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FROM HIJACKINGS TO RIGHT-WING EXTREMISM: THE DRIVERS OF NEW ZEALAND'S COUNTERTERRORISM LEGISLATION 1977 - 2020

Sheridan Webb[1]

New Zealand is currently faced with the need to address extensive recommendations from the recently completed report of the Royal Commission of Inquiry into the terrorist attack on the Christchurch masjidain on 15 March 2019 (RCOI). The RCOI was not tasked with reviewing New Zealand's terrorism legislation, but it has commented among its recommendations on the need for relevant national security legislation that is fit-for-purpose and empowers and resources security services appropriately. This paper outlines New Zealand's counter terrorism legislative chronology, exposing historic themes of slow law making, political disinterest and reactive and incomplete solutions. If New Zealand is to address the RCOI recommendations, it will need to break with previous approaches to legislating terrorism and boldly pursue a new more proactive narrative.

Keywords: Terrorism, Counter Terrorism, International Terrorism (Emergency Powers) Act, Terrorism Suppression Act, Christchurch terror attack, Terrorism Suppression (Control Orders) Bill, Foreign Terrorist Fighters

Introduction

In November 2020, the release of the highly-anticipated report of the Royal Commission of Inquiry into the terrorist attack on the Christchurch masjidain on 15 March 2019 (RCOI) reenergised government focus on countering violent extremism. This article seeks to historically contextualise the legislative status quo ahead of what may be wider

1 Sheridan Webb completed her Master of International Security through the Centre of Defence and Security Studies, Massey University in 2020, her dissertation formed the basis of this article. Sheridan would like to acknowledge Dr. John Battersby for his astute supervision of this dissertation and his enthusiastic support for its inclusion in the *National Security Journal* Women and Security issue.

reform efforts, and in so doing, assist informing those efforts. It does this through focusing on what has driven past change and development in New Zealand's legislation that relates directly to terrorism. It chronologically analyses New Zealand's approach to legislating against terrorism across five key periods: (1) the original establishment of formal counterterrorism machinery commencing in 1977, (2) New Zealand's response to the *Rainbow Warrior* bombing in 1985, (3) the attacks of 11 September 2001 (9/11) and the development of the Terrorism Suppression Act 2002, (4) the rise of Islamic State of Iraq and the Levant (ISIL/IS/ISIS or Daesh) and the emergence of the foreign terrorist fighter issue, and (5) the reaction to domestic right-wing extremism and the threat posed by returning foreign terrorist fighters after ISIL's reverses from 2017. This study finds that New Zealand's legislation is highly reactive, driven by the need to fulfil international obligations and responses after the fact to significant events. The government legislative approach is underscored by a lack of appetite to consistently review and revitalise its legislation to ensure it meets developing challenges and a sense of complacency towards the risk of terrorism. Despite ongoing distractions stemming from COVID-19, opportunities for change are afoot. The question now becomes whether the New Zealand Government will turn over a new leaf in its counterterrorism effort, or whether it will continue to shy away from the work required to make meaningful change.

Methodology

The approach taken here has been to locate and access documentary records held at Archives New Zealand or from relevant government agencies relating to terrorism legislation and to subject them to critical analysis, isolating themes relating to impetus and rationale for change (or inertia), as well as the nature and process of actual legislative development since a start date of 1977. The key types of documents include Cabinet Committee communications, reporting from the Ministry of Foreign Affairs and Trade (MFAT), Select Committee Reports, draft bills from Parliamentary Counsel Office (PCO) and Hansard. At Archives New Zealand, holdings were identified by using the search terms 'terrorism,' 'terrorist,' and 'violent extremism.' Files that were identified and classified as 'unrestricted' were worked through chronologically. Relevant documents released after 2007 have been found online and are publicly available.

To analyse the drivers of change in New Zealand's legislative approach to terrorism, findings have been grouped chronologically into five key phases. These phases are determined primarily by significant domestic or international events, so that approaches to legislating terrorism can be assessed as a bi-partisan issue, where the contributions of both National and Labour-led Governments to the status quo are considered in terms of the challenges they confronted. The start date of 1977 marks the first formal decision by New Zealand to consider the need to address the problem of terrorism.

The role of the United Nations in the development of an international CT framework

The United Nations (UN) has over time carved itself a central role in the development of an international counterterrorism (CT) regime. Between the rise in popularity of air hijackings in the 1960s and the new millennium, the United Nations General Assembly (UNGA) developed a series of conventions that addressed specific terrorist offending. These conventions called on signatories to suppress certain terrorist acts, to criminalise such offending in domestic legislation, and to provide the means to prosecute or extradite terrorists.[1] During UN CT negotiations in the 1970s, the definition of terrorism emerged as the key polarising issue, as states were divided on who could "use force without being described as a terrorist."[2] To date, no definition has been internationally agreed upon and key multilateral agreements, such as the Comprehensive Convention on International Terrorism, remain unresolved.

Following 9/11, the United Nations Security Council (UNSC) issued a series of binding decisions under Chapter Seven of the UN Charter. Chapter Seven empowers the UNSC to act with respect to "threats to the peace, breach of the peace, or acts of aggression", where they can "make recommendations, or decide what measures shall be taken … to maintain or restore international peace and security."[3] These resolutions differed from earlier approaches, as they obliged all UN member states to prevent and prosecute terrorism by virtue of the state's signatory to the UN Charter. The UNSC has subsequently built a framework through these decisions, where states, international organisations and non-state actors have reinforcing roles.[4] However, in pursuing a "pervasive and top-down law-making" approach, the UNSC straddles the line between being an active implementer of international law and overstepping into states' domestic legislative processes.[5] The key constitutional concern relates to whether binding Chapter Seven resolutions intrude on state sovereignty, as while states agreed to be bound by decisions of the UNSC when becoming a party to the UN Charter, "it could hardly have been intended" that the UNSC would hold such influence on states' treaty-making processes and the implementation of domestic CT legislation.[6]

With respect to the definition of terrorism following 9/11, the UNSC has sidestepped the issue; no resolution has attempted to define it. Instead, the UNSC has strived to set international norms, pressing member states to implement domestic legal frameworks with offences that ensure that individuals or groups that finance, plan, prepare or perpetrate terrorist acts are brought to justice.[7] To satisfy these UNSC resolutions, states have had to develop their own definitions of a terrorist act. UNSC resolution 1373 (adopted in the wake of 9/11) is of particular importance as it required states to report on the steps taken to progress these obligations after 90 days of its adoption. The first tranche of domestic CT law changes in several countries was consequently rapid, reactive and rushed.

Perception of terrorism in New Zealand

New Zealanders have naively overlooked domestic deliberate and planned violence that coincided with increased political messaging and activism since the 1970s.[8] Whilst the sinking of the *Rainbow Warrior* sticks out,[9] activist violence, a foiled Ananda Marga plot in 1975, bombings at the NZ Police Computer Centre in 1982, the Wellington Trades Hall in 1984, and the hijacking of an Air New Zealand flight in 1987, are not well remembered in the collective consciousness of New Zealanders.[10] Post 9/11, New Zealand managed to avoid the rise in transnational and home-grown jihadi plots that emerged in Australia.[11] However, contemporary domestic cases of potential terrorism such as Operation Eight (in which a range of activists were involved in apparent training camps) and the 2014 threat by a lone actor to contaminate baby formula unless the use of 1080 ceased, have, according to Battersby, been effectively granted "invisibility in law" due to the inability to charge what were arguably terrorist acts under the Terrorism Suppression Act 2002.[12] Through being prosecuted under existing criminal law, potential terrorist events have resonated less with the public.[13] The media deemed the Christchurch mosques attacks as the "end of New Zealand's innocence."[14] Battersby argues New Zealanders were simply caught off-guard due to a faded collective memory of a chequered terrorist past,[15] given that New Zealand has had a "lengthy history of autonomous actors, mostly unconnected to each other, thoroughly exploiting our complacency."[16] This historic illiteracy, has led to the public collectively holding an erroneous perception of little or no domestic terrorism prior to the Christchurch attacks.

New Zealand has been described as being a "fast follower" and "assiduous" in implementing international terrorism obligations.[17] In order to ensure compliance as quickly as possible, Parliament has at times explicitly used international obligations to justify the manipulation of legislative processes or expedited them under urgency.[18] Outside of this context, New Zealand governments have historically lacked appetite to engage with CT legislation. Practitioners have experienced frustration over perceived complacency; progress on domestic CT matters has been considered "glacial" and required "enormous political capital" in a low threat environment, as terrorism has been largely perceived as a foreign threat.[19] Terry Johannsen suggests that the structural control of the national security discourse by the Prime Minister prevents a 'sub-discourse' from robustly challenging views within the ODESC system.[20] It has been argued in New Zealand that there is no need for specific legislation to address terrorism and that the criminal law is sufficient. But many other countries have felt the need to do so, not just to prosecute offenders but to empower security agencies to intercept or prevent terrorist acts from occurring. UNSC resolutions also tend toward an expectation that specific legislation to address terrorism will be enacted. This article explores New Zealand's experience of specific terrorism-oriented legislation.

1977 – 1984: Establishment of formal operational and legislative frameworks

The formal beginnings of New Zealand's CT machinery reside in a report dated 5 May 1977, which responds to a verbal request for advice by Prime Minister Robert Muldoon.[21] The Prime Minister's Department assessed that New Zealand was not immune from the risk of terrorism and that there was an urgent "need for preparation"; [22]

> so far it [terrorism] has not hit New Zealand but it could do so. Indeed, the increasing effectiveness of preventative security measures now undertaken in Europe and elsewhere could encourage terrorist groups to look to other parts of the western community where security arrangements have not been so well developed.[23]

In practice, police and intelligence agencies had already forged ahead with precautionary measures, having focused strategic attention on international terrorism and begun tightening airport security and training specialist squads.[24] MFAT's coverage of terrorism also predate the report, noting that negotiations at the UN were already stalemating. In 1978, the issue was described as already having "a somewhat chequered history."[25] Attention was therefore focused on establishing leadership arrangements that secured the cooperation of government agencies, and clearly assigned responsibilities in emergency situations.[26] A number of groups were established; notably, the Cabinet Committee on Terrorism (CCOT) and the Officials Committee on Terrorism (OCOT) were formed to lead New Zealand's policy response, and the Terrorist Intelligence Centre (TIC)[27] was tasked with developing a research capability that could continually assess the threat of terrorism as part of the New Zealand Security Intelligence Service (NZSIS).[28] These foundational documents reveal that operationally, New Zealand has always taken a pragmatic approach to terrorism, but from its outset, the policy response has been playing catch up.

The TIC assessments from 1978 and 1979 set a precedent as to tone; while New Zealand could never be free from risk, the risk that it did carry was lower than other states. In a report on hostage situations, the TIC introduced terrorism as being "so world-wide that no country can be regarded as immune from some form of terrorist activity."[29] However, it concluded that "New Zealand is fortunate in that, apart from its geographical isolation, it nurtures no infrastructure of currently operating international terrorist groups with which to link in the organisation of a sophisticated and carefully planned terrorist attack."[30] Similarly, in January 1979, the TIC advised that if a risk did present itself, the abovementioned precautionary measures, legal confirmation that Defence could support Police in terrorist incidents, and media coverage of operational capabilities went,

> part of the way in serving as a deterrent to possible terrorist incursions into New Zealand. Whilst many countries have taken precautions to oppose terrorism, few are better prepared to deal with terrorist incidents than New Zealand.[31]

These free and frank discussions infer that the risk of terrorism has always been considered remote and one that could be managed through visible CT structures.

By the end of 1979, officials appeared comfortable that New Zealand was performing at a high-level internationally. However, a critical report assessing New Zealand's state of readiness adjusted this perception in September 1982.[32] In this report Prime Minister Muldoon noted that New Zealand did not have powers that could control the media in an emergency situation. This was prompted by the Prince's Gate operation in London, where the media's coverage of the Iranian Embassy siege by gunmen from the Democratic Revolutionary Front for the Liberation of Arabistan almost revealed the operational tactics used by the police to the terrorists.[33] The report concluded that in a terrorist emergency, government would only have sufficient emergency response powers if they chose to invoke the Public Safety Conservation Act 1932 (PSCA). However, the PSCA was described as cumbersome, heavy-handed, and required the Governor-General to declare a state of emergency, which could be legally challenged.[34] Controversially, under the PSCA, once a state of emergency was announced, the Executive could enact any regulation that ensured "public safety and order and the life of the community."[35] Even then however, the powers available were deficient in regards to media censorship.

Officials considered "there was a need for a widely drafted purpose-built Act,"[36] and were directed to prepare legislative proposals as a matter of priority:

> There was a degree of urgency in preparing this legislation because of the Executive's knowledge that it was not adequately prepared for a major terrorist incident until such legislative authority was held (coupled with the planning, machinery, and personnel already in place).[37]

Also of note, the challenges inherent in defining terrorism were officially acknowledged for the first time; "there may be some difficulty in defining 'the trigger mechanisms' that would be required to be in place" for the emergency powers to be used.[38] In the report, the CCOT requested an assessment of the likelihood of an attack in New Zealand in September 1982. Officials responded,

> A considered opinion was that there was a "very low" probability of any act of terrorism taking place on NZ soil. … Up until 1977 officials would have judged this country as being a "soft target" for terrorists. … By strategically releasing general outlines of the fact that New Zealand was

> able to counter a terrorist incident, without specific details of operational capabilities, this acted as a deterrent to terrorists selecting this country as a target.[39]

By the end of Muldoon's term, New Zealand's CT efforts had stalled; legislative needs appeared wanting, but the domestic context was not seen as sufficient to justify change. Consequently, no draft proposals were progressed before the 1984 election.

1984 – 1999: The Rainbow Warrior and International Terrorism (Emergency Powers) Act

There is little evidence of interest in terrorism by the David Lange-led government, which came to power in 1984, until the sinking of the Greenpeace flagship *Rainbow Warrior* in Auckland Harbour. The attack by French Secret Service agents on 10 July 1985 required the government to invoke the PSCA for the first time in 36 years - the very piece of legislation that Labour had promised to repeal in its election campaign.[40] A week following the attack, the Prime Minister's Department acknowledged that "the nature of the threat has diversified and is more likely to involve New Zealand. We must be able to cope with a greater number of more sophisticated possibilities."[41] These possibilities included hostage situations, kidnappings, bombings, assassinations and economic sabotage.[42] There was a political 'need' to repeal the PSCA, however, the legislative problem was that the Civil Defence Act 1983 (CDA) "contained a definition of national emergencies which did not include terrorist acts." Although it did not eventuate, it was proposed the CDA be amended to include the definition of terrorism contained in the NZSIS Act 1969. This definition is of note given it captured inchoate offences; "planning, threatening, using or attempting to use violence to coerce, deter, or intimidate" the government or community for political aims.[43] Interestingly, while media coverage did not appear to impact the *Rainbow Warrior* operation, the CCOT was at this point advised of the "very limited powers to control information disseminated by the media during a terrorist emergency" that had previously captured Prime Minister Muldoon's attention.[44]

On 10 October, the Prime Minister's Department recommended Cabinet "reaffirm New Zealand's commitment to the struggle against international terrorism" through taking "an active role in the international arena on the question of terrorism."[45] Cabinet committed, New Zealand acceded to and ratified numerous UN Conventions, endorsed the guiding principles of the European Community on State Terrorism and Abuse of Diplomatic Immunity, urgently updated New Zealand's extradition treaties and legislation, and ensured other domestic practices surrounding the apprehension of offenders were responsive to the international legal environment.[46] The Prime Minister David Lange considered that "while New Zealand has been reasonably active on terrorism issues at relevant international meetings, there is scope for further improvement."[47] While there

is not space here to discuss New Zealand's interactions on the *Rainbow Warrior* incident in detail, statements made at the UN,[48] the 1985 criminal prosecutions of the two agents who were caught, the UN Secretary-General's 1986 ruling to settle bilateral issues between New Zealand and France,[49] and the subsequent 1990 UN arbitration arrangement concerning the fate of the imprisoned agents were the source of much criticism of the Lange Government.[50]

Within this fraught context, the International Terrorism (Emergency Powers) Bill 1987 was developed. In the Bill's third reading, Deputy Prime Minister Geoffrey Palmer stated that the Bill was intended to replace the PSCA, and that "there should be no misunderstanding that the Bill is aimed at anything other than internationally motivated terrorism, because it is becoming increasingly evident that that is where the danger from terrorism lies."[51] The Labour-led government was clearly hesitant to consider the possibility of domestic terrorism due to concern that discourse would encompass domestic protest, especially since the 1981 Springbok Tour protests (which Labour generally supported) were still a recent memory. Finally in response to overwhelming opposition to media censorship provisions, the Government "decided to rely on voluntary censorship rather than compulsory censorship."[52] This was despite control over the media being the key concern of officials.[53] The very limited development that emerged as the International Terrorism (Emergency Powers) Act in 1987 was therefore primarily motivated by the desire to be seen as acting definitively on terrorism, particularly as public opinion on the handling of the *Rainbow Warrior* began to sour. The period can be seen as important as witnessing a previous theoretical threat into a genuinely tangible one. In 2005, reflecting back on the *Rainbow Warrior* incident, Geoffrey Palmer recalled "it was the end of innocence" for New Zealand.[54] Despite this, little had actually changed legislatively. Only 4 years after the International Terrorism (Emergency Powers) Act was passed, the Law Commission recommended its repeal, in favour of general policing powers.[55] The Act has never been used.

1999 – 2008: 9-11 and the Terrorism Suppression Act

Under the Helen Clark Labour-led government, New Zealand began its second foray into terrorism specific legislation with the Terrorism (Bombings and Financing) Bill. As the name suggests, the Bill was borne from international conventions that aimed to suppress the financing of terrorism and terrorist bombings.[56] Previously, UN conventions had been implemented through an Order in Council under the United Nations Act 1946, however stand-alone legislation was preferred as the financing convention was "the first in a new breed of conventions" that built upon the existence of nine situation-specific conventions.[57] These conventions also required serious penalties which would be inappropriate to implement via a regulations process.[58] The Bill was intro-

duced on April 17 2001,[59] received no public submissions, and notwithstanding one issue raised by the Regulations Review Committee, only minor stylistic changes were requested ahead of its second reading in August.[60]

The 9/11 terrorist attacks drastically pivoted the international approach to terrorism. New Zealand's initial response was to take stock, with the Select Committee officially deferring the Terrorism (Bombings and Finance) Bill on 13 September 2001.[61] On 26 September, MFAT advised that it was "very appropriate and highly desirable for New Zealand itself to proceed quickly with enactment of the Bill in order to underline our own strong condemnation of international terrorism and commitment to the framework of international anti-terrorist conventions" and that early action "would not preclude further long-term initiatives."[62] The adoption of UNSC Resolution 1373 on 28 September resulted in a wider range of legislative options being considered, particularly those that were achievable within Resolution 1373's 90 day reporting timeframe. "Because the requirements of this resolution were within the scope of the original Bill, the Select Committee at the request of the Government agreed to incorporate them in the legislation," transforming the Bombings and Financing Bill into the Terrorism Suppression Act (TSA) 2002.[63] New Zealand's first, and only, genuine attempt at defining terrorism is found in Section 5. While Select Committee received 144 public submissions on proposed amendments,[64] the TSA passed on 8 October 2002 with a majority of 97 votes.[65]

The development of the TSA is the clearest example of New Zealand's legislation reacting to proximate events and being driven by international obligations. There are five points from the TSA drafting process to highlight: Firstly, in the 25 October 2001 draft, PCO had expressly included "planning" within the definition of "a terrorist act". Clause 5(5) would have read;

> there is some carrying out of an act for the purposes of subsection 2(b) if any 1 or more of the following occurs: (a) planning or other preparations to carry out the act: (b) a threat to carry out the act: (c) an attempt to carry out the act: (d) the carrying out of the act.[66]

However, this clause was removed in the next available version, dated the 6 November 2001.[67] Secondly, the TSA was considered an "urgent preliminary measure," where further "supplementing"[68] legislation would be required "to give full effect" to the UN resolution.[69] The TSA had been drafted with international obligations in mind, however the Ministry of Justice (Justice) characterised the subsequent 2003 Counter Terrorism (CT) Bill amendments as being the "result of a wide-ranging review by government agencies of offence and penalty provisions and investigative powers that was conducted in the months following 11 September, to identify potential gaps that might be ex-

ploited by terrorists."[70] Officials recommended that the Select Committee for the CT Bill not relitigate issues from the TSA process unless policy had become inconsistent. Officials also acknowledged that the Bill included some offences that were not required by international law.[71] The CT Bill received 24 public submissions before passing on 21 October 2003.[72]

Thirdly, while MFAT was the lead agency for the TSA, Justice took on a joint lead role for subsequent legislative developments. Any critique on the appropriateness of MFAT leading on criminal justice provisions was somewhat mitigated by Justice's involvement in the CT Bill, which was based on a comprehensive review and had an express mandate to correct the TSA if required. Fourthly, officials recommended the inclusion of a sunset or review provision for aspects of the TSA that related to the implementation of UNSC resolution 1373.[73] Section 70 consequently required government to review and report on such provisions by 1 December 2005. Commentary from the CT Bill informs that the review provision's inclusion was largely the consequence of "the problems inherent in trying to define what is meant by [a] terrorist act."[74] This strongly infers that in 2002, Government appreciated the dynamic nature of terrorist threats, the pace in which it was legislating, and that adjustments may be required to ensure the definition was fit-for-purpose. Likely due to the short time-period between the TSA and CT Bill, the definition of terrorism was not considered by the CT Bill, although officials responded to submissions on the issue. They noted that the centrality of a "terrorist act" to UNSC resolution 1373 justified Section 5 of the TSA as it was "difficult, if not impossible, to implement provisions" without a definition.[75] Ultimately however, no amendments to the existing definition of terrorism were recommended in 2003 given that "so far, officials are not aware of any difficulties arising from that definition".[76] Lastly, Justice intended the TSA to function as the principal legislative instrument in relation to terrorist offending; "states are required to make reports on the implementation of UNSC resolution 1373. … It is therefore necessary to ensure that the implementation is done in a way that will withstand expert scrutiny at the international level. Amalgamation with existing criminal law provisions can make the extent of compliance obscure."[77]

The Terrorism Suppression Amendment Bill (No. 2) 2005 was developed for two reasons: Firstly, to ensure compliance with international standards deriving from the Financial Action Task Force on Money Laundering (FATF). [78] Secondly, to provide urgent extensions to terrorist designations which would otherwise expire before the statutory review, thereby contravening international obligations.[79] The Bill was uncontroversial, passing with 97 votes to 10.

The 2005 Review of the TSA largely focused on the designation process and extension procedure at the heart of the No. 2 Act.[80] However, the Review's efficacy is unclear; the analysis of the report was only eight pages long, likely due to time constraints on

Select Committee caused by the urgent No. 2 legislation, the general election, and the requirement to report findings by 1 December 2005. It was also vague; as explained in a concluding draft remark, that was later omitted;

> we have not expressed any concluded view on whether specific provisions in the Act should be retained, repealed or amended. This reflects, in part, the fact that none of these provisions have been used. [81]

Consequently, the Review was criticised by Dr. Alex Conte, Treasa Dunworth and the New Zealand Human Rights Commission (HRC) for not being sufficiently "substantive."[82]

The definition of terrorism was also outside the scope of the 2005 Review; it was only included as an "other issue."[83] While Select Committee requested advice from officials on the appropriateness of the definition, their analysis was peripheral to the Review.[84] Officials did warn that if the UN's Comprehensive Convention on International Terrorism was adopted, despite it remaining deadlocked since 1996, amendments to New Zealand's definition of terrorism would be required ahead of its ratification. This was because the TSA's definition was "slightly more restrictive" than the international narrative in that it requires "an additional element to be satisfied i.e. that it is also carried out for the purpose of advancing an ideological, political or religious cause."[85] Further, this additional element,

> potentially limits New Zealand's compliance with a Convention that we are already party to. … It is possible that New Zealand would be unable to prosecute an offender under the TSA for financing an act that fulfilled the Financing Convention offence provision but where it was not possible to prove that it was "carried out for the purpose of advancing an ideological, political or religious cause."[86]

This issue partly arose in the Review's subsequent legislation, the Terrorism Suppression Amendment Bill (TSAA) 2007. Officials relied on the UK Independent Reviewer of Terrorism Law's assessment of the issue and similarly did not recommend Select Committee remove the additional *mens rea* requirement.[87]

Like the No. 2 Act, the TSAA was also required to maintain compliance with international obligations, where it implemented an amended designation process. However, the Operation-Eight raids on 15 October 2007, greatly changed the narrative of the Bill. In Operation-Eight, Police raided and arrested a group of left-wing and Māori activists who were conducting armed military-style training and indicated they wished to prosecute perpetrators under the TSA. On 8 November, the Solicitor-General (SG) denied permission and communicated that the TSA was inadequate;

> "I have concluded the legislation is unnecessarily complex, incoherent, and as a result, impossible to apply to the domestic circumstances…. I am of the view that at this stage there is insufficient evidence to establish the very high standard required that a group or entity was planning or preparing to commit a terrorist act as that term is defined in the legislation. "[88]

The central issue with New Zealand's definition is that, effectively, for 'a terrorist act' to have occurred, it must physically be carried out.[89] It is unlikely that planning or threatening to carry out a terrorist act could evidentially satisfy the standards of the Act, and as a consequence, using general criminal law for the prosecution of lesser offences has provided greater certainty to law enforcement and justice agencies.[90] Further, in this New Zealand appears to be in breach of international obligations, as Article 2(d) and (e) of UNSC resolution 1373 requires the prevention, enforcement and prosecution of inchoate terrorist offending.

On the same day that SG David Collins delivered his pointed comments, the TSAA began its third reading. The following four excerpts from ensuing debate revealed awareness of problems with the TSA:[91] (1) Winston Peters, the Minister of Foreign Affairs, acknowledged that the Act "will obviously need further improvement" while moving the Bill to be read. (2) National MP John Hayes prioritised New Zealand's compliance with international law;

> In an ideal world I would say that the smart thing to do is to put this legislation on ice while we go back and study the SG's report … [however] the reality is that we are up against a deadline. We have to pass this legislation … because if we do not, we will be the only country out of about 196 countries that has signed up to this legislation [convention] through the UN, but has not put it into effect.

(3) National MP Murray McCully criticised the Government's contributions, despite supporting the Bill generally;

> The SG has used the word "incoherent" to describe some provisions of the Act, and at least implied that if Parliament was attempting to legislate against domestic terrorism then it failed. … If the threat of domestic terrorism was not on Parliament's mind back in 2002, the question that now arises is whether recent events should cause this Parliament to have such a threat on its mind today.

(4) Green MP Keith Locke, who voted against the Bill, referred to expected Law Commission Review;

> There is now an agreement, and I welcome it, by the Attorney-General and the Solicitor-General to review the Terrorism Suppression Act. … I am glad that at last we are having a review of that unjust Act.

A result of the Urewera raids was legal and bi-partisan political recognition that the TSA required further amendment, particularly with respect to domestic terrorism. Despite this, the TSAA passed with 108 votes to 13 on 13 November 2007 and the Law Commission's review of the TSA was deferred until the Operation-Eight judicial proceedings had been completed[92] There is no further evidence of CT reform efforts in the remaining period of the Labour's term, which was diverted by the Global Financial Crisis (GFC). The TSA remains essentially unchanged today.

Ultimately, critique on the TSA is mixed, but for the most part critical although reasons for the criticism vary. The creation of a separate regime to the general criminal law has been fiercely criticised as "unjustified" from a legal perspective. [93] Matthew Palmer submitted that motive, a key component of New Zealand's definition on terrorism, "is not a factor that justifies the creation of a separate offence; instead, it is a factor relevant to sentence".[94] This is a criticism in common with lawyers internationally, with the previous United Kingdom (UK) Independent Reviewer of Terrorism Legislation, Max Hill QC, stating "in an ideal world we wouldn't have specific terror offences."[95] In a piece published the same month as the Christchurch attack, Elana and Andrew Geddis described the TSA as having "virtually no practical effect" other than to provide for an expanding list of terrorist designations, as "its wording has been found seriously wanting."[96] They consider the general criminal law has proved "flexible enough to capture and respond" to examples of terrorist offending. [97] In 2003 John Smith produced a rare positive review, concluding that the TSA "effectively balances international demands, national needs, and individual rights."[98] However, John Battersby, Rhys Ball and Nick Nelson disagree asserting that "controversy has haunted this Act; its definition, design, tautology and application have all been problematic."[99] Battersby argues further, that in failing to act after Operation-Eight, the New Zealand Government squandered "an opportunity and a mandate to address our clear legislative shortcomings and to develop a political understanding of what constitutes terrorism."[100] In practice, the few examples of possible terrorist offending prior to the Christchurch attack have been exclusively addressed through the application of general criminal law provisions. Hesitation by police to test the application of the TSA on less conclusive or possible inchoate terrorist offending has contributed to this reality.

2008 – 2017: Prevention of foreign terrorist fighters

The first term of the John Key National Government largely lacked engagement on terrorism-related matters. Only one significant contribution occurred when Cabinet "refined" the process for "advancing requests to designate non-UN listed terrorist entities," which became operational on 10 February 2010.[101] National Party Members had

expressed "profound concern" at the previous process during the drafting of the TSAA in 2007;

> Given our geographical proximity and relatively open borders, it is simply not credible in our eyes that New Zealand could have made no UN 1373 designations over a period when Australia has designated 88. … Clearly, CT initiatives are being pursued with significantly differing degrees of force and diligence as between this country and Australia. We are forced to the conclusion that New Zealand has been seriously negligent in this respect.[102]

While not a legislative change per se, this designation process for terrorist entities has been the primary function of the TSA until 2019. It is also a rare example of proactive change driven by ongoing engagement with terrorism issues.

The Key Government's second term could be characterised as avoidant. In 2012, the Operation-Eight trials came to a close, however the Law Commission's review of the TSA was dropped from their work programme.[103] Justice Minister Judith Collins explained the review was unnecessary given that,

> the initial concerns arising from the Urewera case have been addressed by the passage of the Search and Surveillance Act 2011, and there does not appear to be any substantial or urgent concerns arising from the operation of the Act.[104]

Collins' comments ultimately miss the point that the SG had refused to charge offenders under the TSA due to clear problems with its wording, which the Search and Surveillance Act did not alleviate. This is of substantial concern as the judiciary was unable to comment on the TSA's inadequacies in the same way it could critique search and surveillance powers. Further, the 'operation' of the TSA could hardly have illuminated any urgent concerns given it had, to date, never been used.

Terrorism became re-prioritised in 2014 with the rise of ISIL and the raising of New Zealand's national threat level from very low to low.[105] A number of notable events occurred in quick succession; (1) The 20 September 2014 election saw the National Party win 60 out of 121 seats.[106] (2) On 24 September, UNSC Resolution 2178 required states to "prevent and suppress the recruiting, organising, transporting or equipping of individuals" who travel to another state for the purpose of terrorism and/or their financing.[107] (3) Shortly after the election, Cabinet requested a review on the interim measures that were needed to address this raised risk ahead of the statutory review on intelligence capabilities.[108] (4) The Countering Terrorist Fighters Legislation omnibus Bill (CTFL) passed with 94 votes to 24, gaining royal assent only 17 days after being introduced on November 25.[109] (5) New Zealand began its term as a non-permanent member of the UNSC in January 2015.

The CTFL is comparable to the TSA as it also directly responds to international obligations and international events. However, while foreign terrorist fighters (FTFs) are intrinsically related to terrorism, the CTFL Bill was strictly focused on intelligence and internal affairs powers, and did not amend the TSA.[110] Government also deferred difficult conversations on the definition of FTFs, through reaffirming the TSA's definition of terrorism and its centrality to New Zealand's approach to terrorism. This can be inferred from the following statement; Hon. Christopher Finlayson commented in the Bill's Second Reading that,

> the question has been raised about whether the term "foreign fighter" requires a definition. The Government's view is that the term does not need a specific definition in the bill. … The definition of "terrorist act" in section 5 of the TSA already provides the definition required. That definition is the core concept on which this legislation relies; adding a definition of "foreign fighter" would be superfluous.[111]

This was asking a lot of a problematic definition that had not been fully reviewed since its inception 18 years previously. It is difficult to imagine a clearer need or opportunity than the emergence of ISIL and UNSC 2178 to review the TSA but this was not taken despite the Key Government's investment in progressing intelligence and security legislation, and that terrorism was the driving force behind the raised national security threat level. But still, the 2012 review of the TSA was not rescheduled. Probably the most obvious sign of the Key Government's disinterest, was that no steps were taken in anticipation of the return of FTFs to New Zealand, and that questions relating to their management and potential prosecution were reserved for subsequent governments. This issue remains urgent, as on 16 February 2021 a dual-national New Zealand woman Suhayra Aden previously associated with ISIS and whose Australian citizenship was revoked, was reportedly apprehended crossing from Syria into Turkey.

2017 – 2020: Right-wing extremists and returning foreign terrorist fighters

The Jacinda Ardern-led Coalition Government has faced two major terrorist challenges in its first term; firstly, New Zealand's most prolific terrorist act, the 15 March 2019 attack on Christchurch mosques, and secondly, the circumstances surrounding returning FTFs. This issue had been largely fuelled by media interest in the potential return of Mark Taylor, a New Zealander jihadi who had travelled to the Syrian conflict and been subsequently captured by Kurdistan forces.[112] The legislative responses driven by these events are well known; New Zealand amended its firearm legislation, passed the Terrorism Suppression (Control Orders) Bill 2019 and set the terms of reference for the RCOI. There has also been a wider policy response, which is out of scope of this assessment, but involves the release of a CT strategy and the Christchurch Call to Action.

There are two noteworthy points relating to legislative change during this period: Firstly, in response to the Christchurch attack, government agreed to a CT Strategy on 10 September 2019. The strategy specifically lists "reviewing and strengthening CT legislation" as a priority of the work programme.[113] This review was already underway by the time the Control Orders Bill was introduced in October 2019. [114] Foreshadowed within the Bill's Regulatory Impact Statement are "potential new and altered terrorism-related offences in the TSA".[115]

Secondly, the Control Orders Act implemented a civil regime that covers returning FTF who are unlikely to satisfy the evidentiary requirements under the TSA or Crimes Act. The Bill obtained royal assent on 19 December 2019, having passed with 63 votes to 56. It had been criticised as being singly responsive to the possible return of Taylor, however Andrew Little, the Minister of Justice, contended that a review of terrorism legislation had begun in September 2018.[116] The extent of this 'review' is unclear and there is no evidence to suggest that the focus was wider than on the specific return of FTFs. Golriz Ghahraman asserted, "there's no argument that this was a law that was being drafted and now by chance it will have application to these people." Paul Buchanan said "they've been working on this law reform for a while, but they've been taking their time to get the wording right."[117] It is therefore difficult to characterise the Control Orders Act as proactive legislation, given that it responds to existing obligations, an ongoing situation in the Middle East and a high-risk policy problem inherited from the previous government. Since then, the government had been forced to significantly adjust to meet the needs of COVID-19 and having secured an outright majority in the October 2020 election, the Labour Government is now faced with responding to the findings and recommendations from the Inquiry.

Concluding Discussion

The chronology of events outlined above bring to light five key trends. Firstly, a clear 'trigger and response' relationship exists between international obligations and the development of domestic law relating to terrorism. With the exception of the International Terrorism (Emergency Powers) Act , every other piece of legislation has its roots in UNSC resolutions or conventions. The Control Orders Act could appear distinct given there was a delay between the issuance of obligations and the implementation of the Act. However, this could be little more than the usual lethargy. The Control Orders Act achieves compliance with UNSC resolution 1373 through preventing the safe-havening of terrorists who may otherwise not satisfy the evidentiary requirements of TSA offences. Therefore, no terrorism legislation has been proactively developed in 32 years, unless required in some way by the UN. In respect of the definition of terrorism, the 2005 review indicated that Government was waiting until the UN had negotiated a universal definition before amending the TSA. That outcome seems increasingly unlikely today, and as time has pressed on, the TSA's definition of terrorism carries enhanced

risk. While it is clear that New Zealand takes its participation in the international rules-based system seriously, meeting the minimum requirements of UNSC resolutions has effectively became New Zealand's leading driver of terrorism legislation following 9/11.

Secondly, New Zealand's legislative change is very reactive. If legislation has not been developed in response to UN obligations, it is due to an event of some magnitude. The one exception to New Zealand's reactivity is when a statutory or Cabinet-directed review has been required. John Ip argues that CT legislation is often enacted in the aftermath of terrorist attacks at the executive's demand to reassure the public that terrorism risks have been addressed. [118] An example of this was the International Terrorism (Emergency Powers) Act , while Cabinet directed officials to draft a bill in 1982,it was not until after the 1985 *Rainbow Warrior* bombing that it was progressed. Given the central censorship provisions were watered down to be voluntary however, this legislation is best seen as a 'show' of action rather than of definite substance during a period of significant scrutiny.

In response to 9/11, MFAT advised that it was "highly desirable" to promptly enact the Bombings and Financing Bill to signal New Zealand's strong condemnation of the attack.[119] While the intended audience in this context was the international community, the same rationale applies. Given that progressing CT legislation was not a 2017 Labour campaign promise, the government's response to the Christchurch attacks illustrates clear reactivity. The speed in which this reaction occurred was designed to demonstrate outwardly that the government could act decisively on terrorism matters domestically and internationally. Changes to the Arms Act were quickly implemented – but the historic theme remains, almost 2 years after the 15 March 2019 attacks – there has been no change to the TSA. The Ardern Government is at a cross roads, with considerable time already having passed, and with the COVID-19 pandemic prevailing as the main security concern with massive fiscal implications an important question remains - can it move beyond a mere acceptance in principle of the RCOI's recommendations, or will momentum stall as it has so often before? [120]

Despite the government's rhetoric, the latter outcome is clearly feasible. Brenton Tarrant's guilty plea spared the TSA it's test case in court and Tarrant himself gave up his opportunity to exploit the hearing process in the manner that Anders Brevik did. In meantime, COVID-19 dominates globally, pushing terrorism from international media attention generally, and suppressing what limited interest there has only ever been in New Zealand for proactive change to terrorism legislation. Events subsequent to Operation-Eight provide a precedent for this outcome; in 2007 the SG clearly expressed that the TSA required re-assessment. This position attracted cross-party support and the matter was referred to the Law Commission. While the Operation-Eight trials initially stalled legislative developments, ultimately the GFC dominated government priorities - a very similar situation prevails today. Despite the existence of a Cabinet mandated CT strategy, the strategy received no publicity at its launch in February 2020

and lacks even express personal endorsement of the Prime Minister. [121] While there has been a legislative review of the TSA since 2019, it has been internally done (rather than by the Law Commission), it has not surfaced publicly, makes up one part of a wider work programme, and it's scope is unclear. [122] When considering that New Zealand is on the cusp of a recession on the back of the largest health crisis in living memory, the developments undertaken by the Ardern Government since March 2019, which are quantifiably more than any other government since 2007, could be considered enough in terms of satisfying public expectations, and protecting against reputational damage.

Thirdly, New Zealand governments have successively lacked an appetite to proactively address terrorist issues. This is exemplified by developments in 2003, 2005, and 2007, where select committees and officials were careful not to relitigate issues from previous legislative processes unless there was a clear policy inconsistency. There are also multiple periods where terrorism has fallen off the agenda entirely. There are no Archive New Zealand files between 1990 and 1997 from the Bolger National Government, notwithstanding restricted Defence and MFAT reporting. There is another 'cool' period during the Key National Government, between 2007 and the emergence of ISIL in 2014. Lengthy periods of inactivity reinforce feelings held by practitioners, that enormous effort is required to spark domestic change in a low-threat environment.[123] The cancellation of the 2012 review also indicates a lack of commitment from the Key National-led government to engage on events that occurred before their term. This lack of consistent engagement opens New Zealand up to significant risk. It begs the question as to whether we have appropriate measures in place to ensure that New Zealand is not only maintaining compliance with international obligations, but that our approach is fit for purpose and flexible enough to cover a dynamic terrorist threat.

Fourthly, there is also an emerging trend where CT legislation is being developed separately to the TSA. Despite enormous change in international context, the past two governments have largely avoided the TSA during the development of the CTFL and Control Orders Bills. It is unclear whether the pursuit of such separate and specific legislation has been to enable this disengagement. A consequence of this widening framework is that a review on CT legislation can no longer be limited to merely the TSA, as the Government has to be assured that all legislation is sufficiently linked up. This study has shown that review provisions are a legislative tool that forces proactive action. Following in the footsteps of the UK and Australia and establishing an independent reviewer of terrorism legislation may be a more appropriate method to drive consistent engagement with this expanding framework. During the Control Orders Bill, the Privacy Commissioner noted that the independent reviewers of terrorist legislation provided "important insight and commentary on the legal regime."[124] The RCOI report recommended the establishment of a national intelligence and security agency "to deliver a more systematic approach" to addressing and responding to violent

extremism.[125] This, in partnership with the strengthened HRC mandate, could go part of the way in driving a more proactive approach.[126]

Fifthly, there is an underlying trend of complacency towards terrorism. Initially, the Muldoon-era system considered the strategic publication of its operational readiness transformed New Zealand from a soft target to one "better prepared" than others. This initial assessment was shattered by the *Rainbow Warrior* bombing, with Deputy Prime Minister Geoffrey Palmer reflecting that the sinking was "the end of innocence" for New Zealand.[127] The exact same sentiment was shared by the media following the Christchurch terrorist attack in 2019. This research considers that New Zealanders felt such a collective shock to Christchurch due to decades of lacklustre public messaging. Terrorism has only ever been discussed as an international threat, even the domestic attack on the *Rainbow Warrior* was discussed in international terms due to the involvement of France. Developments between 2001 and 2007 all had 9/11 and UNSC resolution 1373 as driving factors. At the heart of the CTFL and the Control Orders Bill are Foreign Terrorist Fighter's, the key word being 'Foreign', although they are actually domestic – but are 'foreign' to the country in which they're fighting. Even in Prime Minister Key's noted 2014 national security speech, the terrorist risk emanating from ISIL was expressly described as being less for New Zealand than for our neighbours. The ongoing noting of the Christchurch attacker's Australian citizenship has arguably signalled that the attack, while domestic, was brought here by an outsider . The only genuine example of meaningful dialogue on domestic terrorism in New Zealand's history was arguably during the third reading of the TSAA, following the release of the SG's statement on Operation-Eight. Successive governments' lack of genuine consistent proactivity about its terrorism legislation has cumulatively sent a message to New Zealanders that terrorism is not an issue of significant concern.

Finally, this study has shown that no one political party is responsible for New Zealand's CT legislative 'framework' such as it is. While Labour-led governments have developed more CT legislation, this has largely been down to the timing of events and the issuance of international obligations rather than proactive effort; the *Rainbow Warrior*, 9-11, Operation-Eight and Christchurch all occurred under Labour-led governments. History suggests that if roles were reversed, similar legislative products, would have been pursued by National-led governments, especially if required by international obligations. Even while in opposition, National has generally voted in support of CT legislation, with the exception of the Control Orders Bill. Conversely, Labour also voted in support of the CTFL Bill, despite expressing disdain for National's process. In 2019, the Greens supported terrorism legislation for the first time when it voted for the Control Orders Bill. As such, this shows that reform of New Zealand's CT legislative framework can be a shared goal of all New Zealand political parties to ensure our legislation is fit-for-purpose , if only they would show more proactive interest in doing so.

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