

Chapter 4

The Implementation of Counter-Terrorism Obligations

Considered within the preceding chapter were the various sources of international counter-terrorism obligations. This and the next chapter will examine the domestic legislation through which those obligations have been implemented by New Zealand, as well as legislation that exists outside the scope of those obligations. The focus of this chapter is to first consider the means by which New Zealand's international counter-terrorism obligations have been implemented which, as will be seen, depends on the nature, scope and source of the international obligation.

Modes of Implementation

New Zealand's counter-terrorism obligations exist through various sources of international law: through customary international law; through New Zealand's membership of the United Nations; and as a State party to the 12 international conventions related to terrorism that are currently in force. Each source of law displays different means of implementation and obligation. In turn, those different means of implementation bear upon the way in which domestic courts can deal with the application of the law.

It is useful to briefly note, at this stage, the divergent views on the status of international law norms in domestic law. As explained by Professor Ian Brownlie, there are two theories on the relationship between municipal and international law.¹ The 'dualist theory' posits that international and domestic laws operate in entirely separate systems, and is largely based upon the notion of State sovereignty: the principle that a State has the right to perform governmental actions to the exclusion of all others within its territory.² Dualists distinguish international law from municipal law by three principal means. First, the subjects of international law are

¹ Ian Brownlie, *Principles of Public International Law* (6th edition, Oxford University Press, 2003) 31-53.

² As defined by Arbitrator Huber in the *Island of Palmas Case*, United Nations, 2 *Reports of International Arbitral Awards* 829, 858-859.

sovereign States, while in municipal law both individuals and the State enjoy legal personality. Next, the sources of international law are founded on the notion of the equality of its subjects (States), whereas domestic law is derived from the parliamentary authority of the State giving rise to the domestic constitutional notion of parliamentary sovereignty. Finally, the inter-State structure of international law is different from the intra-State implementation and enforcement of domestic law. On those bases, dualist exponents such as Triepel and Strupp hold that international law is an inferior source of law and therefore does not apply at the national level unless there has been some act on the part of the State transforming the international norm into a domestic one.³

In contrast to the dualist theory, the ‘monist theory’ on the reception of international obligations in domestic law holds that there is one, all-embracing legal order, comprising both international and domestic law. Hersch Lauterpacht, one of the more forceful and practical proponents of monism, argues that it is impossible for two norms with separate bases to be valid at the same time in the same territory.⁴ Indeed, he effectively turns the dualist approach on its head and proposes that international law employs domestic law to govern human affairs. That is, the idea that the State is purely a vehicle used by individuals to represent their interests in the international community (by extension of the idea of the social contract by which the State is empowered to govern its people) so that when the ‘State’ does something at international law, it is simply acting under the authority given to it by those individuals. Under the monist view there is no need to transform an international law rule into a domestic one.

Turning from theory to practice, it is interesting that differing domestic courts adopt alternative approaches, depending upon the particular source of the international law obligation. New Zealand is no different. In the context of treaties, the courts take the dualist view that provisions of an international treaty are not applicable unless there has been some act of incorporation. As has been evidenced through a long line of authority in New Zealand courts concerning the doctrine of sovereign immunity, on the other hand, norms of customary international law need no act of transformation to be received by the courts.⁵ New Zealand courts therefore adopt a monist approach to norms of customary international law.

³ Triepel, *Völkerrecht und Landesrecht* (1899), and Strupp, *Eléments* (2nd edition, 1930), as cited by Brownlie (n 2), 31 n 2.

⁴ See, by way of example, Lauterpacht H, *International Law and Human Rights* (London: Stevens, 1950).

⁵ See *Marine Steel v Government of the Marshall Island* [1981] 2 NZLR 1, 9-10, in which Barker J recognised, in an obiter statement, the relevance of the customary international law

Customary International Law

International obligations concerning terrorism are not restricted to treaties and resolutions of the United Nations, but also include customary international law. This is of potential relevance in two situations: first, concerning the customary law reflections of the Geneva Conventions; and, secondly, concerning the practice of States since 9/11 in response to Security Council and General Assembly resolutions. The latter is considered within the next section of this chapter in which United Nations action is examined.

The customary international law norms reflected within the Geneva Conventions include the prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population – Article 13(2) of the First Protocol.⁶ What should be noted at this stage is that there is no corresponding domestic law provision in New Zealand. New Zealand is a party to all four Geneva Conventions and its two Protocols,⁷ and has ‘incorporating legislation’ through the Geneva Conventions Act 1958. However, the Act only prohibits what are known as “grave breaches” of the Conventions or First Protocol under section 3(1). Subsection (2) sets out which provisions of the Conventions or First Protocol result in “grave breaches”, but this does not include breach of Article 13(2) of the First Protocol.

rule of sovereign immunity and that no special act of transformation was required in the application of such rules by New Zealand courts. In *Reef Shipping v The Ship “Fua Kavenga”* [1987] 1 NZLR 550, 569 in which Smellie J applied the doctrine in New Zealand. The New Zealand Court of Appeal also applied the doctrine in *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426, Cooke P referring to the doctrine as part of “common law, reflecting international law” (428).

⁶ Article 13(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978). On the relationship between terrorism and international humanitarian law see further, *infra*, chapter 2.

⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950); *Protocol I*, *ibid*; and the *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of*

The customary norm reflected in Article 13(2) is thus not reflected within New Zealand's domestic legislation. As a norm of customary international law, however, it is applicable at domestic law without any act of transformation. This, as explained in the foregoing section, is as a result of the application in New Zealand of a monist approach to the reception of customary international law.

Having established that the customary law reflection of Article 13(2) is applicable in New Zealand law, it is next necessary to consider what the significance of this prohibition is. The significance is two-fold. First, as a customary and treaty obligation at international law, the New Zealand State is prohibited from undertaking such acts or threats. Second, the description of prohibited conduct within Article 13(2) is a norm of customary law that is directly applicable by New Zealand's courts. Before taking either point any further, however, it should be noted that the First Protocol is not framed in general terms. Its full title is the "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts" (emphasis added). Thus: (1) the New Zealand State is prohibited from engaging in such conduct when involved in an international armed conflict; and (2) although capable of direct application in domestic law by New Zealand courts, this norm would be restricted in its use to consideration by the courts of the conduct of a person or agency involved in an international armed conflict.

The only potentially wider utility of the norm would lie in a willingness by the New Zealand courts to interpret legislation concerning counter-terrorism in a manner that is consistent with the prohibition: a prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population. On the question of the definition of terrorism under New Zealand law, see chapter 16.

United Nations Action

Both the United Nations General Assembly and Security Council have been active in adopting resolutions concerning the combating of terrorism. Consideration has already been given to the General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism, and its Supplement, and the possibility that this might be representative of

customary international law. That matter is taken no further here.⁸ The focus of this part of the chapter is upon resolutions of the Security Council.

Two resolutions of the UN Security Council have been identified as imposing obligations upon member States of the United Nations concerning counter-terrorism: resolutions 1269 (1999) and 1373 (2001).⁹ As also discussed within chapter 2, resolutions of the Security Council are binding upon members of the United Nations by virtue of Article 25 of the Charter of the United Nations.

It must be determined, therefore, whether the resolutions in question are “decisions of the Security Council” within the terms of Article 25. If so, then their provisions must be complied with by New Zealand, and consideration of the nature of the obligations and means of compliance will then need to be had. If the resolutions, or parts of them, are not binding under Article 25, then different considerations will result. It was concluded within chapter 2 that (1) the resolutions were made within the proper mandate of the Security Council under Article 24 and Chapter V of the UN Charter; and (2) whether a particular provision of a resolution is a “decision” within the meaning of Article 25 turns on whether the provision uses exhortatory or mandatory language.¹⁰

The result of the latter analysis, as well as the nature of the provisions at hand, is that the obligations under resolutions 1269 (1999) and 1373 (2001) fall within three categories: binding obligations; non-binding directions; and non-binding reporting obligations.

Non-Binding Reporting Regime

Under Security Council resolution 1373 (2001), the Security Council established what the writer describes as a reporting and monitoring dialogue between UN members and the Counter-Terrorism Committee:¹¹

Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the

Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 610 (entered into force 7 December 1978).

⁸ See, *infra*, chapter 3.

⁹ SC Res 1269, UN SCOR, 4053rd Mtg, UN Doc S/Res/1269 (1999); and SC Res 1373, UN SCOR, 4385th Mtg, UN Doc S/Res/1373 (2001).

¹⁰ Applying the decision of the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)*, (1970-1971), Advisory Opinion of the International Court of Justice of 21 June 1971, 53.

¹¹ SC Res 1373 (n 8) para 6.

assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

New Zealand has so far submitted five reports to the Counter-Terrorism Committee under the procedure initiated under resolution 1373 (2001).¹² The reports contend that New Zealand is now fully compliant with its international counter-terrorism obligations. The accuracy or otherwise of that contention is considered within the examination of various items of New Zealand legislation, in chapter 5, and within the following discussion on the binding substantive provisions of resolution 1373 (2001).

Binding Obligations

Despite its status as a resolution of the UN Security Council, resolution 1269 (1999) contains no binding substantive obligations, which reflects the increased attention paid to counter-terrorism since September 11. Two of those non-binding directions, however, transformed into mandatory obligations within resolution 1373 (2001). The first of those relates to the prevention and suppression of the financing of terrorism,¹³ which became the subject of detailed attention within paragraphs 1 and 2 of resolution 1373 (2001). The second concerns the apprehension, prosecution or extradition of those who plan, finance or commit terrorist acts,¹⁴ now the subject of attention within paragraph 2 of resolution 1373 (2001). The entirety of the binding substantive obligations is contained within paragraphs 1 and 2 of resolution 1373 (2001).¹⁵

These binding obligations were implemented into New Zealand law under the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, by Order in Council on 26

¹² *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, New Zealand*, UN Doc S/2001/1269 (2002); *Supplementary report providing additional information on the measures taken by New Zealand to implement the provisions of Security Council resolution 1373 (2001)*, UN Doc S/2002/795 (2002); *New Zealand response to the questions and comments of the Security Council Counter-Terrorism Committee contained in the Chairman's letter of 30 May 2003*, UN Doc S/2003/860 (2003); *New Zealand response to the United Nations Security Council Counter-Terrorism Committee questions for response by 30 April 2004*, UN Doc S/2004/359 (2004); and *New Zealand national report to the United Nations Security Council Counter-Terrorism Committee*, UN Doc S/2006/384 (2006).

¹³ SC Res 1269 (n 8) para 4 (second unnumbered subparagraph).

¹⁴ SC Res 1269 (n 8) para 4 (third unnumbered subparagraph).

¹⁵ See, *infra*, chapter 2.

November 2001 under the United Nations Act 1946. As indicated by New Zealand to the Counter-Terrorism Committee in its first report to the Committee, these regulations were made by way of interim measure, pending the enactment of the then Terrorism (Bombings and Financing) Bill.¹⁶ The regulations were to expire on 30 June 2002, by which time the Bill was expected to have passed through Parliament.¹⁷ Due to the early dissolution of the New Zealand Parliament, however, prompted by early elections in July 2002, the life of the regulations was extended to 31 December 2002 by the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2002. The substance of the regulations is considered in more detail below.

The obligations under resolution 1373 (2001) have since been incorporated within the Terrorism Suppression Act 2002.¹⁸ The substance of this piece of legislation is also considered in more detail below. The reason for translating these obligations into the Terrorism Suppression Act, rather than leaving them as regulatory provisions, lies in the fact that penalties for regulatory offences are limited.¹⁹ Liability for the breach of regulations made under the United Nations Act is set at a maximum of 12 months imprisonment, or a \$10,000 fine in the case of a person, or a fine up to \$100,000 in the case of a company or corporation.²⁰ The nature of terrorist-related offences calls, however, for severe penalties.²¹ Offences under the Terrorism Suppression Act reflect this.²²

New Zealand has identified the following features of the Terrorism Suppression Act as measures by which it has implemented resolution 1373 (2001):

1. Prevention and suppression of the financing of terrorist acts

Paragraph 1(a), which requires the prevention and suppression of the financing of terrorist acts, is a general provision, expanded upon by the subparagraphs that follow it. In addition of those more specific requirements, New Zealand identified the fact that the Reserve Bank of

¹⁶ See New Zealand's first report to the Counter-Terrorism Committee (n 12) 7.

¹⁷ Regulation 3.

¹⁸ For a detailed account on how New Zealand's sees that it has complied with these operative provisions (paras 1 and 2), see its first report to the Counter-Terrorism Committee (n 12) 6-15.

¹⁹ As explained in New Zealand's first report to the Counter-Terrorism Committee, *ibid.*, 5.

²⁰ *United Nations Act 1946*, section 3(1).

²¹ As called for within the various international anti-terrorism treaties concerned, and within SC Res 1373 (n 8).

²² Discussed below and, *infra*, chapter 16.

New Zealand took steps to notify financial institutions of these requirements and prohibitions.²³ In addition, funding for security and counter-terrorism has been boosted, with the Minister for Foreign Affairs and Trade identifying the post-September 11 environment as requiring this.²⁴

2. Criminalising the provision of funds for terrorist acts

In compliance with this provision of resolution 1373 (2001), the Act creates offence of the financing of terrorism.²⁵

3. Freezing of funds and assets of terrorist entities

The freezing of assets is said to be given effect through various provisions of the Act.²⁶ New Zealand has described the establishment of various stages in achieving this obligation.²⁷ The first stage is to identify the assets to be frozen, through sections 20 to 42 inclusive, which provide a process by which individuals or groups may be designated as terrorist or associated entities.²⁸ Next, obligations are imposed upon financial institutions to report suspicions of the holding or control of property belonging to or controlled by such entities (sections 43 to 47).²⁹ Third, section 9 of the Act prohibits dealing with property belonging to terrorist entities.³⁰ Finally, sections 55 to 61 establish procedures through which terrorist assets can be forfeited.³¹

²³ See New Zealand's first report to the Counter-Terrorism Committee (n 12) 6.

²⁴ The Budget 2003 provided an additional \$5.9 million for 2004 and \$1.9 million in future years: Hon Phil Goff, 'Funding boost for security, counter-terrorism and emergency responses', Beehive Press Release 12 May 2003, online: <<http://www.behive.govt.nz/PrintDocumentcfm?DocumentID=16723>> (last accessed on 17 May 2003).

²⁵ Section 8 of the *Terrorism Suppression Act 2004*, discussed further. See New Zealand's first report to the Counter-Terrorism Committee (n 12) 6-7, which also refers to the defining provisions of the Act (sections 4 and 5) and the extraterritorial jurisdiction attached to the offences (sections 14, 15, 17 and 18).

²⁶ See New Zealand's first report to the Counter-Terrorism Committee (n 12) 7-9.

²⁷ As explained within New Zealand's report to the United Nations 1267 Committee, *Response of New Zealand to the Security Council Committee under Security Council resolution 1455 (2003)*, 17 April 2003, 4-7.

²⁸ Discussed below and, *infra*, chapters 14 and 15.

²⁹ Discussed below.

³⁰ Discussed below and, *infra*, chapter 16.

³¹ Discussed below and, *infra*, chapter 14.

4. Prohibiting the provision of financial or related services to terrorist entities

Responding to paragraph 1(d) of the resolution, section 10 makes it unlawful to make property, or financial or related services available to terrorist or associated entities (subject to the express permission of the Prime Minister under section 11).

5. Suppression of support to terrorists and elimination of the supply of weapons

In compliance with paragraph 2(a), the Terrorism Suppression Act prohibits the recruitment of persons into terrorist groups, under section 12, and participation in terrorist groups (section 13).³² New Zealand reported that existing law would see New Zealand comply with the requirement to work towards the elimination of the supply of weapons to terrorists, pointing to the Customs Prohibition Order 1996,³³ the Arms Act 1983,³⁴ the Crimes Act 1961 (prohibiting the unlawful possession of an offensive weapon),³⁵ the New Zealand Nuclear Weapons Free Zone, Disarmament and Arms Control Act 1987,³⁶ and the Chemical Weapons (Prohibition) Act 1966,³⁷ together with its intended ratification of the Firearms Protocol to the United Nations Convention against Transnational Organized Crime.³⁸ New Zealand also reported that it would become party to the plastic explosives and nuclear materials conventions, which would see it create offences under the Terrorism Suppression Act, as required by the treaties and create corresponding offences.³⁹ This was ultimately done through sections 13B, 13C and 13D of the latter Act.

6. Preventing the commission of terrorist acts

Additional to the above matters, New Zealand identified measures through which the New Zealand police and intelligence community can investigate

³² Discussed below and, *infra*, chapter 16.

³³ Made under the *Customs and Excise Act 1996*.

³⁴ See New Zealand's second report to the Counter-Terrorism Committee (n 12) 6.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Not yet in force. See New Zealand's first report (n 12) 11. See, also, New Zealand's report to the United Nations 1267 Committee (n 26) 8-9.

³⁹ See New Zealand's second report (n 12) 6.

groups or organisations of interest.⁴⁰ Through the legislative package introduced under the Counter-Terrorism Bill 2003, this has seen the creation of authority to obtain interception warrants, warrants to attach tracking devices to persons or things, deterrence through more severe penalties, and requiring a computer owner or user to provide the information required for accessing any data which is subject to security codes and the like.⁴¹

7. Denial of safe haven

Sections 7, 73 and 75 of the Immigration Act 1987 (already extant at the time of the adoption of resolution 1373) were identified by New Zealand as satisfying the requirement to deny safe haven to terrorists.⁴²

8. Preventing the use of State territory by terrorists

The extraterritorial nature of the offences created under the Terrorism Suppression Act, together with extant party liability provisions under the Crimes Act 1961, were identified as further measures to prevent terrorists acting from New Zealand territory against citizens of other States.⁴³ The further creation of offences of harbouring or concealing terrorists was relied on (offences under 13A of the Terrorism Suppression Act).⁴⁴

9. Ensuring the prosecution and severe punishment of terrorists

As discussed later in this chapter, the various offences created under the Terrorism Suppression Act carry severe penalties.⁴⁵

10. Assisting in criminal investigations and prosecutions

New Zealand again reported that current law permitted New Zealand to comply with this paragraph, referring to the Mutual Assistance in Criminal Matters Act 1992 and the Extradition Act 1999.⁴⁶

⁴⁰ See New Zealand's first report to the Counter-Terrorism Committee (n 12) 11.

⁴¹ Discussed below.

⁴² See New Zealand's first report to the Counter-Terrorism Committee (n 12) 11-12.

⁴³ *Ibid.*, 12.

⁴⁴ Discussed below and, *infra*, chapter 16.

⁴⁵ Discussed below and, *infra*, chapter 16. See also See New Zealand's first report to the Counter-Terrorism Committee (n 12) 13-14.

⁴⁶ See New Zealand's first report to the Counter-Terrorism Committee, *ibid.*, 14.

11. Establishing and maintaining effective border controls to prevent the movement of terrorists

The Passports Act 1992 and Immigration Act 1987 were identified by New Zealand as means through which compliance with paragraph 2(g) of the resolution could be achieved.⁴⁷

Non-Binding Directions

Both resolutions 1269 (1999) and 1373 (2001) contain exhortatory, and therefore non-binding, directions. To begin with, both resolutions call upon States to become party to and fully implement all 12 extant conventions concerning terrorism.⁴⁸ They also call upon United Nations members to:

- Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups.⁴⁹
- Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts.⁵⁰
- Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts.⁵¹
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts.⁵²

⁴⁷ Ibid, 14-15.

⁴⁸ SC Res 1269 (n 8) para 2, and SC 1373 (n 8) para 3(d) and (e).

⁴⁹ SC Res 1373 (n 8) para 3(a).

⁵⁰ SC Res 1373 (n 8) para 3(b).

⁵¹ SC Res 1269 (n 8) para 4 (first unnumbered subparagraph), and SC Res 1373 (n 8) para 3(c).

⁵² SC Res 1269 (n 8) para 4 (fourth unnumbered subparagraph), and SC Res 1373 (n 8) para 3(f)

- Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.⁵³

The first point to note about these non-binding directions is that New Zealand now party to all 12 terrorism-related conventions currently in force. Although the Security Council's direction to become party to and implement all terrorism-related conventions has been identified as a non-binding one, it is interesting to note that this is an area where a great number of States have indeed acted to become party to the conventions. This is partly due, it is posited, to the fact that the issue of participation in these treaties has been one of the recurring matters addressed by the Security Council Counter-Terrorism Committee in its 'dialogue' with States. A striking example can be seen in the case of New Zealand becoming party to the Convention on the Marking of Plastic Explosives for the Purpose of Detection and the Convention on the Physical Protection of Nuclear Materials. It was noted within the two relevant National Interest Analyses prepared by the Ministry of Foreign Affairs and Trade (discussed below) that New Zealand neither manufactures explosives domestically, nor engages in the transportation of nuclear material.⁵⁴ Notwithstanding this, the Analyses referred to the call by the Security Council for UN members to become party to all anti-terrorism conventions⁵⁵ as a sound reason for New Zealand becoming a party to the conventions.⁵⁶

The balance of the directions concern cooperation in the international framework to counter terrorism. Within the very first paragraph of New Zealand's first report to the Counter-Terrorism Committee, New Zealand declared that it was contributing to counter-terrorism "across the full range of diplomatic, legal financial, humanitarian, intelligence and military activities".⁵⁷ New Zealand has pointed to executive action as including an

⁵³ SC Res 1373 (n 8) para 3(g).

⁵⁴ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 4.

⁵⁵ See SC Res 1373 (n 8) para 3(d).

⁵⁶ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, paras 5 and 7.

⁵⁷ See New Zealand's first report to the Counter-Terrorism Committee (n 12) 3.

ad hoc working group of the Department of the Prime Minister and Cabinet examining the existing and potential measures to combat terrorism, and an increase in the physical protection of high profile or significant facilities, aviation security and border control.⁵⁸ New Zealand identified itself as active in consulting with other countries on how to strengthen anti-terrorist measures, including work of raising the awareness of Pacific Island countries.⁵⁹

One particular issue warrants some discussion before concluding the examination of resolution 1373 (2001). In response to the Counter-Terrorism Committee's question concerning steps taken by New Zealand to intensify the obtaining and exchange of operational information, New Zealand has pointed to the Interception Capability Bill as the vehicle through which telecommunications network operators would need to make their networks "interception capable".⁶⁰ The Bill was enacted in 2004 as the Telecommunications (Interception Capability) Act 2004. What should be noted is that the Act does not create any powers of interception, nor any authority to apply for warrants of interception. Its aim is to require network operators to ensure that public telecommunications networks and services have interception capability.⁶¹ For that reason, the Act will not be given separate consideration within this chapter. It is relevant, in the privacy context, to simply note the principles identified within section 6 of the Act:

The following principles must be applied by persons who exercise powers and carry out duties under this Act if those principles are relevant to those powers or duties:

- (a) the principle that the privacy of telecommunications that are not subject to an interception warrant or any other lawful interception authority must be maintained to the extent provided for in law:
- (b) the principle that the interception of telecommunications, when authorised under an interception warrant or any other lawful interception authority, must be carried out without unduly interfering with any telecommunications.

⁵⁸ *Ibid.*, 4.

⁵⁹ *Ibid.*, 5. See, in particular, pages 15-18 of the report.

⁶⁰ See New Zealand's first report to the Counter-Terrorism Committee (n 12) 11. See also New Zealand's second report (n11) 10.

⁶¹ See sections 5 and 7 of the Act.

International Treaties

New Zealand is party to all 12 terrorism-related conventions in force and has signed the International Convention for the Suppression of Acts of Nuclear Terrorism.⁶² This part of the chapter considers the status of treaties in New Zealand municipal law and the manner in which they are incorporated, or transformed, into domestic law. Consideration is then given to each of the conventions and the means by which these have been incorporated.

Status of International Treaties in Domestic Law

Unlike customary international law, which is part of the law of New Zealand without the need for incorporation by statute, treaties require incorporation to become part of domestic law. Here, the New Zealand courts adopt a dualist approach.

In the often cited decision of the House of Lords in *Attorney-General for Canada v Attorney-General for Ontario*, Lord Atkin drew a distinction between the formation of a treaty on the one hand and the performance of the obligations under the treaty on the other.⁶³ He observed that, in the British Empire, the formation of a treaty is a matter for the executive, while performance lay within the purview of the legislature, by enactment into statute of the responsibilities undertaken through the treaty.

The latter decision was relied on by the New Zealand Court of Appeal in the court's consideration of a police warrant to recover the black boxes of an Ansett aircraft in *New Zealand Air Line Pilot's Association Incorporated v Attorney-General and Others*.⁶⁴ Although certain provisions of the Chicago Convention on International Civil Aviation seemed to preclude the recovery of black boxes, the particular provisions had not been implemented into New Zealand law by legislation and the warrants were allowed to stand.⁶⁵ Similarly, in considering the status of the Treaty of Waitangi in *Te Heuheu Tukino v Aotea District Maori Land Board*, Chief Justice Myers had earlier held that:⁶⁶

A treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority.

⁶² See New Zealand's fifth report to the Counter-Terrorism Committee (n 12) 18.

⁶³ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347-348.

⁶⁴ *New Zealand Air Line Pilot's Association Incorporated v Attorney-General and Others* [1997] 3 NZLR 269, 280-285.

⁶⁵ *Chicago Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

Incorporation of International Treaties

In response to a report of the New Zealand Law Commission in 1997,⁶⁷ mainly concerned with the issue of democratic oversight in the treaty-making process, procedures for the making of treaties and the incorporation of their provisions are now governed by the Standing Orders of the House of Representatives and the Cabinet Manual.⁶⁸ The treaty-making process in New Zealand is undertaken in four principal stages.⁶⁹ The first involves steps to be taken when a treaty is first adopted and signed, or where the Executive is contemplating acceding to a treaty. In that event, Standing Order 387 requires all multilateral treaties and “significant” bilateral treaties to be presented to the House with a National Interest Assessment (NIA). Standing Order 388(1) sets out the various issues that must be addressed within a NIA, including the reasons for becoming a party to the treaty, the advantages and disadvantages of this, the costs of compliance and the steps that need to be taken to implement the obligations under the treaty.

The treaty, with the accompanying NIA, must then be considered by the Foreign Affairs, Defence and Trade Committee for it to prepare a report to the House. In undertaking this second step, the Committee is required to determine whether the treaty should be brought to the attention of the House for consideration of any matters covered by the NIA or “for any other reason”.⁷⁰ The Select Committee may seek public submissions at this stage, although it is not obliged to do so.⁷¹

The next step is to introduce legislation through which the treaty obligations are to be incorporated into domestic law. This will be accompanied by the Committee’s report, to which the National Interest Assessment must be appended.⁷² Only once the legislation has been passed as an Act of Parliament will the Executive take the final step of ratifying the treaty, thereby making its provisions (as translated by an enactment) binding at international law upon New Zealand.⁷³

⁶⁶ *Te Heuheukino v Aotea District Maori Land Board* [1939] NZLR 107, 120.

⁶⁷ New Zealand Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*, Report No 45 (1997, Wellington).

⁶⁸ *Standing Orders of the House of Representatives* (with effect 12 August 2005), Parliamentary Standing Orders 387 to 390; *Cabinet Manual* (Department of the Prime Minister and Cabinet, 2001), paragraphs 5.83 to 5.91.

⁶⁹ For a more detailed explanation of this process, see Alex Conte, *An Introduction to International Law* (Wellington: LexisNexis, 2006) 77-80.

⁷⁰ Standing Orders 389 and 390.

⁷¹ *Cabinet Manual* (n 68) para 5.88.

⁷² Standing Order 390; and *Cabinet Manual* para 5.91.

Incorporation of the International Terrorism-Related Treaties

At the time of the September 11 attacks and adoption of Security Council resolution 1373 in 2001, New Zealand was a party to eight of the international terrorism-related conventions, detailed below.

1. Safety of aviation

Four international conventions on terrorism relate to the safety of aircraft and civil aviation in general:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft.⁷⁴ Adopted in 1963, the ‘Tokyo Convention’ was signed by New Zealand on 12 February 1974 and ratified on 13 May 1974.⁷⁵
- Convention for the Suppression of Unlawful Seizure of Aircraft.⁷⁶ Adopted in 1970, New Zealand signed the ‘Hague Convention’ on 15 September 1971 and ratified on 12 February 1974.⁷⁷
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.⁷⁸ Adopted in 1971, the ‘Montreal Convention’ was signed by New Zealand on 26 September 1972 and ratified at the same time as the latter convention, on 12 February 1974.⁷⁹
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.⁸⁰ The ‘Montreal Protocol’,

⁷³ Assuming that the treaty has come into force. The question of when a treaty comes into force is a matter provided for within the text of the treaty itself, normally calling for a certain number of ratifications to be lodged.

⁷⁴ *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969).

⁷⁵ As recorded by the International Civil Aviation Organization (ICAO) in its *Treaty Collection*, online: <<http://www.icao.int/icao/en/leb/Tokyo.htm>> (last accessed on 12 October 2004).

⁷⁶ *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

⁷⁷ As recorded by ICAO (n 75) online: <<http://www.icao.int/icao/en/leb/Hague.htm>>.

⁷⁸ *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

⁷⁹ As recorded by ICAO (n 75) online: <<http://www.icao.int/icao/en/leb/Mtl71.htm>>.

⁸⁰ *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989).

adopted in 1988, was signed by New Zealand on 11 April 1989 and ratified on 2 August 1999.⁸¹

These treaties were incorporated into New Zealand law by the Aviation Crimes Act 1972, considered further in chapter 5. New Zealand did not lodge reservations to any of the four aviation conventions.

2. Safety of persons

The following two conventions are directed towards the safety of persons:

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.⁸² This treaty was adopted in December 1973, with New Zealand not being an original party to the treaty. New Zealand became a State party by accession on 6 December 1988.⁸³
- International Convention against the Taking of Hostages.⁸⁴ Adopted in 1979, the treaty was signed by New Zealand on 24 December 1980 and ratified on 12 November 1985.⁸⁵

Also relevant to the protection and safety of persons, although not listed by the Terrorism Prevention Branch as one of the twelve conventions relating to terrorism, is the Convention on the Safety of United Nations and Associated Personnel.⁸⁶ All three treaties were incorporated under the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980. The Act is considered below.

⁸¹ As recorded by ICAO (n 75) online: <<http://.icao.int/icao/en/leb/Via.htm>>.

⁸² *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

⁸³ As recorded by the United Nations in its record on *Multilateral Treaties Deposited with the Secretary-General*, online: <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty7.asp> (last accessed on 12 October 2004).

⁸⁴ *International Convention against the Taking of Hostages*, opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

⁸⁵ As recorded by the United Nations (n 83) online: <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty5.asp>.

⁸⁶ *Convention on the Safety of United Nations and Associated Personnel*, opened for signature 9 December 1994, 2051 UNTS 391 (entered into force 15 January 1999).

3. Maritime safety

Finally, of the eight terrorism conventions to which New Zealand was a party prior to resolution 1373 (2001), there are two treaties concerning maritime safety:

- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.⁸⁷ Adopted in 1988, the ‘Rome Convention’ was signed by New Zealand as an original signatory on 10 March 1988.
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.⁸⁸ The ‘Rome Protocol’, adopted at the same time as its parent convention, was again signed by New Zealand on 10 March 1988.

The Conventions were incorporated under the Maritime Crimes Act 1999, also considered further in chapter 5.

Legislative Incorporation since September 11

At the date of the adoption of Security Council resolution 1373 (2001), New Zealand was not a party to the following four international treaties on terrorism:

- International Convention for the Suppression of Terrorist Bombing.⁸⁹
- International Convention for the Suppression of the Financing of Terrorism.⁹⁰
- Convention on the Physical Protection of Nuclear Material.⁹¹
- Convention on the Marking of Plastic Explosives for the Purpose of Detection.⁹²

⁸⁷ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

⁸⁸ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

⁸⁹ *International Convention for the Suppression of Terrorist Bombing*, opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001).

⁹⁰ *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

⁹¹ *Convention on the Physical Protection of Nuclear Material*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987).

As the only terrorism-related treaty adopted since September 11, the International Convention for the Suppression of Acts of Nuclear Terrorism was adopted by the UN General Assembly in April 2005.⁹³ New Zealand was an original signatory to this Convention,⁹⁴ although incorporating legislation has not yet been introduced. Concerning the four other conventions just listed, New Zealand became party to the first two of these treaties after the enactment of the Terrorism Suppression Act 2002.⁹⁵ It became party to the remaining conventions on 21 September 2004, after enactment of the legislative package under the Counter-Terrorism Bill 2003.⁹⁶

In terms of the incorporating procedures discussed above, the four-step process for implementation of the treaties was followed, albeit with some points of interest. As treaties that were subject to ratification or accession by New Zealand, Parliamentary Standing Order (PSO) 389 applied,⁹⁷ so that the four conventions had to be referred to the Foreign Affairs, Defence and Trade Committee (FADTC)⁹⁸ with a National Interest Analysis⁹⁹ and then presented to the House.¹⁰⁰

⁹² *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998).

⁹³ *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted by the General Assembly and opened for signature on 15 April 2005 under GA Res 59/290, UN GAOR, 59th Sess, 91st Plen Mtg, UN Doc A/Res/59/290 (2005).

⁹⁴ See New Zealand's fifth report to the Counter-Terrorism Committee (n 12) 18.

⁹⁵ As confirmed in New Zealand's third report to the Counter-Terrorism Committee, see *New Zealand Response to the Questions and Comments of the Security Council Counter-Terrorism Committee Contained in the Chairman's Letter of 30 May 2003*, SI/2003/860, 5 September 2003, 6-7. New Zealand acceded to the International Convention for the Suppression of Terrorist Bombing on 4 November 2002: as recorded by the United Nations (n 83) online: <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty9.asp>. The International Convention for the Suppression of the Financing of Terrorism was signed by New Zealand on 7 September 2000 but not ratified until 4 November 2002: as recorded by the United Nations (n 83) online: <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp>.

⁹⁶ In its third report to the Counter-Terrorism Committee, New Zealand indicated it would become party to these conventions following the enactment of the Counter-Terrorism Bill, *ibid*, 4. New Zealand's accession to the Convention on the Physical Protection of Nuclear Material is recorded in the *Status Register* of the International Atomic Energy Agency, online: <http://www.iaea.org/Publications/Documents/Conventions/cppn_status.pdf> (last accessed on 21 September 2004). Its accession to the Convention on the Marking of Plastic Explosives for the Purpose of Detection is recorded by ICAO (n 75) online: <<http://www.icao.int/icao/en/leb/MEX.htm>>.

⁹⁷ See Parliamentary Standing Order 387 (1).

⁹⁸ *Ibid*, para (3).

⁹⁹ *Ibid*, para (2).

¹⁰⁰ *Ibid*, para (1).

The National Interest Analyses (NIAs) were prepared by the Ministry of Foreign Affairs and Trade, addressing each of the matters required under PSO 390, and then forwarded to the FADTC. In preparation of the Analyses, the Ministry consulted with the Ministry of Justice, Police, New Zealand Defence Force, Ministry of Defence, Security Intelligence Service, Treasury, Reserve Bank, Departments for Courts and of Corrections, Te Puni Kokiri, Customs, the Immigration Service, the Environmental Risk Management Authority, Ministry of Transport, Civil Aviation Authority, Occupational Health and Safety Service, Ministry of Health (National Radiation Laboratory), Maritime Safety Authority, Land Transport Safety Authority and the Institute of Geological and Nuclear Sciences.¹⁰¹

The Analyses, which are each contained within the respective international treaty examination reports of the FADTC, identify New Zealand's desire to become party to the conventions as being based upon its support of efforts to strengthen the rule of law at the international level¹⁰² and support for an effective and well-supported network of multilateral legal instruments to combat terrorism.¹⁰³ In the case of the Plastic Explosives and Nuclear Materials conventions, the NIAs noted that New Zealand neither manufactures explosives domestically, nor engages in the transportation of nuclear material.¹⁰⁴ Notwithstanding this, the Analyses noted the change in the post-September 11 international context and the call by the Security Council for UN members to become party to all anti-

¹⁰¹ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 10, *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 13, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 15, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 22.

¹⁰² New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 2, and *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 2.

¹⁰³ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 2, *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 2, and *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 2.

¹⁰⁴ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 4.

terrorism conventions¹⁰⁵ as sound bases for New Zealand becoming a party to the conventions.¹⁰⁶

The Foreign Affairs, Defence and Trade Committee duly met to consider each treaty and NIA, as required.¹⁰⁷ In each case, the Committee reported to the House, attaching a copy of the relevant NIA, and simply advised that it had conducted an examination of the treaty in question and had no matters to bring to the attention of the House.¹⁰⁸ This completed the first and second (preparatory and consultative) steps in the implementation process for each treaty.

In the third phase of implementation, legislation was prepared and introduced to the House. For the purpose of the bombing and financing conventions, this was through the Terrorism (Bombings and Financing) Bill, introduced in early 2001, which ultimately became the Terrorism Suppression Act 2002. This is discussed in detail in chapter 5. The Counter-Terrorism Bill, introduced in April 2002, was the vehicle through which the obligations under the plastic explosives and nuclear materials conventions were incorporated. This is also discussed in detail in chapter 5.

As a result of the legislation mentioned, the final process was completed in New Zealand's post-September 11 counter-terrorist treaty-making. The Convention for the Suppression of Terrorist Bombing was acceded to on 4 November 2002 and the International Convention for the Suppression of the Financing of Terrorism was ratified by New Zealand on the same day. The Convention on the Physical Protection of Nuclear Material and the Convention on the Marking of Plastic Explosives for the Purpose of Detection were both acceded to on 21 September 2004.

¹⁰⁵ SC Res 1373 (n 8) para 3(d).

¹⁰⁶ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 2, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, paras 5 and 7.

¹⁰⁷ See Parliamentary Standing Orders 387(3), 389 and 390.

¹⁰⁸ The latter question being a decision of the Committee under Parliamentary Standing Order 390(2). For the reports of the Committee, see New Zealand Foreign Affairs, Defence and Trade Committee, *Report on International Treaty Examination of the Convention for the Suppression of Terrorist Bombing*, presented to the House 1 December 2000, *Report on International Treaty Examination of the Convention for the Suppression of the Financing of Terrorism*, presented to the House 1 December 2000, *Report on International Treaty Examination of the Convention on Marking of Plastic Explosives for the Purpose of Identification*, presented to the House 22 February 2002, and *Report on International Treaty Examination of the Convention on the Physical Protection of Nuclear Material*, presented to the House 22 February 2002.

Conclusion

Evident through the discussion to this point of the chapter is that the interface between international and municipal law is a complex one at the best of times, added to in the context of counter-terrorism by resolutions of the UN General Assembly and Security Council. By way of summary, the following can be said about the application and/or incorporation of New Zealand's international counter-terrorism obligations:

- Article 13(2) of the First Protocol to the Geneva Conventions contains a prohibition against acts or threats of violence intended to spread terror amongst the civilian population. Although New Zealand has not incorporated this prohibition into the Geneva Conventions Act 1958, the prohibition is applicable at domestic law as being reflective of customary international law (which requires no act of transformation). In practical terms, however, the prohibition is limited in application to international armed conflicts and its only potential impact upon New Zealand courts might be through informing the interpretation of counter-terrorism legislation consistently with the prohibition.
- According to New Zealand's reports to the Counter-Terrorism Committee, the non-binding directions of Security Council resolutions 1269 (1999) and 1373 (2001) have been, and continue to be, complied with through the diplomatic, legal, financial, humanitarian, intelligence and military activities of the New Zealand State.
- The binding directions under paragraphs 1 and 2 of Security Council resolutions 1373 (2001) have been implemented, according to New Zealand's reports: (1) by way of interim measure, through the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations; and (2) permanently, through the Terrorism Suppression Act 2002.
- The resolutions of the General Assembly, adopting, reiterating and expanding upon the Assembly's Declaration on Measures to Eliminate International Terrorism are not binding upon New Zealand in and of themselves. It is possible that they *might* be reflective of customary international law, in which case the principles within the Declarations are applicable at domestic law. The reality, however, is that the principles reflect matters addressed either through Security Council resolutions or within a number of the international conventions on terrorism, and therefore add little to the domestic law debate.

- The international terrorism-related treaties currently in force have been incorporated into New Zealand law through the Aviation Crimes Act 1972, the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980, the Maritime Crimes Act 1999, the Terrorism Suppression Act 2002 and the Counter-Terrorism Act 2003.

