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Balancing National Security and personal freedom in a low-risk society: the case of New Zealand.

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Introduction

In the pre-dawn darkness of 17 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 authorised by warrants issued under the Firearms Act and the Terrorism Suppression Act, and 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 US in the wake of the September 11 attacks.

The high-level Officials Committee for Domestic and External Security had been briefed before the raids. However, in order to charge people under the Terrorism Suppression Act, the Police still required the approval of the Solicitor-General. When they sought that approval for the October 2007 raids, he said that on the basis of the evidence that had been gathered he could not assert to the charges, and he went on to describe the existing law as 'unworkable'.

The Government responded by giving the New Zealand Law Commission the task of examining 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 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 paper examines some dimensions of how this balance might be achieved. In doing so, it considers the nature and degree of a terrorist threat to New Zealand and situates this within a discussion of wider issues of negotiating risk in contemporary globalised world. It looks at the problems inherent in legislating against terrorism and the associated difficulties of enforcing that legislation. It sets this in the context of recent instances from New Zealand of how the interests of national security and individual freedoms have intersected in practice.

The risk of terrorism in New Zealand

Whether as a result of New Zealand's geographical isolation, its reluctance to join in on whatever military forays in which the US decides to engage, or some other factors, there is little doubt, as even the New Zealand Ambassador for Counter-Terrorism has acknowledged, that 'the threat of a direct attack against New Zealand remains low' [Higgle 2005]¹.

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:

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' [2003: 24]

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 Portuguese photographer, Fernando Pereira died after agents of the French 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.

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. Moreover, there is a sense that, to the extent that New Zealanders abroad are at risk of terrorism, it is largely as a result of the actions of other governments particularly the US, the UK and Australia.

The justification for introducing special anti-terrorism laws into New Zealand since 2001 has, therefore, 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' [Higgle 2005]. Declaring that the September 11 attacks confirmed that terrorism is 'an international phenomenon' and that 'terrorists consider the world their stage', the New Zealand Security Intelligence Service (NZSIS) claims that there are people and groups in New

¹ 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/ Retrieved 30/6/08

Zealand ‘with links to overseas organizations that are committed to acts of 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’ [NZSIS 2003].

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 growing network of authority 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 (which was passed just 17 days after the September 11 attacks) as well as a series of other anti-terrorist conventions in involving aircraft, ships, persons and the use of particular materials (see appendix one).

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*². 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’

However conceptually or strategically compelling the globalisation argument may be in the current response to terrorism, it is eerily similar to the intelligence and security discourse of the Cold War. The communist enemy had a way of life that was anathema to our own, 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.

Again, for New Zealand, the red peril was a proxy threat. The one celebrated case of an alleged real live Kiwi spy was William Sutch, a senior civil servant who was accused by the NZSIS and unsuccessfully prosecuted for being a Soviet spy. Earlier this year, previously confidential files confirmed for the first time that he was not a spy, and that the SIS had deliberately misled the Prime Minister of the day and conducted unlawful surveillance of Mr Sutch. 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 Lange Government 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.

² *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] SCJ No.3 [2002] 1 SCR 3.

In the UK, some of the early assaults on the rule of law³ began in 1974 with Labour's Prevention of Terrorism legislation in the wake of the Birmingham bombing; introduced supposedly as a 'strictly temporary measure' but never repealed [Kennedy 2004: 31]. 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 [Cotler 2002: 113]. Before 2001, New Zealand had not been confronted by the kind of threat that would generate public acceptance of (let alone a public clamour for) the introduction of laws that would significantly compromise basic freedoms⁴. 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. And it presents a number of interesting questions:

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 may be no less devastating than was the impact of New Zealand's resignation from the US nuclear deterrence camp. However, these are hypotheses that will not be tested any time soon as the party that pioneered the anti-nuclear legislation and refused to join George Bush II's invasion of Iraq, has been relying on intelligence and security matters, including anti-terrorism legislation, to demonstrate its allegiance to the US.

Inchoate offences, preventative policing and anti-terrorist legislation

A useful starting point 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. Roach has pointed 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' [Roach 2002: 151]. It would be a serious criminal offence in most countries, including 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 criminalise conduct which has the potential to culminate in an offence without the requirement that the offence be actually committed [Gillies 1985: 512]. 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' [Simester and Brookbanks 2002: 233]. The dividing line for an attempt is often expressed as the point where actions move beyond mere preparation, but it has proved notoriously

³ 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.

⁴ 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.

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 and if it is set too low, people risk being criminalized for conduct that is not much more than unexecuted thoughts [Ibid 238].

Roach has pointed out that the difficulties inherent in inchoate offences are compounded in anti-terrorism legislation that explicitly criminalises 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' [2002 160]

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' [2006: 56].

While it may be possible to endorse the principle of crime prevention without sanctioning the growth of extraordinary, before-the-fact, preventative police powers [Cohen 2003: 9], is it possible to effectively prevent terrorism without affording extraordinary powers to intelligence agencies? Few would dispute Friedland's view that, when it comes to serious threats to national security, judicially authorised wiretapping should be 'at or near the top of the list of techniques that could be used' [2002: 274]. However, it is quite another matter to enact legislation, systems and policies aimed at combating terrorism that have the effect of authorising intelligence agencies to 'conduct a wholesale investigation into society' [Cohen 2006: 56].

This problem is compounded by the political and cultural dimensions of anti-terrorist legislation. A terrorist act in most jurisdictions including New Zealand is one that is carried out to further a political or religious objective. This orients the attention of police and intelligence agencies to gathering and analysing 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 view with suspicion individuals and groups engaged in pressing for some form of social change. Given the agreed low level of risk that exists in New Zealand of an external terrorist threat, there has been widespread concern that the additional powers and resources afforded to New Zealand police and intelligence agencies by new anti-terrorism legislation would be used to increase their surveillance of those engaged in what should be their legitimate right to organise political campaigns and actions.

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. When 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, two Murdoch-owned daily newspapers published excerpts of material that had been leaked to them and are now facing charges of contempt.

Security intelligence since the Cold War

The public scepticism of the competence and political bias of New Zealand's intelligence agencies is derived from the perception of their actions in relation to previous incidents. One of these was the illegal break-in by the SIS 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 SIS Act since the end of the Cold War. One of the changes to the Act was to broaden the scope of the SIS to concern itself with not just traditional concepts of subversion, but also threats to New Zealand's economic well-being.

Critics of the legislation argued that this gave the SIS licence to spy on opponents of the radical neoliberal restructuring of New Zealand that had been relentlessly imposed on an unwilling public since 1984. Such concerns were described as paranoid 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 citizen who feared that they were being unfairly and illegitimately harmed by the SIS had 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 SIS documents and personnel.

The victim of the break-in, Aziz Choudry, and the person who caught the agents, the author of this article, laid complaints with the Inspector-General; Mr Choudry with respect to the break-in, myself with respect to the subsequent police search of my home for bomb-making equipment. The Inspector-General conducted a joint investigation of the complaints and concluded blandly (without even confirming or denying that the perpetrators of the break-in were SIS agents, that 'no crime had been committed'. Subsequent private legal action by Mr Choudry against the SIS and myself against the Police were both successful.

Given the failure of the Inspector-General to provide the guarantees of appeal against the actions of an intelligence agency, the need for independent avenues of appeal through the courts became more pronounced. 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 threshold required for obtaining

refugee status in New Zealand. However, the SIS had issued him with a risk security certificate under the provisions of the Immigration Act upon his arrival in the country. While claiming that Mr Zaoui's presence in New Zealand posed an unacceptable risk to national security, the SIS refused to release to Mr 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. Mr Zaoui's avenue of appeal against the SIS 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.

Mr Zaoui sought to challenge preliminary decisions by the Inspector-General in relation Mr Zaoui's rights under the principles of natural justice enshrined in the New Zealand Bill of Rights Act 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 an exquisite piece of 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*⁵ 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 excluded⁶.

Anti-terrorist legislation and the criminal law

Cohen insists that 'a bright line be maintained between national security intelligence gathering activities and ordinary criminal investigation' and 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' [Cohen 2006: 54] Kennedy discounts the possibility of such a bright line being effective, describing the anti-terrorist laws as 'a contagion which seeps into the bloodstream of the legal and political system' [2004 32]. 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 Midlands⁷, 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' [Ibid 33]

New Zealand's anti-terrorist legislation has received international praise for the balance it achieves between ensuring national security and protecting individual freedoms. In October 2007, a report of the Commonwealth Human Rights Initiative declared that New Zealand's 'anti-terrorism legislation has been enacted without a

⁵ *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

⁶ *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at 179.

⁷ Birmingham is in the West Midlands.

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' [Daruwala and Boyd-Caine 2007: 24]. 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 explicitly allow for judicial review. However, it is being incrementally tightened largely as a result of international factors. Among the recent changes, for example, the requirement that the financing of a designated terrorist entity would be an 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.

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.

The surveillance society

There is another dimension to these developments that compounds the extent to which they represent an erosion of civil liberties and individual freedoms. In recent years, there has been a rapid and radical digitisation of a diverse variety of forms of communication. 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, ideas 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 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.

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’ [Cohen 2006: 56] even without any legislative change. Add to this the significant extension of the powers and resources put at the disposition of the SIS and other intelligence agencies. Then, in the New Zealand context, factor in the absence of a significant external threat combined with a culture of suspicion of political activists, as well as a readiness to act outside the law safe in the knowledge that they probably will not be apprehended and, if they are, they are unlikely to be properly investigated let alone prosecuted by the designated oversight body. The picture that emerges is one that seriously compromises the rights to privacy and freedom of people in New Zealand.

In the case against the SIS break-in, the court judgment noted that for a state agency to have the authority to physically and covertly enter a person’s home was such an intrusion that it could only exist where it is specifically authorised by statute; it could not be inferred as an inherent part of, for example, placing or retrieving a surveillance device⁸. In doing so, 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.

Conclusion

As a small country with a low risk of international terrorist attack, New Zealand is in a special position with regard to anti-terrorist legislation. In adjusting itself to the contemporary terrorist threat, it could choose to adopt a view comparable to its anti-nuclear approach where its political and legislative framework is designed to meet its own specific needs and mitigate the actual threats that it faces. In doing so, it could serve as reminder and inspiration to those in other countries who are facing serious threats to basic freedoms in the name of the war on terror.

Instead, New Zealand is choosing to accept the view that the terrorist threat is so global that the world is only as safe as its weakest link, and New Zealand will not be that weak link. The consequence of this course of action is not only to miss the opportunity of making a different kind of contribution to the global approach to combating terrorism, but also to have the effect of criminalizing legitimate political activity and undermining basic freedoms in New Zealand society.

This paper is a draft for discussion. All comments welcome.

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⁸ *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA)

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