

# **The Uneasy Relationship Between National Security and Personal Freedom: New Zealand and the War on Terror.**

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## 1 Introduction

In the pre-dawn darkness of 15 October 2007, dozens of police from the Armed Offenders' Squad and secret Special Tactics Group conducted simultaneous raids across New Zealand. They announced to a startled country that the raids were authorized by warrants issued under the Arms Act 1983 and the Terrorism Suppression Act 2002, and that they had broken a network of terrorist training camps centred in the remote Urewera mountains in the centre of the North Island. The seventeen people arrested were not, however, members of an Al-Qaeda sleeper cell. They were all local political activists. Some had high public profiles. Many were Maori nationalists. The raids drew widespread public condemnation. They were decried as racist political harassment and evidence of the dangers inherent in the anti-terrorism legislation introduced at the behest of the United States in the wake of the airliner attacks of 11 September 2001.

Although the Police had briefed the high-level Officials Committee for Domestic and External Security before the raids, they still required the approval of the Attorney-General in order to prosecute anybody under the Terrorism Suppression Act<sup>1</sup>. When they sought that approval for those arrested during the October 2007 raids, the Solicitor-General announced that,

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<sup>1</sup> *Terrorism Suppression Act 2002*. S67.

on the basis of the evidence that had been gathered, he could not assent to the charges, and he went on to describe the existing law as ‘unworkable’.

In response to this situation, the Government gave the New Zealand Law Commission the task of examining the crux of the matter: whether existing law needed to be amended ‘to cover the conduct of individuals that creates risk to, or public concern about, the preservation of public safety and security and the means of obtaining evidence in relation to that conduct’. It also specified that the Law Commission must take account of the ‘the need to ensure an appropriate balance between the preservation of public safety and security and the maintenance of individual rights and freedoms’.

This is an opportune time and the Law Commission the ideal agency to conduct this exercise, named the Public Safety and Security Project. This paper was prepared as a contribution to this project. It traverses some of the key theoretical and practical issues that might underlie the matters under consideration, and identifies challenges and opportunities that present themselves.

The paper begins with a discussion of the definitional difficulty associated with the notion of terrorism, and the political history of attempts to resolve this problem. It then considers the New Zealand’s past experience in assessing and managing national security. The next section deals with the tensions that have emerged between anti-terrorism legislation and the criminal law, including a discussion of how such tensions might be resolved; whether, for example, the solution is to adjust the criminal law so as to better equip it to deal with the challenge of terrorism, or to maintain a divide between anti-terrorist legislation and criminal law. In the final section, I scrutinise the ‘balancing’ approach that the Law Commission has been set, noting that some serious criticisms have been raised about models that seek to balance national security considerations on one hand and individual freedoms on the other.

I conclude by identifying a number of ways in which the Law Commission might learn both from the experience of New Zealand and other countries in combating terrorism, and from the extensive body of academic scholarship in this area. I also raise the possibility of whether New Zealand's special position may enable it to develop anti-terrorism legislation with an orientation as independent as its anti-nuclear policies. In doing so, New Zealand may be able to respond to the threat of terrorism no less effectively than any other country, but without having to compromise basic freedoms and the rule of law. I argue that, to the extent that there are such fundamental compromises made, they should occur only with the informed consent of the public.

## 2 Defining and Making War on Terrorism

Nine days after the attacks of September 11, US President George W Bush declared a 'war on terror'. In a speech to the Joint Session of Congress he characterised it in these terms:

'Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen... We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region now has a decision to make. Either you are with us or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime'<sup>2</sup>.

Given the close attention it has attracted, it is remarkable that terrorism has proved such a difficult concept to define with precision. This difficulty can be

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<sup>2</sup> <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>. Retrieved on 2 July 2008.

illustrated by the fact that it remains undefined even in the most important current international anti-terrorism resolution, UN Security Council Resolution 1373 (which was passed just 17 days after the September 11 attacks). Lord Carlile, who was commissioned to produce a report for the British Parliament in 2007 entitled ‘The Definition of Terrorism’, found a wide range of ways that various national jurisdictions and international conventions and resolutions have dealt with the topic, and noted that ‘there is no universally accepted definition of terrorism’<sup>3</sup>. Moreover, he concluded, having read many attempts at defining the concept, ‘there is (not) one that I could read as the paradigm’<sup>4</sup>.

The term ‘terrorism’ was first used at the time of the French Revolution to describe the system of terror administered by the Jacobins<sup>5</sup>. It was later broadened from being exclusively used in relation to state-instigated terror as a means of controlling its own population to also include, as its modern application does, ‘acts of violence by private citizens intended to intimidate other citizens, groups or states’<sup>6</sup>. The definitional difficulties stem from the problem of characterising as terrorism all acts of politically-motivated violence that generate fear and anxiety. Such a simplistic definition would apply the ‘terrorist’ label, in a way many would consider inappropriate, to partisans of occupied Europe during World War Two and, more recently, national liberation movements asserting their legitimate right to self-determination against belligerent states.

This has given rise to what Stephens refers to as ‘the ongoing difficulty in a satisfactory demarcation between terrorism and the violence that continues to be used in aid of what many states consider to be legitimate political

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<sup>3</sup> Lord Carlile of Berriew. *The Definition of Terrorism*. London: Secretary of State for the Home Department, March 2007, p.3.

<sup>4</sup> *Ibid.*, p.4.

<sup>5</sup> G Guillaume. ‘Terrorism and International Law’, *International and Comparative Law Quarterly*. Volume 53, 2004, p.537.

<sup>6</sup> T. Stephens. ‘International Criminal Law and the Response to International Terrorism’, *University of New South Wales Law Review*, Volume 27, number 2, 2004, p.457.

struggle'<sup>7</sup>. Buchanan has argued that this problem can be satisfactorily addressed only by a moral theory of international law which could generate a clearer concept of state legitimacy against which self-determination could be measured<sup>8</sup>. It is the absence of agreement on such a measure that has prevented the emergence of a more principled and less pragmatic and politicised international approach to combating terrorism. Sorel notes that the international community has attempted to sidestep the political sensitivity of definitions and has instead adapted itself to the 'predominant form of terrorist action at any given time'<sup>9</sup>.

There is currently an exceptionally high degree of agreement among states in relation to the anti-terrorist measures that have been developed to counter the terrorist threat posed by Muslim fundamentalists. This is demonstrated by the consensus support of all 192 UN member states for the UN Global Counter-Terrorism Strategy that was established in 2006<sup>10</sup>. To some extent, however, this is simply an indication of the extent to which Al-Qaeda and its affiliates are marginalised in the international community. During the Cold War, by contrast, almost every group that might be a candidate for the 'terrorist' designation enjoyed a degree of support, understanding or tolerance from a significant world power.

Besides the early and unsuccessful attempt by the League of Nations to establish the 'Convention for the Prevention and Punishment of Terrorism' in 1937<sup>11</sup>, the international community first started to seriously address the issue of terrorism in response to the increase in aircraft hijacking in the 1960s. The UN committee that was established to find ways to eliminate international terrorism and study its underlying causes was unable to find an agreed means

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<sup>7</sup> *Ibid.*, p.458.

<sup>8</sup> A. Buchanan. *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press, 2004, p.11.

<sup>9</sup> J-M Sorel. 'Some Questions About the Definition of Terrorism and the Fight against its Financing', *European Journal of International Law*. Volume 14, 203, p.368.

<sup>10</sup> *The United Nations Global Counter-Terrorism Strategy*. UN Doc A/Res/60/288

<sup>11</sup> Reported in J. Dugard. 'Towards the Definition of International Terrorism', *American Society of International Law Proceedings*. Volume 67, 1973, p.95.

for distinguishing terrorism from legitimate struggles for national liberation<sup>12</sup>. However, in the wake of the 1985 seizure of the ship, the Achille Lauro, the UN reached its first agreement on unequivocal condemnation of the use of terror tactics, regardless of the objectives that were being advanced<sup>13</sup>. This position was restated forcefully in 2005 through UN Security Council Resolution 1624 which condemned all terrorist acts ‘irrespective of their motivation, whenever and by whomever committed’<sup>14</sup>.

The international community has, therefore, not allowed its inability to establish an agreed definition of terrorism to prevent it from developing mechanisms for combating terrorism. Many national jurisdictions have done the same. Most have side-stepped definitional challenges by focusing instead on defining terrorist acts. From these definitions are derived, in turn, methods for defining ‘terrorist entities’. Typically, as is the case in New Zealand, an entity is defined and can then be subsequently legally ‘designated’ as terrorist if it ‘has knowingly carried out, or has knowingly participated in the carrying out of one or more terrorist act’<sup>15</sup>.

Golder and Williams usefully describe the definitional approach as the ‘general or deductive model,’ and contrast it with the internationally preferred approach of focusing on terrorist acts which they call the ‘specific or inductive model’<sup>16</sup>. However, the inductive model is not entirely unproblematic either. Golder and Williams note that it ‘results in a piecemeal, ad hoc and reactive means of regulation’ and lacks the wider moral and political appeal of the general approach ‘which can lead to a stronger statement about the

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<sup>12</sup> *Report of the Ad Hoc Committee on Terrorism*. UN Doc A/34/37 (1979)

<sup>13</sup> M. Halberstam. ‘The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalising Terrorism Wherever and by Whomever Committed’, *Columbia Journal of Transnational Law*. Volume 41, 2003.

<sup>14</sup> UN Doc S/Res/1624 (2005)

<sup>15</sup> Terrorism Suppression Act (2002) Section 20 (1) and Section 22 (1).

<sup>16</sup> B. Golder and G. Williams. ‘What is ‘Terrorism’? Problems of Legal Definition’, *University of New South Wales Law Journal*. Volume 27, number 2, 2004, p.273.

indiscriminate use of violence to attain political, religious or ideological ends'<sup>17</sup>.

A key feature of the inductive model is that it confronts practical problems in relation to specific acts. Some acts, for example ones that deliberately aim to maximise human deaths, can be relatively uncontroversially categorised as terrorist acts. There is, however, less unanimity when it comes to harm that is less serious than death or when small numbers of victims are involved<sup>18</sup>. And when it comes to acts that involve harm only to property, there is considerable debate over applying the terrorist label. In the New Zealand Terrorism Suppression Act 2002, 'serious damage to property of great value or significance'<sup>19</sup> is sufficient, but only if it is likely to result in 'the death of, or other serious bodily injury to, one or more persons (other than the person carrying out the act)'<sup>20</sup> or 'a serious risk to the health or safety of a population'<sup>21</sup> or 'serious interference with or serious disruption to an infrastructure facility, if likely to endanger human life'<sup>22</sup>.

Critics such as the Green Party and Greenpeace have expressed concern that the threshold for criminally endangering of human life in this legislation should be that it was not only likely, but also intended. As the Green Party's Foreign Affairs Spokesperson, Keith Locke, told Parliament:

'... those organising a hospital strike or a disruptive protest on the scale of the 1981 Springbok Tour demonstrations could be up for a life sentence for serious disruption of an infrastructure facility, in a way

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<sup>17</sup> *Ibid.*, p.294.

<sup>18</sup> For example, the Carlile Report notes (at p.16) that there are differences over whether to include as a terrorist act, the poisoning of a water supply with intent to cause sickness but not death.

<sup>19</sup> Section 5 (3) c

<sup>20</sup> Section 5 (3) a.

<sup>21</sup> Section 5 (3) b.

<sup>22</sup> Section 5 (3) d.

likely to endanger human life, even if they in no way intended to endanger human life'<sup>23</sup>.

### 3 Terrorism in New Zealand: Real Risk or Global Responsibility?

New Zealand's legislative response to terrorism originated in part as a response to the Rainbow Warrior bombing, with the International Terrorism (Emergency Powers) Act 1987, which confers emergency powers on the police and armed forces in the event of a declaration of an 'international terrorist emergency'. At the time of the September 11 attacks, New Zealand had passed legislation to implement eight of the major international conventions on terrorism and was seeking to implement two more through the Terrorism (Bombings and Financing) Bill 2001<sup>24</sup>. Because this Bill was being debated in Parliament at the time, it became a 'convenient vehicle' to respond to the obligations New Zealand assumed in the wake of UN Security Council Resolution 1373<sup>25</sup>.

For most Western industrialised states comparable to New Zealand, there is no shortage of terrorism 'experts', politicians, civil society leaders and academics who are prepared to publicly declare that there is not only a significant risk of a terrorist attack but also that such attacks are inevitable. Echoing comments from United States Vice-President Cheney that it was not 'if' but 'when' terrorists would strike again at the US, the top security official of the US Senate, William Pickle, declared that a terrorist attack on the Capitol was inevitable and probably could not be prevented.<sup>26</sup> In the United Kingdom, Sir John Stevens, the Metropolitan Police Commissioner, has said, 'As the Prime Minister and the Home Secretary have said, there is perhaps an inevitability

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<sup>23</sup> [http://www.parliament.nz/en-NZ/PB/Debates/Debates/1/0/f/48HansD\\_20071024\\_00000891-Terrorism-Suppression-Amendment-Bill-Second.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/1/0/f/48HansD_20071024_00000891-Terrorism-Suppression-Amendment-Bill-Second.htm) Retrieved 3 July 2008.

<sup>24</sup> A Conte. 'A Clash of Wills: Counter-Terrorism and Human Rights' *New Zealand Universities Law Review*. Volume 20, 2003.

<sup>25</sup> M. Palmer. 'Counter Terrorism Law' *New Zealand Law Journal*. 2002, p.456.

<sup>26</sup> *The Examiner*. 22 November 2006.

that some attack will get through'.<sup>27</sup> Similarly, the FBI's Executive Assistant Director of Counter-Terrorism, John Pistole, has said that 'an attack on Australia is likely inevitable'<sup>28</sup>. His remarks were made in support of the assessment of the Australian Federal Police Commissioner, Mick Keelty, that Australia's involvement in the invasion of Iraq put it at greater risk of terrorist attack.

It is noteworthy, therefore, that the terrorist threat to New Zealand is downplayed. Whether it is because of New Zealand's geographical isolation, its reluctance since 1999 to participate in US military forays, or some other factors, there has been no credible assertion that a terrorist attack on New Zealand is likely, let alone imminent. This is recognised even by those who might be said to have an incentive to exaggerate the terrorist risk to the country. The New Zealand Ambassador for Counter-Terrorism, Dell Higgle, has acknowledged, that 'the threat of a direct attack against New Zealand remains low'<sup>29</sup>. And the New Zealand Security Intelligence Service (NZSIS) reports that it "continues to believe that the risk of a terrorist attack on New Zealand or New Zealand interests is low ('terrorist attack is assessed as possible, but is not expected')"<sup>30</sup>. New Zealanders were among the fatalities in September 11 attacks, the London bombings and the Bali bombings. However, there is no evidence that New Zealanders abroad perceived themselves any more at risk from terrorist attack than from other extraordinary calamities such as plane crashes and natural disasters.

The infrequency of domestic security incidents in New Zealand poses problems for those charged with managing the risk they pose to society. As the Controller and Auditor-General states in his report on managing threats to domestic security:

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<sup>27</sup> *The Guardian*. 17 March 2004.

<sup>28</sup> *Sydney Morning Herald*. 16 March 2004.

<sup>29</sup> Dell Higgle. "Whole of Government Approach and New Zealand's Contribution to Combating International Terrorism". 15 August 2005. [www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/](http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/) Retrieved 30/6/08

<sup>30</sup> New Zealand Security Intelligence Service. *Report to the House of Representatives for the year ended 30 June 2006*. Wellington.

The infrequency of domestic security incidents can also make it difficult to maintain public support. This is especially the case when initiatives to deter threats are likely to impinge on business interests or the freedoms people enjoy... The greater the length of time between security incidents, the greater the likelihood of reduced public consciousness of the threat, and the more likely people will be to perceive precautions as excessive<sup>31</sup>.

Over the last 25 years, the two incidents that would most clearly qualify as terrorist attacks in New Zealand were directed against what might be broadly categorised as social justice groups in civil society. One was entirely domestic: during a period of government-encouraged hostility to trade unions in 1983, a bomb was detonated in Wellington Trades Hall, killing the caretaker, Ernie Abbot. The other was largely international: in 1985 a Portuguese photographer, Fernando Pereira, died after agents of the French Government's foreign intelligence agency, *la Direction Générale de la Sécurité Extérieure* (DGSE), blew-up the Greenpeace flagship, Rainbow Warrior, in Auckland harbour as it prepared a protest voyage to the French nuclear testing site in Moruroa Atoll.

As New Zealand is a low-risk country, the justification for introducing special anti-terrorism laws into it since 2001 has been principally defined in global terms as an acceptance that 'the threat of international terrorism can be effectively addressed only through concerted and co-ordinated international efforts that not only target terrorists themselves, but terrorism funding, support and infrastructure'<sup>32</sup>. Declaring that the September 11 attacks confirmed that terrorism is 'an international phenomenon' and that 'terrorists consider the world their stage', the NZSIS claims that there are people and groups in New Zealand 'with links to overseas organizations that are committed to acts of

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<sup>31</sup> Controller and Auditor-General. *Managing Threats to Domestic Security*. Wellington: Controller and Auditor-General. October, 2003.

<sup>32</sup> Higgle. *Op cit*.

terrorism, violence and intimidation’ and warns of ‘the risk that individuals or groups may use New Zealand as a safe haven from which to plan or facilitate terrorist attacks elsewhere’<sup>33</sup>.

The origins of international criminal law lie centuries ago in attempts by countries to deal with the global scourge of piracy by agreeing that any country could prosecute pirates whether or not they had transgressed a domestic law. Today, there is a widely held view that terrorism also needs to be combated by means of a co-ordinated globalised response. At a global level, this response can be found in UN Security Council Resolution 1373 as well as a series of other anti-terrorist conventions involving aircraft, ships, persons and the use of particular materials.

This global strategic perspective can also be found in the interpretation and application of law, as demonstrated by the Canadian Supreme Court in the deportation case of *Suresh*<sup>34</sup>. The Court declared that since 2001 it has no longer been valid ‘to suggest that terrorism in one country did not necessarily implicate other countries’ and went on to conclude that:

‘... to insist on direct proof of a specific threat to Canada as the test for “danger to the security of Canada” is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security’.

In previous periods when national security is perceived to have been under grave threat, the judiciary has given differing views on how national security and individual freedoms should be reconciled. During the sustained IRA bombing campaign of the 1970s, for example, Lord Denning declared national

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<sup>33</sup> New Zealand Security Intelligence Service. *The Work of the Service*. NZSIS: Wellington, 2003.

<sup>34</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] SCJ No.3 [2002] 1 SCR 3.

security to be of greater importance than individual freedoms, saying ‘great as is the public interest in the freedom of the individual and the doing of justice to him, nevertheless in the last resort it must take second place to the security of the country itself’.<sup>35</sup>

Further, referring to a 1973 judgment of Lord Reid, Lord Denning maintained that ‘when the national security is at stake even the rules of natural justice may have to be modified to meet the position’.<sup>36</sup> This stands in contrast to the famous declaration of Lord Atkin (in a minority opinion) during World War Two:

‘Amid the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by executive, alert to see that any coercive action is justified in law’.<sup>37</sup>

However conceptually or strategically attractive the argument about New Zealand’s global responsibility may be in the current response to terrorism, it is eerily similar to the intelligence and security discourse of the Cold War. The enemy during the decades of the Cold War was communism: it was a phenomenon depicted as a system and a way of life that was anathema to our own, which had global designs for imposing itself on the world, possessed the capacity to destroy us (and indeed the entire planet), and was sufficiently callous and untrustworthy for us to be in no doubt that it could well do so. If the suicide bomber could be the person next to us on the bus, the reds could have been at home under our beds.

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<sup>35</sup> *R v Lewes Justices, Ex parte Secretary of State for Home Department*, [1973] AC 388 at 402.

<sup>36</sup> *R v Lewes Justices, Ex parte Secretary of State for Home Department*, [1973] AC 388 at 460.

<sup>37</sup> *Liversidge v Anderson* [1942] AC 206 at 244.

Again, for New Zealand, the red peril was a proxy threat. The one celebrated case of a New Zealand citizen and resident who was an allegedly active spy was William Sutch, a senior civil servant who was thought by the NZSIS to be a Soviet spy and was unsuccessfully prosecuted in 1975 for breaching the Official Secrets Act. In 2008, previously confidential files were declassified and confirmed for the first time that he was not a spy, and that the NZSIS had deliberately misled the Prime Minister of the day and conducted unlawful surveillance of Mr Sutch. The released documents include a 1976 report by the Chief Ombudsman, Sir Guy Powles, who described aspects of the case as ‘disturbing’ and concluded in relation to the NZSIS raid of Mr Sutch that ‘In August 1974, the service has no legal authority (to do this)’ and that ‘they chose to break the law’<sup>38</sup>.

Convinced of the argument that in the fight against communism, the free world was only as strong as its weakest link, successive governments ensured that New Zealand played its part. In the latter stages of the Cold War, when the Labour Government of David Lange took the bold step of refusing to allow nuclear vessels to enter New Zealand ports, the country was castigated and ostracised by the US and some of her allies.

In the UK, some of the early erosion of the rule of law<sup>39</sup> began in 1974 with Labour’s Prevention of Terrorism legislation in the wake of the Birmingham bombing: it was introduced supposedly as a ‘strictly temporary measure’ but it was never repealed<sup>40</sup>. In Canada, it was the War Measures Act of 1970 in response to the murder of Pierre Laporte, although this has been superseded by the constitutional filter of the Canadian Charter of Rights and Freedoms<sup>41</sup>.

Before 2001, New Zealand had not been confronted by the kind of threat that

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<sup>38</sup> *New Zealand Herald*. 6 June 2008.

<sup>39</sup> Police were given powers such as internment without trial, excluding British subjects from the British mainland, questioning suspects for up to four days without access to lawyers, and spying on whole communities.

<sup>40</sup> H. Kennedy. *Just Law*. London: Chatto and Windus, 2004, p.31.

<sup>41</sup> I. Cotler. ‘Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy’ in R.J. Daniels, P Macklem and K Roach (editors) *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*. Toronto: University of Toronto Press, 2002, p.113.

would generate public acceptance of (let alone a public clamour for) the introduction of laws that would significantly compromise basic freedoms<sup>42</sup>. This combination of circumstances places New Zealand in an interesting position in relation to the view that anti-terrorist legislation can only be effective if it is globally watertight.

It could well be the case that New Zealanders believe that they can retain more basic freedoms than other countries in the context of the ‘war on terror’ without significantly compromising their own security. Were New Zealand to adopt such a position, it is also possible that the consequences for other countries as well as for New Zealand itself may be no less devastating than was the impact of New Zealand’s resignation from the US nuclear deterrence camp. Given the potential compromises that may be made to the basic freedoms and human rights of New Zealanders in the context of the ‘war on terror’, this hypothesis merits if not actual testing, at the very least a thorough exploration.

#### 4 Terrorism and Criminal Law

A key issue for considering the challenges inherent in legislating against terrorism is to ask whether the criminal law is sufficient to deal with the contemporary threat of terrorism. There are no fewer than three important dimensions to concerns that have been expressed about the impact of anti-terrorism legislation on criminal law: the impact on status offences, issues surrounding inchoate offences, and the criminalisation of politics.

##### 4.1 *Nulla Poena*

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<sup>42</sup> The overwhelming public support for a referendum in 2000 calling for harsher penalties for violent criminals was not associated with any call for a change to the legal rights of those accused of crimes.

The first of these relates to the long-standing legal principle of *nulla poena sine lege*, that there should be no punishment without law. As Allen remarked, ‘The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who they are<sup>43</sup>’. McSherry cites Section 102.1 of Australia’s Criminal Code that imposes sentences of up to ten years imprisonment for membership of a terrorist organization where ‘member’ includes being an ‘informal member of the organization’ and one ‘who has taken steps to become a member of the organization’. In a similar vein, she notes that Australia’s Anti-Terrorism Act (No 2) 2004 introduces a maximum three-year term of imprisonment for meeting or communicating with people involved in a terrorist group on two or more occasions. McSherry argues that to punish people because of those with whom they associate, rather than for what they have done ‘raises the spectre of the future enactment of other indictable status offences which will continue to seriously erode the principle of legality as it relates to the criminal law’<sup>44</sup>.

In 1990, Gearty noted that the value to a wide range of political regimes of applying the terrorist label to their opponents, saw an expansionary manoeuvre in which:

‘... all the activities of the groups engaged in acts of terror are automatically classed as terrorist, even when many of those activities, such as fundraising and political campaigning, are conducted in a peaceful manner. In *extreme cases* those who merely share the political goals of subversive groups may find themselves described as terrorists’<sup>45</sup>.

Such instances are now less extreme, although New Zealand law does not go as far in this as Australia and contains no offence of mere association with

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<sup>43</sup> F Allen. *The Habits of Legality: Criminal Justice and the Rule of Law*. Oxford: Oxford University Press, 1996, p.15.

<sup>44</sup> B McSherry. ‘Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws’ *University of New South Wales Law Journal*, Volume 27, Number 2, 2004, p. 366.

<sup>45</sup> C. Gearty. *Terror*. London: Faber and Faber, 1990, p.3. Emphasis added.

terrorists. The Terrorism Suppression Act deals with recruitment to terrorist groups, harbouring or concealing terrorists, and participation in terrorist groups<sup>46</sup>. The strongest protection against the encroachment identified by McSherry is found in relation to participation in terrorist groups which becomes an offence only where the purpose of the participation is to enhance a group's 'ability ... to carry out, or to participate in the carrying out of, one or more terrorist acts'<sup>47</sup>. The law relating to harbouring or concealing terrorists is also less invasive. It criminalises only that assistance that is offered to a particular person who is or should be (the threshold is recklessness, not direct knowledge) known to have carried out or be intending to carry out a terrorist act. It does not apply to assisting any member of a terrorist group.

Each of these provisions is compromised by the problems identified above in relation to the breadth of what might constitute a terrorist act in the current legislation. Besides this, however, the danger McSherry identifies exists most keenly in the way recruitment is dealt with in Section 12. Here, a person is liable to imprisonment for up to 14 years for recruiting somebody into a group which that person knows 'carries out or participates in the carrying out of one or more terrorist acts'. One impact of this provision is that a close and controversial ruling that a single action of a group had crossed the line sufficiently to be classified as a terrorist act could have a far-reaching impact. Such a ruling could easily be made against radical social groups that embraced and were prepared to bear the personal risk of engaging in non-lawful activity. It could also conceivably ensnare a mainstream and normally law-abiding environmental, animal welfare or overseas aid organisation. Such a ruling would leave anybody who recruited another person into the affected group exposed to a severe punishment for what may have been at the time a very innocuous act carried out in a genuine spirit of social concern of the kind that most would agree should be encouraged or at least tolerated in society. As such, in addition to the undesirable effect of repressing basic freedoms of

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<sup>46</sup> Sections 12, 13 and 13A.

<sup>47</sup> Section 13 (1) and (2).

political expression, it would also appear to be an example of New Zealand legislation sitting quite uneasily with the *nulla poena* principle.

#### 4.2 Inchoate Offences and Preventative Policing

A second way in which anti-terrorist measures affect criminal law in an undesirable way is the effect they have on inchoate offences and, more broadly, the direction in which they encourage policies of preventative policing to develop. Roach has made the point that, even in the absence of special anti-terrorist legislation, ‘what the September 11 terrorists did was a crime long before they boarded the doomed aircraft’<sup>48</sup>. It is a serious criminal offence in probably every country, and certainly in New Zealand, to conspire and/or attempt to carry out such a heinous act.

Conspiracy, attempt and incitement are among the inchoate offences in that they criminalize conduct which has the potential to culminate in an offence without the requirement that the offence be actually committed<sup>49</sup>. The rationale for such offences is that if some conduct is sufficiently harmful to be criminalized, so too should an attempt, conspiracy or incitement to bring that about. Inchoate offences empower police to prevent crime and still prosecute the potential perpetrator. However, inchoate offences pose a significant challenge to the police and the courts: how to ‘determine when an act is sufficiently close to the intended offence to constitute a real danger to the public and justify intervention’<sup>50</sup>. The dividing line for an attempt is often expressed as the point where actions move beyond mere preparation, but it has proved notoriously difficult both conceptually and in practice, to define what this means. If the threshold is set too high, public safety is compromised by having dangerous criminals avoid liability; if it is set too low, people risk

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<sup>48</sup> K. Roach. ‘The New Terrorism Offences and the Criminal Law’ in R.J. Daniels, P Macklem and K Roach (editors) *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*. Toronto: University of Toronto Press, 2002, p.151.

<sup>49</sup> P. Gillies. *Criminal Law*. Sydney: The Law Book Company, 1985, p.512.

<sup>50</sup> A.P. Simester and W.J Brookbanks. *Principles of Criminal Law*. Wellington: Brookers, 2002, p.233.

being criminalized for conduct that is not much more than unexecuted thoughts<sup>51</sup>.

Roach has pointed out that the difficulties inherent in inchoate offences are compounded in anti-terrorism legislation that explicitly criminalizes certain inchoate offences like attempts, conspiracies, threats and incitement. Noting the dangers of legal ‘monstrosities such as attempting attempts’, he warns that ‘the reference to inchoate forms of terrorist activities in crimes that are themselves inchoate expands the net of criminal liability in unforeseen, complex and undesirable ways’<sup>52</sup>.

Although inchoate offences authorise police intervention in advance of the substantive crime being committed, the traditional role of the police remains more reactive than proactive. That is, unless there is a reasonably high degree of certainty that a particular crime has been, is being or will be committed by a particular person, the coercive powers of the state for search, seizure or arrest should not be used. Cohen notes that the state’s concern with preventing criminality is ‘supposed to be met with event-specific investigation rather than panoptic supervision’ and that the police are expected to confine their investigations to real and not hypothetical crimes and ‘do *not* possess the power to conduct a wholesale inquisition into society’<sup>53</sup>. It may be possible to endorse the principle of crime prevention without sanctioning the growth of extraordinary, before-the-fact, preventative police powers<sup>54</sup>, and also to effectively prevent terrorism without affording extraordinary powers to intelligence agencies.

Friedland has argued that, when it comes to serious threats to national security, judicially authorized wiretapping should be ‘at or near the top of the

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<sup>51</sup> *Ibid.*, p.238.

<sup>52</sup> Roach., *Op Cit.*, p.160.

<sup>53</sup> S.A. Cohen. *Privacy, Crime and Terror. Legal Rights and Security in a Time of Peril*. Markham: LexisNexis Canada, 2006, p. 56.

<sup>54</sup> S.A. Cohen, ‘Safeguards in and Justification for Canada’s New Anti-Terrorism Act’, *National Journal of Constitutional Law*. Volume 14, 2003, p..9.

list of techniques that could be used<sup>55</sup>. While this appears reasonable, it is fast becoming a far more invasive measure than it previously was, even in the quite recent past. It has become so because of the rapid and radical digitisation of a diverse variety of forms of communication in recent years. Email correspondence, blogs, social networking sites and SMS text messaging represent new forms of communication that have significantly increased the use of the written word in both personal and professional communication. In fact, much of this communication is so instant and non-reflective that it now commits to writing expressions, reactions, idea and thoughts that would previously have never become written documents and would, rather, have constituted little more than thinking out loud. Their digitisation gives them a degree of permanence and authority that does not so easily attach to the spoken word.

At the same time, the electronic footprints generated by, for example, ‘cookies’ embedded within web browsers, the replacement of cash in favour of electronic transactions for commercial exchanges, and the routinisation of both visible and clandestine digital security cameras in the public and private sphere create unprecedented possibilities for the construction of intricate profiles of people’s personal lives. Moreover, it has become routine practice for computer equipment, cell phones and other digital devices to be seized and subjected to forensic examination as part of police investigations.

One common feature of all of these technological developments is that they lend themselves to interception, storage and analysis. This has the effect of enhancing to an extraordinary degree the capacity of intelligence agencies to ‘conduct a wholesale investigation into society’<sup>56</sup> even without any legislative change.

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<sup>55</sup> M.L. Friedland. ‘Police Powers in Bill C-36’ in R.J. Daniels, P Macklem and K Roach (editors) *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*. Toronto: University of Toronto Press, 2002, p. 274.

<sup>56</sup> Cohen, 2006. *Op. cit.*, p.56.

In a successful trespass action against the NZSIS, the Court of Appeal ruled that, for a state agency to physically and covertly enter a person's home was such an intrusion that it could only exist where it is specifically authorized by statute; it could not be inferred as an inherent part of, for example, placing or retrieving a surveillance device<sup>57</sup>. In the 1999 judgment, the court used the ancient expression of a person's home being her castle. An argument might now be advanced that that castle has been digitised.

Borovoy, while recognising the apparent good sense in a strategy of preventative intelligence, issued a warning in 1989 about 'the most groundless anticipatory speculation' being encouraged by a broadly preventative mandate. 'When the goal is prevention', he argues, 'the idea is to amass enough intelligence to make reliable predictions. There would be a tendency to intrude very pervasively on investigative targets in order to learn as much as possible about their habits beliefs, associations and predilections. It is not hard to appreciate the potentially chilling impact of such an approach on the rights of privacy and dissent'<sup>58</sup>.

### 4.3 Criminalising Motive and Politics

The third fundamental difficulty in the relationship between anti-terrorist legislation and criminal law relates to the inherently political, religious or ideological dimensions of 'terrorist' acts. Some anti-terrorist legislation, such as in France, refers to disturbing public order by intimidation or terror in terms which Lord Carlile considers broad enough to include 'a serious idiosyncratic criminal'<sup>59</sup>. However, most post-2001 anti-terrorism legislation, including that of New Zealand, makes it a necessary condition of terrorism for an act to be 'carried out for the purpose of advancing an ideological, political or

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<sup>57</sup> *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA)

<sup>58</sup> A Borovoy. 'Terrorism, Security and the Surveillance Powers of the Canadian Security Intelligence Service' in P. Hanks and J. McManus (eds.) *National Security: Surveillance and Accountability in a Democratic Society*. Cowansville: Yvon Blais, 1989, p.245.

<sup>59</sup> *Ibid.*, p.11.

religious cause, and with the following intention: to induce terror in a civilian population; or to unduly compel or to force a government or an international organization to do or abstain from doing any act'<sup>60</sup>. There are significant difficulties associated with this approach.

Problems could be encountered both in relation to individuals within ideological groups acting with purely criminal intent, and where individuals within criminal groups have quasi-ideological motives. On one hand there may be uncertainty in some circumstances of what might constitute a political, religious or ideological objective and how to prove this beyond reasonable doubt. For example, hatred of the police, which appeared to have been an important factor in the bombing of the Sydenham Police Station by a Christchurch criminal gang in the 1990s, could also be argued to have a political dimension. On the other hand, as Lord Diplock noted in his report on how to deal with terrorist activity in Northern Ireland in the 1970s, there is the issue that terrorist organizations 'inevitably attract into their ranks ordinary criminals whose motivation for particular acts may be private gain or personal revenge'<sup>61</sup>.

These matters compound the challenge the courts already face in determining intention. As Kirby J stated, 'absent a comprehensive and reliable confession, it is usually impossible for the prosecution to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act'<sup>62</sup>. McSherry makes the point in relation to Australian law (although it is equally applicable in New Zealand) that there are no fewer than three elements of intention each of which must be proved in relation to an offence of engaging in a terrorist act: 'an intention to engage in the terrorist act; an

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<sup>60</sup> *Terrorism Suppression Act 2002*. Section 5 (2).

<sup>61</sup> Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal With Terrorist Activity in Northern Ireland*. London: HM Stationery Office, December 1972, p.5.

<sup>62</sup> *Peters v The Queen* (1998) 192 CLR 493 at 551.

intention to advance a political, religious or ideological cause; and an intention to intimidate specified groups'<sup>63</sup>.

Besides this practical consideration, a more fundamental issue arises with the way in which new anti-terrorism legislation blurs the line that has hitherto been drawn in criminal law between intent and motive. Lord Hale identified a clear distinction between motive and intent, declaring that 'it is the emotion that gives rise to an intention and it is the latter and not the former which converts an *actus reus* into a criminal act'<sup>64</sup>.

McSherry argues that the new terrorism offences 'do not fit comfortably within the traditional framework for serious crimes because they focus on why the conduct was performed and at whom it was aimed, rather than on what was done'<sup>65</sup>. That is, the prosecution must prove the motive behind an act and not just the intention to commit the act itself. She notes that motive is normally taken into consideration at the sentencing stage, rather than in determining whether to assign criminal responsibility. Moreover, although one might agree with the reasoning behind UN Resolution 1624 that terrorist acts should be condemned 'irrespective of their motivation, whenever and by whomever committed', it does not follow that an act that is carried out with basic criminal motivation should be considered a less serious offence than the same act that is carried out with an ideological or religious motivation, however misguided that might be.

The ideological component of terrorist acts also has a major impact on the legal system well before any prosecution. The new terrorism offences orient the attention of police and intelligence agencies to gathering and analyzing data and forming opinions about certain political and cultural groups. For decades, the culture if not the explicit policy within such agencies has been to

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<sup>63</sup> McSherry. *Op. cit.*, p.362.

<sup>64</sup> *Hyam v Director of Public Prosecutions* [1975] AC 55 at 73.

<sup>65</sup> McSherry. *Op. cit.*, p.355.

view with suspicion individuals and groups engaged in pressing for some form of social change<sup>66</sup>.

Section 5(5) of the Terrorism Suppression Act provides an element of protection for ‘a person who engages in any protest, advocacy or dissent, or engages in any strike, lockout or other industrial action’. There remains, however, a concern that the additional powers and resources afforded to New Zealand police and intelligence agencies by new anti-terrorism legislation could be used to increase their surveillance of or other intrusions into the lives of those engaged in what should be their legitimate right to organise political campaigns and actions. As W Young J noted ‘there is a difference between police maintaining an interest in political activists (which I accept is legitimate) and the police equating political activism with either the commission of criminal offences or with a sufficient propensity to commit criminal offences to justify the obtaining of search warrants when an offence has been committed’<sup>67</sup>.

The combination of a political orientation and the point at which an inchoate offence has been committed under terrorism legislation was brought into sharp relief in New Zealand by the October 2007 raids. The police issued statements about terrorist training camps that included instruction in the use of napalm and maintained that the raids were a legitimate response to an imminent threat to public safety. Critics argued that any threats of this nature could be dealt with under the provisions of criminal law without recourse to the Terrorism Suppression Act. The Solicitor-General ruled that the evidence the police had presented to him did not warrant laying anti-terrorism charges and described the act as unworkable. Despite District Court suppression orders, two daily newspapers owned by Fairfax published excerpts of material that had been leaked to them and, as a consequence, faced prosecution for compromising the fair trial rights of the accused. Although this charge was

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<sup>66</sup> N. Hager, *Secret Power. New Zealand's Role in the International Spy Network*. Wellington: Craig Potton, 1996.

<sup>67</sup> *David Thomas Small v Attorney-General* Unreported, CP 157/99 at 62.

not proven beyond reasonable doubt, the judgment notes that the actions of Fairfax in publishing the intercepted communications were unlawful and were not ‘in the best interests of responsible and fearless journalism’. The judgment also noted:

‘It may be necessary in future cases to consider whether contempt may be established where a publication has a general tendency to interfere with the administration of justice even where it cannot be demonstrated that the publication has compromised fair trial rights in a particular case.’<sup>68</sup>

There is a degree of public scepticism of the competence and political bias of New Zealand’s intelligence agencies which is derived from the perception of their actions in relation to previous incidents. Important among these was the break-in by the NZSIS to the home of an opponent of neoliberalism at the time of an APEC Trade Ministers’ meeting in 1996. The break-in occurred less than two weeks after the passage of the first amendment to the NZSIS Act since the end of the Cold War. One of the changes to the Act was to broaden the scope of the service to concern itself with not just traditional concepts of terrorism and subversion, but also activities that ‘impact adversely on New Zealand’s international well-being or economic well-being’<sup>69</sup>.

Critics of the legislation argued that this gave the service licence to spy on political activists such as opponents of the neoliberal restructuring of New Zealand that had been pursued since 1984. Such concerns were dismissed and the public was assured that the amendments were to make it possible for the SIS to defend the country against modern threats such as industrial and economic sabotage. Assurances were also given that, with the simultaneous creation of the office of Inspector-General of Intelligence and Security, any citizens who feared that they were being unfairly or illegitimately harmed by

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<sup>68</sup> *Solicitor-General v Fairfax NZ Ltd And Anor* HC WN CIV 2008-485-000705 [10 October 2008] at para 139.

<sup>69</sup> *New Zealand Security Intelligence Service Act 1969*. Section 2.

the service could avail themselves of a new and independent avenue of appeal. The Inspector-General was to be appointed from the ranks of retired High Court judges and would enjoy the same status as a High Court judge with extensive powers of investigation of all NZSIS documents and personnel<sup>70</sup>.

The victim of the 1996 break-in, Aziz Choudry, as well as the person who caught the agents, each laid complaints with the Inspector-General with respect to the break-in and subsequent police search for bomb-making equipment. The Inspector-General conducted a joint investigation of the complaints and concluded (without confirming or denying that the perpetrators of the break-in were SIS agents) that 'no law (had) been broken'. Subsequent private legal action against the SIS for trespass and the Police for a breach of section 21 of the New Zealand Bill of Rights Act (NZBORA) 1990 were both successful.

Thus, the Inspector-General failed to provide the guarantees of appeal against the actions of an intelligence agency for which the office was established. It could be argued that this failure represented a significant consequence of oversight being conducted in isolation from the important sets of checks and balances such as disclosure, cross-examination and appeal that are an essential part of the normal judicial process. It also demonstrated the need for citizens to retain the ability to pursue independent avenues of appeal through the courts, even in matters of national security. There is, however, a tendency on the part of those promoting anti-terrorist legislation to remove mechanisms of judicial oversight through the insertion of privative clauses within that legislation.

These issues were brought to the fore in the case of Ahmed Zaoui, an elected MP in Algeria who was amongst those ousted by the Algerian military and who arrived in New Zealand in 2002 seeking refugee status. The following year, the Refugee Status Appeals Authority agreed that he met the high

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<sup>70</sup> *Inspector-General of Intelligence and Security Act, 1996.*

threshold required for obtaining refugee status in New Zealand. However, upon his arrival in the country, the NZSIS had issued him with a risk security certificate under the provisions of the Immigration Act. While claiming that Zaoui's presence in New Zealand posed an unacceptable risk to national security, the service refused to release to Zaoui or his lawyers any of the information they were relying on in making that assessment. Neither would they disclose the source of that intelligence. Zaoui's avenue of appeal against the service was through the Inspector-General of Intelligence and Security. He was, therefore, expected to reply to accusations about him the content of which was not known to him, and in doing so to rely on the offices of the Inspector-General of Intelligence and Security that had previously been found wanting.

Zaoui sought to challenge preliminary decisions by the Inspector-General in relation his rights under the principles of natural justice enshrined in NZBORA to access information about himself. The Crown objected relying in part on Section 19(9) of the Inspector-General of Intelligence and Security Act that 'except on the ground of lack of jurisdiction, no proceeding, report or finding of the Inspector-General shall be challenged, reviewed, quashed or called in question in any Court'. In a piece of close judicial reasoning, the Court of Appeal rejected the Crown's argument that it had no judicial oversight of decisions of the Inspector-General. Citing the case of Bulk Gas Users Group<sup>71</sup> in which the court had found a way around a purported privative clause in legislation, Young J argued that, since the clause in the Inspector-General of Intelligence and Security Act was similar to that used in the legislation under scrutiny in the Bulk Gas case and had been drafted subsequent to that judgment, Parliament must have intended that judicial oversight was not totally excluded<sup>72</sup>.

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<sup>71</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

<sup>72</sup> *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at 179.

A similar display of judicial activism can be seen in the Belmarsh case where, in contrast to the approach taken in *Lewes*, the House of Lords accepted that a ‘public emergency threatening the life of the nation’ existed but refused to defer to the executive in assessing the proportionality of measures taken under the cloak of national security<sup>73</sup>. By contrast, the Thomas case<sup>74</sup> in Australia reveals a far more deferential approach by the judiciary on matters of national security<sup>75</sup>.

## 5 National Security and the Law

There are two broad ways of responding to the uneasy relationship that has been identified between new anti-terrorism measures and basic legal principles. One is that this provides good reason for rewriting the legislation to ensure that it is consistent with the rule of law and enables criminal law to deal as effectively as possible with the new challenges presented by current forms of terrorism. The other is the argument that criminal law is incapable of dealing with the challenge of terrorism; that it is ‘fundamentally inadequate as a complete response to our present predicament’<sup>76</sup>. This latter view is the one advanced by Ackerman who, while declaring the need to ‘prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty’<sup>77</sup>, advances a case for ‘replac(ing) the logic of war with the logic of a temporary state of emergency’<sup>78</sup>.

Although he is a critic of the ‘war on terror’ model of dealing with political violence, Ackerman shares the views of the ‘war on terror’ proponents about

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<sup>73</sup> *A v Secretary of State for the Home Department* [2005] 2 AC 68. See also D. Feldman, ‘Human Rights, Terrorism and Risk: The Roles of Politicians and Judges’ *Public Law*, 2006, p.364.

<sup>74</sup> *Thomas v Mowbray* [2007] HCA 33.

<sup>75</sup> See D Meyerson, ‘Using Judges to Manage Risk: The Case of *Thomas v Mowbray*’, *Federal Law Review*, forthcoming.

<sup>76</sup> B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale University Press, 2006, p.39.

<sup>77</sup> B. Ackerman, ‘Terrorism and the Constitutional Order’, *Fordham Law Review*. Volume 75, 2006-2007, p.476.

<sup>78</sup> *Ibid.*, p.485.

the extreme nature of the threat posed by terrorism. The scenario he presents is an attack far more deadly than September 11, which ‘was merely a pinprick compared to the devastation of a suitcase A-bomb or an anthrax epidemic’<sup>79</sup>. In such circumstances, he argues, sweeping executive powers would be required for a limited time to introduce draconian measures that consciously undermine established rights and freedoms as well as the checks and balances of the legal process. What would set such a scenario apart from other attacks is, he argues, its direct targeting of effective sovereignty.

‘It is wrong ... for legal traditionalists to treat the war on terror as if it were merely a symptom of collective paranoia, which Americans will come to regret as they recover their sobriety. War talk makes a fundamental point that the legal tradition fails squarely to confront: the criminal law treats individual cases *as if the larger question of effective sovereignty has already been resolved*. But terrorist attacks represent a public assault on this premise, and the visible affront to effective sovereignty will be exploited again and again by the terror warriors to aggrandize their power’<sup>80</sup>.

Critics question whether the challenge posed by terrorism is really as unprecedented as Ackerman maintains. Bonner says this claim would ‘raise eyebrows among those who lived through or were victims of the IRA’s bombing campaign in Northern Ireland and on mainland Great Britain from 1969 to 1999’ as well as those ‘who lived through the nuclear threat during the Cold War’<sup>81</sup>. Ackerman insists that the Communist threat during the Cold War ‘remained abstract to ordinary people and the government’s effective sovereignty was never seriously questioned’<sup>82</sup>. However, Gearty points out that the US Supreme Court upheld the constitutionality of the anti-sedition Smith Act ‘precisely on account of the terrible transformative consequences of

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<sup>79</sup> Ackerman 2006, *Op. cit.*, p.2.

<sup>80</sup> *Ibid.*, p.44. Emphasis in original.

<sup>81</sup> D. Bonner, *Executive Measures, Terrorism and National Security. Have the Rules of the Game Changed?*. Aldershot: Ashgate Publishing, 2007, pp.8-9.

<sup>82</sup> Ackerman 2006, *Op. cit.*, p.42.

Communist success, a set of outcomes which were so bad that they justified the restrictions of free speech to be found in the Act, even though the chances of such a revolution were slight<sup>83</sup>. Gearty also notes that Ackerman does not explain why the criminal law cannot cope with the challenge of a cataclysmic terrorist attack, even if it does represent an assault on the effective sovereignty of the state<sup>84</sup>.

Others, while not going as far as Ackerman, also advocate a response to terrorism that sits outside the criminal law. Cohen, for example, argues that ‘a bright line be maintained between national security intelligence gathering activities and ordinary criminal investigation’. This is based on the view that what he sees to be the imperatives of intrusive national security powers should be kept quarantined from the normal legal process process. He warns that without it, ‘our ability to protect the ordinary criminal justice system from the tainting effects of activities or techniques used in the national security sphere will be compromised’<sup>85</sup>.

Kennedy discounts the possibility of such a bright line being effective. She describes the anti-terrorist laws as ‘a contagion which seeps into the bloodstream of the legal and political system’<sup>86</sup>. She argues that such legislation has been shown to ‘play havoc with the mindset of police officers and people working in the legal system, even lawyers and judges’. Drawing on the UK experience, she points out that the high number of miscarriages of justice that took place in the 1970s and early 80s, especially in the West Midlands<sup>87</sup>, were not all related to subversion, but were handled by the branches of the police that dealt with the bulk of the terrorism cases and had developed a culture that ‘fostered a particular kind of policing’<sup>88</sup>. This is consistent with the warning of Cole and Lobel that, once the clarity of certain

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<sup>83</sup> Gearty, ‘The Superpatriotic Fervour of the Moment’, *Oxford Journal of Legal Studies*. Volume 0, 2008, p.6.

<sup>84</sup> *Ibid.*, p.8.

<sup>85</sup> Cohen, 2006. *Op. cit.*, p.54.

<sup>86</sup> Kennedy. *Op cit.*, p.32.

<sup>87</sup> Birmingham is in the West Midlands.

<sup>88</sup> *Ibid.*, p.33..

prohibitions is lifted, ‘officials will be likely to interpret “emergency situations” broadly and emergency powers will be increasingly used in nonemergency situations’<sup>89</sup>.

New Zealand’s anti-terrorist legislation has received international praise for the balance it achieves between ensuring national security and protecting individual freedoms. ‘Comparing New Zealand to similar systems around the world’, wrote Smith in 2003, ‘this country has adopted an anti-terrorism regime that effectively balances international demands, national needs, and individual rights’<sup>90</sup>. In October 2007, a report of the Commonwealth Human Rights Initiative declared that New Zealand’s ‘anti-terrorism legislation has been enacted without a consequent reduction in human rights in part because many concerns of civil and human rights groups, in submissions to Parliament, were incorporated in the redrafting of the final acts’<sup>91</sup>. Ironically, the publication of the report coincided with not only the pre-dawn anti-terrorism raids but also the passage through parliament of amendments to the Terrorism Suppression Act that tilted the balance further towards the security end of the security/freedom continuum.

New Zealand anti-terrorism law has not adopted provision for detention without charge or compromised the right to silence as has been the case in other jurisdictions. And the Terrorism Suppression Act does include some provisions for judicial review<sup>92</sup>. However, it is being incrementally tightened largely as a result of pressure to become more compliant with UN anti-terrorism resolutions<sup>93</sup>. Among the recent changes, for example, the requirement that the financing of a designated terrorist entity would be an

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<sup>89</sup> D. Cole and J. Lobel, *Less Safe Less Free: Why America is Losing the War on Terror*. New York: The Free Press, 2007, p. 256.

<sup>90</sup> J.E. Smith. *New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security and International Responsibilities*. Ian Axford Fellowship Report, US Department of Justice, 2003, p.3.

<sup>91</sup> M. Daruwala and T. Boyd-Caine. *Stamping Out Rights. The Impact of Anti-terrorism Laws on Policing*. London: Commonwealth Human Rights Initiative. 2007, p.24.

<sup>92</sup> *Terrorism Suppression Act 2002*. Section 33.

<sup>93</sup> Smith, *Op cit.*, pp.72-73.

offence only if it was done with the purpose of assisting that entity to carry out a terrorist act was removed. In other words, the financing of health, education or other social or humanitarian programmes run by broad spectrum groups in places like Aceh, Sri Lanka or Palestine could be terrorist offences. New Zealanders have a long history of supporting such groups, notably the Southern African liberation movements during the Apartheid era. The Terrorism Suppression Act, like the Australian legislation before it, may now deny New Zealanders ‘the right to politically associate with any political movements which may be involved in violent struggles anywhere in the world’<sup>94</sup>.

Agencies such as the NZSIS, while charged with defending New Zealand’s national security, have long considered themselves beholden to a higher order of authority. With their privileged access to information that the rest of the citizenry cannot share, they act as the people’s proxy. The line of accountability back to the people is by way of Prime Ministerial oversight of their activities. However, the Security Intelligence Service of New Zealand is a long way down the global hierarchy of intelligence organizations. It is essentially a consumer of intelligence and, being reliant on other agencies, is required to conform to their norms<sup>95</sup>.

## 6 Getting the Balance Right?

The task that the New Zealand Law Commission was set in the wake of the October 2007 raids was essentially that of balancing national security and individual freedoms and human rights. The Australian Attorney-General, Philip Ruddock, described the current global context as ‘a world of trade-offs’:

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<sup>94</sup> A. Ricketts, ‘Freedom of Association or Guilt by Association: Australia’s New Anti-Terrorism Laws and the Retreat of Political Liberty’, *Southern Cross University Law Review*. Volume 6, 2002, p.141.

<sup>95</sup> P. Buchanan, ‘Playing Spy Scrabble’ <http://www.scoop.co.nz/stories/HL0412/S00153.htm> 14 December 2004. Retrieved 1 July 2008.

‘And now we live in a world where we must accept the costs associated with protecting ourselves from terrorism.. There will always be a trade-off between national security and individual rights. The task of government is to recognize these trade-offs and preserve our security without compromising basic rights and liberties’<sup>96</sup>.

The issue was couched in similar terms by the Sheller Committee in its 2006 review of Australia’s new anti-terrorism legislation and by the Australian Law Reform Commission’s review of sedition laws that spoke of ‘balancing anti-terrorism measures with human rights’<sup>97</sup>.

Hocking makes the point that striking the wrong balance between national security and personal freedoms may even be counter-productive in that those most readily identified as ‘terrorist candidates’, that is, those who would be most likely to be the subjects of the extra powers of the police, might become so alienated and marginalised that they may in turn become sympathetic or even potential recruits to the terrorists’ cause<sup>98</sup>.

Others, however, go further by calling into question the whole ‘balancing’ approach that underlies much scholarly writing and public discourse associated with combating terrorism. Bronitt<sup>99</sup> and Michaelson<sup>100</sup> and challenge the notion that civil liberties can or should be balanced against national security; that in order to save liberal democracy from the threat posed

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<sup>96</sup> P. Ruddock. ‘The Commonwealth Response to September 11: The Rule of Law and National Security’ 10 November 2003.

<sup>97</sup> Australian Law Reform Commission. *Fighting Words: A Review of Seditious Laws in Australia*. Report number 104, 2006, p.105

<sup>98</sup> J Hocking, ‘Counter-Terrorism and the Criminalisation of Politics: Australia’s new Security Powers of Detention, Proscription and Control’ *Australian Journal of Politics and History*. Volume 49, 2003, p. 361.

<sup>99</sup> S. Bronitt. ‘Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform’ in M. Gani and P. Mathew (eds.) *Fresh Perspectives on the ‘War on Terror’*. Canberra: ANU E Press, 2008.

<sup>100</sup> C. Michaelson. ‘Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric’, *University of New South Wales Law Journal*. Volume 29, number 2, 2006.

to it by international terrorism, we must strike a balance between security and liberty.

Michaelsen's argument is that 'the assertion that civil liberties need to be balanced against the interests of national security is, at best, misleading and, at worst, structurally wrong'<sup>101</sup>. He mounts a series of inter-related reasons to support this view and proposes a helpful alternative to the balancing approach. Michaelsen's philosophical objection is based on a rejection of the notion that a citizen is able to enjoy civil liberties only in the context of a secure environment which cannot be achieved without expanding the powers of the state through anti-terrorism legislation. Ruddock made the point in precisely those terms when he declared that, in light of the new climate of terrorism 'we must recognize that national security can in fact promote civil liberties by preserving a society in which rights and freedoms can be exercised' and that 'the extent to which we can enjoy our civil liberties rests upon the effectiveness of our anti-terrorism laws'<sup>102</sup>.

Michaelsen argues that framing national security as a precondition of liberty sits uneasily with the fundamental liberal notions of consent and legitimacy as it tends to 'ignore the fact that individual freedom legitimises the existence of the state in the first place'<sup>103</sup>. He quotes a former German Justice Minister, Burkhard Hirsch, who said, 'there is no societal freedom without the freedom of the individual'. Michaelsen notes that the duty to protect citizens from physical harm is just one of a number of interrelated and indivisible obligations of government that include ensuring that 'individuals are not subjected to oppressive state action', and he argues that 'a policy that does not respect human rights in the first place cannot legitimately claim to protect these rights against transnational security threats in times of emergency'<sup>104</sup>.

The dangers of treating security as paramount have also been highlighted by

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<sup>101</sup> *Ibid.*, p.3.

<sup>102</sup> P. Ruddock. 'A New Framework: Counter-Terrorism and the Rule of Law', *The Sydney Papers*. Volume 16, number 2, 2004.

<sup>103</sup> Michaelsen. *Op. cit.*, p.5.

<sup>104</sup> *Ibid.*, p.6.

the International Commission of Jurists, which noted in the Berlin Declaration:

‘A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism... [S]afeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state’<sup>105</sup>.

A second objection to the balancing approach is based on a critique of the view advanced by Ruddock and his German counterpart, Otto Schily, who treat a ‘basic right to security’ as a key component of the inalienable human rights that every individual should enjoy. Michaelsen notes that the advocates of this view seek to ground their argument with reference to Article 3 of the United Nations Universal Declaration of Human Rights (UDHR) and Article 9 of the United Nations Covenant on Civil and Political Rights (ICCPR) which refers to ‘the right to liberty and security of person’. This is a crucial point as it seeks to establish, as the trade-off model must if it is to be sustainable, that the elements that are to be traded off are of comparable importance.

Decades before terrorist acts were unequivocally condemned by being declared unacceptable in any circumstances, human rights were agreed to be unequivocally essential in that no circumstance could justify their being compromised. However, it does not follow from a categorical condemnation of all terrorist acts that it should be permissible for strategies to prevent such attacks to compromise basic rights. Furthermore, as Michaelsen notes, far from being an obligation on the state to protect the physical integrity of its citizens, the ‘right to liberty and security of person’ that is referred to in the

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<sup>105</sup> *The Berlin Declaration: The International Commission of Jurists Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*. 24 August 2004.

ICCPR is designed as a means of ‘confining the power of the state to coerce individuals through arbitrary arrest and detention’<sup>106</sup>.

Such a depiction of security policy as an integral dimension of a commitment to upholding basic human rights conceals the fact that, as Michaelsen puts it, ‘it is a defining characteristic of liberal democracy that security policy is normatively bound to the rule of law and to human rights; it is not an end in itself’<sup>107</sup>.

A third, and more practical objection to the balancing approach relates to how one might measure the balance in question. While on one hand it is clear that liberties and human rights are being compromised and eroded in the name of the ‘war on terror’, the returns in terms of enhanced security are very difficult to demonstrate. It is clear that at least some elements of the actions undertaken as part of the war on terror were based on the broadly felt need, particularly in the United States, that something needed to be done by way of reprisal even if it was a purely symbolic action. Acknowledging that fair estimates of the effectiveness of counter-terrorism measures are notoriously difficult to make, Michaelsen says that this cannot be an excuse for a failure to conduct as thorough an analysis as is possible of such measures including, for example, the effectiveness (or, as Rojahn has argued<sup>108</sup>, the ineffectiveness) of repressive counter-measures and special anti-terrorism laws introduced to combat left-wing terrorism in Europe in the 1970s and 80s.

Roach makes the point that, while the criminal sanctions of the anti-terrorism legislation may act as a deterrent to third parties who might otherwise offer assistance to terrorists, the deterrent effect on the terrorists themselves is highly questionable<sup>109</sup>. This is particularly apposite at a time when so much

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<sup>106</sup> *Ibid.*, p.12.

<sup>107</sup> *Ibid.*, p.13.

<sup>108</sup> C. Rojahn. ‘Left-Wing Terrorism in Germany: The Aftermath of Ideological Violence’, *Conflict Studies*. Volume 313, 1998.

<sup>109</sup> T. Gabor (ed.) *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*. Ottawa: Research and Statistics Division, Canadian Department of Justice, 2004, p.56.

terrorist activity is carried out by suicide bombers. Waldron shares this view and poses the question of whether, even if they do succeed in increasing the likelihood of convicting and punishing terrorists, compromises to due process do enhance security. Without a deterrent effect, he argues, it is possible that such legal ‘victories’ could make it ‘more rather than less likely that the country punishing the suspect is subject to terrorist attack’. Therefore, he argues, the reasons for punishing the perpetrators of terrorist attacks are not ones of security but of justice ‘and those reasons of justice may not be as separate from the scheme of civil liberties that we are currently trading off as the “new balance” image might suggest’<sup>110</sup>. What is required but has been lacking to date, insists Michaelsen, is ‘a detailed enquiry into whether a diminution of liberty actually enhances security or whether one is trading off civil liberties for symbolic gains and psychological comfort’<sup>111</sup>.

Bronitt describes as ‘irresistible’ the pressure politicians feel to offer reassurance to the electorate in the wake of a terrorist attack and argues that, in hastily borrowing legislation from other jurisdictions, Australia sought to develop an anti-terrorism framework on the cheap without seriously considering its effectiveness or whether minor adaptations could achieve a result ‘more consistent with the existing fabric of our criminal laws’<sup>112</sup>. O’Cinneide makes the related point that in times of public panic, proper parliamentary consideration of legislation is undermined by the tendency for opposition to hard-line measures to evaporate in the face of the electorate’s expectations of action. This dynamic limits the capacity of the legislature to prevent the cycle of terror, panic and repression which, he argues, has been a repeating characteristic of British law since the Fenian bombings of the 1860s<sup>113</sup>.

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<sup>110</sup> J. Waldron. ‘Security and Liberty: The Image of Balance’, *Journal of Political Philosophy*. Volume 11, number 2, 2003, p.210.

<sup>111</sup> Michaelsen. *Op. cit.*, p.21.

<sup>112</sup> Bronitt. *Op. cit.*, p.74.

<sup>113</sup> C. O’Cinneide. ‘Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat’ in M. Gani and P. Mathew (eds.) *Fresh Perspectives on the ‘War on Terror’*. Canberra: ANU E Press, 2008, pp.327 and 352.

As an alternative to the balancing approach, Michaelsen favours the ‘proportionality test’ that has been developed in Germany and refined by the German Federal Constitutional Court<sup>114</sup>. This model identifies three main requirements that must be met if there is to be any curtailment of constitutionally protected civil liberties or human rights. Any such measures should be ‘suitable’ or likely to achieve their intended purpose, ‘necessary’ or warranted by the exigencies of the situation and unable to be achieved by less drastic measures, and ‘appropriate’ or not disproportionate to the purpose of the measure and not, for example, affecting the very nature of the right or freedom that is being curtailed. Clearly, Michaelsen argues, ‘the more the statutory infringement affects fundamental expressions of human freedom of action, the more carefully the reasons serving as its justification must be examined against the principal claim to liberty of the citizen’<sup>115</sup>.

## 7 Conclusion

Kennedy writes:

‘Just law is the invisible substance which sustains social well-being, moral consensus, mutuality of interest and trust. If we interfere with the principles which underpin law, fritter them away, pick them out of the crannies of our political and social architecture, restoration is impossible. Our only hope is an order governed by law and consent’<sup>116</sup>.

The task that the New Zealand Law Commission has been set is a similar challenge to that facing other countries around the world. The contemporary threat of terrorism is testing the capacity of liberal democracies to maintain their security whilst upholding basic freedoms and the rule of law. However,

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<sup>114</sup> H. Goerlich. ‘Fundamental Constitutional Rights: Content, Meaning and General Doctrines’ in U. Karpen (ed.) *The Constitution of the Federal Republic of Germany. Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law*. Baden-Baden: Nomos, 1988.

<sup>115</sup> Michaelsen. *Op. cit.*, pp.20-21.

<sup>116</sup> Kennedy, *Op. cit.*, p.9.

there is also a sense in which this provides a unique and valuable opportunity both for New Zealand itself and for the international community. Seven years after the September 11 attacks, there is a wealth of theoretical and empirical material to review, particularly if the terms of reference are interpreted less as a balancing exercise than as a proportionality test. It would be more possible now than seven years ago, for example, to assess the actual effectiveness of anti-terrorism measures. Similarly, more informed judgments are now able to be made as to whether it really is impossible to combat terrorism within the confines and established principles of criminal law.

The Law Commission is ideally placed to conduct a thorough review of all of New Zealand's anti-terrorist legislation in itself and in its application. This article, through its discussions of the failure of the Inspector-General to recognise that the law had been broken in relation to the APEC case as well as the conflict between Section 12 of the Terrorism Suppression Act and the *nulla poena* principle, has revealed examples of possible conflicts between the pursuit of national security and adherence to important legal methods and principles. Reference has been made to three particular examples; the APEC incident, the Zaoui cases and the October 2007 anti-terrorism raids. Each of these is highly instructive, raising a wide range of fundamental issues including the separation of powers, public accountability, the right to political dissent, the politics of policing, and freedom of the press. These examples could also be examined to assess the effectiveness of safeguards such as the NZBORA which, despite being introduced in an earlier, less digitised and less intrusive era, still contains the weakening provision of Section 4(b).

With some distance from the horror of the September 11 attacks, and notwithstanding the Bali, Madrid, London, Mumbai and other terrorist atrocities in the interim, the Law Commission is also in a position to use as one of its starting points an assessment of the actual risk that terrorism poses to New Zealand. This would enable it to assess, for example, what differences there may be between an anti-terrorism strategy that is oriented to address the

risk to New Zealand as compared with one that has been designed for countries with a far greater likelihood of being a terrorist target. It could, for example, propose a comparable approach to New Zealand's anti-nuclear stance with a political and legislative framework that is designed to meet New Zealand's own specific needs and mitigate the actual threats that it faces. In doing so, the Law Commission might consider a range of ways for New Zealand to fulfil its obligations as a global citizen, one of which might be to develop an anti-terrorism model that could be adopted by other low-risk countries, including its Pacific neighbours whom it has already pledged to support.

In conducting its review, the Law Commission also has the benefit of being able to draw on a vast body of excellent legal scholarship, only a small part of which has been able to be included within the scope of this article. With its legal expertise and without the politicians' vulnerability to political polls, the Law Commission is ideally placed to conduct this review. By being able to identify what legal principles are at stake and why they are important, the Law Commission should be able to ensure that, if Parliament does ultimately decide to continue to compromise and/or further compromise any basic freedoms of New Zealanders in the name of national security, it at least does so deliberately and explicitly and can be judged by the public accordingly. In this regard, however, if the people of New Zealand are able to make a meaningful judgment, to give their informed consent, there may be a need for a process of public consultation and education for them to fully appreciate and comment on what is at issue. Such a process would be appropriate given the importance of the matters under consideration, and its engagement of the public would be in keeping with what international commentators have identified as one of the most positive aspects of New Zealand's anti-terrorism approach to date.

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