Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

Springer

References

Barnes M (2009) Queensland Coroner, inquest into the loss of the *Malu Sara*. 12 February
Bligh A (2010) Quoted in the Townsville Daily Bulletin, 20 July
Brandis G (2009) On ABC Radio, 12 October
Colmar Brunton Social Research (2009) Final report, National human rights consultation – community research phase, September, No. 40338
Commonwealth of Australia (2010) Australia's Human Rights Framework. April
Crime and Misconduct Commission (2010) CMC. Review of the Queensland police service's Palm Island review. June
Hirst J (2009) From British rights to human rights. In: Leeser J, Haddrick R (eds) Don't leave us with the bill: the case against an Australian bill of rights. Menzies Research Centre, Canberra
Kelly P (2009) The Weekend Australian, 10 October
Merkel R, Pound A (2009) Submission to the National human rights consultation. Submission AGWW-7T27RL, 15 June
National human rights consultation (2009) Report. September
Roberts Chief Justice JG (2010) International public lecture. University of Melbourne Law School, Melbourne, 28 July
Smith ATH (2010) Inching towards an Australian bill of rights: cousinly comments on the Australian national human rights consultation. University of New South Wales Law Journal 33(1):171–192
The Australian (2010) US Chief Justice's pep talk on bill of rights. 30 July

Part 7
Influence of International Treaties

Petra Butler

After approaching constitutional issues from a domestic perspective, Session 7 of the conference starts discussing the influence of international law on New Zealand which is concluded by session 8 with a more targeted discussion on Trans-Tasman relationships.

Session 7 took account of the fact that in today's world countries are less and less constitutional islands and cannot avoid being influenced by international law. As one of the discussants, Kennedy Graham, points out "[p]erhaps no issue confronts human society – governments, analysts, media and citizenry – more in the 21st century than the relationship between major international treaties and national constitutional processes."

The discussants approach the topic from three different angles. First, Kennedy Graham explores the influence of international treaties on the uncodified New Zealand constitution. Treasa Dunworth examines the influence of international law in New Zealand, arguing that while generally New Zealand has a receptive approach to international law in its legal system, there is a need to have a robust and thorough debate on the extent to which, and the basis on which international law should play a part in the domestic legal system. Lastly, Ben Thirkell-White asks whether in regard to international economic law, an end to executive dominance had come, after assessing the adequacy of legislative scrutiny over the process of economic treaty-making in New Zealand.

Parliament, the executive, and the Courts are all affected but also involved in making international law relevant in the domestic sphere. As a starting-point, Kennedy Graham's paper gives an overview of the major international treaties affecting New Zealand. He considers, taking a step back, to what extent international treaties influence New Zealand constitutional thought. He points out that major treaties of the twentieth century have heavily influenced the theory of sovereignty and of constitutional thought in UN member states, New Zealand being no exception.

Teresa Dunworth then examines the role played by Parliament in overseeing treaty-making by the executive, suggesting incremental reform. She argues that although there has been some measure of increased transparency and public

participation as a result of the changes to the treaty-making process, overall, the executive has not relinquished any real power to Parliament. Reform could incorporate a greater effort to ensure that the National Interest Analyses properly meet the criteria in the Standing Orders. Further she suggests that it would also be helpful if shadow reports were received. Indeed, they could be actively encouraged. This would go some way to mitigating the existing executive dominance of the process. Finally, broader and more transparent consultations would make the process more meaningful. Furthermore, she also discusses in which way international law is treated in the courts.

Lastly, Ben Thirkell-White puts the two earlier papers into perspective by focusing on international economic law which is particularly apt since even though the development of international economic law has stalled globally the New Zealand government continues to press ahead with some quite radical international economic agreements.

Chapter 16
Global Treaties and the New Zealand Constitution

Kennedy Graham

16.1 Introduction

Perhaps no issue confronts human society – governments, analysts, media and citizenry – more in the twenty-first century than the relationship between major international treaties and national constitutional processes.

Universalism is of two kinds: ancient and modern. For most of the five millennia of recorded history, political entities remained free to govern themselves, largely unencumbered by any challenge of what other, remote, societies might think or wish to do. Universalism of a "primal" kind prevailed, where societies innocently presumed their values to be divinely ordained, intrinsically right, and universally valid. In the earliest treaty left to posterity, the peace signed by the Egyptians and the Hittites in the twenty-third century BCE, the protagonists undertook to respect each other's values and political procedures, thereby acknowledging for the first time a degree of relativity in human affairs.

Yet universalism, and its offspring absolutism, remained entrenched in the laws of empire, both secular (Akkadian, Sassanian, Roman, Sinitic) and religious (Abbasid-Ummayad, Byzantine, Ottoman, Holy Roman). Its grip loosened only recently with the Westphalian era that emerged in the seventeenth century CE – based on the nation-state and (largely) secular-based sovereignty.

With Westphalia a threefold change occurred, concomitant and causally related. In political thought, universalism ceded to nationalism. In jurisprudential thought, natural law ceded to positivism. And in legal thought, imperial law ceded to international law, conceived and defined in a most particular way. From the

Dr Kennedy Graham is a Member of Parliament and a Senior Adjunct Fellow at the School of Law, University of Canterbury.

K. Graham
Parliament Buildings, Wellington, New Zealand
e-mail: Kennedy.Graham@parliament.govt.nz

C. Morris et al. (eds.), *Reconstituting the Constitution*,
DOI 10.1007/978-3-642-21572-8_16,

mid-seventeenth to the early twentieth centuries, nationally-guided, positivist international law prevailed, reaching its apogee during the nineteenth century. International relations were just that – relations between nations, fully sovereign.

The early twentieth century witnessed the first move by nations towards global unity. Such a move entailed the fateful surrendering ("sharing") of national sovereignty. With the introduction of collective security, global enforcement power and international organisation, humankind commenced the painstaking move towards a single political identity. The first experiment, the Covenant of the League of Nations 90 years ago, was rudimentary in theory and imperfect in realisation. The second attempt, the United Nations 65 years ago, built upon that foundation, reinforcing the strategic direction of international affairs laid down by the League, but introducing a new dimension – augmenting the state with the individual as a subject in international law.

Yet a century on, primacy of loyalty and power remains at the national level, with the nation-state continuing to act as the central unit of political principle and action. We are, arguably, in the midst of a two-century transition, from the national to the global level, in political loyalty and power. At such a mid-point the tension between a state's national sovereignty and its international rights and responsibilities is acute. That tension attends particularly to a nation-state's constitutional processes in adopting treaty obligations to which it has agreed.

This chapter analyses certain selected treaties for their import for national sovereignty, their impact specifically on New Zealand; and the implications the treaties carry for this country's sovereignty and constitutional thought.

16.2 The Major Treaties in International Law

Of the panoply of international treaties that have come to shape international relations in the early twenty-first century,[1] certain treaties are generally regarded as both central and fundamental to the nature of the contemporary international system. To this extent, they may be termed "global treaties". They are:

- The Bretton Woods agreements of 1944;
- The United Nations Charter of 1945;
- The three treaties on weapons of mass destruction (the Nuclear Non-Proliferation Treaty of 1968, the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993);
- The two international human rights covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) of 1968;

[1] There are over 500 major international treaties registered with the United Nations Treaty Register. See: http://treaties.un.org/pages/UNTSOnline.aspx?id=1 (last accessed 18 March 2011)

- The United Nations Convention on the Law of the Sea of 1982;
- The United Nations Framework Convention on Climate Change of 1992 (and protocol);
- The Marrakesh Accord establishing the World Trade Organization (WTO) of 1994; and
- The Statute of the International Criminal Court of 1998.

Of these, the United Nations Charter remains *primus inter pares*, for reasons outlined below and reflected in the supremacy article in the document itself.

The inter-relationship between these treaties and their effect on the international system is complex. Created by nation-states through the traditional treaty-making process, they contain nonetheless self-generating provisions that have an evolutionary effect on the system itself, including the nation-state as architect. Creatures of national sovereignty, they are transforming the very concept, indirectly encouraging a sharing of sovereignty at the global level – evoking even the vision of "global sovereignty".

These treaties may be seen as naturally falling into three "pillars":

- The United Nations Charter which governs the international structure, and the "thematic treaties" which operate within the United Nations system – in arms control, maritime affairs, and climate change;
- The Bretton Woods treaties which established and govern the major international financial institutions and the subsequent WTO on trade; and
- The human rights and criminal justice treaties which stand apart from the others in dealing with the individual in international law, despite being the creation of the nation-state.

The interaction between these three pillars is also complex. For half a century a stand-off existed between the Bretton Woods and the United Nations systems with little interaction and virtually no cooperation. The third pillar has also taken a comparable time to develop. The past two decades, however, have witnessed significant progress in both areas, with procedural agreements between the United Nations and the international financial institutions, and the strengthening of human rights and the creation of the International Criminal Court through the Rome Statute.

The five principles most central to contemporary international relations – sovereign equality, pacific settlement, legitimate use of force, self-determination and domestic jurisdiction – are enshrined in the United Nations Charter. These "thematic" principles, inherently prescriptive and flexible in interpretation, continue to govern us today and structure the way we perceive reality and react to events as they occur. The Charter constitutes the rather flimsy framework within which the international system functions.

A final, "structural" principle establishes the institutional nature of the international system – universal and permanent membership of the United Nations.

The expected universality of the United Nations is clear in the provision opening membership to all peace-loving states. While the original membership of 51 nation-states reflected the colonial legacy in the mid-twentieth century, the subsequent decolonisation and post-Cold War independence movements have bequeathed 193 member states of the United Nations. They are not expected to leave. Today, the planet is comprised of a closed grid of nation-states, politically contiguous in a global system, operating an uneasy and shifting balance between national power, international obligation and global aspiration.

It is within that contextual United Nations structure of internationalism that the sectoral treaties play out. But a trend can be discerned of greater global aspiration with each treaty as the decades pass.

16.3 Global Obligations and New Zealand Statute

In assessing the relationship between international legal obligation, national sovereignty and domestic law, the most pertinent measure is the extent to which, and the manner in which, international law is translated ("implemented") into binding domestic law. There is significant variation in this respect between the selected global treaties.

16.3.1 The United Nations Charter

New Zealand has never implemented the United Nations Charter as a whole into its domestic law. Following New Zealand's signature on 26 June 1945 Parliament held a debate on the United Nations Charter in July and August, agreeing to a motion to approve it and recommend ratification.[2] No implementing legislation, however, was passed. Given the dualist tradition in implementing international law observed by New Zealand, it follows that the Charter has never become part of New Zealand domestic law in its entirety. This compares with states of monist tradition which, on signing an international treaty, accept its provisions automatically into their domestic law.

[2] *New Zealand Parliamentary Debates (Hansard)* Vol. 268–269, 24 July–7 August 1945. The motion was adopted with one abstention. The national mood was expressed by the Prime Minister of the day, Rt Hon Peter Fraser: "I do not know if there has ever been in the history of mankind a more important document than the Charter of the United Nations. It is important … because it marks a great opportunity, and perhaps the last opportunity, that the nations of the Earth will have of forming an organisation to maintain peace, to prevent aggression. … The UN Organisation can only succeed if the nations decide to implement its principles and provisions honestly and determinedly with singleness of mind and purity of heart." (Vol. 268, p. 575.)

Only one provision of the Charter is expressly implemented in New Zealand law,[3] namely Article 41 pertaining to economic sanctions.[4] The United Nations Act 1946 confers upon the Governor-General-in-Council the power to make regulations to enable New Zealand to fulfil its obligations under Article 41 of the Charter, namely, to implement Security Council decisions (binding or non-binding) pertaining to economic sanctions. New Zealand has applied economic sanctions (including arms embargoes) on 27 occasions.[5] It seems that the Act has been invoked each time, though there appears to be no public documentation of this.

It is surprising that other provisions of the United Nations Charter have not been implemented in New Zealand law, given the extent to which the Charter impacts upon the domestic life of United Nations member states. Under Article 25 United Nations member states agree to accept and carry out the decisions of the Security Council. This clearly pertains to both economic (and related) sanctions under Article 41, military action under Article 42,[6] and Article 53 pertaining to action by regional organisations.[7]

With respect to Article 42, it is not clear what legal authority the government has invoked to deploy the national armed forces overseas in United Nations enforcement operations (Korea 1950, Southern Rhodesia 1966, Iraq 1991) – whether the deployment of forces require a legislative basis or can rest on prerogative. In the case of Korea, Parliament adopted in 1950 the Emergency Forces Act No. 6 to make

[3] Some treaty provisions may be given effect in domestic law, however, without the need for implementing legislation. This includes certain provisions of the United Nations Charter. See also Diplomatic Privileges and Immunities Act 1968.

[4] "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (Charter of the United Nations, Article 41.)

[5] Southern Rhodesia (1966); South Africa (1980); Iraq (1990); Somalia (1992); FR Yugoslavia (1992); Libya (1992); Liberia (1992); Angola (1993); Bosnia & Herzegovina (1994); Rwanda (1994); Haiti (1994); Sierra Leone (1997); Afghanistan (1999); Eritrea and Ethiopia (2000); Al Qaida/Taliban (2001); DR Congo (2004); Sudan (2004); DPRK (2006); Côte d'Ivoire (2006); Iran (2007); Lebanon (2008). Not all remain in force, and some have been re-applied.

[6] "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." (United Nations Charter, Article 42.)

[7] "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state." (United Nations Charter, Article 53 (1).)

provision for the raising of armed forces for United Nations purposes.[8] The Act empowered the Governor-General, in the name of the King from time to time, to "raise and maintain an emergency military force for fulfilling the obligations undertaken by New Zealand in the Charter of the United Nations". This was passed on 25 August, nearly 2 months after the government had deployed naval vessels to Korea. The government may have believed it had the authority to deploy under the Defence Act 1909, although if so this begs the question of the need for the 1950 legislation. The 1950 Act was replaced by comparable legislation in 1953,[9] which was, in turn, repealed in 1991.[10]

Article 43, for its part, envisaged a series of agreements between the United Nations and member states which would facilitate the provision of national armed forces to serve on a continuous stand-by basis under United Nations command.[11] This provision was never pursued as a result of the bipolar tensions of the Cold War. There is, however, nothing to prevent it being revived in the twenty-first century if the political circumstances become propitious.

16.3.2 The Weapons of Mass Destruction Treaties

The three treaties banning biological and chemical weapons and restricting nuclear weapons constitute a tightly restrictive regime on weapons of mass destruction.

The Nuclear Non-Proliferation Treaty, concluded in 1968 and in force since 1970, was not implemented in New Zealand law until nearly two decades later, initiated by the nuclear-free legislation of the mid-1980s. Following the negotiations over the regional South Pacific nuclear-free zone, the government

[8] Emergency Forces Act No. 6, 25 August 1950: "An Act to Make Provision for the Raising of Military and Air Forces for Service During Any Emergency Arising out of Obligations Undertaken by New Zealand in the Charter of the United Nations and to Authorise the Making of Emergency Regulations in Relation Thereto".

[9] Emergency Forces Rehabilitation Act 1953. The purposes were expanded to cover the United Nations Charter obligations "or otherwise".

[10] Rehabilitation Act Repeal Act 1991.

[11] "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." (United Nations Charter, Article 43.)

moved to introduce a national zone with stronger features relating to visits by nuclear-capable warships. The resulting New Zealand Nuclear-free Zone, Disarmament and Arms Control Act 1987 became an omnibus legislation that implemented a number of international arms control treaties. In addition to legislating for the national nuclear-free zone, the Act implemented five international treaties whose implementation had hitherto been neglected, some for a considerable length of time, viz, the Partial Test Ban Treaty (1963), the Nuclear Non-Proliferation Treaty (1968), the Seabed Treaty (1971), the Biological Weapons Convention (1972), and the South Pacific Zone Treaty (1985). Each treaty is set out in full in schedules to the Act. The Foreign Affairs, Defence and Trade Committee (FADT Committee) reported favourably on the Act in October 1986.

The Chemical Weapons Convention, signed by New Zealand in 1993, was incorporated into domestic law three years later. The stated purpose of the Chemical Weapons (Prohibition) Act 1996 is to "implement New Zealand's obligations under the Convention". The Convention is included in its entirety as a schedule to the Act. The FADT Committee reported favourably to the House on the Bill, although no National Interest Analysis appears to have been produced.

16.3.3 The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) of 1982 did not enter into force until 1994, after extensive modification of Part XI. The United Nation Convention of the Law of the Sea Act 1996 took as its "straightforward" purpose the implementation in New Zealand law, as necessary, provisions of the Convention so as to enable New Zealand to ratify UNCLOS.[12] In submitting the draft legislation, the government explained that many of the rules set out in UNCLOS had already become customary international law. Moreover, much of the legislation required to implement the provisions of UNCLOS was already in place, such as those relating to the exploration and exploitation of the continental shelf,[13] the management and conservation of marine living resources, and protection of the Marine Environment.

The draft legislation was considered by the FADT, which recommended changes of a technical or drafting nature only.

[12] United Nations Convention on the Law of the Sea Bill (168–1) 1996, Explanatory Note, p. i.

[13] Provisions contained in the Continental Shelf Act (1964), the Territorial Sea and Exclusive Economic Zone Act (1977), and the Maritime Transport Act (1994). See United Nations Convention on the Law of the Sea Bill (168–1) 1996, Explanatory Note, pp. ii–iii.

16.3.4 The United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change was implemented in New Zealand law a decade after signing, and 5 years after the Convention's Kyoto Protocol was signed. The Climate Change Response Act 2002 incorporated the whole of the Convention and the Kyoto Protocol in respective schedules. The Act was designed to put in place a framework to allow New Zealand to meet its international obligations under the Kyoto Protocol. It includes powers for the Minister of Finance to manage the country's holdings of units, and to trade units on the international market. It establishes a registry to record holdings and transfers of units, and establishes a national inventory agency to record information relating to greenhouse-gas emissions in accordance with international requirements.

In its consideration of the draft legislation, the FADT Committee noted that, while some provisions fell within existing common law or within the prerogative powers of the Crown, others could not be met through existing domestic law. These included providing for the necessary information collection powers that would be critical to ensuring compliance with the Kyoto Protocol. There was a need for a "clear basis" for the Crown's powers to issue, trade and retire units, and also the right of the New Zealand public to access registry information required as part of the international obligations.

The Climate Change Response Act 2002 recognised the further need to fulfil the obligations of accountability and transparency of process. In this regard, it provides for a clear delineation of the powers of the different Ministers and administrative agents. It safeguards the interests of parties trading with the Crown by providing a clear legal basis for the registry and ability of the Minister of Finance to trade.[14]

The 2002 Act was repealed and replaced by the Climate Change Response (Moderated Emissions Trading) Act 2009. While the provisions of the later legislation were weaker than its predecessor, the legislative change carried no constitutional significance.

16.3.5 The Bretton Woods Agreements

The 1944 Bretton Woods agreements, establishing the International Monetary Fund (IMF) and the World Bank,[15] were not implemented in New Zealand law for nearly two decades. The International Finance Agreements Act 1961 simply enables the government to be a member of the IMF and the World Bank, and the Bank's associated organisation, the International Finance Corporation. The bill that gave rise to the Act does not seem to have been considered by a select committee.

[14] Foreign Affairs, Defence and Trade Committee (2002), pp. 1–2.

[15] Formally known as the International Bank for Reconstruction and Development.