

**‘Banks in defence of the Homeland: Nexus of Ethics, Legality and Suspicious
Activity Reporting in the United States of America’**

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Abstract

This article considers the impact of the legislative and policy responses by the United States of America towards terrorist financing. Firstly, the article provides an overview of the mechanisms utilised by terrorist organisations to fund their operations and the subsequent legislative reactions. Secondly, a critical analysis of the two key parts of the US CTF policy – the ability to freeze or confiscate known or suspected terrorist assets and the imposition of onerous reporting requirements on financial and credit institutions, known as the SAR regime is provided. Thirdly, the article highlights the banks’ use of CFT provisions that raise the spectre of racial profiling, and critiques the fairness and success of such measures imposed on particular group of persons. It is argued that these practices, such as SARs, are a shift to a pre-emptive criminal justice framework which raises serious questions as to their ethics and legality. The objective is not to provide a comprehensive analysis of the laws and policies, but to emphasise areas that have not yet been subject to sufficient scrutiny from the perspective of success and equality in the application of the US CFT regime.

Introduction

As a result of the al-Qaeda inspired terrorist attacks that took place on September 11th 2001, terrorist financing was propelled from political obscurity to the top of the United States of America's (US) anti-crime strategy. Until this time, US financial crime strategy was concentrated on money laundering, fraud and bribery. This stance was almost identical to that adopted by the United Nations (UN), European Union (EU) and Financial Action Task Force (FATF) who directed their resources to money laundering. Interestingly, the term terrorist finance was only adopted by the UN in its Declaration to Eliminate International Terrorism.¹ Additionally, it introduced the International Convention for the Suppression of the Financing of Terrorism in 1999, a legislative measure that was initially not implemented by many countries. The terrorist attacks on September 11th 2001 resulted in several significant policy developments in the US, which formed part of the ill-conceived and controversial "financial war on terror". Funds that are utilised for the purposes of terrorism are defined by the International Convention for the Suppression of the Financing of Terrorism as including "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form".² However, the "financial war on terror" was not a new concept because it was originally utilised by President Bill Clinton, who acknowledged that attacking the financial assets of al-Qaeda was important after they were found to be responsible for

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¹ Annex to Resolution 49/60, 'Measures to eliminate international terrorism,' 9 December 1994, 49/60.

² Article 1, para 1 of the Convention, The United Nations (1999). Hardister has criticised the impact of this International Convention because it has no international enforcement mechanisms and it only applies to signatories. See Hardister, A. 'Can we buy peace on earth?: The price of freezing terrorist assets in a post-September 11 world' [2003] 28 NCJ Int'L & Com Reg 624 at 628.

the bombings of two US embassies in Kenya and Tanzania.³ The importance of tackling terrorist financing and implementing an effective counter-terrorist financing (CTF) cannot be underestimated. It has been asserted by one commentator that targeting the sources of terrorist financing is “one of the most obvious strategies imaginable”.⁴ The international community, through a series of UN Security Council Resolutions, Regulations from the EU and a new set of Special Recommendations by the FATF, introduced, what it envisaged was to become a strict and effective set of CTF measures. One of the most controversial parts of these legislative instruments was the ability of a nation state to freeze and confiscate the assets of known or suspected terrorists. As a result of the terrorist attacks in September 2001, the UN Security Council passed a series of Resolutions that extended the scope of its confiscation mechanisms from money laundering to include terrorism. Gallant took the view that “the 2001 attacks in the United States gave the affiliation between terrorism and proceeds of crime global prominence. In the immediate aftermath of the destruction, the UN Security Council authorised an attack on proceeds linked to terrorism”.⁵ For example, UN Security Council Resolution 1373 provides that countries must prevent and suppress the financing of terrorist acts,⁶ criminalise terrorist financing,⁷ freeze the funds and other financial assets of people who commit or attempt to commit terrorist acts⁸ and prevent its citizens from making funds available to people who commit or attempt to commit terrorist acts.⁹ The asset freezing provisions of Resolution 1373 must be read in conjunction with Article 8 of

³ *Ibid* at 605.

⁴ Rider, B, ‘Editorial – Laundering Terrorists’ [2002] 5 *Journal of Money Laundering Control* 255.

⁵ Gallant, M, *Money laundering and the proceeds of crime* (Cheltenham: Edward Elgar, 2005) at 1.

⁶ Adopted by the Security Council at its 4385th meeting, on 28 September 2001, S/RES 1373 2001, para 1(a).

⁷ *Ibid* at para 1(b).

⁸ S/RES 1373 2001, para 1(c).

⁹ *Ibid* at para 1(d).

the International Convention for the Suppression of Terrorist Financing.¹⁰ This provides that each country is required to forfeit the funds used or due to be used for an offence created by Article 2 of the International Convention for the Suppression of Terrorist Financing.¹¹ However, the extension of the confiscation measures to include terrorism must be questioned because the UN is utilising a ‘money laundering’ or ‘profit’ confiscation model towards a criminal offence that does not generate a profit. The financial process adopted by terrorists to accumulate funds can be contrasted with that adopted by money launderers. For instance, terrorist financing has been referred to as “reverse money laundering”, which is a practice whereby “clean” or “legitimate” money is acquired and *then* funnelled to support terrorism.¹² Conversely, money laundering involves the conversion of “dirty” or “illegal” money into clean money via its laundering through three recognised phases.¹³ Therefore, the extension of the money laundering confiscation model to include terrorism must be questioned because terrorism is *not* a profit based crime. Another important part of a CTF policy is the use of financial intelligence collected by using suspicious activity reports (SAR) or suspicious transaction reports (STR). The US was one of the first countries to introduce legislation that compelled certain deposit institutions (e.g. banks) to file currency transaction reports (CTR) by virtue of the Currency and Foreign Transaction

¹⁰ Png, C, ‘International legal sources II – the UN Security Resolutions,’ in Blair, W, and Brent, R, (eds), *Banks and financial crime – the international law of tainted money* (Oxford: Oxford University Press, 2008) at 81.

¹¹ Such offences are committed if a person by “any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.

¹² For a more detailed discussion of this process, see: Cassella, S, ‘Reverse money laundering’ [2003] 7 *Journal of Money Laundering Control* 92.

¹³ The money laundering process contains three recognised stages: placement, layering and integration. For a more detailed discussion, see: Ryder, N, *Money laundering an endless cycle? A comparative analysis of the anti-money laundering policies in the United States of America, the United Kingdom, Australia and Canada* (London: Routledge, 2012) at 1.

Reporting Act of 1970. In particular, the Act stipulated that “reports should be made of records of cash, negotiable instruments and foreign transactions”.¹⁴ Under the Act, the Secretary of the Department of Treasury is allowed to impose a set of reporting regulations so that certain information on financial instruments and transactions is retained. The reporting obligations were extended to include other types of white collar crimes including money laundering and fraud. However, with regards to forming part of the US CTF policy, the reporting obligations systematically failed due to the terrorist attacks in September 2001.¹⁵ The scope of the reporting obligations under the Currency and Foreign Transaction Reporting Act were extended by Patriot Act 2001 and the Intelligence Reform and Terrorism Prevention Act 2004 to the reporting of cross-border transmittals by certain financial institutions.¹⁶

There are of course other driving factors behind the CTF strategy: owing to technological advancements and globalisation, financial transactions have change in their speed, distance, volume, and nature and created anonymity.¹⁷ Subsequently, the potential for abuse and exploitation of financial institutions for criminal activity including terrorism have become greater. However, the volume and number of transactions flowing through the formal financial systems makes it very difficult to identify what money may find its way to alleged terrorists and other funds. This task is quite simply impossible.

¹⁴ 31 USC ss 5311-5322.

¹⁵ See for example Ryder, N, ‘A false sense of security? An analysis of legislative approaches towards the prevention of terrorist finance in the United States and the United Kingdom’ [2007] *Journal of Business Law* 821.

¹⁶ 31 USC ss 5317(c).

¹⁷ See for example, Bensted, G, ‘Terrorist financing and the internet: dot com danger’ [2012] 21 *Information and Communications Technology Law* 237.

Therefore, this paper begins by briefly identifying the mechanisms utilised by terrorist organisations to fund their operations. This paper then turns its attention to two key parts of the US CTF policy – the ability to freeze or confiscate known or suspected terrorist assets and the imposition of onerous reporting requirements on financial and credit institutions, known as the SAR regime.

Given the atrocities committed by terrorists and terrorist organisations in the last decade, establishing a normative and ethical approach toward countering terrorism may not seem to be salient to some. However, in order to have a sustainable, legitimate and ultimately effective counter-terrorism strategy, it can be argued that “ethical considerations are central to decisions involving discretion, force and due process that require people to make enlightened moral judgments”.¹⁸ Arguably such standards are even more important in the context of counter-terrorism because there is no internationally agreed definition of terrorism and the crimes of terrorism are often complex, value laden and a product of a particular political and moral judgment. Furthermore, the ‘war’ against terrorism is can be seen as a matter of international crime control.¹⁹ However, Hoffman argues that the war rhetoric employed by the US in its anti-terrorism strategy refuses to accept that “any body of law applies to the way this ‘war’ is waged” and eliminates numerous protections provided by international

¹⁸ Banks, S, *Ethics, Accountability and the Social Professions* (Palgrave Macmillan: Basingstoke New York, 2004) at 4.

¹⁹ Crank and Gregor argue that “issues in counter-terrorism in the US are framed by the conflict between the competing justice perspectives of the crime control and due process” and the crime control model seems to be adopted by the authorities. Crank, J, and Gregor, P, *Counter-Terrorism after 9/11: Justice, Security and Ethics Reconsidered* (Anderson: London, 2005) at 9. The USA Patriot Act is a good evidence of this approach which mainly focuses on non-US citizen terrorists. The Act places national security at its centre and formulates both conceptually and in policy terms a strategy which falls outside the conventional parameters of crime control legislation. However, enforcement of counter-terrorism laws has also led to well-intentioned, law-abiding Muslim-Americans to feel inappropriately targeted as threats to domestic security and to fear prosecution as material supporters of terrorism for transmitting their charitable contributions via US-based Islamic NGOs, mosques, and other channels. See: Crimm, N, ‘High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy’ [2004] 45 *William & Mary Law Review* 1341.

human rights law.²⁰ This ‘war on terrorism’ approach seems to view the justice system as lacking capacity to prosecute terrorism thus legitimises the extraordinary practices that have emerged since 2001.

Some of these practices, such as SARs, are seen as a shift to a pre-emptive criminal “(in)justice framework”.²¹ Terrorist acts indeed create great insecurity amongst the public and an overview of the last decade indicates that the US public has been willing to accept restrictions on rights and freedoms.²² The scope of this article does not allow us to critique every aspect of the counter-terrorism strategy be it issues regarding the interrogation of suspected terrorists, the use of torture, indefinite detention, or the legitimate boundaries of anti-terrorist operations, which have been commented upon extensively elsewhere. Instead, this article will critically analyse the US counter-financing of terrorism policy and practice with particular focus on the banks’ use of the SAR system and address the implications of this regime on certain groups of people.

Sources of Terrorist Finance

The detection of terrorist finances is very difficult due to the extensive range of financial mechanisms used by terrorists.²³ Some commentators have argued that terrorists have usually relied on two very different types of funding: state and private

²⁰ Hoffman, P, ‘Human Rights and Terrorism’ [2004] 26 *Human Rights Quarterly* 932 at 939-940.

²¹ McCulloch, J, and Carlton, B, ‘Pre-empting Justice: Suppression of Financing of Terrorism and the “War on Terror”’ [2005-2006] 17 *Current Issues in Criminal Justice* 397.

²² Messelken, D, ‘Terrorism and Guerilla Warfare – A Comparative Essay,’ in Meggle, G, (eds), *Ethics of Terrorism & Counter-Terrorism* (Ontos-Verlag, 2005).

²³ Levitt, M, ‘Stemming the follow of terrorist financing: practical and conceptual challenges’ [2003] 27 *The Fletcher Forum of World Affairs* 63 at 64.

sponsors.²⁴ State-sponsorship of terrorism is where national governments provide logistical and financial support to terrorist organisations.²⁵ However, it is widely acknowledged that there has been a decline in state-sponsored terrorism, which has resulted in terrorists becoming self sufficient.²⁶ There are an abundant number of sources of funding available to terrorists.²⁷ The US Treasury Department has stated that terrorist “funds can be moved among corporate entities and financial institutions in many countries in the blink of an eye through wire fund transfers, making the untangling more and more difficult”.²⁸ Terrorists are also utilising new electronic technologies to transfer money over the internet to conceal their true origin.²⁹ It has been mooted that al-Qaeda has obtained monies from misapplied charitable donations and from lawful corporations.³⁰ Terrorists have also acquired funding through traditional criminal activities, including benefit and credit card fraud, identity theft, the sale of counterfeit goods, arms, human and drug trafficking.³¹ Additionally, it has been argued that terrorists have utilised alternative or non-remittance underground banking systems as part of the war on the financing of terrorism. The use of such banking systems makes it difficult for the international community to prevent and

²⁴ Bantekas, I, ‘The international law of terrorist financing’ [2003] 97 *American Journal of International Law* 315.

²⁵ Chase, A, ‘Legal mechanisms of the international community and the United States concerning the state sponsorship of terrorism’ [2004] 45 *Virginia Journal of International Law* 41.

²⁶ Lee stated that the al-Qaeda “network increasingly is shifting to non-bank methods of moving and storing value and is relying on a decentralised structure of largely self-financing cells”. He also highlighted the diversity demonstrated by al-Qaeda’s whose “adaptiveness in the face of increased law enforcement pressure also is cause for concern. Al Qaeda transferred a portion of its exposed assets into untraceable precious commodities”. See: Lee, R, *Terrorist Financing: The US and International Response Report for Congress* (Washington: Congressional Research Service, 2002) at 19.

²⁷ Banekas concluded that the traditional sources of terrorist funding include collection of membership dues and/or subscriptions; sale of publications; speaking tours; cultural and social events, door to door solicitation within the community, appeals to wealthy members of the community and donations of a portion of their personal earnings: Bantekas, *op cit* n 24.

²⁸ Department of Treasury *Contributions by the Department of the Treasury to the Financial War on Terrorism* (Washington: Department of Treasury, 2002).

²⁹ For a more detailed discussion of the threat of terrorist financing via the Internet, see: Bensted, G, ‘Hi terrorist financing and the Internet: dot com danger’ (2012) 21 *Information & Communications Technology Law* 237.

³⁰ Winer, J, and Roule, T, ‘Fighting terrorist finance’ [2002] 44 *Survival* 89.

³¹ Linn, C, ‘How terrorist exploit gaps in US anti-money laundering laws to secrete plunder’ [2005] 8 *Journal of Money Laundering Control* 200.

detect terrorist finance.³² Underground banking is a phrase that has been used to describe informal banking systems, which takes place outside the formal regulated banking sector. One such method is the hawala system, which “was born centuries before Western financial systems in India and China”.³³ Hawala has several different interpretations including assignment, change, transform or promissory note.³⁴ The hawala system is an informal financial network based on trust which means that any funds transferred are difficult to detect.³⁵ Pathak took the view that “unlike institutional banking, hawala networks make minimal use of written records; transfers of money take place based on verbal communications”.³⁶ The association between underground banking systems and terrorist finance is due to the events of September 2001. As soon as the phrase ‘hawala’ was mentioned in the US following the terrorist attacks in 2001, politicians, law enforcement agencies and the media declared it as a “financial tool of terrorism”.³⁷ However, this is misleading because underground banking systems are legitimate and heavily publicised. It has been argued that al-Qaeda has utilised the hawala system to support terrorist operations.³⁸ It is important to note, however, that there is no conclusive evidence that al-Qaeda used the hawala system to fund the attacks in September 2001.³⁹ The 9/11 Commission went so far as to conclude that the funds used for these attacks were directly transferred into the

³² Such systems are commonly referred to as alternative value transfer systems.

³³ This system has also been referred to as the “hundi” or “fei ch’ien” banking system. See Pathak, R, ‘The obstacles to regulating the hawala: a cultural norm or a terrorist hotbed?’ [2004] 45 *Fordham International Law Journal* 2007. Also see: Liargovas, P, and Repousis, S, ‘Underground banking or hawala and Greece-Albania remittance corridor’ [2011] 14 *Journal of Money Laundering Control* 314.

³⁴ *Ibid* at 2008. Hawala is defined in Arabic as ‘transfer’. See: Viles, T, ‘Hawala, hysteria and hegemony’ [2008] 11 *Journal of Money Laundering Control* 26.

³⁵ Waszak, D, ‘The obstacles to suppressing radical Islamic terrorist financing’ [2004] 35 *Case Western Reserve Journal of International Law* 673.

³⁶ Pathak, *op cit* n 33.

³⁷ Jamwal, N, ‘Hawala – the invisible financing system of terrorism’ [2000] 26 *Strategic Analysis* 181.

³⁸ See for example, Farah, D, ‘Al-Qaeda’s road paved with gold’ *Washington Post* 17 February 2002, available from <http://www.library.cornell.edu/colldev/mideast/qdagold.htm> [accessed 24 February 2013].

³⁹ See: Department of State *International Narcotics Control Strategy Report, Volume II: Money Laundering and Financial Crimes* (Washington DC: Department of State, 2004).

bank accounts of the terrorists through the formal US banking system, not through the hawala system.⁴⁰

The International Legislative Response

Prior to the events in September 2001 the international community's attempts to tackle white collar crime were directed towards the prevention of fraud, money laundering and the illegal drugs trade.⁴¹ Regulatory and law enforcement bodies were, therefore, not focused on finding terrorist monies.⁴² These terrorist attacks set in motion a new and inventive legislative approach towards attacking the sources of terrorist funding.⁴³ McCulloch and Pickering took the view that after 9/11 "measures targeted at the financing of terrorism gained great momentum".⁴⁴ Therefore, the terrorist attacks of 2001 had an instantaneous effect, and dramatically altered the international communities' policy towards the prevention and detection of terrorist funding.⁴⁵ Any fight against terrorist finance is dependent on a highly coordinated and effective level of international co-operation. In an attempt to tackle the global threat of terrorist finance the US government ensured that the USA Patriot Act 2001 provided a series of extraterritorial provisions which require foreign banks to comply with the provisions of this controversial piece of legislation.⁴⁶ However, this policy is flawed because its success is heavily dependent on the support of other nations, which is not always guaranteed. Myers took the view that "the US, cannot, reach foreign

⁴⁰ 9/11 Commission, *The 9/11 Commission Report-Final Report of the National Commission on Terrorist Attacks upon the United States* (London: Norton & Company, 2004) at 170.

⁴¹ Allen, W, 'The war against terrorism financing' [2003] 6 *Journal of Money Laundering Control* 306.

⁴² Binning, P, 'In safe hands? Striking the balance between privacy and security – anti-terrorist finance measures' [2002] 6 *European Human Rights Law Review* 737.

⁴³ Winer and Roule, *op cit* n 30.

⁴⁴ McCulloch, J, and Pickering, S 'Suppressing the financing of terrorism – proliferating state crime, eroding centre and extending no-colonialism' (2005) 45 *British Journal of Criminology* 470.

⁴⁵ Jamwal, *op cit* n 37.

⁴⁶ See: USA Patriot Act 2001 ss 311-313.

financial institutions and block terrorist accounts. Local governments must be persuaded to do that. Allies are important in the physical struggle against terrorism”.⁴⁷ The international response to terrorist finance has been heavily influenced by the US, but led by the UN, which is “in the best position to lead the international coalition against terrorism”.⁴⁸ The UN has indeed pioneered the response to combat terrorist finance and it adopted the International Convention for the Suppression of the Financing of Terrorism.⁴⁹ This Convention contained a series of measures aimed at counteracting the movement of funds suspected of terrorist purposes.⁵⁰ This was followed by UN Security Council Resolution 1373 (2001) which imposes four obligations on members of the UN. Firstly, it specifically requires states to thwart and control the financing of terrorism.⁵¹ Secondly, it criminalises the collection of terrorist funds in states territory.⁵² Thirdly, it freezes funds, financial assets and economic resources of people who commit or try to commit acts of terrorism.⁵³ Finally, it prevents any nationals from within their territories providing funds, financial assets and economic resources to people who seek to commit acts of terrorism.⁵⁴ It is also important to note that Security Council Resolution 1373 makes reference to human rights, calling upon States to *"take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, ..."* and reaffirms the need to combat by all means, "in accordance with the Charter of the United Nations," threats to international

⁴⁷ Myers, J, ‘Disrupting terrorist networks: the new US and international regime for halting terrorist finance’ [2003] *Law & Policy International Business* 17.

⁴⁸ Hardister, *op cit* n 2 at 605.

⁴⁹ However, it must be noted that the Convention is “restricted to terrorist acts with an international element”.

⁵⁰ The measures included outlawing the collection of funds for terrorist purposes (article 2) and the freezing and forfeiture of terrorist funds (article 8(1) and (2)).

⁵¹ SC Res, 1373, UN SCOR, 56th Sess, 4385th Mtg Article 1(a).

⁵² SC Res, 1373, UN SCOR, 56th Sess, 4385th Mtg Article 1(b).

⁵³ SC Res, 1373, UN SCOR, 56th Sess, 4385th Mtg Article 1(c).

⁵⁴ SC Res, 1373, UN SCOR, 56th Sess, 4385th Mtg Article 1(5).

peace and security caused by terrorist acts. A more recent Security Council Resolution, 1963 (2010), reiterates that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, and it notes the importance of respect for the rule of law so as to effectively combat terrorism. Resolution 1373 is extremely important in the battle against the financing of terrorism. In particular, the obligation on member states to freeze assets is absolute and compels collective application.⁵⁵ All UN Member States have submitted reports to the United Nations Security Council Counter-Terrorism Committee on the actions they have taken to suppress international terrorism; this includes blocking terrorist finances as required by Resolution 1373.

The US Treasury Department took the view that “the UN actions have been critical in winning support for our campaign, and they have been essential tools for building the international coalition against terror financing”.⁵⁶ It has been argued that Resolution 1373 forms the basis of the international effort to counter terrorist finance.⁵⁷ Myers noted that Resolution 1373 “presents a powerful tool to leverage co-operation by all states on financing issues, information sharing, police action, criminal prosecution, asset forfeiture, and border control”.⁵⁸ However, “while it contains strong language, the resolution still has grey areas, such as its failure to define the term terrorist”.⁵⁹ Further, Resolution 1373 can be criticised because it provides the individuals and

⁵⁵ Kruse, A, ‘Financial and economic sanctions – from a perspective of international law and human rights’ [2005] 12 *Journal of Financial Crime* 218.

⁵⁶ Department of Treasury Contributions by the Department of the Treasury to the Financial War on Terrorism (Washington DC: Department of Treasury, 2002).

⁵⁷ Myers, *op cit* n 47.

⁵⁸ *Ibid.*

⁵⁹ Zagaris, B, ‘The merging of the anti-money laundering and counter-terrorism financial enforcement regimes after September 11, 2001’ [2004] *Berkley Journal of International Law* 123.

organisations who have been accused of supporting terrorism with no opportunity within the UN to challenge the listing by the UN Counter Terrorism Committee.⁶⁰ Another criticism is that UN Resolution 1373 will actually have a limited impact on the extensive number of sources available to terrorists and their continued ability to raise monies.⁶¹ As a result of Resolution 1373 “we are left with a patchwork of domestic, bilateral, and regional efforts that at best work in parallel but not complimentary fashion, and at worst work at cross-purposes”.⁶² The next part of the article concentrates upon the legislative response of the US towards terrorist finances.

The United States of America

The US strategy against terrorist finance has two objectives - to freeze terrorist assets and to disrupt their financial infrastructures. The US response to the prevention of terrorist finances was swift, but the results have been difficult to determine. The US policy has been hindered by the fact that there are too many federal agencies involved, with some having their own CTF policy.⁶³ An important part of the US CTF policy is Presidential Executive Order 13,224,⁶⁴ which “directed the federal government to wage the nation’s war against the financing of global terrorism”.⁶⁵ This Order sought to “block [and freeze] all assets and interests in property of certain terrorists and individuals and entities materially supporting them”.⁶⁶ Since its

⁶⁰ *Ibid* 123.

⁶¹ Levitt, *op cit* n 21 at 64.

⁶² *Ibid*.

⁶³ Ryder, *op cit* n 15 at 830.

⁶⁴ The Executive Order was issued pursuant to the International Emergency Economic Powers Act 1977, the United National Participations Act 1945 and the United National Security Council Resolution 1214, Resolution 1267, Resolution 1333 and Resolution 1363.

⁶⁵ MacMull, J, ‘Removing the charitable veil: an examination of US policy to combat terrorist funding charities post 9/11’ [2004] *New England Journal of International and Comparative Law* 121.

⁶⁶ These powers already existed under previous US legislation, “yet the new sanctions also significantly expanded on existing ones”. See: Zagaris, *op cit* n 59.

implementation the US government has attempted to deny terrorists admittance to the international financial system and limit their ability to raise funds. There are three important aspects of this law.⁶⁷ Firstly, it covers global terrorism. Secondly, it expands the class of targeted groups to include those who are associated with designated terrorist groups.⁶⁸ Thirdly, it clarifies the ability of the US to freeze and block terrorist assets abroad. The next part of the article considers the impact of the second and third part of the Executive Order.

Asset Freezing

The ability to freeze terrorist assets is one of the most controversial and effective ways to tackle terrorism. In September 2001 the US government began to freeze assets and bank accounts across the globe which they believe to assist terrorists and their operations.⁶⁹ Their ability to freeze the assets of suspected or known terrorists is administered by the Office of Foreign Assets Control of the Treasury Department (OFAC).⁷⁰ The Executive Order designated a number of groups and individuals as either a specially designated terrorist group or a foreign terrorist organisation for the purposes of freezing assets.⁷¹ As a result of the Executive Order, nearly 250 groups and individuals have been designated as terrorist organisations and \$36m in 92 suspected terrorist accounts was frozen. In 2006, the Treasury Department reported that over 150 terrorist related accounts have been blocked in the US, more than 400

⁶⁷ Myers, *op cit* n 47 at 17.

⁶⁸ McCulloch and Pickering, *op cit* n 44 at 482.

⁶⁹ Seldon, R, 'The executive protection: freezing the financial assets of alleged terrorists, the constitution, and foreign participation in US financial markets' [2003] 3 *Fordham Journal of Corporate & Financial Law* 553.

⁷⁰ The OFAC enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists and those engaged in proliferation of weapons of mass destruction.

⁷¹ For a more detailed discussion of the US Governments ability to classify groups as designated terrorists or a foreign terrorist organisation, see: Crimm, *op cit* n 19 at 1369.

individuals and entities have been designated terrorist or terrorists supporters and approximately 40 charities that were transferring money to al-Qaeda, HAMAS and other terrorist groups have been designated and denied access to the US financial system.⁷² This part of the policy has produced mixed results and the freezing of assets has only “achieved modest success”.⁷³ Weiss concluded that “in the months following the attacks, substantial funds were frozen ... after this initial sweep, the freezing of terrorist assets slowed down considerably”.⁷⁴ The number of suspected accounts and assets frozen represents a small fraction of the funds available to terrorists.⁷⁵ Seldon warned that “despite laudable goals, many asset seizures have undermined the faith of foreign investors in the US”,⁷⁶ and he also cited several failed prosecutions of individuals and organisations who also had their assets frozen following 9/11.⁷⁷ The Treasury Department has defended its policy towards the prevention of terrorist finance and argued that as a result of asset freezing terrorists are “suffering financially as a result of our actions”.⁷⁸

One of the most controversial aspects of the US government’s ability to freeze suspected terrorist assets can be seen in its attitude towards US based Islamic charities. US authorities assert that there is increasing evidence that terrorists are partly financed by followers who donate money to Islamic charities which is then transferred to terrorists.⁷⁹ It has been estimated that al-Qaeda funds a large proportion

⁷² Department of Treasury *Office of Terrorism and Financial Intelligence – US Department of Treasury Fact Sheet* (Washington: Department of Treasury 2006) at 5.

⁷³ Winer and Roule, *op cit* n 30 at 88.

⁷⁴ Weiss, M, *Terrorist Finance: Current efforts and policy issues for congress Report for Congress* (Washington DC: Congressional Research Service, 2004) at 1.

⁷⁵ Navias, M, ‘Financial warfare as a response to international terrorism’ [2002] 73 *The Political Quarterly* 59.

⁷⁶ Seldon, *op cit* n 69.

⁷⁷ *Ibid.*

⁷⁸ Department of Treasury, *op cit* n 56 at 5.

⁷⁹ Hardister, *op cit* n 2 at 605.

of its operations through charitable donations.⁸⁰ Crimm concluded that “approximately 30% of al-Qaeda financial resources were derived from charitable donations solicited in the US and abroad”.⁸¹ However, it must be noted that any accurate evidence of charitable donations being used by terrorist groups is extremely rare.⁸² It is, therefore, unsurprising that since a considerable percentage of al-Qaeda’s funding could be attributed to charitable donations, that the US government “has allocated substantial resources and efforts to blocking domestic organisations utilised in those fund raising efforts”.⁸³ One of the first US Islamic charities to be classified as a terrorist organisation was the Holy Land Foundation (HLF). Since this announcement in December 2001, many other Muslim charities based in the US have also been given an identical classification, and had their assets frozen.⁸⁴ The US authorities have argued that all of these organisations supported terrorist activities. However, the “level of the activity proven or alleged at this point varies from the innocuous to the extreme”.⁸⁵ It must be noted that irrespective of the apparent success and robustness with which the US government has targeted this apparent source of terrorist finance, it has faced many problems in actually proving many of the terrorist related charges. Ruff has accused the US government of being “overzealous and using exaggerated facts to gain media attention, thus making the freezing of assets during a pending investigation particularly suspect”.⁸⁶ Engel has also criticised this part of the anti-terrorist finance policy because the freezing of their assets has

⁸⁰ Linn, *op cit* n 31 at 200.

⁸¹ Crimm, *op cit* n 19 at 1373.

⁸² Baron, BF, ‘The Treasury guidelines have had little impact overall on US international philanthropy, but they have had a chilling impact on US based Muslim charities’ (2005) 25 *Pace Law Review* 315 at 317.

⁸³ Crimm, *op cit* n 71 at 1373.

⁸⁴ Ruff, K, ‘Scared to donate: an examination of the effects of designating Muslim charities as terrorist organisations on the First Amendment rights of Muslim donors’ [2006] *NYU Journal of Legislation and Public Policy* 471.

⁸⁵ Engel, M, ‘Donating “bloody money”: fundraising for international terrorism by United States charities and the government’s efforts to constrict the flow’ [2004] 12 *Cardozo J Int’l & Comp L* 251.

⁸⁶ Ruff, *op cit* n 84 at 465.

“confiscated the good-faith donations solicited fraudulently from Muslim-Americans”.⁸⁷ Charitable giving, *Zakat*, is one of the five pillars of Islam which is practiced by US Muslims to provide humanitarian aid to overseas projects in some of the most impoverished regions in the world.⁸⁸ As a consequence of the freezing of their assets, some of the largest US based Muslim charities⁸⁹ had to be shut down and much needed aid has effectively been stopped. In some instances, such as the case of HLF, it was argued that ‘due process’ requirement⁹⁰ - prior to designating them as a terrorist financier and freezing of their assets - was ignored. In response, the District of Columbia Court of Appeals held that due process rights were not infringed because of the important government interests at stake and the special need for prompt action.⁹¹ Similar to the SAR system (discussed below), freezing of assets can be based on mere suspicion or secret information unlike hard evidence of criminal activity which is required by the US Constitution in criminal cases.⁹² In 2007, directors of the HLF were prosecuted for criminal offences, namely providing ‘material support’ to terrorists and none were convicted of any of the charges made against them as the evidence produced by the government was not good enough to convince the jury to determine any wrongdoing.

It is clear that the US strategy of asset freezing can target organisation and individuals by designation and disable these entities whether they are innocent or not. It is not

⁸⁷ Engel, *op cit* n 85.

⁸⁸ Arguably, these poor regions are a petri dish for terrorist recruitment and training as well.

⁸⁹ For example, Holyland Foundation had an annual budget of \$12 Million.

⁹⁰ Due process principle under the US Constitutions requires that government must provide advance notice and hearing prior to freezing of assets.

⁹¹ *Holyland Foundation v Ashcroft* 333 F 3rd 156 (DC Cir 2003). On appeal, the Supreme Court refused to hear the case: *Holyland Foundation v Ashcroft* 540 US 1218 (2004).

⁹² It is clear that the main drive behind this provision is to prevent terrorist suspects from carrying out their criminal activities and to prevent financiers of terrorism to send money and funds which may be used to plan and carry out such acts. Because the main aim is prevention, the provisions do not necessitate being an official suspect of a crime, or require that the authorities have started a criminal procedure against an individual or an organisation.

clear, however, if and to what extent these measures have blocked funds reaching actual terrorist organisations and prevented future terrorist activity. One can observe that charitable donations by the Muslim community in the US have declined dramatically owing to the fear of being branded as a terrorist and face criminal charges. Whilst the US government readily designated charitable organisations as terrorist, by the same token, it was not prepared to provide a ‘white list’ of safe charities to which the public could make their faithful donations without fear. The US Treasury Department did produce guidelines for Voluntary Practices for US Based Charities.⁹³ However, it is argued that these ‘voluntary’ standards are too cumbersome and expensive particularly for smaller charities and that they would not diminish the risk of facing civil or criminal liability.⁹⁴

In a vast majority of these cases the charges of supporting terrorism were either dropped or prosecutors were unable to prove any connections with terrorist activities.⁹⁵ This policy must be criticised because the evidence linking each of these organisations to the funding terrorism was withheld from the media, the public and to the accused charities.⁹⁶ It is evident that designated and targeted entities which are blacklisted and subject to an asset freezing order are helpless to refute the government’s case against them whilst the asset freezing order causes major economic disruption, financial hardship and dents the brand or the reputation of individuals, organisations and even of people who use these entities. The US governments’ policy toward the freezing of suspected terrorist assets is a short-term

⁹³ Department of Treasury *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US Based Charities* (Washington DC: Department of Treasury, 2002).

⁹⁴ Chambers, J, *Impact of US Anti-Terrorist Financing Laws on Muslim International Charities*, in Kidwai, MS, (ed) *US Policy Towards the Muslim World* (University Press of America, 2010) at 62-63.

⁹⁵ Ruff, *op cit* n 84 at 464-471.

⁹⁶ Nice-Petersen, N, ‘Justice for the designated: the process that is due to alleged US financiers of terrorism’ [2005] 93 *Georgetown Law Journal* 1387 at 1389.

solution to a long term problem. It is an ineffective response to the funding of international terrorism due to the vast array of sources of funding available. The US government is clearly motivated by a political desire to make it look like they will actually catch and convict the financiers of terrorism.

Reporting Requirements

Another important part of the US CTF policy is the reporting requirements placed on financial and credit institutions. The USA Patriot Act 2001 contains a comprehensive package of provisions which aimed to bolster the anti-terrorist financing regulatory regimes.⁹⁷ The Act was signed by President Bush on October 26 2001 and Title III increases the reporting obligations and permits the Secretary of the Treasury to impose additional money laundering requirements on financial and credit institutions.⁹⁸ The Act introduced a series of regulations which are aimed at detecting terrorist finance prior to its introduction to the financial system.⁹⁹ Under the Act, financial institutions are required to file a suspicious activity report (SAR) to the Financial Crimes Enforcement Network (FinCEN). A SAR is as a “piece of information, which alerts law enforcement agencies that certain customer activity is in some way suspicious and might indicate money laundering or terrorist financing”.¹⁰⁰ The reporting requirements impose significant administrative burdens on financial institutions that already had to comply with reporting requirements under the Banking Secrecy Act 1970. The USA Patriot Act 2001 has led to an increased level of record-

⁹⁷ Department of Treasury, *op cit* n 56 at 10-11.

⁹⁸ Title III is also known as the International Money Laundering Abatement and Anti-terrorist Financing Act 2001.

⁹⁹ USA Patriot Act 2001, ss 311 to 330.

¹⁰⁰ Fleming, M, *UK Law Enforcement Agency Use and Management of Suspicious Activity Reports: Towards Determining the Value of the Regime* (London: Home Office, 2005).

keeping, report filing, and internal policing requirements.¹⁰¹ FinCEN has reported since 2002, that the number of SARs filed by financial institutions has increased from 281,373 to 1.5m in 2011.¹⁰² Linn has argued that “US law enforcement agencies are drowning in SARs”.¹⁰³ As a result, the imposition of more mandatory reporting requirements was inevitable following the attacks of September 2001 due to how the attacks were financed.¹⁰⁴ However, it is questionable whether the “filing of a SAR following these transactions [to fund 9/11] would have made a difference”.¹⁰⁵ This part of the policy is predictable because a large percentage of the monies used to fund the attacks in September 2001 were wired to the accounts of the terrorists directly through the US banking system. This is a view supported by Lyden who concluded that “it is highly questionable whether the provisions of the Act would have deterred or prevented the World Trade Centre attack”.¹⁰⁶ Indeed, the reporting measures introduced by the USA Patriot Act 2001 may prove to be counterproductive. For example Lee noted that “the plethora of reporting requirements creates a sort of ‘needle-in-the-haystack’ problem for the authorities”.¹⁰⁷ Increasing the level of reporting requirements on financial institutions will not prevent terrorist finance.

¹⁰¹ Baldwin Jnr, F, ‘Money laundering countermeasures with primary focus upon terrorism and the USA Patriot Act 2001’ [2002] 6 *Journal of Money Laundering Control* 116 at 117.

¹⁰² FinCEN, *The SAR Activity Review – By the Numbers Issue 17* (Washington DC: FinCEN, 2012) at 4.

¹⁰³ Lyden, G, ‘The International Money Laundering and Anti-terrorist financing Act of 2001: Congress wears a blindfold while giving money laundering legislation a facelift’ [2003] 3 *Fordham Journal of Corporate & Financial Law* 243.

¹⁰⁴ One of the related financial transactions was red flagged via a currency transaction report in September 2000 by the reporting obligations imposed by the Bank Secrecy Act 1970. See: 9/11 Commission, *op cit* n 40.

¹⁰⁵ Roberts, M, ‘Big brother isn't just watching you, he's also wasting your tax payer dollars: an analysis of the anti-money laundering provisions of the USA Patriot Act’ [2004] 56 *Rutgers L Rev* 573.

¹⁰⁶ Lyden, *op cit* n 103 at 10-11.

¹⁰⁷ Lee, *op cit* n 26 at 22.

The US government claims that it has “pursued a comprehensive strategy for combating terrorist finance”,¹⁰⁸ which has included the successful, yet controversial closure of the al Barakaat financial network, the Holy Land Foundation for Relief and Development, Afghan Support Committee, the Revival of Islamic Heritage Society and the Al-Haramain organisation.¹⁰⁹ However, it has made limited headway against terrorist finance.¹¹⁰ Terrorist organisations have adapted to the legislative changes introduced in the US and they continue to have a vast array of sources of funding available. The impact of these legislative provisions on terrorist finance must therefore be questioned, as al-Qaeda continues to inspire an increasing number of terrorist attacks.¹¹¹ If the US authorities are to achieve any level of success, the Obama Administration must bring these powers and federal authorities together to form a co-ordinated single strategy.

Implications for Suspects: Ethical and Legal Considerations

“There is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them.”¹¹²

This section set out to assess the ethics and legality of the SAR regime. Hence it is important to address what we mean by ethics. Ethics may be defined as “good behaviour” or “what ought to be done”. These values often recognise the rights and

¹⁰⁸ *Ibid* at 14.

¹⁰⁹ Department of Treasury, *op cit* n 56 at 6.

¹¹⁰ Lee, *op cit* n 26 at 23.

¹¹¹ For a list of terrorist acts involving al-Qaeda, see: <http://www.infoplease.com/ipa/A0884893.html> [accessed on 1 February 2013]. For discussion on the US strategy on al-Qaeda, see: Cronin, KA, ‘US Grand Strategy and Counterterrorism’ [2012] 56 *Orbis* 192.

¹¹² HL Deb, col 151, 27 March 2001.

interests of the society as a whole. While ethics and law are not synonymous it is often the case that they coincide and the former is seen as one of the sources of law and contributes to the good functioning and fabric of the society. As Erich Fromm said:

“The growing doubt of human autonomy and reasons has created a state of moral confusion where man is left without the guidance of either revelation or reason. The result is the acceptance of a relativistic position which proposes that value judgments and ethical norms are exclusively matters of taste or arbitrary preference and that no objectively valid statement can be made in the realm. But since man cannot live without values and norms, this relation makes him an easy prey for irrational value systems ... The demands of the state, the enthusiasm for magic qualities of powerful leaders, powerful machines, and national success become the source for his norms and value judgements (O)ur knowledge of human natures does not lead to ethical relativism, on the contrary, to the conviction that the sources of norms for ethical conduct are to be found in man’s nature itself; that normal norms are based on man’s inherent qualities; and that their violation results in mental and emotional disintegration.”¹¹³

While general business ethics encompass conscience based on honesty, integrity, fairness, courtesy, self-restraint, and consideration for other, the benchmarks against which the SAR system is assessed in this article are:

¹¹³ Fromm, E, *Man for Himself: An Inquiry Into the Psychology of Ethics* (New York: Henry Holt & Co, 1947) at 5.

- Do the counter-terrorism measures requiring banks to act as a law enforcement agent violate individual dignity?
- Are the SAR and other reporting requirements for banks necessary?
- Have these measures proven to be effective in detection, prevention of terrorist acts and conviction of terrorists?
- Do these measures comply with constitutional rights and respect international human rights law principles?

Answers to these questions will indicate whether the measures for the prevention of financing of terrorism are ethical or not.

Banks are trusted by the governments, customers, shareholders, employees and the communities in which they operate.¹¹⁴ For each of these stakeholders, there are ethical obligations they have to meet. Banks are given a great deal of discretion and are allowed to exercise their own judgment when it comes to what to do with their money and how they assess risks including suspicious transactions.¹¹⁵ Statutes give explicit duty and obligations to banks for the stewardship of the economic activities and policing of malfeasant activities. However, given the limited effect SAR has had on CTF and the way it impacts people from certain sections of society, it is time to question the duties and discretion given to banks and establish if their practices confirm to ethical standards. In other words, we must look to the spirit of the law as opposed to the letter of the law. Only when these standards are met can we ensure integrity of the banks, affinity of stakeholders, and deal with the causes of terrorism.

¹¹⁴ Green, C, 'Business Ethics in Banking' [1989] 8 *Business Ethics* 632.

¹¹⁵ *Ibid.*

As explained earlier, a plethora of financial crime legislation has found their way to the statute books. However, it is surprising that there has been limited critique of provisions pertaining to the suppression of financing of terrorism. This trend may be a result of a perception that financing of terrorism measures are relatively benign in comparison to, for example, interrogation and detention regimes that have become a common feature in the context of anti-terror policy in putative democracies following the events in September 2001, and less spectacular and deadly to report and critique than the military intervention and invasions in Afghanistan and Iraq and indefinite detention at Guantanamo Bay.¹¹⁶ Perhaps another reason for this lack of critique lies in the perception that banking and finance are seen as unconnected to traditional criminal justice, global justice or national security concerns. However, in contrast money laundering legislation and assets confiscation powers have become embedded in the criminal law over the past two decades and been the subject of extensive critical scrutiny.¹¹⁷

Based on mere suspicion, SAR by banks put the wheels of counter-terrorism measures in motion which can result in full scale investigation with serious ramifications for individuals even though there may be no conviction at the end. Counter-financing terrorism legislation allows for confiscation and freezing of assets and such measures can cripple individuals and other entities (e.g. charities) without conviction, without charge and without any evidence of criminal, let alone terrorist, activity. Thus, SAR can be detrimental for the principle of presumption of innocence and may erode the possibility of justice as well as the legal status of the individual.¹¹⁸ For instance, it may be very difficult to refute a case when a SAR is filed on the basis of a transaction

¹¹⁶ McCulloch and Carlton, *op cit* n 21 at 397.

¹¹⁷ *Ibid.*

¹¹⁸ Agamben, G, *State of Exception* (Chicago: University of Chicago Press, 2005) at 3.

originating from a 'risk' or a 'rouge' state, or suspicion is based on the country of origin or the ethnic background of the customer.¹¹⁹ There is simply no credible evidence which would suggest that there is evidence to distinguish terrorist financing that originates from legitimate sources from other financing. Indeed, credible and independent reports following the attacks in September 2001 state that the financial profile of the terrorists did not indicate that they were planning for terrorist-related activity.¹²⁰ Arguably, owing to the near impossibility of distinguishing terrorist financing through any particular objective criterion of financial profile, non-financial profiles become critical. A number of studies pertaining to prosecutions involving terrorism indicate that non-financial profiles may include terrorism-related record (including media coverage of the suspected person's activities), membership of charity or relief organisations, connection to terrorism "hot spots"¹²¹, or other more crude attributes such as race, religion and ethnicity (Arab-Muslim), gender and age.¹²² As McCulloch and Carlton aptly observe, a "number of the commentators on the suppression of financing of terrorism are rather unabashed about the need for financial institutions to discriminate according to customers' non-financial profiles to determine suspiciousness or unusualness".¹²³ For example, Bantekas is of the opinion that non-financial profiles make a significant contribution to detecting terrorist funds. He argues that this approach, "though used discriminatorily against individuals of Arab

¹¹⁹ McCulloch and Carlton argue that "people and organisations have few opportunities to be informed of the contents of financial intelligence gathered against them or to challenge its veracity or probative value when it is used to their disadvantage." See: McCulloch and Carlton, *op cit* n 21 at 404.

¹²⁰ Financial Action Task Force, *Guidance for Financial Institutions in Detecting Terrorist Financing* (Financial Action Task Force: Paris, 2002) at 6.

¹²¹ Gordon, R, 'Terrorism Financing Indicators for Financial Institutions in the United States' [2012] 44 *Case Western Reserve Journal of International Law* 765.

¹²² Rae, J, 'Will it Ever be Possible to Profile the Terrorist?' [2012] *Journal of Terrorism Research* 3(2). It is also argued that the designation of terrorism is subject to manipulations of language and symbols by the powerful. See: Beck, CJ, and Miner, E, 'Who gets designated a terrorist and why?' [2013] 91 *Social Forces* 837; Jackson, R, *Writing the War on Terrorism* (Manchester: Manchester University Press, 2005); Pokalova, E, 'Framing Separatism as Terrorism: Lessons from Kosovo' [2010] 33 *Studies in Conflict and Terrorism* 429.

¹²³ McCulloch and Carlton, *op cit* n 21 at 404.

descent or the Muslim faith in the aftermath of September 11, can increase suspicion when combined with information based on the account and transaction profiles of a suspect.” Given the need to assess nonfinancial profiles at this stage, bank “staff will be alerted by indicators such as the person's background and knowledge of the local language, the presence of a spokesman, and other unusual features.”¹²⁴ Statements by state officials such as the one made by former US Vice President Cheney: “They [non-US terrorist suspects] don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process,”¹²⁵ may also foster general prejudice. Furthermore, the pre-emptive application of investigation and criminal treatment by the authorities itself tends to stand as 'proof' of guilt because it intentionally or inadvertently sends the message that the person or persons punished were a threat.¹²⁶ Undoubtedly, SAR regime also operates with a degree of secrecy thus it reverses one of the general principles of democracy, namely transparency.

Crawford opines that the doctrine of pre-emption as articulated and deployed by the United States counter-terrorism strategy broadens not only the circumstances in which aggressive or offensive military action is utilised but also the categories of interest that are seen as legitimate to defend. In doing so, financial activities are seen as a crucial factor in national security thus banks and the finance sector are given specific roles in the prevention of terrorism and its financing.¹²⁷ This shift to future crime, pre-crime or pre-emptive strike regimes in law enforcement requires a wide spectrum of

¹²⁴ Bantekas, *op cit* n 24 at 321.

¹²⁵ Bumiller, E, and Myers, S, ‘Senior Administration Official Defend Military Tribunals for Terrorist Suspects,’ *New York Times* 15 November 2001, citing Vice President Dick Cheney, 14 November 2001.

¹²⁶ McCulloch and Carlton, *op cit* n 21.

¹²⁷ Crawford, N, ‘The Slippery Slope to Preventative War’ [2003] 17 *Ethics and International Affairs* 30.

surveillance methods hence the banks are also used as surveillance machines via the SAR regime.

Another development to note is the diminishing of the difference between external (foreign) and internal (domestic) affairs and law enforcement. Both national and international legal instruments of counter-terrorism are increasingly justified on the basis of international cooperation and the state's coercive capacities and regulatory framework are paralleled or mirrored inside and outside national borders;¹²⁸ a phenomena which critics have described as 'policy laundering'.¹²⁹ The linking of financial data with national security regimes under a framework of combating the financing of terrorism foments the process of social, religious, racial or ethnic profiling as a means of categorising and singling out individuals and organisations for differential treatment and reinforces social division and exclusion of already marginalised groups.¹³⁰ Zedner argues that the means by which such groups are identified is wholly unreliable and unscientific because such determinations are based on attributes such as race, ethnicity and class prejudice and drawn on questionable presumptions about people's appearance, lifestyles and habits.¹³¹ It is argued that "people and organisations have few opportunities to be informed of the contents of

¹²⁸ Hardt, M, 'Sovereignty' [2001] 5 *Theory & Event*, available from http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/theory_and_event/v005/5.4hardt.html [accessed on 1 February 2013].

¹²⁹ Steinhardt, B, 'American Civil Liberties Union Conference Paper: Problem of Policy Laundering', *26th International Conference on Privacy and Personal Data Collection* Wroclaw, Poland, 14-16 September 2004, available at: http://26konferencja.giodo.gov.pl/data/resources/SteinhardtB_paper.pdf, [accessed on 1 February 2013].

¹³⁰ *Ibid.*

¹³¹ Zedner, L, 'The Pursuit of Security,' in Hope, T, & Sparks, R, (eds), *Crime, Risk and Insecurity* (London: Routledge, 2000) at 210.

financial intelligence gathered against them or to challenge its veracity or probative value when it is used to their disadvantage”.¹³²

Given the potential dire consequences of being subject to a SAR, it is surprising that there are few safeguards provided. If there is a criminal charge be it related to terrorist offences or not, individuals are conferred numerous rights *inter alia*, fair and independent trial, presumption of innocence, right to legal assistance and the right not to be prosecuted twice for the same offence (*ne bis in idem*). However, the risk of injustice is exemplified by the US counter-terrorism regime which allows for a high degree of discretion (e.g. determination of a suspicious act) in the interpretation of the facts, data, and provides law enforcement, security agencies and executive branches of the government with a wide scope of enforcement powers. Unlike regular crime detection and investigations which rely on evidence, pre-emptive approach relies on intelligence by surveillance based on suspicion or a whim that a crime may occur sometime in the future. However, intelligence and profiling are not always based on hard evidence but instead may be subject to untested categories of people purportedly link to risk, media created perceptions or prejudice.¹³³ Importantly, unlike evidence, intelligence is not always subject to a transparent scrutiny of the courts thus making it vulnerable to political manipulation. For instance, the 'compelling' intelligence, not evidence, “in relation to Iraq's weapons of mass destruction turned out to be, as Former United Nations weapons inspector, Scott Ritter, put it, 'not real, but a phantom

¹³² Binning, *op cit* n 42.

¹³³ Muslim-Americans have seen the widely disseminated media reports on the government’s actions toward U.S. based Islamic NGOs as a blanket branding of all Islamic charities and considered this to be “inappropriate, counterproductive, and unwarranted, generalized anti-Muslim profiling and anti-Islam tactics based on merely a “few bad apples.” As a result, many Muslim-Americans have felt socially, culturally, and religiously fragmented from the rest of U.S. society and politically alienated.” Crimm, N, ‘The Moral Hazard of Anti-Terrorism Financing Measures: A Potential to Compromise Civil Societies and National Interests’ [2008] 43 *Wake Forest Law Review* 620.

menace, something conjured up with smoke and mirrors disguised as "irrefutable fact".¹³⁴ This trend can clearly be seen in the context of SAR by the banks and results in certain groups being viewed as potential terrorists who must prove their innocence through consent or complicity with the state.¹³⁵ According to Levi, such pre-emptive approaches in the criminal justice system existed before September 2001 in the context of organised crime and civil asset confiscation whereby the burden of proving one's innocence was placed on the suspect.¹³⁶ Thus, the trend of singling certain groups of people by counter-terror laws and pre-emptive methods in combating the financing of terrorism should not come as a surprise.

Some authors argue that the post September 2001 legislation gave rise to ethnic/religious profiling.¹³⁷ After the terrorist attacks the US government and its agencies felt it was necessary to circumvent the long-established need to obtain 'probable cause' before investigating a person's private affairs. Lee noted that "in an attempt to flush out the funds of foreign nationals who financed terrorism ... the Fourth Amendment was trumped".¹³⁸

¹³⁴ Ritter, S, *Frontier Justice: Weapons of Mass Destruction and the Bushwacking of America* (Melbourne: Scribe Publications, 2003) at 147.

¹³⁵ Giroux, H, *Proto-Fascism in America: Neoliberalism and the Demise of Democracy* (Bloomington: Phi Delta Kappa Educational Foundation, 2004) at 30.

¹³⁶ Levi, M, 'The Organisation of Serious Crimes', in Maguire, M, Morgan, R, & Reiner, R, (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002).

¹³⁷ Harris, D, 'Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror' [2002] *Crim Just* 36. A number of international legal instruments (e.g. Article 1 of the Universal Declaration of Human Rights 1948 and Article 2(1) and 26 of the International Covenant on Civil and Political Rights 1966) and the US Constitution prohibit discrimination and require equality before the law.

¹³⁸ Lee, C, 'Constitutional cash: are banks guilty of racial profiling in implementing the United States Patriot Act?' [2006] 11 *Michigan Journal of Race and Law* 557 at 562. The Fourth Amendment of the US Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The USA Patriot Act 2001 has been used by US authorities in an attempt to generate “a master list of evil doers and their possible activities”.¹³⁹ If a person enters into a legitimate transaction which has been designated by the financial institution as suspicious or high risk, the business deal will be the subject of a SAR or a cash transaction report. Whether or not these provisions are an example of Islamophobia or amount to racial profiling depends upon the interpretation of the phrase ‘suspicion’ by the employees of financial institutions. Lee contends that “if you are Black or Brown and living in America, you have probably been stopped and questioned by the police at some moment in your life ... since the USA Patriot Act 2001 ... if you are Brown, Muslim, national of Middle Eastern descent, ‘look Muslim’ or ‘of Middle Eastern Ethnicity’ that questioning may happen in a bank”.¹⁴⁰ Lee adds that the USA Patriot Act 2001 “put banks in the business of practicing selective enforcement and racial profiling with every transaction, every hour of every business day”.¹⁴¹

Part of the problem lies with the people who report a suspicious transaction and the grounds they base their decision on. FINCEN have issued guidelines which provide guidance for employees of financial institutions as to what should initiate the completion of an SAR. This includes, for example, the use of a business account that would not normally generate the volume of wire transfer activity, a beneficiary account in a problematic country, currency exchange from various countries in the Middle East and business account activity conducted by nationals in countries associated with terrorist activity. The privacy of account holders versus the authorities’ ability to obtain information has been scrutinised by the US Supreme Court on several occasions. While the US Supreme Court has condemned racial

¹³⁹ *Ibid.*

¹⁴⁰ Lee, *op cit* n 138 at 558.

¹⁴¹ *Ibid* at 564.

stereotyping,¹⁴² it has decided that the reporting obligations imposed by the BSA 1970 do not infringe the Fourth Amendment of the US Constitution.¹⁴³ The appropriateness of racial profiling in concurrence with the SARs regime must be criticised because its effectiveness is dependent upon the employees of the financial institutions who are subject to the reporting requirements of the USA Patriot Act 2001. Whether or not a person is to be the subject of a SAR will wholly depend upon the judgment of the employee in applying the firms counter terrorist finance policy. Is an employee able to understand and detect if a transaction or series of transactions is being used to fund acts of terrorism? This is extremely unlikely given the lack of understanding of the funding of terrorism shown by the Bush Administration and the general ineffectiveness of the USA Patriot Act 2001. This point is noted by Lee who took the view that:

“Profiling has not enhanced national security; not a single arrest, not a single dollar found by a SAR or CTR report since the aftermath of 9/11, has been traced to a terrorist act. Moreover, the Treasury Department is now so overwhelmed by the sheer number of SARs and CTRs, if there were evidence of terrorism uncovered by these devices, it would be months before the particular SAR would be identified”.¹⁴⁴

Before September 11 2001, only 21 SARs described suspicious activity related to terrorism or terrorist organisations. Between September 12, 2001 and March 31, 2002, more than 1,600 SARs were filed by 225 financial institutions that contained

¹⁴² See for example, *Shaw v Reno*, 509 US 630, 643-44 (1993); *Edmonson v Leesville Concrete Co* 500 US 614, 630-31 (1991).

¹⁴³ Lee, *op cit* n 138 at 564.

¹⁴⁴ *Ibid.*

references to terrorism or terrorist groups. The amounts of suspicious financial activities ranged from \$14 to \$300 million. The suspicious wire transfers occurred predominantly to or from Middle-Eastern countries. But other countries with predominantly Muslim populations such as Pakistan, Malaysia, Indonesia and the Philippines were also identified in connection with suspicious wire transfer activity.

Of course, the selection of Middle Eastern ethnicity and Muslims as terrorist suspects does not automatically amount to discrimination by a racial or ethnic profiling if the investigation is based on evidence of particular conduct as well as characteristics of individuals such as race, national origin, eye colour, height, etc. If, however, any counter terrorism measure or decision is based on the belief that members of a particular group are more likely to commit the crime under investigation than are members of other groups (e.g. the member of the Irish Republican Army or the Basque ETA) then one could start establishing the hallmark of racial profiling based on stereotypes.¹⁴⁵

Gross and Livingston have asserted that “it is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating”.¹⁴⁶ While the courts have held that racial component of any evidence and/or suspect description on its own is not sufficient enough to justify a stop and

¹⁴⁵ Ramirez defines racial profiling as “the inappropriate use of race, ethnicity, or national origin, rather than behaviour or individualised suspicion, to focus on an individual for additional investigation. See: Ramirez, D, *et al*, ‘Defining Racial Profiling in a Post-September 11 World’ [2003] 40 *Am Crim K Rev* 1195 at 1202-1207.

¹⁴⁶ Gross, S, and Livingston, D, ‘Essay, Racial Profiling Under Attack’ [2002] 102 *Columbia L Rev* 1414 at 1415. The US jurisprudence also confirms this view that a prohibition of racial profiling would not obligate law enforcement agencies from investigating only members of a particular race or origin if they are seeking a specific perpetrator who has been identified as a member of that race. See: *Brown v State* 592 So 2d 1237 (Fla Dist Ct App 1992); *Commonwealth v Mercado* 663 NE 2d 243 (Mass. 1996) and *Commonwealth v McDonald* 740 A2d 267 (Pa Super Ct 1999).

search, investigate, arrest, etc, no court decision has established that reliance on suspect description is discriminatory or ‘identifying characteristics’ cannot include race or ethnicity.¹⁴⁷ For example, it was asserted that “... common sense dictates when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race”.¹⁴⁸ It has been argued that suspect description reliance is permissible under the Equality Protection Clause¹⁴⁹ as it is not racially discriminatory and relies on particular characteristics of a specific perpetrator.¹⁵⁰ Within the scholarly community there is support the use of racial profiling¹⁵¹ while others are totally against it¹⁵² or argue that it is unnecessary.¹⁵³

The Supreme Court’s view has been that ‘[at] the very least, the Equal Protection Clause demands that racial classifications ... be subjected to the “most rigid scrutiny”’.¹⁵⁴ If such measures to be upheld, it must be shown that they are necessary to promote a ‘compelling’ or ‘overriding’ government interest.¹⁵⁵ The Department of Justice (DoJ) guidelines on the use of race in criminal investigations follow a similar

¹⁴⁷ *US v Kim* 25 F 3d 1426, 1431 n 3 (9th Cir 1994).

¹⁴⁸ For example, *US v Waldon* 206 F 3d 597, 604 (6th Cir 2000).

¹⁴⁹ The Equal Protection Clause of the Fourteenth Amendment to the US Constitution provides that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws”. The Supreme Court in *Yick Wo v Hopkins* 118 US 356, 369 (1886) has recognised that the Equal Protection Clause is applicable “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality”.

¹⁵⁰ Kennedy, R, ‘Suspect Policy’ *New Republic*, September 13/20, 1999 and Cole, D, *No Equal Justice* (New York: New Press, 2000) 50.

¹⁵¹ Taylor, S, ‘The Skies Won’t Be Safe Until We Use Commonsense Profiling,’ in Darmer, KM, *et al*, (eds). *Civil Liberties vs National Security: In a Post 9/11 World* (Prometheus Books, 2004).

¹⁵² Harris, D, ‘Racial Profiling Revisited: Just Common Sense in the Fight Against Terror?’ in Darmer, KM, *et al*, (eds), *Civil Liberties vs National Security: In a Post 9/11 World* (Prometheus Books, 2004).

¹⁵³ Bahdi, R, ‘No Exit: Racial Profiling and Canada’s War Against Terrorism’ [2003] 41 *Osgoode Hall Law Journal* 293.

¹⁵⁴ *Loving v Virginia* 388 US 1, 11 (1967).

¹⁵⁵ *McLaughlin v Florida* 389 US 184, 196 (1964); *Adarand Constructors, Inc v Peña* 515 US 200, 227 (1995). Similarly, in the United Kingdom, the House of Lords held that ‘unless good reason exists,’ differential treatment based on race ‘are properly stigmatised as discriminatory’. See *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 9.

line.¹⁵⁶ It provides that racial profiling is “wrong” and “stereotyping certain races as having greater propensity to commit crimes is absolutely prohibited,” but “efforts to defend and safeguard against threat to the national security or integrity of the Nation’s borders” are exempt from racial profiling prohibitions. According to these guidelines, while the government declares that racial profiling is wrong and immoral, in the same breath it asserts that the war on terror justifies the use of race and ethnicity when similar tactics have been found both ineffective and contrary to equal protection principles in other criminal investigations.¹⁵⁷ Moreover, while statutory instruments do not explicitly endorse or encourage racial profiling, the same cannot be said of policies and practice developed by institutions entrusted with countering the financing of terrorism.

The UN Special Rapporteur on Human Rights asserts that according to the non-discrimination jurisprudence,¹⁵⁸ a difference in treatment on the basis of a criterion such as race, ethnicity, national origin or religion will only be compatible with the principle of non-discrimination if it is supported by objective and reasonable grounds.¹⁵⁹ Accordingly, the terrorist-profiling practices that involve distinctions according to a person’s presumed “race” cannot be supported by objective and reasonable grounds, because they are based on the wrongful assumption that there are

¹⁵⁶ Department of Justice, *Fact sheet racial profiling* (Washington DC: Department of Justice, 2003) at 1.

¹⁵⁷ Rudovsky, D, ‘Racial Profiling on the War on Terror’ [2007] 155 *University of Pennsylvania Law Review* 173.

¹⁵⁸ For analysis of non-discrimination jurisprudence, see: Búrca, G, ‘The Trajectories of European and American Antidiscrimination Law’ [2012] 60 *American Journal of Comparative Law* 1 and Moeckli, D, *Human Rights and Non-discrimination in the War on Terror* (Oxford: Oxford University Press, 2008).

¹⁵⁹ Human Rights Committee, General Comment No 18: Non-discrimination (1989), para 13; Human Rights Committee, *Broeks v The Netherlands* communication No 172/1984 (CCPR/C/OP/2), para 13 (1990); *Belgian Linguistics Case (No. 2)* (1968) 1 EHRR 252, para 10; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights (Ser A) No 4 (19 January 1984), para 57.

different human races and, therefore, inevitably involve unfounded stereotyping through a crude categorisation of assumed races, such as “white”, “black” and “Asian”. As far as distinctions according to national or ethnic origin and religion are concerned, the following two requirements are generally applicable to determine the existence of an objective and reasonable justification. First, the difference in treatment must pursue a legitimate aim. Second, there has to be a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realised.¹⁶⁰

In regards to the first requirement, the aim of law-enforcement practices that are based on terrorist profiling is the prevention of terrorist attacks and this constitutes a legitimate and compelling social need. The decisive question is therefore whether terrorist-profiling practices, and the differential treatment they involve, are a proportionate means of achieving this aim. In assessing proportionality, it is necessary to consider whether terrorist-profiling practices are a suitable and effective means of countering terrorism and also what kind of negative effects these practices may produce. In order to serve as a suitable and effective tool of counter-terrorism, a profile would need to be narrow enough to exclude those persons who do not present a terrorist threat and, at the same time, broad enough to include those who do. However, as the evaluation of current practices reveal, terrorist profiles that are based on characteristics such as ethnicity, national origin and religion are regularly inaccurate and both over - and under - inclusive. Therefore it can be argued that ethnicity, national origin and religion are inaccurate indicators because the initial premise on which they are based, namely that Muslims, Arab or persons of Middle

¹⁶⁰ For detailed discussion on this issue, see: Moeckli, D, *Human Rights and Non-discrimination in the War on Terror* (Oxford: Oxford University Press, 2008).

Eastern appearance are particularly likely to be involved in terrorist activities, is highly doubtful. As Leiken and Brooke's study indicates, Islamist terrorists arrested or killed in Western States showed that less than half of them were born in Middle Eastern countries.¹⁶¹

It is also concerning that the over-inclusive terrorist profiles that are used in SARs overwhelm the law-enforcement system. With the broadening of the terrorist profiles, the greater becomes the number of people whom the law enforcement agencies treat as suspects, even though the vast majority of them will turn out to present no risk. This may result in the important law-enforcement resources being diverted away from more beneficial work. Moreover, there is a danger that profiles based on ethnicity, national origin and religion are also under-inclusive and as a consequence may lead law-enforcement agents to miss a range of potential terrorists who do not fit the respective profile.

In relation to the SAR requirements, the question remains as to whether financial institutions use suspect descriptions in order to narrowly target those individuals who most resemble the perpetrator or whether they view suspect descriptions on stereotypes based on mere geographical origin, name, religion, etc. In fact, is there a real, clear division between the two approaches? In the context of countering the financing of international terrorism there seems to be no dissimilarity.¹⁶² For example, the current number of known and suspected terrorists who are sought by law enforcement agencies can be numbered in the thousands. Moreover, there are those

¹⁶¹ Leiken, R, and Brooke, S, 'The quantitative analysis of terrorism and immigration: an initial exploration' [2006] 18 *Terrorism and Political Violence* 503.

¹⁶² Banks, R, 'Racial Profiling and Antiterrorism Efforts' [2004] 89 *Cornell L Rev* 1201 at 1206.

who are identified as having links or association with prescribed terrorist organisations. Due to the current nature of international terrorism the efforts to identify and find these persons cannot be temporary or geographically limited, based on mere suspect description. Hence, the DoJ shares the names of suspected terrorists by adding the names to the National Crime Information Center Database and provides electronic filtering called the System to Assess Risk, (STAR) used by the FBI's Foreign Terrorist Tracking Task Force, which tracks suspected terrorists. Neither of these tools is available to financial institutions, yet and none of the anti-terrorism laws explicitly regulate the issue of profiling through legislation. Consequently, the financial institutions follow the US Department of Treasury's Guidance on the SAR which stipulates the "*modus operandi*" for conducting the SAR. While the guidelines emphasise the importance of the role of the financial institutions in counter-terrorism efforts and outline what should be included in the SAR they do not provide a criteria against which the SAR regime should be exercised specifically. The guidelines merely require the reporting institution to ask themselves '*Why does the filer think the activity is suspicious?*'¹⁶³ This allows for a great subjective decision making on the filers' behalf and often lacks factual basis. For example, in 40 instances, financial institutions indicated that the SAR was filed because the individual was a pilot or student attending flight school.¹⁶⁴ In other instances, financial institutions indicated that the SAR was filed because the account holder appeared to have the same name as individuals identified by the media as terrorists, appeared to be of Middle-Eastern descent, or the SAR was filed because of the recent events of terrorist acts.¹⁶⁵ It is not

¹⁶³ It is difficult to determine whether race might constitute the only factor subjecting a person to SAR or whether it constitutes only one factor among a group of factors. This is because the financial institution can usually find some basis, independent of race, which might raise suspicion. For example, acting nervously or the amount of the money being transferred may be used as criterion.

¹⁶⁴ See FinCEN, *SAR Activity Review* (Washington DC: FinCEN, 2002).

¹⁶⁵ *Ibid.*

surprising therefore that most SARs have provided no use whatsoever for preventing terrorism nor resulted in conviction of suspected terrorists. In its report, FINCEN asserts that SARs greatly enhance cases involving material support to terrorism. However, in the same report it is also indicated that the only successful conviction relates to a violation of immigration laws *not* financing of terrorism.

Empirical evidence from a number of schemes involving profiling also underline the ineffectiveness of such strategy. For instance, the German *Rasterfahndung* did not result in a single criminal charge for terrorism-related offences.¹⁶⁶ Instead, the few successes achieved by the German police forces in detecting alleged Islamist terrorists were all achieved by traditional, intelligence-led methods.¹⁶⁷ Similarly, in the United Kingdom, the widespread, and ethnically disproportionate, use of stop-and-search powers has produced hardly any results.¹⁶⁸ In the United States, the targeting of mainly immigrants of Middle Eastern descent has not produced any significant results in the form of arrests or successful convictions either.¹⁶⁹ Levi opines that even if these measures were effective it is likely that terrorist finance would be pushed into illegal channels¹⁷⁰ thus causes and risk of terrorism would remain the same.

¹⁶⁶ See the decision of the *Bundesverfassungsgericht* (the Federal Constitutional Court) of Germany in decision BVerfG, 1 BvR 518/02, 4 April 2006, available at: http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html para 28 [accessed 10 January 2013] (explaining that in the Federal State) of Nordrhein-Westfalen, 5.2 million personal data sets were collected).

¹⁶⁷ See for example, Hessischer Landtag, Kleine Anfrage des Abg. Hahn (FDP) vom 10.03.2004 betreffend Ergebnisse der Rasterfahndung und Antwort des Ministers des Innern und für Sport, Drucksache 16/2042, 18 May 2004.

¹⁶⁸ Bowling, C, and Phillips, C, 'Disproportionate and discriminatory: reviewing the evidence on police stop and search' [2007] 70 *Modern Law Review*, 936.

¹⁶⁹ See for example, Ryder, N, 'A false sense of security? An analysis of legislative approaches towards the prevention of terrorist finance in the United States and the United Kingdom' [2007] Nov *Journal of Business Law* 833.

¹⁷⁰ Levi, M, 'Combating the financing of terrorism – A History and Assessment of the Control of 'Threat Finance' [2010] 50 *The British Journal of Criminology* 662.

While the effectiveness of such measures may be debated one ought to consider the long term effect of such policy on the overall social cohesion of the society as well. As a multi-cultural society, the US has over a million Muslim citizens of Middle Eastern, Muslim and/or Arab origin.¹⁷¹ While the SAR regime may not be directed at them, inevitably, American citizens of such origins are affected by the SAR regime especially in terms of how they are perceived by the general population. Therefore, as aptly asserted by Barak-Erez, such practices should not only establish an objective criterion for profiling but also ensure that it does not have long-lasting effects on innocent people.¹⁷² Even though suspect descriptions may be specific as to time and place they may still encompass a large number of people. For instance, reliance on an intelligence report that three Muslim men from the Middle East will attempt to finance a terror plot by wire transfers next week could lead to nearly all money transfers from the Middle East being scrutinised. While the supporters of profiling may contend that members of a targeted group have nothing to fear from profiling because they will be exonerated if they are innocent, this is often not the case. For example, persons who are wrongly identified as suspected terrorists can suffer irreparable harm. Khaled el-Masri of Germany is a case in point.¹⁷³

In fact, in their efforts to combat financing of terrorism banks may engage in profiling on the basis of key aspects of a description of a known terrorist such as name and nationality. Inevitably SARs based on such criteria have resulted in the investigation

¹⁷¹ It is important to note that not all Arabs or people from the Middle East are Muslims. It is reported that only 20% of Muslims are Arabs. See: Middle East Policy Council, 'Arab World Studies Notebook: Muslims Worldwide,' available from www.mepc.org/public_asp/workshops/musworld.asp, [accessed 10 January 2013].

¹⁷² Barak-Erez, D, 'Terrorism and Profiling: Shifting the Focus from Criteria to Effects' [2007] 29 *Cardozo L Rev* 1.

¹⁷³ For full details of el-Masri's ordeal see, Amnesty International, 'The Rendition of Khaled el-Masri: USA / Macedonia / Germany', 9 August 2006, AI Index: AMR 51/133/2006.

of thousands of innocent Arabs and Muslims and could lead to wide stigmatisation of the entire group as potential terrorists. Thus some may view this sort of investigation as racial profiling. On the other hand, it could be perceived as a justified effort to prevent any financial activity which may further terrorism.

Given that distinction between legitimate suspect description reliance and prohibited profiling is fuzzy in the war on financing of terrorism, it may be necessary to consider both the proportionality and effectiveness of such practices if we want to establish an intelligent evaluation. Importantly, without reliable information and concrete evidence connecting suspects or suspicious financial activities to a specific criminal offence will provide hardly any results. It is now accepted that racial profiling does not expose potential terrorists nor increase national security.¹⁷⁴ On the contrary, such practices undermine national security and alienate targeted groups whilst heightening their vulnerability and exclusion from the society. The creation of dualism between “us”, the natives, and “them”, the targeted groups (e.g. Muslims), is also deeply regressive in a globalised society. Therefore, dualist approaches (such as liberalism vs. terrorism, or liberalism vs. Islamic or Christian fundamentalism) to counter terrorism and financing of terrorism policies are bound to fail. Terrorism is not confined to external threats (i.e. al-Qaeda) and is also reproduced internally in those societies imbued with Western values. The IRA bombings; the massacre at Waco, Texas; the Oklahoma City bombing; Aum Shinrikyo (Japanese terrorist cult) gas bomb attack in Tokyo underground and bombings in Istanbul and London are just a few prominent examples. Even if Al-Qaeda and/or Arab terrorists did represent the only terrorist threat, racial profiling would not be effective. The judgments based solely on looks,

¹⁷⁴ Bahdi, R, ‘No Exit: Racial Profiling and Canada’s War Against Terrorism’ [2003] 41 *Osgoode Hall Law Journal* 293.

religion, or nationality can be misleading because neither race, religion, nor nationality assumes a quintessential form. Therefore, there is a great need for reshaping of the counter-terrorism policy pertaining to financial activities.

The assumption that banks have superior knowledge to detect illicit activity may not apply to terrorist financing. While the anti-terrorism agencies may possess the intelligence that could reveal terrorist operatives and fund-raisers, financial institutions generally do not have such capacity. The September 11 plot provides a perfect example. The 19 hijackers hid in plain sight: none of their financial activities could have revealed their real intent.

The vast majority of Islamic or Arab bank customers are not terrorists or terrorist supporters, so indiscriminately filing SARs on them will do nothing but waste resources and cause bad will. Similarly, filing a SAR that an Islamic charity is sending money to Afghanistan or Palestine will not be particularly effective in finding terrorist financiers either. It is very well known that there are many legitimate humanitarian needs in these jurisdictions where such charitable activity can deal with the root causes of terrorism. Moreover, successful counter-terrorism operations depend on the cooperation of the communities where the suspects live. Profiling and SAR based on ethnicity, national origin and religion may have the contrary effect of alienating communities from cooperating with law-enforcement authorities and may thus hamper effective gathering of intelligence and diminish fundamental values on which countries such as the US are founded.

Conclusion

The international community was unprepared to regulate terrorist finances prior to 2001. The terrorist attacks of the September 2001 galvanised the international community into action. Within ten days of the attacks, President Bush proclaimed that his administration would stifle terrorist funds wherever they were held in the world. What followed can only be described as a plethora of legislation, rules and regulations aimed at preventing terrorist organisations from carrying out such attacks. The UN announced a series of resolutions aimed at financially crippling terrorist organisations. At the forefront of the US war on terrorist finances is Executive Order 13,224, which had an immediate impact. The US authorities froze assets worth \$135m of nearly 250 individuals and groups who were designated terrorist organisations. Part of this campaign was directed at US based Islamic charities after it was reported that al-Qaeda received a large percentage of its monies from such organisations. A high-profile attempt to counter terrorist finance resulted in a number of Islamic charities and individuals having their assets frozen. What has this realistically achieved? It is controversial. It has alienated not only potential Islamic investors in the US but more importantly potential international partners who are needed to confront the problems caused by terrorist finance and widen the gap and mistrust between communities. The introduction of additional reporting requirements under the USA Patriot Act 2001 adds little to the so called war on terrorist finances. The inadequacies of the previous legislation were highlighted by the 9/11 Commission, which reported that one of the terrorists had been the subject of an SAR in 2000. This SAR was one of over 1.2 million such reports filed with the US authorities between 1996 and 2003. The effectiveness of such a policy must therefore be questioned. In 2002, ex US President George W Bush stated that, 'war on terror' is a global enterprise of uncertain duration. In these circumstances, one can argue that the state of exception has become the norm

by which certain categories of people are denied the protection of law. People and organisations who are subject to a SAR or an asset freezing order are treated like criminals and face dire consequences only found in the aftermath of a criminal trial. However, in this *de facto* pre-emptive and parallel criminal justice system, there are no safeguards to challenge such determinations. In fact, the distinction between administrative and criminal sanctions without trial has become almost impossible to determine. This is a worrying trend particularly in a country which promotes itself globally as the protector of freedom and human rights. This paper has argued that terrorist organisations use a large number of, and at times, increasingly sophisticated financial tools to fund their operations. There is however little proof to date that the international response to 9/11 is actually working. The war on terrorist financing has done nothing to limit the sources of finance available to terrorist groups. Therefore, irrespective of any legislation, improved methods of investigation, new powers for financial regulatory agencies or even an increased level of international co-operation, there is always the threat of a well organised and self funded terrorist cell, which operates under the radar of anti-terrorist financial legislation, which is capable of a terrorist attack.