Contemporary Comments

Suppressing the Financing of Terrorism

Introduction

Terrorism has become a major preoccupation of governments in western countries, including Australia, the United States, Canada, the United Kingdom and New Zealand. This preoccupation has often manifested itself in frenetic legislative activity. In 2002, amidst some public controversy, the Australian parliament passed a raft of legislation aimed at enhancing Australia's protection against the possibility of terrorist threat (Williams 2003; Carne 2003; Ricketts 2002; Head 2002; Senate Legal and Constitutional References Committee 2002). A major plank of such legislation was the *Suppression of the Financing of Terrorism Act* 2002.

Research into this legislation and its effects, however, remains very undeveloped. More generally, there is limited academic literature on combating the financing of terrorism (see, however, Levitt 2003; Sheppard 2002; Bantekas 2003; Selden 2003; Myers 2002; Chenumolu 2003; Hardister 2003; Pieth 2003). The scholarship to date tends to be focused on the legal and regulatory aspects of the legislation rather than its social and political implications in terms of civil rights and democracy (see Tan 2003).

Against such a lacuna, this comment aims to briefly describe the key provisions of the Australian suppression of financing of terrorism regime. The larger section of this comment identifies six research questions concerning this legislation and its effects.

These research questions arise from two strands in the literature. First, there is the rich body of scholarship critiquing counter-terrorism measures adopted by Western governments. For instance, many critics have claimed that many of the counter-terrorism measures pursued internationally and domestically fail to prevent or detect terrorism (McCulloch 2003; Scraton 2002; Chomsky 2003; Camins 2003). In some cases, these measures even risk being counter-productive with historical experience demonstrating that poorly-calibrated security responses to terrorism have escalated conflict by marginalising key communities (Pickering 2002; Hillyard 1993; Wright 1981). Counter-terrorism measures have been further criticised for representing a significant and dangerous extension of the state's coercive capacities that may impact on civil rights, particularly of marginal or vulnerable communities (see, e.g., Thomas 2002; Hillyard 1993; Schulhofer 2002; Hocking 2004; Williams 2002; Tham 2002). The other strand of the literature which gives rise to the identified research questions is that contextualising increases in state repression coinciding with the 'war on terrorism' as part of the process of globalisation under neo-liberalism (McCulloch 2003; McCulloch 2004 forthcoming; Hirsh 1997; Hayward & Morrison 2002; Giroux 2002).

Australia's suppression of financing of terrorism regime

The *Suppression of the Financing of Terrorism Act* 2002 was enacted for two key reasons. It is designed to implement the provisions of the *International Convention for the Suppression of the Financing of Terrorism* which Australia signed in October 2001 and that came into force internationally in April 2002 (Senate Legal and Constitutional Legislation Committee 2002:11–14). More importantly, it aims to starve terrorists of assets and funds in order to reduce their capacity to operate. In this, the legislation is clearly based on the principle contained in the preamble to the *International Convention for the Suppression of the Financing of Terrorism* that the 'number and seriousness of acts of international terrorism depend on the financing that terrorism may obtain'.

The Act inserts a new financing of terrorism offence into the Australian federal *Criminal Code* providing a maximum penalty of life imprisonment. This offence criminalises the provision or collection of funds to facilitate a terrorist act. Other key provisions:

- require cash dealers and financial institutions to report suspected terrorist-related transactions;
- provide a penalty for using the assets of those allegedly involved in terrorist activities;
- streamline the process for disclosing financial transaction information to foreign countries; and
- allow for the freezing of assets of proscribed persons and entities (see Tan 2003).

The last set of provisions gives the Minister for Foreign Affairs the power to list organisations and individuals s/he considers to be in/directly involved in a 'terrorist act'. Such a listing will mean that it is illegal to use or deal with the assets of the listed organisation or individual or to provide any funds to such an organisation or individuals. The listing of an organisation will effectively outlaw that organisation and prevent it from functioning.

Questions concerning the regime

The legislation and associated measures raise a number of critical issues that warrant closer criminological exploration and analysis. We have identified six key questions which we are using to focus our research into the current approach to suppressing the financing of terrorism.

First, are anti-money laundering processes designed to deal with money derived from criminal enterprises appropriately applied to measures aimed at preventing and detecting terrorist activities? Suppression of financing of terrorism measures build substantially on anti-money laundering strategies targeted mainly at taxation fraud and organised criminal activities (Department of the Parliamentary Library 2002:4; see also, Reddy 2002). The intergovernmental agency Financial Action Task Force argues that organised crime and terrorist organisations typically use similar methods to launder funds and therefore warrant similar policy responses (Financial Action Task Force 2002:153). However, others 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). Money laundering measures traditionally focus on the origins of funds whereas measures targeted at financing of terrorism must look mainly at the intended use of funds. Indeed, some forms of terrorism

require little finance, while many terrorist cells are in fact self-financing and require little external support. These two elements suggest an existential difference between the financial interests of terrorists and those of organised crime that have traditionally inspired money laundering initiatives (Andrews 2002; Pieth 2003:25; cf Ehrenfeld 2003:1–3).

Second, will the compliance costs for financial institutions impact differently on small, large and alternative remittance systems and what implications will this have for competition, and for immigrant communities that have traditionally relied on alternative remittance systems for international money transfers? The legislation and measures aimed at combating terrorism place a heavy burden on the financial sector to scrutinise and report financial transactions (Freeland 2003; Schulhofer 2002:52; O'Harrow 2002). Additional compliance costs may impact most heavily on smaller financial institutions, including credit cooperatives and community banks, thus providing a competitive advantage to the bigger financial institutions. Additionally, larger financial organisations may be able to use their market power and political influence to avoid or minimise the costs of compliance (Andrews 2002). Measures aimed at combating the financing of terrorism may stamp out altogether or severely curtail the alternative remittance systems, such as Hawala, which operate outside the regulated financial sector. These systems offer financially competitive and efficient systems to send money overseas, sometimes to impoverished countries with poorly established formal banking systems (International Monetary Fund & World Bank 2003). The informal financial systems are a major target of post-September 11 measures (see, e.g., United States Department of Justice 2002). The contraction of these systems may impact heavily on some already impoverished countries and communities (see, e.g., *Wall Street Journal* 12 April 2001), forcing users to move to more expensive corporate systems. The demise of informal financial systems may remove a source of competition impacting on fees in the formal financial system.

Third, what will be the impact of the legislation and associated measures on employees in the financial sector and other non-financial business enterprises? Under the Act, responsibility for reporting suspected financing of terrorism rests heavily with employees of financial institutions. The Australian Finance Sector Union maintains that the legislation could make bank tellers inadvertently complicit in 'terrorist acts' by handling money as part of their work (Marshall 2002). Under the provisions of the legislation, an offence can be committed even if a person did not act deliberately to facilitate the collection or provision of finance for terrorism. Recent measures foreshadowed by the government indicate that reporting responsibility is likely to be expanded to include non-financial businesses and professionals (Minister for Justice and Customs 2003). A solicitor in the United Kingdom, for example, was recently convicted for failing to report a financial transaction under reporting requirements in that country. He was convicted and jailed, despite having sought and obtained legal advice, which was ultimately deemed to be incorrect by the courts, that the transaction was one he was not obliged to report (Corker 2002).

Fourth, what will be the impact on charitable and not-for-profit organisations? Charities and not-for-profit organisations are considered particularly vulnerable to abuse in relation to the financing of terrorism and are targeted by measures and legislation aimed at combating terrorism (Financial Action Task Force 2002:133; International Convention for the Suppression of the Financing of Terrorism; Ehrenfeld 2003:16;212–22;37–45). Increased regulation and surveillance of non-profit organisations and charities may undermine the ability of legitimate organisations to operate effectively in addition to curtailing their political independence. The flexibility of the definition of terrorism and the ease with which governments can deem organisations 'terrorist' for the purpose of freezing assets may result in some politically inconvenient or dissident charities and non-profit organisations being labelled terrorist organisations.

Fifth, what will be the impact on financial confidentiality and privacy and the potential consequences of this for individuals, financial institutions and the broader financial environment? Comparable legislation in other western countries has connected financial data with security regimes in unprecedented ways and has, in the process, substantially expanded the power of executive government (see generally Schulhofer 2002; Lyon 2003). Measures and legislation directed at combating the financing of terrorism are redefining limits of privacy and property rights against a new approach to the legitimate needs of law enforcement and national security bodies (Binning 2002). However, ambiguity and controversy surrounding the definition of terrorism gives rise to fears that counter-terrorism measures, particularly surveillance, may be used in an arbitrary or discriminatory fashion (Hocking 1993:1; Herman 1993; Ismael & Ismael 2002). Moreover, increasing flows of financial data will not necessarily translate into improved outcomes in detection or prevention of terrorism and may actually be counter productive if it results in a reallocation of resources away from analysis of information towards administration associated with handling increased flows (White 2004; Lyon 2003).

The *Suppression of Financing of Terrorism Act* throws up similar issues. It impacts dramatically on the privacy and confidentiality of financial information by overriding the obligations of financial institutions to maintain client confidentiality and providing for the greatly expanded sharing of information with other countries. The opening up of financial transactions to domestic and international surveillance may have a significant impact on the culture and behaviour of individuals, organisations, and business. Levi and Gilmore argue that anti-terrorism financing measures' 'closest analogues are (1) corporate and political "slush funds" used for transnational corruption and political finance, and (2) tax evasion on non-criminal activities' (2003:91). The new regimes in relation to financial reporting may lead to greater transparency and regulation of business, coinciding with greater pressure to identify the beneficial ownership of assets and track complex financial transactions. The Australian Tax Office, for example, currently has an unprecedented level of intelligence about offshore movements due to closer co-operation with the Australian Transactions Reports and Analysis Centre and increased co-operation with domestic and foreign regulators in the wake of measures put in place since 11 September 2001. This information may be used to investigate wealthy citizens (Hughes 2004).

Sixth, what will be the implications for communities, civil rights and democracy? Cutting off financial resources to individuals and organisations is a powerful sanction. The impact of such financial sanctions will intensify as cash increasingly becomes more marginalised as a mode of exchange, an outcome currently being pursued as part of increased financial regulation (Pieth 2003:116). The impact on individuals has already been demonstrated in a number of cases. Under the legislation, the assets of an Australian small businessperson, whose business shared a name with a United Nations listed terrorist organisation, were frozen for 26 days. He was given no explanation or warning and only achieved success in having his assets unfrozen when the media intervened (Senate Legal and Constitutional Committee 2002:70; Andrews 2002:16–17). The assets of a number of Somali-born men — citizens of Canada and Sweden — were frozen after they were placed on a United Nations' list of terrorists, on the request of the United States. Their assets were frozen, and financial dealings with them criminalised even though the United States produced no evidence of any terrorist activities or connections (Statewatch 2003; Cooper 2002; Zagaris 2002).

Conclusion

The preceding discussion has canvassed the key provisions of the *Suppression of the Financing of Terrorism Act* 2002 and identified six research questions concerning the legislation and its impact.

The questions highlight why these specific provisions warrant further attention from criminologists and criminal justice practitioners, particularly with respect to the multifarious impacts on law enforcement, banking regulation, community organisations and individuals. They also identify a pressing need to promote practitioner and community reflection on financing of terrorism legislation in political, social and legal contexts. In sum, we hope reflection on these research questions will promote a broader understanding of human security in attempts to understand and redress terror.

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