

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy and the Special Rapporteur on freedom of religion or belief

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(Please use this reference in your reply)

19 January 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on minority issues; Special Rapporteur on the right to privacy and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 40/16, 42/22, 43/4, 41/12, 43/16, 43/8, 46/16 and 40/10.

In this connection, we express our serious concern with the **Counter-Terrorism Legislation Act 2021 and its compatibility with New Zealand's international and human rights law obligations**. This legislation includes measures that could significantly limit the exercise of fundamental freedoms, including those of the right to a fair trial under article 11 of the Universal Declaration of Human Right ("UDHR") and article 14 of the International Covenant on Civil and Political Rights ("the Covenant"), as well as the rights of privacy (article 17 of the Covenant), freedom of religion (article 18), freedom of expression (article 19), freedom of association (article 20) the prohibition of discrimination (article 26) and the rights of minorities (article 17).

We recommend review and reconsideration of certain aspects of this legislation to ensure its compliance with New Zealand's international human rights obligations.

I. Background

The Counter-Terrorism Legislation Bill was introduced in April 2021 as an omnibus bill to make amendments to a range of counter-terrorism and security legislation, including the Terrorist Suppression Act 2002 ("TSA"), the Search and Surveillance Act 2012 ("SSA"), and the Terrorism Suppression (Control Orders) Act 2019 ("COA"). Originally conceived as a response to recommendations of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain,¹ the New Zealand government announced its intention to fast-track the legislation in the immediate aftermath of the 3 September 2021 Auckland stabbing attack.² Despite

¹ The report of the Royal Commission of Inquiry is available at: <https://christchurchattack.royalcommission.nz/the-report/>

² See: 'New Zealand supermarket stabbing: Government to toughen anti-terror laws,' *BBC News* (4 September 2021), available at: <https://www.bbc.co.uk/news/world-asia-58446260>

opposition from minor parties in the Parliament, the bill was passed on 29 September 2021 and the Counter-Terrorism Legislation Act 2021 (“the Act”) entered into force on 5 October 2021.

II. Assessment and concerns with regards to the Act

a) Absence of regular review of counter-terrorism legislation

As a starting point, we note that, while the Act represents one of a number of revisions to the TSA,³ neither the TSA, nor any counter-terrorism-related legislation in New Zealand, is subject to regular independent review of its operation and effect. We understand that a proposed review of the TSA was scheduled for 2013 but was cancelled by the Government, and no formal review has been enacted since.

We note that best international practice is for States to subject counter-terrorism and emergency laws to regular independent review so as to ensure that they remain necessary, proportional and compliant with international law. We are concerned that, despite the TSA having been in force for almost two decades, its operation and effect has never been subjected to any consistent and rigorous independent oversight.

The process of regular independent review represents a necessary discipline and check upon counter-terrorism policymaking, allowing the opportunity to reassess whether legislation remains necessary and its impacts on human rights proportionate to its objectives. In our view, the process of independent review is particularly important in circumstances where not only has the present Act been drafted and approved in a short time period with minimal time for public scrutiny and debate, but also because previous counter-terrorism legislation has been enacted *‘under urgent time frames without providing sufficient time for public consideration and consultation.’*⁴

Accordingly, in addition to the specific concerns raised in this letter, we recommend the appointment of an independent mechanism to conduct regular reviews of New Zealand’s counter-terrorism and emergency legislation, and to make recommendations for amendments and modifications of practices in light of the findings of such reviews.

b) Definition of ‘terrorist act’

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has frequently expressed concerns in relation to States’ reliance, in domestic legislation, upon vague definitions of ‘terrorism’ and related terms, which create the risk of arbitrariness in the application of such legislation.⁵ Similarly, the vagueness of domestic legislation addressing terrorism, and the problematic latitude it affords States to conduct unlawful operations under the pretext of counter-terrorist objectives, has been a consistent subject of

³ We note in particular the: Terrorism Suppression Amendment Act 2003; Terrorism Suppression Amendment Act 2005; and Terrorism Suppression Amendment Act 2007.

⁴ Human Rights Committee commented following New Zealand’s Sixth Periodic Review, CCPR/C/NZL/CO/6, [13]. See, for instance: A/HRC/31/65, [21], [24], and [27]; A/HRC/37/52, [33], [36], and [66]; and A/HRC/40/52, [34]-[35].

criticism in the decisions of regional human rights courts.⁶

In this respect, we note that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has advanced the following model definition of terrorism as a best practice:⁷

‘Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages;*
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or*
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;*

And

2. The action is done or attempted to be done with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or*
- (b) Compelling a Government or international organization to do or abstain from doing something;*

And

3. The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or*
- (b) All elements of a serious crime defined by national law.’*

This understanding of what constitutes terrorism has been endorsed by the Security Council in Resolution 1566 (2004).⁸

A definition of terrorism which applies to conduct going substantively beyond the considered restrictions identified in that definition risks expanding the scope of terrorist offences unnecessarily, and jeopardizes the fundamental principle that criminal provisions should be narrowly drawn and their impacts on individuals’ rights limited to the extent strictly necessary and proportionate to safeguard public safety.

We note that the terminology in the previous section 5 of the TSA was broadly in line with the model definition, including in respect of the requirement that a ‘terrorist act’ is done with the intention either ‘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’ (sub-sections 5(2)(a) and (b), respectively).

Against that background, the changes in sections 6(2) and (3) of the Act give rise to concern. Those clauses have, in turn, replaced the words ‘induce terror in a civilian population’ with ‘intimidate a population’ and the words ‘unduly compel’

⁶ See, for instance: *Big Brother Watch v United Kingdom* [2021] ECHR 439 and *OOO Flavus and ors v Russian Federation* [2020] ECHR 463.

⁷ A/HRC/16/51, [28].

⁸ S/RES/1566 (2004), [3].

with *'coerce.'* Given that the previous terminology used in the TSA appeared closely to reflect the model definition of terrorism, the justification for, and effect of, such alterations in terminology is not clear. **We invite New Zealand's explicit confirmation of the intended application and scope of the Act in this regard.**

If the amended terms are understood as essentially synonymous with the terms replaced, then the amendments do not appear necessary, and instead risk confusion. Given the seriousness of a terrorist charge, and the widespread legal, practical, and social consequences that designating conduct as a terrorist act has not only for the perpetrator, but also for their associates and family members, we consider that any ambiguity or vagueness as to the content of the definition of 'terrorist act' under the TSA should be avoided wherever possible. As the General Assembly has made clear, laws criminalizing acts of terrorism must be, inter alia, *'accessible'* and *'formulated with precision.'*⁹ **Amendments to terminology that lack legal precision and clarity are contrary to the fundamental principle of legal certainty under international law, which is enshrined in article 11 of the UDHR.**

But if the actual intention behind the amendments were to render it easier for a terrorist act to be established, then such a change would raise further serious concerns.

Under section 6A(2) of the TSA, commission of a terrorist act carries a maximum penalty of life imprisonment (that is, the most serious penalty compatible with international human rights law). Additionally, a substantial infrastructure of further penalties applies to those directly or indirectly connected to perpetrators of terrorist acts, not to mention the social stigma that even uninvolved members of families, organizations, and communities suffer whenever a person is accused, let alone convicted of, such conduct. A human rights-compliant approach to terrorism legislation, guided by the principles of legality, necessity, and proportionality, therefore requires that conduct which reaches the high standard of seriousness constituting terrorism is punished as such. Crimes that do not have the status of terrorism, however serious, should not be addressed through counter-terrorism legislation.¹⁰

The extension of counter-terrorism legislation to conduct which ought not properly to fall within the definition of terrorism is to be avoided given that overbroad definitions entail risks of arbitrary and discriminatory enforcement, particularly in respect of minority communities. Relatedly, respect for the law is built upon the community's understanding that it is necessary and the sanctions it imposes are subject to proper limits. Once communities – particularly communities who are, or perceive themselves to be, disproportionately subject to counter-terrorism measures – begin to challenge the legitimacy of those counter-terrorism measures, respect for and compliance with the law may be jeopardized. Given that effective policing in counter-terrorism (as in all spheres) depends upon community engagement, intelligence, and cooperation, any measures, which undermine community respect and engagement risk becoming counter-productive.

c) Provisions relating to 'material support' for terrorist acts

We note that section 10 of the Act replaced section 8 of the TSA, which prohibits the financing of terrorism, with a series of offences. These offences relate

⁹ A/RES/63/185, [18].

¹⁰ See: E/CN.4/2006/98, [47].

not only to the collection of funds for, but also to the provision of material support to, the commission of terrorist acts or for use by entities known to carry out or participate in such acts. The definition of those offences includes the absence of *'lawful justification or reasonable excuse'* and, in respect of mens rea, *recklessness* as to the use of such funds or support.

These changes raise a number of substantial human rights concerns. First, the meaning of the exonerating *'lawful justification or reasonable excuse'* provision is not defined. While those words already appeared in the previous section 8 of the TSA (with respect to collection of funds only), the boundaries of the term are not specified, and the Bill does not clarify them. In circumstances where very serious consequences attach to the offence (the maximum term in the Act being 14 years' imprisonment), the absence of guidance as to what constitutes a *'reasonable excuse'* preventing liability is regrettable, and violates the fundamental principle of legal certainty, contrary to article 11 of the UDHR.

This vagueness is particularly inappropriate in circumstances where the boundaries between legitimate and illegitimate provision of funds and material support, particularly across borders into conflict zones, may be difficult to draw. As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has observed, great care needs to be taken with frameworks criminalizing financial support for terrorism given the threat such frameworks to civil society organizations *'some of whose activities may – unwittingly – constitute material support according to the definitions adopted.'*¹¹ Further, as the Special Rapporteur has noted,¹² there is a tendency on the part of financial institutions, in response to counter-terrorism legislation which imposes sanctions for indirectly supporting terrorist financing, to impose blanket protocols banning bank transfers into certain territories affected by conflict, regardless of individual identities.¹³

Broad approaches to criminalizing material support may also lead to international and governmental donors including restrictive clauses in humanitarian grants and funding contracts requiring NGOs to satisfy onerous evidential and procedural standards so as to insulate funders from criminal liability.¹⁴ Experience suggests that this chilling effect on international financial transfers to recipients in conflict regions has a pronounced effect on NGOs conducting grassroots work, particularly smaller organizations, those without a multinational presence, and those working with the most vulnerable communities.¹⁵ **The impact upon NGOs in regions affected by terrorism and conflict risks to cause serious harm to persons whom those organizations support, including their rights to life (contrary to article 6 of the Covenant), to freedom of expression (article 19), freedom of**

¹¹ A/70/731, [31].

¹² A/70/371, [42].

¹³ Financial institution risk aversion appears to have a demonstrable macro impact on cross-border flows of funds. See: M Collin et al., 'The Impact of Money Laundering Regulation on Payment Flows: Evidence from SWIFT Data' (Center for Global Development Working Paper 445, December 2016).

¹⁴ See: Harvard University Program on Humanitarian Policy and Conflict Research (HPCR) Working Paper, 'Humanitarian Action Under Scrutiny: Criminalizing Humanitarian Engagement' (February 2011), p23; and A/70/731, [34].

¹⁵ See: A/70/731, [41]; Association for Women's Rights in Development, 'Watering the Leaves, Starving the Roots: The Status of Financing for Women's Rights Organizing and Gender Equality' (2013), p110; K Mackintosh and P Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action' (July 2013), p104; and Duke University Law School International Human Rights Clinic and Women Peacemakers Program, 'Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security' (March 2017).

association (article 22), and freedom of thought, conscience, religion or belief (article 18), the prohibition of discrimination (article 26) and the rights of minorities (article 27), guaranteed by the Covenant.

Second, we note that the Act has introduced the *mens rea* of *recklessness* as an alternative to intent. We acknowledge that the penalties attaching to conviction for the material support offences are calibrated according to *mens rea* (with intentional offences attracting the maximum penalty of 14 years' imprisonment, and reckless offences attracting a maximum term of 10 years' imprisonment). However, the position of the international community (as set out in Security Council Resolutions 1373¹⁶ and 2178)¹⁷ has been limited to requiring the criminalization of the *intentional* financing of terrorism. The considered position of the international community is that, in light of the serious consequences of conviction for material support of terrorism, and given the potential for persons unwittingly to provide factual support without intention or even awareness of doing so, the appropriate mental state to which culpability should attach is no less than intention.

Introducing a recklessness standard may inappropriately extend liability to circumstances of material support to persons or organizations which lack any knowledge of criminal or terrorist links, but whose family loyalties, charitable instincts, naïveté, or bad luck render them connected, however unwittingly and indirectly, to terrorist acts or organizations. The principles of legality, necessity, and proportionality argue against criminal liability in such circumstances.

d) Representation of entities designated under the TSA

Finally, with respect to the TSA, we note that, despite the amendments introduced by way of the Act, there appears to remain a disjunct between the range of entities designated as 'terrorist entities' under the TSA and the reality of contemporary terrorist and extremist threats. Under the architecture of the TSA, entities will either be designated on the basis of their status as entities to which the UN sanctions regime relates or by the Prime Minister's exercise of her discretion. Designation of an entity enlivens many of the provisions of the TSA relating to association with and provision of support for, such designated terrorists.

While we recognize that decisions regarding the designation of entities as 'terrorist entities' for the purposes of the TSA fall within the New Zealand Government's margin of appreciation based on national security intelligence and advice, it is a matter of public record and concern that, of the list of 20 designated entities, only one – the individual Brenton Tarrant responsible for the Christchurch massacre¹⁸ – is linked to far-right extremism, whereas the overwhelming majority are linked to Islamist extremism. The risk posed by far-right terrorism, extremism, antisemitism and Islamophobia is rising internationally, and we note that other countries such as Australia, Canada, and the United Kingdom have formally designated various far-right groups as terrorist entities. In those circumstances, **we are concerned that the apparent lack of focus on this form of harm may fuel perceptions within New Zealand – particularly in minority Muslim communities – that the counter-terrorism framework is not applied in a non-discriminatory and risk-responsive fashion.** Insofar as the counter-terrorism minority framework

¹⁶ S/RES/1373 (2001), p2.

¹⁷ S/RES/2178 (2014), p5.

¹⁸ Designated on 1 September 2020. See: <https://gazette.govt.nz/notice/id/2020-go3941>

enacted by the New Zealand Government disproportionately applies to Muslim communities without proper reference to risk, it amounts not only to discrimination contrary to the Covenant but also to an unjustified infringement of New Zealand Muslims' freedom of religion or belief guaranteed under article 18 of the Covenant and could breach their rights as a minority under article 27. Moreover, it will likely legitimize Islamophobia by perpetuating harmful stereotypes and negative over-generalizations about Islam and the essentialization of Muslims.

e) Provisions relating to control orders with respect to persons following expiry of their sentences

The previous legislation in respect of control orders under the COA restricted the scope of the control order regime to persons returning to New Zealand who had been, prior to their arrival, engaged in terrorism-related activities or subject to associated sanctions. We understand that the function of this section was to enable administrative control and monitoring of individuals who would otherwise have been liable to conviction and sanctions in New Zealand as a result of their terrorism-related conduct, but whose previous geographical location created a procedural obstacle to such conviction (as a result, for instance, of the absence of relevant legislation in the individual's country of origin or previous residence).

But we note that section 44 of the Act has brought about a change to the scope of the COA such that the control order regime is no longer limited to such persons (known in the COA as '*relevant returners*'), but has been extended also to persons within New Zealand who have reached the conclusion of sentences duly imposed within the country for terrorism-related offences (known as '*relevant offenders*') (see, COA, s6(1AA)). The *de facto* power granted in respect of '*relevant offenders*' is thus to extend their deprivation of liberties beyond the boundaries of the criminal sentence already determined by the Courts in applying existing sentencing limits and guidelines.

The effect of this change is that the control order regime can be applied retrospectively to individuals who have served the full length of the sentence imposed under New Zealand law. That is a very concerning departure from the fundamental international legal principle that persons are entitled to due process and the presumption of innocence, as enshrined in article 11 of the UDHR. That fundamental principle is reflected in binding provisions of international human rights law, including article 14 (preventing persons from being punished twice for the same offence) and article 15 of the Covenant (preventing persons being subject to heavier penalties than those applicable at the time an offence was committed).

The UN Human Rights Committee, in its General Comment No 32 on article 14 of the Covenant has underscored that that the Covenant provides that '*no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country...*'¹⁹ The violation of this prohibition against 'double jeopardy' is all the more acute where – as is the case with a control order regime – the second punishment applied to a person deemed a '*relevant offender*' under the COA would not even be delivered following a second trial process, and would instead be applied via administrative procedures subject to limited opportunities for challenge, oversight, and/or appeal.

¹⁹ CCPR/C/GC/32, [54].

In light of the real risk that the extension of the control order regime poses to the fundamental ethics of fair trials, the prohibition on double jeopardy, and the principle of non-retrospectivity, we strongly recommend that these changes to the COA be reconsidered.

f) Surveillance and search regimes

We note that sections 39 to 42 of the Act extend the provisions of the SSA to the offences as newly defined in the amended TSA. While the amendments in the Act do not, therefore, substantively expand the scope of the warrantless search and surveillance regime in New Zealand, we consider that the existing scope gives rise to serious concerns. Widescale surveillance regimes have been repeatedly declared inconsistent with human rights law, including by the UN High Commissioner for Human Rights,²⁰ the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,²¹ the Court of Justice of the European Union,²² and the European Court of Human Rights.²³

In respect of New Zealand specifically, we recall that the Human Rights Committee, in its Concluding Observations on the New Zealand Government's Sixth Periodic Report, expressed concerns regarding the absence of the statutory recognition of the right to privacy in New Zealand's Bill of Rights, the breadth of key terms justifying communications surveillance under New Zealand law, and the absence of a comprehensive judicial authorization process (especially in relation to non-citizen targets of surveillance).²⁴

As the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has observed,²⁵ disproportionate use of surveillance and search powers undermines freedom of expression, particularly through the creation of a chilling effect whereby persons engage in self-censorship so as to avoid State scrutiny. That concern is particularly keenly felt by persons who already perceive themselves as targeted by State authority, including members of religious or ethnic minorities.²⁶

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above.
2. Please provide information in detail on how the counter-terrorism and preventing and countering violent extremism efforts of your Excellency's Government comply with United Nations Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017), as well as Human Rights

²⁰ A/HRC/27/37.

²¹ A/69/397.

²² Case C-362/14 *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

²³ *Szabo and Vissy v Hungary* [2016] ECHR 579; (2016) 63 EHRR 3, [52]-[89].

²⁴ CCPR/C/NZL/CO/6, [15]-[16].

²⁵ A/HRC/32/38, [57].

Ibid. See also: A/HRC/29/32.

Council resolution 35/34, and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180, and with international human rights law.

3. Please provide information as to how your Excellency's Government guarantees regular and independent review of the impact and human rights compliance of the TSA and of counter-terrorism related legislation generally.
4. Please provide information about the criteria adopted to designate groups as 'terrorist entities' and how your Excellency's Government ensures that such criteria as applied in a non-discriminatory and risk-responsive manner.
5. Please provide information on what steps are being taken to ensure that measures implemented to combat terrorism financing do not infringe upon the rights of NGOs and human rights defenders to carry out their legitimate work.
6. Please provide information on how the surveillance regime for which New Zealand's counter-terrorism legislation provides is compatible with the principles of necessity, legality, proportionality, and non-discrimination, and how the regime safeguards the rights to privacy, liberty, freedom of opinion and expression and movement. In doing so, please provide information as to whether or not any authority has issued guidance on the implementation of warrantless searches and monitoring by ordinance, and what capacity-building and training measures have been taken in this respect, including with respect to a human rights-centered approach.
7. Please provide information explaining how the fundamental principles of fair trials, the prohibition on double jeopardy, and the principle of non-retrospectivity are safeguarded in the framework of the extended scope of the COA as established through section 44 of the Act.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Miriam Estrada-Castillo
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