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Overseeing New Zealand's modern military operations

Rhys Ball and Wil Hoverd discuss the implications for democracy and national security of the deployment of special operations forces.

'The integrity of the Defence Forces is too important not to investigate this fully and properly...' (Barry Coates MP, 8 August 2017)¹

New Zealand has had an active special operations force since 1956. It has been deployed to places such as Malaya, Borneo, East Timor and, more recently, Afghanistan. This article outlines how New Zealand's special operations forces might continue to contribute to the interests of the state by engaging in a broader discussion about this country's national security and the relationship between democracy and the military in light of the recent 'Hit and Run' allegations.

Politics and New Zealand special forces have been indirect and direct bedfellows in one form or another since the creation of this military force over 60 years ago. New Zealand's special forces have progressively expanded their capabilities, influence and strategic footprint thanks in large part to operationally successful campaigns and a higher public profile (think Corporal Willie Apiata VC). And when the former New Zealand Prime Minister John Key publicly describes the New Zealand Special Air Service (NZSAS) as 'the Ferrari of the New Zealand military', as he did in 2016, we can perhaps deduce the perceived political value that such a force generates in a wider national security sense.²

But in early April 2017, Prime Minister Bill English gave a press conference³ where he responded to a call for an official inquiry into the allegations of war crimes made against NZSAS operations in 2010 as they were documented in the book *Hit & Run* written by investigative journalists Nicky Hager and Jon Stephenson.⁴ English considered that, after receiving a 'detailed briefing' from Chief of Defence Force Lieutenant-General Tim Keating, including official reports and classified video footage, 'there was no basis for launching an inquiry'. In response to this announce-



New Zealand SAS troops in Afghanistan

ment, Hager wrote that the decision was 'the result of military pressure on the government: the tail wagging the dog' and was 'not good for the country'. Hager added:

Bill English is an experienced minister who knows the difference between being shown selective information by an interested party, as he has been by the defence force, and having an independent inquiry. This does not appear [to be] a rational decision based on evidence; it is helping the military bureaucracy to avoid having to front up.⁵

In this article, our purpose is not to argue that one or other party is correct or that another is lying; rather it is our intention to focus upon the broader issues this debate has raised in thinking about democratic governance, public accountability and the role of the military now and in the future. This most recent set of allegations perhaps points to the fragility of New Zealand's democratic processes around military deployment and action. Specifically, we review our constitutional structure for deployment and show that the executive decision-making power to deploy and act militarily continues to rest in the hands of only a few people. Finally we suggest that as New Zealand's military deployments move away from a paradigm of mandated United Nations deployments towards ever-increasing participation with traditional partners, it might be a useful exercise to consider if there is a possible role for an independent oversight mechanism to make our deployment procedures and activities more robust.

Constitutional accountability

Militaries deploy to conflict as an extension of the executive

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New Zealand's special operations forces continue to make a valuable contribution to this country's national security. However, in light of the recent 'Hit and Run' allegations, and the prime minister's response, there is a possible fragility of New Zealand's democratic processes around military deployment. A review of New Zealand's constitutional structure for making such commitments indicates that the executive power to act militarily continues to rest in the hands of only a few people. In the circumstances, it might be an opportune moment to consider a possible role for an independent oversight mechanism to make procedures more robust and transparent.

power of a nation. New Zealand has no formal constitution; consequently, executive authority tends to be derived from a series of acts of Parliament and other documents. When it comes to defence, the relevant document is the Defence Act 1990, which explains that the governor-general, on behalf of the sovereign, is responsible 'for continuing to raise and maintain armed forces, either in New Zealand or elsewhere for the following purposes:

- (a) 'the defence of New Zealand, and of any area for the defence of which New Zealand is responsible under any Act;
- (b) the protection of the interests of New Zealand, whether in New Zealand or elsewhere;
- (c) the contribution of forces under collective security treaties, agreements, or arrangements'.⁶

In Section 6 the governor-general is deemed to be the commander-in-chief of New Zealand, and 'shall have such powers and may exercise and discharge such duties and obligations relating to any armed forces raised and maintained under Section 5 as pertain to the office of Commander-in-Chief'. In Section 7 the general responsibility of the minister of defence is outlined 'in relation to the defence of New Zealand, where the Minister shall have the power of control of the New Zealand Defence Force, which shall be exercised through the Chief of Defence Force'. The role of the chief of defence force is set out in Section 8.3:

- The Chief of Defence Force shall — (a) command the Navy through the Chief of Navy, the Army through the Chief of Army, and the Air Force through the Chief of Air Force: and (b) command any joint force either directly through the joint force commander or through the Chief of any Service.

Under the Defence Act 1990, the responsibility for deployment of the NZDF is handed to the three offices of governor-general, minister of defence and chief of defence force. However, what is not exactly clear in the Act are the roles and responsibilities of Parliament and the prime minister when it comes to military deployment and action, which means we need to look to historical precedent.

The decision to establish the NZSAS was made at, or following, the Commonwealth Prime Ministers' Conference in London in February 1955, in response to a British request that New Zealand send an infantry battalion to Malaya. Prime Minister Sidney Holland refused, saying that New Zealand's Korean War commitments limited his ability to do so; instead, he counter-offered with the SAS. Interestingly, the NZSAS did not exist at this time. Holland's decision to create the SAS was ultimately successful — militarily, politically and diplomatically — and laid an essential foundation for subsequent post-Second World War service by New Zealand regular army units. For much of this time, decisions were considered and made behind closed doors; genuine democratic input was next to non-existent and certainly there was no broader mechanism to consider and debate defence and foreign policy commitments and contributions.

Flexible tool

Scholars Eliot Cohen and Colin Gray both posit that special operations forces offer a strategically flexible foreign policy tool that is much less costly, both financially and politically, than a much larger deployment. Such an 'economy of force' has been consistently demonstrated by the NZSAS — certainly this was the case during the top secret CLARET operations in Borneo in 1965. CLARET operations were not only risky from a military perspective but also politically sensitive. Neither the United Kingdom,

the Commonwealth nor Malaysia were technically at war with Indonesia and it was important that they not appear to escalate the conflict. The then Prime Minister Keith Holyoake was initially reluctant to allow the NZSAS to operate inside Indonesian territory. Officials convinced him, however, that the strategic value of deployment would far outweigh the 'risk of political embarrassment, [both] domestic and international', if any soldiers were discovered across the border.⁷

The SAS operations in Borneo thus became a politically safer instrument of choice, at a time when — it must be noted — international coalition operations could not be observed or viewed by external commentators and domestic populations in the same way that they can be now in the 21st century. Would the public of today be so tolerant and accepting of NZSAS operations that clearly breached international law? CLARET cross-border operations were just that: illegal incursions into sovereign territory. And would New Zealand governments today be willing to allow similar activity to take place, without any national authority coming from Wellington? The answer is 'possibly', if we are to consider more recent activity.⁸

In a more contemporary setting, when it comes to deploying the NZDF abroad, there remains no requirement for parliamentary consent, but it has been common practice for a parliamentary debate to occur before or after the announcement of any deployment. This occurred, for example, in advance of UN-mandated deployments to the Persian Gulf in 1990, Bosnia–Herzegovina 1994, East Timor 1999 and the Solomon Islands 2003, as well as non-mandated deployments to Afghanistan 2001 and Iraq 1998, 2003 and 2014. This practice is similar to that of Australia, Canada and the United Kingdom, where there is no legal requirement to have parliamentary consent to deploy abroad, but in the United Kingdom it has become a convention to seek parliamentary consent for such purposes.⁹

All of New Zealand's military deployments have been announced by the prime minister of the time, generally with the support of Cabinet and the minister of defence.¹⁰ So what exactly is the role of the prime minister in this process? The New Zealand Cabinet Manual section 2.11 states that 'The Prime Minister customarily has overall ministerial responsibility for national security and intelligence matters, and may also hold other portfolios.'¹¹ In addition, the manual in section 2.3 states that

The Prime Minister is the head of the government. The functions and powers of the Prime Minister have evolved over time. There is no statutory provision that constitutes the office of Prime Minister or defines its role.

Nevertheless, the prime minister's role when it comes to national security extends to oversight of the minister of defence, thereby theoretically adding a fourth office to the decision-making layers around military deployments and action.

Potential weakness

Terry Johanson has recently contested the robustness of having the prime minister making decisions about national security because this person is not elected for expertise in this area.¹² For Johanson, the prime minister represents a potential weakness in New Zealand's national security system for two reasons. First, they lack the relevant security expertise and, second, the executive power of the office of the prime minister can override the democratic processes of the government's national security mechanisms. In light of the *Hit & Run* controversy, we would add a third and fourth

concern. Third, when it comes to determining the veracity of the *Hit & Run* allegations the prime minister acts as oversight for the NZDF, as well as retaining the executive power for its deployment; fourth, the only oversight of the prime minister's judgment is coming from investigative journalists, who likely do not have a full picture of the truth, and neither do they present a formal independent democratic oversight mechanism.

What happens when the powers of executive offices are brought into question? By only having four offices involved in the decision-making process our system could possibly be democratically fragile. Let us turn to Hager and Stephenson and how they portray the democratic decision-making process that they reconstructed around the NZSAS operations in question. To paraphrase, they portray the August 2010 decision-making process as follows: they note that the NZSAS operation fell within their rules of engagement but that its scale required that the then Chief of Defence Force Jerry Mataparae and then Minister of Defence Wayne Mapp should be briefed; they then in turn both felt that responsibility for authorising such an operation should go to Prime Minister John Key. Together they rang Key from Afghanistan and in response Key gave a 'greenlight' to the specific action to go ahead.¹³ Before we shift to analyse this process, some caveats are required. While we do not know how accurate this reconstruction might be, we can likely infer that the prime minister's decision was made very quickly, and his 'greenlight' was almost completely reliant on the expertise and leadership of the CDF. That executive office responsible for giving permission for the operation in 2010 is essentially the same office that has investigated possible wrongdoing now in 2017.

A consequence of *Hit & Run* is that a picture of democratic defence decision-making emerges that contains potential conflicts of interest. And this process becomes fragile when the integrity of the actors and offices are brought into question. This is especially so when we see how close the 2010 personalities are to those doing the investigating in 2017. The closeness means that there is potential for a perceived conflict of interest. Consequently, in 2017 English and the CDF, Tim Keating, are vulnerable to having trust, integrity and confidence in their decisions further challenged.

Integrity questioned

What Hager and Stephenson have achieved is to question the integrity of our democratic processes and effectively to lessen public trust and confidence in these offices. And if they are correct, they are right to do so. However, because we cannot discern complete truth in this case, today, the New Zealand public have to trust the word of the prime minister and the CDF when they state that there is no need for an inquiry. Our current democratic processes mean that we have to *trust*, rather than be fully certain, that these experts are acting independently and with full knowledge of the facts. Hager and Stephenson and the executive's responses to their allegations have resulted in a 'he said, she said' situation. And herein lies the democratic fragility: the New Zealand public has been asked to trust the NZDF, trust their decision-making and trust that they are indeed accountable to the prime minister; currently, we have to be content that there has been no misconduct, because the alternative is unthinkable.

When we look elsewhere, this question presents itself both locally and beyond, and both militarily and within a wider national debate. In May 2017, former prime minister and constitutional lawyer Sir Geoffrey Palmer also criticised the robustness of New

Zealand's democratic processes because the government has increasingly failed to provide transparency or consult with the public around its decision-making and has actively withheld information. All of which, he argues effectively, lessens trust in political offices and alienates the public.¹⁴ More specifically, we see that allegations into the alleged cover-up of war crimes in Afghanistan are not unique to New Zealand, with three Canadian cases being investigated and in 2010 Canadian Prime Minister Stephen Harper being accused of suspending Parliament rather than releasing testimony and documents related to the investigations.¹⁵ Similarly, in July 2017 the United Kingdom opposition leader Jeremy Corbyn has called for an independent inquiry to examine 'whether the probe into alleged SAS "war crimes" had been deliberately impeded by the Ministry of Defence'.¹⁶ In these cases, public scrutiny, trust and confidence in the existing oversight and accountability mechanisms have also been brought into question.

Ultimately, if we decide to continue to maintain our support for a rules-based international system, and demonstrate our willingness to be a responsible global citizen, we need an agile military, but we also need to have trust and confidence that the executive's defence decisions are robust and act in the best interests of New Zealanders. A national security system which allows for both outcomes is essential. This is especially so when we move into an era where we might not always act within UN mandates, but rather are deploying at the request of our allies. As such, part of this shift also means we need to actively consider whether we need stronger domestic democratic mechanisms to ensure that New Zealand's overseas military actions and deployments are just and responsible.

Oversight question

Do we need better oversight mechanisms? Colin Gray suggests that from a geopolitical standpoint, small-scale is extremely important as it 'reduces the radar signature of involvement'.¹⁷ This small-scale can offer deniability, but more importantly it can equate to a reduced public interest. It can be argued that in the past this has enabled New Zealand governments to offer credible military resources to coalition partners and strategic allies with minimal domestic interest. The NZSAS created in 1955 was an example of this low key, small-scale contribution achieving certain strategic objectives. A generation later, the deployments to Afghanistan, which began in 2001, have enabled consecutive administrations to provide a credible military contribution, even if a much larger and significant domestic debate about the deployment of New Zealand troops overseas now takes place.

Beyond their economic utility, Gray also suggests that the typical circumstances of special operations, as well as their purposes, generally involve significant risk.¹⁸ Fine; from a tactical perspective, special operations are high risk because as a general rule they operate in a high risk or hostile (for example, behind enemy lines) environment. Similarly, because they are small-scale, they are unlikely to have support (such as back-up forces or transport for extraction) if they get into 'trouble'. This presents operational risk and — especially relevant here — political risk when things go wrong. And in a globalised world, when we can see and hear much more than ever before, how we consider and manage this space is worth thinking about a little more.

The *Hit & Run* discussion prompts the question: do we need an oversight mechanism for the prime minister and the military?¹⁹ The question of independent national security oversight is

not without recent precedent in New Zealand, as it arose in the intelligence domain after it was found that in 2012, amongst a variety of allegations, the Government Communications Security Bureau was illegally spying on New Zealanders.²⁰ In 2013, the consequences of these findings resulted in the expansion of oversight powers for the independent inspector-general of intelligence and security;²¹ they also led to Prime Minister John Key divesting the traditional prime ministerial responsibility for intelligence to a new ministerial portfolio,²² the restructuring of personnel structures and leaders in our intelligence sector²³ and the commissioning of an independent review of intelligence and security (the Cullen–Reddy Report), which ultimately led to the recently passed Security and Intelligence Act 2017.²⁴ When it came to considering the oversight of New Zealand’s intelligence community, the 2016 Cullen–Reddy Report found as follows:

Our central conclusion is that there should be a single, integrated and comprehensive Act of Parliament that lays out in plain English how the agencies are constituted; what their purposes are; how all their intelligence and security activities are authorised; and how they are overseen so as to protect those freedoms and liberties that are part of what we are as a nation.

The Act should state clearly that its fundamental purpose is the protection of New Zealand as a free, open and democratic society. That then becomes the guiding principle by which the activities of the agencies must be undertaken and judged.²⁵

Likely continuance

At this stage, it is not clear that there is a requirement for wholesale change to the Defence Act or that a formal oversight mechanism would be regularly needed. The current system of prime ministerial and CDF oversight, which is democratically fragile and fraught with trust and conflict of interest issues because it operates on an ad hoc basis, likely will remain unchallenged for the time being; at least until the next time it is tested, as it was by *Hit & Run*.²⁶ If such a challenge were to occur, it is likely a proper conversation about the benefits and limitations of defence oversight mechanisms would be necessary. Certainly, we cannot afford to have any individual party or parties, be they two investigative journalists or others, bring the integrity of the whole decision-making system into question because there is an absence of democratically adequate and acceptable oversight.

But neither is it reasonable to burden ourselves with unwieldy and extraneous multi-layered oversight mechanisms that would potentially paralyse the NZD; nor is it necessary to introduce wholesale constitutional changes to the Defence Act based on a single event. Such an event has potential implications at the highest level; the implications and consequences ‘ripple out’ within New Zealand and further afield. Adequate oversight protects democratic institutions, citizenry and freedoms as much as it protects the very elements of the state — like special operations forces — that we are asking to carry out these roles in our name. How this is considered needs to be very carefully discussed and resolved to the satisfaction of all parties of this democratic state. And there is no better time than the present.

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