostile action that is set out in official United States policy and demonstrated in the invasion of Iraq. In his landmark West Point address, United States President, George W Bush, advocated preemption as a primary defence strategy against terrorism, stating that the doctrines of containment and deterrence employed during the Cold War could not effectively be applied to 'shadowy terrorist networks'. He argued that 'if we wait for threats to fully materialise, we will have waited too long ... we must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge' (Bush 2002). The West Point address preceded the release of the United States National Security Strategy (NSS) in September 2002 which states that it will use 'military power, better homeland defences, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing' in order to attack terrorism preemptively, before 'unseen' threats arise (White House 2002). Specifically, in relation to terrorist financing, the NSS states that:

The United States will continue to work with our allies to disrupt the financing of terrorism. We will identify and block the sources of terrorist financing, freeze the assets of terrorists and those who support them, deny terrorists access to the international financial system, protect legitimate charities from being abused by terrorists, and prevent the movement of terrorists' assets throughout alternative financial networks (White House 2002:6).

In addition to international terrorist networks, the NSS targets 'rogue states' which, it observes, in their alleged harbouring of terrorists and efforts to obtain weapons of mass destruction, 'display no regard for international law, threaten their neighbours, and callously violate international treaties to which they are party' (White House 2002:14).

The National Security Strategy states that:

legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat — most often a visible mobilisation of armies, navies and air forces preparing to attack ... We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means (White House 2002:15).

The Bush preemption doctrine embodies a fundamental contradiction by advocating the urgent need to strike down a hidden network of 'unseen' enemies in self-defence by subscribing to a concept in international law, originally devised to cater to a world order comprised of sovereign nation states. As Russell Hogg points out, the US desire to target and strike down terrorists and 'rogue states':

manifests a longing for some old military certainties while obscuring what is distinctive about this new 'asymmetric' brand of warfare/crime: that it is networked rather than state administered or sponsored and that the technologies that work against states — missiles, aircraft carriers, tanks, etc — are of limited effect in a 'war against terrorism' (2002:205).

The NSS maintains that, in defending against terrorism, the US stands firmly for:

the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance (White House 2002:3).

Jutta Brunnee and Stephen Toope argue that the Bush administration has attempted to resurrect an 'expansive doctrine of just war: one rooted in broad moral, rather than restrictive legal, assessments of threats and punishments' and furthermore that international law provides a 'framework against which states' actions are assessed' and thus requires 'more specific, testable claims' than can be offered by the 'rhetoric of evil' (2004:405). Neta Crawford argues that the US definition of 'the self to be defended' has expanded to encompass broader goals associated with self-interest. She highlights that an essential goal of the US security strategy has been to maintain 'preeminence', arguing that the NSS effectively fuses 'ambitious political and economic goals with security' (2003:32). The doctrine of preemption as articulated and deployed by the United States thus broadens not only the circumstances in which aggressive or offensive military action is utilised but also the categories of interest that are seen as legitimate to defend.

After the Bali bombing in October 2002, in line with the US moves, the Australian Minister for Defence, Senator Hill, called for a revision of the doctrine of self-defence in the United Nations Charter in order to more effectively counter terrorism. Prime Minister John Howard went further, causing outrage amongst Australia's South-East Asian neighbours, when he was reported as arguing that the self-defence doctrine needed to be changed so that Australia could act preemptively within the region to deal with any terrorist threat to Australia (see, Fry 2004; *Sydney Morning Herald*, 3 December 2002:12, 6). The attempts to redefine international law to justify a range of preemptive strategies in the US-led 'war on/of terror' has rendered preemption — its application, meaning and legitimacy in terms of both law and morality — amongst the most contentious issues of contemporary times.

Although critical criminologists are involved in critiquing domestic counter-terrorist measures (see, for example, Hogg 2002; McCulloch 2002; Scraton 2002; Stanley 2002; Whyte 2002), these critiques have not generally been couched in terms of understanding such measures as a domestic version of preemption. Couching critique in terms that mirror those used in the international setting has a number of practical and theoretical advantages for criminologists attempting to articulate and understand the dynamics and importance of the changes in the criminal justice system delivered by the 'war on/of terror'.

Blurring the boundaries in the continuous state of emergency

The first advantage of incorporating terminology with popular currency in relation to the international front of the 'war on/of terror' into the context of discourses concerned with developments at the national level is largely theoretical. The use of consistent language to

describe developments on what can be thought of as the war's *two* fronts underlines and highlights the way that the borders between foreign and domestic policy, national defence and criminal justice, domestic and international laws have been incrementally but extensively eroded over the previous three decades. Peter Andreas and Richard Price argue that 'one of the most important blurring of traditional boundaries occurring in the post-Cold War era is that between an internally oriented domestic police sphere and an externally oriented military sphere' (2001:32). Although this process was well underway prior to the September 11 attacks on the United States, it has accelerated markedly since then. The blurring of traditional boundaries is manifest in hybrid military and law enforcement configurations and operations at both the national and global level, terms which, according to this analysis are themselves becoming increasingly problematic and redundant (Alliez & Negri 2003; Andreas & Price 2001; Hogg 2002b; McCulloch 2004a). President George W Bush, setting out the US National Security Strategy in 2002, observed that '[t]oday, the distinction between domestic and foreign affairs is diminishing' (2002:31). In this context counter terrorist policing operations and counter terrorist legislation are increasingly justified on the basis of international cooperation, a phenomena critics have dubbed 'policy laundering' (Steinhardt 2004). National defence and internal security and law enforcement have increasingly merged (Hardt & Negri 2000:189; Kraska & Kappeler 1997; White 2004; Lutterbeck 2004). In Australia, consistent with international trends in established democracies, paramilitary policing has been integrated into everyday policing (McCulloch 2001), the military are increasingly involved in domestic security (Head 2000), police are more frequently deployed extraterritorially and in joint deployments with the military (see, e.g., MacLellan 2004), there is increasing interaction between domestic and international law (McSherry 2004:371) and the dynamics of law and order politics are reflected in the political rhetoric and tactics surrounding national security (McCulloch 2004b). These developments foreshadow the eclipse of civil politics under the weight of national security as 'the military logic of fear, surveillance and control' progressively infuses and colonises public and institutional spaces, political discourse and domestic justice systems (Giroux 2004:1; McCulloch 2003; 2004b).

Increasingly, the state's coercive capacities are paralleled or mirrored inside and outside national borders (Hardt 2002). This development coincides with and is wholly congruent with the merging of the concept and practice of war and peace. Alliez and Negri argue that:

the 'commerce among nations' has thrown off the mask of external peace, everything happens as if peace and war were so tightly enmeshed that they no longer form anything but the two faces of a single membrane projected onto the planet ... This is less a hypothesis than the common recognition of a hybrid identity that throws 'the whole world' into a metapolitics in which peace no longer appears as anything other than *the continuation of war by other means*. A wholly relative alterity, that of a continuous police action exercised upon a globalized *polis* under the exceptional legislation of an *infinite war* — from which peace is deduced as a permanent state of exception (2003; emphasis in original).

The 'state of exception' as elaborated in the work of influential contemporary Italian philosopher Giorgio Agamben, although difficult to precisely define, exists in the 'no-man's-land between public law and political fact, and between juridical order and life' (Agamben 2005:1). The state of exception bears a 'close relationship to civil war, insurrection and resistance' (Agamben 2005:2). It refers to a situation where 'the emergency becomes the rule, and the very distinction between peace and war (foreign and civil war) becomes impossible' (Agamben 2005:22). The state of exception 'is not a dictatorship ... but a space devoid of law, a zone of anomie in which all legal determinations — and above all the very distinctions between public and private — are deactivated' (Agamben 2005:50). The space devoid of law removes 'law' from the coupling 'force-of-

law' leaving only the former operative, so the two sides that characterises justice's relationship to suspects or accused in 'normal' times — punishment and protection — is reduced to the unitary function of the former (Agamben 2005:Chapter 2). In the state of emergency, and in the name of national security, the law is effectively suspended in both its national and international forms (Butler 2004:51) so that the legal status of the individual is erased (Agamben 2005:3). The 'war on/of terror' and the accompanying state of emergency is infinite because it is not temporarily or geographically bounded, being, as US President George W Bush terms it, a global enterprise of uncertain duration (White House 2002:i). In these circumstances, the state of exception, that is where people or categories of people are denied the protection of law on the basis of a putative state of emergency, increasingly becomes the norm both in terms of the categories and number of persons affected and its duration (Agamben 2005:3).

Writing about the nature of the state under neo-liberal globalisation, Giroux observes that 'what has emerged is not an impotent state, as some have argued, but a garrison state that increasingly protects corporate interests while stepping up the level of repression and militarization on the domestic front' (2002:143). According to Giroux, as:

the state is hollowed out, it increasingly takes on the functions of an enhanced police state or security state, the signs of which are most visible in the increasing use of the state apparatus to spy on and arrest its subjects, the incarceration of individuals considered disposable ... and the ongoing criminalization of social policies (2004:70).

Hirsh, writing about nation states and democracy under contemporary capitalism, argues that 'we are dealing not with a "hollowing-out" of the state as such, but rather of liberal democracy' (1997:45-6). Neoliberalism and repressive social control are a 'package deal' where the 'rhetoric of criminalization and punishment legitimizes states that have reneged on their commitment to the social wage' (Mariani 2001). The garrison, police or security state — terms that are used interchangeably in the literature — is protected by walls of secrecy constructed under the guise of 'national security', while subjects are exposed to a plethora of state penetrations into arenas that were formally private or protected individual spaces or fundamental individual rights on the same grounds (see, for example, McCulloch & Tham forthcoming).

The opening up of a global militarised polity, subject to continuous 'peacekeeping' by an army of globocops, that has emerged and intensified under the banner of the 'war on terror' has combined the coercive powers of war with the punitiveness of the criminal justice system to create a framework that seeks to deny individuals caught within the net of 'counter-terrorist' interventions, measures and legislation both the protections of international laws embodied in instruments such as the Geneva conventions and the protections traditionally afforded criminal suspects (see, for example, Butler 2004:Chapter 3 on indefinite detention; Ratner & Ray 2004 on Guantanamo Bay). Given the marked impact these developments are having on national criminal justice systems it is a dynamic which criminologists must be cognisant of.

The second advantage of using consistent terminology to critique both the home and international fronts of the 'war on/of terror' is that it allows the insights developed in one context, for example, the insights of the notion of preemption in the international context, to be tested, developed and, where relevant, incorporated into the critiques of domestic measures. This will assist criminologists to develop theoretical frameworks for articulating and understanding the domestic significance and consequences of the 'war on/of terror'. While domestic counter-terrorist legislation is radically and rapidly refiguring the nature of the criminal justice system, criminologists have only just begun this project and many

otherwise sophisticated criminological reviews of major trends and themes in criminal justice proceed without any reference to the 'war on/of terror' and its effects, despite its apparently obvious significance (see, for example, Newburn & Sparks 2004:1–12).

The third advantage of using concepts and terms such as 'preemption' is of a more practical nature. The international aspects of the 'war on/of terror' have garnered enormous media and public attention. This popular and public attention has not been matched at the domestic level. While counter-terrorism legislation has been enormously controversial on some levels, for a number of reasons, the public discourse around many of these developments has been relatively muted. One reason why this has happened in Australia is that the federal Labor Party opposition has decided not to openly or robustly contest the government on domestic security legislation for fear of appearing 'soft' on security issues and damaging its electoral chances. The convergence of opposition and government policy on these issues reduces their newsworthiness (McCulloch 2004b). Additionally, the claim of 'national security' is increasingly being used by government to impose restrictions upon the flow of public information (McCulloch & Tham forthcoming). Using terms that already have popular currency in the public domain widens potential audiences and interest and thus adds impact to criminological critique by broadening its accessibility.

From anti-money laundering to suppression of terrorist financing

After the 9/11 attacks on the United States, the Australian federal government passed legislation targeted at the suppression of financing of terrorism. In line with international frameworks, this legislation allows for individuals and entities to be deemed 'terrorists' and, as a consequence, have their assets frozen. The Minister for Foreign Affairs can freeze the assets and criminalise financial dealings with an organisation listed by the United Nations and the government can nominate a person or entity for listing. No proof is necessary to achieve a listing.

In addition, these laws make it a serious crime to enter into financial dealings with those deemed or defined under legislation as terrorists and also to provide or collect funds related to terrorism. Other measures require cash dealers and financial institutions to report suspected terrorist-related transactions and streamline the process for disclosing financial transaction information to foreign countries (*Suppression of Financing of Terrorism Act 2002* (Cth); McCulloch et al 2004). The framework for combating the financing of terrorism builds on anti-money laundering measures aimed at organised crime (Department of the Parliamentary Library 2002:4; Reddy 2002). However some commentators argue that '[m]oney laundering and financing of terrorism are two completely separate concepts' and call into question the wisdom of mixing the issues of money laundering and the financing of terrorism (Kersten 2002; Pieth 2003:123). There are a number of fundamental differences between organised crime and activities defined as terrorist or terrorist-related.

Although defining terrorism is highly contentious, all officially-accepted definitions recognise politics, ideology or religion as the motivation for terrorist action (Golder & Williams 2004). Organised crime, by way of contrast, is motivated by profit. Organised crime generally involves large sums of money whereas a suicide or highjack bombing or other violent acts commonly designated as terrorism frequently require only modest financing. The 9/11 attacks on the US, for example, reportedly cost only about \$US500,000 (Wolosky & Heifetz 2002:3).

Money laundering aims to disguise the origins of money generated through crime. Those committing crimes like hijackings and bombings may use the proceeds of crime to facilitate their activities but equally they may use funds from legitimate sources. These differences

mean that anti-money laundering regimes and combating of financing regimes are fundamentally different. Anti-money laundering measures are primarily designed to ferret out financial transactions attendant to criminal acts and law enforcement is concerned with the illegal activities which generate money. Anti-money laundering measures and penalties — in line with the traditional concerns of law enforcement and the criminal justice system — are generally measures and penalties put in place to detect, investigate and punish crime.

Measures put in place post-9/11 to combat the financing of terrorism, on the other hand, seek to identify money that may be from legitimate sources and predict whether that money will be used to facilitate future crime. Combating of financing of terrorism measures and sanctions are aimed then, not at crime that has occurred, but at crime that *may* occur. Comments by David Aufhauser, chairman of the US National Security Council Committee on Terrorist Financing capture the spirit of this shift. He argues that:

Last year the promise of decades of work on money laundering was silenced by the assault on New York and Washington ... [now] the more immediate threat to well-being was 'clean money' intended to kill not illicit proceeds of crime looking for a place to hide. The job now is prevention, not crime-busting (2003).

Matthew Levitt in a similar vein maintains that:

[t]he al-Qaeda suicide hijackings underscored not only the post blast investigative utility of tracking the money trail, but also drove home the critical need to preemptively deny terrorist the funds they need to conduct their attacks (2003:60).

The combating of financing of terrorism measures are, however, drawn so broadly that they potentially encompass activities not popularly conceived as involving terrorism. These include giving money to a charity or social cause or being connected, even quite remotely, to someone who might be suspected of being involved in terrorism or someone deemed without due process or evidence to be a terrorist by government proscription (McCulloch & Pickering 2005; Ricketts 2002; Statewatch 2005).

Preempting justice: surveillance, suspicion and the presumption of innocence

Preemptive criminal justice looks to predicting crimes that might occur in the future and preventing them through the anticipatory application of penalties or coercive measures.

Preemptive criminal justice is similar to the type of pre-crime investigations that were the primary feature of the 2002 Hollywood movie *Minority Report*, starring Tom Cruise. In the futuristic scenario portrayed in the movie, crimes are investigated and criminals caught before the crimes they would commit occur. The fictional scenario presented in the movie reflects criminal justice preemptive strike regimes which are part of a trend away from past-oriented surveillance towards more future-oriented surveillance based on visions of the future (Bogard 1996; Lyon 2002:20).

The shift to preemptive strike frameworks aimed at suppression of financing of terrorism after 9/11 are part of the intensification and consolidation of the trend from past- to future-orientated surveillance firmly established prior to 9/11.

The shift to future crime, pre-crime or preemptive strike regimes in criminal justice necessarily involves massive levels of surveillance. The intensity and centralisation of state surveillance has increased dramatically since the 9/11 attacks on the US (Lyon 2002:16). Consistent with this, combating financing of terrorism measures link financial data with security regimes in unprecedented ways, usurping notions of bank secrecy along with

financial privacy and confidentiality (Binning 2002). According to sociologist David Lyon, this type of regime ‘easily loses sight of actual data-subjects — persons — whose daily life chances and choices are affected — often negatively by surveillance’ (Lyon 2002). The linking of financial data with security regimes under combating financing of terrorism legislation and measures fuels the process of social sorting as a means of categorising and singling out individuals and organisations for differential treatment and reinforcing social division and exclusion of already marginalised groups (De Goede 2004; Lyon 2002:17). People and organisations have few opportunities to be informed of the contents of financial intelligence gathered against them or to challenge its veracity or probative value when it is used to their disadvantage (Binning 2002).

In a preemptive strike framework, the notion of innocent until proven guilty is turned on its head. The presumption of innocence is a long-standing tenet of the Anglo-American criminal justice systems. It is designed to militate against miscarriages of justice and political interference in criminal justice by recognising, and to some extent, compensating for the disparate power and resources the state can marshal against individual suspects. States, for example, have publicly funded police forces with special powers to investigate and work towards establishing proof of guilt, whereas individuals have no such resources or powers. In addition, it is difficult to prove a negative, that is, that something *wasn't* done. Moreover, the preemptive application of punishment by governments itself tends to stand as ‘proof’ of guilt because it sends the message that the person or persons punished *was/were* a threat. Once coercive force and punishment has been deployed, governments and state agents have a vested interest in the continued vilification of those harmed, as any admission of innocence or doubt would reverse the moral order sought to be inscribed by the punishment.

Under suppression of financing legislation and other measures, assets can be frozen and confiscated, and individuals and entities financially crippled without conviction, without charge and without any evidence of criminal, let alone terrorist, activity. Although these measures bear a resemblance to previous legislation in relation to assets forfeiture, the measures go significantly further (see, for example, Binning 2002). As Fletcher Baldwin puts it: ‘[w]hether persons are deemed guilty or innocent is irrelevant, it is the money we are after’ (2002:8).

Pre-crime regimes necessarily involve a high degree of discretion in interpretation of data and give wide latitude to law enforcement, security agencies and executive government. Crime detection relies on the search for evidence of crime whereas pre-crime prediction relies on intelligence, frequently linked to surveillance, based on the suspicion that an event may occur some time in the future. But intelligence is not evidence and may involve little more than dubious and untested categories purportedly linked to risk (Lyon 2002:20–1), innuendo, gossip or prejudice. Intelligence is also vulnerable to manipulation for political purposes because intelligence, unlike evidence, is generally not tested in open court. The ‘compelling’ intelligence in relation to Iraq’s weapons of mass destruction turned out to be, as Former United Nations weapon’s inspector, Scott Ritter, put it, ‘not real, but a phantom menace, something conjured up with smoke and mirrors disguised as “irrefutable fact”’ (Ritter 2003:147). This intelligence was then used to provide a ‘figleaf for pre-emptive action against Iraq outside the UN Charter and to support the US objective of regime change’ (Barker 2003:17).

Suspicion and intelligence are closely linked and often circular, so that intelligence is often a self-fulfilling prophecy related to preconceived notions of whom or what is suspicious. In the militarised framework that dominates domestic counter-terrorist

measures, it is categories of people designated as enemies rather than categories of behavior that primarily determine who is caught within the net of suspicion. According to Lyon '[c]ategorical suspicion has consequences for anyone "innocent" or "guilty" caught in its gaze' (2002:19). Counter-terrorist frameworks are particularly productive of the idea of 'enemy' because 'rather than a war against enemy states, what is involved is a war against the idea of an enemy or an enemy idea' (Ross 2004:140). According to Giroux, the:

threat of outside terrorism redefines the rules of war since there is no traditional state or enemy to fight. One consequence is that all citizens and noncitizens are viewed as potential terrorists and must prove their innocence through either consent or complicity with the national security state (2004:30).

It is clear, however, that the move to pre-crime or preemptive criminal justice frameworks is not merely a reaction to the threat of terrorism. The move towards preemptive criminal justice frameworks was established prior to 9/11 as part and parcel of more punitive criminal justice measures the reversed the onus of proof particularly in relation to drug offences (see, for example, McSherry 2004:369). Civil assets confiscation in relation to organized crime similarly placed the burden on the suspect to prove their innocence (Levi 2002). Military metaphors related to the 'war on crime', the 'fight against organized crime' and particularly the 'war on drugs' had already infected the criminal justice system giving rise to notions of enemy populations or suspect communities prior to 9/11 (see, for example, Kraska & Kappeler 1997; McCulloch 2001:17; Poynting et al 2004:Chapter 2; Andreas & Price 2001). Lucia Zedner, in a chapter published in 2000, entitled 'In Pursuit of Security', wrote of the trend towards targeting potential offenders, arguing:

Whereas traditional modes of punishment focused attention on the individual wrongdoer, on the determination of their guilt and on punishment, attention is now increasingly turned to a target population of potential wrongdoers. The means by which this population is identified is wholly unscientific, relying on race and class prejudice and drawing on questionable presumptions about people's appearance, lifestyles and habits (2000:210).

It is inevitable that suspicion and intelligence in relation to financial transactions will be determined and operate in a highly discriminatory manner. Indeed, logically, the combating of financing of terrorism measures can only operate in this way, unless the global movement of finance is to be impeded in ways that are antithetical to twenty-first century capitalism. Unprecedented growth in global finance capital flows is a hallmark of globalisation (Green & Ward 2004:190-1). The volume of dollars flowing through the formal financial systems create a snowstorm of data and a virtual 'white-out' in the distinction between money that might be used by alleged terrorists and other funds. Looking for terrorist financing amongst the billions of dollars that flow through global financial markets is described as being more difficult than searching for the proverbial needle in a haystack, and instead more 'akin to searching for an indistinguishable needle amongst a stack of needles' (Ayers 2002; Wolosky & Heifetz 2002:4). The available evidence suggests that there is little or nothing to distinguish terrorist financing that originates from legitimate sources from other finances. The post-9/11 analysis of the financing of the attacks indicates that there was nothing in the financial profile of the hijackers that would have indicated planning for terrorist-related activity (Financial Action Task Force 2002:6). Given the difficulty or impossibility of distinguishing terrorist financing through any type of financial profile, non-financial profiles become critical. A number of the commentators on the suppression of financing of terrorism are rather unabashed about the need for financial institutions to discriminate according to customers' non-financial profiles to determine suspiciousness or 'unusualness'. Ilias Bantekas writes that:

[t]he nonfinancial profile makes a seminal contribution to detecting terrorist funds. This feature, though used discriminatorily against individuals of Arab descent or the Muslim faith in the aftermath of September 11, can increase suspicion when combined with information based on the account and transaction profiles of a suspect. Since at this stage the financial institution must assess nonfinancial profiles, staff will be alerted by indicators such as the person's background and knowledge of the local language, the presence of a spokesman, and other *unusual features* (2003:321; our emphasis).

On 31 October 2001, the Financial Action Task Force (FATF), an international group comprised of thirty-one member states, announced that it would expand its remit beyond money laundering to include the combating of terrorist financing. The Task Force published its 'Guidance for Financial Institutions in Detecting Terrorist Financing' (2002). Under the heading of 'Characteristics of the customer or his/her business activity', FATF designates as potentially suspicious or unusual '[f]unds generated by a business owned by individuals of the same origin or involvement of multiple individuals of the same origin from countries of specific concern acting on behalf of similar business types'(2002:9). Under 'transactions linked to locations of concern' the FATF designates as potentially suspicious or unusual sending or receiving funds by international transfers from and/or to 'locations of specific concern' (2002:10).

The impact of suppression of financing of terrorism measures on individuals and communities is potentially profound. Guilt by suspicion means that individuals and groups commonly stereotyped as terrorists are extremely vulnerable to severe financial penalties under the suppression of financing of terrorism regimes and other punitive 'counter-terrorist' measures. If, for example, a financial institution lodges a 'Suspicious Transaction Report', now a mandatory requirement on financial institutions, on the basis that their customer speaks poor English, is acting with the help of an interpreter, appears to 'originate' from a 'country of concern', and to associate with persons who likewise appear to 'originate' from a 'country of concern', it is quite conceivable that, under the expanded detention regimes established post-9/11, such a person could be detained and interrogated. Certainly, in Australia, suspicion that someone might know something about terrorism is now adequate grounds for detention for up to seven days and for compelled response to questioning (Stary & Murphy 2003). Suspicion of involvement in terrorism could result in a state placing an individual or entity on the United Nations blacklist which would lead to them having their assets frozen and otherwise financially crippling them (Statewatch 2005).

There are now numerous case studies which attest to the severe consequences of combating the financing of terrorism measures for individuals, the lack of due process involved in the assets freezing process and the substantial hurdles faced in overturning freezing orders. An Australia small businessman who ran a music shop that shared a name with a United Nations blacklisted Peruvian group, 'Shining Path', had his bank accounts frozen for twenty-six days. It was only through the intervention of the media that he was eventually able to persuade the authorities to unfreeze his accounts and thus get his business back on track (Senate Legal and Constitutional Legislation Committee 2002:70). This is one of the less serious of the case studies that can be gleaned from the international media and literature. The cases relating to a number of men of Somali origin are particularly worrying. In these cases, the names of one man, who was a Canadian citizen and the others citizens of Sweden, were put on a United Nations blacklist of terrorists by the United States. Thereafter, their assets were frozen and all financial dealings with them criminalised. The United States did not produce any evidence to support the allegation even when pressed to do so. Eventually, after long campaigns supported by legal proceedings and advocacy by the government of Sweden, the men were taken off the blacklist and their financial status regularised (Cooper 2002; Statewatch 2003; Zagaris 2002).

Charities, non-government organisations and activist groups in advanced democracies working in solidarity with independence movements and alternative financial systems heavily used by people from the global north, particularly immigrants remitting money home, are also considered 'suspect' and potentially criminalised under suppression of financing of terrorism measures and legislation (McCulloch & Pickering 2005).

Conclusion

In the field of international relations preemption provides a vehicle for advancing national self interest outside the bounded and relatively objective framework of international law in favour of recourse to discourse about good and evil, right and wrong. On the 'war on/of terror's' domestic front preemptive criminal justice appeals to the amorphous and emotionally resonant concept of national security, undermining in the process traditional due process protections related to the presumption of innocence and open and accountable justice.

The move towards preemptive criminal justice frameworks embodied in the suppression of financing of terrorism measures are emblematic of changes to the criminal justice system taking place under the banner of security as part of the 'war on/of terror'. These changes represent the consolidation and intensification of a trend away from due process and towards a more punitive criminal justice system that tends towards the assumption of guilt, a trend firmly established prior to 9/11. Preemptive criminal justice involves the erosion or reversal of onus of proof, increased executive power, increased discretion to law enforcement, increased state secrecy, and increased state penetration into the lives of individuals.

Suppression of financing of terrorism measures represents a major shift in the relative balance of power between the state and subjects in liberal democracies. As Binning notes, in relation to these new financial measures, the:

redefinition of proportionate interference with rights is being developed without a satisfactory parallel consideration of the consequences for those subjected to the new powers, which may be innocent of any wrong doing (2002:138).

The preemptive framework is also apparent in many of the other measures in the 'war on/of terror' that have been implemented domestically and internationally post-9/11. Ross, writing particularly about internment, but in a comment that applies more generally to the shift in relationship between the state and subjects in liberal democracies, argues that it is illustrative 'of the transformation of the conception of the people as the inaugurators and the embodiment of politics and law, bearing rights and freedoms, to a conception of the public as acted upon by a governmental machine preoccupied with protection and security' (2004:149).

The suppression of financing of terrorism measures and legislation as an example of preemptive criminal (in)justice illustrate the increasing tendency of the state to withdraw the guarantees of legal protection and entitlements and abandon subjects to the violent whim of law and intensifying coercive state powers in the national security state. The laws and measures also entrench and further differential law enforcement. According to Judith Butler, although deeming someone dangerous, a process at the heart of preemptive criminal justice frameworks, 'is considered a state prerogative ... it is also a potential license to prejudicial perceptions and a virtual mandate to heightened racialised ways of looking and judging in the name of national security' (2004:77).

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