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Damien Rogers *

1. Introduction

Within the academic literature on national security law there is a conventional view which holds that this law is a formal system of rules applied to specific state institutions whose objectives and functions respond to the most serious, urgent, or existential problems facing a political community.[1] Proponents of this view tend to assert that a state's primary responsibility is to maintain its sovereignty, defend its territory, and protect its population from serious harm. To that end they also tend to assert that a state should maintain a Weberian monopoly over the use of armed force within its sovereign territory and that it is justified in collecting secret intelligence and using violence, both at home and abroad, under the auspices of national security. Understood in these terms the state is a unitary entity that exists in an increasingly complex and dangerous world and must respond to an evolving set of material and ideational phenomena that constitute objective security problems with a material existence independent from contemplation of them. Much of this orthodox literature on national security law enacts a problem-solving approach and appears positioned as close as practicable to executive and bureaucratic power, presumably with the aim of informing decisions

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1 See, for instance: Craig Forcese and Leah West, *National Security Law* (Irwin Law, 2nd edn 2021); Geoffrey S. Corn and others(eds), *National Security Law: Principles and Policy* (Aspen Publishing, 3rd edn 2024); Danielle Ireland-Piper (ed), *National Security Law in Australia* (Federation Press 2024); Robert Ward and others (eds), *National Security Law, Procedure and Practice* (Oxford University Press, 2nd edn 2024).

concerning national security's legal dimensions.[2] Notwithstanding the proliferation of academic literature focusing on national security law we know very little about the professional stakes involved in its making.

Drawing on Pierre Bourdieu's theory of fields and his sociological conceptualisation of capital, including his rare foray into the juridical field, I attempt to move beyond pious renderings of evolving systems of rules, abstracted notions of the state, and reductive political realist readings of contemporary world affairs to offer a politico-sociological account of national security law that considers its social conditions of possibility and the professional stakes involved in its making.[3] To do so I rethink this law relationally; that is, as both a product and an instrument of struggles among professionals of politics, security, and law. These professional struggles, which take place on fields of contestation and cooperation open to, but rarely welcoming of, newcomers, are negotiated through various types of political, social, and cultural capital which, distributed unevenly, produce social power that reproduces hierarchies within and among these professions.[4] By seeking in this way to more deeply understand the making of national security law I aim to add to the scholarship on both the international political sociology of law and the law as a profession, as neither has produced much, if any, knowledge on this law.[5] By problematising, rather than naturalising, the processes of securitisation

2 See, for instance, 'Foreword' by Rory Medcalf in Ireland-Piper [n. 2]. This orthodoxy is reminiscent of the policy-orientated perspective fostered by the so-called New Haven School of International Law. See Jean d'Aspremont and others (eds), *International Law as a Profession* (Cambridge University Press 2017) especially Matthew Windsor, 'Consigliere or Conscience: The Role of the Government Legal Advisor' 355–88; Anne Orford, 'Scientific Reason and the Discipline of International Law' 93–114; Tanja Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turf War: Towards an Understanding of International Law as Practice' 287–310. By comparison the scholarship adopting critical approaches to national security law is quite modest. But see James Thuo Gathii, 'Beyond Color-Blind National Security Law' in Matiangai Sirleaf (ed), *Race and National Security* (Oxford University Press 2023).

3 Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 814. Bourdieu's works are extensive, but see Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice tr, Cambridge University Press 2005); Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Richard Nice tr, Routledge Classics 2010); Pierre Bourdieu, *Homo Academicus* (Peter Collier tr, Stanford University Press 1988); Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (Polity Press 1993).

4 For Bourdieu, 'capital is a "social relation of power" that has a differentiating and stratifying effect between individuals and groups. An object becomes a capital when it establishes a social relation of power that differentiates the holder from the non-holder, when it establishes some degree of social closure – a relation of inclusion and exclusion.' David L. Swartz, *Symbolic Power, Politics, and Intellectuals: The Political Sociology of Pierre Bourdieu* (University of Chicago Press 2013) 5.

5 On the international political sociology of law, see, for instance: Tanja Aalberts and Wouter Werner, 'International Law' in Xavier Guillaume and Pinar Bilgin (eds), *Routledge Handbook on International Political Sociology* (Routledge 2017) 36–45; Oliver Kessler, 'So Close Yet So Far Away? International Law in International Political Sociology: Introduction' (September 2010) 4(3) *International Political Sociology* 303; Wouter Werner, 'The Use of Law in International Political Sociology' (September 2010) 4(3) *International Political Sociology* 304; Jan Klabbers, 'Counter-Disciplinarity' (September 2010) 4(3) *International Political Sociology* 308; Friedrich Kratochwil, 'International Law and International Sociology' (September 2010) 4(3) *International Political Sociology* 311; Nicholas Onuf, 'Old Mistakes: Bourdieu, Derrida, and the "Force of Law"' (September 2010) 4(3) *International Political Sociology* 315; Philip Liste, 'The Politics of (Legal) Intertextuality' (September 2010) 4(3) *International Political Sociology*

which take place during the making of national security law through occasional expressions of the executive prerogative and everyday security practice, I seek to signal this law's significance to proponents of the 'PARIS approach' to (in)securisation that 'highlights the study of how different bodies of knowledge are labelling security, examining the tensions and controversies between and within practitioners and disciplinary fields in these labelling practices.'[6]

In what follows I take my empirical evidence from New Zealand because, as a case study, it has both exceptional and exemplary characteristics. New Zealand is exceptional not for reasons of remote geography, its colonial settler character, nuclear-free policy, or early adaption of neoliberalism – though these aspects are important – but because it is the smallest and least powerful of the second parties to the UKUSA Agreement.[7] In this respect New Zealand, joining that agreement in 1956, is a potential exemplar to those desiring to become a third party to that cryptologic agreement.[8] In this context I pay particular attention to the Crimes Act 1961, the Defence Act 1990, and the Intelligence and Security Act 2017, as well as to the Independent Police Conduct Authority Act 1988 and the Inspector-General of Defence Act 2023 (hereafter collectively 'national security law') because these are the core acts of legislation that grant a monopolistic jurisdiction to New Zealand security professionals by authorising and controlling the collection of secret intelligence and management of state violence at home and abroad as a means of preserving the integrity of New Zealand's democratic institutions, values, and routines.[9] By granting them an array of extraordinary powers while providing for

318. On law as a profession, see David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2018); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001). See also Jean d'Asprement and others (eds), *International Law as a Profession* (Cambridge University Press 2017); Wouter Werner, Marieke de Hoon and Alexis Galen (eds), *The Law of International Lawyers: Reading Martii Koskenniemi* (Cambridge university Press 2017).

6 Didier Bigo and Emma McCluskey, 'What Is a PARIS Approach to (In)securization? Political Anthropological Research for International Sociology' in Alexandra Checiu and William C Wohlforth (eds), *The Oxford Handbook of International Security* (Oxford University Press 2018) 116. Securitisation, understood here, is a process centred around a speech act whereby a person or group possessing political authority describes or denotes a phenomenon, which hitherto had been dealt with through the routines of politics, as a security concern. It is a discursive practice that expands the permissive scope of security practices. Yet securitisation is also understood here as the practices of various networks of professionals of (in)security that comprise, sustain, and reproduce forms of governmentality. For an excellent exposition of these mutually supporting understandings of securitisation, see C.A.S.E. Collective, 'Critical Approaches to Security in Europe: A Networked Manifesto' (2006) 37(4) *Security Dialogue* 443.

7 British-US Communications Intelligence Agreement, 5 March 1946.

8 See Damien Rogers, 'Transversal Practices of Everyday Intelligence Work in New Zealand: Transnationalism, Commercialism. Diplomacy' in Hager Ben Jaffel and Sebastian Larsson (eds), *Problematising Intelligence Studies; Towards a New Research Agenda* (Routledge 2022) 132–55. For an excellent account of the various SIGINT relationships with the US National Security Agency, see Ronja Kniep, 'The Code of silence: Transnational Autonomy and Oversight of Signals Intelligence' in Didier Bigo, Emma McCluskey, and Felix Treguer (eds), *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (Routledge 2023) 98–129, particularly Table 3.1.

9 See, for example, the Intelligence and Security Act 2017, s. 3, and the Inspector-General of Defence Act 2023, s. 3.

democratic control over their activities, these Acts frame not only how security professionals make inferences about possible responses to specific cases of (in)security problems, but also how they take courses of action to treat cases at hand. I also consider the Suppression of Terrorism Act 2002, Crimes (Countering Foreign Interference) Amendment Bill currently before the Justice Select Committee, repealing the crimes of sedition and subversion, as well as the defeated International Non-Aggression and Lawful Use of Force Bill because they signal an uneven juridicalisation of security which, criminalising some but not all (in)security problems, nevertheless provides a frame of reference for how New Zealand security professionals diagnose their cases. By considering the content of public speeches and statements, parliamentary debate, and departmental reports submitted to select committees, as well as the reports from public inquiries and a statutory review, I attempt to systemically map the respective stances taken on this monopoly by parliamentarians, security professionals, and juridical professionals.

This article begins by describing how New Zealand's national security law grants a jurisdictional monopoly over the collection of secret intelligence and management of state violence to security professionals. The first section also describes how this law provides a frame of reference for security professionals to comprehend their core tasks. The second section analyses the contention and consensus over the making of national security law among 'consecrated' parliamentarians and newcomers within the political field. I acknowledge that parliamentarians, especially those holding ministerial portfolios, dominate this field and argue that, as legislators, they criminalise pressing problems of (in)security because they wish to replenish their political capital by being seen to take substantive action on public safety. The third section analyses how security professionals cooperate with one another to justify their extraordinary powers so that parliamentarians recognise their custodianship over highly specialised tradecraft as a form of social capital, thereby enhancing their prestige and attracting an increased share of public resources. In the fourth section I argue that juridical professionals use their cultural capital to interpret national security law, recommend law reform, and, in certain circumstances, scrutinise scandalous security practices because they wish to maintain their position of esteem vis-à-vis ministers and security professionals when they temporarily appear on the juridical field. To deepen our understanding of the social power relations that reproduce the structures of hierarchy within and among these professional fields, I demonstrate how capital functions by taking seriously its transnational dimensions. In the final section I find that, despite their ongoing struggles with one another, professionals of politics, security, and law collectively hold sufficient symbolic capital to wield a form of violence as they create the conditions required for those who are dominated to accept their subordination by internalising the current configuration of power relations as the unquestionable natural social order.

2. Jurisdictional monopoly over secret intelligence and state violence

New Zealand law provides relatively clear mandates to those organisations which employ security professionals responsible for preserving the integrity of New Zealand's democratic institutions, values, and routines. The principal objectives of the Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS) are to contribute to New Zealand's national security, as well as to help protect New Zealand's international relations and economic well-being.[10] These two organisations have four common functions: intelligence collection and analysis; protective security services, advice, and assistance; cooperation with other public authorities to facilitate their functions; and cooperation with other entities to respond to imminent threat. GCSB has an additional specialised protective security function to undertake information assurance and cybersecurity activities. The Intelligence and Security Act 2017 formalises the close working relationship between the GCSB and the NZSIS on the one hand, and the New Zealand Defence Force (NZDF) and the New Zealand Police on the other hand, 'for the purpose of facilitating the performance or exercise of the functions, duties, or powers of those [latter] public authorities.'[11] The purposes of the NZDF are to defend New Zealand's territory from armed attack and to protect New Zealand's interests, contribute forces to collective defence and collective security agreements, assist civil authorities in times of emergency, and provide any other public service.[12] The New Zealand Police's functions include contributing to national security as well as preventing crime and enforcing the law, helping manage emergencies, keeping the peace and maintaining public safety, supporting and reassuring the community, and participating in policing activities outside New Zealand.[13]

Significantly, only certain employees of these organisations are authorised to collect secret intelligence through intrusive means or apply armed force routinely or exceptionally. Since it is unlawful for any other person to intentionally intercept a private communication using an interception device, New Zealand's national security law effectively grants a jurisdictional monopoly over the collection of secret intelligence to the cadres of intelligence professionals who, hosted by the GCSB and the NZSIS, are custodians of specialised tradecraft skills in signals intelligence or human

10 Intelligence and Security Act 2017, s. 9. For an early assessment of the Act, see Damien Rogers, 'Intelligence and Security Act 2017: A Preliminary Critique' (2018) 4 *New Zealand Law Review* 657.

11 Sec. 12(1)(b). Since New Zealand SIGINT capabilities were originally hosted within the NZDF, security professionals at the GCSB have always had a close working relationship with their military counterparts, whereas their relationship with policing professionals began in earnest in about 2012. The early fruits of this relationship became a scandal when it was revealed in the District Court of the Northshore in Auckland that the GCSB had unlawfully conducted electronic surveillance on a New Zealand resident on behalf of the New Zealand Police. See Damien Rogers, 'Extraditing Kim Dotcom: A Case for Reforming New Zealand's Intelligence Community?' (2015) 10(1) *Kotuitui: New Zealand Journal of Social Sciences* 46.

12 Defence Act 1990, s. 5.

13 Policing Act 2008, s. 9.

intelligence, respectively.[14] Similarly, only those employees within the intelligence and security agencies who provide information assurance, undertake vetting procedures, and inspect premises for the most sensitive areas of government business become experts in protective security and custodians of this specialised tradecraft. Moreover, the fusion of the signals intelligence and information assurance disciplines has given rise to a new cohort of cybersecurity professionals. New Zealand national security law also grants a jurisdictional monopoly over the management of state violence to expertly trained members belonging to either the Special Forces of the NZDF or the Special Tactics Group and/or the Armed Offenders Squads of the New Zealand Police.[15] A monopoly over these core tasks is a necessary condition for the existence of the security profession within New Zealand and for distinguishing its members from all other intelligence professionals, military personal, and police officers.

It would be a mistake, therefore, to equate New Zealand security professionals with the organisations that employ them. Most obviously, those employees of the above-mentioned organisations who are accountants, lawyers, public relations specialists, and bureaucrats responsible for policy or producing assessments based on intelligence are not security professionals.[16] The NZDF and New Zealand Police employ intelligence analysts and investigators to support their operations and the delivery of core services, while other government departments maintain intelligence analysis and law enforcement capabilities to meet their responsibilities for ensuring compliance with regulatory regimes controlling, for example, the flow of people, goods, or finances across the border. While they might perform similar tasks to those that security professionals perform, they are not themselves security professionals because they are not authorised to collect secret intelligence for the purpose of preserving the integrity of New Zealand's democracy, nor are their activities subject to specialised control under national security law. This means that the security profession is a subset of intelligence, military, and policing professionals, rather than an overarching nomenclature for a system of professions.

New Zealand's national security law not only provides security professionals with a jurisdictional monopoly but also provides a frame of reference for how they comprehend their core tasks.[17] Security professionals' first core task, diagnosis, involves

14 Crimes Act 1961, s. 216B. For a brilliant account of the formation of guilds around this tradecraft, see Didier Bigo, 'Sociology of Transnational Guilds' (2016) 10 *International Political Sociology* 398.

15 However, as Marnie Lloydd has explained it remains unclear whether it is unlawful for a New Zealander to travel overseas to participate in an armed conflict. See Marnie Lloydd, 'Unpacking Foreign Fighting: New Zealand's Legislative Responses to transnational Combatants' 5(1) *National Security Journal* 113.

16 The New Zealand Ministry of Defence exists to provide policy advice to the Government on defence matters whereas the National Security Group within the Department of the Prime Minister and Cabinet provides advice on national security matters to the Prime Minister and the Minister(s) responsible for the NZSIS and the GCSB. The National Security Group includes the National Assessments Bureau that provides strategic assessments using, among other sources, secret intelligence disseminated by the GCSB and the NZSIS. See the Intelligence and Security Act 2017, s. 233.

17 This paragraph draws heavily on Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labour* (University of Chicago 1988) especially Chapter Two titled 'Professional Work' 35–58.

colligation, where an empirical picture of a specific phenomenon of concern is drawn up into a case, and categorisation, where that case is placed within a classification framework. To diagnose cases of (in)security problems, security professionals remove any contingent features of the phenomenon of concern, including its historical and cultural contexts, as well as any politically urgent grievances, before situating these abstracted cases within a system of expert knowledge based upon classification schema designed to categorise new cases into pre-existing problem sets. Having reconstituted phenomena of concern as cases of pre-defined (in)security problems through their acts of diagnosis, security professionals undertake a process of inferencing. This inferencing process involves taking diagnostic information from an abstracted case of (in)security problems and identifying a range of possible responses and assessing their likely outcomes. Having considered possible responses and likely outcomes, security professionals design treatments specific to the case at hand. Treatment involves another classification system based on existing institutional functions and, through a process of prescription, reintroduces human qualities to their abstracted cases.

By criminalising certain acts as 'crimes against public order,' New Zealand's national security law defines various types of (in)security problems that frame how security professionals diagnose specific cases. The Crimes Act 1961 states that espionage involves any person who, owing allegiance to the Sovereign in right of New Zealand, collects or records any information, copies any document, obtains any object, makes any sketch, plan, model, or note, takes any photograph, records any sound or image, or delivers any object to any person as an intended means of undermining the security or defence of New Zealand.[18] Treason, also under the Crimes Act 1961, involves any person who, owing allegiance to the Sovereign in right of New Zealand, 'kills or wounds or does grievous bodily harm to the Sovereign, imprisons or restrains her or him, levies war against New Zealand, assists an enemy at war with New Zealand or any armed forces against which New Zealand forces are engaged in hostilities, incites or assists any person with force to invade New Zealand, uses force for the purpose of overthrowing the Government of New Zealand, or conspires with any person to do anything mentioned in this section.'[19] The Act also states that sabotage involves any person, who lawfully present in New Zealand, impairs the efficiency or impedes the working of any ship, vehicle, aircraft, arms, munitions, equipment, machinery, apparatus, or atomic or nuclear plant, or damages or destroys any property which it is necessary to keep intact for the safety or health of the public as an intended means of undermining the safety, security, or defence of New Zealand or the safety or security of the armed forces of any other country.[20]

Furthermore, the Terrorism Suppression Act 2002 provides that terrorism involves any act that, advancing an ideological, political, or religious cause, intends to cause the

18 Sec. 78.
19 Sec. 73.
20 Sec. 79.

death of, or other serious bodily injury to, another person(s) or intends cause the destruction of, or serious damage to, property of great value or importance. It also include acts that intend to cause major economic loss or major environmental damage, constitute serious interference with, or serious disruption to, critical infrastructure (if likely to endanger human life), or introduce a disease-bearing organism, (if likely to cause major damage to the national economy of a country), or otherwise pose a serious risk to the health or safety of a population. Each of these acts must be taken as a means of intimidating a population or coercing a government (or an international organisation) to do or abstain from doing any act.[21] In 2021, the definition of terrorism within the Terrorism Suppression Act 2002 was amended to include planning and other preparations to carry out a terrorist act. [22]

While criminalising these (in)security problems renders them subject to the powers of the New Zealand Police to, *inter alia*, search for, and seize, evidence of a crime, seek control orders, and prosecute alleged offenders within the criminal justice system, New Zealand's national security law authorises extraordinary powers – that is, powers to do things that would otherwise be unlawful – thereby making permissible a wider range of responses to those cases upon which security professionals make relevant inferences.[23] Under Part 3 of the Intelligence and Security Act 2017, security professionals working for the GCSB and/or the NZSIS are permitted to practice deception by using assumed identities, false documents, front companies, and corporate identities. Part 4 of the Act grants those professionals the power to conduct surveillance on persons, places or things, intercept private communications, and seize information and communications. Security professionals at the NZSIS are granted the power to enter any place or vehicle, and to install, use and maintain visual surveillance, tracking and interception devices, whereas those at the GCSB can access information infrastructure and deploy visual surveillance and interception devices. Part 5 of the Act expands the informational reach of these security professionals to include direct access to official databases and on-request ('compelled') access to information held by commercial providers of telecommunications services and financial services.[24]

Under the Crimes Act 1961, Police are authorised to use the force necessary to overcome any force used in resisting the execution a warrant or the making of an arrest. They can also use force to prevent a person escaping to avoid arrest or the escape or rescue of that person after their arrest, or to recapture a prisoner who escaped lawful custody, but only if there is no less violent viable option available. The Act, however, does not authorise the use of force when it is intended, or likely to, cause death or grievous bodily harm.[25] Section 9 of the Defence Act 1990 authorises members of the New

21 Sec. 5.

22 See John Ip, 'New Zealand's Adoption of Precursor Terrorism Offences in the Post-March Era' (2023) 4 *New Zealand Law Review* 449.

23 See Search and Surveillance Act 2012.

24 See also Pt 2 and Pt 3 of The Telecommunications (Interception Capability and Security) Act 2013.

25 Sec. 39–40. But see s. 41.

Zealand Defence Force to use armed force to provide public service or assist civil power, including the New Zealand Police, in times of emergency, but only after the Prime Minister has been briefed by the Commissioner of Police and is satisfied that there is in New Zealand an emergency in which one or more persons are threatening or attempting to kill or seriously injure any other person, or are causing or attempting to cause damage to or the destruction of any property, or that such an emergency is imminent. The Prime Minister must also believe that the emergency cannot be dealt with by the Police without the assistance of members of the NZDF exercising powers that are available to constables.

Often veiled in official secrecy, courses of action taken by security professionals to treat specific cases of these (in)security problems are controlled through special oversight measures established under national security law, and by public accountability arrangements built upon the cornerstone of ministerial responsibility.[26] Security professionals have become increasingly mindful of these retrospective controls. The Inspector-General of Intelligence and Security conducts inquiries into the lawfulness and propriety of activities by security professionals working at the GCSB and the NZSIS, and disseminates reports on their inquiries.[27] The Independent Police Complaints Authority, established in 1989 as a statutory Crown Entity, considers complaints made against the New Zealand Police and investigates policing activities that involve death or serious bodily harm. Both offices cooperated on an inquiry into the 3 September 2021 terror attack at the LynnMall Countdown supermarket in Auckland committed by Ahamed Aathil Mohamed Samsudeen, who was shot dead by the Police during a knife attack.[28] Recently established in response to the Burnham Inquiry, the Office of the Inspector-General of Defence will investigate incidents that occur during NZDF activities and assess their policies and procedures governing its activities.[29] Occasional oversight occurs when integrity assurance officers give focus to security practices as part of their routine investigations.[30] Ad-hoc oversight of certain cases of

26 Cabinet Manual, paragraphs 3.7 and 3.14 respectively.

27 Sec. 157–191 of the Intelligence and Security Act 2017, but see, too, the Inspector-General of Intelligence and Security Act 1996 (repealed). All public reports are available at https://igis.govt.nz/publications/igis-reports.

28 Inspector-General of Intelligence and Security, Police Conduct Complaints Authority, and the Office of the Inspectorate, *Coordinated Review of the Management of the LynnMall Supermarket Attacker*, 14 December 2022.

29 This Office was established on the recommendation of the Burnham inquiry, which was itself established to inquire into serious allegations, made by two investigative journalists, against the conduct of the New Zealand Special Air Service when they were operating in Afghanistan in 2010. See Nicky Hager and John Stephenson, *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour* (Potton & Burton 2017).

30 See, for instance: Guy Powles, *Security Intelligence Service: Report by the Chief Ombudsman* (1976); Lyn Provost, *Governance of the National Security System* (Controller and Auditor-General November 2016); Paul Hunt, *Reflections on the Report of the Royal Commission of Inquiry into the terrorist attacks on Christchurch Masjidain on 15th March 2019: Human rights of affected whānau, survivors and witnesses to accountability and remedies in the aftermath of the Report* (New Zealand Human Rights Commission 2021).

security practice occurs through public inquiries established by Ministers in the immediate aftermath of a scandal, including a Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019.[31] Ministers are held to account through parliamentary question time and the work of select committees. While the Justice Select Committee and the Foreign Affairs, Defence and Trade Committee hold, respectively, the Ministers of Police and Defence to account, the Intelligence and Security Committee was established in 1996 to scrutinise the performance of the GCSB and the NZSIS.[32]

3. Parliamentarians and political capital

Parliamentarians differ from other professionals of politics, such as party officials, ministerial advisors, and lobbyists, because they enjoy membership to the House of Representatives and, with that membership, the collective power to make law, distribute executive power, and hold the political executive to account.[33] Parliamentarians remain positioned at the core of the political field because they hold political capital, which 'represents the capacity to mobilise support for a candidate, cause, party, and so on, that is, the ability to mobilise collective resources.'[34] Understood from a Bourdieusian perspective, struggles to dominate this field are motivated less by competing partisan ideological commitments and more by the contest between dominant parliamentarians who are 'consecrated' as Cabinet members wielding executive power, and dominated parliamentarians who are relative newcomers to the field without any realistic prospect of obtaining ministerial writs.[35] Although they diagnose a wide array of cases that they categorise as political problems, make inferences as to the likely outcomes of various responses, and then act to treat these cases, preserving the integrity of democratic institutions, values, and routines is a significant issue over which consecrated and newcomer parliamentarians struggle with one another.[36] Preserving

31 William Young and Jacqui Caine, *Ko tō tātou kāinga tēnei [This is our home]: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (Wellington 2020). See Damien Rogers, Nick Nelson, and John Battersby, 'Public Inquiries on Counterterrorism: New Zealand's Experience' (2023) 16(3) *Critical Studies on Terrorism* 452.

32 Sec. 192–205 of the Intelligence and Security Act 2017, but see, too, the Intelligence and Security Act 1996 (repealed). See Damien Rogers, 'The Anatomy of Political Impunity in New Zealand' in Didier Bigo, Emma McCluskey, and Felix Treguer (eds), *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (Routledge, New Intelligence Studies Series 2023) 203–30.

33 Andrew W. Neal, *Security as Politics: Beyond the State of Exception* (Edinburgh University Press 2019.) See also Andrew W. Neal, 'The Parliamentarisation of Security in the UK and Australia' (2020) 74(2) *Parliamentary Affairs* 464.

34 Swartz [n. 5] 65.

35 Under New Zealand Mixed Member Proportionate system, parliamentarians belonging to minor parties who can form coalitions with larger parties can and have formed governments and have been given ministerial portfolios and appointed as cabinet members. But their ability to do so is determined by the consecrated members of the larger party.

36 By politics, I mean here what Ralph Pettman means when he writes '[a]s a concept, politics refers to all those things we do, individually and in concert, to get and use power over others for non-trivial purposes.

democracy, particularly for ministers, also entails ensuring the public remains safe from harms associated with acts of political violence because such acts, while relatively rare in New Zealand, undermine trust and confidence in government. Acts of political violence that threaten the existence of the entire political community, or at the very least pose a serious harm to members of that community, can (obviously) diminish the political capital of the minister(s) responsible for New Zealand's security professionals. We see here parliamentarians who are not yet consecrated taking action to protect the privileges of executive power that they aspire to someday wield.

Criminalising (in)security problems is a relatively low-cost way for all parliamentarians to signal to their electors that they are taking substantive action to preserve democracy and ensure public safety. Attaching serious penalties to these crimes enables them to reflect the extent of society's disapproval of those acts. Criminalising (in)security problems places those suspected of committing them within the criminal justice system, 'domesticating' potentially damaging political problems and keeping them at a comfortable distance from ministers.[37] But those reasons do not explain why parliamentarians criminalise some (in)security problems but not others. Sheridan Webb has argued that New Zealand lawmakers were rather complacent when it came to criminalising terrorism and the efforts to make counterterrorism law were driven by pressure to sign UN-led suppression treaties.[38] While Webb is correct to point to external pressures bearing upon New Zealand lawmakers, the cornerstone of New Zealand's international political strategy remains closer defence relations with the United States.[39] In New Zealand consecrated parliamentarians, especially the Prime Minister, replenish their political capital through photo opportunities at the White House or, even better, golfing with US Presidents, rather than by addressing the UN General Assembly alongside a very long list of state leaders.[40] This significant transnational dimension influences how political capital functions in New Zealand to juridicalise security and then to instrumentalise juridicalised security. Notwithstanding the reasons why certain (in)security problems are criminalised, parliamentarians ensure the executive's prerogative to deal with cases of (in)security by other means – ranging from declaring foreign diplomats as *persona non-grata* under the 1961 Vienna Conventions on Diplomatic Relations to the use of armed force in international affairs provided for under Article 51 of the United Nations Charter – remains undiminished.

Politics is always about trying to get our own way to some substantive end. It is always a verb.' Ralph Pettman, *World Politics: Rationalism and Beyond* (Palgrave 2001) 6.

37 For an excellent account of how armed conflicts can be pacified and become domesticated within the language of household governance, see Patricia Owens, *Economy of Force: Counterinsurgency and the Historical Rise of the Social* (Cambridge University Press, 2015).

38 Sheridan Webb, 'From Hijacking to Right-Wing Extremism: The Drivers of New Zealand's Counter-terrorism Legislation 1977–2020' (2021) 3(1) *National Security Journal* 101.

39 Damien Rogers, 'Deconstructing National Security Strategy as Professional Struggle' (2024) 5 *Political Anthropological Research on International Social Sciences* 211.

40 Rogers [n 9].

When parliamentarians criminalised the problem of terrorism, they seized upon an opportunity for ministers to replenish their political capital by being seen by their constituents to preserve democracy and ensure public safety, but also by signalling abroad their solidarity and support of the United States, particularly during its so-called war on terror. Before the terrorist attacks on the United States of America on the 11 September 2001, Hon. Phil Goff, as Minister of Foreign Affairs and Trade, introduced the Terrorism (Bombing and Financing) Bill as an important part of New Zealand's contribution to combatting international terrorism.[41] After those attacks and following the passing of Resolution 1373 by the United Nations Security Council, Dr Wayne Mapp, a future Minister of Defence, supported the renamed the Terrorism Suppression Bill and stressed that New Zealand could no longer afford to be complacent as '[t]errorist organisations may well see us as a haven in which terrorists can plan their deeds.'[42] Drawing a link between New Zealand's foreign policy and its prospects for better trade deals with the United States, Hon. Ken Shirley lamented New Zealand's refusal to support US President George W. Bush's call for the use of armed force against Iraq because this meant 'we are now towards the back of the queue in terms of any free-trade access to the United States market.'[43] Referring to the Bill, and the debate over it, Rt Hon Winston Peter pointed out that 'what we have is the appearance that the Government is doing something.'[44] Only the Green Party voted against the Bill, as they feared it would 'criminalise New Zealanders' support for liberation movements and criminalise New Zealanders' support for mass protest action of a type that does involve mass civil disobedience.'[45] Keith Locke's preference was to include terrorism in the Crimes Act 1961 and subject its investigation and prosecution to the same checks and balances used for other crimes against public order.

Parliamentarians recently agreed to read the Crimes (Countering Foreign Interference) Amendment Bill for the first time and referred it to the Justice Committee because they saw potential for ministers to replenish their political capital at a time of intensifying Great Power competition. Drawing on, but moving beyond, the crimes of espionage, treason, subversion, and sabotage, the Bill defines foreign interference as 'covert, deceptive, corruptive, or coercive conduct that is undertaken for, or on behalf of, a foreign power to intentionally or recklessly harm a wide range of core New Zealand interests, including security or defence, the conduct of elections, officials.'[46]

41 (3 May 2001) 591 NZPD.

42 (8 October 2002) 603 NZPD.

43 *Ibid.*

44 *Ibid.*

45 (8 October 2002) 603 NZPD. While Keith Locke was roundly condemned by members of every party, the emerging record of the US Government's rendition, torture, assassination practices meant his fears were perceptive. For more details on the US-led programme of extraordinary rendition and torture, see Elspeth Guild, Didier Bigo, and Mark Gibney (eds), *Extraordinary Rendition: Addressing the Challenges of Accountability* (Routledge 2018).

46 New Zealand Security Intelligence Act 1969 s. 2(1) defined subversion as 'attempting, inciting, counselling, advocating or encouraging – (a) the overthrow by force of the Government of New Zealand; or (b) the undermining by unlawful means of the authority of the state of New Zealand' but it was repealed on

Hon Paul Goldsmith, Minister of Justice, introduced the Bill by pointing out that it forms part of his government's commitment 'to restoring law and order and strengthening democracy and freedoms,' which his party campaigned heavily on during the 2024 General Election.[47] 'To commit the offence,' he explained, 'a person's conduct must include all of the following elements: it must be undertaken for, or on behalf of, a foreign power; and be covert, deceptive, corruptive, or coercive; and, thirdly, be meant to compromise protected New Zealand interests.'[48] Laura McCure placed the Bill in a context of 'global competition and geopolitical tensions [that] are increasingly influencing our international relations,' but stressed the 'need for New Zealand to safeguard its democracy, security, and values has never been more urgent. We are facing new challenges – covert, deceptive and often invisible activities carried out by foreign powers that seek to manipulate, disrupt, or even harm the core functions of our society.'[49] Only the Green Party voted against the Bill having its first reading. Teanau Tuiono, a second term parliamentarian in a minor party with little or no realistic expectation of becoming Prime Minister or holding a national security portfolio, argued that it did little to preserve New Zealand's independent foreign policy from the influence of the United States. Referring to a foreign intelligence agency (presumably the US National Security Agency) that had maintained an unknown electronic presence within the GCSB, Tuiono acknowledged the problem of foreign interference targeting New Zealand but lamented that the Government seemed to 'roll out the red carpet for some.' Any response to foreign interference would need to maintain New Zealand's 'even-handed relationship diplomacy.'[50]

Parliamentarians previously refused to criminalise the problem of state aggression because they saw only limited opportunity for ministers to enlarge their political capital and chose, instead, to insulate the executive from exposure to any new challenges issued by those with little prospect of becoming senior ministers, thereby preserving the established hierarchy that structures the political field. Drawn from the ballot and introduced to the House as a private member's Bill by Dr Kennedy Graham, the International Non-Aggression and Lawful Use of Force Bill was defeated before its first reading.[51] It defined the crime of aggression as 'the use of armed force by the State of New Zealand against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the purposes of the Charter of the United Nations.'[52] This definition excluded the lawful use of armed force

28 September 2017 by section 242(3) (a) of the Intelligence and Security Act 2017 (2017 No 10). The 2017 Act does not define subversion.

47 (19 November 2024) 780 NZPD.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 New Zealand has not accepted the 'crime of aggression' amendment to the Rome Statute of the International Criminal Court, which entered into force on 17 July 2018.

52 (19 August 2009) 656 NZPD 5740.

authorised under Chapter VII of the UN Charter or action taken in accordance with Article 51 of that Charter. Speaking to the Bill, Graham explained that its dual purpose was, firstly, to ensure New Zealand's use of armed force conforms with international law, especially the UN Charter, by making it a criminal offence for any New Zealand leader, who is constitutionally in a position to direct the defence forces, to commit the forces to any act of aggression overseas; and, secondly, to protect New Zealand ministers from external pressure to commit the New Zealand Defence Force to any illegal action overseas by requiring those leaders to receive written legal advice from the Attorney-General that such action is consistent with international law, especially the UN Charter, and that such advice be debated in Parliament before committing the defence forces to any action overseas. While Graham, as member of the Green Party, again had no realistic expectation of becoming Prime Minister or holding a national security ministerial portfolio, Hon. Dr Wayne Mapp belonged to the National Party and was Minister of Defence at the time. Mapp argued against the Bill on the grounds that it would prevent New Zealand from joining interventions led by the US and NATO by 'effectively hand[ing] our foreign policy to the whims of a United Nations Security Council veto.'[53] He also argued that, if the Bill were passed, members of the Green Party would use the office of the special prosecutor to indict and try the Prime Minister or the Ministers of Foreign Affairs and Defence when they authorised the New Zealand Defence Force to undertake an internationally wrongful act.

Parliamentarians in 2007 repealed the crime of sedition because, at least in part, it exposed ministers to the charge that they might misuse it to repress the expression of unpopular political speech, dissent, and protest that might 'excite disaffection' against the New Zealand and its administration of the law.[54] Such misuse would, according to Peter Dunne, have 'no place in a democratic society like ours.'[55] However, voting against repealing this crime, Ron Mark, a member of the minor party New Zealand First, argued that the crime of sedition existed to protect New Zealand's democratic institutions, values and routines, including 'the system of government, the head of State, the justice system, the judiciary, Parliament and its members, and the institution of Parliament itself.'[56] For Mark, repealing this crime devalued democracy because it suggested that New Zealand's constitutional arrangements 'do not deserve any extra protection or recognition.'[57] There was, however, very little political capital to be gained or lost transnationally by repealing this crime.

53 *Ibid.*
54 (19 June 2007) 640 NZPD 9975. See the Crimes (Repeal of Sedition Offences) Amendment Act 2007, s. 5.
55 (19 June 2007) 640 NZPD 9979.
56 (18 October 2007) 642 NZPD 12544.
57 (18 October 2007) 621 NZPD 12544.

4. Security professionals and social capital

Although the crimes of espionage, treason, sabotage, and terrorism might frame how security professionals comprehend their core diagnostic tasks, they are only partially bound by these crimes. The Intelligence and Security Act 2017 makes clear that the mandates given to security professionals at the GCSB and the NZSIS include cooperating with the New Zealand Police when they investigate and prosecute the above-mentioned crimes within the criminal justice system, though these bodies do not themselves have any enforcement powers.[58] According to section 58(2) of that Act, the 'harm' of sabotage is linked to the crime of sabotage in the Crimes Act 1961, though the 'harm' of espionage is not explicably linked to the crime of espionage in the Crimes Act 1961, nor is the 'harm' of terrorism explicitly linked to the crime of terrorism in the Terrorism Suppression Act 2002. The 'harm' of terrorism is accompanied by violent extremism, defined in an assessment published by the NZSIS as 'the use or justification of violence to achieve radical political, social, or religious change. Violent extremists often target groups they see as threatening their success or survival or undermining their worldview.'[59] NZSIS has gone as far as to develop a typology of violent extremism based on whether the harmful acts were motivated by identity, faith, or politics. The harm of espionage is accompanied by foreign interference, which security professionals define as 'an act by a foreign state, often acting through a proxy, which is intended to influence, disrupt or subvert New Zealand's national interest by deceptive, corruptive or coercive means. Normal diplomatic activity, lobbying and other genuine, overt efforts to gain influence are not considered interference.'[60] The diagnostic tasks carried out by those members of the New Zealand Police or the NZDF authorised to use armed force are not bound by those crimes either.[61]

Rather than diagnosing specific cases and classifying them as a type of (in)security problem defined in law, New Zealand security professionals proactively identify and select their cases by thinking through their extraordinary powers – but only to the extent limited by their understanding of their respective organisational mandates – and using their inferencing process. This is because, unlike other professions, whose members rely on specific cases being brought to them, security professionals are responsible for assessing challenges emerging from within the evolving landscape of (in)security which are not yet known or fully understood. They cooperate and, at times, do so in highly calibrated ways to justify these extraordinary powers by highlighting their unique contributions to preserving New Zealand's democracy while demonstrating the large extent to which their specialised tradecraft differs from the routine skills of strategy used by all other intelligence, policing, and military professionals.

58 Sec. 16.

59 New Zealand Security Intelligence Service, *New Zealand's Security Threat Environment: An Assessment by the New Zealand Security Intelligence Service* (2024) 13.

60 *Ibid.*

61 Refer (n 26).

In an opening statement to the parliamentary Intelligence and Security Committee, the Director-General of the NZSIS justified the agency's extraordinary intelligence gathering and sharing powers by signalling the looming danger posed by the problem of terrorism, particularly as it manifested in ISIL and its ability to spread its messages and attract foreign fighters under its banner. Rebecca Kitteridge also referred to specific cases where the threat of terrorism either materialised or was managed. She explained that NZSIS's counter-terrorism risk register lists, at any one time, between 30 and 40 individuals who might represent a potential terrorism-related threat to New Zealand and mentioned that a few individuals have been charged for offences committed in support of their extremist ideology. 'Like our partners around the world,' Kitteridge said, 'we are concerned both with the threats within our country, and also threats that may kill or injure our citizens in other countries', before noting a recent plot to plant an explosive device on a passenger plane departing for Sydney was foiled by intelligence provided by Isreal to Australia.[62] That case, she argues, underscored the importance of intelligence-sharing partnerships. Subsequent statements made by Kitteridge echo these points until 2020 when she began in these statements to acknowledge the terrorist attack that took place in Christchurch in 2019 and the steps taken to ensure an attack like that never occurs again.

In his opening statement to the same committee, the Director-General of GCSB gave focus to the problem of the 'cyber threat' and how it impacts on New Zealand to justify the extraordinary powers of GCSB's security professionals to do 'everything that is necessary or desirable to protect the security and integrity of communications and information infrastructures of importance to the Government of New Zealand, including identifying and responding to threats or potential threats to those communications and informational infrastructures.'[63] Andrew Hampton explained that he had publicly condemned the NotPetya cyber-attack attributed to the Russian Government and expressed his concern over North Korean links to the major WannaCry ransomware campaign not because New Zealand was significantly impacted by either (he conceded it was not), but because GCSB's international partners had been. He went on to say that '[a]s an agency that receives much of its intelligence from our Five Eyes partners, a particularly important feature of the new [Intelligence and Security Act 2017] is the strengthened provisions around cooperation with foreign intelligence services.' However, Hampton did not mention (publicly at least) that the networks of relationships currently forged by the US National Security Agency map onto the global submarine cable infrastructure, meaning Sweden, Germany, France, the Netherlands, and Spain are becoming, if they are not already, more valuable than New Zealand.[64] Nor did he raise the possibility that the GCSB's value to the National Security Agency will

62 Rebecca Kitteridge, *Opening statement by the Director-General of Security to the Intelligence and Security Committee,* 21 March 2018.

63 Sec. 12(1)(b). This authority is not without limits: see Sec 12 (4) – (7).

64 Didier Bigo, 'Beyond National Security, The Emergence of a Digital Reason of State(s) led by Transnational Guilds of Sensitive Information: The Case of the Five Eyes Plus network' in Ben Wagner, Matthias

decline even further as the US deploy more of its own diplomatic, military, and intelligence capabilities to the Asia-Pacific region.

Both Directors-General understand the problem of foreign interference through their extraordinary powers to undertake protective security activities and collect secret intelligence. When briefing the Justice Select Committee, Kitteridge and Hampton outlined the activities of their security professionals in the lead up to the 2017 General Election – namely: conducting a threat assessment; providing advice and assistance to protect the Electoral Commission's core information and communications systems; offering advice and assistance to ministers and other parliamentarians; and developing a protocol if a case of foreign interference was identified – before describing how the problem of foreign interference might affect New Zealand's democratic institutions, values, and routines. Their briefing also described the problem of disinformation but acknowledged that 'New Zealand had not been the direct target of widespread state-backed dis-information or mal-administration campaigns.'[65] It also noted the vulnerability of diaspora communities and the risks of covert influence associated with political donations that evade public scrutiny. They concluded their brief by mentioning the crucial role played by their protective security and cybersecurity experts in equipping 'those on the frontline of our democracy … with the capability to identify and protect themselves from foreign interference risks.'[66]

The specialised tradecraft needed to exercise these extraordinary powers is a type of social capital defined by Bourdieu as 'the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalised relationships of acquaintance or recognition.'[67] This social capital has a vital transnational dimension because the tradecraft, around which the New Zealand security profession coheres, is protected and sustained by professional guilds positioned within what Didier Bigo has astutely described as the transnational field of (in)security.[68] The sociogenesis of the New Zealand security profession, as we know it today, began with the visits and advice of UK security officials in the aftermath of the Second World War, and with the first head of the NZSIS visiting MI5 and returning to New Zealand with some of its staff.[69] Paul Scott has recently shown that as New Zealand,

C. Kettemann, Kilian Vieth-Ditlmann, and Susannah Montgomery (ed), *Research Handbook on Human Rights and Digital Technology* (Edward Elgar 2019) 33–52.

65 Rebecca Kitteridge and Andrew Hampton, "Director-General remarks: Select Committee Inquiry into the 2017 General Election and 2016 Local Elections."

66 *Ibid.*

67 Cited in Swartz [n 5] 248.

68 Didier Bigo, 'Analysing Transnational Professionals of (in)security in Europe' in Rebecca Adler-Nissen (ed), *Bourdieu in International Relations: Rethinking Key Concepts in IR* (Routledge 2012); Didier Bigo, 'Adjusting a Bourdieusian Approach to the Study of Transnational Fields: Transversal Practices And State (Trans)Formations Related To Intelligence And Surveillance' in Christian Schmidt-Wellenburg and Stefan Bernhard (eds), *Charting Transnational Fields: Methodology for a Political Sociology of Knowledge* (Routledge 2020).

69 Paul F. Scott, *National Security Constitutionalism in the Commonwealth Five Eyes States* (Bloomsbury Publishing 2025), particularly chapter 2 'Imperial Origins and Cold War Connections.' See also

along with Australia, Canada, and the United Kingdom, set about the constitutionalisation of national security within their respective jurisdictions, 'they frequently borrowed from each other: borrowed rules, borrowed powers, borrowed the design of institutions, and sometimes borrowed even specific statutory language.'[70] In a metaphorical, rather than a strictly legal sense, the constitutional origins of New Zealand security professionals lie less in New Zealand's parliament and more in the UKUSA Agreement. Since their very existence depends upon maintaining their ongoing access to this tradecraft, New Zealand security professionals revere their membership of the so-called 'Five Eyes' and tend to venerate leaders of the US intelligence community and, to the extent that they can help facilitate good relations with the US, their counterparts from the United Kingdom.

Cognisant of its convertibility from the transnational field of (in)security, security professionals want their social capital recognised by parliamentarians because this enhances their prestige and increases their share of public resources, which in turn ensures their ongoing involvement in that transnational field.[71] Consecrated parliamentarians recognise the value of this social capital because it helps replenish their political capital by being seen at home taking steps to preserve democracy and ensure public safety, and abroad as valuing and investing in closer defence relations with the US. Encouraging New Zealand security professionals to position themselves as close as possible to the centre of gravity within the transnational field gives ministers an even greater opportunity to replenish their political capital than does criminalising insecurity problems in support of the war on terror, because the National Security Agency currently values New Zealand's position in the southern reaches of the Pacific Ocean, which offers a useful location to collect intelligence by intercepting high-frequency radio transmission and satellite-based telecommunications, as well as by accessing major fibreoptic cable networks.[72] That is one reason explaining why parliamentarians made provisions within national security law to facilitate information, intelligence, and personnel exchange between New Zealand security professionals and those who work for foreign governments deemed 'international partners.'[73]

Richard S. Hill and Steven Loveridge, *Secret History: State Surveillance in New Zealand, 1900–1956* (Auckland University Press 2023).

70 Scott [n 70] 1.

71 In 2000 the GCSB employed 220 staff and had a budget just over $20m whereas the NZSIS employed 115 staff with a budget of $1.5m. In 2024, the GCSB employs 605 staff with a budget of $402m whereas the NZSIS has 457 staff and a budget of $112m. See Department of the Prime Minister and Cabinet, *Securing Our Nation's Safety: How New Zealand manages its security and intelligence agencies* (2000); NZSIS, *Annual Report* (2024); GCSB, *Annual Report* (2024). These figures, indicative only, are not adjusted for inflation.

72 Desmond Ball, Cliff Lord, and Meredith Thatcher, *Invaluable Service: The Secret History of New Zealand's Signals Intelligence During Two World Wars* (Resource Books 2011); Ally McCrow-Young, 'Visibility, Power and Citizen Intervention: The Five Eyes and New Zealand's Southern Cross Cable' (2017) 12(3) *Westminster Papers in Communication and Culture* 37.

73 Intelligence and Security Act 2017, s. 201(1). The Ministerial Policy Statement: Cooperating with overseas public authorities, signed by the Minister Responsible for the GCSB and for the NZSIS on 1 March 2025 provides guidance to security professionals on their international relations.

5. Juridical professionals and cultural capital

'The juridical field,' according to Bourdieu, 'is the site of a competition for monopoly of the right to determine the law.'[74] It is structured by a hierarchy determined by the ongoing struggle among professionals of law who possess a form of institutionalised cultural capital which, derived from their certifiable legal training and university qualifications, enables them to make authoritative interpretations of a corpus of legal texts and the relationship between cases and those texts. In New Zealand judges of the Supreme Court, especially the Chief Justice, reside at the apex of the field's hierarchy, and near them are those legal professionals working at the Crown Law Office providing advice to the government, those working as integrity assurance officers for parliament, and those within government agencies. Below them are other legal professionals, including those who work for the Law Commission, commercial law firms, or clients, as well as those legal academics producing expert knowledge.

Juridical professions use their cultural capital to impose status distinctions among those contesting other professional fields by interpreting a body of rules and establishing procedures for resolving conflict occurring in those fields.[75] Unlike parliamentarians and security professionals, who rely almost exclusively on expertise found in Australia, Canada, and the United Kingdom, juridical professionals invest in, and benefit from, the local production of specialist knowledge to better undertake their own core tasks, and can translate and reconfigure international scholarship into a utile resource of expertise.[76] In so doing judicial professionals use their access to academic knowledge to connect their professional practices with widely held social values relating to justice and human rights. One of the reasons they can do this is because over the longer term, professions that invest in their pool of expert knowledge strengthen their ability to protect or advance their jurisdictional boundaries.[77]

While many juridical professionals have contributed to the making of national security law through public submissions to select committees, even prompting law reform on sedition,[78] those who interpret cases and national security law use their cultural capital to reproduce the juridical field's hierarchy while preserving their positions of esteem by holding themselves above the security practices of collecting secret intelligence and managing state violence. Their legal profession's esteem is at its height when judges play an important judicial review role by checking and balancing the power of ministers, making judgements on the lawfulness on security practices, and convicting

74 Bourdieu [n 4] 817.

75 Onuf [n 6] 316.

76 Reports of the Law Commission and the New Zealand Law Foundation are cases in point.

77 Abbott [n 18], particularly 52–58.

78 The expertise of the Law Commission is held in particularly high esteem among parliamentarians, most of whom spoke glowingly of their work on repealing the crime of sedition. New Zealand Law Commission, *Reforming the Law of Sedition* (Report no. 96) (Law Commission 2007).

individuals for crimes of sabotage, treason, and terrorism through the criminal justice system.[79] Lawyers appointed as the Inspector-General of Intelligence and Security subject security practice to close and sustained scrutiny within the judicial field, which security professionals have, at least in public, welcomed on the basis that it augments their social license to operate.[80]

When international law expertise is used to interpret national security law and cases treated by security professionals it becomes an important transnational dimension of this cultural capital. Lisa Stampnitzy has recently argued that the US Government developed a legal infrastructure to permit and defend its use of torture and assassination because the rise of a transnational human rights field reduced the effectiveness of plausible deniability.[81] In New Zealand, human rights law serves to reassure an uneasy public that safeguards restraining security practices are in place whereas international humanitarian law serves to reassure the public that limits exist on military action. However, while human rights law contains core rights that cannot be violated under any circumstances, most rights can be limited during times of emergency.[82] The right to privacy, for example, does not prevent state surveillance conducted to preserve democracy from a serious threat, but that does not necessarily stretch to include intelligence gathered to contribute to New Zealand's international or economic wellbeing.[83] The development of international humanitarian law facilitates lawful killing in certain circumstances by constructing categories of persons and objects worthy of protection and renders that

79 On the lawfulness of security practices, see Winkelmann H 2013. Judgment of Justice Helen Winkelmann: Dotcom v Attorney-General of New Zealand, return of evidence. http://news.rapgenius.com/Justice-helen-winkelmann-dotcom-v-attorneygeneral-of-new-zealand-return-of-evidence-lyrics (accessed 3 March 2014). On conviction of 'crimes against public order' and terrorism respectively, see R v Philip [2022] NZHC 3199; R v Tarrant [2020] NZHC 2192. Hamiora Pere is the only person executed for treason in New Zealand in 1869. On convictions of sedition: R v Holland [1914] 33 NZLR 931; R v Selwyn (8 June 2006) CRI: 2005-004-11804, District Court Auckland. See also New Zealand Law Commission [n 79], chapter 2.

80 All of those appointed as Inspector-General of Intelligence and Security have been juridical professionals: Hon Laurence Greig (1996 to 2004); Hon Paul Neazor CNZM, QC (2004 to 2013); Hon R A McGechan CNZM, QC (July 2013 to May 2014); Cheryl Gwyn (May 2014 to July 2019); Madeleine Laracy (Acting from August 2019 to June 2020); and Brendan Horsley (June 2020 to present).

81 Lisa Stampnitzky, 'The Lawyers' War: States and Human Rights in a Transnational Field' (2016) 64(2) *The Sociological Review* 170. For a similar argument but without the influence of Bourdieu's field theory, see Rebecca Sanders, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (Oxford University Press 2018).

82 See Mark Klamberg, 'International Human Rights Law and States of Emergency' in Damien Rogers (ed), *Human Rights in War* (Springer 2022), 105–63. See also Evan J. Criddle (ed), *Human Rights in Emergencies* (Cambridge University Press 2016).

83 Elspeth Guild and Sophia Soares, 'Torture and Security Service Mass Surveillance' in Didier Bigo, Emma McCluskey & Felix Treguer (eds), *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (Routledge, New Intelligence Studies Series 2023) 263–85. Guild and Soares lament, '[a]ll too often the claim of necessity to protect national security goes unexplained and unchallenged. As soon as a state authority raises the claim of national security, the authority making the claim all too often expects considerations of human rights and legality will fall way … If a state claims national security, that claim must be justified on the basis of evidence and suspectable to judicial control' 278.

killing more humane by restricting the types of weapons available for war.[84] Put simply, rather than restraining the collection of secret intelligence and the use of state violence in international affairs, international human rights law and international humanitarian law create the legal conditions for its permissibility and tolerability.

When serious allegations were made about possible war crimes committed by members of the New Zealand Special Forces and a successful terrorist attack on a marginalised religious minority community in Christchurch took New Zealand security professionals by surprise, ministers quickly established independent public inquiries to scrutinise these potential scandalous cases. Juridical professionals were appointed as chairs and members of these public inquiries, which are granted the power to make remedial recommendations, including proposing law reform.[85] Yet they were not well positioned to challenge the political field's established hierarchy because their tenue was temporary. While their recommendations tended towards problem-solving approaches rather than radical critique, the executive remains under no obligation to accept any recommendation made by an inquiry it establishes.[86] In any case recommendations to reform national security law, including recommendations to strengthen oversight measures and public accountability arrangements, often serve to facilitate, rather than restrict, the collection of secret intelligence and management of state violence while offering immunity to the political executive.[87] That is one reason why the juridical professionals put in charge of these public inquiries refer to international human rights law and international humanitarian law, both of which genuflect to state parties, but not to international criminal law, including the crime of aggression, which rests on the doctrine of individual responsibility that precludes head of state immunity, and can be enforced at the International Criminal Court.

Leading the Burnham Inquiry, Sir Geoffrey Palmer and Sir Terence Arnold justified their use of international humanitarian law – instead of international human rights law – to frame their analysis of the potentially scandalous activities of the New Zealand Special Air Service by citing Sir Kenneth Keith and Dapo Akande on the *lex specialis*

84 Maja Zehfuss, *War and the Politics of Ethics* (Oxford University Press 2018); Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021).

85 Leading the Burnham Inquiry, Sir Terrence Arnold and Sir Geoffrey Palmer have distinguished legal careers in New Zealand. Leading the Royal Commission of Inquiry, Sir William Young is a High Court judge while Jacqui Cain is a former diplomat with a law degree.

86 Enacting what Robert W. Cox described as problem-solving approaches, which "takes the world as it finds it, with the prevailing social and power relations and the institutions into which they are organized, as the given framework for action. The general aim of problem-solving is to make these relationships and institutions work smoothly by dealing effectively with particular sources of trouble." Cox contrasted problem-solving theory with critical theory that "is critical in the sense that it stands apart from the prevailing order of the world and asks how that order came about … [It] does not take institutions and social and power relations for granted but call them into question by concerning itself with their origins and how and whether they might be in the process of changing. It is directed towards an appraisal of the very framework for action, or problematic, which problem-solving theory accepts as its parameters." Robert W. Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory' Year 10(2) *Millennium: Journal of International Studies* 128.

87 Rogers [n 33].

principle, though a more cautious approach might apply the separate branches of international law relevant to this case concurrently because the terminology shared among these branches masks profound conceptual differences that are not necessarily compatible or easily reconcilable.[88] Describing the question of which international law is applicable to this case in such dualistic terms enables Palmer and Arnold to eschew any mention of international criminal law, even though, in March 2020, the Prosecutor of the International Criminal Court opened a preliminary investigation into alleged crimes against humanity and war crimes committed in Afghanistan since 1 May 2003.[89] While Palmer and Arnold criticised the way in which ministers and the NZDF handled the allegations of war crimes, they made only four recommendations, one of which sought to reform national security law by establishing an Inspector-General of Defence. While this recommendation is evidence of a problem-solving approach that will remedy one deficiency in the existing democratic controls over the military professionals' use of armed force, this oversight measure is designed to insulate the Minister of Defence from any military scandals, rather than to hold them publicly accountable.

Sir William Young and Jacqui Caine led the Royal Commission of Inquiry into the terrorist attack on Christchurch mosques on 15 March 2019, an attack that took New Zealand security professionals by surprise.[90] Also taking a problem-solving approach, their 18 recommendations to improve New Zealand's counter-terrorism effort strengthened the existing governance architecture yet never sought to fetter the executive prerogative. Young and Caine recommended clearer ministerial responsibility and public engagement, better informed integrity assurance measures, strengthening the Intelligence and Security Committee, and a review of all counter-terrorism related legislation. Their use of international law expertise was restricted to recommending that New Zealand's counterterrorism effort conform with New Zealand's domestic and international human rights obligations.

Sir Terence Arnold and Matanuku Mahuika conducted the first periodic review of the Intelligence and Security Act 2017 and the intelligence and security agencies governed by it.[91] While their review was not prompted by any specific case of security malpractice, the legislation requiring periodic reviews was passed in response to a series of scandals embroiling parliamentarians.[92] Their review was, however, bought forward

88 Rogier Bartels, 'The Interplay Between International Humanitarian and Human Rights Law when Applied During International Criminal Trials' in Damien Rogers (ed), *Human Rights in War* (Springer 2022) 197–205.

89 International Criminal Court, Statement of ICC Prosecutor Karim A.A. Khan KC on the Situation in Afghanistan: receipt of a referral from six States Parties, 29 November 2024.

90 Young and Jacqui [n 32].

91 Terence Arnold and Matanuku Mahuika, *Taumaru: Protecting Aotearoa New Zealand as a Free, Open and Democratic Society. Review of the Intelligence and Security Act 2017*, 31 January 2023. Like Arnold, Mahuika is a juridical professional. They were assisted by Dr Penelope Ridings, a career diplomat with expertise in international law, serving on the International Law Commission.

92 Sec. 235. GCSB's unlawful surveillance of Kim Dotcom, the unauthorised disclosures of Edward Snowden scandal, and Prime Minister John Key's involvement in the appointment of Ian Fletcher as the GCSB Director are examples of such scandals. See Rogers [n 11].

because of the 2019 terrorist attack and to respond to issues raised by the Report of the Royal Commission of Inquiry. Unlike the above-mentioned inquiries, the recommendations put by Arnold and Mahuika constitute a direct challenge to the consecrated parliamentarians atop the hierarchy structuring the political field, potentially fettering the executive's prerogative and restricting the everyday practices of security professionals. While they recommended that the Inspector-General of Intelligence and Security engage more often and more deeply with other oversight bodies and broaden the scope of its mandate to include the National Assessments Bureau, they were bolder when it came to the Intelligence and Security Committee. Since its current composition defeats its public accountability purpose, Arnold and Mahuika recommended that the Committee's membership be reconstituted so that it excludes members of the executive; notably the Prime Minister who usually has responsibility for the national security and intelligence portfolio, and the minister(s) in charge of the GCSB and the NZSIS. They also recommended the Committee's scope not only be deepened to assess agency effectiveness but also broadened to encompass the activities of the National Assessments Bureau, as well as the practices of intelligence professionals focused on supporting the New Zealand Defence Force or the New Zealand Police, or on ensuring compliance with the regulatory regimes managed by the New Zealand Customs Service and Immigration New Zealand. Arnold and Mahuika also recommended the reformed Committee be strengthened by a small, permanent secretariat staff.[93] Though the review was completed in January 2023, the Government has yet to announce its position on these rather radical recommendations.

6. Symbolic violence of national security law

Even though professionals of politics, security, and law struggle within one another, collectively they possess symbolic capital which manifests in accumulated social authority based upon public recognition of their positions within their respective fields.[94] This type of capital imposes cognitive categories used to represent and comprehend the politico-social dimension of contemporary world affairs. Social realities can be either conserved or transformed through inculcating classifications that either conceal or reveal the large extent to which the authority dominating social order is arbitrary.[95] For Bourdieu law is the form *par excellence* of the symbolic power of naming that creates the things named, including groups.[96]

Instrumental to the making of national security law but also a product of it, symbolic capital is used to impose meanings of national security – firstly, that 'national security is the condition which permits the citizens of a state to go about their daily

93 See recommendations 29–33.
94 Swartz [n 5] 84.
95 *Ibid*, 83.
96 Bourdieu [n 4] 838.

business confidently free from fear and able to make the most of opportunities to advance their way of life. It encompasses the preparedness, protection and preservation of people, and of property and information, both tangible and intangible'; and secondly, that '[n]ational security is about protecting New Zealand from threats that would do is harm. It is the foundation for New Zealand's overall prosperity and well-being'[97] – even as a definition of the term is not contained in New Zealand law but is specifically referred to in the Intelligence and security Act 2017 and the Policing Act 2008.[98] Originally expressed in *National Security System Framework* released in 2010, this first of these expansive meanings has been accepted by ministers, though Michael Cullen and Patsy Reddy, as well as Arnold and Mahuika, suggested revisions.[99] Derived from the New Security Agenda that emerged in the immediate aftermath of the Cold War to counter any expectations of a peace dividend within democratic societies, this meaning of national security, and the classifications that accompany it, has broadened and deepened to cover non-conventional security challenges, such as the serious transnational crimes of trafficking humans, drugs, and arms, for instance. Security challenges need no longer constitute an existential threat to the political community; they need only trouble the lifestyle of the global elite, and those aspiring to become part of that elite.[100] This meaning of national security also blurs the distinction between internal and external security, transforming New Zealand society into a legally permissive space for security practices. Signals intelligence, once focused exclusively on foreigners, now targets (albeit under certain warranted circumstances) New Zealanders, who were once protected under the law.[101] Originally geared toward defending New Zealand's territory and population from foreign aggression, the NZDF now regularly assists civilian agencies by providing surface patrols and aerial surveillance.[102] During the pandemic, military professionals even guarded quarantine facilities.[103] Just as the NZDF underwent this civilianisation of sorts, a slow process of militarisation continues

97 Department of the Prime Minister and Cabinet, *National Security System Framework* (2010); Department of the Prime Ministers and Cabinet, *Secure Together: New Zealand's National Security Strategy, 2023–2028* (2023).

98 But see New Zealand Security Intelligence Service Act 1969, s. 2(1) (repealed). The concept of national security found in the GCSB Act 2003 (also repealed), unlike the NZSIS Act, included the defence of New Zealand from a military invasion of a foreign power.

99 The meaning of national security was much debated during the Committee of the Whole House stage: (15 March 2017) 720 NZPD 16716. See also John Key, 'Speech to the New Zealand Institute of International Affairs', 5 November 2015. Michael Cullen and Patsy Reddy, *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand,* 29 February 2016, 156–7; Arnold and Mahuika [n 92] 248–9.

100 There has been a slight narrowing through the removal of climate change as a national security threat, but not to the extent reported elsewhere. Cf. Paul F. Scott, ''State Threats,' Security, and Democracy: The National Security Act 2023' (2024) 44(2) *Legal Studies* 260.

101 Government Communications Security Act 2003, s.14 [repealed].

102 Department of the Prime Minister and Cabinet, *Maritime Patrol Review* (February 2001) https://www.dpmc.govt.nz/sites/default/files/2017-03/maritime_patrol_review.pdf.

103 Harriet Kay and others, 'Fusing Intelligence and Strategy Capabilities: The MIQ Experience' (2023) 5(2) *National Security Journal* 5–25.

to shape the New Zealand Police into something resembling what Jude McCulloh describes as a blue army.[104]

This symbolic capital is also used to construct a new grouping of security professionals, largely self-designated as the national security community to distinguish it from all other public servants, commercial providers of security services, and the rest of society-at-large. This neo-tribal in-group not only imagines itself separate to, rather than part of, New Zealand society, but also as watching over, rather than serving, the New Zealand public. Given the rather elastic meaning of national security, the new group's membership includes security professionals from the GCSB, NZSIS, NZDF, and the New Zealand Police as well as employees from the Department of the Prime Minister and Cabinet, Ministry of Defence, Ministry for Primary Industries, New Zealand Customs Service, The Treasury, Ministry of Business, Innovation & Employment, New Zealand Foreign Affairs and Trade, and the Ministry of Transport.[105] The feelings of prestige attached to belonging to such an august group remain attractive to those who are not authorised to collect secret intelligence or to manage the use of state violence for the purposes of preserving New Zealand's democracy. Given all members of this group have a professional stake in sustaining its existence, it is imperative for them that the meaning of national security is never defined in law so that the possibilty remains for it to be enlarged or constricted as necessity demands. Rather than test this new conventional thinking, Arnold and Mahuika sought to codify it when they recommended expanding the scope of the existing oversight measures and public accountability arrangements to include 'other agencies with significant intelligence and collection and assessment functions that bear on national security, including Defence Intelligence, Customs Intelligence, Immigration Intelligence and Police Intelligence.'[106]

Yet declaring, and then performing, their membership of this national security community seeks not only to transform all intelligence professionals, military personnel, and law enforcement officers into security professionals but allows them to be

104 Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (Melbourne University Press, 1997). The New Zealand Police has had specialist units trained to use lethal force to counter lethal force; firstly, the Armed Offenders Squad in 1963; and secondly, the Anti-terrorist Squad in 1975 (renamed as the Special Tactics Group in 1992). Both units train with certain military units, including the New Zealand Special Air Service, and use military weapons. Frontline Police Officers are now routinely armed, though their weapons are carried in vehicles rather than on their person. According to Richard Shortt, the routine arming of the New Zealand Police was 'probably one of the most momentous' in the history of New Zealand policing, but 'seemingly passed without comment.' He describes the New Zealand Police as 'a well-armed police service' cited in Nicholas Dynon, 'ARTS and the Myth of the Unarmed Police Officer' (2020) 16 *Line of Defence: New Zealand's Defence and National Security Magazine* 44. For an insider account, see Ray Van Beyen, *Zero-Alpha: The NZ Police Armed Offenders Squad official history: From Armed Constabulary to Anti Terrorist Commandos* (Howling at the Moon Productions 1998). See also Garth den Heuer, 'Mayberry Revisited: A Review of the Influence of Police Paramilitary Units on Policing' (2014) 24(3) *Policing and Society* 346.

105 Department of the Prime Minister and Cabinet, *Secure Together* [n 98] 35.

106 Arnold and Mahuika [n 92] 257.

mobilised as a resource by the most powerful professionals of politics and security who insist *ad nauseum* that international partners are a means of contributing to the ends of New Zealand's national security. As part of this insistence, they frequently recite a value-for-money proposition – that is, that GCSB gets access to 99 intelligence reports from its partners in return for each one it produces, and that the NZSIS receives 170 in return for every intelligence report it produces – even though this quantitative metric has no bearing on the quality or impact of those reports for New Zealand decision-makers as most of them are produced in response to US priorities.[107] Yet, as we have seen, the New Zealand security profession is a creature born from the transnational field of (in)security and its very existence depends upon its ability to serve the interests of those who dominate that field. Any contributions they make to preserving New Zealand's democracy are welcome by-products of those efforts. In this sense, New Zealand national security law is a function of New Zealand's international political strategy and a means by which the transnational positionality of New Zealand security professionals is better assured.[108] By inverting the dynamic of social power in this way symbolic capital functions to draw attention towards the broadening spectrum of security practices now performed under the auspices of national security, and away from an unwavering commitment to an international political strategy predicated on closer defence relations with US.[109]

Most people, with limited forms of political, social, and cultural capital at their disposal, are subordinated by the social hierarchies that structure professional fields. Promoting a particular view of the social world which piously reproduces official categories, concepts, and rationalities that encourage a mis-cognition of security practices, and imposing meanings that create conditions required for those who are dominated to accept their subordination by internalising these power relations as the unquestionable natural social order, New Zealand's national security law is an act of symbolic violence which Bourdieu describes as 'the gentle, disguised form which violence takes when overt violence is impossible.'[110] This symbolic violence masks its own historical arbitrariness with the mythmaking needed to invent a foundational fiction of political order and 'is misrecognized obedience … accepted as legitimate rather than as an arbitrary imposition.'[111] It subjugates the knowledge of New Zealand's international partners' myriad acts of lawless violence and cuts away the ground needed for radical dissent. The violence occurs as the New Zealand Police unlawfully raid the homes of those, such as Nicky Hager, an investigative journalist, who might inform and

107 The vital importance of New Zealand's intelligence partnerships is mentioned in all, but a very few, public facing documents disseminated by the GCSB and the NZSIS. See also, for instance: Andrew Hampton, Statement on the Intelligence and Security Bill, 22 September 2016; Andrew Hampton, Speech to Transparency International New Zealand, 13 February 2017. See also Cullen and Reddy [n 100], paragraph 3.43.

108 Rogers, [n 40].

109 *Ibid.*

110 Pierre Bourdieu, *The Logic of Practice* (Standford University Press 1990) 133, cited in Swartz [n 5] 89.

111 Swartz [n 5] 83.

transform public opinion.[112] It occurs through the law's secrecy provisions which ensure the effects of security practice remain beyond the public's grasp; not only will any unauthorised discharge of classified information be severely punished but security professionals are also given criminal immunity.[113] This violence occurs as perfunctory consultations with the public and as the cooption of representatives of civil society and members of community groups appointed as non-experts on public advisory committees that attract media attention but are easily ignored by those in power.[114] It occurs as academics uncritically accept and willingly reproduce the official meaning of national security and perpetuate the fiction that international partners are as a means for the ends of New Zealand's national security.[115]

7. Conclusion

New Zealand's national security law is less about defending liberal democracy from serious, urgent, or existential challenges and more about augmenting the position of New Zealand security professionals on a transnational field of (in)security. The United States' National Security Agency lies at the heart of this transnational field and New Zealand's international political strategy is anchored on deepening its security ties with the United States. National security law legitimises the security profession in New Zealand by granting it extraordinary powers based on highly specialised tradecraft that is preserved and developed by transnational guilds. Without ongoing access to this tradecraft New Zealand security professionals would lack their social capital and be indistinguishable from intelligence, military, and policing professionals. The most powerful professionals of politics have an important stake in maintaining the security profession and benefit from its position within the transnational field because it becomes a useful reservoir to replenish their political capital. Conventional thinking on national security law obscures these important politico-social concerns, but an international political sociology built around Bourdieu's fields theory and his concept of capital deepens our understanding of the professional stakes involved in making of national security law. My focus here on material gathered from New Zealand, which I hope helps broaden the empirical foundations of knowledge produced on the international political sociology of law, the law as a profession, and the PARIS approach to (in)securitisation, must however be accompanied by other case studies before

112 Hager v Attorney General [2015] NZHC 3268. See also Independent Police Conduct Authority, *Unlawful Search of Journalist Nicky Hager's Property, 20 August 2019* [IPCA: 15-1173].

113 Intelligence and Security Act 2017, s. 108–11.

114 Rogers, Nelson, and Battersby [n 32].

115 Uncritical accounts are mostly descriptive, lack theoretical engagement, and explain very little. See, for instance: Alexander Gillespie and Claire Breen, 'The Security Intelligence Agencies in New Zealand: Evolution, Challenges and Progress' (2021) 36(5) *Intelligence and National Security* 676–95; Austin Gee and Robert G. Patman, 'Small State or Minor Power? New Zealand's Five Eyes Membership, Intelligence Reforms, and Wellington's Response to China's Growing Pacific Role' (2020) 36(1) *Intelligence and National Security* 34.

anything other than the most provisional of conclusions can be drawn about the international political sociology of national security law.

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