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“Counter-Terrorism Law”

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Counter-Terrorism law

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questions New Zealand’s latest counter-terrorism legislation.

In April 2001 the Terrorism (Bombings and Financing) Bill was introduced into the House of Representatives. Its provisions were intended to implement the International Convention for the Suppression of Terrorist Bombings (Bombing Convention) and the International Convention for the Financing of Terrorism (Financing Convention). Such was the public interest in the Bill that when the Foreign Affairs Defence and Trade Select Committee called for public submissions on the Bill, they received: none.

The terrorist attacks of 11 September changed the profile of the Bill for the public and for the government. On 28 September 2001 the UN Security Council adopted resolution 1373 which, under Chapter VII of the United Nations Charter requires member states to adopt a package of counter-terrorism measures.

The Labour-Alliance Government decided to use the Bill before Parliament, which had not then been reported back by the select committee, as a convenient vehicle to enact the measures required by the UN. There was a procedural kerfuffle about the speed and secrecy with which the amendments would be adopted. Initially the select committee proposed to seek submissions on a selective basis from specific groups in very short order. Eventually, however, sense prevailed and the select committee issued an Interim Report (8 November 2001) on the proposed amendments, received 143 submissions, conducted hearings in Auckland, Wellington and Christchurch, and extended their report-back deadline. The Bill was reported back from the Foreign Affairs, Defence and Trade Committee on 22 March 2002 and on 8 October 2002, under a new government, the Bill had its second reading. Committee stage of the Whole House and Third Reading with the House under urgency. The Bali bombings occurred between passage of the Bill in the House and the Act coming into force on 17 October 2002.

I observe in passing that the initially proposed select committee process would have violated principles of good legislative process and cast a shadow on the legitimacy of the amendments; that it was not pursued is a welcome credit to the maturity of our political representatives. That the temptation to do was there illustrates the raw emotional and political power of the events of the 11 September.

The UN Made me do it

Much has been made by various governments of the binding requirement of UN Security Council Resolution 1373 of 28 September 2001. Clearly there is significant emotional, political and moral resonance in this Resolution. And this is new ground for the UN. Governments do not always pay such deference to the UN. In cl 6 of the Resolution, the Security Council signalled the seriousness of its intent by establishing a Committee of the Council to monitor implementation of the resolution and called upon all States to report to the Committee within 90 days. However, it is also worth noting that the SCR 1373 does leave significant latitude to implementing states as to how they should choose to comply with the requirements.

The most specific actions required of member States by SCR 1373 relate to attacking the funding of terrorism and denying support to, and preventing terrorist acts. More specifically, in attacking the funding of terrorism each member State is required to:

• prevent and suppress the financing of terrorist acts;
• criminalise collection of funds with the intent that they be used to carry out terrorist acts;
• freeze the funds, assets and economic resources of those who commit, attempt to commit, or participate in or facilitate terrorist acts;
• prohibit funds, assets or economic resources or financial services being made available for the benefit of those who commit, attempt to commit, or facilitate or participate in committing terrorist acts;
• refrain from supporting those involved in terrorist acts, including by suppressing their recruitment and eliminating their supply of weapons;
• prevent commission of terrorist acts, including by early exchange of early warning information to other States;
• deny safe haven to those who finance, plan, support or commit terrorist acts;
• prevent those who finance, plan, facilitate or commit terrorist acts from using their territories;
• bring to justice those who finance, plan, prepare or perpetrate or support terrorist acts and ensure that, at least, terrorist acts are established as serious criminal offences;
• assist other States in criminal investigation and criminal proceedings against terrorists;
• prevent the movement of terrorists through effective border controls and issuance of identity papers and travel documents;

There are also a variety of other, more exhortatory, statements relating to exchange of information, cooperation and entering into international conventions.
The way in which these requirements are satisfied are up to each member State. Most importantly, given that each of the actions required by the Resolution relates specifically to terrorism, that term is itself nowhere defined. I will discuss this further later on.

**What is the problem? Terrorism (un)defined**

At first glance the answer to this question might be thought to be obvious: “it’s terrorism stupid”. But what is terrorism? One scholar has counted 109 different definitions of terrorism (Alex Schmidt, *Political Terrorism* Transaction Press, 1994). As the Minister of Foreign Affairs and Trade (and of Justice), Hon Phil Goff said in the second reading debate on the Bill “one of the hardest tasks was to define what constituted a ‘terrorist act’ given that debate within the international arena had failed to reach a consensus on this issue”. There is no internationally agreed definition of terrorism. The main reason for this lies in the over-used maxim: “One person’s terrorist is another person’s freedom fighter”. In this lies the core of what I will argue is the difficulty of terrorism as a legal concept.

Resolution 1373 does not adopt a definition of terrorism, despite the heavy reliance on the term in each of its “requirements”. In effect, the minimum the term is required to cover by virtue of the Resolution is the conduct to which the various international anti-terrorism conventions relate – which is the approach taken in the Financing Convention. No doubt the need to pass the Security Council Resolution outweighed the need to meet a challenge on which there has been no international consensus to date.

**THE TERRORISM SUPPRESSION ACT 2002**

Commodably, the Foreign Affairs, Defence and Trade select committee has had the nerve to grapple with the issue of defining terrorism. Sections 4 and 5 of the Act provide definitions. It is important to remember that they are primarily operative in identifying the individuals and entities that may be designated, and whose assets are to be frozen as a result, for the purposes of the Act. The definitions are based on existing international conventions and the approaches to definition taken in other current proposals for legislative reform in like jurisdictions – in particular the UK and Canada.

Under ss 4 and 5, and paraphrasing a bit in the interests of comprehension, a “terrorist act” is an act that is:
- carried out for the purpose of advancing an ideologi-cal, political or religious cause; and
- with the intention to induce terror in a civilian popula-tion or “to unduly compel or to force” a government to do or not do something and that is
- intended to cause one or more of the following 7 outcomes:
  - death or serious bodily injury;
  - serious risk to the health or safety of a population;
  - serious interference with or disruption to an infra-structure facility if likely to endanger human life;
  - destruction or serious damage to property of great value or importance in a safety-endangering out-come above;
  - major economic loss if likely to result in a safety-endangering outcome above;
  - major environmental damage if likely to result in a safety-endangering outcome above;
  - release of a disease bearing organism if likely to devastate the national economy of the country.

Unless it occurs in a situation of armed conflict but, if it does, under s 4(1) it is still a “terrorist act” if it
- has the purpose to intimidate a population or compel a government or international organisation to do or not do something; and
- is intended to cause death or serious bodily injury to a civilian; and
- is not excluded by art 3 of the Financing Convention.

There is also a nice provision in s 5(5) that “to avoid doubt” the fact that a person engages in any protest, advocacy, dissent or any strike, lockdown or other industrial action is not, by itself, enough to infer that elements of the definition of terrorism are met.

Under s 5(1)(b) an act is also a terrorist act if it is an act against one of eight terrorism conventions referred to (but not spelt out) in Schedule 3. From their titles, they relate to: aviation and shipping, diplomas; hostages; and the Bombing Convention. I must admit to not having considered what an act “against” one of these conventions would look like.

Under s 25, a terrorist act is deemed to be carried out if, among other possibilities, “a credible threat to carry out the act, whether it is actually carried out or not” occurs.

The definition is awkward and multi-faceted. It contains various forms of activity that could constitute terrorism. In summary, there appear to be three elements required to be present together:
- an intention to cause really significant harm to humans (or introduce an economically destructive disease); and
- a purpose to advance a political cause; and
- an intention to induce terror or “unduly” compel or force a government to do or not do something.

Meeting the definition of terrorist act does not constitute an offence itself. But it does constitute one of the core elements on which a number of offences may hang – and that can have significant civil liberties implications. And the definition of terrorism must lie at the root of the problem that government seeks to address in passing an Act labelled “Terrorism Suppression”. This matters, as people began to realise with the designation of Jemaah Islamiyah under the Act.

**EARLY USE OF THE ACT**

On 1 November 2002 the Prime Minister, in consultation with the Attorney-General, designated Jemaah Islamiyah (JI) as a terrorist group for a period of three years under s 22 of the Act (see www.beehive.govt.nz). Section 22(1) empowers such a designation “if the Prime Minister believes on reason-able grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts”.

The Prime Minister’s statement noted that JI “was identi-fied as a terrorist organisation by the United Nations based on information drawn from a number of sources including Jemaah Islamiyah detainees, confidential sources and media reports”. The nature of the evidence was reportedly ques-tioned by Keith Locke MP and the Council of Civil Liberties who were forcefully rebutted by Hon Phil Goff, the Minister of Foreign Affairs and Trade. It is interesting to note the Government’s reliance on the UN Security Council’s identi-fication of JI as a terrorist group as s 31 of the Act provides
that such information “is, in the absence of evidence to the contrary, sufficient evidence of the matters to which it relates”. Thus the UN Security Council is deemed by statute able to determine matters of fact in New Zealand which may be relied on to curtail civil liberties.

The significance of the potential legal effects of satisfying the definitions is clear. The potential legal effects themselves can be difficult to trace through. The Prime Minister’s statement of 1 November noted that the effect of the designation would “make it an offence to participate in the Jemaah Islamiyah group, recruit members for this group, provide or collect funds for this group or make property or financial services available to this group”. Sections 9, 10, and 12 and 13 are indeed authority for all these, except providing or collecting funds, and these sections require knowledge of the designation (or alternatively in ss 12 and 13, knowledge that the entity carries out terrorist acts).

But s 8, which deals with providing or collecting funds, does not actually refer to designated organisations. It applies to providing or collecting funds intending or knowing that they “are to be used in order to carry out 1 or more acts of a kind that, if they were carried out, would be 1 or more terrorist acts”. Contrary to the PM’s statement, simply providing them to a designated organisation is not enough. Whether the practical difference that makes is as slight as it seems would turn on the facts of the individual circumstances and the difficulty of proving the intent or knowledge of the financier.

There are safeguards in the designation process. Designation must be notified to the designated organisation, may be challenged by judicial review, expires after three years unless extended by the High Court, and the effects do not apply retrospectively.

Overall my assessment is that the Foreign Affairs, Defence and Trade select committee, as advised by officials, has done a pretty good job of defining terrorism. It certainly compares favourably with the PATRIOT Act passed in the US in October 2001 (standing for Provide Appropriate Tools Required to Interdict and Obstruct Terrorists). However, there is a deeper problem here that is inherent to the concept of terrorism itself.

TWO MISCHIEFS

And that is where definition becomes important. As in the terrorist/freedom fighter distinction, there are at least two possible definitions of the “problem” that counter-terrorism policy should seek to address: the causes of terrorism; and the suppression of terrorism.

First, and most obviously in the context of 11 September, there is a problem where some individuals or groups seek to oppose a legitimate political regime that they disagree with, through the use of force and, particularly, terror. This is a problem of public order – of how to “maintain peace, order and good government” to use the classic colonial legislative phrasing. One of the fundamental purposes of government is to maintain order – to produce stable behavioural expectations amongst the members of the society it governs. Use of terror to challenge that order strikes at the heart of the function of government and must be opposed.

However, there is a second, parallel definition of the problem that could exist in contexts other than that created on 11 September. And that is that a deep-seated societal division, open to more than one legitimate perspective, may remain fundamentally unresolved and yet be covered over or actively suppressed by the coercive power of the state. Where all avenues of peaceful protest have been exhausted it can be expected that those on the wrong side of such deemed resolution can resort to force to make their point. Where they eventually succeed, as in the American Revolution of 1776, such freedom fighters become heroes and founding fathers and, now perhaps, mothers, of a new order. Sometimes we retrospectively recognise the cause that revolutionaries fought for as legitimate.

The problem, then, is how to decide which is the right problem to be addressing in a given circumstance. In the literature of history and political science various variables can be concocted to help in this decision – involving appeals to norms asserted to be universal, such as civil and political rights, democracy and justice. But in the cold characters of legal definitions such concepts are hard to pin down.

Section 5 of the Act does contain in its definition of terrorist act an intention to induce terror in a civilian population. It is true that most successful revolutionaries have trouble overcoming that qualification as a hurdle to subsequent moral legitimacy (were the French revolutionaries an exception?). The principle of civilian inviolability is well established in the law of war and international criminal law. It may offer the best principle around which to create a set of consistent international and domestic laws that would be effective against terrorism (See Slaughter and Burke-White “An International Constitutional Moment” 43 Harvard J of Intr Law 1).

But inducing terror in a civilian population has not inhibited the recognition at international law of successful revolutionaries. And war between nation states surely induces terror in affected civilian populations. And, more to the point for present purposes, an alternative to inducing terror in the s 5 definition is an intention “to wounding compel or force” a government to do or not do something – which is likely to be much more commonplace, depending on your interpretation of “unduly”.

So, you surely know terrorism when you see it; because you know who you are and who they are. But abstracting from the decision-maker and the decision-taker, as the rule of law requires, robs us of certainty about who history will judge to wear the white hats and who the black.

Luckily, it’s not an either/or dilemma. The problem of resolving deep-seated societal and political disputes can be and perhaps, in a democracy, must be addressed. But seeking to address such divisions does not require compromise in maintaining international and domestic legal order. Both strategies can, and should, be pursued together.

Not very difficult to work out perhaps, but looking at it this way is important, because it tells us that there are two separate objectives that we are pursuing in seeking to make policy and law to fight terrorism:

• seeking to resolve political divisions and disputes – dealing with the causes of terrorism; and
• maintaining order in our society and legal system – suppressing terrorism, while we work on those causes of conflict.

Law is not necessarily the most useful way of achieving the first objective – this is the stuff of normal domestic and international political processes – and I won’t comment further on how to achieve world peace. But the important thing about the second objective is that that is just what we do every day in maintaining and enforcing our criminal justice system.
Crime and politics

Whatever the political motivation, acts which harm people, that are intended to do so, and that are not sanctioned by the state, are offences against the order maintained by government and are labelled "crimes" in all societies.

In New Zealand, the elements of criminal law are summarised in the elements ofactus reus and mens rea. However, the need for both a harmful act and an intention to cause harm. Political, or other, motivation is irrelevant to whether an offence has been committed (though not the penalty imposed). All that you need for the existence of a crime is the act and the intention to do it.

Criminals must be apprehended and incarcerated but are, ungrudgingly in many quarters it is true, entitled to the civil rights of due process that in New Zealand are spelt out in the New Zealand Bill of Rights Act 1990. While there is always a debate about the extent to which police power should be hampered by woolly woolly civil rights lawyers' arguments, there is at least some recognition that not upholding such rights is a truly reprehensible mark of an uncivilised regime unfamiliar with the rule of law which we criticise in other regimes.

The incoherence of counter-terrorism law

So why do we think our criminal law is not enough?

First, there may be aspects of the actions committed by international terrorists that are not adequately captured by the particular drawing of some of our offences. Indeed §7 of the 2002 Act creates a new offence of terrorist bombing, with a potential penalty to life imprisonment; whereas, a person:

- intentionally, and without lawful justification or excuse, delivers, places, discharges, or detonates...

This would seem to capture the Rainbow Warrior bombing whereas, arguably, the definition of terrorist act might not (because of the required intention – an element that may be difficult to prove generally in the new offences). Note that there is nothing in this offence that needs any reference to political purpose. It is just as applicable to ordinary criminal beahviour as terrorism – as it should be.

But the need for such updating does not occur only in relation to terrorism. It happens regularly in our criminal law, as our society, economy and culture changes. The particular features of international terrorism that need to be reflected in our criminal law are very similar to those of other organised crime: communications interceptions; search and seizure powers; money-laundering and attacking financial resource-base.

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Specific to “terrorism” are the purpose of advancing a political cause and intention to induce terror or make a government do or not do something. Terrorism is really organised crime committed with a political purpose. But the purpose for which a criminal act is committed does not affect the existence of an offence in criminal law. What it may do is affect the sentence that is appropriately imposed for the commission of an offence – because it is the behaviour that the law seeks to deter or for which it seeks retribution, rather than the reason for the behaviour, which is more nebulous to define with certainty.

I suggest that if our criminal law is inadequate to fight terrorism, it is likely to be inadequate to fight non-political organised crime – and vice versa. Similarly, if it is adequate to fight non-political organised crime, it is likely to be adequate to fight terrorism. Of particular importance given the emotions aroused on 11 September and revived on 12 October, the criminal law contains a careful balance that our democratic system of law-making has decided is appropriate between effective law enforcement powers and safeguards for civil and political rights. If this balance of civil and political rights is appropriate in relation to organised crime it should also be appropriate in relation to organised crime committed with a political purpose – terrorism.

**Law and Terrorism**

What does this mean for the law of counter-terrorism? I suggest, and this is my conclusion: there is no conceptually distinct and coherent body of law we can sensibly call counter-terrorism law.

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Intention to cause harm is the essence of criminal offending. The additional elements in these definitions that are specific to “terrorism” are the purpose of advancing a political cause and intention to induce terror or make a government do or not do something. Terrorism is really organised crime committed with a political purpose. But the purpose for which a criminal act is committed does not affect the existence of an offence in criminal law. What it may do is affect the sentence that is appropriately imposed for the commission of an offence – because it is the behaviour that the law seeks to deter or for which it seeks retribution, rather than the reason for the behaviour, which is more nebulous to define with certainty.

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Terrorist actions are a global problem that must be tackled firmly and effectively. Legislation is a powerful symbol of commitment to do that. And, while the causes of terrorism must be addressed using multi-prong strategies, the acts of terror themselves must be dealt with by the law. But terrorist actions are the same as criminal actions; the difference is that they are politically motivated. Motivation can affect the penalties that are imposed on offenders, but motivation itself is not sensibly the subject of different offences. The effect of terrorist offending is the same as the effect of crime – most particularly, it is the same as the effect of organised crime.

So the procedural safeguards that we apply to criminal offending must be applied to “terrorist” criminal offending. Either:

- the safeguards are unduly inhibiting to law enforcement, in which case we have the balance wrong in the criminal law as well and it should be changed; or
- the safeguards are justified in preserving the rights and freedoms of a free and democratic society and should be equally applied to criminals who offend for political reasons as criminals who offend for other reasons.

This is why it does not make sense to try to distinguish the existence of a separate body of “law” of counter-terrorism. I suggest that to proceed otherwise is to fall victim to the very terror that was intended to be induced on 11 September and on 12 October.