New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, And International Responsibilities

Prepared by
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John E Smith
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PREFACE

This report aims to trace the evolution of New Zealand's anti-terrorism legislation, outline the operation of the current system, compare recent laws to those enacted in other countries, and discuss the civil liberties implications of these measures. While a goal of this project is to review the similarities and differences between the New Zealand approach and that of other countries, there is no suggestion in doing so that one nation's legal strategies are preferable to another's.

In those instances where I make recommendations, I do it necessarily as an outsider looking in to New Zealand government, society, and culture. While I believe there is a value in having an outside third party offer observations on one's programmes and policies, this view necessarily benefits and suffers from a lack of personal familiarity. I did not "live" the Waterfront strikes, the Springbok Tour, the bombing of the Rainbow Warrior, and the turbulence of the periods of governments from Muldoon to Lange and beyond. Because I come from a country with a well-entrenched written Constitution and a judiciary able to strike down laws that encroach upon basic freedoms, issues that may have been crucial in considering legislation within a nation founded on parliamentary sovereignty may not have been raised at all back in my home territory.

Furthermore, I am no objective observer. I am a trial attorney with the United States Department of Justice, and I have worked on anti-terrorism issues since before September 11, 2001. I have served as one of a core group of people from the Justice Department to review designations of suspected terrorists and their financial supporters and to defend the US when such designations are challenged in court, as they occasionally have been. As former Labour MP Graham Kelly remarked to me about members of Parliament, I come to this job bearing the "baggage" of my life's experiences – as a former journalist, an ex-private practice lawyer whose proudest accomplishment was helping a wrongfully convicted and sentenced man escape death row, and a Justice Department attorney under Presidents Clinton and Bush. I have endeavoured to examine both sides of every issue, but I necessarily have viewed everything through the lens of my past.

Although I took leave from the Justice Department to come to New Zealand to accept this Ian Axford (New Zealand) Fellowship in Public Policy, and since that time have worked in the offices of the New Zealand Ministry of Justice, the views expressed in this report are my own, and endorsed neither by the US Justice Department, nor its New Zealand counterpart. I have relied on a tremendous number of people for advice and assistance, and to all of them I am grateful, but the blame for any inaccuracies contained herein rests solely on my shoulders.

I should address up front the limitations of this project. My focus throughout has been the Terrorism Suppression Act. While I have looked at relevant legislation enacted before and after this Act, that review has necessarily been a somewhat cursory one. Because of the time limitations of this project – less than five months from my arrival in New Zealand to completion of this report – I have had to pick and choose the particular issues within the counter-terrorism arena to address, which led me to focus more on the process established by the Terrorism Suppression Act of designating terrorists and the offences associated with such designations (matters in which I have had considerable experience in the US), and less on the increased investigative and intelligence powers authorised by the recently enacted Counter-Terrorism Bill (issues to which I have had limited direct exposure in the past).

Finally, a personal note. In researching and preparing this report, I have been forced to confront on a daily basis the haunting memories of September 11 and what that day meant to me and my countrymen and women, particularly for those of us living and working in New York or Washington, DC. Since arriving in New Zealand, I have been deeply moved by the outpouring of sympathy and support that this country has offered my own. I have read the

passionate speeches of solidarity that New Zealand leaders offered on 12 September and listened to members of Parliament, government officials, and "ordinary" Kiwis describe with emotion the gut-wrenching feelings they experienced on that day. And I have witnessed remarkable displays of friendship, both large and small, from the native sons and daughters sent to the dangerous rebuilding efforts in Afghanistan and Iraq to the New Zealand flag rescued from the wreckage of the Twin Towers that now hangs in a place of honour in Parliament. For all of this, and for the warm welcome and generous hospitality I have received in this extraordinary country, I wish to express my gratitude and appreciation.

I. INTRODUCTION

Over the past year, I have been asked the same question, by Kiwi and Yank alike, whether at the office, on a tramp, or at a pub: "Why New Zealand?" Why, indeed, choose this relatively tranquil island nation, isolated from much of the bloodshed affecting other parts of the globe, as a place to spend half a year studying anti-terrorism measures?

The answer to that question is straightforward. We live in an extraordinary era where, for the first time in the modern age, the greatest threats to civilised nations, large and small, may come not from the saber-rattling of authoritarian governments, but from the destructive bent and capabilities of people and groups around the world who despise us or our friends for political, religious, economic, or cultural reasons that may be hard to understand and even harder to resolve. There are no easy answers to the critical questions posed by terrorism and the threats of terrorism.

But nations can learn from one another. While the US used its extensive history of sanctions programmes to act quickly against terrorists after the September 11, 2001, destruction of the World Trade Center towers and the attacks in Pennsylvania and the Washington area, New Zealand took more than a year to study, obtain public comment, and approve its Terrorism Suppression Act and another year to enact its supplemental Counter-Terrorism Act. This comparison is offered as no criticism of New Zealand. The difference in timing resulted from differing circumstances facing the two nations half a world apart and presented, for me, an extraordinary opportunity to compare and contrast two different anti-terrorism regimes, both developed by democratic nations committed to the rule of law. One nation acted rapidly, propelled by the drumbeat of an overwhelming majority of its government and citizenry, after thousands of its residents had been killed and maimed, its landmarks destroyed, and its sense of security shattered. The other nation bowed to vocal public demands to slow down the legislative process to ensure a thorough consideration of the proposals and how they might tread on treasured notions of individual liberties, particularly the rights to protest and to support liberation movements across the globe.

In addition, the history and culture of New Zealand make it an attractive country for study of anti-terrorism issues. New Zealanders well remember their sense of shock and horror at being the victims of an extraordinary act of "terrorism" – the 1985 bombing of the Rainbow Warrior – and understand the need for protection from, and punishment for, future aggressors. On the other hand, the people of this country also tend to be fiercely proud and protective of their rights to dissent and to support overseas humanitarian and political causes. The civil disobedience and public unrest that surrounded the 1981 Springbok Tour, for example, make New Zealanders wary of laws that potentially could be interpreted broadly enough to ensnare peaceful protesters and violent terrorists within the same criminal net. New Zealanders died in the World Trade Center towers and in the Bali bombings, but some of their countrymen and women continue to support overseas organisations – such as the Tamil Tigers – that could be deemed (and have been by other governments, such as my own) to be terrorists.

The fundamental New Zealand notion of being a good international citizen, and doing its bit for the world, also makes this country an interesting subject of scrutiny during these troubled times. To a large degree, the United Nations has been called upon to spearhead the worldwide effort against terrorism, and the fact that it is this august body issuing the call for action places particular pressures on, and carries a certain gravitas in, this country in ways that may not be felt in other jurisdictions. New Zealand also proudly serves as an educator, adviser, and role model throughout the South Pacific, thereby making the effectiveness of its anti-terrorism regime all the more important.

Finally, New Zealand provides an excellent location for this study precisely because of its geographical remoteness to the world's primary terrorism hotspots. As United Future Leader Peter Dunne remarked during a recent debate, "we are not a hotbed of international terrorism, nor are we likely to become such a hotbed."[1] This perception of the nation's low threat level allowed the Government and the public to contemplate the merits of proposed counter-terrorism legislation without as much of the hysteria and hyperbole that might have surrounded these matters in other jurisdictions. On the other hand, discussions of these issues can only help raise awareness among the public and its leaders that, despite this idyllic setting, terrorism continues to pose a very real threat to these shores. As the New Zealand Security Intelligence Service found:

> The terrorist threat to New Zealand is low, but it cannot be discounted. The country learned at the time of the Rainbow Warrior bombing that relative geographic isolation, in itself, is no guarantee of immunity. The events in the United States on 11 September 2001 confirmed that terrorism is an international phenomenon and terrorists consider the world their stage when they look for a way to advance their cause.
>
> There are individuals and groups in New Zealand with links to overseas organisations that are committed to acts of terrorism, violence and intimidation. Some have developed local structures that are dedicated to the support of their overseas parent bodies. There are also isolated extremists in New Zealand who advocate using violence to impress on others their own political, ethnic or religious viewpoint.
>
> But the threat of terrorism could come equally from beyond New Zealand. Modern transport and communications have effectively made the world a smaller place. Events such as a visit by an overseas dignitary, or a major international gathering may be seen by off-shore terrorists as providing the opportunity to do something spectacular to capture world wide publicity, or to otherwise further their cause.
>
> There is also the risk that individuals or groups may use New Zealand as a safe haven from which to plan or facilitate terrorist acts elsewhere.[2]

Thus, for all the aforementioned reasons, there may well be no better place in which to rationally and thoughtfully study the complexities of global terrorism and the legislative means to combat the problem than New Zealand.

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1 Hon Peter Dunne (14 October 2003) NZPD, no 39, 11.

2 New Zealand Security Intelligence Service "The Work of the Service", located at www.nzsis.govt.nz/work/work.html.

II. EXECUTIVE SUMMARY

Like many other nations, New Zealand has an extensive history of law-making designed to protect and defend the country, but which may have been abused in prior decades to permit government encroachment upon the rights of the individual. The 1951 Waterfront strikes, the 1981 Springbok Tour, the 1985 bombing of the Rainbow Warrior, and other formative events in this nation's history have taught today's generations a variety of valuable lessons. Depending on one's perspective, the lessons of the past may demonstrate the need to ensure that the government has the requisite authority to deal with emergencies, but others may be more concerned with ensuring that such national power is sufficiently limited in scope to prevent authorities from intruding into the freedom of the individual to protest, strike, and support humanitarian causes worldwide.

The tragedy of September 11, 2001, prompted New Zealand and the community of nations to respond in more significant ways to terrorism and threats of terrorism. Like their counterparts across the globe, New Zealand authorities reacted immediately on the home front – with law enforcement deployment and legislative solutions – to ensure the nation's security against the modern and innovative mechanisms that terrorists can use to wreak havoc on an unsuspecting country and its citizenry. The legislative response initially came in the form of a Terrorism Suppression Act, which evolved over the course of a year from a bill regarded as "draconian" and "horrifying" by some to a statute that juggles the complexities of defining terrorism, designating terrorists, and using classified evidence, on the one hand, with upholding civil liberties, on the other.

Since approval of the Terrorism Suppression Act over a year ago, the Government has been forced to confront an even more difficult and challenging matter: Now that it has the authority to designate terrorists, how does it utilise wisely the power given, to target the Usama bin Ladens and terrorists of today, but not the Nelson Mandelas and freedom-fighters of yesteryear? New Zealand recently finalised development of a thorough and thoughtful internal process for designating terrorists, but – unlike Australia, Canada, the European Union, the UK, and the US, among others – it has yet to implement it to designate any notorious terrorist groups not already mandated by the UN.

September 11 sparked a worldwide governmental grab for new powers to combat the evils of terrorism, which some regard as a laudable and necessary reaction to an extraordinary threat to global peace and security. Others – civil libertarians, academicians, and religious and human rights organisations – characterise the new measures enacted by New Zealand and other nations as violative of the fundamental freedoms of the individual. The pending case of Ahmed Zaoui – refugee, terrorist, or both? – demonstrates that New Zealand's geographic isolation does not render it immune to the complexities wrought by modern terrorism, national security, and personal liberties.

Comparing New Zealand to similar systems around the world, this country has adopted an anti-terrorism regime that effectively balances international demands, national needs, and individual rights. The New Zealand definition of terrorism is narrower than other jurisdictions', thereby all but eliminating the possibility that protesters, strikers, and others could be unnecessarily brought within its laws. Parliament also made difficult, but correct, judgments in permitting the judiciary to deal with classified evidence in assessing terrorist designations and in forbidding mere membership within a terrorist organisation, without more, to constitute a crime.

On the other hand, this nation has yet to utilise its authority to designate non-UN-listed terrorists, as I believe it should, to add its considerable moral and symbolic voice to the international chorus against terrorist violence, wherever it occurs. New Zealand also has

implemented a potential loophole within its anti-terrorism laws that could permit individual citizens to challenge the binding judgments of the UN Security Council. Other laws – including outdated censorship provisions antithetical to modern democratic notions – remain on the books and either should be repealed immediately or considered as part of a comprehensive review of anti-terrorism provisions that Parliament is expected to undertake within the next two years.

Overall, New Zealand has done an admirable job in complying with its duties arising from abroad, while listening to the concerns of those here at home. The world is a different place than it was prior to September 11, but New Zealand has ensured, to a large extent, that the fundamental freedoms of its citizens remain intact as this nation and others seek to end the devastating and deadly consequences of terrorist violence.

III. THE EVOLUTION OF MODERN ANTI-TERRORISM LAWS

Like the experience of many countries, the New Zealand laws to counter terrorism and to respond to national emergencies have evolved over the course of the nation's history. When confronted with a national crisis, the Government – the "fastest law in the West," according to Sir Geoffrey Palmer[3] – historically tended to react, and sometimes overreact, to cure specific ills, as governments around the world have done from time to time. Today's counter-terrorism legislation bears some resemblance to its historical predecessors, such as granting certain emergency powers to the Executive, but many of the more controversial and authoritarian of the measures have now been rejected as contrary to basic human rights. Still, a lens to prior laws and events permits us to learn from the successes and failures of the past and to understand the suspicions of civil libertarians about legislation that could be interpreted to allow future government overreaching.

A. HISTORICAL PERSPECTIVE

For more than a century, New Zealand has enacted measures to protect itself and its citizens during periods of national emergency, well before the word "terrorism" ever made its way onto a piece of legislation or modern attitudes toward the rights of indigenous peoples, the politically disenfranchised, and protesters and strikers had evolved. In the mid- to late-1800s, for example, the New Zealand Government repeatedly used proclamations of martial law and other legal manoeuvres to quell Maori resistance.[4] In 1913, after using force and shedding blood to end a waterfront strike in Wellington, the Government followed up its "victory in the streets" with legislation to restrict picketing and to prevent striking.[5] Ultimately, however, it took serious rioting during the Great Depression of the 1930s to prompt the Government to enact its most far-reaching law, one characterised half a century later as "potentially the most dangerous and repressive piece of legislation on the New Zealand statute books."[6]

1. The Public Safety Conservation Act 1932

On 14 April 1932, up to 20,000 protesters marched in Auckland to denounce wage cuts and the Government's treatment of the unemployed. After a march leader was injured by a policeman's baton, thousands "ran amok" and "careened down Queen Street smashing shop windows as they went."[7] Amid Government claims that the riots resulted from the actions of a "lawless minority" or "Communist agitators,"[8] the Public Safety Conservation Act 1932 was

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3 Rt Hon Sir Geoffrey Palmer *Unbridled Power An Interpretation of New Zealand's Constitution & Government* (2nd ed, Oxford University Press, Auckland, 1987) 139.

4 New Zealand Law Commission *Final Report on Emergencies* (NZLC R 22, Wellington, 1991) 99 [*Final Report*].

5 Len Richardson "Parties and Political Change" in W H Oliver and B R Williams (eds) *The Oxford History of New Zealand* (Oxford University Press, Auckland, 1981) 197, 212 [*Oxford History*]; New Zealand Law Commission *First Report on Emergencies Use of the Armed Forces* (NZLC R 12, Wellington, 1990) 62 [*First Report*].

6 Palmer, above, 177.

7 Richardson, above, 224.

8 Richardson, above, 224.

"[i]ntroduced, debated and enacted over a period of 48 hours," under urgency.[9] The Act authorised the Governor-General to declare a state of national emergency whenever "the public safety or public order is or is likely to be imperilled."[10] Once such an emergency was declared, "the Executive had unrestricted powers to promulgate emergency regulations."[11] Indeed, the Executive was permitted to issue any regulation on any topic that it considered "essential to the maintenance of public safety and order and the life of the community."[12]

Over the course of its 55-year life span, the Public Safety Conservation Act would be invoked three times, and threatened at other times, by various governments.[13] The first usage of the Act came in 1939, "as a useful piece of legislation to mobilise for war while the emergency regulations were promulgated."[14] Subsequent uses of the Act, however, "revealed its true potential for the abrogation of civil liberties . . ."[15]

2. The 1951 Waterfront Strike

In 1950, a cycle of work stoppages and wage claims by waterfront unions resulted in the one-year-old National Government declaring a state of emergency under the Public Safety Conservation Act.[16] Despite the state of emergency, negotiations between employers and unions continued for a few months, but by February 1951 both sides "readied themselves to go over the brink," negotiations broke down, and work on the waterfront halted.[17] When the Cabinet insisted upon arbitration, and the employers demanded that overtime be accepted along with regular work, the unions refused.[18] "The men continued to report for work while refusing to accept the employers' conditions, so no work was given. The Government saw it as a strike in defiance of the principle of arbitration: to the men it was a lockout by employers. The struggle escalated rapidly."[19] The Government again declared a state of emergency under the Public Safety Conservation Act and promulgated sweeping Waterfront Strike Emergency Regulations, "prohibiting processions, demonstrations, pickets and signs in support of the strike, giving the police extremely wide powers of arrest and entry, and essentially censoring

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9 Jennifer Caldwell "International Terrorism (Emergency Powers) Act 1987" (1988) 6 Auckland U L Rev 108, 108; K J Patterson "The Spectre of Censorship Under the International Terrorism (Emergency Powers) Act 1987" (1988) 18 VUWLR 259, 267 note 50; Law Commission *First Report,* above, 63.

10 Public Safety Conservation Act 1932, s 2 (1).

11 Patterson, above, 267. The Public Safety Conservation Act was based on a 1920 UK statute, the Emergency Powers Act 1920 (UK), but it did not contain the proviso found in the British version which protected the right to strike. See Law Commission *First Report,* above, 63.

12 Public Safety Conservation Act 1932, s 3 (1).

13 Law Commission *First Report,* above, 64; Caldwell, above, 108.

14 Caldwell, above, 108.

15 Caldwell, above, 108.

16 Robert Chapman "From Labour to National" in Oliver and Williams (eds) *Oxford History,* above, 333, 356-357; Law Commission *First Report,* above, 64.

17 Chapman, above, 357.

18 Chapman, above, 357.

19 Chapman, above, 357.

the media by prohibiting publication of anything likely to encourage the strike."[20] The assets of unions could be frozen, and it became "an offence to supply food or clothing to the striking watersiders."[21] These regulations were subsequently described as being of "the most oppressive character imaginable."[22]

On at least two subsequent occasions, the National Government threatened to use the Public Safety Conservation Act to deal with industrial unrest: in 1976, during a dispute with electricity workers, and in 1982, when national petrol supplies were endangered by turmoil at the Marsden Point oil refinery.[23] The Act became "widely perceived as a dangerously open-ended licence; a blank cheque for the government with limitless funds once a state of emergency was declared."[24] Labour critics began denouncing the Act as "unnecessarily repressive" legislation.[25]

3. The 1981 Springbok Tour

More than two decades of protest in and out of New Zealand against the country's sporting contacts with racially divided South Africa culminated in the infamous 1981 Springbok Tour of New Zealand, undoubtedly a "formative event in the nation's history."[26] A nearly all-white South African team accepted the New Zealand Rugby Football Union's invitation to tour the country in July, August, and September 1981, and the National Government, led by Prime Minister Robert Muldoon, permitted the tour to proceed, despite a 1977 agreement between Commonwealth nations, including New Zealand, to discourage contacts with South African sporting organisations and widespread opposition within New Zealand and without, particularly throughout Africa and the Commonwealth.[27]

Thousands of New Zealanders – "old and young, male and female, Caucasian and Polynesian, tradespeople and professionals," "many of whom had never publicly protested before"[28] – marched against the tour, using a variety of means, including extreme measures such as tearing down fences to charge the rugby fields, "flour bombing" from a plane above,

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20 Caldwell, above, 108.

21 Law Commission *First Report*, above, 64.

22 Patterson, above, 267 and n 53.

23 Law Commission *First Report*, above, 64; Caldwell, above, 108; Patterson, above, 267 note 50.

24 Caldwell, above, 108.

25 Law Commission *First Report*, above, 64.

26 Bruce Ansley "Another Country: On the 20th Anniversary of the 1981 Springbok Tour Can We Dare to Say What the Sound and Fury Signified?" (28 July 2001) *Listener* 28, 28; "Rugby, Racism and Riot Gear: New Zealand in the Winter of 1981" (November 1981) *Broadsheet* New Zealand, 10, 15 ["Rugby, Racism and Riot Gear"].

27 Jerome B Elkind and Antony Shaw "The Municipal Enforcement of the Prohibition Against Racial Discrimination: A Case Study on New Zealand and the 1981 Springbok Tour" (Faculty of Law, University of Auckland) 189, 189-92. See also "Rugby, Racism and Riot Gear", above, 15. The Springbok team had one "coloured" player and one "coloured" assistant manager, but no "blacks." Under the South African system, "coloureds" – a mixed-race group – were "somewhat more privileged than blacks, but considerably less privileged than whites." Elkind and Shaw, above, 215.

28 Frederick Graham "A Shameful Pride" *North and South* New Zealand, 86, 89.

overturning cars, and pelting the police with paint and food.[29] Police responded with increasingly aggressive strategies, including "the first police baton charge[s] in New Zealand since the early 1900's."[30] About 2000 demonstrators eventually were arrested and charged with a variety of offences.[31] The massive and occasionally violent protests "caused bitter division within New Zealand society and opposition to it resulted in extended use of police power."[32] Although untold numbers were injured in clashes during this period,[33] the Springbok Tour may have left far more and perhaps longer-lasting emotional scars, with politicians and the public continuing to hearken back 20 years later to the lessons of the winter of 1981 – the need, principally, to protect the fundamental right to protest, but also, for some, to respect the practice of civil disobedience and, for others, to ensure that police have appropriate powers to deal with large-scale crises.

4. The Rainbow Warrior

On 10 July 1985, two bombs ripped into the Greenpeace flagship Rainbow Warrior in its berth in Auckland harbour.[34] The vessel sank in less than four minutes, drowning a Portugese-born crew member and photographer on board, Fernando Pereira, who was trapped in a cabin below deck.[35] Two French secret service agents were caught, charged with murder, and sentenced to prison for their role in the bombing, which had been designed to prevent the Rainbow Warrior from disrupting French nuclear testing at Mururoa Atoll.[36] The incident ignited a political firestorm at home and abroad, as "a huge sense of injustice and a demand for retribution gripped the nation."[37] The Government characterised the incident as a terrorist act, making it "[a]rguably the first instance of international terrorism within New Zealand" – "[a]lbeit terrorism of the government sponsored variety."[38]

With a recognition that, "sadly, it can no longer be assumed that New Zealand will remain immune from acts of international terrorism,"[39] the Labour Government introduced a legislative package in 1987 that included a new bill, the International Terrorism (Emergency Powers) Act 1987, along with the repeal of the Public Safety Conservation Act 1932.[40] "[T]he

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29 "Rugby, Racism and Riot Gear", above, 15; Graham, above, 88-90; Tony Reid "The Days of Rage: 10 Years After" (22 July 1991) *Listener & TV Times*, 22, 24.

30 "Rugby, Racism and Riot Gear", above, 15; Graham, above, 89.

31 Reid, above, 24; "Rugby, Racism and Riot Gear", above, 15.

32 Elkind and Shaw, above, 189.

33 "Rugby, Racism and Riot Gear", above, 15.

34 Robin Morgan and Brian Whitaker (eds) [The Sunday Times Insight Team] in *Rainbow Warrior: The French Attempt to Sink Greenpeace* (Hutchinson, London, 1986) 9-29 [*Rainbow Warrior*]; Patterson, above, 259-60.

35 Morgan and Whitaker *Rainbow Warrior*, above, 26-29; Patterson, above, 259-60.

36 Morgan and Whitaker *Rainbow Warrior*, above, 161-225; Patterson, above, 259-60.

37 Morgan and Whitaker *Rainbow Warrior*, above, 37.

38 Patterson, above, 259 n 2, 269 n 65.

39 Rt Hon Geoffrey Palmer (30 June 1987) 482 NZPD 10115.

40 International Terrorism (Emergency Powers) Act 1987; Public Safety Conservation Repeal Act 1987; Patterson, above, 266.

government had two objectives, namely the repeal of the Public Safety Conservation Act 1932 and the desire to remedy the vulnerability of New Zealand to terrorist attack."[41] The two measures were tied together, because with the abolition of the general emergencies authority, the Government wanted to avoid a power vacuum in the event of a future international terrorist threat. As then-Deputy Prime Minister Geoffrey Palmer said at the second reading of the bill: "Where there is a need for emergency powers they should be specifically tailored to the type of emergency in contemplation. This Bill exemplifies that approach."[42]

The bill proposed special government powers in the event of an actual or threatened international terrorist emergency, as well as broad censorship provisions, which resulted in widespread opposition from the media and civil liberties advocates, among others. After newspapers lambasted the bill as "heavy-handed," "repressive," and "draconian,"[43] and "[t]he media presented a united front in objecting to these provisions" as undemocratic,[44] "the more controversial censorship provisions were removed from the statute."[45]

As ultimately enacted, the legislation provided that three Cabinet ministers together may declare an "international terrorist emergency" when anyone is "threatening, causing, or attempting to cause" (a) death or serious harm to any person or (b) serious damage or injury to any building, structure, vessel, vehicle, animal, or any natural feature or chattel of import.[46] Only actions done to coerce or intimidate a government or person fall within the scope of the Act.[47] Once such an emergency is declared, any member of the police or certain armed forces may:

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41 Patterson, above, 266.

42 Rt Hon Geoffrey Palmer (30 June 1987) 482 NZPD 10115.

43 Patterson, above, 265.

44 Caldwell, above, 111.

45 Patterson, above, 265.

46 International Terrorism (Emergency Powers) Act 1987, ss 2, 6. The definition in question reads: "'International terrorist emergency' means 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 interest; 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."

47 International Terrorism (Emergency Powers) Act 1987, s 2.

- require evacuation of, or exclusion from, any place, public or private;
- enter, even by breaking into, any place, vehicle, or vessel;
- destroy any property that an officer reasonably believes constitutes a danger to any person;
- require an owner or possessor of any type of personal or private property to give control of the property to police; and
- intercept or interfere with private telephone communications, if done to assist in preserving a life.[48]

The emergency powers may be utilised for up to seven days, and can be extended by Parliament, or the Governor-General, when Parliament is not in session.[49]

In addition, despite the removal from the bill of certain censorship provisions, the Act empowers the Prime Minister to prohibit any media dissemination relating to the identity of "any person involved in dealing with that emergency" or "[a]ny other information or material which would be likely to identify any person as a person involved in dealing with that emergency," if she believes such dissemination would be likely to endanger any person's safety.[50] The Prime Minister also could censor any "information or material . . . relating to any equipment or technique lawfully used to deal with that emergency" if she believes that disclosure "would be likely to prejudice measures designed to deal with international terrorist emergencies."[51] Even after the emergency has ended, the Prime Minister may continue to prohibit media disclosure of the information for a year, and that may be extended by Prime Ministerial order for additional five-year periods.[52]

The Act remained subject to criticism after its enactment. Commentators complained that "international terrorist emergency" was defined too broadly, remained subject to abuse, and "did not expressly exclude application of the Act to legitimate forms of domestic protest," such as "a threatened mass demonstration against the policies of a foreign government."[53] Another criticism has involved the "broad and far-reaching" censorship provisions in the Act.[54] In 1991, the Law Commission recommended that a review be conducted on the police powers in the Act because, if they were necessary, they should be available on a wider basis, not just in cases of international terrorist emergency.[55] The Commission also characterised the media censorship provisions as an unjustified "encroachment on the right to freedom of expression,"

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48 International Terrorism (Emergency Powers) Act 1987, ss 10-12.

49 International Terrorism (Emergency Powers) Act 1987, ss 6-7.

50 International Terrorism (Emergency Powers) Act 1987, s 14.

51 International Terrorism (Emergency Powers) Act 1987, s 14.

52 International Terrorism (Emergency Powers) Act 1987, ss 14, 15.

53 Patterson, above, 273; Caldwell, above, 109; Law Commission *Final Report*, above, 204-06.

54 Patterson, above, 279.

55 Law Commission *Final Report*, above, 220.

as set out in the International Covenant of Civil and Political Rights and the New Zealand Bill of Rights Act 1990, and recommended their repeal.[56]

Despite the criticism, the Act remains on the books. Although it has never formally been invoked, authorities periodically have contemplated utilising it, including as recently as this year, when cyanide was mailed in threatening letters to the embassies of the US and UK and the Editor of the New Zealand Herald.[57]

5. The New Zealand SIS Amendment Acts 1999

Prior to 1956, New Zealand Police handled national security issues.[58] In that year, an Order in Council created the New Zealand Security Intelligence Service (SIS), but its "very existence," "not to mention its role and functions within society, were hidden in the shadowy realms of Crown prerogative."[59] In 1969, "Parliament made a conscious decision to bring the SIS, in part at least, out into the open,"[60] and it enacted legislation which formally established the agency, charged it with collecting and evaluating intelligence relating to national security, and empowered the Minister in charge of the Service (in practice, the Prime Minister)[61] to issue a warrant for the interception or seizure of communications if necessary for national security.[62] Under amendments to the Act nearly a decade later, "[t]he collection and evaluation of intelligence regarding terrorism became a specific function of the Security Intelligence Service."[63]

After a four-decade history, an incident in a Christchurch home in 1996 resulted in substantial public distrust of, and legislative changes to, the SIS. In July 1996, two SIS officers "broke into and searched the home of political activist Aziz Choudry,"[64] "a well known critic of government policies and practices."[65] "These SIS actions led to two Court of

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56 Law Commission *Final Report*, above, 228.

57 Interview with Jon White, Assistant Commissioner, Counter Terrorism, New Zealand Police (Wellington, October 2003).

58 Rt Hon Sir Geoffrey Palmer "Security and Intelligence Services – Needs and Safeguards" in Domestic and External Security Secretariat, "Securing Our Nation's Safety: How New Zealand Manages Its Security" ["Security and Intelligence Services"] December 2000, 9, located at www.dpmc.govt.nz/dpmc/publications/securingoursafety/needs.html; Law Commission *Final Report*, above, 65; Kirsten Barrie *Balancing Security and Accountability: SIS Legislation and Recent Amendments* (LLB (Hons) Research Paper, Victoria University of Wellington, 1999) 1.

59 Barrie, above, 1.

60 Barrie, above, 1.

61 Palmer, "Security and Intelligence Services", above, 14 note 2; "Report of the New Zealand Security Intelligence Service to the House of Representatives for the year ended 30 June 2002" [2002] AJHR G-35, 1, 23.

62 New Zealand Security Intelligence Service Act 1969; Law Commission *Final Report*, above, 65-66.

63 Law Commission *Final Report*, above, 186.

64 Astrid Sandberg "Keeping a Watch on Big Brother: The SIS and the Court of Appeal" (2000) 9 Auck U LR 257, 257.

65 Barrie, above, 3.

Appeal cases and two separate pieces of legislative reform relating to the extent of SIS powers."[66] In the 1999 decision of *Choudry v Attorney-General*, the Court of Appeal rejected the Government's claim that the entry into the home was authorised by its interception warrant and concluded instead that the SIS had no implied right to enter private property.[67] Against an additional Government claim of public interest immunity preventing the disclosure of approximately 70 documents, the Court held that it "cannot be beguiled by the mantra of national security into abdicating its role" in balancing the "needs of national security" and "proper judicial scrutiny."[68] The Court required the Government to amend the ministerial certificate and provide additional information justifying non-disclosure of the material.[69] In a subsequent decision, the Court deferred to the judgment of the Prime Minister in the amended certificate and granted the immunity.[70] Choudry eventually received a financial settlement from the Government.[71]

The SIS actions and the Court of Appeal proceedings "provoked outcry amongst civil libertarians,"[72] as well as legislative action. In 1999, Parliament enacted two SIS amendment acts, the first to overrule the original *Choudry* decision and explicitly confer authorisation to enter property in the course of an interception warrant and the second "to provide greater certainty as to when SIS powers may be exercised and to provide safeguards against potential abuse."[73] That second Act established the office of the Commissioner of Security Warrants, who must be a retired High Court judge, and required that both the Commissioner and the Minister in charge of the SIS jointly issue any domestic interception warrant.[74] The Commissioner of Security Warrants was intended to operate as a "substantial check on the power of the Executive" and "recognises that the Prime Minister alone should no longer exercise the great power of issuing an interception warrant directed against New Zealand citizens or permanent residents."[75]

The Choudry incident resulted in "heightened sensitivities" among the public about the use of classified evidence and the need for "robust" review of any Government decisions to utilise such evidence without disclosure to the affected parties.[76]

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66 Sandberg, above, 257.

67 Sandberg, above, 257-259; *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA).

68 Sandberg, above, 258-60; *Choudry v Attorney-General*, above, 594.

69 Sandberg, above, 260-261.

70 *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA); Sandberg, above, 261.

71 Palmer "Security and Intelligence Services", above, 13; Sandberg, above, 263.

72 Sandberg, above, 257, 263.

73 Barrie, above, 9, 11.

74 Palmer "Security and Intelligence Services", above, 14; New Zealand Security Intelligence Service, located at www.justice.govt.nz/pubs/reports/2001/dir-of-info-2001/list-s/s-2.html.

75 Palmer "Security and Intelligence Services", above, 14.

76 Interviews with Philip Divett, Manager, Crime & International Team, Criminal Justice, Ministry of Justice (Wellington, October-November 2003).

6. The Immigration Amendment Act 1999

The Immigration Amendment Act 1999 made sweeping changes to prior immigration policies to "[i]mprove the effectiveness of the removal regime for persons unlawfully in New Zealand by streamlining the procedures involved."[77] Under a new part 4A inserted into the principal Immigration Act of 1987,[78] a "special security regime" was established "to protect sensitive security information that is relevant to immigration matters."[79] The Act authorised the Director of Security to provide a security risk certificate to the Minister of Immigration if he possesses credible classified security information pertaining to a non-citizen about whom immigration decisions need to be made.[80] The Minister may request an oral briefing from the Director, but may not record it or divulge it to anyone.[81] The existence of a security risk certificate is evidence of sufficient grounds for the conclusion certified, subject only to a review by the Inspector-General of Intelligence and Security, by statute a retired High Court judge.[82] The Minister may decide to remove or deport a person based on the security risk certificate.[83]

These 1999 immigration amendments remained unused and untested until this past March, when the Director of Security issued a security risk certificate – the first ever under the Act – against an Algerian refugee, and suspected (at least by some) terrorist, Ahmed Zaoui.[84] Proceedings in that case, which has resulted in intense political, media, and public scrutiny, are expected to continue into 2004.[85]

7. United Nations Sanctions and Conventions

Throughout the 1990s and into the new millennium, New Zealand increasingly participated in a variety of international sanctions programmes initiated by the UN against certain "rogue" countries and governments. These sanctions, often including the freezing of assets, were adopted via regulations enacted pursuant to the United Nations Act 1946, which authorises the Governor-General, by Order in Council, to respond to certain binding Security Council resolutions by "mak[ing] all such regulations as appear to him to be necessary or expedient for enabling those measures to be effectively applied."[86] Although the Government

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77 Immigration Amendment Act 1999, Preamble.

78 Immigration Act 1987, Part 4A.

79 Immigration Amendment Act 1999, Preamble.

80 Immigration Act 1987, s 114D.

81 Immigration Act 1987, s 114E.

82 Immigration Act 1987, s 114F. The position of the Inspector-General was created by the Inspector-General of Intelligence and Security Act 1996. The Inspector-General was intended to be "a public watchdog" to ensure that the activities of the SIS and the Government Communications Security Bureau (GCSB) are "lawful and that any complaints about either of them are independently investigated." Palmer "Security and Intelligence Services", above, 15.

83 Immigration Act 1987, ss 114G, 114K.

84 For further discussion of Mr Zaoui's case, see below, Parts VI.E and VII.F.

85 Interview with Rodney Harrison, counsel for Mr Zaoui (Auckland, October 2003).

86 United Nations Act 1946, s 2 (1); Law Commission *Final Report*, above, 57.

had utilised this Act as far back as 1966 to impose sanctions against Southern Rhodesia and in 1980 against South Africa,[87] it invoked this Act at least a dozen times in as many years to implement an assortment of UN sanctions programmes, which are modified as international events warrant, such as in:

- 1990 and 1991 against Iraq, following its invasion of Kuwait,[88] and again in 2003;
- 1991 against Yugoslavia;
- 1992 against Serbia and Montenegro;
- 1992 against Somalia;
- 1992 and 2001 against Liberia;
- 1993 against Libya;
- 1993 and 1994 against Haiti;
- 1993, 1997, and 1998 against Angola;
- 1994 against Bosnia and Herzegovina;
- 1994 against Rwanda;
- 1997 and 2000 against Sierra Leone;[89]
- 1999 and early 2001 against Afghanistan (as well as the Taliban, Al-Qaida, and bin Laden);[90] and
- 2000 against Eritrea and Ethiopia.

New Zealand still imposes sanctions pursuant to the UN Act against, among others, Eritrea, Ethiopia, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, and the former Yugoslavia.[91]

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87 United Nations Sanctions (Southern Rhodesia) Regulations 1966, SR 1966/222 (revoked); United Nations Sanctions (South Africa) Regulations 1980, SR 1980/200 (revoked).

88 Law Commission *Final Report*, above, 57.

89 These sanctions measures are entitled United Nations Sanctions Regulations and generally include the name of the sanctioned country in a parenthetical, as well as the year of the regulation.

90 United Nations Sanctions (Afghanistan) Regulations 1999, SR 1999/415; United Nations Sanctions (Afghanistan) Regulations 2001, SR 2001/26. These sanctions measurers were amended, for example, after the September 11 attacks and again after the fall of the Taliban. United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, SR 2001/351; United Nations Sanctions (Afghanistan) Amendment Regulations 2002, SR 2002/89.

91 New Zealand Customs Service, "Fact Sheet: United Nations Export and Import Sanctions", located at www.customs.govt.nz/resources/fact02.pdf.

In addition to its sanctions programmes, the UN had proposed as far back as the 1960s the first of a dozen major international conventions and protocols on terrorism, involving subjects as diverse as aircraft hijacking, nuclear material, and hostage-taking, to name but a few. In the decades prior to the new millennium, New Zealand had approved legislation ratifying eight of the 12 conventions.[92]

B. THE TERRORISM SUPPRESSION ACT: PRE- AND POST-SEPTEMBER 11

1. Original Bill

On 17 April 2001, the Government introduced the Terrorism (Bombings and Financing) Bill to the House to implement two more international conventions: the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism.[93] The original bill proposed to implement the conventions by criminalising terrorist acts using explosive devices and the direct or indirect financing of terrorist acts.[94] The bill was not controversial, and the Foreign Affairs, Defence and Trade Committee considering the legislation received no submissions on it.[95] The Committee was scheduled to meet to report the bill back to Parliament on 13 September, but members awoke the day before to the news of the September 11 tragedy instead.[96]

2. September 11

On September 11, 2001, terrorists hijacked four commercial airliners containing passengers and crew and crashed them into the World Trade Center towers in New York, the Pentagon outside Washington, DC, and (because of the heroic actions of some on board) the Pennsylvania countryside. These acts of terrorism obliterated the World Trade Center complex, destroyed a portion of the Pentagon, and resulted in the deaths of over 3000 people from more than 90 countries, including two New Zealanders, Alan Beaven and John Lozowsky.[97]

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92 Alex Conte "A Clash of Wills: Counter-Terrorism and Human Rights" (June 2003) 20 NZULR 338, 340 and note 7.

93 Terrorism (Bombings and Financing) Bill, 2001 No 121-1; (3 May 2001) 591 NZPD 9001; (8 October 2002) 603 NZPD 1061.

94 Terrorism (Bombings and Financing) Bill, 2001 No 121-1; (3 May 2001) 591 NZPD 9001-02.

95 (8 October 2002) 603 NZPD 1061; House of Representatives Foreign Affairs, Defence and Trade Committee "Interim Report on the Terrorism (Bombings and Financing) Bill" (8 November 2001) 1, 2, located at www.clerk.parliament.govt.nz//content/91/fd121int.pdf.

96 Telephone interview with Graham Kelly, current High Commissioner to Canada and the former Labour Party Chairperson of the Select Committee on Foreign Affairs, Defence and Trade (Wellington, October 2003); (8 October 2002) 603 NZPD 1074-1075. At the first reading of this bill, four months before September 11, the words of the Minister of Justice and Minister of Foreign Affairs and Trade, Phil Goff, were eerily prescient. He recounted the increasing acts of terrorism throughout the world in recent years, including the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, the 1998 bombings of the US embassies in Kenya and Tanzania, and the 1993 bombing of the World Trade Center, which "killed six, and wounded about 1,000 people, but the terrorists' goal was to topple the twin towers and to kill tens of thousands of people." Hon Phil Goff (3 May 2001) 591 NZPD 9001.

97 US Department of State "September 11, 2001: Basic Facts" (15 August 2002), located at http://usinfo.state.gov/topical/pol/terror/020815basic.htm; US Department of State "September

The images of crashing planes, collapsing skyscrapers, and falling bodies flashed worldwide and were played and re-played countless times in the following days and weeks. In New Zealand, telephones started ringing after 1 a.m. 12 September local time – within minutes of the attacks on the World Trade Center – to rouse sleeping government officials.[98] As throughout the world, early reactions were of shock, horror, and confusion.[99] Phil Goff recalls his initial "state of utter disbelief" and then, as Minister of Foreign Affairs and Trade, "I thought, 'What in the hell should I do?'"[100]

Ministers and officials began trickling into their offices in and around the Beehive shortly after receiving the news, and, whether at home or the office, they continued to update

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11: One Year Later"["September 11: One Year Later"], located at http://usinfo.state.gov/journals/itgic/0902/ijge/gjchron.htm; (8 October 2002) 603 NZPD 1093.

98 Interview with Phil Goff, Minister of Justice and Minister of Foreign Affairs and Trade (Wellington, October 2003); Interview with Mark Prebble, Chief Executive, Department of Prime Minister and Cabinet (Wellington, October 2003); Interview with David Hill, Director, Domestic and External Security Secretariat (Wellington, September 2003); Interview with Patrick Helm, Policy Advisor, Department of Prime Minister and Cabinet (Wellington, September 2003); Jim Anderton Ministerial Statement "Terrorist Attacks in US" (12 September 2001) ["Terrorist Attacks in US"], located at www.executive.govt.nz/terrorism/ja120901.htm; "September 11: One Year Later", above; (12 September 2001) 595 NZPD 11615.

99 Then-National MP Max Bradford remembers thinking it was an event that "would change the world." Interview with Max Bradford, currently of Bradford & Associates and former Member of Parliament (Wellington, October 2003). United Future leader Peter Dunne recalls feeling "absolute shock," wondering whether it was the "start of World War III," and questioning whether New Zealand, with less obvious security than the targeted American cities, might be vulnerable: "If they could do this in the heart of New York or Washington, then what could they do in Auckland or Wellington?" Interview with Peter Dunne, Member of Parliament (Wellington, October 2003). Graham Kelly, the former Labour Chairperson of the Foreign Affairs, Defence and Trade Committee, called it "horrifying" and notes that it destroyed preconceived ideas of security and stability in the world: "It was like tearing down everything and starting from scratch." His next reaction was that America had helped cause the incident by the "cavalier fashion" in which it had treated the world, such as supporting Israel at the expense of the Palestinians. Kelly interview, above. National Party MP Wayne Mapp received a call telling him to turn on the television because "World War III has started," and his immediate thought on watching the tragedy was that New Zealand needed to "stand shoulder to shoulder" with the US. Interview with Wayne Mapp, Member of Parliament (Wellington, October 2003). New Zealand First Member Ron Mark remembers his feeling of "quiet shock": "It was one of those jaw-dropping moments in life when you simply sit down and watch what's happening on your television with disbelief." He realised then that "no one's safe anywhere. Nobody. An audacious attack like that, so highly coordinated, so meticulously planned, done under the noses of the people who had accommodated, trained, and made their society available to those people, done to the world's superpower, meant nobody's safe . . . . No McDonald's, no Kentucky Fried, no Marks & Spencer department store, no petrol stations are safe anywhere in the world." Interview with Ron Mark, Member of Parliament (Wellington, November 2003). Progressive MP Matt Robson felt "the enormity of the crime" was "absolutely staggering." He also recalled thinking that, at times, US foreign policy had spent money to support terrorism against other governments, such as Nicaragua and Vietnam. "If you're going to fight terrorism, then a lot of countries are going to have to start looking at themselves." Interview with Matt Robson, Member of Parliament (Wellington, October 2003).

100 Goff interview, above.

each other through the early morning hours.[101] At 3 a.m., Mr Goff telephoned US Charge d'Affairs Phil Wall with the Government's sympathies,[102] and, by 4 a.m., Acting Prime Minister Jim Anderton had relayed a message of condolences and support to President Bush.[103]

A high-level meeting of the Officials Committee for Domestic and External Security Co-ordination (ODESC) – chaired by Department of Prime Minister and Cabinet Chief Executive Mark Prebble and attended by the chief executives or deputies of Police, Foreign Affairs and Trade, Defence, Defence Force, Civil Defence and Emergency Management, and the intelligence agencies[104] – convened at 5:45 a.m. in a boardroom of the Reserve Bank Building for the first of its two meetings that day to analyse the situation at home and abroad.[105] The mood was "somber," as officials discussed measures to protect the public, prevent a "copycat" event in New Zealand, and offer assistance to the US. "The palpable feeling was not just sympathy that a group of New Yorkers had suffered. It was grief that humanity had suffered. The general feeling was: This is us."[106]

Between 6 and 7 a.m., as television cameras began to appear in force around Parliament, officials briefed Mr Anderton and Mr Goff on the latest developments to allow their voices to be heard on Morning Report and other news programmes to calm and reassure a startled public as it awoke to news of the tragedy.[107] The message to the nation was to offer "grief and sympathy" for the victims and to show New Zealanders that "we are awake here."[108] Shortly after noon, Mr Anderton convened a meeting in his office with leaders of all parties in Parliament so that he and officials, such as Dr Prebble and Police Commissioner Rob Robinson, could update the Members on the latest developments and the Government's response.[109] All parties offered support to the Government; "no one was trying to score any political points that day."[110] Throughout the early morning hours, Dr Prebble had been attempting to contact Prime Minister Helen Clark, who was travelling overseas, and he eventually reached her in the mid-afternoon en route to Rome.[111]

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101 Goff interview, above; Prebble interview, above; Hill interview, above; Interview with Andrew Ladley, Director of the Institute of Policy Studies at Victoria University (Wellington, October 2003); (12 September 2001) 595 NZPD 11622.

102 (12 September 2001) 595 NZPD 11637; Goff interview, above.

103 Hon Jim Anderton Ministerial Statement "New Zealand Response to US Attacks" (12 September 2001), located at www.executive.govt.nz/terrorism/ja120901_2.htm; (12 September 2001) 595 NZPD 11614-15.

104 Namely, the New Zealand Security Intelligence Service (SIS), the Government Communications Security Bureau (GCSB), and the External Assessments Bureau (EAB).

105 "Terrorist Attacks in US", above; Prebble interview, above; Hill interview, above.

106 Prebble interview, above.

107 Prebble interview, above; Hill interview, above; Helm interview, above; Ladley interview, above.

108 Prebble interview, above.

109 Prebble interview, above; Hill interview, above; Helm interview, above; Ladley interview, above.

110 Prebble interview, above.

111 Prebble interview, above.

At 2 p.m., the New Zealand Parliament purportedly became the world's first to convene after the terrorist attacks,[112] and speaker after speaker from all parties issued powerful expressions of sympathy for the victims and condemnation of the attackers.[113] All parties, with the exception perhaps of the Greens,[114] issued passionate calls for support of forceful international efforts against terrorism.[115] In the end, a unanimous resolution from Parliament – expressing "New Zealand's strong resolve to work with all other countries in the international community to stamp out terrorism and swiftly to bring terrorists to justice" – left no doubt about the Government's position.[116] Members offered these strong calls for action, recognising, however, that "we will in many cases be forced to accept changes, limits to our freedom, and limits to our capacity to live our lives the way we did yesterday, as we seek to remove this cancer from amongst us."[117]

Because it was unclear at the time whether the attacks on the US were isolated events or part of a worldwide campaign of terrorism, and to prevent "copycats," New Zealand authorities reacted immediately by beefing up security around Parliament, the embassies of the US and Israel, the offices of US-based airlines, and a variety of other strategic or political sites.[118] The military and Police were enlisted to assist aviation authorities with heightened airport security.[119] Police, Customs, and other law enforcement departments remained on high alert. Ministers and officials began considering whether New Zealand Special Forces could lend a hand in any ensuing military operation.[120] And leaders from a range of Government departments and from across the political landscape began to consider whether New Zealand had the necessary legal tools in place to prevent devastating acts of terrorism from reaching its shores.

3. Post-September 11 Assessment

After September 11, the shocked Foreign Affairs, Defence and Trade Committee members were called upon to review the adequacy of the original terrorism bill they had been prepared to submit to the House. As New Zealand First MP Ron Mark recounted, "No one could imagine the sorts of acts that we witnessed on our television screens on September 11. It is interesting that we were back in the Foreign Affairs, Defence and Trade Committee the next day – looking at each other across the table as reality dawned on us – and we all asked the question: 'Oh dear, what now? Obviously there is now a need to go back to review our deliberations.'"[121] Committee members opted not to report the terrorism bill to the House that

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112 (12 September 2001) 595 NZPD 11616-17; Ladley interview, above.

113 (12 September 2001) 595 NZPD 11616-18, 11636-46.

114 (12 September 2001) 595 NZPD 11639-40.

115 (12 September 2001) 595 NZPD 11614-18, 11636-46.

116 (12 September 2001) 595 NZPD 11618, 11637.

117 Hon Peter Dunne (12 September 2001) 595 NZPD 11618.

118 Prebble interview, above; Hill interview, above; Helm interview, above; White interview, above.

119 Prebble interview, above; Hill interview, above; Helm interview, above; Ladley interview, above.

120 Prebble interview, above.

121 Ron Mark (8 October 2002) 603 NZPD 1079.

day, but agreed that they and officials should consider the proposed legislation in light of the unfolding national and worldwide events.[122]

With "[t]he shock waves . . . rippling around the globe," the reaction from the world community was swift.[123] Governments immediately offered strong rebukes of the terrorists and support to the US, and, the following day, the UN Security Council adopted Resolution 1368, condemning the attacks and calling on member States to "redouble their efforts to prevent and suppress terrorist acts."[124]

Back in New Zealand, the Government, members of the Committee, and officials reviewed the terrorism bill and the Committee concluded, as Chairperson Graham Kelly stated, "We could drive a horse and cart through it."[125] The general consensus was that the legal framework to counter terrorism needed to be strengthened "to take into account the new environment we are in."[126] The only question was how to accomplish that objective.

On 28 September 2001, the Security Council unanimously adopted Resolution 1373,[127] "one of the most strongly worded resolutions in the history of the Security Council."[128] Resolution 1373 mandated that all member States freeze "without delay" assets of terrorists and their supporters and enact "additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism." [129] The UN Resolution required all States to, among other tasks:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of

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122 Kelly interview; above; Interview with Keith Locke, Green Party Member of Parliament (Wellington, October 2003); Mark interview, above.

123 Hon Jim Anderton (12 September 2001) 595 NZPD 11615.

124 United Nations Security Council Resolution 1368 (12 September 2001), located at www.un.org/Docs/scres/2001/sc2001.htm.

125 (8 October 2002) 603 NZPD 1075; Kelly interview, above.

126 Graham Kelly (8 October 2002) 603 NZPD 1075.

127 United Nations Security Council Resolution 1373 (28 September 2001) [hereafter UN Resolution 1373], located at www.un.org/Docs/scres/2001/sc2001.htm; United Nations Press Release, SC/7158, "Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution" (including the text of UN Resolution 1373) (28 September 2001), located at www.un.org/News/Press/docs/2001/sc7158.doc.htm.

128 Conte "A Clash of Wills", above, 342.

129 UN Resolution 1373, Preamble, s 1.

> persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
>
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons . . . [130]

The Resolution created a Security Council Committee to monitor the situation and called on all UN member States to report to that Committee within 90 days on actions they had taken to implement the mandates of the resolution.[131] Because the Security Council action was taken pursuant to Chapter VII of the UN Charter, it imposed a binding obligation on member States, including New Zealand.[132] While the UN resolution provided a roadmap for governments to use in revising and strengthening their terrorism laws, it also fostered a sense of urgency to accomplish the necessary legislative or regulatory changes before the deadline to report back to the UN Committee at the end of the year.[133]

4. Post-September 11 Proposals[134]

The meaning, scope, and implementation strategy of Resolution 1373 immediately became the subject of considerable debate among New Zealand policy-makers, as well as their counterparts around the world. At least initially, certain members of Parliament from across the spectrum of political parties appeared to view the 90-day report-back date as essentially requiring – if not legally, then politically – that New Zealand implement measures before that time. Yet, many officials feared the consequences of proceeding with such complex legislation on such a fast track, particularly since they were considering certain proposed amendments to the bill in anticipation of the necessary Cabinet approvals. Some of the players involved believed that New Zealand should simply implement the UN resolution via regulations under the UN Act, as it had done under previous UN sanctions programmes, while others saw the existing terrorism bill and the crisis surrounding September 11 as ready vehicles to enact far-

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130 UN Resolution 1373, s 1.

131 UN Resolution 1373, s 6.

132 House of Representatives Foreign Affairs, Defence and Trade Committee "Interim Report on the Terrorism (Bombings and Financing) Bill" (8 November 2001) 1, 3, located at www.clerk.parliament.govt.nz//content/91/fd121int.pdf.

133 Kelly interview, above.

134 This section is based on interviews with members of Parliament and more than a dozen current and former officials from a variety of Government departments – including, among others, Crown Law, Foreign Affairs and Trade, Justice, Parliamentary Counsel, Police, and the Reserve Bank – as well as a review of Ministry of Justice files on the bill. To a certain extent, members, agencies, and officials offered differing perspectives on the process, depending on their points of view and the meetings and discussions in which they participated at the time. I have attempted to incorporate these competing views as much as possible and to corroborate individual viewpoints with contemporaneous written documentation, where available.

reaching reforms deemed necessary to prevent terrorist acts and other serious criminal behaviour. A number of members of Parliament and Government agencies argued for extraordinarily tough measures to support adequately the international war on terrorism, while others urged caution in implementing policies that appeared out of step with New Zealand notions of fairness and due process. And considerable debate arose over how strictly the UN resolution should be interpreted and to what extent it allowed countries to implement it while incorporating their own established traditions and restrictions of domestic law.

Within a few weeks of the Security Council action, the Government was internally circulating the first of at least a dozen or so drafts of proposals to amend the terrorism bill to comply with the UN resolution. Because the terrorism bill was pending before the Foreign Affairs, Defence and Trade Committee, the Government and many officials endured "bloody long hours" revising the bill along with members of the Committee, instead of the usual process of presenting Parliament with a fully formed Government proposal. On 4 October, Mr Goff appeared before the Committee and requested that it implement as much of the UN resolution as possible within the current bill and report it back to the House by 2 November, less than a month away. The Government hoped to secure passage of the legislation by year's end and in time for inclusion in New Zealand's 90-day report back to the UN. The Government told the Committee to expect a progress report on a draft bill at the following week's Committee meeting and a set of proposed amendments the week after, on 18 October.

Over the next month, the Government and Committee members struggled with finding the appropriate balance between satisfying the UN resolution, being a good international citizen in a time of crisis, and protecting national security, on the one hand, and protecting individual liberties, on the other. To a certain extent, the difficulties resulted from the diverse nature and interests of the primary agencies involved. Police wanted sweeping new powers to combat terrorism, Justice officials opposed intrusions on civil liberties and established notions of due process, and Foreign Affairs and Trade sought full and speedy compliance with the UN resolutions. Other complications arose because of issues of interpretation posed by the UN resolution and a lack of precedent on the subject matter.

In that situation of urgency, the Government and officials initially considered a range of extremely stringent proposals, including foreclosing all right of judicial review or appeal for persons designated as terrorists; listing as terrorists purported legitimate businesses which were at least partially owned or controlled by persons whose assets were eligible for freezing, but which had no other link to, or knowledge of, terrorism; and freezing assets of small businesses that innocently might have employed a single terrorist, as well as potentially capturing "innocent" employees of terrorist-owned businesses. Looking back, then-Committee Chairman Graham Kelly says he is "horrified" at the sweeping breadth of the proposals considered.[135]

Among the fundamental issues under internal debate was how to define terrorism and how to comply with the UN's directive to "[f]reeze without delay funds and other financial assets or economic resources" of terrorists and their supporters.[136] Early proposals to amend the bill defined terrorist acts as those actions done to coerce or intimidate a government or population, for ideological, political, or religious aims, and which resulted – even inadvertently – in death, serious violence, serious damage to property or the environment, serious risk to the health and safety of a population, or a disruption in a major electronic system. There were no explicit exceptions proposed for strikes or other protests that inadvertently resulted in one of those outcomes, resulting in concern from Crown Law and other agencies that the amendments

135 Kelly interview, above.

136 UN Resolution 1373, s 1(c).

to the bill could have encompassed the anti-apartheid protests of the 1980s and the anti-globalisation protests of today. In addition, even when an exception for protests and other advocacy was added to the amendments, it excluded only "lawful" actions. Officials subsequently added "peaceful" to the exception to ensure that non-violent acts of civil disobedience could not be considered terrorism.

In the early weeks of proposing amendments to the bill, certain officials intended to require court approval before any suspected terrorist assets could be frozen, and to allow the courts to give whatever weight they chose to evidence of a terrorist designation by the UN or other countries. But, confronted with evidence that other jurisdictions were entrusting such power to their Executives out of a concern that assets needed to be frozen quickly to avoid dissipation, the Government proposed to place the authority to designate terrorists in the hands of the Executive. The proposals for Executive designations of terrorists initially granted such power to the Minister of Foreign Affairs and Trade and indicated he must treat designations by the UN as "conclusive" evidence sufficient for a New Zealand designation. Subsequent proposals gave the designation power to the Minister in charge of the New Zealand Security Intelligence Service, generally the Prime Minister, and the Commissioner of Security Warrants – who both had to agree to the designation – and, later, to the Prime Minister alone, so that she could act quickly, if necessary.

If the Government wanted to rely on classified evidence to support a designation, early proposals of amendments would have paralleled the Immigration Act procedures by requiring the Director of Security to provide the responsible Minister with a security risk certificate, the existence of which was to be "sufficient grounds for the conclusion or matter certified." The Minister would not have been entitled to see the classified evidence herself, but could ask for an oral briefing. The content of that briefing would be determined by the Director, and the Minister could not in any way record that briefing or discuss its contents with anyone else, presumably including the Prime Minister.

The standard of proof needed for a freezing order was considered, ranging from "good cause to suspect" to "reasonable grounds" to a higher standard. The length of freezing orders also was the subject of debate, with some suggesting a maximum length of two years or the filing of criminal charges and others noting that such a requirement would mean that the assets of bin Laden himself would have to be released by 2003, if the US or another country had not filed formal charges against him by then.

The preliminary proposals also would have imposed a requirement on ordinary citizens mandating that they determine whether they are in possession of property owned or controlled by or on behalf of a designated person, report such possession to Police, and hold such property until the designation had ended or the property forfeited to the Government Furthermore, some early proposals would have prohibited persons from providing any type of property, broadly defined, to a designated terrorist, but Crown Law observed that such a proviso could bar family members of terrorists from supplying them even with food and other necessities of life.

Because the UN resolutions did not explicitly cover the forfeiture of assets, as opposed to a temporary "freezing," officials queried what should be done with terrorist assets that had been frozen indefinitely. Some argued that any forfeitures should not occur without a criminal conviction or a higher standard of proof, while others believed that a normal civil standard should apply. Issues also arose regarding the scope of assets to be forfeited and the criteria to be used for any forfeitures.

"Given the urgency of the matter," the Committee decided it would not have time for the usual open public submissions process, but instead it would privately request submissions

from a limited group of likely supporters and opponents.[137] It then intended to convene open public hearings to hear from the hand-picked submitters.[138] After Green MP and Committee member Keith Locke "blew the whistle" on that proposed "secret" procedure and leaked details of the plan, the resulting public and media furore convinced the Government and the Committee to open the process to permit widespread public dissemination of the proposed legislation and to accept any and all public submissions on the bill.[139] Once that decision was made, leaders of the Government and the Committee realised they could not complete work on the bill by the year's end.[140]

5. Interim Report

On 8 November, the Committee released its interim report on the bill, highlighting the new provisions agreed to by Government and the Committee over the previous month and vetted by Crown Law for compliance with the Bill of Rights.[141] The Committee called for public submissions to be made by 30 November, just three weeks away, to permit the Government to "move with reasonable dispatch to put in place amendments to address some clear gaps in New Zealand law" with regard to terrorism.[142]

The name of the legislation was changed to the "Terrorism Suppression Bill" in order "to reflect the expanded functions of the bill."[143] The bill's criminal provisions forbade the providing or collecting of funds, with either the intent that the money be used for a terrorist act or recklessness as to that consequence.[144] Any direct or indirect dealing with the property of terrorists or those who facilitated their actions also was subject to criminal penalties, so long as the person dealing knew that the property was owned or controlled, either directly or indirectly, by terrorists or their supporters or was reckless as to that fact.[145] The bill included a section criminalising the knowing or reckless provision of property, or financial, professional, or other services, to terrorists.[146]

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137 Graham Kelly (8 October 2002) 603 NZPD 1075; Kelly interview, above.

138 Kelly interview, above.

139 Graham Kelly (8 October 2002) 603 NZPD 1075; Keith Locke (8 October 2002) 603 NZPD 1071; Kelly interview, above; Locke interview, above.

140 Kelly interview, above.

141 House of Representatives Foreign Affairs, Defence and Trade Committee "Interim Report on the Terrorism (Bombings and Financing) Bill" (8 November 2001) 1, 5 [hereafter "Interim Report on Terrorism Bill"], located at www.clerk.parliament.govt.nz//content/91/fd121int.pdf; Interviews with Andrew Butler, Crown Counsel, Crown Law Office (Wellington, October-November 2003).

142 "Interim Report on Terrorism Bill", above, 1, 5.

143 "Interim Report on Terrorism Bill", above, 6.

144 Terrorism (Bombings and Financing) Bill, with proposed amendments, cl 9. The proposed amended bill [hereafter "Terrorism Suppression Bill"] is located within the Interim Report on Terrorism Bill, above.

145 Terrorism Suppression Bill, above, cl 10A.

146 Terrorism Suppression Bill, above, cl 10B.

Persons acting with "lawful justification" or reasonable "excuse", however, would have a safe harbour and not be subject to any of these criminal penalties.[147] A lawful justification would be, for example, providing the "necessaries of life," such as food, clothing, or medicine.[148]

The bill also established criminal penalties for participating in a known terrorist group or recruiting others to become members of such a group.[149] It required financial institutions and others to notify Police, or face criminal prosecution, if they reasonably suspected that they might possess or control property that could be owned or controlled by a designated terrorist.[150]

On the civil side, the bill authorised the Prime Minister to make an interim designation of a group as a terrorist if she had "good cause to suspect" that the entity had "carried out" or "participated in" a terrorist act. The Prime Minister could designate a group as an "associated entity" on "good cause to suspect" that the entity had facilitated a terrorist act or was owned or effectively controlled by a designated terrorist.[151] An interim designation would expire in 30 days or upon the making of a final designation of the entity, unless it was revoked either by the Prime Minister or the Inspector-General of Intelligence and Security.[152]

A final designation of an entity as a terrorist group could be made if the Prime Minister had "reasonable grounds" to believe the entity had knowingly carried out or participated in a terrorist act. The Prime Minister could make a final designation of an organisation as "associated" with a terrorist entity if she had "reasonable grounds" to believe the entity had facilitated a terrorist act or was owned or effectively controlled by a terrorist group.[153] A final designation would expire after five years, unless extended by an order of the High Court or revoked by the Prime Minister, the Inspector-General, or the High Court.[154]

The bill authorised the Prime Minister to consider any relevant information, including classified material, in making a designation.[155] The proposal required that the Prime Minister consider information provided by the UN Security Council, or a committee established by it, regarding terrorist entities, and that she "must treat the information as sufficient evidence of the matters to which it relates, unless the contrary is proved."[156]

Ordinary judicial review was not to be permitted. A designated entity first had to apply to the Prime Minister to seek revocation of the designation.[157] If that request was not

147 Terrorism Suppression Bill, above, cls 9, 10A-10B.

148 Terrorism Suppression Bill, above, cl 10B.

149 Terrorism Suppression Bill, above, cls 10D-10E.

150 Terrorism Suppression Bill, above, cl 17I.

151 Terrorism Suppression Bill, above, cl 17A.

152 Terrorism Suppression Bill, above, cl 17B.

153 Terrorism Suppression Bill, above, cl 17C.

154 Terrorism Suppression Bill, above, cls 17D, 17V.

155 Terrorism Suppression Bill, above, cl 17E.

156 Terrorism Suppression Bill, above, cl 17K.

157 Terrorism Suppression Bill, above, cl 17M.

granted, the entity could petition the Inspector-General of Intelligence and Security for review.[158] Only then could an entity appeal to the Court of Appeal, and appeals could raise points of law only.[159] Judicial review of any aspect of the matter involving classified information was prohibited.[160]

Designation as a terrorist would have resulted in restrictions on dealings with others, but there was no provision for the Government to assume control of the assets of designated entities and individuals. The bill provided for the Government to seek forfeiture of property in New Zealand owned or controlled by designated terrorists.[161]

The Committee indicated that it intended to consider any written submissions received by 30 November 2001, hear oral submissions in January and February 2002, and offer a tentative report back to the House in March 2002.[162]

6. Interim Sanctions Regulations

Given the Committee's decision to consider public submissions and, accordingly, delay approval of the anti-terrorism bill, the Government decided a stopgap measure was necessary to temporarily implement the new UN requirements, above those already imposed pursuant to pre-September 11 sanctions on Afghanistan, the Taliban, bin Laden, and Al-Qaida.[163] On 26 November 2001, the Government announced that the Cabinet had approved new regulations – the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 – to implement the mandates of UN Resolution 1373 on an interim basis until the terrorism legislation was enacted.[164] The regulations were enacted pursuant to the United Nations Act 1946 and mirrored several provisions of the proposed Terrorism Suppression Bill, prohibiting persons from directly or indirectly collecting money or providing or making available any funds, property, or services for any entities or persons designated as terrorists by the UN or dealing in any way with property owned or controlled by a designated terrorist.[165] An exception was made for the provision of the necessities of life, such as food, clothing, or medicine.[166] New Zealanders also were barred from participating in designated terrorist groups or recruiting others to join such groups.[167]

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158 Terrorism Suppression Bill, above, cls 17N, 17P, 17T.

159 Terrorism Suppression Bill, above, cl 17U.

160 Terrorism Suppression Bill, above, cl 17O.

161 Terrorism Suppression Bill, above, cl 17Y.

162 "Interim Report on Terrorism Bill", above, 1, 5.

163 See Part III.A.7, above, and Part IV.A, below.

164 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 SR 2001/351 (revoked); Hon. Phil Goff "New Zealand Passes New Anti-Terrorism Measures" (26 November 2001), located at www.beehive.govt.nz/ViewDocument.cfm?DocumentID=12475.

165 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, regs 6, 7, 9.

166 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, reg 9.

167 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, regs 11, 12.

The regulations required persons to report to police if they suspected that any property they possessed or controlled belonged to a designated terrorist. Anyone found in violation of the regulations was subject to criminal charges and a fine, although the Attorney General's consent was required for any prosecutions.[168]

7. Committee Process and Amendments

"The challenge for the select committee and the Government . . . was to put in place effective anti-terrorism measures without infringing on the rights of New Zealanders to support international causes and liberation movements."[169] Given the public concern over the bill, the challenge appeared to be significant. Despite the limited three-week time period for written comment, the Foreign Affairs, Defence and Trade Committee received 143 submissions – most of them opposed to the bill – from individuals as well as social policy, civil liberties, and immigrant groups, including the New Zealand Council for Civil Liberties and similar regional bodies, Amnesty International, the Human Rights Commission, the Federation of Tamil Associations in New Zealand, and the Indonesia Human Rights Committee, to name but a few.[170] The substantial number of submissions resulted, at least in part, from an outspoken campaign against the bill by the Green Party, which publicly derided the bill as "a can of worms," "scary to the public," and "very dangerous."[171]

The Committee heard submissions in Wellington and travelled to Auckland and Christchurch to accommodate interested submitters from other regions of the country.[172] After hearing nearly 16 hours of testimony, and deliberating for another 30 hours, the Committee members – many of whom had marched against the 1981 Springbok Tour and raised funds for overseas liberation movements – recommended substantial amendments to the more controversial aspects of the legislation. As Chairperson Graham Kelly recounted, "It was clear [from the submissions] that we needed to make some changes to the bill that took into account people's rights and civil liberties, and took into account the legislation that had been passed in Canada, the United States, and the United Kingdom. We had to look at better ways of legislating than they did, because we were not satisfied that there were enough protections for people."[173]

Of course, protecting civil liberties for some meant unduly weakening the bill for others. "On balance, the bill has gone a bit too far in assisting the nutter, loopy, lunatic fringe in New Zealand to have the freedoms they traditionally have had to cause mayhem . . ." according to National MP Lockwood Smith.[174]

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168 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, regs 8, 14, 15.

169 Hon Phil Goff (8 October 2002) 603 NZPD 1061.

170 Keith Locke (8 October 2002) 603 NZPD 1071; Submissions on Terrorism (Bombings and Financing) Bill no 1-143; Foreign Affairs, Defence and Trade Committee "Terrorism Suppression Bill" ["Select Committee Report"], 2.

171 Green Party "Anti-Terrorism Bill – A Can of Worms" (7 November 2001), located at www.greens.org.nz/searchdocs/speech4802.html.

172 Select Committee Report, above, 2.

173 Graham Kelly (8 October 2002) 603 NZPD 1075.

174 Hon Lockwood Smith (8 October 2002) 603 NZPD 1078.

The Committee reported the bill back to the House on 22 March 2002. The first significant change, and "[o]ne of the hardest tasks [before the Committee], was to define what constituted a terrorist act, given that the debate within the international community had failed to reach a consensus on this issue."[175] The Committee proposed to amend the definition of a terrorist act to, *inter alia*, explicitly mandate that the intent requirement apply both to the "effect" and "outcome" prongs of the definition, meaning that a person could not be found to have committed terrorism unless he (1) intended to induce terror in a civilian population or unduly compel a government or international body to act; and (2) intended to cause death or serious bodily injury, a serious risk to public health or safety, or serious damage to certain significant property, the economy, or the environment in a manner likely to injure a person or the public. "[T]he changes [we]re intended to raise the threshold and to focus the definition more squarely on acts intended to induce terror."[176] Mindful of the 1981 Springbok Tour protests, the Committee suggested the outcome prong be revised to ensure that, before they could be considered terrorism, actions intended to damage property or an infrastructure facility also must be likely to endanger human life or public safety. The bill had expressly excluded strikes and lawful or peaceful protests from the definition of terrorist act, but the Committee proposed to revise the exclusion to note that any such strike or protest, "by itself," would not be covered. The Committee noted that "these acts should not be automatically excluded simply because they are an act of protest, advocacy, dissent, strike, lockout, or other form of industrial action. . . [T]hese acts will be a 'terrorist act' only in the unlikely event that they satisfy the high thresholds of" the definition.[177]

Second, the Committee recommended various changes to the crime of financing terrorism. The Committee retained the provision making it a crime to intend to finance a terrorist act, but dropped a parallel provision to criminalise conduct that was reckless as to whether money provided was to be used to finance terrorism. To clarify whether the provision encompassed "humanitarian aid," the Committee suggested the following additional clause to this section and a similar section prohibiting the provision of property or services to terrorists: "To avoid doubt, nothing in [this section] makes it an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights."[178] In the clause criminalising the provision of property or services to terrorists, the Committee added the caveat that, to be lawful, the funds must go to an entity "that is not involved in any way in the carrying out of terrorist acts," although it did not add the same caveat to the terrorist financing provision. The Committee believed that this "safe harbour" provision would prevent any "impact on the willingness of New Zealanders to continue to support particular causes overseas."[179]

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175 Hon Phil Goff (8 October 2002) 603 NZPD 1061. As Mr Goff indicated, the UN has long struggled with, and still been unable to agree to, an accepted definition of "terrorism". UN Counter-Terrorism Committee "A Definition of Terrorism", located at www.un.org/Docs/sc/committees/1373/definition.html.

176 Select Committee Report, above, 3-4.

177 Select Committee Report, above, 5. Terrorist acts also were defined to include any sort of planning, preparation, or credible threats to carry out such an act, even if no violent action was ever committed. Terrorism Suppression Act, s 25.

178 Select Committee Report, above, 5-7.

179 Select Committee Report, above, 6.

Third, the standard necessary to satisfy the criminal offence of participating in terrorist groups was recommended to be heightened to require that, "to be an offence, the participation in the terrorist group or organisation must be for the purpose of enhancing the ability of terrorists to carry out, or to participate in the carrying out of, terrorist acts."[180]

Fourth, the Committee proposed substantial revisions to the terrorist designation process, including that:

- a knowledge requirement be added before a person could be designated as a terrorist or terrorist-"associated" entity, meaning that a person must have "knowingly" carried out or participated in a terrorist act to be designated as a terrorist or "knowingly" facilitated the carrying out of terrorist acts to be designated as an associated entity. The knowledge requirement for associated entities "is to ensure that an entity that is connected in some way with the designated terrorist but not consciously involved in terrorism, cannot be designated";[181]

- final designations would expire after three years, rather than the five-year period initially proposed, and such designations could be extended, for up to three years per extension, upon an application by the Attorney-General and approval by the High Court;

- UN Security Council information would be considered, "in the absence of evidence to the contrary," as "sufficient evidence of the matters to which it relates," rather than the original requirement that the Prime Minister "must treat the information as sufficient evidence of the matters to which it relates, unless the contrary is proved";

- ordinary judicial review of the designation decision would be permitted, instead of the original process whereby an entity first had to apply to the Prime Minister for revocation, then petition the Inspector-General for a review, and only then could an appeal be made (on matters of law only) to the Court of Appeal. Not only was judicial review authorised, but third parties "having an especially close connection with the designated entity or its interests or objectives" also would be eligible to challenge the designation; and

- classified information could be presented to the court, without disclosure to the designated entity or its counsel, and a non-classified summary of the information could be provided to the litigant, rather than the prior proposal to allow judicial review on matters of law only. The same classified information procedure would apply in cases of Government applications for extensions of the designation or forfeiture of property.[182]

The Committee inserted a procedure for the Government to assert custody and control of frozen property, *e.g.*, any property in New Zealand subject to the prohibition on dealing with terrorists. As a check on the process, the Committee also tacked on a provision requiring a select committee to review and report on most of the bill's provisions by 2004-05.[183]

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180 Select Committee Report, above, 18.

181 Select Committee Report, above, 8-9.

182 Select Committee Report, above, 7-18

183 Hon Phil Goff (8 October 2002) 603 NZPD 1062; Terrorism Suppression Act 2002, s 70.

Green MP and Committee member Keith Locke privately issued a minority report on the bill, which "acknowledges that the committee has worked hard to incorporate amendments so that support for legitimate protest activities or liberation movements would not be treated as terrorist activities." He maintained, however, that the "bill undermines our civil liberties in several respects."[184]

8. Final Act

The bill's second reading occurred in October 2002, nearly a year after the revised legislation was revealed to the public and after mid-year elections which marked the departure from Parliament of key Opposition Committee members, including former Prime Minister Jenny Shipley, former Deputy Prime Minister Wyatt Creech, and former Minister of Defence Max Bradford.[185] Five of the six parties in Parliament supported the bill, with only the Greens opposing, and the Committee's amendments were accepted by a vote of 100-9.[186] The Green Party offered a number of amendments to gut the bill, but all were soundly rejected.[187]

The debate in Parliament was passionate and frequently vitriolic. Some Opposition members took to the floor to praise the Government, while others offered stinging diatribes against various perceived Labour slip-ups, including the Prime Minister's purported "stumbling" in the days immediately following September 11, the Government's handling of the Iraqi crisis, and the alleged failure to include sufficient anti-terrorism measures in the bill.[188] As usual, New Zealand First asserted that immigration policies were being ignored,[189] and the Greens characterised the bill as "the biggest attack on our civil liberties for many years."[190] In response, Keith Locke and the "loony-fringe, loony-tune Green fraternity"[191] came under withering attacks from virtually every other party, with various speakers calling their arguments "hogwash," "daft, stupid, ill-informed," "absolute rubbish," and "deeply disturbing and offensive."[192]

New Zealand's brushes with civil disobedience and terrorism played a central role in the Parliamentary debate, with members repeatedly referencing the 1951 waterfront strikes,[193]

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184 Keith Locke "Terrorism (Bombings and Financing) Bill – Minority Report" (21 March 2002), located at www.greens.org.nz/searchdocs/other5209.html.

185 (8 October 2002) 603 NZPD 1079.

186 (8 October 2002) 603 NZPD 1081.

187 (8 October 2002) 603 NZPD 1090-91, 1099-1100, 1115-16, 1125-26.

188 Wayne Mapp (8 October 2002) 603 NZPD 1062-1063; Hon Lockwood Smith (8 October 2002) 603 NZPD 1077.

189 Rt Hon Winston Peters (8 October 2002) 603 NZPD 1068.

190 Keith Locke (8 October 2002) 603 NZPD 1071.

191 Ron Mark (8 October 2002) 603 NZPD 1079.

192 (8 October 2002) 603 NZPD 1075-1083, 1087-1088, 1093-1094, 1143-1147.

193 Hon Peter Dunne (8 October 2002) 603 NZPD 1065.

the 1981 Springbok Tour demonstrations,[194] and the 1985 Rainbow Warrior bombing.[195] The New Zealand victims of September 11, and other terrorist acts, also were remembered.[196]

After more than seven hours of parliamentary debate on the bill, spread over a few days, the Terrorism Suppression Act was approved on its third reading by a 106-9 margin, with only members of the Green Party voting against it.[197]

By that time, more than a year after September 11, some government officials sensed that the feeling of much of the country may have changed from the urgent calls for action heard in the wake of September 11 to complacency and a belief that the terrorism bill might be a bit of "overkill."[198] Two days after debate ended in Parliament, however, terrorists detonated bombs in two Bali night spots popular with foreign tourists, killing 202 people, including New Zealanders Jared Gane, Mark Parker, and Jamie Wellington.[199] The Bali blasts served as a "wake-up call" to New Zealand and the region that international terrorism could arrive at any time on their doorstep[200] and, for many members of Parliament, served as a "reinforcement" of the need for effective counter-terrorism measures.[201] "It was random, it was indiscriminate, it was murderous, and it was close to home. We know that, because of the New Zealand citizens who lost their lives there. If September 11 was no wake-up call, surely Bali was."[202]

The majority of the Terrorism Suppression Act took effect on 18 October 2002.[203] A week later, the UN designated as a terrorist Jemaah Islamiyah, the Al-Qaida-linked organisation blamed for the Bali bombings and other acts of violence. On 1 November, the Prime Minister designated the group as a terrorist under New Zealand law, the first such listing under the new Act.[204]

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194 (8 October 2002) 603 NZPD 1065, 1072, 1075.

195 Wayne Mapp (8 October 2002) 603 NZPD 1063.

196 Hon Phil Goff (8 October 2002) 603 NZPD 1093.

197 (8 October 2002) 603 NZPD 1124-25, 1142, 1148.

198 Hill interview, above.

199 Rt Hon Helen Clark "Ministerial Statement on Bali Bombing" (15 October 2002), located at www.beehive.govt.nz/ViewDocument.cfm?DocumentID=15195; "Tears Flow as Mourners Relive Bali Nightmare" (13 October 2003) *New Zealand Herald* Auckland.

200 Hill interview, above.

201 Dunne interview, above.

202 Hon Peter Dunne (14 October 2003) NZPD, no 39, 9.

203 Terrorism Suppression Act, s 2.

204 Rt Hon Helen Clark "NZ List Jemaah Islamiyah as Terrorist Group" (1 November 2003), located at www.beehive.govt.nz/ViewDocument.cfm?DocumentID=15337; "Ministers Press Ahead With Apec Visit" (2 October 2003), located at www.stuff.co.nz/stuff/0,2106,2678346a6160aT,00.html.

C. THE COUNTER-TERRORISM BILL

Throughout debate on the Terrorism Suppression Act, the Government vowed that additional anti-terrorism measures would be proposed in new legislation. As a result of a "whole-of-Government review of relevant offence and penalty provisions and investigative powers," and of "possible gaps in New Zealand law that could be exploited by terrorists," the Government introduced the Counter-Terrorism Bill on 17 December 2002, about two months after approval of the Terrorism Suppression Act.[205]

1. Original Bill

The Counter-Terrorism Bill was designed to complement the Terrorism Suppression Act by "clos[ing] potential gaps that may be exploited by terrorists" and providing "supplementary powers in the form of new terrorism-related offences and penalties, and a range of investigative measures designed to combat terrorism and address miscellaneous problems encountered by agencies in the investigation and enforcement of offences."[206] While the Terrorism Suppression Act focused on establishing a civil process to designate terrorists and criminal offences for supporting them, the Counter-Terrorism Bill centered on broadening criminal penalties and investigative powers that could be applied to terrorist and non-terrorist acts alike.[207]

The bill proposed to implement in New Zealand law the requirements of two international conventions: the Convention on the Physical Protection of Nuclear Material and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, in addition to the remaining requirements of UN Security Council Resolution 1373.[208] Along with the conventions implemented by the Terrorism Suppression Act, this legislation would bring New Zealand into compliance with all 12 of the international conventions on terrorism.[209]

A range of new criminal offences were proposed by the bill, "which are not all terrorism-specific, but are necessary to ensure that the criminal law caters adequately for the whole range of offending likely to be committed by terrorists."[210] The new offences included: infecting animals with disease; contamination of food, crops, water, or other products intended for human consumption; threatening or falsely communicating information about harm to persons or property; harbouring or concealing terrorists; and dealing with radioactive material. Terrorism also would become an aggravating factor for sentencing purposes under the Sentencing Act 2002.[211]

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205 Hon Phil Goff (14 October 2003) NZPD, no 39, 1; Hon Phil Goff (21 October 2003) NZPD, no 40, 40; Foreign Affairs, Defence and Trade Committee "Counter-Terrorism Bill" ["Select Committee Report on Counter-Terrorism Bill"], 68, located at www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/27bar2.pdf.

206 Government Bill "Counter-Terrorism Bill" ["Counter-Terrorism Bill"], 1; Hon Phil Goff (1 April 2003) NZPD, no 20, 4620.

207 Divett interview, above.

208 "Counter-Terrorism Bill", above, 1; "Select Committee Report on Counter-Terrorism Bill", above, 1.

209 Hon Phil Goff (1 April 2003) NZPD, no 20, 4619.

210 "Counter-Terrorism Bill", above, 2.

211 "Counter-Terrorism Bill", above, 2.

The bill proposed a range of measures designed to assist Police in their investigation of terrorist incidents and other serious crimes. In cases in which "authorised public officers" obtain interception warrants under the Crimes Act 1961 or the Misuse of Drugs Amendment Act 1978, the bill allowed evidence obtained under one act to be used in a prosecution under the other act.[212] Current law had allowed for the use of tracking devices for investigation of drug dealing offences; the bill proposed to authorise such devices for investigation of criminal offences generally and to establish a general regime for Police to apply to a judge for a warrant for a tracking device, except in emergency situations where it is not reasonably practicable to obtain such a warrant in advance. The bill also authorised Police executing a search warrant to require a person, under threat of criminal penalty, to provide information or assistance that was deemed "reasonable and necessary" to allow access to a computer on premises covered by the warrant.[213]

In addition, the bill proposed to expand the powers under the Terrorism Suppression Act involving the freezing of property of designated terrorists.[214] Under the legislation, Customs could detain property crossing the New Zealand border if it had "good cause to suspect" that the property was owned or controlled, directly or indirectly, by designated terrorists. Customs also was authorised to seize "cash or cash equivalents" that it had "good cause to suspect" were owned or controlled, directly or indirectly, by anyone "eligible for designation" as a terrorist. Customs could hold such property for seven days, unless extended by court order for another 14 days, and it had to provide persons whose property was detained "with sufficient cash to provide themselves or any dependants with the necessities of life."[215]

On 1 April 2003, the bill received its first reading and was referred to the Foreign Affairs, Defence and Trade Committee.[216] Six of the seven parties supported the first reading of the bill, with only the Greens opposing it, although members of three parties – United Future, ACT New Zealand, and the Greens – and Committee Chairperson Peter Dunne expressed concern about the legislation's impact on individual rights and civil liberties.[217] Although supportive of the bill, National MP Gerry Brownlee commented that "[t]he need in New Zealand for a bill like this tells us that society, as we have known it, has definitely changed, and no New Zealander should be comfortable with that."[218]

2. Committee Process and Amendments

Over the course of the next several months, the Foreign Affairs, Defence and Trade Committee received 25 submissions, many opposed to the bill, from interested groups and

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212 "Counter-Terrorism Bill", above, 2.

213 "Counter-Terrorism Bill", above, 3.

214 "Counter-Terrorism Bill", above, 3-4.

215 "Counter-Terrorism Bill", above, 4.

216 (1 April 2003) NZPD, no 20, 4619-20; "Select Committee Report on Counter-Terrorism Bill", above, 15, 68.

217 (1 April 2003) NZPD, no 20, 4622-23, 4627-32, 4634.

218 (1 April 2003) NZPD, no 20, 4632.

individuals, and heard 11 submissions.[219] Victoria University Dean of Law Matthew Palmer argued in a submission invited by the Committee that Parliament should avoid creating a separate body of terrorism law and should endeavour, as much as possible, to ensure that terrorist acts are encompassed within the general criminal law, with its ordinary safeguards and procedures.[220] Accordingly, the Committee wrestled with "whether the provisions in the bill should be terrorism-specific, so they do not unwittingly capture other activity, or whether they should be of general application."[221] The Committee majority agreed "that terrorism should be addressed within the existing scope of criminal law wherever feasible and that amendments required to combat terrorism may be equally justifiable for the investigation and prosecution of other serious offending. For this reason, we have adopted a broad approach to most of the provisions of the bill."[222] Some provisions specifically relating to terrorism, however, were judged to be necessary to fulfil New Zealand's obligations under the various international terrorism conventions and UN resolutions. The Committee considered, and ultimately rejected, a proposal to split the terrorism and non-terrorism parts of the legislation into two separate bills.[223]

For his part, Green MP Keith Locke vehemently opposed the scope of the bill and, in a "minority view" filed within the Committee report, he criticised the inclusion of general amendments to the criminal law, "with no specific reference to terrorism," in a "counter-terrorism" bill. "Their presence risks misleading the public as to the bill's nature, and also acts as a restraint on criticism of the bill, because [of] people's aversion to be seen as soft on terrorism." [224]

After hearing from the Attorney-General on the bill's compliance with the Bill of Rights Act 1990,[225] from the Ministry of Justice, and from the submitters, the Committee, by majority, referred the bill back to the House on 8 August 2003, with amendments recommending that:

- the crime of infecting animals with disease or sickness be amended to require "both serious risk to the health and safety of an animal population, and major damage to the national economy," rather than only one of those outcomes;[226]

- the offence of threatening to do harm to persons or property be made more specific: first, by requiring a threat to engage in an action likely to cause risk to the health or safety of any person, major harm to property, or major economic loss; and, second, to require proof that the threat be made with an intent to cause a

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219 "Select Committee Report on Counter-Terrorism Bill", above, 15; Submissions on Counter-Terrorism Bill no 1-25.

220 Professor Matthew Palmer "Submission to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill"; see also Matthew Palmer "Counter-Terrorism Law" [2002] NZLJ 456.

221 "Select Committee Report on Counter-Terrorism Bill", above, 2.

222 "Select Committee Report on Counter-Terrorism Bill", above, 2.

223 "Select Committee Report on Counter-Terrorism Bill", above, 2-3.

224 "Select Committee Report on Counter-Terrorism Bill", above, 13-14 (Green minority view).

225 Hon Phil Goff (14 October 2003) NZPD, no 39, 2.

226 "Select Committee Report on Counter-Terrorism Bill", above, 6.

significant disruption within New Zealand of an infrastructure facility, civil administration, or civilian or commercial activities;[227]

- interception warrants be made available for terrorism-related offences, or conspiracy to commit them, in addition to those permitted for crimes that are serious and violent or drug-related;[228]

- under any seizure of terrorist property by Customs, the entity from which goods were seized must be provided at least 24 hours' notice of any court hearing on an application to extend the length of the seizure;[229]

- under the clause requiring persons to help Police armed with a warrant to access a computer, persons would not be forced to provide any information tending to incriminate them, but might be required to provide information or assistance that would enable Police to access a computer containing information that may be incriminating;[230]

- only Police and Customs officers would be authorised to use tracking devices, rather than the original bill's inclusion of any "authorised public officer," and those officers who utilise emergency powers to use a tracking device without a warrant would be required to file a written report on the matter.[231]

In the minority view filed within the Committee report, Mr Locke and the Greens objected to various provisions of the bill, claiming that the new offence of threats of harm to people or property could encompass the activities of protesters and strikers; that "police could more easily misuse interception warrants for fishing expeditions"; and that the new tracking power for Police was too broad.[232] The Greens alleged that the clause requiring persons to provide information or assistance to enable police to access computer files violated the "long-held common law privilege against self-incrimination": "In the Green member's opinion, it is contradictory that the bill does allow a suspect to withhold 'information tending to incriminate' yet not apply that provision to information sitting on the suspect's computer."[233] Mr Locke also continued to object to provisions relating to the Terrorism Suppression Act, which he asserted had established "a flawed terrorist designation process" that could ensnare "protest groups or strikers," as well as "New Zealand solidarity groups that actively support armed liberation movements overseas."[234]

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227 "Select Committee Report on Counter-Terrorism Bill", above, 7.

228 "Select Committee Report on Counter-Terrorism Bill", above, 7-8.

229 "Select Committee Report on Counter-Terrorism Bill", above, 9.

230 "Select Committee Report on Counter-Terrorism Bill", above, 10.

231 "Select Committee Report on Counter-Terrorism Bill", above, 11.

232 "Select Committee Report on Counter-Terrorism Bill", above, 13 (Green minority view).

233 "Select Committee Report on Counter-Terrorism Bill", above, 13 (Green minority view).

234 "Select Committee Report on Counter-Terrorism Bill", above, 14 (Green minority view).

3. Final Acts

Parliament took up the second reading of the bill on 14 October 2003, almost a year to the day after the Bali bombings, a fact not lost on members:[235] "The Bali attack was in our backyard, and we have to be concerned."[236] Speakers reiterated previously stated advantages and disadvantages of the bill, and all parties except the Greens supported the Committee's amendments and the second reading, although even some supporters continued to express various reservations about the potential "draconian" impact of the bill on civil liberties.[237] The following week, at the Committee of the Whole House stage, the Green and ACT parties became "strange bedfellows"[238] in attempting to limit certain provisions of the bill through proposed amendments, all of which were defeated, usually by overwhelming margins.[239] Members then agreed to the division of the Counter-Terrorism Bill into six separate bills – the Crimes Amendment Bill, the Terrorism Suppression Amendment Bill, the Misuse of Drugs Amendment Bill (No 2), the New Zealand Security Intelligence Service Amendment Bill, the Sentencing Amendment Bill, and the Summary Proceedings Amendment Bill – one for each statute the bill would amend.[240] All parties but the Greens ultimately supported each bill on its third reading, with the exception of the Summary Proceedings Bill, which also was opposed by ACT's eight members.[241]

After the passage of two anti-terrorism bills in as many years, the Government indicated that its work was completed on the issue, at least for the moment. According to Minister of Justice and Minister of Foreign Affairs and Trade Phil Goff, "At this point, legislatively, I think we've pretty much got it covered."[242] Others wonder what may happen after "the next attack," as "terrorism evolves": "I don't think people really understand how far terrorism can yet go."[243]

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235 Hon Phil Goff (14 October 2003) NZPD, no 39, 1.

236 Marc Alexander (21 October 2003) NZPD, no 40, 9384.

237 Stephen Franks (14 October 2003) NZPD, no 39, 12; see also (14 October 2003) NZPD, no 39, 11-15, 18-19.

238 Stephen Franks (21 October 2003) NZPD, no 40, 26.

239 (21 October 2003) NZPD, no 40, 7, 21-22, 29, 37.

240 (21 October 2003) NZPD, no 40, 40.

241 (21 October 2003) NZPD, no 40, 9389-90.

242 Goff interview, above.

243 Mark interview, above.

IV. OTHER ANTI-TERRORISM REGIMES

Although governments around the world have been guided by the UN resolutions in establishing their anti-terrorism regimes, they have approached the subject in different ways, based on their own traditions and political systems. International law experts have classified certain countries, such as the US and UK, as establishing stricter anti-terrorism models, while New Zealand and countries such as Australia and Canada are viewed as having adopted more moderate approaches.[244]

A. THE UNITED NATIONS

As noted above, UN Security Council Resolution 1373 provided a framework for New Zealand and other countries to use in implementing additional anti-terrorism machinery. But the UN actions against terrorism began well before September 11 and continue to the present day.[245]

1. Pre-September 11

Chapter VII of the UN Charter permits the Security Council to adopt measures binding on all member States when dealing with threats to the peace and acts of aggression.[246] The Security Council regularly has utilised this authority through the decades by imposing on rogue nations and regimes a variety of sanctions, many of which previously have been described in relation to New Zealand's implementation of its own United Nations Act 1946.[247]

Terrorism has been a subject of UN action since at least the 1960s, "when a series of airplane hijackings hit the headlines."[248] After Palestinians attacked and held the Israeli team hostage at the 1972 Munich Olympic Games, then-UN Secretary-General Kurt Waldheim asked the General Assembly to take up the matter.[249] Since that time, the UN has proposed a dozen major international conventions and protocols to respond to, and to try to combat, acts of terrorism.[250]

The current sanctions against Usama bin Laden, Al-Qaida, and the Taliban date back to events in 1998, when terrorist bombings of the US embassies in Kenya and Tanzania killed

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244 Interview with Alex Conte, Lecturer, University of Canterbury (Christchurch, October 2003); Interviews with His Honour Sir Kenneth Keith, Justice, Court of Appeal (Wellington, September-October 2003).

245 Alex Conte "The Cost of Terror" (November 2001) NZLJ 412; UN "Report of the Policy Working Group on the United Nations and Terrorism" (1 August 2002) [hereafter "UN Report"], 6.

246 Charter of the United Nations, located at www.un.org/aboutun/charter/.

247 See Part III.A.7, above.

248 Conte "The Cost of Terror", above, 412.

249 Conte "The Cost of Terror", above, 412.

250 Conte "The Cost of Terror", above, 412; UN "Conventions Against Terrorism", located at www.unodc.org/unodc/terrorism_conventions.html.

223 people and injured more than 5000 others.[251] On 13 August 1998, six days after the attacks, the Security Council adopted a resolution condemning the bombings and calling for worldwide assistance in bringing the perpetrators to justice.[252] Shortly thereafter, the Security Council issued resolutions on the turmoil in Afghanistan, criticising the violence and lawlessness there and demanding "that the Taliban stop providing sanctuary and training for international terrorists and their organizations."[253]

Following the US indictment of bin Laden and his associates for violent actions including the 1998 embassy bombings, and the refusal of the Taliban to surrender him for trial, on 15 October 1999, the Security Council issued Resolution 1267 under Chapter VII of the UN Charter, mandating that all States freeze assets of the Taliban and entities it owned or controlled if it did not turn over bin Laden and cease its support of terrorism. Resolution 1267 established a Security Council committee to monitor global progress in implementing the resolution.[254] Subsequently, on 19 December 2000, the Security Council mandated that all States freeze the assets of bin Laden, Al-Qaida, and individuals and entities associated with them. The Resolution 1267 Committee was called upon to maintain an updated list of individuals and entities designated as associated with bin Laden and Al-Qaida, as well as the entities owned or controlled by the Taliban.[255] Since that time, the UN has designated hundreds of individuals and entities pursuant to this mandate, both before and after September 11, and it is the assets of the individuals and entities on this list that New Zealand and other member States are required to freeze.[256]

2. Post-September 11

After September 11, the Security Council issued a series of resolutions, noted above, to condemn the attacks, to require States to act to prevent and deter future acts of terrorism, and to establish a Counter-Terrorism Committee to monitor global efforts against terrorism.[257] On 16 January 2002, the Security Council followed up these actions by mandating that all States "[f]reeze without delay" the assets of groups and persons designated as associated with bin Laden, Al-Qaida, and the Taliban, and "ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly," to them.[258] That Resolution emphasised that the "obligation[s]" of Resolution 1373 applied to all UN-designated entities and individuals and urged States to take immediate action to enact

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251 US Department of State "Fact Sheet: Terrorist Bombing of US Embassy in Kenya (US Commemorates Second Anniversary of Kenya, Tanzania Attacks)" (12 August 2000), located at http://usembassy.state.gov/islamabad/wwwh00081201.html.

252 UN Resolution 1189. This UN Security Council Resolution and others may be found at the following site, www.un.org/Docs/sc/.

253 UN Resolutions 1193, 1214 s 13.

254 UN Resolution 1267.

255 UN Resolution 1333, s 8(c). For information on the Counter-Terrorism Committee, its website is located at www.un.org/Docs/sc/committees/1373/.

256 UN "The New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organisation as Established and Maintained by the 1267 Committee", located at www.un.org/Docs/sc/committees/1267/1267ListEng.htm.

257 See Part III.B.3, above; UN Resolutions 1368, 1373.

258 UN Resolution 1390, s 2.

legislation or other administrative processes to prevent and punish violations of the UN requirements.[259]

Although pressing member States on the need for forceful measures to combat terrorism, the UN has emphasised the importance of guaranteeing civil liberties in the process. As UN Secretary-General Kofi Annan stated months after September 11: "We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism."[260]

B. THE UNITED STATES

The US has two principal mechanisms for curtailing the financing of terrorists and terrorists groups: (1) a general international economic emergencies statute that permits the President to freeze certain assets and transactions during a national emergency arising from a foreign threat; and (2) a foreign terrorist organisation statute that permits the Executive Branch to designate foreign terrorist organisations, freeze their financial assets, prohibit others from providing them with material support, and bar their representatives from entering the country. Since September 11, the US has used the first statute, and an Executive Order declared pursuant to it, as its primary tool to target and designate terrorists and their supporters and freeze their assets.

1. Pre-September 11

For virtually its entire history, the US has utilised economic sanctions as a tool of its foreign policy and national security arsenals.[261] Throughout most of the 20th century, US sanctions programmes were governed by the Trading With the Enemy Act (TWEA), enacted in 1917.[262] As amended in 1933, TWEA granted the President "broad authority" to "investigate, regulate, . . . prevent or prohibit . . . transactions" in which a foreign country or national has "any interest" in times of war or declared national emergencies.[263] Although TWEA does not use the term "freeze," the authority it conveyed to the Executive to regulate, prevent, or prohibit transactions has been interpreted for more than half a century to encompass the power to freeze or block an entity's property.[264]

Pursuant to TWEA, the US engaged in a variety of sanctions-based programmes over the past 80 years, including, for example, asset freezes of enemy countries and companies they

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259 UN Resolution 1390, ss 4, 8.

260 UN Counter-Terrorism Committee "Terrorism and Human Rights", located at www.un.org/Docs/sc/committees/1373/human_rights.html.

261 *Global Relief Foundation, Inc. v O'Neill*, 207 F Supp 2d 779, 791 (ND Ill 2002).

262 40 Stat 411 (codified as amended at 50 USC appendix ss 1-44).

263 50 USC appendix s 5(b); *Dames & Moore v Regan*, 453 US 654, 672 (1981). Although the statute refers to "any interest" of a foreign country or national, it has long been interpreted to permit the designation and freezing of assets of US persons, as long as there is some broadly defined foreign "interest" in their relevant activities, resources, or transactions. *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F 3d 156, 162-63 (DC Cir 2003); *Global Relief Foundation v O'Neill*, 315 F 3d 748, 752-54 (7th Cir 2002); *IPT Co v United States Department of Treasury*, No 92 Civ 5542, 1992 WL 212437, *1 (SDNY 25 August 1992); *Draeger Shipping Co v Crowley*, 55 F Supp 906, 910 (SDNY 1944).

264 *Orvis v Brownell*, 345 US 183, 187-88 (1953); *Propper v Clark*, 337 US 472, 483-84 (1949).

were deemed to control during World War II.[265] In more recent decades, TWEA has been used to implement the continuing sanctions against Cuba and North Korea, the freezing of assets of US and foreign persons and companies who acted for or on behalf of sanctioned countries, and the restrictions on US persons who wished to engage in travel-related or any other form of financial transactions with such nations.[266]

In 1977, Congress enacted the International Emergency Economic Powers Act (IEEPA) and amended TWEA to govern "the President's authority to regulate international economic transactions during wars or national emergencies."[267] The 1977 statute limited TWEA's application to periods of declared wars and to certain pre-existing sanctions programmes, with IEEPA available during other times of national emergency arising from international events.[268] Although the President's broad authority to freeze assets under TWEA and IEEPA remained essentially the same, with certain limited exceptions,[269] IEEPA required the President, before the exercise of any of its powers, to first declare a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[270] IEEPA contains criminal penalties for anyone who transfers assets or engages in transactions forbidden by the statute or an executive order promulgated pursuant to it.[271]

Since its enactment in 1977, Presidents have used IEEPA to sanction countries and entities and freeze assets, foreign and domestic, in response to a variety of declared national emergencies arising from foreign threats, including those relating to the Iranian hostage crisis, the former Yugoslavia, Libya, and Iraq.[272]

Throughout most of the last century, TWEA- and IEEPA-based sanctions programmes generally targeted certain unfriendly countries and their nationals, including companies and individuals deemed to be owned or controlled by those governments. With the rise in power, prominence, and threat level of non-governmental organisations and individuals in the 1990s, however, President Clinton imposed IEEPA sanctions directly on two particularly threatening groups of entities and individuals, declaring two national emergencies – one to deal with Colombian drug "kingpins" and the other involving terrorists threatening the Middle East peace process. The President ordered that the foreign entities and individuals at the centre of each emergency be designated, and their assets frozen, and that US persons be prohibited from

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265 *Global Relief Foundation*, 207 F Supp 2d at 791; *Draeger Shipping Co. v Crowley*, 55 F Supp 906, 910 (SDNY 1944).

266 31 C.F.R. chapter V, appendix A; Declaration of R. Richard Newcomb, Director of the Office of Foreign Assets Control, United States Department of the Treasury (26 March 2002), 2, attached to Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and In Support of Defendants' Motion to Dismiss or for Summary Judgment, *Global Relief Foundation* [hereafter Newcomb Declaration].

267 S Rep No 95-466 at 2 (1977), reprinted in 1977 USCCAN 4540, 4541.

268 *Regan v Wald*, 468 US 222, 227-28 (1984).

269 *Regan v Wald*, 468 US 222, 227-28 (1984).

270 50 USC s 1701(a).

271 50 USC ss 1704-05.

272 Newcomb Declaration, above, 2-3; *IPT Co. v United States Dep't of Treasury*, No 92 Civ 5542, 1992 WL 212437 (SDNY 25 August 1992).

engaging in financial transactions with them.[273] As a result of this action, the US designated and froze the assets of hundreds of companies and individuals owned or controlled by, or acting for on behalf of, Colombian drug kingpins and Middle-East terrorists.[274]

In 1996, Congress added another tool to the country's anti-terrorism arsenal by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[275] Finding that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations", Congress authorised the Secretary of State to designate a group as a foreign terrorist organisation if the group: (a) is foreign; (b) engages in "terrorist activity"; and (c) that terrorist activity threatens the security of US nationals or the national security of the US.[276] "The consequences of that designation are dire. The designation by the Secretary results in blocking any funds which the organization has on deposit with any financial institution in the United States. Representatives and certain members of the organization are barred from entry into the United States. Perhaps most importantly, all persons within or subject to jurisdiction of the United States are forbidden from 'knowingly providing material support or resources' to the organization."[277]

A designation as a foreign terrorist organisation lasts for two years, unless the Secretary of State acts to redesignate it prior to the expiration of that period.[278] Congress is empowered to block or revoke any designation.[279] A designation may be based, at least in part, on classified evidence, which the designated entity cannot see.[280] An entity may challenge its designation in federal court, and, if it does so, the judges may review all the evidence used to support the action, including the classified evidence.[281]

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273 Executive Order 12978, 60 Fed Reg 54579 (1995); Executive Order 12947, 60 Fed Reg 5079 (1995).

274 Office of Foreign Assets Control "Specially Designated Nationals and Blocked Persons", located at www.treasury.gov/offices/eotffc/ofac/sdn/t11sdn.pdf.

275 Pub L No 104-132, 110 Stat 1214.

276 AEDPA ss 301(6), 302. The AEDPA provisions on foreign terrorist organisations amended an earlier statute, the Immigration and Nationality Act, *codified at* 8 USC 1181 *et seq.* AEDPA, s 302.

277 *National Council of Resistance of Iran v Department of State*, 251 F 3d 192, 196 (DC Cir 2001) (citing the AEDPA).

278 AEDPA, s 219(a)(4).

279 AEDPA, s 219(a)(5).

280 AEDPA, s 219(a)(2).

281 AEDPA, s 219(a)-(b).

2. Post-September 11

Twelve days after the September 11 attacks, President Bush issued Executive Order 13224, declaration a national emergency with respect to the "grave acts of terrorism . . . and the continuing and immediate threat of further attacks on United States nationals or the United States."[282] In determining that actual and threatened terrorist acts constituted "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," the President invoked the authority of IEEPA and the United Nations Participation Act (the US corollary to New Zealand's United Nations Act 1946).[283] The Executive Order designated 27 terrorists, terrorist organisations, and their supporters – including Al-Qaida and bin Laden – froze their property and property interests that were in the US, subsequently come within the US, or come within the possession or control of US persons, and prohibited US persons from engaging in financial transactions with designated parties.[284]

In addition, the Executive Order authorised the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate "foreign persons" whom he determines "have committed or . . . pose a significant risk of committing, acts of terrorism that threaten the security of US nationals or the national security, foreign policy, or economy of the United States."[285] The Order also authorised the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate "persons" (defined as individuals or entities) whose property or interests in property should be blocked because they act for or on behalf of, or are owned or controlled by, designated terrorists, or they "assist in, sponsor, or provide . . . support for," or are "otherwise associated" with them.[286]

A designation under the Executive Order can last as long as the emergency exists. A terrorist designated under the Executive Order may petition the Treasury Department for a reconsideration of the decision, seek a licence to allow it to use part or all of its frozen property, and/or file a legal challenge in federal court against the designation.[287] In the event of a legal challenge, the court is entitled to review any classified evidence used by the Government in making its decision without the entity or its attorneys being able to see that material.[288]

Pursuant to this Executive Order, the US has designated well over 300 organisations and individuals as terrorists and supporters of terrorism and frozen all of their assets within its jurisdiction or control.[289]

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282 Executive Order 13224, 66 Fed Reg 49079 (2001).

283 Executive Order 13224 Preamble. The United Nations Participation Act authorises the President to implement measures adopted by the United Nations Security Council pursuant to Article 41 of the UN Charter. 22 USC s 287c; *Milena Ship Mgmt. Co. v Newcomb*, 995 F 2d 620, 622 (5th Cir 1993). The statute is similar to New Zealand's United Nations Act 1946.

284 Executive Order ss 1, annex.

285 Executive Order s 1(b).

286 Executive Order s 1(c)-(d).

287 31 CFR ss 501.801–.802, 501.807.

288 50 USC s 1702(c).

289 US Department of Treasury "US Designates 15 Members of Italian Al-Qaida Cell" (12 November 2003), located at www.treasury.gov/press/releases/js993.htm. For a complete list of entities and individuals designated by the US, see US Department of Treasury "Terrorism:

As the President was issuing his Executive Order, his Administration was working with Congress on proposed legislative responses to deter terrorism. Less than a week after the September 11 attacks, Attorney General John Ashcroft met with Congressional leaders to discuss an emergency package of anti-terrorism legislation.[290] On 24 September, the Attorney General presented to Congress a comprehensive anti-terrorism bill, which proposed broader authority for wiretaps and intelligence investigations, increased power to detain and deport suspected terrorists, strengthened civil and criminal forfeiture powers, and additional criminal provisions, higher sentences, and reduced statutes of limitations for terrorism-related offences.[291] The proposed legislation raised concerns among civil liberties advocates, and Congress eliminated some of the more controversial provisions, including a proposal to permit the indefinite detention of suspected foreign terrorists without specific charges being filed against them.[292] In October 2001, six weeks after the terrorist attacks, Congress enacted the sweeping legislation – dubbed the USA PATRIOT Act – but added a "sunset clause" on the Act's "most worrisome elements" that results in their expiry in 2005, unless re-enacted by Congress and the President.[293] Since its enactment, the Act has continued to be relatively controversial, with denunciations from civil liberties organisations, a critique from the Justice Department Office of Inspector General, and legal challenges to the constitutionality of several of its provisions.[294]

As a result of the September 11 attacks and the refusal of the Taliban to hand over bin Laden and his top Al-Qaida accomplices, the US and coalition governments, including New Zealand, subsequently waged war in Afghanistan "to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected it."[295] The Taliban-led government was toppled, and allied forces captured thousands of individuals, many of whom were transferred to the US Naval Base at Guantanamo Bay, Cuba.[296] The President

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What You Need to Know About US Sanctions", located at www.treasury.gov/offices/eotffc/ofac/sanctions/t11ter.pdf.

290 Philip Shenon and Alison Mitchell "Lawmakers Hear Ashcroft Outline Antiterror Plans" (17 September 2001) *New York Times*.

291 US Department of Justice "Attorney General Ashcroft Outlines Mobilization Against Terrorism Act" (24 September 2001), located at www.usdoj.gov/opa/pr/2001/September/492ag.htm.

292 "Explaining the U.S.A. Patriot Act" (23 August 2002) CNN.com; John Lancaster "Anti-Terrorism Bill is Approved" (13 October 2001) *The Washington Post*; John Lancaster and Jonathan Krim "Ashcroft Presents Anti-Terrorism Plan to Congress" (20 September 2001) *The Washington Post*.

293 United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 [USA PATRIOT Act"], Pub L No 107-56, 115 Stat 272, 277 (2001); Jacob R. Lilly "National Security at What Price?" (Spring 2003) 12 Cornell J L & Pub Policy 447, 459.

294 Lilly, above, 458-64; US Department of Justice Office of the Inspector General "Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act" (17 July 2003), located at www.usdoj.gov/oig/special/03-07/final.pdf; *Muslim Community Ass'n of Ann Arbor v Ashcroft*, (D Mich 2003); *Humanitarian Law Project v Ashcroft* (CD Ca).

295 *Al Odah v United States*, 321 F 3d 1134, 1136 (DC Cir 2003), *certiorari granted*, *Al Odah v United States*, 2003 WL 22070599.

296 Brief of the United States, *Rasul v Bush*, at 2-3, located at www.usdoj.gov/osg/briefs/2003/0responses/2003-0334.resp.pdf.

subsequently "determined that the Guantanamo detainees – both al Qaeda and Taliban – are not entitled to prisoner-of-war status under the Geneva Convention," a decision that sparked widespread international criticism of the US and a bevy of lawsuits, including a consolidated case challenging the legality of the detentions which the Supreme Court is scheduled to hear this term.[297]

C. THE UNITED KINGDOM

The UK has established two primary procedures for classifying and penalising terrorists and terrorist groups. First, the Government may institute an outright ban – called proscription – on terrorist organisations, which freezes a group's assets and prohibits any type of association with, support for, or activity by, the group. Second, the Government "lists" other groups pursuant to UN resolutions 1373 and 1390, which freezes the person or entity's assets, but does not result in a complete banning of the organisation and all the attendant consequences thereof.

1. Pre-September 11

The UK has a lengthy history of anti-terrorism rule-making, including a variety of legislative responses over the past three decades to deal with the violence relating to Northern Ireland.[298] These modern laws originated in the wake of the Birmingham bombings of 21 November 1974, when the Irish Republic Army exploded bombs in two crowded city centre pubs, killing 21 and injuring 162.[299] The resulting anti-terrorism law and its successors generally were enacted quickly, in response to an outbreak of violence, and labelled "temporary," and they were "officially admitted, and indeed intended, to be 'Draconian' (repeating the epithet used by the Home Secretary, Roy Jenkins, when introducing the original Prevention of Terrorism legislation in 1974)."[300] These anti-terrorism measures gave the British Government the authority to ban organisations, such as the Irish Republican Army, and criminalise membership in or support for terrorist groups, as well as providing police with sweeping powers of search, arrest, detention, and asset confiscation.[301]

In recent years, the UK enacted a series of comprehensive anti-terrorism measures that drew upon key aspects of its prior laws, such as the power to ban organisations, but eliminated

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297 Brief of the United States, above, at 14; *Al Odah*, 321 F 3d at 1136-38, *certiorari granted, Al Odah v United States*, 2003 WL 22070599; Conte "A Clash of Wills: Counter-Terrorism and Human Rights", above, 346.

298 HM Treasury "Combating the Financing of Terrorism: A Report on UK Action" (October 2002) [hereafter "UK Report"], 5; Clive Walker "The Bombs in Omagh and their Aftermath: The Criminal Justice (Terrorism and Conspiracy) Act 1998" (November 1999) 62 Modern L Rev 879, 879-81 [hereafter Walker "The Bombs in Omagh"].

299 "Birmingham Was Target of IRA Attacks" (4 November 2001) BBC News; "Birmingham Relives Bomb Blast" (10 November 2001) BBC News.

300 Walker "The Bombs in Omagh", above, 879-80; Law Commission *Final Report*, above, 197-98. The Law Commission noted, "In the United Kingdom the police, in the face of an ongoing campaign of terrorism, were in 1974 given expanded powers of arrest and detention and search and seizure. The police still have these powers." Law Commission *Final Report*, above, 21.

301 Walker "The Bombs in Omagh", above, 879-902; Conor Gearty "Turning Point" (11 May 2001) Solicitors Journal 426-27; Clive Walker "Anti-Terrorism for the Future" (3 May 1996) New L J 657, 657-58; J J Rowe "The Terrorism Act 2000" (July 2001) Criminal L Rev 527, 527-28.

some of the more controversial provisions, including the ability to detain suspected terrorists indefinitely without a warrant or judicial oversight.[302]

On 20 July 2000, the UK Parliament passed the Terrorism Act 2000, which replaced the previous anti-terrorism legislation dealing primarily with Northern Ireland – which had to be renewed by Parliament annually – with a comprehensive, international anti-terrorism regime.[303] The Act gave the Government the power to "proscribe" any organisation if the Secretary of State believed that it was "concerned in terrorism," which was defined to include participation in, preparation for, promotion of, or "otherwise concerned in" terrorism.[304] Groups were permitted to appeal to the Secretary to remove their names, with further appeals available to a Proscribed Organisations Appeal Commission and, ultimately, on questions of law, to an appeals court.[305] The Act made it a criminal offence to "belong[] or profess[] to belong to a proscribed organisation," to arrange or encourage any type of support for such a group, or even to wear clothing or to carry an article that reasonably indicated membership or support of the organisation.[306]

In addition to the provisions regarding proscribed organisations, the Act established criminal penalties for those who provided, possessed, received, or invited others to provide, money or property where there was reasonable cause to suspect that it might be used for terrorism.[307] The Act permitted law enforcement officers to arrest a person without a warrant if they reasonably suspected he was a terrorist and to hold him for up to 48 hours, extendable for a further five days.[308] Constables also were empowered to seize money at the borders which they reasonably suspected was to be used for terrorism or belonged to a proscribed organisation.[309] The legislation allowed such cash to be forfeited if, on a balance of probabilities, the money was deemed to be for terrorist purposes or belong to a proscribed group.[310]

Pursuant to this legislation, the UK has proscribed 25 international organisations, including Al-Qaida, Hamas, and Jeemah Islamiyah, as well as 14 Irish groups proscribed under previous emergency legislation.[311] Not all the proscribed groups have been designated by the UN; the Liberation Tigers of Tamil Eelam ("LTTE"), is an example of a group proscribed by

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302 Walker "The Bombs in Omagh", above, 879-902; Gearty, above, 426-27; Walker "Anti-Terrorism for the Future", above, 657-58; Rowe, above, 527.

303 Terrorism Act 2000 (UK) s 3, located at www.hmso.gov.uk/acts/acts2000/20000011.htm; UK Home Office "Legislation", located at www.homeoffice.gov.uk/terrorism/govprotect/legislation/index.html.

304 Terrorism Act 2000 (UK) s 3; Home Office "Legislation", above.

305 Terrorism Act 2000 (UK), ss 4-6.

306 Terrorism Act 2000 (UK), ss 11-13.

307 Terrorism Act 2000 (UK), ss 15-16.

308 Terrorism Act 2000 (UK), s 41; George Williams "Australian Values and the War Against Terrorism" (2003) 26(1) UNSW L J 191, 197.

309 Terrorism Act 2000 (UK), ss 24-25.

310 Terrorism Act 2000 (UK), s 28.

311 UK Home Office "Terrorism", located at www.homeoffice.gov.uk/terrorism/threat/groups/index.html.

the UK and designated by the US and other countries, but which is not on the UN list. The UK Parliament must agree to proscribe, or de-proscribe, any additional groups.[312]

According to the Home Office, the outright banning of certain groups plays an important role in combating terrorism at home and abroad. "Proscription deters international terrorist organisations from coming to the UK in the first place, and makes it difficult for them to operate here. It also sends out a strong signal across the world that we reject these organisations and their claims to legitimacy."[313]

2. Post-September 11

Less than two weeks after the UN Security Council adopted Resolution 1373, the UK Government enacted the Terrorism (United Nations Measures) Order 2001 to implement the resolution. The Order, which came into effect on 10 October 2001, criminalised the provision of funds or services directly or indirectly to anyone who commits, facilitates, or participates in an act of terrorism, as well as those organisations owned or controlled or acting on behalf of such a terrorist.[314] It also allowed the Treasury to freeze assets of anyone it reasonably suspected of such actions.[315] Persons affected by freezing orders were permitted to challenge the decisions to the High Court.[316]

On 13 November 2001, the UK Government unveiled an emergency legislative proposal to respond to the September 11 attacks and the UN resolution.[317] The bill proposed emergency powers for the police, customs, and other agencies, including authority to detain foreign-born terrorism suspects indefinitely without trial where deportation is not possible.[318] The House of Lords resisted some of the proposals, forcing the Government to scale back certain investigative powers requested by police and to agree to a Privy Council committee review of the legislation within two years.[319] After these modifications were made, Parliament approved the Anti-Terrorism, Crime and Security Act 2001 on 14 December 2001, one month after it was proposed.[320]

The Act allowed the Treasury, on reasonable belief, to issue orders freezing funds of foreign governments or persons who have taken, or are likely to take, any action detrimental to the UK economy or to the life or property of UK residents.[321] Such freezing orders prohibit

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312 Terrorism Act 2000 (UK), s 123.

313 UK Home Office "Terrorism: Frequently Asked Questions", located at www.homeoffice.gov.uk/terrorism/govprotect/faq/index.html.

314 Terrorism (United Nations Measures) Order 2001 (UK), statutory instrument 2001 no 3365 [hereafter "Terrorism (United Nations Measures) Order 2001 (UK)"], s 3.

315 Terrorism (United Nations Measures) Order 2001 (UK), above, s 4.

316 Terrorism (United Nations Measures) Order 2001 (UK), above, s 4.

317 "Anti-Terror Laws Unveiled" (13 November 2001) BBC News.

318 "Anti-Terror Laws Unveiled", above.

319 "Battle Ends Over Anti-Terror Bill" (14 December 2001) BBC News; "Anti-Terror Act At-a-Glance" (14 December 2001) BBC News.

320 "Battle Ends Over Anti-Terror Bill", above; "Anti-Terror Act At-a-Glance", above; UK Report, above, 14.

321 Anti-Terrorism, Crime and Security Act 2001 (UK), ss 4-5.

persons from making any type of financial asset available to specified terrorists and to those assisting them or deemed likely to provide assistance.[322] Freezing orders last for two years (unlike such orders made pursuant to the relevant Orders in Council), and must be approved by Parliament within a month of its sitting.[323] The Act also provided for the forfeiture of cash, inland as well as at the borders, that was intended for, or obtained from, terrorism, or belonged to a proscribed organisation.[324] The legislation encompassed a broad number of other topics, involving tightened immigration and detention rules, increased protections for aviation, civil nuclear sites, and certain laboratories, and heightened penalties for an assortment of crimes relating to terrorism.[325]

The Act required that the Secretary of State appoint a Privy Council committee to review the legislation within two years and recommend expiry of any of its provisions. Any provisions recommended for expiry by the committee will cease to have effect six months later, unless a contrary motion is made in each House of Parliament prior to that time.[326] Because of the provision providing for indefinite detention of suspected foreign terrorists who pose a threat to national security but cannot be deported because, for example, there are no flights to the destination or deportation would result in a risk of torture, the UK issued an order derogating from (*i.e.*, temporarily suspending) Article 5(1) of the European Convention on Human Rights.[327] This provision of the Act has resulted in at least eight foreign nationals being detained for nearly two years, without charge or trial, according to a sharply critical report released by Amnesty International in October.[328]

An additional tool added to the UK anti-terrorism arsenal last year was the Al Qa'ida and the Taliban (United Nations Measures) Order 2002, which came into force on 25 January 2002.[329] This Order renewed prior sanctions on Al-Qaida and the Taliban, implemented the automatic freezing of assets of persons listed under UN Security Council Resolution 1390, and authorised the Treasury to freeze other assets that it had "reasonable grounds for suspecting" were held by, for, or on behalf of, listed persons or someone acting on their behalf.[330] The Order made it a criminal offence to provide funds, goods, or technical assistance or training to listed persons or anyone acting on their behalf, except where the supplier could prove "he did not know and had no reason to suppose" that the recipient was a listed person.[331] The Order

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322 Anti-Terrorism, Crime and Security Act 2001 (UK), s 5.

323 Anti-Terrorism, Crime and Security Act 2001 (UK), ss 8, 10.

324 Anti-Terrorism, Crime and Security Act 2001 (UK), s 1.

325 Anti-Terrorism, Crime and Security Act 2001 (UK); (UK) Legislation, above, at 2.

326 Anti-Terrorism, Crime and Security Act 2001 (UK), ss 122-23.

327 UK Home Office "Terrorism: Frequently Asked Questions", located at www.homeoffice.gov.uk/terrorism/govprotect/faq/index.html; Amnesty International "UK: Proceedings Amount to a Perversion of Justice" (30 October 2003), located at www.scoop.co.nz/mason/stories/WO0310/S00314.htm.

328 Amnesty International "UK: Proceedings Amount to a Perversion of Justice", above.

329 UK Report, above, 13.

330 Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (UK), statutory instrument 2002 no 111 [hereafter "Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (UK)"], ss 2, 7-8.

331 Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (UK), above, ss 3-7.

also made it an offence to facilitate its circumvention or to fail to disclose information regarding activity with listed persons or a person acting on their behalf.[332]

As a result of its United Nations Orders, the UK has frozen the assets of over 100 organisations and over 200 individuals.[333]

D. OTHER JURISDICTIONS[334]

1. Australia

Prior to September 11, Australia had no laws dealing specifically with terrorism, other than measures enacted by the Northern Territory.[335] In March 2002, the Government introduced two packages of anti-terrorism legislation into Parliament.[336] The first, including the Security Legislation Amendment (Terrorism) Bill 2002 (Cth), would have authorised the Federal Attorney-General to ban organisations, with a penalty of 25 years' imprisonment for members and supporters.[337] It also proposed to "criminalise actions performed 'with the intention of advancing a political, religious or ideological cause' that caused harm or damage," thereby potentially reaching "farmers, unionists, students, environmentalists and even internet protesters who were engaged in minor unlawful civil protest."[338]

After "a highly critical, unanimous report" by a Senate committee, the Parliament approved the legislation, with substantial amendments, and it largely took effect in July 2002. "The bill, as enacted, contains a much stricter definition of terrorism, and does not grant the Attorney-General a unilateral power of proscription."[339] Instead, the Act empowers the Governor-General to specify an organisation as a terrorist only if the UN Security Council already has listed the group.[340] A listing by Australian authorities "effectively bans the organisation."[341] The Act created several new offences, including life imprisonment for

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332 Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (UK), above, ss 9-10.

333 UK Report, above, 14. A complete list of those whose assets have been frozen by the UK is available at the Bank of England website, located at www.bankofengland.co.uk/sanctions/sanctionsconlist.htm.

334 That other jurisdictions are summarised briefly or omitted entirely does not imply a lack of significance of their regimes, but rather a lack of time to study their systems in any greater detail.

335 Christopher Michaelsen "International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11" (2003) 25 Sydney L Rev 275, 281; Williams, above, 191.

336 Williams, above, 191.

337 Williams, above, 191, 195; Michaelsen, above, 281-82. A total of five terrorism-related bills were introduced as part of this first package of legislation. Michaelsen, above, 281.

338 Williams, above, 194-95.

339 Williams, above, 195 (footnotes omitted); Security Legislation Amendment (Terrorism) Act 2002 (Cth).

340 Security Legislation Amendment (Terrorism) Act 2002 (Cth), s 102 (1).

341 Criminal Code Amendment (Hizballah) Bill 2003 (Cth), located at www.aph.gov.au/library/pubs/bd/2002-03/03bd170.htm.

engaging in or planning a terrorist act.[342] Other new criminal offences include providing support or funding to a terrorist group, recruiting members, directing the activities of such a group, and being a member.[343]

The second package of anti-terrorism legislation introduced in 2002 contained the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth). The bill would have allowed adults and even children to be strip searched and detained for "rolling two day periods that could be extended indefinitely," thereby permitting "the indefinite detention of citizens."[344] The proposal provided for detention not only of terrorism suspects, but also of those who might "substantially assist the collection of intelligence that is important in relation to a terrorism offence."[345] The bill "motivated a 27 hour debate in Parliament over the final sitting days of 2002, but was not passed."[346]

On 26 June 2003, "[a]fter intense negotiations between the Government and the Opposition," the Parliament approved an amended version of the legislation.[347] The Security Legislation Amendment (Terrorism) 2002 was made applicable only to those aged 16 years and over. Detainees were to be given immediate access to a lawyer of their choice. Australians could be questioned for up to 24 hours over a one-week period and then released, but could be questioned again with the issuance of a new warrant with fresh information. The legislation contained a sunset clause, causing it to lapse after three years unless re-enacted.[348]

Because the prior packages of legislation did not authorise the Government to designate non-UN entities, *i.e.*, terrorists not associated with bin Laden, Al-Qaida, or the Taliban, the Government proposed two additional bills in May 2003: the first to permit authorities to specify non-UN listed persons as terrorists and the second to designate Hizballah. The first bill passed the House on 3 June 2003, but remained stalled in the Senate.[349] Parliament approved the second, Hizballah-specific bill on 16 June, and the Government formally announced the listing of the organisation as a terrorist group on 17 July.[350]

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342 Williams, above, 191.

343 Michaelsen, above, 282 note 28; Security Legislation Amendment (Terrorism) Act 2002 (Cth).

344 Williams, above, 191, 195.

345 Williams, above, 195.

346 Williams, above, 191.

347 Michaelsen, above, 282; Williams, above, 199.

348 Williams, above, 199.

349 Criminal Code Amendment (Terrorist Organisations) Bill 2003 – Criminal Code Amendment (Hizballah) Bill 2003, 3 June 2003, located at www.ag.gov.au/www/attorneygeneralHome.nsf/Web+Pages/9995BF819BD64D5ECA256D3A0079D38C?OpenDocument.

350 Passage of Hizballah Legislation, 16 June 2003, located at www.ag.gov.au/www/attorneygeneralHome.nsf/Web+Pages/5ECD7F2EF89375ECCA256D47007A1A94?OpenDocument; Hizballah External Security Organisation Listed, 17 July 2003, located at www.ag.gov.au/www/attorneygeneralHome.nsf/0/9F22AF531A4693F2CA256D66007C1F14?OpenDocument.

2. Canada

On 2 October 2001, less than a week after UN Resolution 1373 was issued, Canada promulgated regulations under its United Nations Act to implement the Security Council decision. The regulations listed individuals and entities designated by the UN and forbade the provision to or collection of funds for such persons and groups. It also froze all assets of listed parties within the jurisdiction or control of Canada. The regulations imposed on financial institutions a duty to determine whether they possessed or controlled property owned or controlled by a listed party, and required all persons to disclose to Police information about property or transactions within the scope of the measures. Persons who contravened any part of the regulations were liable for criminal charges.[351]

Less than two weeks later, on 15 October, the Government introduced a package of legislation to "take[] aim at terrorist organizations and strengthen[] investigation, prosecution and prevention of terrorist activities at home and abroad." The Anti-Terrorism Act proposed to authorise the definition and designation of terrorist organisations, criminalise the knowing participation in, contribution to, or facilitation of terrorist groups, as well as the knowing harbouring of a terrorist or the knowing collection or provision of funds to terrorists. The Act also would deny or remove the charitable status of those who supported terrorist groups and make it easier to freeze and seize assets. In addition, law enforcement powers were to be strengthened by, for example, making it easier to use electronic surveillance against terrorist groups and allowing the arrest, detention, and release with conditions of suspected terrorists.[352]

After "impassioned expressions of concern over the damage that the bills will do to the human rights and civil liberties of Canadians,"[353] the Government agreed to several amendments to "clarify the safeguards" in the bill "and strike the right balance between ensuring the safety and security of Canadians and protecting our values and civil liberties." The amendments added a sunset clause to certain controversial preventative arrest and investigative provisions, on top of the three-year Parliamentary review of the legislation already required, and narrowed the definition of terrorist activity to delete the word "lawful" to "ensure that protest activity, whether lawful or unlawful, would not be considered a terrorist activity unless it was intended to cause death, serious bodily harm, endangerment of life, or serious risk to the health and safety of the public." Attorney General certificates to prohibit the disclosure of sensitive information also would be subject to judicial review.[354]

The Parliament passed the amended bill shortly thereafter, and it took effect on 24 December 2001.[355] As enacted, the Act authorises the Governor in Council, on the

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351 United Nations Suppression of Terrorism Regulations – Administrative Consolidation (2 October 2001), located at www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_24.html.

352 "Government of Canada Introduces Anti-Terrorism Act" (15 October 2001), located at http://canada.justice.gc.ca/en/news/nr/2001/doc_27785.html.

353 "Civil Liberties, Human Rights and Canada's New National Security Legislation" located at www.caut.ca/english/issues/hr_can/nationalsecurity.asp. For other criticisms, see "Canada's New Anti-Terrorism Bill is a Misguided Assault on Basic Freedoms", located at www.caut.ca/english/bulletin/2001_nov/president.asp.

354 "Amendments to the Anti-Terrorism Act" (20 November 2001), located at http://canada.justice.gc.ca/en/news/nr/2001/doc_27904.html

355 "Anti-Terrorism Legislation Comes Into Force" (24 December 2001), located at http://canada.justice.gc.ca/en/news/nr/2001/doc_29513.html.

recommendation of the Solicitor General, to establish a list of entities that she reasonably believes knowingly carry out, attempt, participate in, or facilitate a terrorist act, or act on behalf of or in association with terrorists. The designated entity may apply to the Solicitor General to be de-listed and, if denied, may apply to a judge for judicial review.[356] The Act also criminalised the financing of terrorism, the participating in or facilitating of terrorist acts, and the harbouring of terrorists.[357]

As a result of the Act, Canada has listed 34 entities as terrorists, on top of the individuals and groups listed under its UN sanctions regulations. "And the assessment process for more listings continues," according to the Federal Solicitor General.[358]

3. Financial Action Task Force

The Financial Action Task Force on Money-laundering (FATF) is an inter-governmental organisation created by the Group of Seven industrialized countries but now comprising 28 member States. FATF "plays a leading role in setting standards and effecting the necessary changes in national legislation on terrorist financing." On 31 October 2001, the Task Force issued eight special recommendations on terrorist laundering which commit member States to a wide range of legislative and regulatory action.[359] Although New Zealand has implemented some of these recommendations, at least one analyst cautioned that it has fallen behind some other countries in its progress toward full compliance.[360] However, Government agencies currently are conducting a review on compliance with FATF's Revised 40 Recommendations, as well as its eight special recommendations, and have indicated that this review may result in some changes (legislative and otherwise) to achieve a higher level of compliance.

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356 Criminal Code, s 83.05.

357 Criminal Code, ss 83.02-83.04, 83.18–83.23.

358 "Federal Solicitor General Wayne Easter Announces Further Action Against Terrorism" (13 November 2003), located at www.sgc.gc.ca/publications/news/20031113_e.asp. For a catalogue of listed entities, see www.sgc.gc.ca/national_security/counter-terrorism/Entities_e.asp.

359 UN Report, above, 11.

360 Interview; UK Report, above, 22-24.

V. THE OPERATION OF THE TERRORISM SUPPRESSION ACT

Although the Terrorism Suppression Act provides that the Prime Minister may designate an entity as a terrorist, it does not specify any particular process leading up to that designation, other than that she must consult with the Attorney-General (and the Minister of Foreign Affairs and Trade, in the case of an interim designation).[361] The Act "does not prescribe who may seek a designation or the reasons for doing so."[362] Accordingly, it has been up to the Cabinet and the relevant Government departments – namely, the Department of Prime Minister and Cabinet (including the Domestic and External Security Secretariat and the External Assessments Bureau), the New Zealand Security Intelligence Service (SIS), the Ministry of Foreign Affairs and Trade, and the Police – to flesh out the procedures that will culminate in terrorist designations.[363]

Since enactment of the Terrorism Suppression Act, the Prime Minister has used her new authority in order to designate dozens of individuals and entities as terrorists, but, so far, New Zealand has named only persons and groups already designated by the UN.[364] The Government recently finalised procedures that may be utilised to make additional designations, however, on top of the UN ones.[365] According to Minister of Foreign Affairs and Trade and Minister of Justice Phil Goff, New Zealand "will designate where we think the balance of interests lie," after weighing various legal, political, and foreign policy considerations. He emphasised the Government's effort would not become "a crusade," with an intent to designate the longest list possible, but instead to target those who continued to use terrorist acts to achieve their aims, particularly where there might be a "real risk" that New Zealand or its residents could be directly affected.[366]

After passage of the Terrorism Suppression Act, the Officials Committee for Domestic and External Security Co-ordination (ODESC) – consisting of representatives from various relevant agencies[367] and chaired by DPMC Chief Executive Mark Prebble – agreed upon a "centralised approach" to designations, where Police take a lead role in initiating the process, as they have in counter-terrorism operations generally.[368] Police collect, collate, assess, and

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361 Terrorism Suppression Act, s. 20, 22; New Zealand Police National Crime Service Centre "The Process of Designating a Terrorist Entity" (Draft, November 2002) [hereafter Police Draft], 3.

362 Police Draft, above, 3.

363 Interviews with W J Peoples, Inspector, Crime Policy and Projects Officer, New Zealand Police (Wellington, September-November 2003); Hill interview, above; Helm interview, above.

364 Cabinet Minute "Terrorism Suppression Act: Designating Non United-Nations Listed Terrorist Entities" (13 October 2003) CAB Min (03) 34/15A [hereafter Cabinet Minute], 1; Office of the Minister of Police "Terrorism Suppression Act: Designating Non-United Nations Listed Terrorist Entities" [hereafter "Designating Non-United Nations Listed Terrorist Entities"], 1; Goff interview, above; White interview, above; Peoples interview, above.

365 Cabinet Minute, above, 1-2; Goff interview, above; White interview, above.

366 Goff interview, above.

367 These agencies include Police, Foreign Affairs and Trade, Defence, the Defence Force, the Security Intelligence Service (SIS), the Government Communications Security Bureau (GCSB), the External Assessments Bureau (EAB), and Ministry of Civil Defence and Emergency Management (MCDEM).

368 Minutes of Meeting of ODESC (28 August 2002), 3; ODESC "Terrorism Suppression Bill: Implementation" (20 August 2002) [hereafter Implementation Paper], 2.

analyse the relevant data on terrorists, and make a preliminary determination whether an individual or entity satisfies the criteria for designation, in consultation with Crown Law and other Government departments, as necessary.[369] The Ministry of Foreign Affairs and Trade, "for example, might well want to consider the foreign policy implications of taking (or not taking) action on an individual or group before a decision is made."[370]

Police also coordinate the decision whether to seek an interim or final designation. "The key difference between these two processes relates to (1) the evidential threshold, with this being lower for interim designations; and (2) the duration of the designation, interim designations lasting 30 days and final designations lasting 3 years."[371] Because the legal standards and procedures are relatively similar between an interim and a final designation, Police generally will seek only final designations, since they last for three years rather than the 30-day time frame of an interim designation, unless there is a need to act urgently on an interim basis.[372]

After making these preliminary determinations about whether and how to move forward against a suspected terrorist, Police draft an application for designation, with any supporting material, and forward it to the appropriate officials for their review.[373] Once the Prime Minister ultimately makes a designation, Police are responsible for publishing the appropriate notice in the Gazette and handling any notification of the entity designated.[374] Police also are tasked with informing New Zealand financial institutions of all designations.[375] The entity to be designated generally would not be given notice before the designation has taken place; "otherwise it is possible that a designated entity may learn of what is intended and transfer money out of the country before its assets can be frozen."[376]

If a designated terrorist has assets within New Zealand, Police will prepare the necessary paperwork for the Prime Minister's review and signature to direct the Official Assignee to take control of the specified property.[377] So far there have been no assets of designated terrorists located in New Zealand.[378]

Upon the approval of the Terrorism Suppression Act, the "primary focus," at least initially, was to "align[]the New Zealand list of terrorist entities with that of the United Nations."[379]

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369 Implementation Paper, above, 2.

370 Implementation Paper, above, 2.

371 "Designating Non-United Nations Listed Terrorist Entities", above, 2.

372 Peoples interview, above.

373 Implementation Paper, above, 2; "Designating Non-United Nations Listed Terrorist Entities", above, 3-4.

374 Minutes of Meeting of ODESC (28 August 2002), 3.

375 Peoples interview, above.

376 Implementation Paper, above, 3.

377 Implementation Paper, above, 4; Terrorism Suppression Act, s 48.

378 White interview, above; Peoples interview, above.

379 "Designating Non-United Nations Listed Entities", above, 1.

A. UNITED NATIONS DESIGNATIONS

In the case of an entity designated by the UN, the process of designation in New Zealand is relatively straightforward. Prior to enactment of the Terrorism Suppression Act, the interim terrorism regulations instituted in November 2001 prohibited funding, dealing with, and other transactions with UN-designated persons and groups.[380] When the Terrorism Suppression Act was approved, it revoked the interim regulations, but contained a transitional provision that automatically designated in New Zealand all of the individuals and entities that the UN had designated by 18 October 2002, the date most of the Act took effect.[381]

Since that time, New Zealand has supplemented its list of designated entities "by way of the Prime Minister making a designation decision based upon a request and supporting statement of case submitted by the New Zealand Police."[382] The fact that the UN has designated an entity is deemed, "in the absence of evidence to the contrary, sufficient evidence of the matters to which it relates."[383] Of the 31 requests from Police to the Prime Minister for UN-based designations pursuant to the Terrorism Suppression Act, all have been approved.[384]

Proposals for designations generally are forwarded about once a month from the Police to the DPMC.[385] Accordingly, there is some lag time between designations made by the UN, and the subsequent designations of the same person or entity by New Zealand. For example, the UN designated Jemaah Islamiyah on 25 October 2002 (a week after the Terrorism Suppression Act took effect), and New Zealand followed suit with its own designation by 1 November.[386] Most designations since that time have evidenced similar gaps between the dates of the UN and New Zealand designations. Police say they are confident that, when an entity or individual is believed actually to have funds in New Zealand, a designation could be processed through the system within a day, if necessary.[387]

B. NON-UNITED NATIONS DESIGNATIONS

The UN designations process only encompasses groups and persons associated with bin Laden, Al-Qaida, and the Taliban.[388] Terrorists unaffiliated with either the man or those two organisations do not fall within the scope of the UN designations lists and, accordingly, do not have to be frozen by governments worldwide, except as obligated by the UN's general

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380 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 SR 2001/351.

381 "Designating Non-United Nations Listed Entities", above, 1; Hon Phil Goff (8 October 2002) 603 NZPD 1121.

382 "Designating Non-United Nations Listed Entities", above, 1.

383 Terrorism Suppression Act, s 31(1).

384 "Designating Non-United Nations Listed Entities", above, 2; Cabinet Minute, above, 1.

385 Peoples interview, above.

386 Rt Hon Helen Clark "NZ List Jemaah Islamiyah as Terrorist Group" (1 November 2003), as located at www.beehive.govt.nz/ViewDocument.cfm?DocumentID=15337.

387 Peoples interview, above.

388 See Part IV.A, above; Cabinet Minute, above, 1.

admonition that countries should freeze the assets of terrorists and their supporters.[389] Nevertheless, many jurisdictions – including the US, UK, Australia, Canada, and the EU – have taken additional steps to designate and freeze other notorious terrorists and terrorist groups,[390] such as Hamas and Hizballah, in an attempt to curtail the funding that supports their continuing acts of violence.

The Terrorism Suppression Act authorised New Zealand to join these other governments in designating entities not listed by the UN, but which commit acts of terrorism, but so far the Government has not done so.[391] The Government's inaction on this front has been the source of criticism from the Opposition, among others. During the second reading on the Counter-Terrorism Bill, National MP Wayne Mapp argued that the Government, in failing to designate certain infamous terrorist organisations, was again taking New Zealand down "its own isolated path": "How many people, however, would know that New Zealand does not designate Hizbollah as a terrorist group? We do not designate a group that explicitly undertakes terrorism almost on a daily basis as a terrorist group."[392]

Government officials counter that they intend to consider designating and freezing assets of groups not listed by the UN, but they needed first to implement an internal process for doing so. On 13 October 2003, the Cabinet approved a procedure for officials to follow in determining what entities, not listed by the UN, should be designated by New Zealand.[393]

Under the approved procedure, various government agencies or officials may initiate a request to designate a non-UN listed entity, depending on the circumstances of each case. For example, evidence of a threat to national security received by the SIS may "trigger" it to propose a designation, while a request from another government may prompt the Ministry of Foreign Affairs and Trade to ask for a listing. Police will continue to be the lead agency in coordinating any agency requests to designate.[394]

Once a designation has been suggested, and Police have completed an initial review and prepared a proposal, a working group of ODESC will consider whether to advance the name of the person or entity at issue to the Prime Minister for designation. The primary factor under consideration will be whether the requirements of the Terrorism Suppression Act have been satisfied and "that evidence is available that establishes, in the case of a final designation, reasonable grounds to believe that the entity has engaged in a terrorist act."[395] In cases in which countries such as Australia, Canada, the UK, or the US already have designated the group, "there is likely to be sufficient evidence available to New Zealand to meet the evidentiary threshold prescribed in the Terrorism Suppression Act."[396] Other factors to be assessed, reflecting a range of political, national security, and foreign policy considerations, include:

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389 UN Resolutions 1373, 1390.

390 Cabinet Minute, above, 1.

391 Terrorism Suppression Act: Designating Non-United Nations Listed Entities, above, 1-2; Cabinet Minute, above, 1.

392 Wayne Mapp (14 October 2003) NZPD, no 39, 3.

393 Cabinet Minute, above, 1-2.

394 "Designating Non-United Nations Listed Entities", above, 4.

395 "Designating Non-United Nations Listed Entities", above, 4.

396 "Designating Non-United Nations Listed Entities", above, 4.

- whether the proposed designee has a presence, including funds, in New Zealand;
- whether it has a presence in the region;
- the nature and scale of its involvement in the commission or support of terrorist acts;
- any links to New Zealand citizens, which "may increase the possibility of New Zealand being used to facilitate the activities of that organisation";
- whether it presents a risk to the national security or citizenry of New Zealand;
- whether designation would promote international peace and security;[397]
- whether other countries or international organisations have listed it as a terrorist; and
- whether another country has requested New Zealand to designate it.[398]

The ODESC working group is expected to begin its review of non-UN designated entities by focusing on organisations that satisfy one or more of the criteria listed above. A preliminary decision to seek the listing of any person or group not designated by the UN would be reviewed by Crown Law to ensure that the proper legal standards had been satisfied. Once the relevant groups, including ODESC and Crown Law, approved any proposal, Police would place the final package before the Prime Minister for her consideration.[399] As noted above, prior to making a designation, the Prime Minister must consult with the Attorney-General, as well as the Minister of Foreign Affairs and Trade, in case of an interim listing.[400]

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397 Terrorism Suppression Act: Designating Non-United Nations Listed Entities, above, 5; Cabinet Minute, above, 1.

398 Police Draft, above, 5.

399 Cabinet Minute, above, 1-2; Police Draft, above, 4-6.

400 Terrorism Suppression Act 2002, ss 20, 22.

VI. VOICES IN DISSENT: THE IMPACT ON CIVIL LIBERTIES OF ANTI-TERRORISM LAWS

After the revised version of the Terrorism Suppression Act was released to the public following September 11, most of the 143 resulting submissions vehemently opposed the bill, calling it "potentially draconian and possibly unworkable,"[401] "a serious undermining of the right to dissent,"[402] and "a serious assault on the civil liberties of the people of Aotearoa."[403] Although the proposal was later modified to take account of some of those civil liberties matters, many critics remain concerned about the impact of the Act and the follow-up counter-terrorism legislation on cherished individual freedoms, such as due process and the rights to protest and to support overseas liberation movements.

A. GLOBAL ANTI-TERRORISM LAWS

For some with an eye to the past, today's global anti-terrorism campaign may be little different than various ideological witch-hunts of prior eras. Andrew Ladley, Director of the Institute of Policy Studies at Victoria University, characterised these modern measures as the "second wave" and lamented that they are coming not long after the "first wave" – the stringent anti-Communist laws enacted in the 1950s and 1960s throughout much of the world – was finally being discredited. Mr Ladley noted that, like today's anti-terrorism laws, the prior anti-Communist campaigns initially had a limited focus, but the sweeping scope and enduring nature of the legislation allowed them to be misused, in places like Malaysia and Singapore, as "instruments of state repression" to stifle political opponents.[404]

While the term "terrorism" originates from the "reign of terror" following the French Revolution, it has been practised in one form or another for centuries.[405] And governments throughout the world have long utilised means, both legitimate and illegitimate, to combat the perceived terrorist threats of the day. Students of history recall that it was in the name of fighting terrorism, as well as Communism, that South Africa brutally enforced its apartheid regime for decades. And the anti-terror legislation that had been utilised in Zimbabwe in colonial times stayed on its books after independence, only to be used against succeeding governments' political opponents.[406] Such perversions of prior laws thereby pose the "historical risk" to be considered in assessing modern laws.[407] The UN itself has recognised this possibility as a potential side effect of anti-terrorism campaigns: "Labelling opponents or adversaries as terrorists offers a time-tested technique to de-legitimize and demonize them. The

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401 New Zealand Council for Civil Liberties "Submission to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill 2002" 1.

402 Democratic Peoples Republic of Korea Society "Submission to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill 2002" 1.

403 Waikato Students' Union "Submission to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill 2002" 1.

404 Ladley interview, above.

405 Lisa Ferris "Terrorism: Application of a Law of Armed Conflict Framework" (October 2003) NZ Armed Forces L Rev 27, 27; Law Commission *Final Report*, above, 187.

406 Ladley interview, above.

407 Ladley interview, above.

United Nations should beware of offering, or be perceived to be offering, a blanket or automatic endorsement of all measures taken in the name of counter-terrorism."[408]

Human rights organisations contend that history is indeed repeating itself via some ongoing anti-terrorism campaigns. Human Rights Watch has charged that some countries, such as Russia, Uzbekistan, and Egypt, have used the post-September 11 "war on terrorism" as an excuse to carry out repressive policies and crush internal dissent.[409] In addition, critics have accused the US and the UK, among others, of having overreacted to threats of terrorism by passing overly restrictive legislation, waging a non-UN sanctioned war in Iraq, and violating perceived standards of human rights, such as the continued US detention of prisoners in Guantanamo Bay.[410] As the Final Report on Emergencies noted over a decade ago, "The danger is that States will over-react. . . . [I]t is possible to imagine government officials doing more to destroy democracy in the name of counter-terrorism than is presently likely to be achieved by terrorists themselves."[411]

B. NEW ZEALAND ANTI-TERRORISM LAWS

Supporters of New Zealand's anti-terrorism legislation dismiss the dark track record of other countries and argue that such political repression is "not the New Zealand way." As United Future leader Peter Dunne argued, "With the exceptions of, perhaps, the Public Safety Conservation Act of 1932 and the waterfront strike regulations of 1951, the reality of this country has been that we have been blessed with Governments and leaders over the years who have not so indulged. It is not part of the New Zealand character to become involved to that degree in the repression of our own citizens. While members may say that that is a remarkably complacent view, it is a realistic one, given our circumstances. Therefore, when we paint pictures of what might happen and of what risks might be imposed on New Zealand safety, we need to test them against the record."[412]

Civil libertarians and sceptics of the recent legislation counter that New Zealand history has not been so "squeaky clean."[413] Critics point to lessons from the 1800s as varied as the suppression of Maori[414] to regulations against the Salvation Army.[415] According to Progressive MP Matt Robson and others, the last century was filled with similar examples, all demonstrating the need for continued vigilance in protecting individual freedoms:

> If we move to the period of the First World War, we treated conscientious objectors abominably in New Zealand and violated their rights — rights that are now recognised in any civilised society. We did exactly the same in the Second World War, when there were a number of breaches of the

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408 UN Report, above, 6.

409 "War on Terror 'Curbing Human Rights'" (16 January 2002) BBC News.

410 See Part IV.B-C.

411 Law Commission *Final Report*, above, 188.

412 Hon Peter Dunne (14 October 2003) NZPD, no 39, 10.

413 Hon Matt Robson (14 October 2003) NZPD, no 39, 14.

414 Hon Matt Robson (14 October 2003) NZPD, no 39, 13-14.

415 Interview with Stephen Franks, ACT Party Member of Parliament (Wellington, October 2003).

> civil rights of New Zealand citizens. In the cold war period the atmosphere of repression generated in New Zealand harmed many people's lives . . . .[416]

Regardless of the interpretation of New Zealand history, Mr Dunne and other supporters of the anti-terrorism legislation argue that current generations would not tolerate the excesses that occurred in prior eras: "While I'm sensitive to criticism that there are some dark periods in our past, I think that is the past, and today's society would not tolerate it."[417] National MP Wayne Mapp agreed, saying that opponents had "produced somewhat far-fetched scenarios, cast doubt on the general integrity of our democratic society and the institutions therein —Parliament, the judges, and the police — and would have us believe that we live in some sort of totalitarian State, or at least if we do not live in a totalitarian State, then all the machinery is there and the agencies of State are just waiting to seize the opportunity to grossly infringe the liberty of New Zealanders. I say that, ultimately, the sense of liberty of a people does not depend on the law but depends on the hearts of the people."[418] Labour MP Tim Barnett conceded that government agencies sometimes abuse their power, but "if problems do arise, they're likely to be evident" and able to be corrected by Parliament, such as occurred with the SIS search of the Choudry home in Christchurch. Ultimately, Mr Barnett said, "I have some trust in the system in its ability to be monitored in formal and informal ways."[419]

Once again, critics dismiss any type of "trust us" approach, contending that the Choudry case, and the pending immigration procedures involving Ahmed Zaoui, indicate the need for stricter controls on the government's ability to encroach on human rights.[420] In fact, supporters and opponents of the anti-terrorism bills agreed that New Zealand may be particularly vulnerable to government overreaching because, unlike most other democracies, it does not have a written Constitution, a well-entrenched Bill of Rights, or a judiciary able to strike down unjust laws.[421]

Many activists rejected the need for any of the recent anti-terrorism legislation, other than the relatively routine acts necessary to implement the UN conventions. Mr Locke suggested there has been a "huge exaggeration of the terrorist threat," both inside and outside New Zealand, to convince policy-makers around the world to adopt stricter laws authorising greater government power at the expense of the individual. "Relative to the threat that we as a country face, there has been a legislative over-reaction for reasons that are not particularly praiseworthy," agreed Rodney Harrison, a representative of the Auckland Council for Civil Liberties and an attorney in the pending Zaoui case. "I think a lot of what has been done has been to please Washington and to avoid falling out of line with the Western response to 11 September, whether or not it was necessary in the New Zealand context."

Other civil liberties advocates, such as the Human Rights Commission, took a different view and determined that additional legislation, properly balanced, was appropriate following

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416 Hon Matt Robson (14 October 2003) NZPD, no 39, 14.

417 Dunne interview, above.

418 Wayne Mapp (21 October 2003) NZPD, no 40, 31.

419 Interview with Tim Barnett, Labour Party MP and Minister of the Crown (Wellington, October 2003).

420 Hon Matt Robson (14 October 2003) NZPD, no 39, 14-15; (21 October 2003) NZPD, no 40, 9386, 9388**.**

421 Barnett interview, above; Kelly interview, above; Locke interview, above; Patterson, above, 276 n 91.

September 11 and the subsequent UN resolution.[422] University of Canterbury Law Lecturer Alex Conte, an author on terrorism laws, agreed that New Zealand needed to establish some sort of system to handle the international demands posed by terrorism: "A counter-terrorism regime is appropriate, so long as there is a proper checking and balancing process."[423] Others, such as Mr Goff, added that, while the risk to New Zealand might not be high, the legislation will deter terrorists from deciding to set up shop in this country.[424]

In Parliamentary debates, speaker after speaker from various parties expressed the belief that the anti-terrorism legislation constituted an appropriate "balance" of the competing demands of society versus individual.[425] As Mr Goff told Parliament, "This bill does find the balance. It finds the balance between protecting the proper civil liberties of New Zealanders, at the same time as allowing for effective action to be taken against terrorism."[426] Opponents contend, however, that policy-makers had paid "lip service" to the notion and merely had "changed a few things around the edges" in purporting to address issues of concern in the bills.[427] According to Mr Locke, "The balance between civil liberties and national security is not very much in the minds of politicians and civil servants."[428] Indeed, most civil liberties advocates interviewed agreed that the Committee's amendments to the anti-terrorism legislation had improved the bills from an individual rights point of view, although not sufficiently to address their concerns.[429]

And even supporters of the Terrorism Suppression Act conceded that, while they viewed the legislation as necessary and proper, it has potentially far-reaching implications. "Who knows how it would be used by a future government? I think the risk is still there actually. There are very few checks and balances in there compared to what we usually have," according to former National MP Max Bradford.[430]

In addition, critics charged that authorities had misused the threat of terrorism to increase investigative and intelligence agency powers across the board. "The opportunity has been given and taken by various government departments to put in a wish list of things that they want by way of an increase in their powers, frequently with no connection to terrorist

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422 Human Rights Commission "Submission on the Terrorism (Bombing and Financing) Bill" (November 2001) 2.

423 Conte interview, above.

424 Goff interview, above.

425 (8 October 2002) 603 NZPD 1137, 1140-41.

426 (8 October 2002) 603 NZPD 1134.

427 Locke interview, above.

428 Locke interview, above.

429 Interview with Anne Boyd, Social Policy Analyst, Council of Trade Unions; Senior Policy Analyst, Human Rights Commission (Wellington, November 2003); Interview with Graeme Dunstall, Canterbury Council for Civil Liberties (Christchurch, September 2003); Harrison interview, above; Telephone Interview with Jane Kelsey, Professor of Law, University of Auckland (Wellington, November 2003); Locke interview, above; Telephone Interview with Maire Leadbetter, Indonesia Human Rights Committee spokesperson (Wellington, November 2003); Ladley interview, above; Interview with Luke Trainor, Canterbury Council for Civil Liberties (Christchurch, September 2003).

430 Bradford interview, above.

threats."[431] In fact, one of the primary criticisms of the legislation enacted in October 2003, even by supporters, was that the Government had utilised a bill labelled "Counter-Terrorism" to adopt broad and far-reaching changes to general police and law enforcement authorities.[432]

Opponents contend that the ramifications of the country's anti-terrorism legislation already are being felt among certain immigrant communities, such as the Tamils. According to Mr Locke, the "climate of the Terrorism Suppression Act" has resulted in an increase in SIS surveillance of members of the group and an "intimidatory effect" on such organisations, making them afraid to participate in ordinary fund-raising and other advocacy.[433]

C. DEFINITION OF TERRORIST ACT

Some critics, particularly Green MP Keith Locke, continue to criticise the definition of terrorism in the Terrorism Suppression Act as being too broad.[434] The Act defines a terrorist act as requiring three fundamental elements. First, it must be carried out "for the purpose of advancing an ideological, political, or religious cause."[435] Second, it must be done with the intent "to induce terror in a civilian population" or "to unduly compel or to force a government or an international organisation to do or abstain from doing any act."[436] Finally, it must be "intended to cause," inside or outside of New Zealand at least one of the following "outcomes":

> (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);
> (b) a serious risk to the health or safety of a population;
> (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d);
> (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
> (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.[437]

The Committee added the following caveat to the definition: "To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person" engaged in a terrorist act.[438]

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431 Harrison interview, above.

432 See Part III.C, above.

433 Locke interview, above.

434 Locke interview, above.

435 Terrorism Suppression Act, s 5(2).

436 Terrorism Suppression Act, s 5(2).

437 Terrorism Suppression Act, s 5(3).

438 Terrorism Suppression Act, s 5(5).

Mr Locke views this definition as encompassing legitimate forms of strikes, such as one by nurses in a hospital, that could result in death, serious injury, or another of the outcomes specified in the Act.[439] Proponents of the definition, including former Labour MP and Foreign Affairs, Defence and Trade Committee Chairperson Graham Kelly, dismiss that assertion as "bloody nonsense," pointing out that, not only would such a strike not fall within the definition because nurses would not intend to cause such an outcome, as the Act requires, but also because such strikes are explicitly exempted from the Act.[440] Mr Locke responds that the Act's exclusion provision for protests and strikes indicates that such an action, "by itself," does not fall within the definition, but does not fully exclude them from coverage.[441] Further, critics complain the definition permits certain economic harms to be considered terrorism,[442] although the Act has limited the applicability of such provisions.

D. TERRORIST DESIGNATION PROCESS

Another concern with the Terrorism Suppression Act among some activists was the "political designation process" it established.[443] Under the legislation, the Prime Minister designates terrorists, after consultation with certain relevant Ministers.[444] Civil liberties advocates and others remain sceptical of the "robustness" of the designation process and fear an impact on the cherished ability to support overseas humanitarian and political causes.[445] The concern is that, given history, such legislation could be used around the globe to "oppress" unpopular groups or fledgling liberation movements, such as those that have arisen in South Africa and East Timor.[446] This would be particularly true, critics say, in the event of a "rogue" Prime Minister out of step with the views of much of the nation.[447] As the adage goes, and is oft-repeated in debates on this issue, one person's terrorist is another person's freedom fighter:[448] "When is a terrorist a freedom fighter, and when is a freedom fighter a terrorist? That is always a hard call, and it largely depends upon which side one is on."[449]

For certain activists, the Terrorism Suppression Act process is troublesome because it does not involve a neutral third party, such as a court, prior to a designation.[450] Others remain

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439 (8 October 2002) 603 NZPD at 1072.

440 Kelly interview, above; Boyd interview, above; Terrorism Suppression Act, s 5(2)-(3).

441 Locke interview, above.

442 Locke interview, above.

443 Locke interview, above.

444 Terrorism Suppression Act, ss 20-23.

445 Dunstall interview, above; Franks interview, above; Locke interview, above.

446 Franks interview, above; Leadbetter interview, above; Locke interview, above; Trainor interview, above; (21 October 2003) NZPD, no 40, 9385-86.

447 Locke interview, above; (8 October 2002) 603 NZPD at 1072.

448 Goff interview, above; Locke interview, above; Robson interview, above.

449 (8 October 2002) 603 NZPD at 1069.

450 Dunstall interview, above; Leadbetter interview, above; Locke interview, above.

concerned about the minimal standards outlined in the legislation, such as the "good cause to suspect" threshold required for interim terrorist designations.[451]

E. CLASSIFIED SECURITY INFORMATION

Perhaps the strongest condemnations of the anti-terrorism legislation focus on its provisions allowing "secret justice"[452] – or "classified security information"[453] – to be used against suspected terrorists without disclosure to the designated persons or their attorneys. Although the use of classified evidence in these types of proceedings is consistent with the approach of other countries,[454] even the Government – trapped in the "uncomfortable position" of not being to publicly explain its position – expresses unease with the practice and concedes that it creates a "civil rights dilemma."[455] Former Labour MP Graham Kelly, who headed the committee that shepherded the Terrorism Suppression Act through Parliament, views the limited use of such material as "a necessary evil" in these turbulent times.[456]

1. Ahmed Zaoui

The use of classified security information against a suspected "terrorist" is, of course, not a mere hypothetical issue facing New Zealand. The case of Ahmed Zaoui, an Algerian jailed since his arrival on these shores, largely on the basis of classified evidence, has brought the matter to the fore of government and public consciousness. After destroying his false travel documents on the plane, Mr Zaoui arrived at Auckland Airport on 4 December 2002 and sought refugee status – beginning a labyrinthine sequence of legal proceedings that continues to test this country's policies on national security versus individual liberties.[457] On 30 January 2003, the Immigration Service denied Zaoui's application for refugee status, and he appealed to the Refugee Status Appeals Authority (RSAA).[458]

Before that appeal was concluded, a separate legal process began when, on 20 March, the Director of Security issued a security risk certificate – the first ever under the Immigration Amendment Act 1999 – declaring that Mr Zaoui's continued presence in New Zealand constituted a threat to national security and that reasonable grounds existed for regarding him as a danger to the nation's security.[459] Days later, the Minister of Immigration made a

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451 Terrorism Suppression Act s 20; Boyd interview, above.

452 Locke interview, above.

453 Terrorism Suppression Act, s 32.

454 Conte interview, above.

455 Goff interview, above.

456 Kelly interview, above.

457 Interlocutory Decision of Inspector-General of Intelligence (6 October 2003) In the Matter of Part IVA of the Immigration Act 1987 and In the Matter of a Review by the Inspector-General of Intelligence and Security pursuant to Section 1141 of the Immigration Act 1987, at the Request of Ahmed Zaoui [hereafter "Inspector-General Decision"]; Alistair Bone "The Running Man," (16-22 August 2003) New Zealand Listener Auckland, located at www.listener.co.nz/default,499,497,0.sm.

458 Inspector-General Decision, above, 2.

459 Inspector-General Decision, above, 2; First Amended Statement of Claim (Applications for Judicial Review and for Declaratory Relief) (23 October 2003) *Zaoui v Attorney-General*, High Court (Auckland) [hereafter Zaoui First Amended Statement of Claim].

preliminary decision to rely on the Director's certificate in making her decisions on Mr Zaoui's fate.[460] On 27 March, Mr Zaoui applied to the Inspector-General of Intelligence and Security for a review, which was held in abeyance pending the outcome of his appeal to the RSAA.[461] On 1 August, the RSAA released a 215-page decision, recognising Mr Zaoui as a refugee under international conventions.[462]

With the conclusion of the RSAA proceedings, the Inspector-General continued his review of the security risk certificate and, on 6 October, issued an Interlocutory Decision, concluding that Mr Zaoui was not entitled to any further details about the nature and content of the classified security information at issue and that the Inspector-General would not consider "either the human rights dimension or the potential adverse consequences for [Mr Zaoui] of his being deported.[463] Mr Zaoui filed a petition for judicial review of that decision, and a High Court hearing on the case is scheduled for the first week of December.[464] The Inspector-General has postponed further consideration of the matter until the court resolves the issues before it – primarily whether judicial review is available and, if so, the validity of the decision of the Inspector-General not to consider certain human rights issues.[465]

The Zaoui case is proceeding under the process established by the Immigration Amendment Act 1999.[466] For months, members of Parliament publicly have debated the issue,[467] while civil liberties and human rights groups have rallied behind Mr Zaoui's cause, claiming the Immigration Act procedure is unfair in at least three fundamental respects.

First, Mr Zaoui's defenders object to the use of classified security information being introduced in his case, particularly since they suspect much or all of the evidence came from Algeria's government, which sentenced him *in absentia* to death following its January 1992 military coup.[468] "There's too much at stake for this individual to allow this particular body of security information to be used," according to Rodney Harrison, one of Mr Zaoui's attorneys.[469]

Second, if classified evidence is going to be introduced against him, critics say the Government must be required to supply an unclassified summary to the defence. Mr Zaoui's

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460 Inspector-General Decision, above, 2.

461 Inspector-General Decision, above, 3.

462 Inspector-General Decision, above 3; Refugee Status Appeals Authority (New Zealand) Appeal No 74540 (1 August 2003) [hereafter "RSAA Decision"].

463 Inspector-General Decision, above; Zaoui First Amended Statement of Claim, above.

464 Harrison interview, above; Butler interview, above; Zaoui First Amended Statement of Claim, above.

465 Harrison interview, above; Butler interview, above; Zaoui First Amended Statement of Claim, above.

466 This Amendment Act is described above in Part III.A.6.

467 Hon Matt Robson (14 October 2003) NZPD, no 39, 15; (21 October 2003) NZPD, no 40, 2, 4-5, 9-12, 9383-84, 9389.

468 Harrison interview, above; Locke interview, above; RSAA Decision, above, 1.

469 Harrison interview, above.

defenders contend they do not know whether the classified material purports to evidence something he has done or might do, or what others might do to him. "Unless the information is able to be challenged, it is inherently untrustworthy."[470] In fact, the Inspector-General has commented about the seeming-unfairness of a procedure in which a party is not entitled to learn the specific allegations against him. "Is that fair? Fair? It's not fair. But . . . we're in an area where you can't have fairness because you can't tell all," noted Inspector-General Laurie Greig, in a recent media interview.[471] But the need for full disclosure of the allegations is particularly true in this case, advocates claim, given the stakes involved. "[T]he Inspector-General of Intelligence and Security, operating in secret and not even giving Mr Zaoui or his lawyers any information on what the accusations are against him, can determine his future and perhaps send him back to torture, and possible death, under the Algerian regime that he fled from many years ago."[472]

Finally, supporters of Mr Zaoui argue that the Inspector-General procedure set up by the Immigration Amendment Act 1999 is flawed, biased against defendants,[473] and resembles that of countries, such as Malaysia and Singapore, with a poor track record of fairly utilising its anti-terrorism legislation.[474] Because of the very nature of his specialised statutory role of working with the SIS and other intelligence agencies on a regular basis, the Inspector-General allegedly develops working relationships with the SIS, becomes familiar with its perspective on security matters and, consequently, is subject to "capture" by the agency.[475] Instead of the Inspector-General process, critics argue the proceedings should take place with "the transparency and rigour of a presently sitting High Court judge holding a public hearing."[476] Notes Dr Harrison: "[A] High Court judge, by and large, is going to be more removed and more objective."[477] In addition to benefiting the defendant, advocates contend that a judicial process would fare better in the court of public opinion. "My view is people would accept it more if it were before a judge than if it were an Executive-appointed ex-judge," according to Dr Ladley.[478] Agrees former Secretary for Justice Colin Keating, "The New Zealand system would be much more robust in the eyes of the public if regular judges were looking at these things."[479]

While critics have been vocal in their condemnation of the Zaoui proceedings, others have been equally adamant in their support of the current process and the immigration law under which it is proceeding. National MP Wayne Mapp noted that Mr Zaoui was convicted in

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470 Harrison interview, above.

471 Donna Chisholm "SIS Watchdog Under Fire For 'Damning' Zaoui Comments" (23 November 2003) *Sunday Star Times*.

472 Keith Locke (21 October 2003) NZPD, no 40, 3.

473 Harrison interview, above; Locke interview, above.

474 Ladley interview, above.

475 Harrison interview, above.

476 Harrison interview, above. Also Conte interview, above; Interview with Colin Keating, Partner, Chen Palmer & Partners, and former Secretary for Justice (Wellington, November 2003); Locke interview, above; Robson interview, above.

477 Harrison interview, above.

478 Ladley interview, above.

479 Keating interview, above.

Belgium after a five-day hearing and deported, subsequently deported from Switzerland, and convicted *in absentia* in France.[480] Not only does such evidence provide reason for New Zealand to be concerned, he argued that this country is providing a full and fair process in the case:

> This country has spent hundreds of thousands of dollars — through legal aid, through a lengthy hearing in the Refugee Status Appeals Authority, and now, before the Inspector-General of Intelligence and Security — taking Mr Zaoui's interests into account. But, more important, given that he is not a resident or citizen, we should be taking the interests of this nation into account. This is not the time to look at these issues through rose-coloured glasses. We have to take a realistic approach. I trust retired High Court Judge Greig to do the right thing, and Mr Locke should do likewise. That decision should be determinative. . . . The question here is whether we trust our institutions to protect public safety. [481]

Others, such as New Zealand First and ACT, go one step further and assert that the process being afforded to Mr Zaoui is far more than necessary, given that he is not a New Zealander.[482] According to New Zealand First MP Ron Mark, "Mr Zaoui came here with some documents, trashed them, presented himself without documentation, and claimed political asylum and refugee status. Mr Zaoui should have been put on the first aircraft back to the country from whence he came, and we would not be wasting time and taxpayer dollars debating the merits of his perceived case."[483]

Even apart from the Zaoui case, the Inspector-General procedure has been defended by some as being as good as, if not better than, judicial process. In vetting the procedure for Bill of Rights concerns, when it was proposed for the Terrorism Suppression Act, Crown Law counsel determined the Inspector-General process would be "robust," given that the decision-maker is a retired High Court judge, whose post-retirement financial position has been protected in accordance with generally accepted norms of judicial independence, and, accordingly, can be independent of Government whims.[484] Furthermore, the Inspector-General has a mandate to review the evidence thoroughly, while a court would be limited in the scope of its review to considering whether a rational decision-maker could have made the decision at issue, a relatively low threshold for the Government to satisfy.[485]

2. The Terrorism Suppression Act

As with the proceedings involving Mr Zaoui, the Terrorism Suppression Act authorises the Government to utilise "classified security information" in making its decision to designate terrorists.[486] In the proposed amendments to the bill released to the public in November 2001, the Government indicated it intended to utilise a system similar to the Immigration

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480 Wayne Mapp (21 October 2003) NZPD, no 40, 9; RSAA, at 1-2.

481 Wayne Mapp (21 October 2003) NZPD, no 40, 10.

482 Franks interview, above; Mark interview, above.

483 Ron Mark (21 October 2003) NZPD, no 40, 10.

484 Butler interview, above.

485 Butler interview, above.

486 Terrorism Suppression Act 2002, ss 30, 32.

Amendment Act 1999 – under which the Zaoui case currently is being litigated – but Parliament changed course after a flurry of objections to the procedure.[487] Instead, it permitted entities and individuals to challenge their designations in the courts, although any classified evidence involved could not be released to them or their attorneys.[488] The Act also requires litigants challenging their designations to be given a non-classified summary of the classified evidence, "except to the extent that a summary of any particular part of the information would itself involve disclosure" prejudicial to specified security interests.[489]

The changes made to the Terrorism Suppression Act before the select committee largely resolved two of the three objections raised by critics of the Zaoui case, via abolition of the Inspector-General process in favour of judicial review and addition of a requirement that an unclassified summary of the classified evidence be provided to the designated entity, if possible.[490] Supporters of the Act see the compromise position adopted as "the best of a bad bunch of options."[491] Although conceding the amendments make the Act more palatable, critics such as Mr Locke continue to object to the use of classified information, particularly as it relates to evidence supplied by overseas governments that is not reviewable or verifiable by New Zealand agencies:[492]

> [W]e do not even have a process to interrogate, from our own values and our own legal process, whether this information could be kept secret. It is being determined, by that definition, by the overseas agencies. . . One of the problems is that under this terrorism legislation there are not the checks and balances in the system. The debate in relation to America and Britain over the weapons of mass destruction shows that. These institutions of the State tend to reinforce each other's erroneous determinations in this climate of anti-terrorism, rather than correct them.[493]

Even the harshest critics of classified information, however, leave open the possibility for its use in limited circumstances with rigorous protections for the individual affected by the evidence. Dr Harrison personally advocates "a spectrum or sliding-scale approach, with no outright ban", in which a judge could decide, based on the circumstances of the case, whether to accept the classified information or require the Executive either to disclose the information to the opposing party or to not rely on it. As an example, he points to the US criminal case of the alleged September 11 conspirator, Zacarias Moussaoui.[494] In *United States v Moussaoui*, the judge ordered the US to produce an "enemy combatant" deemed necessary for the defendant's "fundamental right to a fair trial" and, when the Government refused on the basis of "devastating consequences for national security and foreign relations," the court sanctioned it by dismissing the death sentence as a possibility and foreclosing the prosecution from

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487 See Part III.B, above.

488 Terrorism Suppression Act 2002, ss 33, 38.

489 Terrorism Suppression Act 2002, s 38. These procedures supplement existing legal principles applicable to the concept of public interest immunity.

490 Harrison interview, above.

491 Kelly interview, above.

492 Dunstall interview, above; Ladley interview, above; Locke interview, above.

493 (21 October 2003) NZPD, no 40, 9383-84.

494 Harrison interview, above.

arguing that the defendant had any knowledge or involvement in the attacks, as the defence alleged the unavailable witness would have shown.[495]

Dr Harrison and other legal experts predicted that courts considering classified material would work overtime to ensure a fair proceeding. "I would predict that a New Zealand High Court judge, under the Terrorism Suppression Act, is going to be extremely uncomfortable with this [the use of classified evidence not seen by the other party], and I want the judge deciding a case like that to be uncomfortable or, if you prefer, highly sensitive to the issue."[496] That judges will "bend over backwards" to make the process as fair as possible is the benefit of the procedure adopted by the Terrorism Suppression Act, supporters say.[497] Court of Appeal Justice Kenneth Keith acknowledged that judges likely would be "anxious" in resolving how to deal with classified evidence in their courtrooms.[498]

Similarly, Mr Locke concedes a possible role for classified evidence in certain circumstances, but only if foreign government-supplied information that did not endanger specific sources was either shared with the accused or not used at all by the Government. He readily concedes such a system might result in the Government not obtaining from overseas valuable information, which conceivably could protect New Zealand from a terrorist attack, but he considers that method the only approach sufficient to protect individual rights.

Still others advocate the use of classified evidence only where specially cleared trial counsel are permitted to review all the evidence, classified or not, and advocate forcefully on behalf of the person or entity accused.[499] Variations of this system allegedly are available in other countries.[500]

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495 *United States v Moussaoui*, 2003 WL 22251284, at *1 (ED Va 2 October 2003).

496 Harrison interview, above.

497 Bradford interview, above.

498 Keith interview, above.

499 Conte interview, above; Dunstall interview, above; Robson interview, above.

500 Robson interview, above.

VII. A COMPARATIVE ANALYSIS OF GLOBAL ANTI-TERRORISM MEASURES

Before and after September 11, New Zealand and other countries adopted sweeping changes to their domestic laws to respond to the violence facing the international community of nations. While virtually every country agreed on the ultimate objective – a world without terrorism – reasonable governments and peoples have disagreed on how to achieve that goal.

A. THE EVOLUTION OF THE TERRORISM SUPPRESSION ACT

Looking back on the latter months of 2001, New Zealand and her sister nations around the world faced defining moments not only in terms of balancing individual rights and the needs of the state, but also with respect to weighing national and international demands for quick and decisive action against individual voices calling for caution and care. With the benefit of hindsight, I believe the process worked here, and New Zealand established a model counter-terrorism regime that effectively balances national security with civil liberties. This does not imply a lack of room for improvement, because no system is perfect, but, through dedication, hard work, and open minds, the Government, Parliament, officials, and the public came together and shaped legislation that improved markedly because of the process.

That this occurred is a credit to the Government, the relevant Ministries, members of Parliament, and the MMP system. All political parties and views contributed to shaping the legislation, particularly as it evolved before the Foreign Affairs, Defence and Trade Committee and its Chairperson, Graham Kelly, its senior Opposition statesmen and woman, including former Prime Minister Jenny Shipley and Deputy Prime Minister Wyatt Creech, and its most effective "fly in the ointment", Green MP Keith Locke.[501] As New Zealand First MP Ron Mark commented: "Occasionally in this House we all sit down as representatives of our electorates with different philosophies, views, and angles, but we actually come to a compromise that is in the interest of the nation. That is what this does."[502]

The role of the Greens, particularly Mr Locke, played a crucial part in the legislative drama. Although the bill improved sufficiently during the process to leave me sceptical of some of the continued criticisms of the legislation by the Greens and others, there is no question that Mr Locke helped to educate his colleagues and the public about some of the worst features of the early proposals and nudge Parliament toward better substance and procedure. Many of his colleagues from other parties and political philosophies subsequently acknowledged the importance of his role,[503] even if they opposed some of his methods, including a possible breach of Parliamentary rules in publicly airing internal Committee matters.[504] The open minds of the other Committee members and their own concerns about civil liberties should not be discounted, because, if they had simply turned a deaf ear to Mr Locke, they could easily have "shut him down with an 8-1 vote."[505]

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501 In mentioning these Committee members, I mean no slight to the work of the remaining members, Max Bradford, Chris Carter, Harry Duynhoven, Winston Peters, H V Ross Robertson, and replacement members, Ron Mark, David Benson-Pope, and Wayne Mapp.

502 (8 October 2002) 603 NZPD 1103.

503 Bradford interview, above; Mark interview, above; Robson interview, above.

504 Kelly interview, above.

505 Mark interview, above.

I would be remiss in lauding the politicians if I failed to mention the hard work, long hours, and delicate dances which officials from a variety of agencies had to endure to mould this legislation in the atmosphere of crisis that existed at the time, and amid the contradictory demands of the international community, national tradition, diverse political parties, and specialised government agencies. These officials essentially created a new subject area of New Zealand law, choosing many of the best elements from the relatively slim pickings of domestic precedents and a variety of overseas examples.

On questions of procedure, the Committee ultimately chose the right course in opening up the process to the public at large and accepting submissions from all concerned. Having come from a city directly affected by the September 11 tragedy, I well understand the sense of urgency and pressure for immediate action that existed at the time. Again, however, hindsight permits a recognition that overall public trust and acceptance of the legislation was more important in New Zealand at the time than a quick-fix, particularly since the "luxury of time" allowed legislators to transform "a bill that could have been extremely dangerous to the rights of New Zealanders" into an Act with a more thorough set of checks and balances.[506] As Victoria University Dean of Law Matthew Palmer commented, "[T]he initially proposed select committee process would have violated principles of good legislative process and cast a shadow on the legitimacy of the amendments; that it was not pursued is a welcome credit to the maturity of our political representatives. That the temptation to do was there illustrates the raw emotional and political power of the events of the 11 September."[507]

As described above, the infamous Public Safety Conservation Act 1932 symbolises the dangers inherent in legislative speeding, without public comment,[508] and the year-long periods that Parliament spent on the Terrorism Suppression Act and its successor Counter-Terrorism Bill undoubtedly resulted in better and safer laws for New Zealand and its people. As the Law Commission noted, "Legislation hurriedly enacted in such a time of crisis is likely to include wider powers than are necessary and to omit desirable safeguards. Consequently it will be open to abuse. Legislation enacted without pressure of time and in the absence of a crisis is more likely to be carefully considered."[509] In this respect, New Zealand compares favourably with the actions of other jurisdictions, many of which reacted within months with dramatic legislative change,[510] but these observations are offered with the recognition that different countries faced different levels and types of threat. Accordingly, a speedy solution might well have resulted had this country lost the BNZ Tower and its occupants on September 11 or faced an urgent threat from an identifiable terrorist soon afterwards.[511]

I disagree with those who argue that New Zealand did not need to enact any legislative change in response to September 11 and the resulting UN resolutions. New Zealand is admirable for many attributes, including its respect for living up to international obligations, and there is simply no way the country adequately could have complied with its UN mandates had some form of legislation not been approved. And such compliance may mean far more

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506 Kelly interview, above.

507 Palmer "Counter-Terrorism Law", above, 456.

508 See Part III.A.1, above.

509 Law Commission *Final Report*, above, 10.

510 See Part IV, above.

511 The Law Commission recognised that emergency legislation may be appropriate where a crisis arises in an area in which existing legislation is not adequate to handle a necessary response. Law Commission *Final Report*, above, 10.

than a mere technical fulfilment of an international legal requirement. "If we're slack, and we're lax, and we don't fulfil our obligations as part of an international community of nations, then we can find to our horror that we've contributed to deaths in other nations. I don't want that."[512] The Terrorism Suppression Act also imbues the Government with basic authorities to implement necessary policies against terrorism today, as well as to manoeuvre through unexpected crises arising tomorrow. As a result, it reduces the likelihood that the Government will need to rush through an emergency act because of a future terrorist threat, thereby avoiding the risk of the type of over-reaching in a crisis about which the Law Commission and the lessons of history warn.

B. DEFINITION OF TERRORISM

With respect to the definition of a terrorist act, the Terrorism Suppression Act succeeds admirably in restricting the range of activity that could fall within its scope. With no definition forthcoming from the UN, New Zealand had to craft its own, and its definition is similar to or narrower than those of other comparable jurisdictions.

After flirting with a much stricter definition of terrorist act, Australia ultimately enacted language that nearly mirrors that contained in the Terrorism Suppression Act. Like New Zealand's law, the Australian definition requires an action or threat done: (1) for a "political, religious, or ideological cause"; (2) with intent to coerce or intimidate a government or the public or a section thereof; and (3) that causes, among other things, death, serious injury, or serious damage to property. Unlike New Zealand's definition, Australia's second criterion requires intimidation of the public, rather than the New Zealand standard of "inducing terror," and does not explicitly require the final criterion to be intended. Like New Zealand's statute, the Australian law explicitly excludes from the definition of terrorism any acts of advocacy, protest, and dissent (as well as "industrial action") that are not intended to cause serious physical harm to a person or risk thereof. [513]

Canada's definition is similar, although with some changes. It defines terrorist activity as an act: (1) committed "in whole or in part for a political, religious, or ideological purpose, objective or cause"; (2) "in whole or in part" with the intention of intimidation of at least part of the public "with regard to its security, including its economic security" or compelling a person, organisation, or government to do or refrain from doing an act; and (3) that intentionally causes death, serious bodily injury or endangerment, serious risk to public health or safety, or substantial property damage or serious interference with an essential service or facility if likely to result in serious death or injury or risk thereof. The definition excludes "advocacy, protest, dissent or stoppage of work that is not intended to result in" death, serious bodily injury, or serious risk to public health or safety.[514]

The New Zealand Act also resembles the relevant language of the UK terrorism statute, which defined "terrorism" as requiring: (1) the "use or threat of action" "designed to influence the government or to intimidate the public or a section of the public"; (2) "made for the purpose of advancing a political, religious or ideological cause"; and (3) that involves, for example, serious violence to or endangerment of a person; serious risk to the health and safety of at least a portion of the public, or serious damage to property or an electronic system.[515]

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512 Mark interview, above.

513 Compare Security Legislation Amendment (Terrorism) Act 2002, s 100.1, with Terrorism Suppression Act 2002, s 5.

514 Criminal Code, s 83.01.

515 Terrorism Act 2000 (UK), s 1.

The UK definition stipulated that the use of firearms or explosives constituted terrorism, whether or not the first condition above is satisfied. Unlike New Zealand's law, there was no explicit exclusion for strikes or other protest activity, although it is debatable whether such activity could satisfy the various criteria of the definition. The UK language also does not require intent to cause the outcomes specified in the third prong, contrary to the New Zealand position. [516]

For its part, the US defined "terrorism" in its Executive Order as activity that "(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking."[517] The US does not limit terrorist acts to those done for "ideological, political, or religious cause[s]," nor does it require intent to commit a violent, dangerous, or destructive action, as New Zealand law does.[518] Although the US has no explicit exclusion from strikes and protest activity, there is probably no need for such language, given the strong and binding Supreme Court decisions upholding those rights as guaranteed under the Constitution.

C. TERRORIST DESIGNATION PROCESS

1. A Quasi-Political Process

Critics complain that the Terrorism Suppression Act improperly established a political procedure, where the "designation process is done by a politician, not a judge."[519] On this point, the sceptics are partially correct in their evaluation of the process, but not, I believe, in their criticisms of it. It is, indeed, accurate that the Prime Minister designates, subject to a right of judicial challenge, and that the Prime Minister is a political officer. But the decision being made is, necessarily, at least partially political, albeit subject to judicial scrutiny pursuant to general administrative law principles. As Mr Goff noted, "There's an element of political judgment" inherent in the designations process.[520]

Under even the most restrictive definition of terrorism, one designed simply to capture the Al-Qaidas of the world, at least some other groups using violence, killing unarmed civilians, and terrorising citizenry are going to fall somewhere within that definition. But no country actually designates every individual or entity that falls within its definition of a terrorist, because it uses its political and foreign policy judgment to assess whether designation would result in a positive result, namely, preventing further terrorist acts, or a negative one, such as unduly isolating a group that had been prepared to lay down its arms and engage in a peace process. Such public policy decisions are, necessarily, the province of the political branches of government and not the judiciary. That is why New Zealand and comparable jurisdictions – including Australia (to a limited extent), Canada, the UK, and the US – entrust the designation decisions to the executive, with the courts or other processes available afterward to ensure that substantive and procedural criteria have been satisfied.[521]

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516 Terrorism Act 2000 (UK), s 1.

517 Executive Order 13224, s 3(d).

518 Terrorism Suppression Act 2002, s 5.

519 "Select Committee Report on Counter-Terrorism Bill", above, 14.

520 Goff interview, above.

521 See Part IV, above.

In this respect, sanctions on terrorists and terrorist groups are no different than a country's sanctions or policies toward other nations. The political branches of government, not the courts, determine whether it is in the national and foreign policy interest to cut off trade with another country or to adopt other strategies within the international arena, through measures as varied as imposing economic sanctions, [522] declaring a nuclear-free policy, or opting not to join a coalition to engage in a war. This is true, even if the policies adopted are opposed by certain groups or individuals within the country who may feel directly the sting of the government's decisions, such as businesses which trade with the nations at issue or citizens who support the foreign governments' viewpoints. We elect governments to make these decisions, and we "throw the bums out" if we do not like the decisions they have made.

Because terrorist designations target individuals and groups, however, it is critical to also offer the protections of the judiciary to ensure that the evidence reasonably supports the government's quasi-political decisions and that the requisite processes have been followed. New Zealand offers such judicial scrutiny, like many other nations (including my own), and above that offered by others, such as the UK (which has a process similar to the Inspector-General procedure for its terrorist proscription regime).[523] Accordingly, New Zealand has satisfied the fundamental requirements of due process for these hybrid political/legal decisions. To the extent that critics contend that the judicial scrutiny should occur prior to the designation decision, instead of immediately after, New Zealand's approach falls in line with that of the UN and most other countries – such as the Australia, Canada, the UK, and the US – in determining that such pre-designation procedures would defeat the purpose of the designation system by giving warning to terrorists to transfer their assets out of the sanctioning jurisdiction and into places of relative safety.[524] As Phil Goff noted, "In today's age of information technology, money can be transferred with a phone call. Obviously we have to get in there and freeze that money, with safeguards later on if the interim decision was a mistake."[525] The Reserve Bank's Stephen Dawe was more blunt: "In the banking system that [pre-designation process] means the money's gone."[526]

2. Non-United Nations Designations

The Terrorism Suppression Act permits New Zealand to designate individuals and entities, whether named by the UN as associated with bin Laden, Al-Qaida, or the Taliban, or not encompassed within the limited scope of that UN list. As noted above, New Zealand has not designated anyone not already named by the UN, although the Cabinet recently has approved a procedure for deciding if and when to do so.[527]

The listing procedure recently adopted by New Zealand appears to be a carefully crafted and sensible approach to considering non-UN designations, with input from appropriate

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522 For examples of this, see the lengthy list of sanctions discussed in Part III.A.7, above.

523 See Parts IV, VI.E, above.

524 See Part IV, above.

525 (8 October 2002) 603 NZPD 1105.

526 Interview with Stephen Dawe, Chief Executive Officer and Secretary, New Zealand Overseas Investment Commission and former Legal Adviser, Reserve Bank of New Zealand (Wellington, November 2003)

527 See Part V, above.

agencies and consideration of relevant factors. Under the approved criteria, entities likely to receive early consideration for designation include those which have been listed by multiple countries, such as Hizballah (designated by the US, UK, Canada, and Australia) and Hamas (designated by the US, UK, and Canada). The Liberation Tigers of Tamil Eelam (LTTE) also might fall on a short list for consideration, since it has been designated by the US and UK and it has extensive links with New Zealand citizens.[528]

Compared with other jurisdictions, New Zealand has been at the back of the pack in designating notorious and violent terrorists and terrorist groups. Australia, Canada, the UK, and the US, among others, all have exercised their powers to condemn certain other groups that commit repeated and sustained terrorist attacks.[529] To be clear, this observation does not suggest that New Zealand blindly accept the lists of any or all of these other jurisdictions. I merely urge this country to utilise its own carefully considered procedures to assess the evidence, its own national and foreign policy considerations, and take a stand against terrorist violence and "cut the blood supply – that is the funding – to terrorist organisations."[530] As the US Embassy stated, "New Zealand has been a staunch ally in the struggle against terrorism. Any decision by the Government of New Zealand to supplement U.N. counter-terrorism efforts by designating additional terrorists and terrorist groups would further assist in the ongoing global effort to condemn acts of terrorism and to cut off the funding for such violence."[531]

Even if there were no funds of named terrorists within New Zealand, designations would send a powerful symbolic message of opposition to terrorism, just as this country has long demonstrated its opposition to dictatorial regimes, nuclear weapons, and apartheid. The 1981 Springbok Tour protests, for example, "proved to the world that a lot of New Zealanders had heart."[532] In much the same way, New Zealand could show its deeply held commitment to peace by standing up to those who seek to destroy it by any means necessary.

3. Designations Generally

Before completing the discussion on designations, a few miscellaneous points are in order. In today's Internet age, jurisdictions around the world publish their terrorist designations on government web sites to ensure that banks, businesses, and others can readily ascertain with whom they can and cannot deal.[533] New Zealand Police have been working to establish such an Internet site,[534] and I recommend that its creation be expedited.

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528 Any designation of the last organisation would be expected to spark controversy in New Zealand, however, given the support for the Tamil Tigers by Tamil groups and others. Minister of Justice and Minister of Foreign Affairs and Trade Phil Goff said he probably would have concerns with any immediate designation of the Tamil Tigers, for example, since its terrorist bombings had stopped and a peace process begun. Goff interview, above.

529 See Part IV, above.

530 Matt Robson "Disarmament Minister Fights Terrorism" (24 September 2001), located at www.beehive.govt.nz/ViewDocument.cfm?DocumentID=11899.

531 US Embassy Statement (10 November 2003).

532 Reid, above, 28.

533 See Part IV, above.

534 Peoples interview, above.

Furthermore, Police generally forward recommendations that New Zealand implement UN terrorist designations to the Prime Minister's office about once a month.[535] Although Police said they could move faster if assets were known to be within the country, this regular delay in implementing designations potentially allows assets to move inside and out of New Zealand within that time and, in a worst-case (and, admittedly, unlikely) scenario, exposes the country to "running an international diplomatic risk" if such assets were later used for a terrorist attack anywhere in the world.[536] Accordingly, I suggest, if feasible, that such routine UN-mandated designations be forwarded to the Prime Minister for consideration as soon as possible.

D. EXCEPTIONS TO CRIMINAL OFFENCE PROVISIONS

The UN designation process and the designation systems of other countries are founded on the proposition that the international body and national governments decide which individuals and entities support terrorism to such a degree that their assets should be frozen globally and further financial contributions from, or dealings with, third parties ended.[537] These rules establish bright lines so that people will know which groups and persons can be supported and which ones cannot. Further, the UN not only requires that States freeze the assets of entities and individuals designated by the world body, it also mandates that all countries ensure that no funds or services of any kind are provided by their citizens or residents to designated persons and groups.[538]

In its implementation of the UN mandates, however, New Zealand has created a potential loophole that undermines the force of the Security Council resolutions and permits each and every one its residents to challenge the authority and merits of mandatory UN Security Council decisions. Section 10 of the Terrorism Suppression Act tracks the wording of section 1(d) of Security Council Resolution 1373 in prohibiting the provision of property or financial or related services to UN-designated terrorists. Yet, section 10(b) also contains an exception – not provided for or contemplated by the UN resolutions – that excuses such conduct when the recipient is "a movement or organisation advocating democratic government or the protection of human rights and that is not involved in any way in the carrying out of terrorist acts."[539] Section 8, criminalising the providing or collecting of funds for terrorist acts, contains a similar exception.[540]

On the surface, the exception seems logical; of course we do not want to ensnare donations to legitimate humanitarian organisations within the criminal laws against terrorism. The problem is that the exception is applied to a provision prohibiting the knowing supply of property or services to a *designated* terrorist, meaning that the exception allows persons to violate the mandatory UN-imposed terrorist sanctions regime if they believe – contrary to the UN Security Council – that the designation is somehow unfair or in error.

Legal experts concur that the provision potentially circumvents the UN regime. According to Alex Conte, an international law lecturer at the University of Canterbury, "I think

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535 See Part V, above.

536 Dawe interview, above.

537 See Part IV, above; UN Resolutions 1373, 1390.

538 UN Resolution 1390, s 2.

539 Terrorism Suppression Act 2002, s 10.

540 Terrorism Suppression Act 2002, s 8.

it [section 10(b)] does provide a loophole and, therefore, that loophole means that New Zealand is not entirely compliant with" the UN resolutions.[541]

This potential loophole is, by no means, a meaningless one. The UN and New Zealand lists conceivably do and may one day contain groups that do not themselves "carry out" terrorist acts, within the meaning of the Act,[542] but which may somehow otherwise support bin Laden, Al-Qaida, or associated entities. In fact, Mr Goff has recognised the possibility that the financing of terrorist acts "may be direct or indirect," including "through organisations that have legitimate goals."[543] In addition, the designation lists might now or in the future include certain groups, like Hamas, that contain both military and political/social wings, so that a donor could argue that the political/social wings fit within the section 10(b) exception, even if the UN Security Council and the New Zealand Government both deem the organisations in their entireties to be worthy of sanctions.

Government insiders recalled that the exception, added at the Committee stage, was intended as a "safeguard"[544] and to provide comfort that the Terrorism Suppression Act process would not reach wholly humanitarian causes. National MP Wayne Mapp said the Committee wanted to offer reassurance that such causes would not be targeted, but did not intend the language to be an exception from a criminal offence once a designation was made. He "freely concede[s]," however, that the provision does not read as intended: "Because we feel like we have to dot every 'i' and cross every 't,'" Mr Mapp said, it sometimes results in legislation "which looks deficient".[545]

Because this provision is drafted as an exception to a criminal offence, section 10(b) also creates potential prosecutorial dilemmas. Under section 10(a), the Government merely would have to prove that a person provided property or services to a terrorist, knowing that the person or entity had been designated. Section 10(b), however, would put the merits of the designated terrorist on trial and require prosecutors to rebut a defence with proof that the individual or organisation actually committed terrorist acts – evidence that is likely to be classified or at least otherwise inadmissible because of hearsay or other evidentiary problems.[546] This is particularly true because the Act explicitly authorises the Government to rely on UN Security Council information[547] and, accordingly, such third-party material may be the only evidence authorities have to buttress their decision.[548]

The problematic nature of this provision is further demonstrated via a comparison with the language of the other parts of the Act. The legislation explicitly authorises the Prime Minister to designate parties that: (1) carry out terrorist acts, (2) facilitate the carrying out of

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541 Conte interview, above.

542 Terrorism Suppression Act 2002, ss 10, 25.

543 (3 May 2001) 591 NZPD 9002.

544 Goff interview, above.

545 Mapp interview, above.

546 For example, if the evidence against a terrorist came from an overseas government, it is far from certain that it would be admissible without some testimony from that government.

547 Terrorism Suppression Act 2002, s 31.

548 White interview, above.

such acts, or (3) are owned or controlled by those who carry out or facilitate terrorist acts.[549] Yet, the exclusion provision in section 10 allows persons to escape punishment if they can prove that the designated entity to which they provided support is not involved in any way in the "carrying out" of terrorist acts, the first category above. The exclusion provision does not recognise that entities may be designated under either of the latter two categories, meaning that it appears to permit persons to continue to provide services to entities designated for facilitating terrorist acts or being owned or controlled by terrorists.

Having offered this argument, however, I recognise that the Government and the Committee certainly did not intend by this provision to undercut the UN regime and that there is considerable room for debate about the effect of the exception. An alternative view is that, unlike the description offered above, the exception does nothing more than simply reflect the requirements that need to be made out by the Government when listing entities under the designation provisions of the Act; namely, that there is good cause to suspect (interim designations) or reasonable grounds to believe (final designations) that the subject entity has carried out or participated in terrorist acts. Under the exception it is open to defendants charged with offences under the Act to dispute the validity of the designation of an entity they are charged with supporting. These types of defences may be based on procedural grounds but under the wording of the exception may also raise the issue of whether the evidential basis necessary for the designation decision was met.

This alternative view posits that the exception only would be available in cases where an accused supports a movement or organisation that advocates democratic government or the protection of human rights. In addition, an accused is required to satisfy an evidential onus that the movement or organisation has not been involved in any way with the carrying out of terrorist acts. It would not be successful if the accused cannot convince a jury of this threshold or if the evidence raised by the defence is rebutted by the prosecution. The exception highlights the issue of whether in meeting its obligations under UN Resolution 1373, a signatory State may permit its citizens to challenge the evidential basis for designations giving rise to offences related to the support of designated terrorist entities as well as procedural issues.

While in my view, the UN Resolutions do not permit citizens to question UN-based designations in the way that appears to have been contemplated in sections 8 and 10 of the Act, the extent to which individual rights are affected under this type of legislation is one that will undoubtedly be the subject of further debate and quite likely judicial interpretation at some point in the future.

The anomalous nature of this provision is demonstrated by New Zealand's proud and lengthy history of participation in UN sanctions programmes against rogue nations and regimes. The UN regularly has compelled world governments to impose sanctions on "designated" countries, and New Zealand has complied by prohibiting dealings between its citizens and residents and the nations at issue, whether South Africa, the former Yugoslavia, Iraq, or others.[550] At no time has New Zealand created an exception to its sanctions regime to allow individuals to challenge the wisdom of the UN-based sanctions programme or the merits of the sanctioned governments.[551]

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549 Terrorism Suppression Act, ss 20, 22.

550 See Part III.A.7, above; Keating interview, above.

551 Dawe interview, above.

The reason that such exclusions are not and have not been allowed is that a global sanctions programme would be ineffective if interested persons in every country were allowed to challenge the wisdom of the UN Security Council and its mandatory and binding resolutions issued under Chapter VII of the UN Charter. This is particularly true where juries in each country would be called upon to assess the sympathetic local defendant's views, particularly in regions where the UN and its decisions might be considered unpopular.

To be clear, my position does not suggest that New Zealanders be restricted from supporting overseas "liberation" movements, even those that might engage in violence. To the contrary, citizens should be free to wholeheartedly support such causes[552] – up to the moment at which the UN or the New Zealand Government exercises its legal, political, and foreign policy judgment to designate an organisation as a terrorist. Once that decision has been made, individuals may continue to express their opinions in support of the group, request the Prime Minister to reconsider her decision,[553] and even attempt to challenge the designation in the democratically guaranteed venue of a courtroom. They should not, however, be free to second-guess, and thereby undermine the effectiveness of, the UN or New Zealand policy by continuing to provide funding or other support.

E. MEMBERSHIP IN A TERRORIST GROUP

The terrorist designation process is a civil, rather than criminal, proceeding, meaning that no one is threatened with imprisonment for being listed as a terrorist. Nevertheless, the Terrorism Suppression Act established various criminal offences for continuing to maintain certain connections with a terrorist after its designation, such as prohibiting dealing with the property of a listed terrorist and forbidding the provision of financial or related services to it.[554] One of these offences is the knowing participation in a terrorist group.[555]

During debate on the Terrorism Suppression Act, the Government stated the legislation would not capture mere membership within an organisation, although "[a]ny active support" toward its ability to carry out its terrorist mission, such as payment of a membership fee, would be an offence.[556] Mr Goff explained, "As much as we dislike a number of groups in our society, it is not a crime to be a member of the Nazi party in this country. It is not a crime to be a member of the Headhunters gang or the Mongrel Mob. As much as we deplore those organisations, as a society we have not sought to proscribe membership of them."[557]

Opposition members vigorously criticised that provision, calling it "quite extraordinary that, in its wisdom, the select committee decided that people can belong to a terrorist group and it not be an offence. So, believe it or not, it is legal in New Zealand – or will be – to belong to al-Qaeda."[558]

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552 This support, of course, may not include direct support for an act of terrorism itself, as prohibitted by section 8 of the Terrorism Suppression Act 2002.

553 The Terrorism Suppression Act explicitly authorises petitions for revocation of a designation to be made by the designated party, as well as by those with a particular interest in the action, aside from a general public interest. Terrorism Suppression Act 2002, s 34.

554 Terrorism Suppression Act 2002, ss 9-10.

555 Terrorism Suppression Act 2002, s 13.

556 (8 October 2002) 603 NZPD at 1104, 1110.

557 (8 October 2002) 603 NZPD at 1104.

558 (8 October 2002) 603 NZPD at 1101.

Other countries have struggled with the membership issue. In the UK, belonging or claiming to belong to a proscribed terrorist organisation was outlawed by the Terrorism Act 2000, [559] as well as by prior emergency measures dealing with Northern Ireland.[560] In 1969, the House of Lords considered an appeal from the Court of Appeal in Northern Ireland and upheld (by three judges to two) a defendant's conviction for being a member of a republican club in breach of regulations, relying on war time and emergency cases for support.[561] Earlier this year, a government-appointed reviewer of the 2000 terrorism statute acknowledged the "human rights implications of rendering unlawful membership of political organisations whose targets are well outside the UK," but "concluded that the retention of proscription is a necessary and proportionate response to terrorism."[562] Under legislation enacted last year, Australia also criminalises membership, even status as an "informal member," of a terrorist organisation.[563]

On the other hand, in the US, mere membership in a terrorist organisation – without more – is not an offence, nor could such a criminal provision, in all probability, be enacted, because of the First Amendment to the US Constitution and its guarantees of freedom of speech and association. The US faced this issue squarely recently in considering the case of John Walker Lindh, an American citizen who joined Al-Qaida and fought in Afghanistan with the Taliban against Northern Alliance and American forces. The court upheld the criminal charges against Mr Lindh and concluded that, while mere membership in an organisation may not be unlawful, that exception provided "no license to supply terrorist organizations with resources or material support in any form, including services as a combatant."[564] Canada appears to have taken a similar view, criminalising the knowing participation in a terrorist group, but enumerating a variety of factors demonstrating additional conduct, other than passive membership, as evidence of such participation.[565]

This position of "individual responsibility" served as a guiding principle of the post-World War II Nuremberg Tribunal, according to Court of Appeal Justice Kenneth Keith.[566] Despite the Nuremberg Charter, which criminalised status as a member of certain groups, the Nuremberg Tribunal ultimately determined that "[m]embership alone is not enough" and "[c]riminal liability was to be based on individual responsibility and individual fault."[567] It does not seem unreasonable to continue to utilise these principles as a guidepost in assessing current legislation.

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559 See Part IV.C, above.

560 Justice Kenneth Keith "Terrorism, Civil Liberties and Human Rights", 17, Paper Presented at 13th Commonwealth Law Conference 2003, Melbourne, Australia.

561 Keith, above, 17-18.

562 Lord Carlile of Berriew "Report on the Operation in 2001 of the Terrorism Act 2000", 12.

563 See Part IV.D, above; Security Legislation Amendment (Terrorism) Act 2002, ss 102.1, 102.3.

564 *United States v Lindh*, 212 F Supp 2d 541, 570 (ED Va 2002); *see also Humanitarian Law Project v Reno*, 205 F 3d 1130, 1133-34 (9th Cir 2000).

565 Criminal Code, s 83.18.

566 Keith interview, above.

567 Keith, above, 18.

F. CLASSIFIED EVIDENCE

Evidence about terrorist activity may come from a variety of sources. Foreign governments, law enforcement agencies, intelligence services, and confidential informants may provide much of the information, while media reports, financial and tax records, and public statements by the terrorists themselves may serve as another important repository of data. Much of the material in the first category may well be classified and unavailable for public dissemination – for example, to protect intelligence sources and methods – and the fact of its classification presents two inter-related issues: first, whether the Government should be permitted to use classified evidence in the process of designating terrorists and, second, if such material is used, what process should be followed in the event a named terrorist challenges its designation and, by extension, the information used to support it.

The answer to the first question, I believe, is relatively clear. Of course we want our world to be protected from terrorist attacks, particularly because of the extraordinary threat level they pose, and countries and law enforcement and intelligence agencies routinely share their information as a means of furthering this goal. Some may be sceptical of the motives for sharing certain data or the accuracy of it – indeed, whether it may have been "sexed up" – but, in the end, we want our leaders to have access to all available information to make the most informed decisions on protecting our national and global security. If classified evidence existed suggesting a threat to one's homeland, few would not want the government to be able to see the data, evaluate it, and determine what response, if any, to make. This is the reason that New Zealand and other countries around the world – including Canada, the UK, and the US, among others – permit classified evidence to be used in the process of designating terrorists.[568]

The response to the first question, however, results in a sort of Faustian dilemma with respect to the second. The Government can see the classified material and take action based upon it, but it may not reveal where it came from or what it says. If the Government does reveal the source or content of the data, it runs the very real risk of being cut off from the global flow of information and may well endanger lives or covert political and strategic alliances. But if the Government does not reveal the substance of the material, it faces the prospect of scepticism from a portion of the public and accusations of violations of fundamental rights on behalf of those adversely affected by Government decisions based in whole or in part on what is called the "secret" evidence.

The solution for many countries around the world – embodied in the Terrorism Suppression Act – is to allow challenges to go before the judiciary, with all unclassified information provided to the designated party and classified evidence reviewable by the judges. This is the system adopted by the US in 1996 legislation allowing designations of foreign terrorist organisations and in the USA PATRIOT Act of 2001.[569] US courts have utilised this procedure on several occasions in upholding terrorist designations both pre- and post-September 11.[570] Canada has implemented a similar approach, with the judge authorised to review such information in private, without the designated party or its counsel, "if the judge is

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568 See Part IV, above.

569 See Part IV.B, above.

570 *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F3d 156, 162-64 (DC Cir 2003); *Global Relief Foundation v O'Neill*, 315 F 3d 748, 754 (7th Cir 2002); *National Council of Resistance of Iran v Department of State*, 251 F 3d 192, 197 (DC Cir 2001); *People's Mojahedin Organization of Iran v United States Department of State*, 182 F 3d 17, 19 (DC Cir 1999). To be forthright about my prior work in this area, I served as lead trial counsel in *Global Relief Foundation*, as well as a trial counsel in *Holy Land Foundation*.

of the opinion that the disclosure of the information would injure national security or endanger the safety of an person." A summary of the information is to be provided to the party "without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person."[571]

Other countries, including the UK, have taken a different path and created special tribunals, apart from the ordinary courts, to consider classified evidence used to proscribe terrorist organisations. This system is akin to the process being utilised in the Zaoui case pursuant to the Immigration Amendment Act 1999.[572] Under the UK procedure, a proscribed organisation may apply to the Secretary of State for removal from the list and, if refused, appeal to a Proscribed Organisations Appeal Commission (POAC), which is comprised of at least one current or former "holder of high judicial appellate office."[573] In reaching its decision, the POAC views all the evidence, including classified material not available to the proscribed group or any attorneys it employs. An additional protection of the UK procedure is that it utilises "special advocates," appointed by the Law Officers of the Crown, to review the closed material. "Their role is to represent the interests of an organisation or other applicant, but they are not instructed by or responsible to that organisation or person", nor may they "disclose any part of [the closed material] to those whom they represent".[574]

In analysing the different methods employed throughout the world, I lean toward the ordinary and largely transparent judicial process permitted by the Terrorism Suppression Act (and, admittedly, similar to that used in my home country) as providing the best solution to what has been described as a "Catch 22" situation.[575] Although New Zealand has not faced any judicial challenges to designations under the Terrorism Suppression Act, US courts have considered several challenges by groups on its terrorism lists, and federal judges have proven more than capable of reviewing the classified material without infringing upon national security and while guaranteeing due process rights.[576] As former Secretary for Justice Colin Keating noted, "US courts have managed . . . perfectly well" the process of dealing with classified evidence in the cases before them.[577]

The UK special advocate system, with independent counsellors appointed to review the classified material on behalf of the proscribed party, suggests an additional safeguard. This feature is not employed in the New Zealand or US approaches to designating terrorists, although, as noted, these latter regimes offer the protections of the judiciary in analysing the evidence.

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571 Criminal Code, s 83.05.

572 See Parts III.A.6, VI.E, above.

573 Carlile, above, 10-14.

574 Carlile, above, 14.

575 Mark interview, above.

576 *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F3d 156, 162-64 (DC Cir 2003); *Global Relief Foundation v O'Neill*, 315 F 3d 748, 754 (7th Cir 2002); *National Council of Resistance of Iran v Department of State*, 251 F 3d 192, 197 (DC Cir 2001); *People's Mojahedin Organization of Iran v United States Department of State*, 182 F 3d 17, 19 (DC Cir 1999).

577 Keating interview, above.

Having concluded that the transparency and rigour of a judicial proceeding offers the optimal solution when designating terrorists and freezing their assets, I do not comment on the procedures being utilised in the pending Zaoui case. There may well be particular interests at stake in the context of an immigration proceeding that are not present in a terrorist designation scheme.[578] Ultimately, however, Parliament should review the immigration procedures to determine whether they should be brought in line with the judicial review permitted by the Terrorism Suppression Act.[579] As Mr Keating remarked, "New Zealand has, I think, a perverse reluctance to involve its courts in matters that its courts should deal with," such as human rights issues and national security matters.[580] Yet, if the Government wants to reassure the public that it is not misusing classified evidence – issues dogging the US and the UK in the wake of the war in Iraq – it might want to demystify and dismantle its special processes and lean instead, to the extent possible, on its experienced and publicly known and accepted judiciary.

G. COUNTER-TERRORISM BILL

The Counter-Terrorism Bill became six separate acts upon its passage and affected broad changes in the criminal law and investigators' powers. As noted in the Preface, given time limitations, I did not conduct a comprehensive review of this legislation or a comparison with the laws of other jurisdictions. I have been struck, however, by the array of people from different backgrounds and political philosophies who have raised concerns about certain features of the bill. One concern, raised even by some of those who favour the bill, involves section 307A, which makes it an offence to offer threats of harm to people or property. The bill criminalises conduct causing major economic loss even to one person and, accordingly, could be read in an extraordinarily sweeping manner.[581] As National MP Wayne Mapp, a proponent of the bill, acknowledged, "If you took a literal reading of these [provisions], you could include a modest offence", although "no sensible court" should interpret it that way.[582]

An additional provision raising wide-spread concern is clause 33 of the bill, requiring persons to provide assistance, such as providing passwords, to Police armed with a warrant to enable them to access a computer, even if the computer contained incriminating information.[583] Critics see this as a violation of privilege against self-incrimination and an alarming expansion of law enforcement powers: "The proposed provision represents a significant extension to existing police powers and a departure from established common law and statutory rights," argued Alex Conte, a University of Canterbury law lecturer.[584]

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578 This report does not examine the immigration laws and procedures of other countries, which may or may not be similar to the New Zealand system.

579 Labour MP Tim Barnett, among others, expects such a Parliamentary review to take place after the Zaoui proceedings conclude. Barnett interview, above. Progressive MP Matt Robson said he supports such a review. Robson interview, above. Although New Zealand First MP Ron Mark acknowledged there is "always a need to look back," he does not know whether he would favour any change to the Immigration Act procedure. Mark interview, above.

580 Keating interview, above.

581 Locke interview, above.

582 Mapp interview, above.

583 Locke interview, above.

584 Conte "Tracking Devices, Search Warrants, and Self-Incrimination" (July 2003) NZLJ 235, 236.

H. INTERNATIONAL TERRORISM (EMERGENCY POWERS) ACT 1987

As described above, the post-Rainbow Warrior anti-terrorism legislation authorised sweeping governmental powers in the event of an international terrorist emergency, including extended police authorities and media control provisions.[585] This latter feature of the International Terrorism (Emergency Powers) Act appears to be an anomaly unlike anything found in other democratic societies, and has been criticised by, among others, the UN Human Rights Committee, the Law Commission, and various academic commentators.[586] As the Law Commission noted in recommending the repeal of these provisions in 1991: "Although other Western countries face a greater terrorist threat than New Zealand and have experienced the problems which the present provisions are designed to meet, they have not introduced comparable media control legislation. Rather than impose information control on the media, it is preferable to foster close liaison between government, police and the media in an effort to establish guidelines which would operate in relation to a crisis incident."[587]

New Zealand Police and media, in fact, established such guidelines on dealing with terrorist incidents as far back as 1984.[588] Assistant Police Commissioner for Counter Terrorism Jon White described the Police relationship with the media as "a good one," and said the media have been "responsive" to Police requests for cooperation during a crisis: "Where the chips are down, they will cooperate," he said.[589]

Mr Goff speculated that repeal of the media provisions of the 1987 statute has not been considered a priority because the Act is "just sitting there," unused and untested.[590] The danger with leaving such overly broad legislation on the books, however, is that Government leaders might remember the Act and utilise it years or even decades after its enactment, as occurred in 1951, when the Public Safety Conservation Act 1932 was used to break the waterfront strikes. Accordingly, I recommend the repeal of these censorship provisions.

I. PARLIAMENTARY REVIEW

There is no question that the Terrorism Suppression Act, like the 1987 terrorism statute before it and the counter-terrorism legislation after it, established new and potentially far-reaching government powers. Perhaps one of the best features of the Act in terms of balancing civil liberties and national security is its provision for select committee review of the legislation by 1 December 2005, including whether its "provisions should be retained or repealed".[591] In this sense, New Zealand's law resembles those in other jurisdictions – such as Australia, Canada, the UK, and the US – where, for example, sunset provisions were placed on post-September 11 legislation which had potential civil liberties implications.[592] Similar

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585 See Part III.A.4, above.

586 Law Commission *Final Report*, above, 24, 224-29; Part III.A.4, above.

587 Law Commission *Final Report*, above, 226-27.

588 Guidelines Agreed by Police and Media on Media Coverage of Terrorist Incidents (1984), attached as Appendix E to Law Commission *Final Report*, above.

589 White interview, above.

590 Goff interview, above.

591 Terrorism Suppression Act 2002, s 70.

592 See Part IV, above.

review provisions were not contained in the six acts arising from passage of the Counter-Terrorism Bill, although Progressive MP Matt Robson called on Parliament to "keep a watchful eye on this legislation".[593]

I thoroughly endorse such a review process, not only for the Terrorism Suppression Act, but for all existing terrorism legislation, including, among others, the 1987 International Terrorism (Emergency Powers) Act 1987, the Immigration Amendment Act 1999, and the acts resulting from the 2003 Counter-Terrorism Bill. Such a comprehensive review would ensure a consistent and considered approach to terrorism matters and ensure that New Zealand does not repeat the mistakes of history and leave emergency legislation on its books indefinitely, with review only "when it bites."[594]

VIII. CONCLUSION

The Terrorism Suppression Act represents New Zealand's effort to respond to the extraordinary threats posed by international terrorism while limiting the impact on the civil liberties of New Zealanders. Through the combined efforts of the Government, Parliament, officials, and public, the legislation incorporated some of the most effective approaches of other jurisdictions, albeit sometimes with a uniquely New Zealand flavour. Although the legislation and its implementation are by no means perfect, the Government has succeeded admirably in balancing the needs of the individual versus those of the State and international community.

593 (21 October 2003) NZPD, no 40, 9389.

594 Ladley interview, above.