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## Combatting terrorist propaganda

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### ABSTRACT

Propaganda is a common element in many, if not all, terrorist incidents. Objectives are usually to instil fear in the target population but may also include winning approval from associates and inspiring new adherents. The advent of social media has greatly expanded opportunities for achieving these objectives. The attacks on worshippers in two mosques in Christchurch, New Zealand, on 15 March 2019 resulting in the murder of 51 people and the live streaming of the attack on Facebook were met with responses from governments in New Zealand, France and Australia that sought international cooperation in finding effective counter-measures to the propaganda value of the attacks. Australia's ambitious regulatory approach is problematic when considered in an international context particularly in relation to the need to take account of free speech guarantees. However, since it recognises the need for international solutions in this area, there are opportunities to explore other ways of achieving its objectives.

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There are many aspects to counter-terrorism policy, including intelligence collection and sharing, prevention, community engagement, incident response, de-radicalisation and dealing with the aftermath of a terrorist attack. One that requires more examination is that of negating, or at least minimising, the propaganda value that perpetrators seek to derive from their actions. Terrorists have always sought to amplify the effect of their attacks but the advent of social media has greatly expanded their ability to achieve this. This was highlighted by the attack on two mosques in Christchurch, New Zealand in March last year.

On 24 February, 2020, in delivering ASIO's annual threat assessment, the Director-General, Mike Burgess, said (Burgess, 2020):

... extreme right wing online forums such as The Base proliferate on the internet, and attract international memberships, including from Australians. These online forums share and promote extremist right wing ideologies, and encourage and justify acts of extreme violence.

We expect such groups will remain an enduring threat, making more use of on-line propaganda to spread their messages of hate.

## The Christchurch attacks

The sequence of events, as reported, can be briefly stated (Ensor & Sherwood, 2020; Newton, 2019; NZ Police, 2019)

On Friday, 15 March, 2019, at 1.40 pm worshippers at the Al Noor Mosque in Riccarton, a suburb of Christchurch, were attacked by a gunman who live-streamed the attack on Facebook. Fifteen minutes later, there was a second attack at another mosque, 5 kilometres away, at the Linwood Islamic Centre. During the course of this attack, the gunman discarded a shotgun outside the mosque. It was picked up by one of the worshippers who used it in an unsuccessful attempt to distract his attention from those inside. When the gunman returned to the car, the worshipper threw the weapon at the car shattering one of its windows or the windscreen. The gunman then drove away (Newton, 2019).

Soon after this, the car was rammed by a police car and the gunman was arrested at gunpoint. Two other weapons were found in the car and it was said that he had been on his way to carry out another attack. The gunman was identified as Brenton Tarrant, a 28 year old Australian, resident in New Zealand, who was said to have become obsessed with Islamic terrorist attacks and to have been associated with far right organisations in Austria, France and other European countries as well as in Australia (Kaye & Allard, 2019). Despite ASIO's warnings, the threat posed by extremist right wing groups may be generally underestimated (Storey, 2020).

The police recovered five guns at the scene and defused two improvised explosive devices attached to a car. Two of the weapons were semi-automatic rifles which had been legally purchased in New Zealand but subsequently modified by the fitting of 30-round magazines purchased online. A manifesto attributed to Tarrant indicated that the attacks were planned two years earlier and the locations selected three months earlier (Kaye & Allard, 2019; Toohey, 2019).

Fifty-one people were killed in the attacks. Tarrant has been charged with 51 counts of murder and 40 counts of attempted murder. A subsequent charge of committing a terrorist act has also been added. He has since entered guilty pleas to all charges (Ensor & Sherwood, 2019).

## The response

This attack appears to have contributed substantially to a growing international realisation that the use of social media cannot be allowed to remain a wholly unregulated activity. Comparisons have been made with the reaction of the law in various countries to the introduction of the printing press. In this respect, we need to take great care to ensure that the regulation is limited to what is strictly necessary to address the problem. Legislation that is too broad would serve nobody's interests (Dewar, 1998).

Shortly after the Christchurch attacks, the New Zealand Prime Minister, Jacinda Ardern, together with French President, Emmanuel Macron, established the 'Christchurch Call' (France Diplomacy, 2019; New Zealand Foreign Affairs and Trade, 2019) which is now supported by 58 countries and the European Union, UNESCO and the Council of Europe. While its effectiveness has been questioned (Kfir, 2019), it seeks to encourage governments and tech companies to prevent the spread of extreme content online. Among other things, it has established a shared crisis response protocol for governments and companies to

manage content in the event of a terrorist attack. On 26 May 2020, the New Zealand Government introduced the Films, Video and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill. The Bill inserts a new section 124AB in the Act to make live-streaming of objectionable content a criminal offence. Other provisions are directed towards speeding up processes for the issue of 'take down' notices for objectionable online content.

A related initiative, one that is targeted at the more fundamental problem of gun availability, is the institution of a 'gun buy-back scheme' along the lines of the one adopted in Australia following the Port Arthur shootings in 1996. To date, the results of this scheme appear to be mixed. Whatever the precise figures, it can be assumed that a large proportion of the surrendered weapons have come from law abiding citizens who pose no threat to society (Geddes, 2019; Zraick, 2019). While the measures taken may have somewhat reduced the risk, the extent to which they have diminished the capacity of extremists to carry out another such attack is not clear. Proposals to introduce a tighter registration scheme for all firearms in New Zealand (Gillespie, 2019) have proven to be controversial and are not supported by the opposition party. Some argue (Dowling, 2019) that even without legislation police should have carried out a more thorough inquiry of the alleged gunman's past in Australia when he successfully applied for a firearms licence around a year prior to the massacre.

It was also announced that the Global Internet Forum to Counter Terrorism (GIFCT), created in 2017, would change its focus towards increasing cooperation between companies, government agencies, and experts. As with other transnational initiatives, its enforcement mechanisms are problematic but one of its achievements appears to have been a greater degree of transparency of the actions of the major tech companies (Gorwa, 2019).

Legislation was also passed in Australia to require tech companies and telecommunications providers to take down 'abhorrent violent material' when so directed by the eSafety Commissioner (Burgess, 2019; eSafety Commissioner, 2019). Initially, as a temporary measure, a regulation was made to include in her functions:

to promote online safety for Australians by protecting Australians from access or exposure to material that promotes, incites, or instructs in, terrorist acts or violent crimes. (Legislative Rule 2019, Reg. 5)

One month after the attacks, the Australian Parliament amended the Criminal Code to provide a more substantial basis for government action Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 ('the 2019 Act'). The General Outline of the legislation makes it clear that the objective is to prevent terrorists from amplifying their messages through the use of live streaming and other social media platforms in the immediate aftermath of their attacks. The legislation requires 'internet service providers and those who provide content or hosting services' to 'take timely action in relation to abhorrent violent material that can be accessed using their services' (Explanatory Memorandum, General Outline). Notice of the existence of such material must be given to the Australian Federal Police within a reasonable time of them becoming aware of its existence. Where the eSafety Commissioner issues a notice that material hosted on a website is 'abhorrent violent material' the person providing the service must expeditiously remove such material if it is accessible in Australia through the service (Explanatory Memorandum, General Outline).

The definition of ‘abhorrent violent material’ that was inserted in the Criminal Code by the 2019 Act, in addition to covering material that would be regarded by a reasonable person as offensive, also covers ‘material that records or streams abhorrent violent conduct engaged in by one or more persons’ (s. 474.31). ‘Abhorrent violent conduct’ is in turn defined to include ‘engaging in a terrorist act’ (s. 474.32). By this means, the Australian legislation provides a broad basis for the exercise of ancillary powers to require the removal of a wide range of material (ss. 474.33 to 474.36).

The Australian Government also led the adoption of a statement by G20 leaders on cooperation in this area (Coorey, 2019) and commissioned a report from a Taskforce on combatting ‘terrorist and extreme violent material online’ (Prime Minister of Australia, 2019).

If effective international action is to be achieved, it is suggested that the following issues need to be addressed:

- what should be the objective of international cooperation?
- how, if at all, should national counter-terrorism laws be harmonised?
- is agreement on a common definition of ‘terrorism’ necessary or even possible?
- what precisely should tech companies be expected to do?
- what considerations apply to different forms of transnational terrorism (e.g. ISIS, Al Qaeda, white supremacist)?
- what are the practical limitations that must be recognised?

Inherent in the consideration of all these issues is the need to resolve the tension between achieving effective counter-terrorism policy and respecting the right to free speech. Varying constitutional protections in different countries may impose limitations on the extent of cooperation that can be achieved. However, the standards set by the UN International Covenant on Civil and Political Rights may assist in reaching agreement (UN General Assembly, 1966). In particular, Article 20.2 provides: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. In addition, Article 27 provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## Objective of international cooperation

By their very nature, terrorist acts incorporate an element of propaganda. To some extent, reliance can be placed on independent reporting for the terrorist act to engender fear in the public at large. The 9/11 attacks are a striking example of such incidents. More generally however, terrorists believe that, to be fully effective, they need to drive home a message that they prepare themselves and video technology provides a ready means of doing this.

Different terrorist incidents indicate a wide variation in aims ranging from those associated with the familiar hostage taking model to others that indicate nothing more than a

wish to kill as many people as possible. While terrorist aims are controversial (Kurtuluş, 2017), it is widely believed that inspiring fear is a common element in many incidents. Attempts to reach a universal definition of 'terrorism' have so far been unsuccessful but the element of inspiring fear has featured prominently in attempts to date (UN General Assembly, 1994). In the present case, it appears that the offender regarded his video as serving not only to inspire fear in his perceived adversaries but also as winning approval from his international associates and stimulating interest among possible recruits.

It is this aspect of terrorist activity – propaganda – that forms the focus of the measures discussed internationally. Governmental responses are intended to minimise the effect of this terrorist propaganda. In studies of the relationship between terrorism and the media, the attention given to religious differences has featured prominently (Kearns, Betus, & Lemieux, 2018) but the exploitation of the media by terrorists for propaganda purposes (Boot, 2019) has received less attention.

In relation to attacks sponsored by ISIS, governmental responses aimed at minimising the effects of propaganda could be seen as complementary to the recently declassified counter-terrorism measures taken by the Australian Signals Directorate and allied intelligence agencies in a U.S. led operation (Borys, 2019). As reported, the objective of the operation was 'to hack into Islamic State's online system. The mission was to isolate its network, lock out users and then obliterate its contents. By deleting everything, the group's ability to produce propaganda and spread misinformation was ruined' (Borys, 2019). For some time, ISIS has, of course, been a designated enemy on Middle-East battlefields and different considerations apply to it. However, the activities of white supremacist organisations, whether national or international in character, are also of security concern and measures to combat their propaganda should similarly complement intelligence operations.

Of fundamental importance is the issue of whether any legislation of this kind would infringe constitutional guarantees of free speech. As Australia lacks a Bill of Rights, there has been no such impediment here to government action. Not surprisingly, U.S. First Amendment rights appear to have formed a roadblock to U.S. participation in the discussions to date (Romm & Harwell, 2019; Wood, 2019). Although, following Twitter's fact checking of some statements by President Trump, it is perhaps ironic that such considerations appear not to have troubled the President in seeking, by executive order on 28 May 2020 to weaken the statutory protection afforded to social media companies by s. 230 of the Communications Decency Act (Hirsch, 2020). Moreover, the U.S. First Amendment rights may not preclude all forms of legislative regulation (Tsesis, 2017).

There are also other ways of combatting extremist propaganda that do not raise free speech issues. For example, one company has developed online processes that respond to searches for extremist material by disrupting the process of radicalisation by redirecting the search to 'short videos ... by ... former extremists explaining why the ideology is misguided' (MacFarquhar, 2019). While these measures, known as the 'Redirect Method' were first used against Islamic State, they were quickly adapted to also target white supremacy following the Christchurch attacks.

Thus, in defining the objective of international cooperation, the first point to note is that the proposed prohibition is limited to material that is produced by the terrorists themselves and not to material produced by independent observers (Graham-McLay & Satariano, 2019; Scott, Montaz, & Kayali, 2019). Whether such a clear line can be drawn in all

cases is, of course, a moot point. For example, one could ask whether a violent video of a few seconds of a terrorist attack should be free of regulation if it is taken by a journalist and submitted for inclusion in an online edition of a newspaper. What if the journalism in question is regarded by government agencies as sympathetic to the aims of the terrorists, if not their methods?

The context in which violent material is published is also important. Should it be prohibited if the purpose is simply the dissemination of information to the public? Can reliance be placed on established media companies to show appropriate restraint or on the efficacy of existing regulatory frameworks? Even ignoring constitutional limitations, these questions illustrate the difficulty of seeking international cooperation in regulating publication of material of any kind.

The next issue to be addressed in any particular case is whether the material in question is sufficiently objectionable to warrant its prohibition. The test embodied in the Australian legislation is whether it is 'abhorrent violent material'. That threshold would clearly be met where a video shows civilians being killed but what about a video of the detonation of an explosive device in an environment where it is known that there were casualties but no victim is visible? How could this be distinguished from the video of the 9/11 attacks with which we are all familiar?

A related question is who is to make the decision as to whether the material is objectionable. Is it reasonable to impose the duty of identifying suspect material on internet service providers and tech companies? The specification of an appropriate government agency to make the final decision (subject to judicial review) may be regarded as a matter for domestic resolution but the Australian precedent, as now set out in the Criminal Code, of vesting the power in the eSafety Commissioner, may not be considered an appropriate precedent for other jurisdictions.

In contrast to the U.S. position, the law in Canada, which also has a Bill of Rights, focuses on 'terrorist propaganda or computer data that makes terrorist propaganda available – stored on and made available to the public through a computer system that is within the court's jurisdiction and empowers judges to order the 'computer system's custodian' to remove such material (Criminal Code s. 83.223(1)). Ancillary powers are provided by the same section to require an electronic copy of the material to be provided to the court and to identify and locate the person who posted the material. 'Terrorist propaganda' is defined in s. 83.222(8) of the Criminal Code as 'any writing, sign, visible representation or audio recording that counsels the commission of a terrorism offence'.

In its original form, as enacted in 2015 (C 20, s. 16), 'terrorist propaganda' was defined as 'any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general' – other than an offence that is not here relevant – 'or counsels the commission of a terrorism offence'. Thus, the words 'advocates or promotes' have now been omitted. While the original definition was a matter of political controversy (Schwartz, 2015), it arguably provided a firmer basis for regulation than the current definition. Australian legislation appears to have been influential in the formulation of the 2015 Canadian Bill (Schwartz, 2015). Advocating terrorism was already an offence in Australia (Criminal Code s. 80.2C).

The purpose of the amendment of the Canadian legislation was said to have been to correct 'potentially unconstitutional language' and to avoid the possibility of exposing journalists and others to 'criminal charges simply for calling attention to widely publicised

terrorist videos' (Freeze, 2018; Mendel, 2015). These criticisms could still be made of the Australian legislation. On the other hand, the Canadian legislation may now be less effective in dealing with objectionable material.

The New Zealand approach of seeking the voluntary cooperation of social media companies avoids the difficulties inherent in legislative schemes while, at the same time, being able to incorporate countries that take a legislative approach into the 'Christchurch Call'. In New Zealand, the banning of the alleged gunman's manifesto has, however, intensified the debate on free speech and sparked controversy over whether existing legislative guarantees and laws on hate speech should be amended (Cormack, 2019; O'Regan, 2018).

Finally, there is the question why international action is considered necessary at all. It might be argued that those countries that are concerned about the issue should legislate as they see fit without the need to persuade others to act similarly. The answer is twofold. First, the size of some of the private sector players such as Facebook and Google is such that national action by even medium sized countries may be ineffectual (Herrera, 2020; Paslawsky, 2011-2012). Second, in today's digital environment, the absence of international cooperation means that national laws on anything to do with the digital economy can easily be evaded (Vickovich, 2019; Wu, 2015-2016).

### **Harmonisation of national counter-terrorism laws**

From the acknowledged need for concerted international action, it follows that there is a need for consistency in the demands placed by governments on private sector actors. Significant variations among these demands would be not only unreasonable but would make realisation of the common objective impossible. However, this does not mean that there is a need for uniformity of laws. All that is necessary is that internet service providers and other relevant actors require clarity and consistency in what they are asked to do.

Experience with the Australian law shows that the process of enforcing removal of offensive material can still be difficult (Australian Law Reform Commission, 2012) and the difficulties in this area are more general (Hintz, 2015). Investigators of a website that had posted a video game based on the Christchurch shootings were initially met with the response 'Christchurch is a hoax'. Eventually the providers agreed to block access to the site but only in Australia (Cave, 2019).

It has been noted (Cave, 2019; Jaffe, Cooke, & Giral, 2019) that the Australian approach is in line with the way the world fights child pornography but that there is less consensus in this area. The Australian approach of internet censorship has also been criticised (Bambauer, 2009) as being likely to create incentives for platforms and websites to pre-emptively censor material and for the absence of any publicly available descriptions of what is being removed under the law. However, this aspect could readily be addressed by amendment and by the inclusion in laws of other countries of a provision addressing this issue.

An alternative approach preferred by some is one that has been described as an 'evolving' French approach where internet services are required to design risk reduction systems that are subject to audit (France Mission Report, 2019; see also Wright & Breindl, 2013). Similarities exist with the way banks are regulated in that banks are required to implement efficient systems to meet their objectives and the systems are subject to

audit by the banking regulator. The report is an interim one. It argues that any new regulation should be at the European level and that it should avoid the traditional model of a regulatory body making judgments about content, arguing instead for a system of regulation based on where speech is viewed (Tiani, 2019). It has been compared favourably with the Australian approach as one that is more nuanced in its appreciation of technical issues and respectful of civil liberties (Douek, 2019).

Whatever its status, a regime that vests responsibility for developing appropriate systems in private sector agencies has clear advantages over the more prescriptive approach taken in Australia. Government agencies do not have a monopoly of wisdom in this area and any attempt to spell out in detail what private sector agencies should do and how they should do it is likely to fail.

### **A common definition of terrorism**

In the absence of a commonly accepted international definition of terrorism, there is a risk of cooperative efforts being hindered by differences in the definitions adopted by social media companies and nation states. Just such a difference emerged between relevant laws and Facebook policies following the Christchurch attack.

However, after signing the Christchurch Call in Paris, Facebook announced that, it had 'co-developed a nine-point industry plan in partnership with Microsoft, Twitter, Google and Amazon ... to address the abuse of technology to spread terrorist content' (Facebook, 2019). This demonstrates that, with good will, problems of this kind can be rapidly dealt with in the future. Differences in the definition of 'terrorism' therefore are not necessarily of any particular significance for the purposes of international cooperation in this area.

### **Duties of tech companies**

Governmental expectations of tech companies will no doubt be discussed within the Global Internet Forum to Counter Terrorism but a clear indication of Australian expectations is provided by the Report of the Australian Taskforce to combat terrorist and extreme violent material online (Department of the Prime Minister and Cabinet, 2019). It sets out specific actions and recommendations in nine categories. In summary form, they are:

- technical intervention to develop solutions;
- aligning measures to those applicable to child abuse;
- developing live-streaming controls;
- jointly funding research;
- maintaining content blocking;
- developing crisis response protocol;
- periodic reporting on detection and removal of violent content;
- enforcing policies against users who upload and share violent material; and
- building ISP capacities.

This rather cumbersome action plan could no doubt be refined and sharpened up in international discussions. In essence, it appears that Australian initiatives are directed at

building a closer relationship between government and private sector organisations involved in the digital economy with the objective of denying internet access to anyone seeking to use it for the purpose of terrorist propaganda.

## Different forms of transnational terrorism

The policy changes announced by Facebook mean that white nationalist terrorism is treated in the same way as the terrorism of ISIS and Al Qaeda. So far as governments are concerned, there is wide agreement that the issues raised for security agencies by white nationalist terrorism are similar to those raised by these organisations. A notable difference, of course, is that the latter have also been involved in military operations against certain States particularly States aligned with the U.S. However, this is not sufficient reason to differentiate between them in respect of measures taken solely to combat the amplification of the fear engendered by terrorist attacks.

## Practical limitations

If the Report of the Australian Task Force is any indication, the nascent expectations of tech companies held by governments will require detailed discussion. So too will the context in which controls should apply. In this respect, the Australian Task Force noted that:

While the definition and exclusions outlined above seek to provide clarity as to what is and isn't terrorist and extreme violent material, the Taskforce members have discussed the fact that context is critical in assessing the measures that seek to combat the dissemination of such content online. There are circumstances where the upload and sharing of otherwise harmful content online will be legitimate and motivated by a desire to address social issues and raise awareness of illegal activity or unconscionable conduct, rather than to cause harm or fear in the community.

A well-known example concerns the use of Facebook Live to broadcast the aftermath of the shooting of Philando Castile (Parks & Yan, 2017). While graphic, the content enhanced transparency of the incident and informed public discussion about the use of lethal force by police.

It is also apparent that international consultations may need to extend beyond counter-terrorism forums.

For example, in outlining Australia's position, the Australian Prime Minister said that 'Australia, New Zealand, and the OECD will also develop voluntary transparency reporting protocols on the major platforms. This will set the first global reporting standards for industry to meet' (Prime Minister, 2019). This may prove to be more productive than the more prescriptive approach represented by the report of the Australian Task Force. The OECD has extensive experience and an impressive record in working with government agencies, industry and civil society in developing voluntary guidelines applicable to other aspects of the digital economy (Organisation for Economic Cooperation and Development, 2019).

## Conclusion

The prospects of concerted international action on this issue depend, to a large extent, on the suitability of the forum for the task of carrying out a joint project by government

agencies, industry and civil society. The aim of a joint project could be to develop a statement of high level principles the implementation of which could then be left to the private sector. In this connection, the French approach would be much more likely to win support than the Australian.

Under this approach, the systems put in place by the large social media and internet companies would need to be designed to meet common international objectives but would not necessarily need to be identical in their functioning across multiple jurisdictions. I would suggest that the first step should be a consideration of the question whether the primary focus should be ‘terrorist propaganda’ rather than ‘abhorrent violent material’.

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