Joshua Williams Memorial Essay

EMERGENCY POWERS LEGISLATION AFTER THE REPEAL OF THE PUBLIC SAFETY CONSERVATION ACT

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On 20 July 1987 the Labour Government fulfilled an election promise to repeal the Public Safety Conservation Act 1932, legislation which a 1984 Labour Party publication had described as "unnecessarily repressive".[1] Enacted together with the Public Safety Conservation Act Repeal Act 1987 were the International Terrorism (Emergency Powers) Act 1987 and the Defence Amendment Act 1987. These Government measures were introduced as one on 3 February 1987 in the International Terrorism (Emergency Powers) Bill, a bill drafted so that it could be enacted as three separate Acts. The aim of this paper is to elucidate the connection among the three Acts, their underlying rationale, and their potential implications for civil liberties.

I BACKGROUND

Awaited with impatience in some quarters,[2] the bill enabling the repeal of the Public Safety Conservation Act was drafted by the Department of Justice in consultation with the Ministers of Internal Affairs, Police, and Defence, and with the officials committee on terrorism.[3] Repeal of the oft-criticised Act, however, was not a straightforward matter. In an oral reply to a question in the House of Representatives on 17 October 1985, Minister of Justice Geoffrey Palmer remarked that "a simple repeal would not do the job effectively because it would leave uncovered several emergency situations in which the Government would need power."[4]

The need for retaining some of the emergency powers conferred under the Public Safety Conservation Act had also been advocated by Captain E D Deane in 1985.[5] He contended that the kinds of power available under the Act were an appropriate legal mechanism for employing the armed

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1 Cl 20, "Open Government Policy 1984," New Zealand Labour Party Policy Document (Wellington, 1984).

2 On 20 March 1985, Mr Garry Knapp, Social Credit MP for East Coast Bays, introduced the Public Safety Conservation (Repeal) Bill with the avowed intention of urging the Government to keep to its election promise. This Bill aimed at repealing the Public Safety Conservation Act 1932, the Public Safety Conservation Amendment Act 1960, s 26(a) of the Petroleum Demand Restraint Act 1981, and s 84(2) of the Civil Defence Act 1983. See 1985 NZ Parliamentary Debates 3812-3821.

3 See 1985 NZ Parliamentary Debates 7458.

4 Ibid.

5 "Public Safety Conservation Act: Repeal and the Armed Forces" [1985] NZLJ 266. This article was written in response to Mr Garry Knapp's introduction of the Public Safety Conservation (Repeal) Bill (supra n 2).

forces in aid of the civil power in serious national emergencies, such as widespread lawlessness during the panic of a "nuclear winter" or where there was a large scale terrorist operation.[6] He also observed that at the time the Public Safety Conservation Act was the only mechanism available for prohibiting the media from publishing or broadcasting information that might be useful to terrorists in the latter type of emergency.[7]

In the end, the legislation that finally emerged, the International Terrorism (Emergency Powers) Bill, sought to make provision for two categories of emergency that ostensibly would be left uncovered by the repeal of the Public Safety Conservation Act. One of these categories was narrowly confined to international terrorist emergencies, while the other somewhat more broadly encompassed any emergency threatened or caused by human agency for which military assistance to the civil power would be required.

With regard to international terrorist emergencies, the Bill made provision for extraordinary emergency powers. International terrorism has been regarded as a significant danger in New Zealand since at least the mid 1970's. In his 1976 report on the Security Intelligence Service, the Chief Ombudsman Sir Guy Powles recommended that that organisation alter its priorities and focus more on the threat of terrorism and less on subversion.[8] This recommendation was reflected in the 1977 Amendment to the New Zealand Security Intelligence Service Act 1969.[9] 1977 was also the year that saw the formation of a small police anti-terrorist squad which today has thirty-two members and maintains a close liaison with Ministry of Defence forces, in particular the New Zealand Special Air Service troops, who are specially trained to deal with terrorist emergencies.[10] In 1980, Parliament enacted the New Zealand Crimes (Internationally Protected Persons and Hostages) Act, which gave effect to the United Nations Covenant on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, and the Convention Against the Taking of Hostages 1979. More recently, the need for making better provision against international terrorism, which no longer seemed so remote a contingency in New Zealand after the sinking of the Greenpeace ship *Rainbow Warrior* on 10 July 1985,[11] was expressed in the Government's *Review of Defence Policy 1987:*[12]

> As further protective measures are taken in the world's centres of influence, terrorist groups may seek what they might consider to be softer targets, such as those in the South Pacific. While New Zealand and the other small countries in the region are unlikely to become the focus of terrorist activities, it is proper to take some steps to counter this possible threat.

6 Ibid at 269.
7 Ibid at 270, n 14.
8 *Security Intelligence Service* (Wellington, 1976), 31, para 20.
9 See ss 2(1), 2(2)(b), and 3 of the New Zealand Security Intelligence Service Amendment Act 1977.
10 See *Report of the New Zealand Police* 1978, 18, and 1987, 17.
11 For the possible impact of this event on the drafting of the subsequent legislation, see infra n 82.
12 *Defence of New Zealand: Review of Defence Policy 1987* (Wellington, 1987) para 2.6.

With regard to emergencies created by human agency and requiring military assistance to the civil power, however, it was less a question of creating new emergency powers to cover the contingency than it was of clarifying and limiting the powers available under existing legislation sans the Public Safety Conservation Act. The issue here was that repeal of the Public Safety Conservation Act, with nothing more, would remove a check on the Executive's employment of the armed forces to aid the civil power. This was a point adverted to by the Minister of Justice on 20 March 1985 when he observed:[13]

> It is necessary to consider what use, if any, can be made of troops in [an emergency] situation, and what legal rules should govern their use. Legal rules exist at present, but they are dependent upon the Public Safety Conservation Act.

Under the terms of section 4(1) of the Defence Act 1971, the purposes for which the Governor-General as Commander-in-Chief is empowered to raise and maintain armed forces include:

> (a) The defence of New Zealand
> (b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere . . . .
> (e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency or disaster.

Section 79 of the Defence Act deals with the provision of public services by the armed forces:

> (1) If the Minister considers that it is in the public interest to do so, he may authorise any part of the Armed Forces to perform any public service capable of being performed by the Armed Forces either in New Zealand or elsewhere, subject to such terms and conditions (including payment) as he may specify.
> (2) The Minister shall not authorise any part of the Armed Forces to perform any public service in New Zealand pursuant to subsection (1) of this section in circumstances such that a Proclamation of Emergency could lawfully be issued under the Public Safety Conservation Act 1932, unless such a Proclamation is for the time being in force.
> (3) Any authority given under subsection (1) of this section may authorise any ships, aircraft, vehicles, or equipment of the Armed Forces to be operated in connection with the performance of any such public service.

The powers available to the Executive under section 79 were first conferred in the Defence Act 1971 and they have provided a legal basis for the authorisation of military aid to the civil power in circumstances where invocation of the powers available under the Public Safety Conservation Act would be inappropriate. While Captain Deane has observed that "the vast majority of cases have been politically neutral matters like search and rescue, provision of transport to stranded commuters, and other items of a humanitarian and civic action type",[14]

13 1985 NZ Parliamentary Debates 3816. Cf Deane (supra n 5 at 268).
14 Supra n 5 at 268.

military assistance to the civil power nevertheless can be, and often has been, politically controversial.[15]

The constitutional problem that arises if the Public Safety Conservation Act is repealed, expressly or impliedly repealing section 79(2), is that the remaining subsections of section 79 would place a large body of ill-defined and virtually uncontrollable powers in the hands of the Executive to use the armed forces as they will without any parliamentary review. Not being regulations within the definition of "regulation" in section 2(1) of the Regulations Act 1936, any authorisations made by the Minister under section 79(1) would not be tabled in Parliament under section 8 of the Regulations Act or automatically referred to the Parliamentary Regulations Review Committee.[16] In addition, the power of the courts to review such authorisations would be limited in scope. Aside from such common law grounds for review as denial of natural justice, lack of reasonableness, bad faith, and improper purposes, the courts could determine whether the Minister did indeed consider it to be in the public interest to give the authorisation in question, whether the action authorised was a "public service", whether it was a public service capable of being performed by the armed forces, and whether the action authorised was within the reasonable scope of the rather widely-drawn purposes for which the maintenance of armed forces is empowered under section 4(1).[17]

This problem had been recognised by Dr Martin Findlay QC, an Opposition MP when the then National Government introduced the original Defence Bill in 1971. It was upon his motion that section 79(2) was in fact inserted as an amendment to the Bill in order to enable the operation of section 79 to be reviewed by Parliament and the courts. He stated that:[18]

> [T]he intent of what I propose is clear. It is to allow the use of military forces to be challenged if this ever reaches major proportions, and to guarantee, if they are used, that the proper constitutional course is followed as is required by the Act of 1932. The purpose of the amendment would be to ensure that a situation of military dominance could not be achieved by stealth.

A simple repeal of section 79(2) of the Defence Act, with nothing more, therefore again would have raised this constitutional objection.

15 The Peace and Justice Forum of the Wellington Labour Regional Council, for example, criticised the military's involvement in dealing with the Springbok tour and industrial disputes, such as the 1971 Oakley Hospital strike, the 1975 Christchurch fire brigade strike, and various Cook Strait ferry stoppages. Among their conclusions was that "The transfer of these defence functions to appropriate civil bodies should be investigated": "An Alternative Defence Policy," March 1985.

16 House of Representatives, Standing Orders 388-390 (1985).

17 Cf *Attorney-General for Canada* v *Hallet & Carey* [1952] AC 427, 450 per Lord Radcliffe; *Reade* v *Smith* [1959] NZLR 996; *New Zealand Drivers' Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374 (CA).

18 1971 NZ Parliamentary Debates 4153.

II THE EMERGENCY POWERS LEGISLATION ENACTED WITH THE REPEAL OF THE PUBLIC SAFETY CONSERVATION ACT

The background to the International Terrorism (Emergency Powers) Bill revealed three concerns: that the Public Safety Conservation Act be repealed, that the potential gravity of international terrorist emergencies would make the retention of some emergency powers by the Executive appropriate, and that the provision of military aid to the civil power in certain emergencies should have a statutory basis under the purview of Parliament and the courts. Accordingly, the International Terrorism (Emergency Powers) Bill had three parts, reflecting each of the foregoing concerns. Its three-fold purpose, as stated in the long title, was:

> to make better provision to deal with international terrorist emergencies, to make better provision for the giving of assistance by the military to the civil authorities in emergency situations, and to repeal the Public Safety Conservation Act 1932.

Part I of the Bill was enacted as the International Terrorism (Emergency Powers) Act 1987. This Act makes provision for the exercise by the police of certain emergency powers during an international terrorist emergency (section 10). It empowers the Executive to authorise the exercise of such emergency powers (section 6), and it empowers the Prime Minister to censor certain information relating to such emergencies (section 14). Part II of the Bill was enacted as the Defence Amendment Act 1987. It repeals section 79(2) of the Defence Act 1971 (section 2) and inserts section 79A after section 79 of that Act. Section 79A empowers the Executive to authorise military assistance to the police in certain emergencies, including, if necessary, international terrorist emergencies (section 3).[19] Part III of the Bill was enacted as the Public Safety Conservation Act Repeal Act 1987. It repeals the Public Safety Conservation Act and provides for the consequential amendment of other enactments (section 2).

1 The International Terrorism (Emergency Powers) Act 1987

The term "emergency" in general is a broad one and is capable of embracing a wide variety of circumstances.[20] In *Bhagat Singh* v *King Emperor,* Viscount Dunedin observed that "[a] state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action."[21] There are three possible legislative approaches with respect to states of emergency and the creation of extra-ordinary powers to take that drastic action. First, Parliament can enact ad hoc emergency powers legislation to meet a particular crisis.[22] This

19 Cf s 12, International Terrorism (Emergency Powers) Act 1987.

20 Cf *Stephen Kalong Ningkam* v *Government of Malaysia* [1970] AC 379, 390 per Lord MacDermott (PC).

21 [1931] 18 AIR 111 (PC).

22 Australian examples of such ad hoc emergency powers legislation to deal with industrial disputes include the National Emergency (Coal Strike) Act 1949, the Western Australia Flour Act 1977 and Essential Foodstuffs and Commodities Act 1979, and the New South Wales Road Obstructions (Special Provisions) Act 1979.

approach was favoured by Mr Garry Knapp when he introduced the Public Safety Conservation (Repeal) Bill in 1985:[23]

> When a strike or public disturbance threatens the essential requirements of the community, and/or the economy, or the public safety, a Government can take the opportunity available to it, as it has done in the past, to introduce special legislation, subject to Parliamentary debate, that meets the needs and purposes of that particular occasion.

The principal disadvantage of such an approach is that response to an emergency requiring swift action may be unnecessarily delayed, especially if it occurs when Parliament is not in session.

The other two approaches to emergency powers entail "stand-by" legislation and have been classified as "umbrella-type" and "specific-type" special powers legislation.[24] The Public Safety Conservation Act is an example of "umbrella-type" emergency legislation.[25] The definition of "emergency" is broad, capable of covering a wide variety of crises, and the emergency powers available are equally wide. This approach has been favoured by Sir Robert Muldoon, who, in debate on the International Terrorism (Emergency Powers) Bill, remarked that "The great advantage of all-embracing legislation such as the Public Safety Conservation Act is that, rarely used, it can be aimed at the particular evil of the time."[26] The principal disadvantage of this approach is the opportunities for abuse it affords an unscrupulous Executive. Certain emergency powers may be inappropriate or irrelevant to a particular type of crisis. Blanket censorship of the press, for example, would be inappropriate during a fuel emergency. In addition, the mere threat of invoking such wide-sweeping legislation as the Public Safety Conservation Act in certain situations, such as labour disputes,[27] can be viewed as overly repressive in a policy that purports to be governed by democratic principles.

The third, "specific-type" legislation, approach is based on the ideal that the emergency powers available to deal with a crisis should be designed expressly for that particular type of emergency.[28] The International Terrorism (Emergency Powers) Act follows this approach. When introducing the International Terrorism (Emergency Powers) Bill, Prime Minister Lange stated that "The philosophy of the Government is that if special powers are needed in particular cases the power should be tailored to specific

23 1985 NZ Parliamentary Debates 3814.

24 See H P Lee, *Emergency Powers* (1984) 129-130.

25 Other examples of such legislation are the Emergency Powers Act 1920 (UK) as amended by the Emergency Powers Act 1964, the Victoria Public Safety Preservation Act 1938, and s 22 of the Queensland State Transport Act 1938-1981.

26 1987 NZ Parliamentary Debates 6722.

27 In May 1976 the National Government's Minister of Labour, the Hon Peter Gordon, threatened to invoke the Public Safety Conservation Act during the electricity workers' rent dispute, and in December 1982, Prime Minister Muldoon announced that he was prepared to invoke the Act during the Marsden Point dispute (see 1982 NZ Parliamentary Debates 5322).

28 Cf Lee supra n 24 at 5, and "The National Security Interest and Civil Liberties" (1972) 85 Harv L Rev 1130, 1287.

matters in specific pieces of legislation."[29] The specific type of emergency with which the Act is tailored to deal is, as the title of the Act suggests, an international terrorist emergency. Section 2 of the Act defines it as a situation in which any person is threatening, causing, or attempting to cause serious injury to persons or certain types of property in order to coerce, deter, or intimidate the Government of New Zealand, the government of any other country, or any body or group of persons, whether inside or outside New Zealand, for the purpose of furthering any political aim outside New Zealand.

Many of the emergency powers available to the police under section 10 also can be found in the Civil Defence Act 1983, which empowers the police to evacuate premises and places (section 60), enter premises (section 61), prohibit or restrict public access on roads or public places (section 62), remove vehicles (section 63), and requisition private property (section 64) during a national or civil defence emergency.[30] In addition to these powers, the International Terrorism (Emergency Powers) Act empowers the police to destroy property (section 10(2)(e)), prohibit or restrict land, air, or water traffic (section 10(2)(g)), and interfere with and intercept telephone communications (section 10(3)). Moreover, sections 14(1) and (2) empower the Prime Minister to prohibit or restrict the publication or broadcasting of the identity of any person involved in dealing with an international terrorist emergency and any information relating to the equipment or technique used.

The International Terrorism (Emergency Powers) Act contains a number of checks on the exercise of these powers that accord with current guidelines suggested in the international legal literature on the subject of emergency powers.[31] First, the Ministers, not being fewer than three, who are authorising the exercise of emergency powers must have a reasonable belief in both the existence of an emergency and in the necessity of the exercise of emergency powers to deal with that crisis before those powers can be authorised (section 6(2)).[32] The test here is an objective one and open to judicial review.[33] The same objective test applies to the Prime Minister's powers of censorship under section 14. Second, immediate public notice is required to be given of any authorisation of emergency powers (section 6(5)), and of any notice to suppress information pursuant to section 14 (section 14(4)). Third, the House of Representatives must be immediately

29 1987 NZ Parliamentary Debates 6719.

30 Cf subss 10 (2) (a), (b), (c), (d) and (f) of the International Terrorism (Emergency Powers) Act 1987.

31 See "The National Security Interest and Civil Liberties" supra n 28 at 1288; W L Twining, "Emergency Powers and Criminal Process: The Diplock Report" [1973] Crim L R 406; Lee supra n 24 at 192-194.

32 Cf W L Twining's "minimum invocation principle": "[emergency] powers should be invoked in individual cases only in circumstances where ordinary powers and procedures would be inadequate"; Ibid at 408-409.

33 *Quaere:* s 5 requires the Commissioner of Police to inform the Prime Minister if he believes an emergency is occurring, that the emergency may be an international terrorist emergency, and that emergency powers are or may be necessary to deal with that emergency; in view of the presumed expert judgment of the Commissioner of Police, could the "reasonable grounds" test of s 6(2) be satisfied by simply pleading reliance on those beliefs?

informed of the authorisation of emergency powers, and of the reasons why it was given, if the House is sitting, or otherwise at the earliest practicable opportunity (section 7(1)). Section 8 empowers the House of Representatives to revoke the authority to exercise emergency powers at any time. Section 17(1) requires the Commissioner of Police to make a report to the House of Representatives on the exercise of any emergency powers as soon as practicable after the end of an emergency. Fourth, the Bill sets an upper limit on the duration of international terrorist emergency powers. The initial authorisation is valid for up to seven days (section 6(4)).[34] The House of Representatives (section 7(2)), or the Governor-General, if Parliament has been dissolved or has expired (section 7(3)), can each extend the emergency period by no more than seven days. If, however, the emergency ends short of that further period of seven days, the authorisation given by the House of Representatives or, as the case may be, the Governor-General to extend the exercise of emergency powers ceases to be of effect (section 7(5)). The longest possible duration of emergency powers is therefore fourteen days in the aggregate (section 7(4)).[35] The Prime Minister's power to suppress any information concerning the emergency under section 14 is limited to a maximum period of six years (section 15(3) and (4)). Fifth, there is minimum derogation from citizens' ordinary rights.[36] All of the emergency powers exercisable by the police under section 10 are restricted to the area in which the emergency is occurring. Section 10(2)(e) requires the police to act on reasonable grounds when destroying property which constitutes a danger to any person. Section 10(3) authorises the police to interfere with or intercept telephone communications only if it is for the purpose of preserving life threatened by the emergency; section 18 prohibits the disclosure of intercepted private communications otherwise than in the performance of one's duty; and section 20 provides for the inadmissibility of such communications as evidence of an offence not related to the international terrorist emergency. The Prime Minister's power to suppress information under section 14(1) and (2) is limited to the identity of any person involved in dealing with an international terrorist emergency and any information relating to the equipment or technique used, but only if publication or broadcasting of that information would be "likely" to endanger the safety of any person or prejudice measures designed to deal with international terrorist emergencies, respectively. Any notice given by the Prime Minister to suppress information expires one year after it is issued (section 15(3)), and it can only be renewed, for up to five years, if it is "necessary" to protect the safety of any person or avoid prejudice to

34 It is curious, however, that although an authorisation to exercise emergency powers expires prior to the end of that seven day period if the Commissioner of Police is satisfied that the emergency is not an international terrorist emergency (s 6(4)(a)), such an authorisation does not similarly expire if the Prime Minister is so satisfied.

35 Unless, of course, a fresh notice authorising emergency powers is issued by the Ministers pursuant to s 6.

36 Cf W L Twining's "minimum derogation principle": "emergency powers authorised by law should involve derogation to the minimum extent strictly necessitated by the exigencies of a given emergency"; supra n 31 at 408-409.

measures intended to deal with international terrorist emergencies (section 15(4)).[37]

With regard to the purpose of the Act, "to make better provision to deal with international terrorist emergencies", it will be necessary to examine provisions to deal with such crises that existed prior to the enactment of the legislation. These fall into four categories: legislation, common law, the royal prerogative, and the doctrine of martial law.

(a) Legislation

All of the emergency powers exercisable under the International Terrorism (Emergency Powers) Act could have been authorised equally by way of Proclamation under the Public Safety Conservation Act. That Act could be viewed as making better provision against international terrorist emergencies in that additional emergency powers were available to meet exigencies not provided for under the International Terrorism (Emergency Powers) Act. The present legislation, however, can be regarded as making better provision for international terrorist emergencies in that emergency powers are already delineated. The police presumably are acquainted with the scope of these powers, with the result that less time will need to be spent on briefing them on these matters if an international terrorist emergency actually arises. The making of "better provision" to deal with such emergencies also can be viewed as having to it a political aspect, for surely in a liberal democracy it is undesirable to hand over to the Executive the power to make emergency regulations, the extent and manner of exercise of which are unknown to its citizens until their actual promulgation in each instance.

Providing for international terrorist emergency powers by regulation under section 79 of the Civil Defence Act 1983 would have the same shortcomings as were noted with respect to the Public Safety Conservation Act. In addition, reliance on the Civil Defence Act for the exercise of these powers would invite uncertainty as to the application of that Act, for the Governor-General is there empowered to make emergency regulations "for the purpose of securing the public safety and generally safeguarding the interests of the public during any state of national or civil defence emergency". The definition of "national emergency" in section 2 covers an "actual or imminent warlike act whether directed against New Zealand or not, whereby loss of life or injury or distress to persons or danger to the safety of the public is caused or threatened to be caused in New Zealand." An international terrorist emergency may not constitute a "national emergency" if terrorism is not construed as a warlike act, or if the terrorist emergency occurs beyond the territorial limits of New Zealand, such as on a ship or aircraft. Similarly, the definition of "civil defence

37 Similarly, details concerning the personnel, techniques, and equipment of the police anti-terrorist squad are not available to the public, and it is highly unlikely that such information would be obtainable under the Official Information Act 1982. Section 6(c) of that Act provides that good reason for withholding official information exists if the availability of that information would be likely "to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences".

emergency" in section 2 of the Act may not be sufficiently wide to cover an international terrorist emergency. A "civil defence emergency" is defined as "a situation (not attributable to any warlike act) that causes or may cause loss of life or injury or distress or in any way endangers or may endanger the safety of the public . . ." in New Zealand.[38] This definition, while allowing for the exercise of emergency powers should terrorism not be construed as a warlike act, also precludes extra-territorial application.

(b) Common Law

The nature and scope of common law powers to deal with international terrorist emergencies is fraught with uncertainty. It is highly doubtful whether a clear and acceptable framework for dealing with such emergencies is available under the common law. Emergency powers may be invoked under the doctrine of necessity, embodied in the widesweeping but uninformative maxims *salus populi suprema lex est* ("the safety of the people is the highest law"), *salus rei publicae est suprema lex* ("the safety of the state is the highest law"), and *id quod aliter non est licitum, necessitas licitum facit* ("that which otherwise is not lawful, necessity make lawful"). In addition, at common law every citizen has the duty to assist the civil power in enforcing the peace.[39] For the ordinary citizen, assistance in the context of an international terrorist emergency may simply mean co-operating with the police.

(c) Royal Prerogative

Uncertainty also overshadows the use of the royal prerogative to deal with international terrorist emergencies. A V Dicey defined the prerogative as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown".[40] Much of this authority relates to war emergencies. If an international terrorist emergency can be construed as an invasion or warlike act, the war prerogative may be available. The courts, while acknowledged to have the power to determine the existence and ambit of the prerogative,[41] will not inquire into the manner in which an already established prerogative power is used.[42] H P Lee has observed, however, that:[43]

> The traditional dichotomy between the existence of a prerogative and its manner of use is losing much of its credibility. The distinction can be a sham for it all depends on how tightly the prerogative is stated.

38 Cf the definition of "civil defence" in s 2.

39 See David Bonner, *Emergency Powers in Peacetime* (1985) 9; Michael Supperstone, *Brownlie's Law of Public Order and National Security* (2nd ed 1981) 210; and *Manual of Military Law* (UK) Pt II, s V, para 2.

40 *An Introduction to the Study of the Law of the Constitution* (10th ed 1971) 424, referred to with approval by Lord Dunedin in *Attorney-General* v *De Keyser's Royal Hotel Ltd* [1920] AC 508, 526.

41 Cf *The Case of Proclamations* [1611] 12 Co Rep 74.

42 Cf *Darnel's Case* [1627] 3 St Tr 1; *Chandler* v *Director of Public Prosecutions* [1964] AC 763.

43 Supra n 24 at 43. Cf *Attorney-General* v *De Keyser's Royal Hotel Ltd* supra n 40.

In *Laker Airways Ltd* v *Department of Trade,* Lord Denning suggested obiter that the courts may be able to exercise still another form of control over the prerogative:[44]

> The law does not interfere with the proper exercise of the discretion . . . but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution.

This viewpoint, however, has been disapproved of as being excessively wide by the House of Lords in *Gouriet* v *Union of Post Office Workers,*[45] and more recently in *Council of Civil Service Unions* v *Minister for the Civil Service.*[46]

Yet more uncertainty surrounds the use of prerogative powers in emergencies not amounting to a war emergency. Dicta by Viscount Radcliffe in *Burmah Oil Co Ltd* v *Lord Advocate* provide some authority for the proposition that the prerogative may be exercised to deal with a "sudden and extreme" emergency which imperils public safety. He stated that:[47]

> There is no need to say that the imminence or outbreak of war was the only circumstance in which that prerogative could be invoked. Riot, pestilence and conflagration might well be other circumstances; but without much more recorded history of unchallenged exercises of such a prerogative I do not think that for present purposes we need say more than that the outbreak or imminence of war, provided that it carried with it the threat of imminent invasion or attack, did arm the Crown with what may be called the war prerogative.

In the same judgment he went on to observe that:[48]

> The essence of a prerogative power, if one follows out Locke's thought, is not merely to administer the existing law — there is no need for any prerogative to execute the law — but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.

Viscount Radcliffe's obiter remarks suggest that the circumstances in which the prerogative might justifiably be exercised would have to be on such a scale as to pose a serious danger to society as a whole, or a significant portion thereof. Yet some would see a role for the prerogative as an appropriate last stopgap measure against the more limited threat posed by terrorist emergencies. After the military were called out to Heathrow Airport in 1974 to search for surface-to-air missiles during a terrorist threat, for example, the editor of the *Criminal Law Review* commented:[49]

44 [1977] 1 QB 643, 705; cf *Gouriet* v *Union of Post Office Workers* [1977] 1 QB 729, 758 (CA).

45 [1978] AC 435, 483 per Lord Wilberforce, 487 per Viscount Dilhorne, 505 per Lord Edmond-Davies.

46 [1985] AC 374, 416 per Lord Roskill.

47 [1965] AC 75, 115.

48 Ibid at 118.

49 [1974] Crim L R 141; cf A W Bradley (ed) in E C S Wade and G Godfrey Phillips, *Constitutional and Administrative Law* (9th ed 1977) 238.

> If on a future occasion the legal powers of police and soldier prove inadequate, reliance may, in the last resort, have to be placed on the Royal Prerogative governing emergencies. That power, with its requirements of compensation, may provide an acceptable means of filling in gaps in statutory and common law powers.

(d) Martial Law

Martial law takes several different forms.[50] The one that is relevant to the present context is "the right to use force against force within the realm in order to suppress civil disorder", as R F V Heuston has defined it.[51] This use of force may be exercised by the military or by the civil authorities, and the particular danger this form of martial law is intended to meet, and where it differs from the common law obligation of citizens to enforce the peace, is that of "actual war, or of insurrection, riot or rebellion amounting to war".[52]

Invocation of martial law to handle international terrorist emergencies would be highly unsatisfactory for a number of reasons, not the least of which is the uncertainty of the doctrine's scope. As is apparent from the description of martial law proffered above, whether or not terrorist actions amount to war is uncertain and may depend on the nature or scale of the particular emergency in question. Uncertainty also surrounds the basis of the doctrine. Although perhaps not making much of a difference for practical purposes, some hold that martial law stems from the royal prerogative, while the dominant view is that it has its basis in the common law doctrine of necessity.[53] Uncertainty also exists as to the powers and, once order has been restored, the legal liabilities of those functioning under the doctrine. In *R* v *Nelson and Brand,* Cockburn C J remarked that "Martial law when applied to the civilian is no law at all, but a shadowy, uncertain, precarious something, depending entirely on the conscience, or rather on the despotic and arbitrary will of those who administer it."[54] Recourse cannot be had to the courts, for under the doctrine the courts have no jurisdiction once they are satisfied that a state of war does in fact exist.[55] Once martial law has been lifted, civil proceedings may be undertaken, but it is unclear whether the authorities' defence lies in strict necessity, or in a bona fide belief in the necessity of the action taken.[56] It is customary for Parliament to pass an Act of Indemnity to protect those functioning under martial law, but the extent of protection will depend on its terms.

50 See Lee supra n 24 at 211-214; Harry Street and Rodney Brazier, *de Smith's Constitutional and Administrative Law* (9th ed 1983) 511-513.

51 *Essays in Constitutional Law* (2nd ed 1964) 151.

52 8 *Halsbury's Laws of England* (9th ed) para 982. Cf Harold M Bowman, "Martial Law and the English Constitution" (1916) 15 Michigan L Rev 93 n 43.

53 See *Halsbury's Laws of England* supra n 52 para 982 and nn 11-12; Frederick Pollock, "What is Martial Law?" (1902) 18 LQR 152, 153; Cyril Dodd, "The Case of Marais" (1902) 18 LQR 143, 145; Dicey supra n 40 at 290; Lee supra n 24 at 215-216.

54 [1867] 9 Cockburn Sp Rep 59, 86.

55 See Supperstone supra n 39 at 216; cf Bonner supra n 39 at 51-52. See *Ex p Marais* [1902] AC 109; *Tilonko* v *Attorney-General for Natal* [1907] AC 93; *R* v *Allen* [1921] 2 I R 241.

56 Supperstone supra n 39 at 216.

In addition to the many uncertainties entailed by resort to the doctrine of martial law, there are powerful policy reasons for not invoking it during an international terrorist emergency. First, it is constitutionally preferable that emergency powers be defined and conferred by statute if Parliament is still in existence during the emergency. This has been the practice in Great Britain, where martial law has not been invoked since 1800.[57] Second, martial law smacks of totalitarianism and the oppressiveness of a *junta;* it would mar New Zealand's international standing. Third, the imposition of martial law would not only suggest to the international community that the government had lost control, but it would undermine the confidence of its own citizens in their government.

For both the practical and policy reasons offered above, then, the International Terrorism (Emergency Powers) Act can indeed be viewed as making "better provision" for dealing with international terrorist emergencies than existed prior to its enactment.

2 *The Defence Amendment Act 1987*

In consequence of the repeal of the Public Safety Conservation Act, the Defence Amendment Act provides for the amendment of the Defence Act 1971 by the repeal of section 79(2) (section 2) and the addition of section 79A (section 3). Section 79A(1) empowers the Executive to authorise military assistance to the civil power in emergencies where any person is threatening, causing, or attempting to cause serious injury to persons or property.

This amendment is clearly intended, in part, to act as a safeguard against abuse of the unfettered discretion to use the armed forces to perform any "public service" granted the Executive under section 79(1) of the Defence Act. The safeguards instituted by the amendment accord with the recommendations made by Justice Hope in Australia in the wake of the constitutional controversy surrounding the 1978 "Bowral affair",[58] when Prime Minister Malcolm Fraser called out the army to provide security after a bomb was detonated at the Sydney Hilton Hotel just hours before a Commonwealth Heads of Government Regional Meeting.[59] First, section 79A(1) requires a formal authorisation by the Executive for military assistance to the police. The objective existence of an emergency is a condition precedent to any such authorisation and as such is open to judicial review. In addition, section 79A(2) requires that before any such authorisation can be made, information must be provided by the Commissioner of Police to satisfy the Executive that military assistance to the police is necessary. Second, section 79A(5) requires that the House of Representatives be informed immediately of any authorisation, or, if it is not sitting, at the earliest practicable opportunity. Third, section 79A(3) provides that the military shall "act at, and in accordance with, the request of the member

57 Ibid at 214.

58 These recommendations were made in *Protective Security Review* (1979) ch 10.

59 On the controversy surrounding the legal basis upon which Prime Minister Fraser acted, see A R Blackshield, "The Siege of Bowral: The Legal Issues" (1978) 4 Pacific Defence Reporter 6.

of the Police who is in charge of operations in respect of that emergency", and section 79A(4) provides that when members of the armed forces are acting in accordance with a police request given under subsection (3), they are to be treated as if they were members of the police for the purposes of civil and criminal liability. These provisions satisfy the requirements of Justice Hope's "most satisfactory safeguard" in that they make explicit the primacy of the civil power, the limits that are placed on the armed forces' actions, and their obligations and responsibilities during emergencies.[60] Fourth, section 79A(6) sets an upper limit of fourteen days for the validity of any authorisation, unless either the House of Representatives extends that authority by resolution (section 79A(6)(a)) or, if Parliament has been dissolved or has expired, the Governor-General extends that authority by Proclamation (section 79A(6)(b)). In the latter event the Governor-General must be satisfied that it is necessary to so extend that authority.

By statutorily clarifying the nature and extent of the military's powers in emergencies caused or threatened by human agency, and by putting safeguards on the exercise of those powers, the Defence Amendment Act makes provisions that are both consistent with democratic values and effective in removing the uncertainties that existed prior to its enactment. Reliance on the royal prerogative or martial law for military assistance to the civil power would have raised the same shortcomings as were noted earlier in discussion of emergency provisions without the International Terrorism (Emergency Powers) Act.

At common law, the soldier has the same obligations as the ordinary citizen. The British *Manual of Military Law* defines these obligations as follows:[61]

> [F]irst, . . . every citizen is bound to come to the aid of the civil power when the civil power requires his assistance to enforce law and order and secondly, . . . to enforce law and order no one is allowed to use more force than is necessary.

In New Zealand, the common law has been replaced in part by statutory provisions of the Crimes Act 1961. Aside from several sections which relate specifically to riot (sections 43-47), the soldier, like any ordinary citizen, is protected from civil and criminal liability if, after witnessing a breach of the peace, he interferes to prevent its continuance or renewal, provided that no more force than necessary is used (section 42), and if he acts in defence of himself or another, provided that the force used is reasonable in the circumstances as he believes them to be (section 48 as amended by the Crimes Amendment Act 1980). Reliance on these provisions alone would lead to uncertainty as to the ambit of the soldiers' powers and functions. Does "breach of the peace" apply to circumstances other than

60 *Protective Security Review* supra n 58 at 174-175.

61 Pt II s V para 2; cf the British *Report of the Select Committee on the Featherstone Riots* (c 7234) 1893 Parl Papers vol 17, 381; *Report of the Proceedings of the Select Committee on the Employment of Military in the Case of Disturbances* (HC 236) 1908 Parl Papers vol 7, 365.

riots, and does it include the threat of serious property damage?[62] Can a soldier stop and search suspects, or is he liable to actions for assault and false imprisonment?[63] The Defence Amendment Act obviates such uncertainties by placing the military under the supervision of the police and giving them the same powers, and obligations, as have the police.[64]

The Defence Amendment Act serves not only to make clear the position of the military when it is acting in assistance to the civil power in certain emergencies, but it also makes the rules governing such assistance more accessible by placing them together in one appropriate piece of legislation, the Defence Act 1971. Prior to the enactment of the Defence Amendment Act, such statutory provisions as existed had, as Captain Deane observed, "to be derived from a complex of largely unrelated statements in the Defence Act 1971, the Crimes Act 1961, the Public Safety Conservation Act, and the Civil Defence Act 1983".[65]

III Conclusion: The Emergency Powers Legislation And Civil Liberties

In *Conway* v *Rimmer,* Lord Pearce made the rather poetic observation that "[t]he flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings".[66] Indeed, resort to the exercise of emergency powers by a government may constitute a necessary evil for the greater public good. It is, at any rate, recognised as acceptable practice in various international conventions, so long as it complies with certain minimum standards. Article 4(1) of the United Nations Covenant on Civil and Political Rights 1966, for example, provides that:[67]

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

62 Glanville Williams has noted the lack of any authoritative definition of "breach of the peace" and expressed doubt as to whether the concept embraces the threat of property damage: "Arrest for Breach of the Peace" [1954] Crim L R 578, 579. Supperstone suggests that "the definition may vary according to the functional context", supra n 39 at 2. The context in the Crimes Act is clearly that of riot; cf ss 86-91 of that Act.

63 Cf Lee supra n 24 at 247.

64 This accords with Justice Hope's recommendation in *Protective Security Review* supra n 58 at 171, 173, and App 19; cf s 239 of the Canadian National Defence Act 1950.

65 Supra n 5 at 266. The relevant section of the Civil Defence Act 1983, s 84(2), which pertained to ss 2 and 4(1) of the Public Safety Conservation Act, was repealed by s 2(d) of the Public Safety Conservation Act Repeal Act.

66 [1968] AC 910, 982.

67 Cf Art 15(1) of the European Convention on Human Rights 1950 and Art 27(1) of the American Convention on Human Rights 1969. The phrase "other public emergency threatening the life of the nation" in the former was defined by the Court of the Council of Europe as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed": *Lawless* v *Ireland* [1961] 1 EHRR 15 at para 28.

Authorisation of emergency powers per se, then, is not objectionable by international standards. The acceptability of such powers from a civil libertarian standpoint, however, depends on the extent of such powers, how they are exercised, and what checks have been put into place to act as safeguards against abuse.

When introducing the International Terrorism (Emergency Powers) Bill, Prime Minister Lange stated that:[68]

> It removes from the Executive the hitherto wide and dangerously ill-defined powers, the existence of which threatens the very values and democratic ethos of a society they were designed to protect.

Although the Government has apparently been scrupulous in instituting safeguards against the abuse of the extraordinary powers conferred under the new legislation, it is still a fair question to ask whether or not it has succeeded. The Bill attracted nine submissions to the Justice and Law Reform Committee, eight of which were from organisations, and all were concerned with the provisions relating to international terrorist emergencies. In particular, the submissions referred to the difficulty of drafting a suitable definition of "international terrorist emergency". The Human Rights Commission, for example, noted that "the provisions in the Bill could be abused by being used or threatened in relation to legitimate domestic protest", and observed that "it may be almost impossible to draft a suitable definition".[69]

The latter points were well taken, and indeed, the Minister of Justice remarked that the issue of definition was "perhaps the most debated aspect of the Bills during the Committee stage".[70] When he had earlier stressed the strengths of "umbrella-type" emergency powers legislation, Sir Robert Muldoon observed that:[71]

> When a Government attempts to write more precise [emergency] legislation aimed at a very limited evil, it always finds that it is extremely difficult to draft . . . . The legislation becomes clumsy.

The definition of "international terrorist emergency" in the International Terrorism (Emergency Powers) Act is at the same time both excessively wide and too narrow. As it stands, the definition suffers from at least four weaknesses.

First, in the absence of a separate definition of "emergency" in section 2, it is both unclear and overly broad in setting out what would constitute an "emergency" for the purposes of sections 5 and 6(2). These sections run as follows:

> 5. Where the Commissioner of Police believes –
> (a) That an emergency is occurring; and
> (b) That the emergency may be an international terrorist emergency; and

68 1987 NZ Parliamentary Debates 6722.
69 See "Terrorism Bill 'threat to human rights'," *Otago Daily Times,* 16 April 1987, 5.
70 1987 NZ Parliamentary Debates, 10511.
71 Ibid at 6722.

(c) That the exercise of emergency powers is or may be necessary to deal with that emergency, –

the Commissioner shall forthwith inform the Prime Minister that such an emergency is believed to be occurring and that it is or may be necessary to exercise emergency powers.

6. (2) The Ministers of the Crown, not being fewer than 3, present at the meeting held pursuant to subsection (1) of this section may, if they believe, on reasonable grounds –

(a) That an emergency is occurring; and

(b) That the emergency may be an international terrorist emergency; and

(c) That the exercise of emergency powers is necessary to deal with that emergency, –

by notice in writing signed by the Minister of the Crown presiding at the meeting, authorise the exercise, by the Police, of emergency powers.

The two sections necessarily leave one to resort to picking apart the definition of "international terrorist emergency" in section 2 to arrive at precisely what the "emergency" component of the definition is. Section 2 defines an "international terrorist emergency" as follows:

a situation in which any person is threatening, causing, or attempting to cause –

(a) The death of, or serious injury or serious harm to, any person or persons; or

(b) The destruction of, or serious damage or serious injury to, –

(i) Any premises, building, erection, structure, installation, or road; or

(ii) Any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle; or

(iii) Any natural feature which is of such beauty, uniqueness, or scientific, economic, or cultural importance that its preservation from destruction, damage or injury is in the national insterest; or

(iv) Any chattel of any kind which is of significant historical, archaeological, scientific, cultural, literary or artistic value or importance; or

(v) Any animal –

in order to coerce, deter, or intimidate –

(c) The Government of New Zealand, or any agency of the Government of New Zealand; or

(d) The Government of any other country, or any agency of the Government of any other country; or

(e) Any body or group of persons, whether inside or outside New Zealand, –

for the purpose of furthering, outside New Zealand, any political aim.

Accordingly, an "emergency" would be a situation where any person is threatening, causing, or attempting to cause serious harm to persons or certain types of property. Comparison of this definition with the definition of "emergency" in section 79A(1) of the Defence Act, however, which provides for the rendering of military assistance to the civil power, produces an anomaly. That section makes no provision for the authorisation of extraordinary police powers, even though the definition of "emergency" there (as a situation in which any person is threatening or causing serious harm to persons or property) is essentially similar to that found in the International Terrorism (Emergency Powers) Act, the principal differences being in the latter's limitations in regard to the nature of the property affected and the particular purpose for which the criminal act is being undertaken.

The "emergency" component in the definition of "international terrorist emergency", then, is drafted too broadly since it embraces situations in which emergency powers would not ordinarily be available. The Inter-

national Terrorism (Emergency Powers) Act is ostensibly aimed at a peculiarly narrow type of emergency; nevertheless, as the definition of "emergency" for the purposes of sections 5 and 6(2) stands, it need not be established that the emergency in question is in fact a terrorist emergency, let alone an international terrorist emergency. The role that the term "emergency" assumes in the Act suggests that the legislation imperfectly balances two distinct competing interests: on the one hand it is aimed at a narrowly defined species of emergency, while on the other it seeks to provide for sufficient flexibility to enable a hair-trigger response to an emergency that may or may not be that specific type of emergency.

Second, the difficulty of definition becomes particularly acute when one deals with a term such as "terrorism", which is emotionally-charged and poorly suited to being treated as a term of art. The meaning of "terrorism", as suggested by the word's etymology, would appear to depend entirely on both its effect and whom it affects. A terrorist act is generally one that is calculated to strike fear into innocent persons.[72] It is therefore hardly surprising that a satisfactory statutory definition of "terrorism" has yet to be devised inasmuch as most criminal acts can be viewed as having the effect of frightening their innocent victims. One indication of the difficulty is the fact that there is no corresponding provision for a crime of "terrorism", with its own penalties, in current New Zealand legislation.[73]

Under the scheme of the Act, however, the political component of the criminal act constitutes the essence of terrorism. The definition of "international terrorism", which, again, must be arrived at by picking apart the definition of "international terrorist emergency", is the use of violence to coerce, deter, or intimidate the Government of New Zealand, the government of any other country, or any body or group of persons, whether inside or outside New Zealand, for the purpose of furthering any political aim outside New Zealand.[74] If "terrorism" is the use of violence for political purposes, however, not all violence used to further political purposes is necessarily "terrorism". For example, the appellation "terrorist" inappropriately describes, except by way of pejorative, a protester whose rally has disintegrated into violence.[75] Moreover, some offences may be simply

72 Cf the definition of "terrorism" in s 14(1) of the Prevention of Terrorism (Temporary Provisions) Act 1976 (UK) and s 31(1) of the Northern Ireland (Temporary Provisions) Act 1984: "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear".

73 S 8 of the New Zealand Crimes (Internationally Protected Persons and Hostages) Act 1980 however, does provide for the crime of hostage-taking.

74 This definition is apparently based in part on the definition of "terrorism" in s 2(1) of the New Zealand Security Intelligence Service Act 1969 as amended in 1977:
"Terrorism" means planning, threatening, using, or attempting to use violence to coerce, deter, or intimidate –
(a) the lawful authority of the State in New Zealand; or
(b) the community throughout New Zealand or in any area in New Zealand
for the purpose of furthering any political aim.

75 Cf Harry Street, "The Prevention of Terrorism (Temporary Provisions) Act 1974" [1975] Crim L R 192, 197; Colin Warbrick, "The European Convention on Human Rights and the Prevention of Terrorism" (1983) 32 ICLQ 82.

treasonous or seditious.[76] Some political aims, such as disarmament and aboriginal rights, may have an international aspect to them that could be potentially caught under the Act. Indeed, in his report for the Justice and Law Reform Committee, the Government MP for Hamilton East, Mr Bill Dillon, conceded that:[77]

> A more precise definition that makes a distinction between foreign and domestically motivated activity has proved elusive, despite lengthy consideration both before and after the introduction of the Bill.

The definition of "terrorism" in the Act is therefore overly broad in that it potentially embraces a wide range of circumstances unified only by the existence of a political aim that can be construed as extending outside New Zealand.

Third, the evil against which the International Terrorism (Emergency Powers) Act is aimed is manifestly narrow. It seems illogical that two acts that are identical, save that one is intended to further a political aim outside New Zealand, should be treated differently, and that extraordinary police powers should be deemed necessary to cope with the one, but not the other. This somewhat xenophobic illogicality appears to stem from the Government's desire to combat "terrorism of a foreign kind, because on a 'clear and present danger test', that is where the risk lies", according to Mr Bill Dillon,[78] while at the same time striving to narrow the powers so as "not [to] destroy civil liberties by being extended to people who are entirely New Zealanders", as Mr Richard Northey explained.[79]

Furthermore, the emergency powers provided for under the Act can "be triggered", as the Opposition MP for Rotorua, Mr Paul East, noted, "in relatively trivial circumstances."[80] He went on to contend that:

> [T]hose powers cannot be used in some of the most serious circumstances that can be envisaged in New Zealand, and I refer particularly to instances of terrorism that do not have an object outside New Zealand, such as terrorism within New Zealand, the object of which is to overthrow the lawfully elected Government. No matter how widespread that terrorism may become the Government will be unable to use the powers contained in the legislation . . . .

Finally, the definition of "terrorism" in the Act, like legislation of its kind elsewhere, is overly broad in the sense that it fails to draw a distinction between the terrorists against whom the legislation is ostensibly aimed, and those whom society charges with combating them, namely the police

76 Cf ss 73 and 81 of the Crimes Act 1961.

77 1987 NZ Parliamentary Debates 9347. The New Zealand Law Society was concerned that the definition might not cover foreign terrorists' activities in aid of domestic political causes. Mr Richard Northey, Government MP for Eden, however, stated (ibid 9349-9350) that: "[T]he select committee received clear advice from experienced people that if overseas terrorists were in New Zealand supporting an internal objective by terrorist methods they would be pursuing a matter of concern to them and their foreign policy or overseas objectives, and would be clearly caught by the Act."

78 Ibid at 9347.

79 Ibid at 9350.

80 Ibid at 10512.

and the military.[81] Indeed, the authorities' actions may themselves be fairly characterised as "terrorist" according to the Act's own definition, since it covers situations in which any person is acting:[82]

> in order to coerce, deter, or intimidate . . .
> (e) Any body or group of persons, whether inside or outside New Zealand, –
> for the purpose of furthering, outside New Zealand, any political aim.

Since propaganda generally plays a vital role in terrorist aims, definitions of terrorism which are capable of including state actors are ill-conceived in that they actually suit the terrorist's purposes.

The Defence Amendment Act 1987, while instituting safeguards against the Executive's misuse of military assistance to the civil power in certain emergencies, leaves somewhat of a vacuum with regard to other types of emergencies by its repeal of section 79(2) of the Defence Act. The wide discretionary powers conferred on the Executive by section 79(1) to "authorise any part of the Armed Forces to perform any public service capable of being performed by the Armed Forces" remain in place, while section 79A provides a check on only one aspect of that discretion. Confined as it is to emergencies in which

> any person is threatening, causing, or attempting to cause –
> (a) The death of, or serious injury or serious harm to, any person or persons; or
> (b) The destruction of, or serious damage or serious injury to, any property –

section 79A(1) leaves a gap that had been filled by the Public Safety Conservation Act, which by its very existence set a standard against which the Executive's use of the military in certain situations could be measured. The Amendment allows for greater flexibility in the Executive's use of the military in circumstances not falling within the definition of "emergency" in section 79A(1) of the Defence Act, yet which might well have fallen under the repealed section 79(2), dependent as it was on section 2(1) of the Public Safety Conservation Act. The scope of section 2(1) of the Public Safety Conservation Act was somewhat wider than section 79A(1) of the Defence Act, since it covered:

> any action . . . taken or . . . immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light or with the means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life, or . . . any circumstances [that] exist, or are likely to come into existence, whereby the public safety or public order is or is likely to be imperilled . . . .

For example, if there were ever to be serious or widespread industrial action as there was in 1951, the Executive could authorise the military to

81 Cf Bonner supra n 39 at 102; Warbrick supra n 75 at 82.

82 One is tempted to speculate that the sinking of the *Rainbow Warrior* had its influence here, for this part of the definition would clearly cover the Greenpeace organisation. Unhappily, it also ostensibly covers terrorist groups.