

# Review Essay

*State Crime, Terror Laws and the 'War Against Terror': Review of Green, P & Ward, T (2004) State Crime: Governments, Violence and Corruption, Pluto, London; and Hocking, J (2004) Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy, UNSW Press, Sydney*

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What happens to the conceptual apparatus of criminology and how salient are its taken-for-granted terms — crime, law, justice, state, sovereignty — at a time when global change and conflict may be eroding some elements at least of the international framework of states it has taken for granted ... How is the language of criminology to be applied, if at all, to events like the Tampa and the US terrorist attacks and their aftermath? (Hogg 2002:195).

Russell Hogg raises an important issue. Recent events in world politics, and the changing global context since the end of the Cold War, have thrown down many challenges for all disciplines seeking to address the activities and dynamics of the modern state.

This review of two important new books considers only one aspect of this: In the era of the 'War on Terror', can critical criminology provide the conceptual frameworks to challenge the abuses of human rights being perpetrated by the dominant states in the name of defending the 'freedoms' of liberal democracy? Penny Green and Tony Ward's *State Crime* suggests it can, while Jenny Hocking's *Terror Laws* provides good reasons why it should.

Green and Ward argue that state crime ought to be an integral part of the subject matter of criminology. They develop themes raised by some of the earliest contributions to critical criminology (e.g Schwendinger & Schwendinger 1975) but which have remained marginal to the mainstream. Their focus is 'crimes committed by, or with the complicity of, governments and government agents ... [that is] most of the serious crime, and the most serious crimes, in the modern world'. Their subject matter is extensive — corruption; state-corporate crime; natural disasters; police crime; organised crime and the 'deep state'; state terror and terrorism; torture; war crimes; genocide; and the unfolding situation in Iraq ('every crime in the book'). It is a thoroughly researched and compelling work which, while demonstrating the need for concrete empirical research, locates state crime as a universal phenomenon.

Adapting concepts from the disciplines of political science and international relations, the authors define state crime as 'state organisational deviance involving the violation of human rights'. Breaking down this definition within a broadly Marxist framework, they propose that in order 'to recognise certain common patterns of crime ... it makes sense to talk about three categories of states' — capitalist states (divided into advanced and transitional); state capitalist states (principally China); and predatory states 'where the state elite rules essentially for its own benefit'. However, all states, including proto-states like that constituted by the Taliban in Afghanistan, 'claim an entitlement to do things which if

anyone else did them would constitute violence and extortion'. They exercise or seek 'a monopoly of the legitimate use of force' and comprise 'personnel organised and equipped for the use of force, "material adjuncts, prisons and institutions of coercion of all kinds" and agencies which levy taxes'.

Drawing on interpretations of Gramsci, the authors emphasise that states secure legitimacy through a process of hegemony, 'essentially the process by which those beliefs that support the status quo are instilled in the population at large, so that they appear as matters of consensus and common sense'. If this is successful, 'the specific interests of the dominant class will appear as universal interests'.

Hegemony is a complex concept not to be interpreted too mechanically. It should not be understood as meaning that all ideas in society are instilled by dictat or force, or without opposition. Civil society plays a crucial role in disseminating the common moral language. The media and institutions such as the education system play their part, in addition to a wide range of community and cultural organisations. A vibrant civil society is a world of contradiction in which various social formations contest ideas. Thus, while civil society can help legitimise the activities of the state, it 'can also play a crucial role in defining state actions as illegitimate where they violate legal rules or shared moral beliefs'. In other words, civil society can operate as a key restraining influence on state crime.

Green and Ward define state crime as 'one category of organisational deviance'. The state, or the elements of the ensemble of institutions that comprise it, is capable of breaking or deviating from its own rules or organisational goals. Its 'operative goals ... may or may not reflect the goals the organisation publicly proclaims'. However, not every form of state organisational deviance is a crime. The authors tie their definition of state crime to human rights abuses because these represent a break from the normative standards of domestic and international law and, more importantly, the fundamental premises underlying human rights law --- such as the right to food, clothing and shelter; freedom from physical restraint and debilitating pain, and more broadly, the right to participate in cultural and political life.

The human rights discourse is very contradictory. As the authors point out, 'There is an enormous gap between the normative ideal of human rights --- or the often admirable phraseology of the Universal Declaration --- and the selective and hypocritical promotion of such rights by powerful states and transnational institutions such as the World Bank and International Monetary Fund'. Moreover, the role of human rights, as an aspect of global hegemony, is highly ambiguous. Protecting human rights can be used as a justification for military intervention by the major powers (Chomsky's 'new military humanism') and operate alongside growing levels of Islamophobia and the exclusion of refugees.<sup>1</sup> It can also provide 'oppositional groups in many repressive states with an international network of campaigning support and a common discourse'.

As I write, serious allegations are emerging of abuse of Iraqi prisoners by United States and British forces. Green and Ward's comment that 'criminology has largely ignored the crime of torture'<sup>2</sup> is therefore rather timely. That such allegations have been made should not come as a surprise to anyone reading this book. Marshalling the extensive material produced by Amnesty International and other human rights NGOs, the authors point out:

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1 It perhaps reflects my own preoccupations to suggest that these are two themes which could have been covered more thoroughly.

2 There are some exceptions, e.g. Cohen 1993 and 2001

Torture is not confined to a small number of particularly brutal regimes ... The United States, Israel and the United Kingdom, First World democracies characterised by multi-party political systems, free elections and a separation of powers, have also been clearly identified as torturing nations. At the beginning of the twenty-first century, deaths as a result of torture take place in over 80 countries; torture or ill treatment of suspects by state agents occurs in over 150 countries and torture is widespread in over 70 countries ... While political prisoners remain the most studied victims of torture, evidence seems to suggest that the majority of torture victims are criminal suspects from the poorest and most marginalised sections of society.

Green and Ward draw attention to the significant issues arising from the definition of torture adopted in the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Acknowledging that 'the roots of torture lie beyond law in the complex realities of political economy, conflict and culture', they employ a relatively narrow definition of torture, which excludes capital punishment, imprisonment and other official punishments which are 'best understood as a separate category of state power'. They also limit their examination to 'acts perpetrated by state officials rather than private individuals'. They emphasise the 'public character of torture — whether in strict legal procedure or in the hands of sub-legal or paralegal agencies' so that it may be regarded 'no longer in simplistic terms of personality disorder, ethnic or racial brutality, residual primitivism, or the secularisation of ecclesiastical theories of coercion ...'. They stress the 'powerful context of public terror in which [torture] occurs ... [which] allows for its capacity as "world destroying"'.

In discussing the various explanations for the revival of torture practices in the twentieth century, Green and Ward highlight the emergence of political police forces and a military operating in accordance with a 'quasi-jurisprudence' in Nazi Germany and Stalinist Russia; as well as the enforcement of colonial power by countries such as France in Algeria. They conclude torture is more likely to occur in states where:

- There has been a historical devaluation of a section of the population.
- There is, in the society, a strong respect for authority.
- The culture is both monolithic and enjoys a high degree of popular identification.
- There is embodied within the dominant ideology the clear designation of an enemy, for example, Jews in Nazi Germany, 'subversives' in Argentina, Kurdish militants in Turkey.

While on the face of it, the alleged mistreatment in Iraq constitutes torture and is likely to breach both the domestic law of the Coalition states and international law, Green and Ward's analysis of torture suggests it is a systemic phenomenon, rather than the product of 'a few bad apples'. Torture is conducted 'as part of a strategy with well designed political and social consequences: it is about the elimination of oppositional civil society'. This means the victims of torture tend to be representative of the generalised threat that torturing regimes perceive themselves to face. Torture is justified by its initiators through the devaluation of a section of the community and the clear identification of an enemy. Complex 'techniques of neutralisation' are employed by torturing states to avoid wider recognition that they are breaking rules they to some degree accept and promote as legitimate.

The allegations of torture in Iraq are significant not just because of their immediate political impact but also because the moral high ground, or hegemonic ideal, in relation to questions such as torture and war crimes has, to a large degree, been claimed by the dominant western states. Torture is the subject of an extensive range of international instruments, representing 'an attempt to universalise and privilege normative commitment to human rights over individual state concerns ... [P]rotection from torture ... retains the highest degree of protection afforded by international human rights and international humanitarian law'.

Green and Ward comment that 'the US and other Western powers employ a double discourse around torture', in that they denounce it while providing direct assistance in the form of personnel, training and hardware to torturing states:

Between 1998 and 2000, Amnesty International identified the United States as the country with the greatest number of manufacturers, distributors, suppliers or brokers of leg irons, shackles, gang chains or thumbcuffs. While Amnesty identified 22 such companies in the US, Germany was known to have three, the United Kingdom, South Africa and Taiwan two each, and France, Spain and China each had one such company.

Referring to the alleged mistreatment of prisoners in US facilities in Guantanamo Bay and Afghanistan, Green and Ward suggest these particularly reflect two of the structural preconditions for torture outlined above — 'the devaluation of a section of the community (manifest in "Islamophobia")', and the clear identification of an enemy — the "Axis of Evil"

While the same analysis could be applied to Iraq, the contest between the military machines of the US-led Coalition and their designated enemies feeds the ongoing tensions between and within the state and civil society. In the name of creating democratic institutions and enforcing norms of free trade favourable to themselves, the Coalition states are directly intervening in the fragmented social and political networks of the occupied regions, while Coalition governments are trying to neutralise opposition from within their own civil sphere.

How then, is the legitimacy of opposing acts of state crime being committed by the Coalition forces in Iraq to be determined? The fact that many major states opposed the invasion and have mixed views on the occupation of Iraq, might suggest there is limited consensus at a state level as to when opposition to a state's activity is justified, what forms of opposition are acceptable and the circumstances under which contesting state behaviour becomes criminalised. However, despite the diplomatic and foreign policy divisions generated by US unilateralism,<sup>3</sup> all the major states have sought to restrict civil liberties, and thereby the capacity of sections of civil society to oppose state policy, in the name of conducting the 'War on Terror'.<sup>4</sup>

Jenny Hocking's book on Australia's 'anti-terrorism' legislation reveals how increasingly, the extent to which civil liberties can be exercised, is contingent upon compliance with a very narrow conception of fighting 'terrorism'.

Hocking argues that the justification for Australia's intelligence operations shifted in the late 1960s from tackling domestic 'subversion' to countering 'terrorism'. This resulted in the substantial erosion of parliamentary and civil oversight of the state's intelligence activities and reflected a generalised shift within the major Western states to a domestic and

3 See also Callinicos 2003.

4 For discussions of the measures taken by the US government and the European Union, see Cole 2003 and Stawatch 2004.

security infrastructure based on concepts of 'counter-insurgency'. In an interesting parallel with Green and Ward's findings on torture, she describes how this shift was devised principally by the British and French states to police anti-colonial struggles.<sup>5</sup> Within the official discourse, internal security and military operations were fused, with domestic counter-terrorism measures incorporating: the use of exceptional legislation; the maintenance of vast intelligence collections; the development of pre-emptive controls on political activity; military involvement in civil disturbances; and the development of a strategy of media management in times of crisis.

According to Hocking, the shift occurred in Australia in 'two waves': the first, propelled by the Hilton bombing in February 1978 and incorporating reports by former commissioner of the London Metropolitan Police, Sir Robert Mark and Justice Hope (Mark 1978; Hope 1979); the second, as part of the official response to September 11 and 'premised on a notion of "globalised" terrorism'.

It is difficult to provide a broadly acceptable definition of terrorism in either legal or political terms. Anti-terrorism legislation does not create new crimes, but instead relies on constructing specific categories of politically motivated offence to distinguish terrorists from 'ordinary' criminals. The exceptional status conferred upon 'terrorism' creates a 'second tier' within the criminal justice system in which 'established protections and procedures are denied'. Measures hitherto used to distinguish police states from liberal democracies are employed and previously legitimate activity is threatened. State terrorism is removed entirely from the discourse precisely at a time when critical analyses of, and resistance to, the state's agenda are required.

Within weeks of September 11, the Howard Government initiated unprecedented changes to Australia's security legislation. This was in the context of the Tampa events, when the elision between 'illegals' and 'terrorists' combined with 'the popular reduction of "Islam" to "terrorism"' to help create 'a climate of unbridled, officially sanctioned division and fear'. Hocking highlights four elements of the initial proposals:

- ASIO to be given the power to detain anyone, even those not suspected of any offence and including children, indefinitely for interrogation incommunicado, without access to legal representation and without trial. This would incorporate the removal of the right to remain silent — refusal to answer questions would carry a maximum penalty of five years.
- New categories of 'terrorist' offences to be created.
- A list of deemed 'terrorist' organisations to be created by means of Regulation, allowing for the seizure of finances and property.
- The Attorney-General, or any other delegated minister, to be empowered to proscribe or ban, by declaration and without trial, political organisations which the minister alone considers a danger to security.

With Labor Party backing, most of these proposals have reached the statute books or the job description of the appropriate minister in only a slightly modified form. The right to silence has been removed and ASIO can now:

- Detain an adult for up to seven days if they are suspected of having information about a 'terrorist' offence, regardless of whether they are suspected of any criminal offence.

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5 See also Curtis 2003.

- Detain a 16–18 year-old if they are suspected of involvement in a ‘terrorist’ offence.
- Deny the right of a detained person to contact family or friends.
- Restrict access to legal advice and veto the lawyer of choice.

Limited serious critical analysis, particularly by the media, has allowed the ideological content of the concepts of ‘terrorism’ or ‘national security’ to go largely unchallenged and dissenting voices to be ignored. Further changes given assent at the end of last year severely restrict the right to make public comment on ASIO’s operations. This could have serious long-term consequences for the exercise of democratic norms.

Under the *Security Legislation Amendment (Terrorism) Act 2002*,

A Terrorist Act means an action or threat of action ... done with the intention of advancing a political, religious or ideological cause and with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or State or Territory or foreign country or intimidating the public or a section of the public.

As Hocking argues, this explicitly challenges the right to political dissent, despite the exclusion of ‘advocacy, protest, dissent or industrial action’ from the ambit of the Act:

This same intent ... also lies at the heart of every political protest and every industrial dispute. It is the nexus which remains, despite the amendments, between ‘terrorism’ thus defined and political dissent which must, inevitably, criminalise politics.

The criminalisation of politics undermines civil society. In part, this is achieved by limiting the right to association. The power of proscription, with the effect of retrospectively criminalising association with the organisation concerned, which has now been conferred upon the Attorney-General, bears marked similarities to the powers sought by the Menzies Government under the *Communist Party Dissolution Act 1950*. Apart from the implications for civil liberties, important questions about the nature of liberal democracy are raised:

The very notion of proscription of political organisations within a formal democracy raises immeasurable questions about the very nature of the political system, its legitimacy and its relationship to domestic political violence. Proscription is the end product of a fear of democracy itself, a desire to limit the realm of legitimate political debate, to exclude political voices and to structure politics in a manner which is, by its very design, anti-democratic.

In the post Cold War era, ‘counter-terrorism’ is justified less by reference to the activities of particular states and their domestic supporters (notwithstanding the ‘Axis of Evil’) than by targeting socially constructed enemies. In Australia, the fusion of the immigration and national security discourses during the 1990s has ensured terms such as ‘border protection’ have acquired near hegemonic status. This gives official sanction to the exclusion of refugees and Muslims as external and internal threats. It consolidates more militarised methods of policing and is underpinned by a shift towards the use of detention and solitary confinement. In this context, it becomes easier both to extend the use of detention and to deny that torture and mistreatment of detainees and prisoners is the inevitable result of the isolation and lack of accountability detention creates.<sup>6</sup>

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6 It is worth noting that in March 2004, the Joint Standing Committee on Treaties recommended the Australian Government decline to sign the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the basis that ‘Australia has already demonstrated its commitment to proscribing and preventing torture’.

The 'War on Terror' seems likely to dominate international politics for the foreseeable future. How it is analysed, the legitimacy of the various responses to it and the limitations it reveals in liberal democracy are key questions confronting civil society. Both books provide perspectives confirming this is legitimate terrain for criminologists.

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