

STATE CRIME BY PROXY AND JURIDICAL OTHERING

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This paper explores the range of strategies employed by states to obfuscate their responsibility in state crime through 'othering' both perpetrators and victims. It draws upon a range of frameworks of international humanitarian law, human rights, transitional justice as well as criminological theory to explore the historical and contemporary techniques of obfuscation. The first part of the article focuses upon the ways in which state agency is either exercised covertly or by proxy. Strategies include 'resort to perfidy', the expanded use of 'specialist' forces, collusion with indigenous paramilitaries and the use of private-sector mercenaries and military firms to outsource state deviance. The second part of the article then examines the 'othering' of the enemies of the state. These strategies include holding detainees outside national territories, using third-party nations to carry out torture or redefining the status of individuals to designate them as juridical 'others', with few national or international legal protections. The authors conclude that the notion of state crime should move beyond a monolithic conceptualization of the state and that a more subtle grasp of the different modalities of proxy agency and othering encourages us to look beyond retributive-centred international and national criminal law as but one of the mechanisms for attributing responsibility for state deviance.

Introduction

One of the key features in the development of criminological theory in the past decade has been a focus upon the fragmentation of the state's monopoly on justice and security functions. As Garland has argued, in crime control, as with other spheres, the limitations of the state's capacity to govern social life has become ever more apparent in the late-modern era (Garland 2001: 110). The result has been that criminologists have increasingly refined their analysis of crime, crime control and security functions to examine activities above the state, alongside the state, below the state and indeed across differing state agencies (Johnston and Shearing 2002; Loader and Walker 2004). Thus, a criminology of 'state crime' requires a subtle and pluralistic notion of the state intersecting with other sectors in both the commission of and response to deviant actions.

A basic principle of human rights law and indeed most domestic legal systems is that the state is legally responsible for the actions of its agents (Crawford 2002; ILC 2001). Thus, a longstanding strategy for evasion of responsibility for actions carried out in pursuance of its 'organisational goals' (Green and Ward 2004) is for state agencies to put distance between themselves and those actors responsible for conducting illegal

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activities on their behalf. States routinely develop spoken and unspoken arrangements for concerted and deliberate ignorance concerning such actions as part of broader strategies of denial (Cohen 2001). The formidable literature on state crime now encompasses a broad spectrum of forms of criminality, including genocide, human rights abuses, war crimes, corporate misdeeds, environmental abuses and others (e.g. see Barak 1991; Hagan 1997; Friedrichs 1998; Ross 2000; Kauzlarich *et al.* 2001; Green and Ward 2004). Such literature does, at times, tend towards a crude instrumentalist conception of state crime as the product of a top-down, centralized and monolithic entity. Modern state crime, like the modern state, is often a much more slippery concept (Kauzlarich *et al.* 2003).

Our interest in this article focuses in particular upon those actions of the state which fall under the jurisdiction of the different forms of international justice, i.e. violations of human rights, humanitarian law, crimes against humanity and the related developments in international criminal and transitional justice in the last 20 years (Haynor 2002; Hirsh 2003; Schabas 2004). The International Criminal Court (ICC), ad hoc Tribunals or Truth Commissions all struggle with the state's capacity for 'othering' its deviant acts. The repositioning of the state within wider governance networks of non-state actors (e.g. indigenous paramilitaries, mercenaries, private contractors) or indeed state surrogates renders the task of identifying and prosecuting the planners and perpetrators of violations particularly difficult. Moreover, recent moves by the United States to wage 'war on terrorism' through an exceptionalist and unilateral reinterpretation of international law as well as the exemption of its citizens from the ICC's jurisdiction pose a serious threat to the legitimacy and effectiveness of international institutions and the prospects for realizing the international rule of law (Koh 2003; Ignatieff 2004; Schabas 2004).

This paper is divided into two parts. The first examines strategies through which states seek to 'other' the actors who carry out state crimes and the second focuses on similar processes of 'othering' the victims of state crimes (see Figure 1). Part One focuses in particular upon the intersecting frameworks of 'resort to perfidy', the

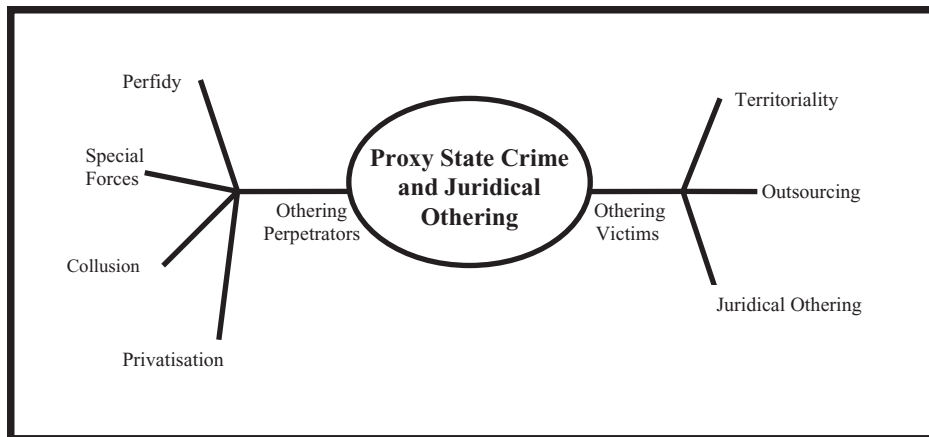


FIG. 1 Proxy state crime and juridical othering

expanded use of ‘specialist’ forces, collusion with indigenous paramilitaries and the utilization of private-sector mercenaries and military firms. Each of these strategies facilitates the obfuscation of the relationship between the *perpetrators* of illegal acts and the state. Part Two then focuses in particular upon the ‘othering’ of those perceived to be the enemies of the state. In particular, it explores strategies designed to facilitate torture and circumnavigate national or international legal protections through holding detainees outside national territories, using third-party nations to carry out torture or redefining the status of individuals to designate them as juridical ‘others’. Again, such strategies distance the state from abuses, as well as allowing for a more effective management of torture by minimizing legal impediments. The paper concludes with an assessment of the impact of these strategies and various efforts to render states accountable for such actions.

Part One: ‘Othering’ the Perpetrators of State Crime

Resort to perfidy

The principal rationales for the development of international humanitarian law (IHL) has been to seek to humanize the rules of engagement in conflict and to protect civilian populations as much as possible (see generally van Sliedrecht 2003; Henckaerts and Doswald-Beck 2003). The 1949 Geneva Conventions and the 1977 Additional Protocols which form the basis for IHL provide rules on how conflicts should be conducted and the treatment of injured combatants, prisoners of war and civilians (Kalshoven and Zegveld 2001). One of the key provisions of IHL is to place an obligation on combatant groups to distinguish themselves from the civilian population through wearing uniforms, displaying weapons openly and explicitly prohibits the ‘resort to perfidy’. Perfidy is distinguished from lawful ‘ruses of war’ (e.g. camouflage, disinformation) by Article 37(1) of Additional Protocol One (1977), which offers a number of examples, including ‘the feigning of non-combatant status’ in order to ‘kill, injure or capture’ an adversary as a perfidious act. In effect, the basis of perfidy is that the affiliation of state combatants should be clear and that such affiliation should not be hidden in order to gain a military advantage in attempts to kill, injure or capture enemy combatants (Rodgers 2004).

In the 1960s and 1970s, with the expansion of death squads in at least a number of Latin-American countries, many members of the state forces operated with de facto impunity for abuses committed as members of such death squads. Death squads often became de facto adjuncts of the state’s security infrastructure (Malamud-Goti 1996; Sluka 1999). State actors often either direct or carried out attacks against perceived subversives or their civilian supporters in the guise of death squads (McCuen 1984; Amnesty International 1988; Jones 1991; Rone 1996). Numerous high-profile killings attributed to loyalist paramilitaries in Northern Ireland have subsequently been identified as having been carried out by members of the locally recruited regiment of the British Army (the Ulster Defence Regiment) and, in some instances, the Royal Ulster Constabulary (Dillon 1990, especially Chapter 8; Ryder 1991, especially Chapter 5). Similarly, some of the atrocities committed during the war in the former Yugoslavia which were attributed to paramilitaries were in fact carried out by ‘. . . crack [Serbian] professional soldiers masquerading as local volunteers’ (Sherwell 1992, cited in Ron 2000: 289).

At one level, given that many of these actions may involve the most egregious attacks, then the question of whether the attackers were also guilty of acting perfidiously might appear, at first blush, something of a legal side issue. Indeed, there is a very lively debate amongst international lawyers as to the extent to which IHL can be applied as customary law in conflicts not of an international nature or indeed to groups not clearly defined as state actors (Petrasek 2002; Watkin 2004). However, we would argue that the notion of perfidy is a more important notion than simply a technical classification.

The historical efforts to promote distinctions between combatants and non-combatants have always struggled against the widely practised strategy of attacks upon civilians (Carr 2003). Perfidy speaks directly to that phenomenon, as perpetrators deliberately obscure their role as combatant actors, often in order to carry out acts which are banned by the Geneva Conventions. As noted above, not all ruses in military conflict are perfidious. However, it is the distinction within the notion of perfidy between *lawful* and *unlawful* ruses that is crucial. It is not simply the act of denial to gain military advantage that is significant. Rather, it is the attempt to evade legal accountability. Perfidy, like the range of 'othering' strategies below, is reflective of a broader tendency which undermines the effectiveness of the laws of war. It is, as Best (2001: 293) has argued, 'especially damaging to the law's standing because, more than any other illegal or immoral act of war, it spits in the face of the law's rock bottom assumption of universal kinship' (Best 2001: 293).

Counter-insurgency, counter terrorism and the importance of 'being special'

Another key feature which arguably promotes the routinization of abuses is when such practices become embedded aspects of organizational or indeed sectional culture within specialist elements of the state security or military infrastructure. Perhaps paradoxically, as Gurr (1986) has argued, the biggest predictor for state terror is the existence of units or institutions which specialize in combating insurgency or terrorism. Such units or organizations are often separately funded, and receive *specialized* training in counter-insurgency and counter-terrorism, including working with indigenous or other external military or paramilitary actors. They are encouraged to develop a strong elitist sense of organizational self as the 'sharp end' of the states military or security infrastructure and, because of the particularly difficult and dangerous nature of their work, often enjoy even less rigorous political or legal oversight mechanisms than their mainstream colleagues (see, e.g. McRaven 1995; De B. Taillon 2001). While similar dynamics are shared by many specialist units and organizations in different national security services and armed forces,¹ the British and American experiences will suffice as illustrative examples.

The use of special forces by the British army is usually traced in particular to the contracting of the British Empire in Aden, Borneo, Kenya, Malaya and elsewhere (Mockaitis 1995; Newsinger 2001). Facing the drain of maintaining large numbers of conventional troops in Europe during the Cold War, the British army has long taken pride in its

¹ For a range of commentaries on the 'special forces' experience of other countries, see, e.g. Pustay 1965; Shultz *et al.* 1989; Adams 1998; O'Brien 2001; Finlay 2003).

expertise in its specialist forces for use in 'low intensity conflict'.² The best known of such special forces is of course the Special Air Service (SAS). One of the most celebrated regiments in the British Army, the self-image of the SAS is of 'highly professional men pursuing the enemies of the state by highly uncivilised means' (Charters 1977: 24). According to the Ministry of Defence, their general tasks have traditionally included 'the collection of information on local insurgents, ambush and harassment of insurgents, sabotage, assassination and demolition, border surveillance, limited community relations and liaison with, and organisation, training and control of, friendly guerrilla forces operating against a common enemy' (MOD 1969: 60, cited in De B. Taillon 2001: 35). Their work in Northern Ireland is particularly instructive.

The Northern Ireland conflict has produced a considerable literature on the involvement of specialist anti-terrorist forces, such as the 14th Intelligence Company, Force Research Unit (FRU), Royal Ulster Constabulary (RUC) Special Branch, elements of MI5 and, of course, the SAS. Well documented deviant activities have included torture and 'shoot to kill' operations of terrorist suspects, collusion with Loyalist paramilitaries in the murder of Republicans and Catholic civilians (discussed below) and a range of related illegal activities (Dillon 1990; Stalker 1988; Larkin 2003; Murray 1998). The SAS was formally deployed in Northern Ireland in January 1976 (although had actually operated there for some time previously (Murray 1990)) and were based initially in the Republican stronghold of South Armagh. As both the British government and the paramilitary groups increasingly settled in for 'the long war' (Coogan 1995), their acknowledged usage was part of a broader strategy of passing responsibility for the sharper edges of the military conflict to such specialists and away from generic regiments of the British army, while simultaneously placing the primary responsibility for more general security in the hands of the local police (Ellison and Smyth 2000). Famously distrustful of the other agencies involved in counter-terrorist work, their energies were almost exclusively directed towards gathering intelligence upon and carrying out attacks against the Republican groupings, in particular the IRA (Taylor 2002).

The work of the SAS and other special forces in Northern Ireland, such as the 14th Intelligence and the Force Research Unit (discussed in greater detail below with regard to collusion), highlights a number of interesting features of more generic interest. First, they have a regimental or unit view of themselves as elite specialists in 'dirty war'. Secondly, the deployment of such highly trained specialists in a conflict is often an important political gesture in the broader propaganda battle.³ Thirdly, in order for special forces to be effective, there is a view that they should enjoy *de facto* legal impunity (Charters and Tugwell 1989). Thus, for some senior army officers, for the SAS to operate in a part of the United Kingdom with attendant media and political scrutiny, this presented considerable difficulties.⁴ While special laws or special rules of engagement

² For example, speaking to a group of students at the US Army Command regarding the developing specialisms of insurgency and counter-insurgency in 1964, Sir Kenneth Darling, a Colonel in the Parachute Regiment, argued 'There is nothing new in these tactics, and we not want to be persuaded by upstarts such as Mao Tse Tung that he has produced some original thought in this field. In fact, we British in some degree or another have been promoting insurgency all around the world for centuries' (Darling 1965: 9).

³ As then Secretary of State for Northern Ireland, Merlyn Rees, subsequently acknowledged, the formal deployment of the SAS to Northern Ireland in 1976 was 'more presentational and mystique making than anything else' (Rees 1985).

⁴ 'I had reservations about their employment within the United Kingdom, and did not believe that any operational advantage that there employment might produce would outweigh the possible political and public relations difficulties it might cause' (Field Marshall Lord Carver, cited in De B. Taillon 2001: 36).

for Special Forces are never written down, there are, instead, unwritten and unspoken ‘big boys’ rules’ (Urban 1992) and one of them is that big boys who get caught rarely get held to account.⁵ The final feature of more general interest is the inability or unwillingness of special forces to engage militarily with pro-state terror groups (Urban 1992). The SAS killed either Republicans or civilians, not Loyalist paramilitaries (McKittrick *et al.* 1999: 1499).⁶ The conventional army wisdom that one should avoid fighting a war on two fronts where possible may become honed and refined by specialist forces who make it their business to actively supply, train and direct pro-state terror groups against the ‘real enemy’.

In the United States, while Special Forces were certainly deployed during the Second World War, their dominance in counter-insurgency is usually traced to the Kennedy presidency (Blum 2003). Kennedy’s administration viewed their capacity to engage in unconventional warfare as crucial to countering the Soviet threat (Evans 1987). Originally envisaged as assistants to anti-Soviet guerrilla and partisan activity, Special Forces in the United States have traditionally been separately funded, trained and institutionally organized as the ‘action arm’ of the CIA and other intelligence agencies involved in insurgency or counterinsurgency activities (McRaven 1995). In due course, counter-insurgency was developed as a ‘specialist’ discipline, practised by elite units of each of the armed services with organic links to the intelligence community, and largely unencumbered by the bureaucratic and cumbersome oversight structures of the traditional forces (McClintock 1992).

As well as these structural and cultural factors, what sets American Army Special Forces apart is the view of ‘working with foreign military and security personnel in counterinsurgency and paramilitary tactics as their core mission’ (Fitzimmons 2003: 207). As McClintock argues, in the 1970s and 1980s, it was Special Forces (together with the CIA) who provided the bulk of the training, security assistance programmes and on-the-ground expertise to US allies in Latin-America in counter-insurgency, this suggesting that the more professionalized use of guerrilla/counter-guerrilla tactics was absorbed to coexist with traditional blunt military and security force repression (McClintock 1991).⁷ Special Forces were also heavily involved in the training and direction of the pro-state paramilitary death squads which operated in jurisdictions like Guatemala, El Salvador, Nicaragua and other places (Sluka 1999; Arnson 2002; Schroeder 2002).

More recently, the profile of Special Forces in the United States has been considerably enhanced by the ‘War on Terror’. They benefited from a turf war between the Secretary of State, Donald Rumsfeld, on the one hand and both the CIA and more traditional military senior figures on the other (Risen 2002). The unified combatant

⁵ As Urban (1992: 74–6) argues, Special Forces and service personnel serving in N. Ireland were shielded from the normal legal process in cases of killing by a series of amendments to the conduct of coroner’s courts including the fact that coroners were not empowered to pass verdicts, only to make findings (Urban 1992: 74–6). While only a handful of members of regular regiments of the British Army were successfully prosecuted for serious offences in Northern Ireland, including murder (despite the fact that almost half of the 321 victims killed by state forces were uninvolved civilians), no member of the British Special Forces has been similarly held to account for serious criminal acts (see Ní Aoláinn (2000) for further discussion).

⁶ Urban (1992: 238–9) also notes that between 1976 and 1987, special forces of the SAS and 14th intelligence killed 32 Republicans and no Loyalists, despite the high numbers of deaths for which the Loyalists were responsible.

⁷ ‘... armies such as that of El Salvador in the 1980s were virtually remade in Special Forces image. . . . Certainly it is astonishing to imagine the guerrilla specialists of the US army (any more than the British SAS commandos) being wasted teaching a conventional curriculum on military logistics—or as convincing professors of humanitarian law’ (McClintock 1991: 145).

command responsible for managing Special Forces has been designated as leading the global war on terrorism (Fitzimmons 2003). A Special Forces General has been appointed as the Army Chief of Staff (Gertz 2003), their budget has been increased substantially to \$6.7 billion per annum in 2004 (Department of Defense 2003: 81) and Special Forces can now plan and execute their own armed actions (rather than support other missions). As part of that broader struggle with the CIA in particular, over which there is considerably greater Congressional scrutiny precisely because of their chequered history, Special Forces have now secured a considerably enhanced flexibility for conducting covert actions with minimal political oversight (Kibbe 2004). Their tasks in Afghanistan, and later, Iraq, have included coordinating with local indigenous forces (the Northern Alliance in Afghanistan and Kurdish forces in Northern Iraq); the management of anti-insurgent information and propaganda and the development/maintenance of relations with local civilian populations (Psychological Operations or PSOPs); the unsuccessful search for weapons of mass destruction in Iraq; the interrogation of terrorist suspects; and they have also headed up the ‘hunter killer’ teams in pursuing ‘high value targets’ (Fitzimmons 2003; Finlay 2003; Kibbe 2004).

In sum, like their British counterparts, US Special Forces have, since their inception, been involved in what McClintock (1991) has described as the ‘dark side’ of counter-insurgency work. They combine the similar features of an elite specialist self image, whose deployment is viewed as of considerable symbolic as well as operational significance, little apparent traditional legal oversight over their actions and an organizing principle that they should work in collaboration with local indigenous insurgents. Such long-standing characteristics have been augmented by the contemporary US government’s response to the War on Terror. This campaign has enhanced the operational, bureaucratic and political privilege of such organizations as an ‘othering’ strategy and underlined the fact that ‘being special’ further reduces the possibility of accountability for any state crimes committed by such groups.

Indigenous terror groups and the collusion continuum

The third overlapping method of ‘othering’ responsibility for state crime is through state collusion with third-force actors, usually indigenous paramilitary groups. Collusion is based upon the premise that one of the key tactical advantages of insurgent groups is their use of terrorist tactics, and therefore that they are, in turn, most vulnerable to mirror organizations and tactics rather than conventional policing or military responses (McClintock 1991). Terror is fought with terror. Collusion has been defined recently by retired Canadian Supreme Court Judge Mr Justice Cory in his investigation of the phenomenon in Northern Ireland as state security forces ‘ignoring or turning a blind eye to the wrongful acts of their servants or agents or supplying information to assist them in their wrongful acts or encouraging them to commit wrongful acts’ (Cory 2004: 21). Of course, othering state violence through collusion with indigenous ‘enemies of my enemy’ is a long-standing counter-terrorism/counter-insurgency strategy utilized across a broad range of conflicts.⁸ For the sake of brevity, however, we have

⁸ E.g. South Africa’s employment of Inkatha hit squads to attack members of the ANC during the Apartheid regime, Rhodesia’s use of RENAMO forces in Mozambique against FRELIMO (Front for Liberation of Mozambique), the US use of the Contras in Nicaragua, Israel’s use of the South Lebanese Army in Lebanon, and Uganda’s use of the FAPC (Armed Forces of the Congolese People) militia as a proxy in the Democratic Republic of Congo, despite its official withdrawal from there.

chosen in particular to focus upon the actions of the British state in order to highlight themes of more general interest.

Perhaps the best known historical commentator on British collusion is Brigadier Frank Kitson, who wrote extensively about a range of counter-insurgency strategies employed by successive British governments. Kitson documented in considerable detail how he and his colleagues in Army intelligence and Special Branch trained and developed indigenous ‘counter-gangs’ or ‘pseudo gangs’ as a means of gathering information, killing ‘terrorists’ and generally creating confusion and dissension amongst the enemy in their fight against the Mau Mau in Kenya (Kitson 1960). Later, his work on counter-gangs was augmented by reflection upon the relationship between insurgent groups and their host communities (Kitson 1971), and then charting the contours of how counter-insurgency strategy intersected with the law and those tasked with the political management of a conflict (Kitson 1989, especially Chapter 3). Each of these areas of study broadly highlights key themes in understanding the collusion continuum—setting up a mechanism to either establish or assist an established counter-gang as a mechanism for deniability; terrorizing the ‘host’ community from which the ‘enemy’ insurgent group derives; and, if necessary, enlisting and implicating the legal system and, in some instances, the political masters of the security services to varying degrees to facilitate such groups doing their work.

The Northern Ireland conflict again provides an instructive example of what might be termed a collusion continuum. As noted above, state crimes have been committed in that jurisdiction both by serving members of security forces acting perfidiously and by special forces acting with *de facto* legal impunity. In addition, a number of different styles of state collusion have been employed. At one end of the continuum is so-called ‘bad apple’ collusion, wherein intelligence information on suspected Republicans has been passed to Loyalist paramilitaries by individual members of the security forces sympathetic to their cause (Dillon 1990; Lister and Jordan 2003; Larkin 2004). At the other is what has been termed ‘institutional collusion’ (Lawyers Committee for Human Rights 2003), wherein collusion with paramilitary groups has been organized, planned and bureaucratized by elements of the security forces and which have, in some instances, implicated institutions and individuals with the criminal justice system as well as the political elites. While increasing numbers of killings carried out by Loyalists have been credibly linked to this style of collusion (British and Irish Rights Watch 2000; Lawyers Committee for Human Rights 2003), the best known example is the murder of human rights lawyer, Pat Finucane.⁹

⁹ Pat Finucane was a lawyer who was murdered by the Loyalist Ulster Defence Association in 1989. During interrogations of Loyalist suspects, RUC officers consistently urged Loyalists to kill him, alleging wrongly that he was a member of the IRA. A few days prior to the murder, Conservative Junior Minister Douglas Hogg announced in the House of Commons that ‘there are in Northern Ireland a number of solicitors who are unduly sympathetic to the IRA’. Hogg later acknowledged that this statement was based on a Special Branch briefing. The intelligence which led to Finucane’s murder was coordinated by Brian Nelson, a UDA member and Army’s Force Research Unit agent. The principal weapon was supplied by another RUC Special Branch agent. One of the prime actors recently convicted of the murder was also an RUC informer. When Brian Nelson was arrested in 1990 and faced 34 charges, including two counts of murder (after speculation that he would expose the Army’s role in open court), counsel for the Attorney General told the court that after ‘a rigorous examination of the interests of justice’, 15 charges were to be dropped, including the two murders. These facts have been the subject of three investigations by the Chief of the Metropolitan Police, Sir John Stevens, and an independent report by Judge Cory, both of whom found that collusion had taken place. Judge Cory recommended public inquiries into this and three other cases. The appointments for the other cases have been made; however, the British government recently announced the need for a new Inquiries Bill to deal with the *Finucane* killing (and indeed other inquiries into events ‘that have caused or have the potential to cause public concern’) and has indicated that because of the sensitivities of national security in this case, much of the Inquiry will have to be held in private (see CAJ 1999; British and Irish Rights Watch 2000; Stevens 2003; Lawyers Committee for Human Rights 2003; Cory 2004; Cowan 2004).

The form of institutional state collusion in the *Finucane* and other murders in Northern Ireland highlight a number of important themes. First, the relationship between the state and the paramilitary or counter-terror groups with whom it colludes is often a fluid one. Such groups do not supinely follow state directives on each and every killing. They often have a dynamic of their own in their targeting and operational strategies. Indeed, this space for innovative sadism—Loyalist ‘romper rooms’¹⁰ or acts of depraved sexual violence by Bosnian-Serb paramilitaries—is useful in both distancing the state from its proxy actors (what self-respecting state would condone such actions?) as well as terrorizing the host community from which the insurgent groups derive (Nikolic-Ristnanovic 1999; Dillon 1990; Vulliamy 1996). The image of ill-disciplined, out-of-control, sectarian paramilitaries, irregulars or death squads who are ‘beyond the reach’ of the state is materially and symbolically convenient in the denial of state crime (e.g. Gottschalk 2000; Campbell 2000). Secondly, and in particular when collusion occurs in a developed Western democracy, the bureaucratic compartmentalization of those who run agents means that, on the surface at least, other aspects of the criminal justice system may function ‘as normal’. Intelligence and policing agencies do not necessarily talk to each other; the state justice system is not a monolith so it is quite feasible for criminal investigations into collusive and non-collusive acts to continue. Indeed, as in the *Finucane* case, the investigating officers may not even be privy to all the relevant information, or indeed be aware that the objects of their investigations are in fact agents. However, the third and related feature, and arguably the most corrosive, occurs when such actors do come within the ambit of the criminal justice system. In such instances, the prosecutors and indeed the judiciary may become tainted by fairly naked efforts to prevent state collusion being unearthed in open court. Finally, as evidenced by the comments of Douglas Hogg regarding the *Finucane* murder, the highly unusual appearance of Tom King at the Nelson trial and the dogged political efforts to resist a full public inquiry in this case, despite ceding them in others, institutional collusion in high-profile acts of proxy state violence may require implicating the political elites (either before or after the fact) in order to attempt to ensure that the truth remains hidden.

Privatized proxies: mercenaries and private military firms

The othering of state crime through proxy actors is, of course, not limited to indigenous terror groups such as the Loyalists in Northern Ireland. The employment of mercenaries to obfuscate state culpability in armed conflicts may be traced at least to ancient times (e.g. Griffith 1997; Shearer 1998). Indeed, the overlap between paid mercenaries and indigenous counter-terror groups may appear to blur considerably. Thus, for example, in the Basque conflict, an organization calling itself GAL (Anti-terrorist Liberation Group) claimed responsibility for at least 28 killings of alleged ETA activists and sympathizers between 1983 and 1987 (Artexga 1999).¹¹ Subsequent investigations determined that GAL was led by two serving anti-terrorist police officers, who recruited mercenaries paid for by the Spanish treasury and relied upon intelligence support

¹⁰ Loyalist ‘romper rooms’ were drinking clubs where Catholic civilians were kidnapped, tortured and mutilated (sometimes while the drinkers watched on) and their bodies later dumped. They were termed ‘romper rooms’ after a popular local children’s television programme (see Bruce 1992).

¹¹ GAL came to public prominence after an embarrassing bungled attempted kidnapping of a senior ETA figure in France by Spanish anti-terrorist police in 1982. The kidnap team was arrested by French police.

from the Guardia Civil. Similarly, in South Africa, several commissions, a number of high-profile trials and the Truth and Reconciliation Commission have confirmed that police and intelligence officers were involved directly in clandestine murders, as well as training, equipping and paying Inkatha Freedom Party hit squads who carried out attacks on anti-apartheid activists during the process of negotiation and transition (TRC Report 1998; Ellis 1998; Wilson 2001).

More recently, the presence of private contractors working at Abu Ghraib and other detention facilities in Iraq, Cuba and Afghanistan was seized on by the press as a new phenomenon. In fact, the use of private military firms (PMFs), private security companies—such as Executive Outcomes (now defunct), Sandline International, CACI, Dyncorp, Titan Corp or Group 4—mercenaries and ad hoc project teams (e.g. to stage coups, as planned for Equatorial Guinea) has been a central feature of civil conflicts in Africa, Central America, Cuba and the Maldives (Spicer 1999; Ballesteros 2003) throughout the post-war period. Five Commando was used in the Belgian Congo during the 1960s to promote the secession of the mineral rich territory Katanga, to fight patriot nationalist forces and to overthrow President Mobutu. Similarly, Security Advisory Services Ltd was used to recruit indigenous paramilitaries in Angola and Zaire from the 1970s onwards. Lifeguard Management has been used for intelligence gathering and counter-insurgency operations in Sierra Leone. Executive Outcomes, which conducted covert reconnaissance for De Beers in the early 1990s, had also begun discussions with Heritage Oil and Gas to provide similar services, before it was dissolved in 1999 (FCO 2002, Annex A).

The use of private companies for military assistance, training, intelligence and security services is becoming an increasingly important element of American defence policy in particular (Singer 2003). Reports of abuses at Abu Ghraib prison outside Baghdad have provoked demands for some explanation of what conditions of detention and what practices during or prior to interrogation were authorized by the American military. The fact that private contractors employed by the CIA (as they had been in detention facilities in Afghanistan and Guantánamo Bay) were among the abusers was a less hotly debated point, but the case nicely illustrates the typology of state crime by proxy that we are trying to develop. The American soldiers charged with the abuse of prisoners will be dealt with through the US Army's internal discipline and court martial system. By contrast, although civilian contractors who commit crimes would normally fall under the jurisdiction of the state on whose territory they were committed, Coalition Provisional Authority regulations which were in force at the time of the abuses explicitly state that foreign contractors (all 15,000–20,000 of them) do not fall under local Iraqi jurisdiction (Singer 2004a).¹²

Contractors who are American nationals can be tried under US extraterritorial jurisdiction,¹³ but non-national contractors cannot be and they 'fall into the same gray area as unlawful combatants in Guantánamo Bay' (Phillip Carter, quoted in Singer 2004a). Private military contractors do not fit the existing definition of mercenaries¹⁴

¹² Paul Bremer, Chief American Administrator in Iraq, granted civilians and their employees from both criminal and civil actions in the Iraqi legal system, including arrest and detention in June 2003. See Public Notice 'Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel' (26 June 2003, 030628–04).

¹³ A Federal Grand Jury indicted in North Carolina a private contractor employed by the CIA for the death of a detainee in Afghanistan. This is the first prosecution of a civilian (*New York Times*, 18 June 2004).

¹⁴ See Art.47 of Additional Protocol I, 1977 of the Geneva Convention.

and have an ambiguous legal status as a basis for enforcing accountability. The employees of private military companies are accountable as individuals, as are their superiors in some cases. But attributing responsibility to a private company is much more difficult and, in any case, PMFs as corporate entities do not come under the jurisdiction of the ICC (Lilly 2002: 4).

As for prosecuting the private military companies themselves through national courts, this too is difficult, given their fluid multinational presence and their relationships with their subcontractors. There is less transparency about PMF activities if they are contracted by other government agencies like the CIA for secret or special operations. Also PMFs tend not to have a continuous corporate existence, have 'few fixed assets or permanent employees' and they can 'move relatively easily from one jurisdiction to another' and 'regularly mutate', both as commercial entities and in terms of their personnel (Beyani and Lilly 2001: 17; FCO 2002: 14, 44). Cynics among us might conclude that this trinity of features is a significant advantage of outsourcing military and intelligence services. In this as in other aspects of the changing nature of the conduct of war, international and indeed law lags behind the concrete actuality of military practice. Using private military firms or local proxies is not only more flexible¹⁵ but it also offers the states that use these strategies greatly enhanced scope for denying responsibility for illegal or abusive activities.

To recapitulate briefly, therefore, through perfidy, specialization, collusion and the deployment of private sector resources states have developed a range of strategies designed to distance themselves from those who carry out their work 'once removed'. State agencies divest themselves of responsibility for abuses through a remarkable array of horizontal and vertical distancing techniques, which are designed precisely to obstruct the potential for public knowledge and lawful accountability. Each strategy underlines the difficulties in properly conceptualizing state crime if we fail to take on board the state's capacity to other those proxy actors who do its criminal bidding. As we shall explore in the section below, states have developed a parallel set of discourses and practices, designed to other those on the receiving end of such actions.

Part Two: Othering the Victims of State Crime

There is a considerable sociological, political science and psychological/sociopsychological literature on the mechanisms through which the victims of conflict may become dehumanized, rendered 'face-less' and placed beyond legal or other protective frameworks (e.g. Jay Lifton 1998; Ignatieff 1998; Hirsch 2003). Distinct modes of 'othering' the victims of state crime may be traced to colonial discourses, 'states of emergency' (or security states) and 20th-century genocides. For example, Franz Fanon (1967) has detailed the ways in which colonialism requires the 'othering' of subaltern races and nations by focusing on the manichean logic of *difference*—belonging/not belonging—thus constructing an ideological and material rationale for the continued imperial

¹⁵ Governments give many reasons for outsourcing particular services to private military companies. The most frequently voiced reason is the neo-liberal economic argument that privatization is cheaper and more efficient; hence, outsourcing military expertise is said to provide more flexibility and cost-effectiveness because services can be bought only when they are needed. The United States has downsized its active-duty troops by 32 per cent since 1991 (Crock *et al.* 2003; Singer 2004b) and the United Kingdom is currently privatizing 'everything except the "core competency"—fighting and killing people' (Cohen 2003: 20). The political benefits of buying in PMFs personnel to casualty-averse and militarily over-stretched states like the United States are fairly obvious.

exploitation of subaltern ‘others’ (e.g. in Algeria). A further style of othering is premised upon the need for *elimination* of internal enemies of the state via the disappearances that were the hallmark of Latin-American ‘security states’ of the 1970s and 1980s or, indeed, genocides of the 20th century, such as the Holocaust or the events in Rwanda (Minow 1998).

For current purposes, we are particularly interested in the ways in which victims of state crime are physically and/or conceptually located beyond legal protection—what Cohen has described as a process whereby people are ‘placed outside the boundary within which values and rules of fairness apply’ (Cohen 2001: 97). As Bauman has observed regarding the eliminationist othering of genocide victims, before the perpetrators could acquire power over the victims’ lives, they had to acquire power over their definition (Bauman 1995: 203). Each of these forms of othering involves defining certain persons or groups as being outside the moral community protected by law (Bauman 1989; Opatow 1990; Agamben 2004). Thus, the key issue for analysis is the ways in which states seek to legally ‘other’ the victims of state crime by placing them beyond the jurisdiction of either international justice or indeed their own national justice systems. Below, we explore three overlapping mechanisms of *juridical* othering designed to achieve exactly that aim: the creation and exploitation of inaccessible ‘extra-territorial legal black holes’; the outsourcing of state crime to regimes known to practice torture; and the creation of special rules and regimes which permit the torture of ‘juridical others’ who are deprived of the protection of domestic and international law.

Territoriality

The specifically territorial exploitation of jurisdiction may take the form of the transferring or holding of suspects or combatants in a variety of different detention arrangements. During the Latin-American dirty wars in the 1970s, especially under Operation Condor, there was significant cross-border cooperation in the kidnapping, torture and enforced disappearance of suspected Leftist subversives (Fitzgerald 2003: 253). For example, the government of Argentina allowed officers of the Uruguayan OCOA (Coordinating Organization of Anti-Subversive Operations) access to Uruguayan nationals living in Argentina for their interrogation and or disappearance (National Commission on Disappeared People 1986: 153). Israel has adopted similar tactics in utilizing detention centres such Khiam in Southern Lebanon in order to circumnavigate the then strictures of the Israeli courts that interrogators could only apply a ‘moderate degree of physical pressure’ in Israel proper.¹⁶

As with the various othering strategies detailed above, these techniques have been considerably refined in the contemporary war on terror. Thus, detainees may now be kept in the jurisdiction where they were captured (e.g. Afghanistan) and held in either the occupying state’s military detention facilities (e.g. a US military detention facility in Bagram, Jalalabad, Asadabad in Afghanistan) or in a facility run by the indigenous authorities but to which the agents of another state are allowed access to interrogate detainees. Combatants or suspects may also be transferred out of the jurisdiction of capture, e.g. out of Afghanistan, into either an extraterritorial US military detention facility (e.g. Guantánamo Bay, Diego Garcia, US warships), an undisclosed location

¹⁶ For an excellent critique of the latter notion, see B’Tsem (1991; 1998).

such as the CIA's 'Hotel California' (Grey 2004) or a jurisdiction offering such 'hospitality' (e.g. the United Kingdom in the case of Diego Garcia) which turns a blind eye to what takes place on its territory.

The explicit rationale for such territorial manipulation is to retain maximum control over the conduct of interrogations and torture while simultaneously minimizing the potential for legal oversight. As the British Court of Appeal has described with regard to Guantánamo Bay, it represents an attempt to place the detainee in 'a legal black hole'.¹⁷ In instances where the authorities adjudge that more 'effective' interrogations can be conducted outside of the territory over which they have de jure control, they have also employed the option of simply transferring individuals to other appropriately obliging jurisdictions.

Outsourcing

The practice of extra-judicial transfer of prisoners for interrogation to states that are known to torture (termed 'rendition' by Sandy Berger, a national security advisor to the Clinton administration) pre-dates the war on terror. In his testimony to the Joint House and Senate Select Intelligence Committee (the '9/11 Commission'), the former Director of the CIA, George Tenet, reported that 'by 11 September, CIA (and in many cases with the FBI) had rendered 70 terrorists *to justice* around the world' (Markey 2004, emphasis added). A former covert agent who worked for the CIA across the Middle East during the 1990s elaborated on how this worked, suggesting that each proxy regime in the Middle East 'penal archipelago' has its own specialism in the services it provides to liberal states:

If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear—never see them again—you send them to Egypt. (Bob Baer, quoted in Grey 2004: 25)

By definition, extraordinary rendition requires the existence of cooperation between the security apparati of two or more states. Some forms of rendition amount to little more than a form of jurisdiction shopping that enables so-called liberal states to commit human rights violations by proxy or to take advantage of 'hospitality' arrangements with less liberal states (Human Rights Watch 2004). The rendition of Wahad Al-Rawi, an Iraqi-born British citizen, is one such case. Al-Rawi was snatched in the Gambia outside UK territorial jurisdiction after an MI5 tip-off to the CIA. He was then held in a Banjul goal, where not only was he refused access to the British consulate (in violation of his Vienna Convention right), but an 'official' from the US embassy was allowed access to interrogate him (Grey 2004: 23–4). Another variant of this inter-state practice is a hybrid of rendition and refoulement. In 1998, five Egyptian nationals deemed to be Islamist extremists were picked up in Tirana, Albania and allegedly tortured there. Then they were transported to Cairo in an unmarked US Gulfstream jet, where they were handed over to the Egyptian government for further interrogation and torture. One of the men, Ahmed Osman Saleh, was tortured, tried *in absentia* and hanged.

¹⁷ *Abbasi and Anor v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ. 1598, at para.63.

Another, Shawki Attiya, was also tortured and then hanged without trial in February 2000 (Grey 2004: 24). The fate of the other three is not known.

As noted above, after 9/11, this form of torture and interrogation by proxy was supplemented by more direct actions of American Special Forces. Now, high-value targets may be interrogated in US military detention facilities such as Abu Ghraib or be transferred to third states for interrogation. In addition, Donald Rumsfeld has given Special Forces units blanket advance approval to kill, capture and, if possible, interrogate ‘high value’ targets and a ‘Special Access Program’ (SAP) was set up to recruit, equip, support and analyse the information these units gleaned in their war on terror activities (Hersh 2004).

Our argument here is not that the United States is alone in resorting to these sorts of calculated actions to evade its obligations under international law. However, we are suggesting that the resources of the United States now give a truly global rather than merely regional reach. The scale of its potential is well illustrated by the case of Mahar Arar, a Canadian Muslim (Gillis 2003: 16; Grey 2004: 22–3; Beinert 2004). Mr Arar was picked up by a CIA ‘snatch squad’ while transiting through JFK airport in New York in October 2002, apparently on the basis of information supplied to the Americans by the Canadian security services. He was taken by a ‘Special Collection Services’ jet to Jordan and then on to Syria, where he reports having been tortured and held in appalling conditions for 10 months, before being returned to Canada. His case is not unique. According to J. Cofer Black (CIA Counterintelligence Chief), there were in the order of 3,000 war-on-terror prisoners in detention in various locations across the globe at that time (Black 2003). As Mégrét (2003: 343) has argued, what we appear to be witnessing is the emergence of ‘a global network of loosely interconnected security apparati which are profoundly redrawing the boundaries of the law of deportation and extradition, with the blessing of panic-stricken liberal states and only-too-happy-to-oblige illiberal ones’.¹⁸

Juridical othering

Closely linked to physically placing people beyond the jurisdiction of the courts are the discursive efforts to define such individuals or groups as *juridical* others to whom normal rules do not apply. Such processes have been documented regarding the anti-Jewish Nuremberg laws in Nazi Germany (Bauman 1989; Agamben 2004) or, indeed, political prisoners in Ireland, South Africa and elsewhere (McEvoy 1998; 2001). One relatively crude way of achieving this—what Cohen (2001) has referred to as *literal* denial—is for a state to arrest, detain, torture and simply deny the existence of particular detainees altogether. Latin-American countries such as Chile and Argentina in the 1970s, Saddam Hussein’s regime in Iraq and the Russians in Chechnya (Human Rights Watch 2003) are all examples of the same basic template of denial. Keeping ‘ghost detainees’ unregistered, off the books and moving them between detention locales or within particular facilities (e.g. at Abu Ghraib and hidden from the International Committee of the Red Cross) constitutes a fairly unequivocal form of deception involving

¹⁸ In a controversial ruling, the British Court appeal appeared to ‘give a green light’ to evidence obtained by torture overseas when it ruled, by 2:1, that such evidence could be utilized in special terrorism cases, provided that the British government has ‘neither procured the torture nor connived at it’. See A, B, C, D, E, F, G, H, *Mahmoud Abu Rideh Jamal Ajouaou v. Secretary of State for the Home Department* [2004] CA EWCA 1123. For a discussion of the implications of this case, see *Amnesty International*, 11 August 2004.

‘othering’—the outright denial of the person’s existence (see Taguba 2004: para.33; Human Rights Watch 2004).¹⁹

More subtle efforts at juridical othering have been the efforts of the US government to assert that not only are locations such as Guantánamo Bay outside of US jurisdiction, but that the detainees held there had no recourse to either the US justice system or, indeed, as POWs under the Geneva Convention beyond humane treatment because they were ‘unlawful combatants’.²⁰ This form of othering is only partial, however, in that it at least provides the opportunity for lawyers to challenge government assertions. Indeed, the government’s views on detainees were rejected by the US Supreme Court, which held, by a 6:3 majority, that the US Courts did have jurisdiction to hear challenges to the legality of the detention of foreign nationals held at Guantánamo Bay.²¹ The Supreme Court also decided that with regard to US nationals, due process demanded that suspected terrorists must be given a meaningful opportunity to contest the factual basis for their detention by a neutral decision maker and that ‘. . . a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.’²² The Bush administration responded to these rulings by stating that it was establishing military tribunals to conduct ‘enemy combatant status reviews’ at Guantánamo Bay.²³

In a further interesting parallel to the ‘othering’ of proxy state violence through ‘specialization’, the US administration has also sought to give a particular special status to certain individuals within the generic category of unlawful combatants. Certain ‘high value detainees’ (‘HVDs’) may be subject to harsher interrogation practices²⁴ that amount to torture or cruel treatment under international law on the grounds that the global war on terror was a new kind of war to which new *special* rules apply.²⁵ These special rules may be officially authorized guidelines for harsh treatment for certain categories of persons (as was the case, for example, at Abu Ghraib for ‘HVDs’)²⁶ or the reflection of a local interpretation about what is permissible.

¹⁹ ‘The various detention facilities operated by the 800th MP Brigade have routinely held persons brought to them by Other Government Agencies (OGAs) without accounting for them, knowing their identities or even the reason for their detention . . . on at least one occasion moved [them] around within the facility to hide them from the visiting ICRC survey team’ (Taguba 2004, para.33).

²⁰ For a discussion of the genesis of the notion of ‘an unlawful combatant’, see Dörmann (2003).

²¹ *Shafiq Rasu v. Bush*, 542 US (2004) 03–334 and *Fawzi Khalid Al Odah v. United States*, 542 US 542 (2004) 03–343.

²² *Hamdi et al. v. Rumsfeld, Secretary of State for Defence*, US 542 (2004) 03–6696, Justice O’Connor at 29. At the time of writing, reports suggest that after he spent two years’ detention incommunicado without being charged, Mr Hamdi’s lawyers appear on the verge of making a deal with the US government. In a further interesting twist on the importance of jurisdiction, he will be freed providing he agrees to relinquish his US citizenship, reside in Saudi Arabia and to travel restrictions and some monitoring from the Saudi authorities (Ricks and Markon 2004).

²³ See US Department of Defence Background Briefing on Combatant Status Review Tribunals, available online at http://www.defencelink.mil/news/Combatant_Tribunals.html. These tribunals were established by Secretary of Defence, Military Commission Order No.1 (21/3/02) and reviewing of cases began on 30 July 2004. For a detailed discussion of the law on these military tribunals, see Rogers (2004).

²⁴ See US Senate Armed Services Committee 13 May 2004 press release, ‘Rules of Engagement for Interrogation’.

²⁵ Former White House Counsel, now US Attorney General, Alberto Gonzales, wrote (in his 25 January 2002 memorandum to President Bush): ‘As you have said, the war against terrorism is a new kind of war. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians. . . . In my judgement, *this new paradigm renders obsolete Geneva’s strict limitations on questioning enemy prisoners and renders quaint some of its provisions.*’ (emphasis added)²⁸

²⁶ Where one military policeman admitted that ‘In Wing 1A we were told that they had different rules and different SOP for treatment’, Sgt Jamal S. Davis, 372nd MP Company, Abu Ghraib. *Taguba Report* (2004, para.11.b).

In sum, the broader process of juridical othering of the victims of state crime involves the territorial manipulation of jurisdiction, the rendition of suspects to states known to torture and the exploitation of ‘hospitality’ arrangements with accommodating host states. A necessary element of every one of these strategies is an assemblage of cooperative bilateral relationships and understandings between the participating states. Finally, none of these jurisdictional otherings would be possible without stripping particular groups of their legal rights by defining them as a special class of persons outside the law to whom special rules apply.

Conclusion

For a number of years now, we have argued for a more systemic application of criminological scholarship to the understanding of conflict and conflict transformation (Jamieson 1998; McEvoy 2003). In particular, criminology’s emphasis on the centrality of the state as a key constitutive actor in the study of crime (e.g. Matza 1969) makes it a particularly useful paradigm in studying conflict where the role and responsibilities of the state are highly politically and ideologically charged issues (McEvoy and Ellison 2003). Recent scholarship on the disaggregation (and reassembling!) of the security and justice functions of the criminological state through the work of Shearing, Johnston, Garland and others speaks directly to the othering strategies discussed in this paper. While not losing sight of its coercive and deviant capacity, criminology encourages us to *see* the state within a wider network of governance within states, between states and outside the state/s. It provides us with a corrective to the monolithic and uni-dimensional *feel* to some of the traditional state crime literature. The othering strategies discussed above thus underline the need for a more subtle framework for the analysis of state crime in the wake of 9/11.

We have tried to capture how contemporary state crime by proxy and juridical othering strategies exploit these novel forms of governance relationships whilst retaining key elements of past counter-insurgency doctrine. Our argument has essentially been that we are not witnessing the sudden ‘panic’ of liberal states, but rather that they have resorted to a well worn repertoire of strategies and practices normally kept in reserve for use in states of emergency in Latin-America, Africa, Northern Ireland and elsewhere. That said, the wholesale slaughter of 3,000 people in New York, Washington and Pennsylvania in September 2001 has undoubtedly altered the conception of state crime in a number of important ways.

The much-commented-upon US hegemonic status as the sole remaining superpower and its recent stance towards the international community and international law in particular suggests that we are in fact in a different era. The currents of American exceptionalist attitudes to international law and human rights as impediments to foreign policy are longstanding and deeply culturally embedded (Hietala 2003; Ignatieff 2004). 9/11 and the Bush administration’s response to those events have refined and entrenched those positions. Traditionally, othering strategies have been designed to put political distance between the state and more obvious or heinous abuses, to give space to the possibility of plausible deniability (Cohen 2001). The post-9/11 era has arguably transformed the rationale for such strategies. Othering by US authorities in particular seems more driven by material and managerial concerns, finding ways of conducting such activities with the minimum of legal or political interference, rather

than by the traditional concerns regarding obfuscation. What is arguably novel in the contemporary War on Terror is not that a liberal democracy would engage in the illegal othering practices discussed above, but rather that it does so with a brash lack of concern about admitting it.²⁷

During the Cold War, denial through othering strategies was designed in part to facilitate states giving the impression at least of a commitment to the international rule of law while simultaneously sponsoring criminal acts through third parties.²⁸ Proxy actors such as local paramilitaries or mercenaries assisted the United States, United Kingdom and other states in either conducting their own state crimes or ignoring the excesses of their allies, while simultaneously criticizing the human rights records of those regimes whom they opposed. The contemporary crudity of the othering strategies, such as Guantánamo or Abu Ghraib, and indeed the culture of eulogizing lawlessness demanding that Special Forces bring Osama Bin Laden in ‘dead or alive’ have arguably had a ripple effect across the world. Repressive regimes elsewhere have been emboldened by such tactics (Fitzpatrick 2003). The global war on terror now serves as a pretext for intensifying repression of political opposition or, in some cases (e.g. Egypt or Saudi Arabia), a vindication of long-established abusive practices (Fitzpatrick 2003; Human Rights Watch 2003). China, India, Georgia, Indonesia, Uzbekistan and others have all similarly formalized categories of juridical others in taking increasingly brutal and egregious action against their own ‘terrorists’ by removing many of their substantive and procedural protections (Human Rights Watch 2003).

The global response to 9/11 has led some commentators to suggest that a critical historical transformation has occurred so that the state of exception or emergency is now a normal form of governance. Certainly, the indeterminacy of the War on Terror is one of its key features.²⁹ While some jurisdictions such as Egypt have long existed in a ‘state of emergency and indeed UK’s annual reviews of emergency legislation have long been a formality of adding to rather than reducing emergency powers’ (Walker 2002), Agamben has argued that a de facto permanent state of exception has exposed the limits of the rule of law and opened up a zone where the political state is the paramount authority, not legal norms (Agamben 2004). He argues that:

... the state of exception establishes a hidden but fundamental relationship between law and the absence of law [where there are no rules]. It is a void, a blank and this empty space is constitutive of the legal system. (Agamben 2004: 609)

Following our analysis of the othering strategies outlined above, we are somewhat less pessimistic. While impunity is arguably the norm rather than the exception for proxy state crime in particular, even that most elusive form of deviance is occasionally rendered answerable after a fashion. Thus, for example, while in *Republic of Nicaragua v. The United States of America*,³⁰ the International Court of Justice did not attribute responsibility

²⁷ ‘All told, more than 3,000 suspected terrorists have been arrested in many countries. *Many others have met a different fate.* Put it this way – they are no longer a problem to the United States and our friends and allies’, President George W. Bush, 28 January 2001, State of the Union Address, available online at: <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (emphasis added).

²⁸ For a general critique of the relationship between human rights, Western ‘imperialism’ and politics, see Ignatieff (2001), Douzinas (2002) and Rajagopal (2003).

²⁹ UK government minister, Peter Hain, is reported to have said that the War on Terror ‘could last a lifetime’, *BBC News*, 26 September 2001, ‘War Could Last a Lifetime’, available online at: http://news.bbc.co.uk/1/hi/uk_politics/1564524.stm.

³⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* Merits International Court of Justice Judgement of 27 June 1986, available online at: <http://www.icj-cij.org/icjwww/icasas/inus/inusframe.htm>.

for the actions of Contras, they did find the United States responsible for the actions of the Unilaterally Controlled Latin Assets³¹ because the United States exercised a high degree of control over them at the time the violations were committed (Sassòli 2002: 407, n.29). More recently, in the *Tadic* case, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia found that it was sufficient that the outside state (Serbia-Montenegro) had a role in ‘organising, co-ordinating or planning’ the military actions of the military group [Bosnian Serbs] for it to be held accountable.³² In a number of US cases, the courts have found Salvadoran military commanders guilty of human rights violations for the actions of those over whom they had ‘effective control’ under the doctrine of command responsibility.³³ As noted above, the US Supreme Court has asserted that Guantánamo Bay is not beyond the reach of the US Courts. While state crimes (and, more especially, state crimes by proxy) remain difficult to render accountable, as one human rights activist acquaintance of ours put it, it is still ‘not quite time for the lawyers to pack up and go home’.

We would argue that the idea that we are witnessing a transformation from a rule-governed ‘normal’ to a ‘state of exception’ governance is both facile and ahistorical. It mistakes the overt indifference to international norms that is the hallmark of contemporary state crime for novelty. It also misses the considerable continuities of current war on terrorism practices with the Cold War and post-colonial counter-insurgency practices of the recent past. It also despairs too readily of the possibility of domestic and international legal arenas holding states to account. We would contend strongly that the retributive-centred international and national criminal law is but one mechanism for publicly imputing responsibility for state crimes. Indeed, a key limitation of the ‘individualising juridical mode’ of imputing responsibility is, as Heinz Steinert (1997) astutely points out, that it not only produces a handful of the officially guilty, but many more ‘false innocents’. Truth-recovery processes in South Africa and across Latin-America (Hayner 2002), civil actions and corporate shaming strategies in the United Kingdom, United States and elsewhere (Wells 2001), media scrutiny (Miller 2003) and even critical scholarship(!) must all be viewed as crucial to the broader task of seeing beyond state othering strategies of denying state crime. To paraphrase Cohen (2001: 249), they are part of the broader process of turning ignorance into information, information into knowledge, knowledge into acknowledgement and acknowledgement into action.

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³¹ The UCLA’s (Unilaterally Controlled Latin Assets), operated under CIA-supervision, carried out sabotage operations in Nicaragua, for which the Contras would later claim credit.

³² Judgment, *Prosecutor v. Dusho Tadic* (IT-94-1-1A), 15 July 1999, 49–50.

³³ See *Ford v. Garcia*, 289 F3d 1283 (11th Cir. 2002), *Romagoza v. Garcia*, Civ. No. 99-8364 (Hurley), Final Judgment, 31 July 2002.

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