Parliamentary Sovereignty Versus Executive Responsibility: The making of regulations to give effect to obligations under the United Nations Charter

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This article analyses various matters which arise from New Zealand's response to the United Nations Security Council's resolution 1373 on terrorism which followed the 11 September 2001 attacks on New York and Washington, DC. In particular, it considers the interaction between regulations made under the United Nations Act and rights and freedoms guaranteed under the New Zealand Bill of Rights Act 1990.

I Introduction

In the immediate aftermath of the terrorist attacks in New York and Washington DC, the United Nations Security Council adopted Resolution 1373 which, amongst other things, required all member States to report to the Council's Counter Terrorism Committee on the steps taken to implement the Resolution and the other twelve international conventions on terrorism.[1] The Resolution placed particular emphasis on the issue of the financing of terrorism, calling on States to become party to the International Convention for the Suppression of the Financing of

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[1] United Nations Security Council Resolution 1373, S/RES/1373, 28 September 2001, paragraph 6.

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Terrorism 1999[2] and requiring certain steps to be taken in the prevention and suppression of terrorism. In response to Resolution 1373, New Zealand made the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 (the Terrorism Regulations), pursuant to an empowering provision in the United Nations Act 1946.[3]

This exposes an interesting aspect of the traditional tension between the Executive and Legislature. There has been, as reflected within the Magna Carta of 1215 and the Bill of Rights of 1688, a long-standing tension between the need for the Executive to have the ability to carry out certain functions, and the sovereignty of Parliament to legislate without interference. In the context of the regulations made by New Zealand in response to Resolution 1373 (by way of illustration), this article considers the question of regulation-making powers of the New Zealand Government in respect of obligations imposed upon it by the UN Security Council. Particular attention is paid to the interaction between regulations made under the United Nations Act and rights and freedoms guaranteed under the New Zealand Bill of Rights Act 1990, this heightening the tension because of Parliament's role as guardian of the public interest.[4]

II The United Nations Act 1946

In New Zealand, resolutions made by the United Nations Security Council (UNSC) under Chapter VII of the Charter of the United Nations, and the obligations they impose upon New Zealand, are given effect to through the United Nations Act 1946, its preamble stating that it is:

> An Act to confer on the Governor-General in Council power to make regulations to enable New Zealand to fulfil the obligations undertaken by it under Article 41 of the Charter of the United Nations.

Section 2(1) of the Act provides that if the Security Council calls upon the New Zealand Government to apply any particular measures to give effect to a decision of the Council, then the Governor-General in Council may make '. . . all such regulations as appear to him to be necessary or expedient for enabling those measures to be effectively applied.'

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[2] New Zealand signed the Convention on 7 September 2000 and, following the enactment of the Terrorism Suppression Act 2002, ratified it on 4 November 2002.

[3] The United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 came into force on 1 December 2001 and were to expire on 30 June 2002 (by which time it was expected that the Terrorism Suppression Bill would have passed through Parliament). Due to the early dissolution of Parliament, however, (prompting early elections in July 2002), the life of the Regulations was extended to 31 December 2002 by the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Amendment Regulations 2002.

[4] It is, naturally, contestable whether Parliament or the Judiciary is the ultimate 'guardian' of the public interest, a matter discussed further within this article: see Part V(D) below.

Regulations made under the United Nations Act (United Nations regulations) fall within the category of what are known as 'Henry VIII Clauses', enabling provisions that authorise the regulations made thereunder to override primary legislation. Sub-paragraph (2) states: 'No regulation made under this Act shall be deemed to be invalid because it deals with any matter already provided for by an Act, or because of any repugnancy to any Act.'

III Regulation-making powers

In March 2002, the Regulations Review Committee of New Zealand's Forty-Sixth Parliament presented a report entitled *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments* to the House.[5] The report is not directly on point, but there are principles enunciated within it that are relevant to the question of the Executive's regulation-making powers under the United Nations Act and to the interaction between such regulations and the New Zealand Bill of Rights Act.

As the title suggests, the report of the Regulations Review Committee is concerned with regulations that authorise international treaties to override any Act of Parliament, the view of the Committee being that (as a principle) only Acts should amend other Acts. While this focus on international treaties is due to the particular terms of reference of the Committee inquiry,[6] it is most unfortunate that the Committee did not concern itself in any detail with regulation-making powers that might authorise obligations under the United Nations Charter (which is, after all, one of the most important multilateral treaties in existence) to override any Act of Parliament. The Committee took a peculiar approach to the issue of section 2 of the United Nations Act. It, on the one hand, noted concern with the breadth of these regulation-making powers. It then dismissed the need to review those powers, stating:[7]

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[5] Report of the Regulations Review Committee, *Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, NZAJHR (2002) I. 16H.

[6] The Committee's terms of reference required it to consider: (1) The circumstances in which regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments have been used; (2) Alternative means of implementing international treaties into New Zealand law by regulations that do not authorise the provisions of a treaty to override any provisions of New Zealand enactments; (3) The appropriateness of enacting regulation-making powers to implement international treaties into New Zealand law, notwithstanding the provisions of any other enactment; (4) General principles for identifying if and when it is appropriate to enact regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments; and (5)What limits should be imposed on prescribing regulations to implement international treaties by overriding any provisions of New Zealand enactments.

[7] Above n 5, p 29.

> We do not seek review of section 2(2) of the United Nations Act 1946, as this provision falls within the exceptional circumstances in which regulation-making powers authorising overriding treaty regulations are justifiable . . .

The Committee does not, however, explain the basis for this conclusion. While the issue might appear to be narrow in its focus, it is regrettable that it has not been fully considered since it is one that goes to the heart of the Committee's inquiry – the balance between Executive law-making authority and Parliamentary sovereignty. Notwithstanding the lack of direct consideration, there are various matters discussed within the report, and recommendations made, that are of relevance to the regulation-making power under the United Nations Act.

To begin with, the Regulations Review Committee was critical of Henry VIII Clauses, the overriding message of the Committee being that regulation-making powers should enable the derogation of an Act of Parliament only in exceptional circumstances.[8] It accordingly recommended that the House consider limiting such powers in a number of ways, with the following suggestions having some bearing on the power within the United Nations Act:[9]

- Limiting enabling provisions to override the principal Act only;[10]
- Expressing the particular primary legislation provisions that may be overridden by such regulations;[11]
- Limiting such operation to matters of a technical nature or emergency measures;[12]
- Providing for additional Parliamentary scrutiny of any such regulations;[13] and
- Prohibiting the derogation of the common law and the New Zealand Bill of Rights Act 1990.[14]

Of those recommendations, some warrant further consideration, others only brief mention. As well as enabling the making of regulations, the United Nations Act provides for liability for breach of any regulations made under the Act and application of the Act in the Cook Islands.[15] That is, however, the extent of the Act.

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8 Above n 5, recommendation 1, p. 17. See also the Regulation Review Committee's discussion of Henry VIII Clauses at p. 15 and an earlier report of the Committee concerning such clauses, *Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period*, NZAJHR (1995) I. 16C.

9 A number of the recommendations reflect those made by an earlier Committee in its 1995 report, above n 5, p. 22.

10 See Recommendation 3(2), ibid, p.4: discussed within pp.21–22 of the report.

11 See Recommendations 3(3) and 4, ibid, p. 4: discussed within pp.21-23 of the report.

12 See Recommendation 2, ibid, p. 4: discussed within pp.19–20 of the report.

13 See Recommendation 5, ibid, p. 4: discussed within pp.23–26 of the report.

14 See Recommendation 3(4), ibid, p. 4: discussed within pp.16 and 22 of the report.

15 See sections 3 and 4 of the United Nations Act 1946.

The first recommendation listed above can therefore have little application to the Act, the sole purpose of which is to establish a mechanism by which the New Zealand Government can comply with decisions of the UN Security Council.

The second recommendation listed, pertaining to explicit reference within an empowering provision to statutory provisions that may be overridden by such regulations, is self-explanatory and does not need any further consideration. This will effectively be a question for Parliament to answer. The remaining suggestions do, however, raise some interesting issues for United Nations regulations and might assist in deciding the level to which these regulations can and should override primary legislation.

A Emergency measures

Although the Committee recognised that there may be a need to make regulations which, in a situation of emergency, might require enactments to be superseded, it was very cautious in doing so. It noted, for example, that mechanisms already exist for the rapid adoption of legislation through the House by way of urgency. All the same, it considered that in exceptional circumstances, citing the example of the Executive Government needing to respond to Security Council resolutions when Parliament is not sitting, regulations may be made.[16]

While not given further consideration, it therefore seems that the Committee was willing to recognise that regulations made under the United Nations Act can be appropriately used to override Acts of Parliament. What seems clear, however, is that this should be limited to exceptional circumstances. While the Committee does not go on to define the scope of such circumstances, it is suggested that the position to be adopted in the current context should be to allow Government compliance with UN resolutions through regulations only if the resolution requires immediate action and when Parliament is not sitting. In the context of the Terrorism Regulations, these were made during the life of the last Parliament

Tying this point to the abrogation of human rights, it is notable that a similarly restrictive view is adopted within the International Covenant on Civil and Political Rights 1966. Article 4 of the Covenant permits certain limitations upon rights and freedoms when a public emergency which threatens the life of a nation arises.

[16] Above n 5, p. 20. The example of the Government being required to establish peacekeeping forces under the United Nations Act 1946, in response to measures required by the United Nations Security Council, was suggested by the New Zealand Law Society as being an appropriate emergency measure justifying Henry VIII regulation-making: see *Submissions by the New Zealand Law Society to the Regulations Review Committee in its Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, Parliamentary Library, Wellington, paragraph 10.

A State party[17] cannot, however, derogate from certain specific rights and may not take discriminatory measures on a number of specified grounds.[18] States are also under an obligation to inform other States parties immediately, through the UN Secretary-General, of the derogations it has made including the reasons for such derogations and the date on which the derogations are terminated.[19] The Human Rights Committee has issued a general comment on the application of article 4.[20] It clearly considers that this is limited to states of emergency, as provided for within municipal legislation setting out grounds upon which a state of emergency may be declared.[21] It also expressed the view that measures taken under article 4 are of an exceptional and temporary nature and can only last as long as the life of the nation concerned is threatened

B Parliamentary scrutiny

Greater scrutiny by Parliament of Henry VIII regulations was something recommended by the Committee. The Regulations (Disallowance) Act provides for what is known as a 'negative' procedure of Parliamentary approval.[22] That is, regulations remain in force unless specifically disallowed by Parliament. The alternative 'positive' procedure for scrutiny provides that regulations do not

[17] Which includes New Zealand and Australia; New Zealand signed the International Covenant on Civil and Political Rights on 12 November 1968 and ratified on 28 December 1978; and Australia signed the Covenant on 18 December 1972 and ratified on 13 August 1980.

[18] Article 4(2) of the International Covenant on Civil and Political Rights qualifies the ability to derogate by stating that 'No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision' — those articles relating to the right to life (article 6), freedom from torture or to cruel, inhuman or degrading treatment or punishment (article 7), the prohibition of slavery and servitude (article 8(1) and (2)), freedom from imprisonment for failure to fulfil a contract, freedom from retrospective penalties (article 15), the right to be recognised as a person before the law (article 16) and freedom of thought, conscience and religion (article 18).

[19] Article 4(3) of the International Covenant on Civil and Political Rights.

[20] See *Derogation of Rights (Art. 4)*, CCPR General Comment 5 (31/07/81). The Human Rights Committee is a specialist committee established under article 28 of the International Covenant on Civil and Political Rights, it having three main functions: (1) to receive reports from member States for the purpose of monitoring human rights standards within the territory of those States; (2) making general comments on the interpretation and application of rights contained within the Covenant; and (3) receiving communications under the First Optional Protocol to the Covenant from individuals who claim that their rights have been infringed by the State within which they are present.

[21] Ibid, paragraph 2.

[22] See section 6 of the Regulations (Disallowance) Act 1989 and Standing Order 382 of *New Zealand Standing Orders of the House of Representatives.*

come into force until first allowed by Parliament.[23] As well as positive and negative approval procedures, a third method is used in England: the 'super affirmative procedure'. The procedure is intended for scrutiny of regulations of an important or sensitive nature such that Parliament should consider, through a specialised Parliamentary Committee, the regulations in their draft form rather than waiting for them to be made and subsequently disallowing them.[24] The benefits are naturally two-fold: Parliament is able to have input and control of the process prior to the regulations coming into force; and the Executive Government can be sure that important and sensitive matters are given effect to, without the risk of subsequent disallowance.[25]

C Regulations abrogating rights and freedoms

In its submissions to the Regulations Review Committee, the Ministry of Foreign Affairs and Trade made the very valid point that there are significant benefits to be gained from the use of overriding treaty regulations.[26] It pointed to this enabling the Executive to ensure compliance with treaty obligations and avoiding wasted time by Parliament in considering technical, rather than policy, matters.

A similar approach might be adopted to the situation of international obligations under the United Nations Charter, although an important distinction needs to be made at this point. The submissions of the Ministry made a broad separation between matters of policy and technical matters and equated bilateral treaties as being technical, versus multilateral treaties as often involving policy issues.[27] Where, within that scale, do obligations imposed by the UN Security Council fall? There is no absolute answer. The question must be addressed having regard to the substance of the resolution and its effect. In the context of the current discussion, if the effect of UN regulations is to abrogate human rights, by impacting upon the New Zealand Bill of Rights Act, that is clearly a matter of policy rather than mere technicalities. Adopting the philosophy behind the Ministry's own submissions,

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[23] For further discussion on positive approval procedures, see Thornton G.C., *Legislative Drafting*, London (1996), p. 337. The only positive procedure is contained within the enabling provision of section 4(1) of the Misuse of Drugs Act 1975, which requires a resolution of the House approving any regulations made under that Act before they can come into force.

[24] For further discussion on the process, see Tudor P., 'Secondary Legislation: Second Class or Crucial?', *Statute Law Review*, Volume 21, 149.

[25] An example of this procedure in the United Kingdom, cited within the Committee's Report, is the approval of remedial orders under the Human Rights Act 1998: above n 5, p.26.

[26] See *Submissions by the Ministry of Foreign Affairs and Trade to the Regulations Review Committee in its Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments*, Parliamentary Library, Wellington.

[27] Ibid.

such matters must therefore be within the influence of Parliament. Where human rights are to be affected, the ability of Parliament to carry out its role as 'guardian of the public interest'[28] must be protected. Central to that role, as recognised by the Committee, is the protection of rights and freedoms.[29]

IV The Issue in context: counter-terrorism versus human rights

The issue being considered here (the relationship between United Nations Act regulations and the New Zealand Bill of Rights) is one that, unless subsequently taken up by the Regulations Review Committee, is relatively academic in nature. It is therefore useful to place the issue in context by considering the recently made Terrorism Regulations.

A Suppressing the financing of terrorism

There is natural logic to the notion that combating terrorism can, at least in part, be achieved or assisted by the suppression of the financing of terrorist organisations. By cutting of the monetary means of, or access to finance by, terrorist groups the ability of those groups to obtain arms and explosives and to pay for the various means by which terrorist acts can be committed will be stifled.[30]

1. *International Law on the Suppression of the Financing of Terrorism*

Of the twelve existing international conventions on counter-terrorism, the International Convention for the Suppression of the Financing of Terrorism 1999 is possibly the most controversial. It requires States party to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running. It commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts and provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy will no longer be justification for refusing to cooperate under the treaty. Interestingly, there were only 4 party States to the convention prior to September 11 and, accordingly, the convention was not in force. Since then, and largely in response to UNSC Resolution 1373, more than 100 States (including Australia and New Zealand) have now ratified the convention. The convention came into force on 10 April 2002.

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[28] That phrase having been adopted by the Regulations Review Committee when discussing the issue of abrogation of human rights: above n 5, p. 16.
[29] Ibid, p.17.
[30] See the preamble to the International Convention for the Suppression of the Financing of Terrorism 1999.

UN Security Council Resolution 1373 was adopted soon after 11 September 2001, through which the Council determined that all States will prevent and suppress the financing of terrorist acts, including the criminalisation of such financing and the freezing of funds and financial assets.[31] Described as one of the most strongly worded resolutions in the history of the Security Council,[32] it also requires countries to cooperate on extradition matters and the sharing of information about terrorist networks.[33] As a decision made under Chapter VII of the United Nations Charter, compliance with the latter Resolution is mandatory under international law.[34]

Not atypically, the Resolution raises more questions than it answers. Foremost, how is the United Nations to achieve the aims enunciated? How is terrorism to be defined?[35] The Security Council has itself characterised Resolution 1368 as an ambitious text, with the President of the Council indicating that lengthy and considered meetings of the Council would need to be convened.[36] In this regard, the author posits that Resolution 1373 should be seen as a 'work in progress'. Of note, paragraph 6 of Resolution 1373 calls upon UN members:

> . . . to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the [Security Council Counter Terrorism] Committee, on the steps they have taken to implement this resolution.

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[31] Above n 1.

[32] Richard Rowe, 'Key Developments: Year of International Law in Review', A paper presented at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 15 June 2002, Australian National University, Canberra. Richard Rowe works in the International Organisations and Legal Division of the Australian Department of Foreign Affairs and Trade. He was the Australian representative and Vice-Chairman of the Ad Hoc Committee Established by General Assembly Resolution 51/210 during its Sixth Session, which followed the September 11 attacks.

[33] UNSC Resolution 1373, above, n 1, paragraph 3.

[34] See Article 25 of the United Nations Charter.

[35] This is notably absent from the Resolution and left for individual Member States of the United Nations to resolve on a municipal basis. While this might be justifiably criticised as 'passing the buck' from the United Nations to its Members, the reality is that there could never have been consensus within the Security Council on a definition of terrorism within the timeframe desired (in order to affect and initiate some immediate change). The issue of defining terrorism is extremely problematic, as recognised by the United Nations Office of Drug Control and Crime Prevention (UNODCCP): see UNODCCP site 'Definitions of Terrorism', <www.odccp.org/terrorism_definitions.html>, 19/06/02.

[36] United Nations Secretary-General's Report to the United Nations General Assembly, 56th General Assembly Meeting, GA/9914, 24 September 2001.

2. *New Zealand's Legislative Responses*

In its initial report to the Security Council Counter Terrorism Committee under paragraph 6, New Zealand stated that it would be in full compliance with the Convention for the Suppression of the Financing of Terrorism once the Terrorism Suppression Bill was passed into law.[37]

By way of interim measure, the Government implemented the relevant obligations by passing the Terrorism Regulations made under the United Nations Act. New Zealand reported that further legislation would be introduced to give effect to the remaining obligations under Resolution 1373, adding further provisions to the Terrorism Suppression Bill (now Act) and amending other legislation such as the Crimes Act 1961 and the Immigration Act 1987. This was eventually achieved through the Counter Terrorism Act 2003.

The focus of this article is upon the regulations made. In particular, were the regulations made within the terms of the empowering provision under the United Nations Act 1946? If the answer is in the negative, and it is disclosed that the New Zealand Government in fact exceeded its authority in an endeavour to present a positive report to the Security Council, then the relevant provisions of the regulations are ultra vires.[38] If, on the other hand, the regulations do no more than what is permitted by the United Nations Act, the author suggests that this is not necessarily the end of the matter.

Under the Regulations (Disallowance) Act 1989, all regulations made after 19 December 1989 must be put before the House of Representatives. Under Parliamentary Standing Orders, such regulations are in fact presented to the Regulations Review Committee.[39] Aspects of the Committee's recent report to the House on regulation-making powers raise the issue of whether, notwithstanding the potentially proper making of the regulations in question, it was appropriate for the Executive to act in the way it did. This involves consideration of issues surrounding the treaty-making process within New Zealand, and various comments within the Committee's Report that impact upon the making of regulations that impact upon Acts of Parliament.

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[37] Ministry of Foreign Affairs and Trade, 'Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001', submitted on 24 December 2001 from the Permanent Representative of New Zealand to the United Nations to the United Nations Security Council Counter Terrorism Committee. New Zealand's subsequent report, within which it addressed various questions posed to it by the Committee, was submitted on 10 July 2002. The Bill was passed into law in 2002.

[38] See, for example, *Official Assignee v Chief Executive Officer of the Ministry of Fisheries* (CA) [2002] 2 NZLR 722.

[39] Above n 24.

B The terrorism regulations

Having regard to the controversial nature of the Financing of Terrorism Convention, and the fact that New Zealand has reported to the Security Council Committee that (by way of interim measure) it implemented the financial regulation obligations through the Terrorism Regulations,[40] is there cause for concern? First, are the regulations beyond or within the statutory authority under the United Nations Act? Next, is there a conflict between the Regulations and the Bill of Rights?

As discussed, the United Nations Act empowering provision permits the Executive to make regulations in order to comply with any requirements imposed upon New Zealand by the Security Council under article 41 of the Charter of the United Nations. The Terrorism Regulations contain various provisions relating to financial regulation, creating offences where the Government is satisfied that a person has financed a terrorist group (as defined within the Schedule to the Regulations).[41] This, according to the Regulations' preamble, has been done for the purpose of giving effect to Resolution 1373.[42] If it was shown that the regulations were outside the terms of the empowering provision, what would the consequences be? First, it would mean that the regulations would be ultra vires the empowering Act.[43] Added to this would be the fact that the regulations would bypass the legislative process mandated within the House of Representatives Standing Orders.[44]

Upon close inspection of the Terrorism Regulations, it transpires that the regulations do not appear to offend the scope of the empowering provision, nor the Bill of Rights. The offences created by the Regulations are clearly within the scope of obligations imposed upon New Zealand through paragraph 1 of Resolution

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[40] It should be noted, however, that New Zealand's report does not say that the Regulations incorporated the obligations under the International Convention on the Suppression of the Financing of Terrorism 1999 — it only said that the Regulations were there to give effect to the financial regulation obligations imposed under United Nations Security Council Resolution 1373.

[41] Limited to Al-Qaiada, the Taliban and Usama bin Laden: see the Schedule to the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and the Regulations's definitions of those entities within regulation 4(1).

[42] The Regulations are also stated to be made to give effect to United Nations Security Council Resolutions 1267 of 15 October 1999 and United Nations Security Council Resolution 1333 of 19 December 2000 (which specifically relate to the regulation of financial and other assistance to the Taliban regime in Afghanistan).

[43] See Robertson *Adams on Criminal Law* (Brookers Loose-Leaf), 10-30.

[44] See Standing Orders 384 to 387 inclusive of the *New Zealand Standing Orders of the House of Representatives*, which require international treaties (that are proposed to be ratified or acceded to by the Executive Government) to be presented to the House with a 'National Interest Assessment'. See also the report of the New Zealand Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*, Report 45 (1995), Wellington; and a recent private member's bill, the International Treaties Bill.

1373.[45] They do not go as far as the Financing of Terrorism Convention goes, nor the Terrorism Suppression Act (NZ) — through which the Convention was eventually incorporated into domestic law.[46]

Neither is the New Zealand Bill of Rights Act impinged upon. The offences within the Regulations are framed within the context of conduct in support of terrorist organisations where the person *knows* that s/he is doing so. This is much narrower in focus than the equivalent sections within the Terrorism Suppression Act 2002, which drew much criticism on account of the broad definition of terrorist groups and liability for *reckless* conduct within sections 8 and 9 of the Act.[47] The Executive acted responsibly, in the author's view, to avoid any potential natural justice[48] or rule of law[49] conflicts between the Regulations and the NZBORA.

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[45] See United Nations Security Council Resolution 1373, paragraph 1, which states that the Security Council:
'*Decides* that all States shall:
(a) Prevent and suppress the financing of terrorist acts;
(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities; and
(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.'

[46] It could not, however, be said that New Zealand's initial report to the Security Council Counter Terrorism Committee was misleading. As discussed at note 35 above, it only said that the Regulations were there to give effect to the financial regulation obligations imposed under United Nations Security Council Resolution 1373.

[47] See, for example, *Submissions of the Institute of Chartered Accountants of New Zealand to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/63, and *Submissions of the New Zealand Bankers' Association to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/133, Parliamentary Library, Wellington.

[48] A criticism that might be directed towards the Terrorism Suppression Bill's designation process, through which a group is able to be categorised as being a terrorist group on the basis (potentially) of information not disclosed to the designee for national security reasons (thereby stifling the right to be heard and make a proper response), and the very limited judicial scrutiny of the process and potential recourse to the judiciary.

This is all positive news and displays a responsible approach on the part of the Executive. However, two potential problems remain. Firstly, is the fact that the power to make Henry VIII regulations inconsistent with the NZBORA nevertheless *remains* with the Executive under the United Nations Act (whether exercised or not). Secondly, and this might be of more concern, is the potential for the UN Security Council to adopt a resolution with obligations upon the Executive that do, in fact, impact upon rights and freedoms. In such a situation, the New Zealand Government would be bound, by reason of article 25 of the United Nations Charter, to give effect to such directions. What then? Which obligations are to be given priority: those under the United Nations Charter or those under the International Covenant on Civil and Political Rights (as incorporated through the NZBORA)?

V The issue in principle: How should the **United Nations Act** *and* **Bill of Rights Act** *interact?*

The foregoing leads to these conclusions. Regulations made under the United Nations Act are open to 'negative' procedural scrutiny by Parliament, such that they will come into force on the date nominated within the regulations unless actively disallowed by Parliament. When in force, the regulations have the *potential* to override the Bill of Rights Act, to the extent in which they might limit any right or freedom contained therein by the express provisions of the regulations. In view of the principles propounded by the Regulations Review Committee, however, one might ask (and this, in the author's view, is a constitutionally significant question): how *should* regulations be made under the United Nations Act, in particular to afford New Zealand citizens with protection from unfettered Executive law-making power and/or over-zealous direction from the UN Security Council threatening the abrogation of human rights?

A Operative provisions of the Bill of Rights Act

The operative provisions of the Bill of Rights, in terms of its application by the courts, are found in sections 4, 5 and 6:

> 4. Other enactments not affected
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> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights) —
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) Decline to apply any provision of the enactment —
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[49] A criticism that might be made of the Terrorism Suppression Bill's offence regime due to the broad definition of terrorist groups and the consequential inability of citizens to regulate their conduct in accordance with reasonably accessible law.

> 5. Justified limitations
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> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 6. Interpretation consistent with Bill of Rights to be preferred
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Sections 4, 5 and 6 therefore direct how the Act is to be applied to other legislation and, thereby, how the Bill of Rights is to be used as a tool of statutory interpretation. In a relatively recent decision of the New Zealand Court of Appeal, *Moonen v Film and Literature Board of Review*, a five-step process for application of sections 4, 5 and 6 was set out:[50]

1. Identify the different interpretations of the words contained in the enactment being examined: if only one interpretation is open, that meaning should be adopted (s4); if more than one meaning is open, proceed to the next step.
2. Identify the meaning which constitutes the least possible limitation on the right or freedom in question and adopt that meaning (s6).
3. Having adopted the appropriate meaning (through either steps one or two), identify the extent — if any — to which that meaning limits the relevant right or freedom.
4. Consider whether that limitation (if found) can be demonstrably justified in a free and democratic society (s5): if it can, then that is the end of the matter; if it cannot, proceed to the next step.
5. Although a particular meaning to the enactment will have been adopted by this stage (ss4 or 6), if that meaning 'fails' the s5 test, then it is a limitation that is <u>not</u> justifiable in a free and democratic society. Step 5 accordingly requires the Court to issue a declaration to that effect (termed a declaration of inconsistency or incompatibility).

Given that regulations made under the United Nations Act are 'Henry VIII' regulations, how do these operative sections apply? Two particular issues arise: (1) does section 6 of the NZBORA require the regulations to be made consistently with the Bill of Rights Act; and (2) if not, how do other regulations interact with the NZBORA and what can be learnt from this?

B Applying section 6 of the NZBORA

The position here is simple. By application of the general principles of statutory interpretation, one could argue that section 6 of the Bill of Rights requires subordinate legislation to be made in a manner that is consistent with the

[50] [2000] 2 NZLR 9, 17.

NZBORA, lest that subordinate legislation (including UN regulations) be ultra vires its empowering Act.[51] By virtue of section 6, wherever an enactment can be given a meaning that is consistent with the provisions of the Bill of Rights Act 'that meaning shall be preferred to any other meaning'.[52] The argument would be that the United Nations Act empowering provision must be construed consistently with the NZBORA so that it does not confer upon its delegate the power to make subordinate legislation which infringes the Bill of Rights Act.[53]

If section 6 does not operate in this way in the current context, UN regulations could be made (unfettered) in contravention of the NZBORA given the prevailing status of such regulations, by virtue of section 2(2) of the United Nations Act. This brings us to the question of what principles might be applied from the interaction between other regulations and the Bill of Rights.

C How do other regulations interact with the NZBORA?

If section 6 does not apply in the manner described, subordinate legislation might be able to effect limitations and still be afforded protection under section 4 of the Act. This would depend on the meaning of the term 'enactments' and, therefore, the following question must also be addressed: does subordinate legislation fall within the term 'enactments' as used in sections 4 and 6 of the Bill of Rights Act?

1. *Meaning of 'Enactments'*

Two potentials exist. The first is that, by way of a broad interpretation of the term, 'enactments' is taken to extend to subordinate legislation as well as Acts of Parliament. Alternatively, by way of restrictive interpretation, the term could be taken to refer to Acts of Parliament alone.[54]

(a) Broad interpretation

There are a number of arguments that could be made in support of both approaches. With respect to the broad approach, three main points can be made that tend to favour that approach. The first pertains to the Acts Interpretation Act 1924, and its successor the Interpretation Act 1999, in which the terms 'Act' and

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[51] Above n 44.

[52] This was the approach taken by the New Zealand Court of Appeal in *Drew v Attorney-General* [2002] 1 NZLR 58, where the Court was faced with the question of whether regulations preventing legal representation were ultra vires the empowering section of the Penal Institutions Act 1954, s 32(A)(1), by reason of inconsistency with the New Zealand Bill of Rights Act 1990.

[53] Ibid.

[54] The various arguments discussed below are discussed in more detail in the author's article 'The Application of Section 4 of the Bill of Rights Act 1990 to Subordinate Legislation' [1997] 3 Human Rights Law & Practice, 146.

'enactment' are defined as inclusive of both primary and subordinate legislation.[55] Following this approach, an enactment is the whole or part of any Act of Parliament and includes subordinate legislation made under its principal.

Next, Professor John Burrows posits that the term 'enactment' (within the framework of the operative provisions of the NZBORA) extends to regulations as well as Acts of Parliament, based on the language of section 4 of the Bill of Rights Act.[56] In doing so he points to the fact that section 4 of the Bill of Rights Act refers to enactments 'passed' or 'made'. Since Acts of Parliament are *passed* by Parliament, and subordinate legislation *made* by delegates, the logical conclusion to be drawn is that Parliament must have intended 'enactments' to include both Acts of Parliament and subordinate legislation. There is weight in this argument, particularly when one has further regard to the wording of section 4 (sub-paragraph (a) in particular), which refers to provisions impliedly 'repealed' or 'revoked'. As before, an Act of Parliament is *repealed*, whereas subordinate legislation is *revoked*.

A third argument in favour of a broad interpretation of the term 'enactments' could be based on the case of *Black v. Fulcher*.[57] The New Zealand Court of Appeal held in that case that, generally, the word 'enactment' is a convenient and succinct term embracing any Act or rules or regulations made thereunder and any provision thereof. In the absence of some 'good reason', the then President Cooke would not accept that the term should be given a restrictive interpretation to refer only to an Act or any provision of an Act.

(b) Restrictive interpretation

The general rule of statutory interpretation is that an Act of Parliament has primacy over subordinate legislation so that, if there is a conflict between an Act and a regulation, the regulation must give way.[58] This being so, it should follow that if there is a conflict between the NZBORA and an item of subordinate legislation, then the Bill of Rights Act will prevail.

Additionally, while the Interpretation Act definitions define the term 'Act' so that it includes rules and regulations, the Acts and Regulations Publication Act 1989 and the Regulations (Disallowance) Act 1989 both distinguish between the terms 'Act of Parliament' and 'Regulations'.

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[55] The Acts Interpretation Act 1924 defines an 'Act' as 'an Act of the General Assembly and includes all rules and regulations made thereunder'; and the Interpretation Act 1999 defines 'enactment' as 'the whole or a portion of an Act or regulations'.
[56] Burrows J.F., *Statute Law in New Zealand*, (2nd edn) Butterworths (1999), 337.
[57] [1988] 1 NZLR 417.
[58] See dictum of Lord Herschell in *Institute of Patent Agents v Lockwood* [1894] AC 347, 360 — followed by Stout CJ and Adams J in *Lee v Macpherson (No 1)* [1923] 2 QB 260.

The next point to note is Justice Henry's consideration of the term 'enactments', as used in the Third Schedule of the Transport Amendment Act (No 2) 1963, in the case of *Munro v Auckland City*.[59] In that case, Justice Henry concluded that:

> . . . the word 'enactments' does not include the Act and the regulations which are described in the first column of Part IV. The word 'enactments' is of narrower import and should not be extended to mean the whole Act and regulations unless the context so requires.[60]

Considering the constitutional importance of the Bill of Rights Act, and the purposive approach adopted by the judiciary in the application of the Act, it is suggested that this context does not require the word to be given a broad interpretation so as to allow delegates to legislate inconsistently with the rights and freedoms guaranteed under the Bill of Rights Act.

Regard might also be had to Hansard. At its second reading, the Bill of Rights Bill was presented before the House with a new 'Clause 3A' inserted (now section 4 of the Act). During the debates of the second reading, Paul East discussed the motives of this new provision.[61] The purpose of the clause was to protect Parliament's role in making law.[62] While the original Bill was introduced as supreme legislation, clause 3A was added to do away with this so that Parliament was not prevented from effecting changes to human rights aspects of the law if it felt it should do so in the future. However, the parliamentary debates did not focus on a delegate's power to make subordinate legislation. Similarly, it is noted that the specific wording of the clause ('pass' versus 'made' and 'repeal' versus 'revoke') was a product of Select Committee recommendations and the distinctions alluded to by Professor Burrows were not discussed by Parliament in its debates.

Furthermore, section 7 of the Bill of Rights itself points to the adoption of a restrictive interpretation of the term 'enactments' so that it refers to Acts of Parliament alone. The NZBORA is an ordinary statute, giving Parliament the freedom to legislate inconsistently with its provisions. However, section 7 of the Act makes this power conditional in that it requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill which appears to be inconsistent with the rights and freedoms guaranteed in the Bill of Rights Act. By doing so, Parliamentary supremacy[63] is still preserved since the final decision as to whether to contravene any right or freedom is left with

[59] [1967] NZLR 873.
[60] Above n 18, 874.
[61] NZPD, No 19, 3460, 14 August 1990.
[62] This was clearly a concern of various members of Parliament, as evident in their debates on the Bill of Rights Bill. See NZPD, no 62, 13038, 10 October 1989 (introduction); NZPD, no 19, 3460, 14 August 1990 (second reading); and NZPD, no 20, 3759, 21 August 1990 (third reading).
[63] The protection of which is the whole aim of section 4: see Paccioco D.M., 'The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill' [1990] NZ Recent *Law Review* 353, 355.

Parliament, New Zealand's elected officials. It is in this context of limiting fundamental rights that the importance of section 7 can be seen. On a political level, section 7 brings any potential contravention of the Bill of Rights Act by any Bill before the House out into the open and forces Parliament to make a conscious decision on whether to limit any right or freedom. Therefore, Parliament's legislative powers are well monitored to protect our fundamental freedoms.

As indicated earlier, the Regulations (Disallowance) Act now requires all regulations to be laid before the House of Representatives, including regulations made under the United Nations Act 1946.[64] The House may then, by resolution, disallow any regulations or provisions of regulations or amend or substitute any regulations.[65] The Disallowance Act does not provide for any reporting procedure relating to apparent contraventions of the Bill of Rights Act, as section 7 of the NZBORA does in respect of Parliamentary Bills. Nevertheless, since January 1995, all draft regulations submitted to Cabinet for approval must be accompanied by a specified cover sheet.[66] The cover sheet is based on that used for draft Bills and is designed to ensure that Cabinet has due regard to a number of factors prior to approval of such regulations. Item 4(a) of the cover sheet requires the submitting Minister to indicate whether the regulations comply with the Bill of Rights Act.[67] It therefore appears that the abrogation of human rights by a delegate of legislative power is guarded against to some extent, although the extent to which the Regulations Review Committee is able to consider potential conflicts (having regard to time and resources) is debateable.

Most usefully, there has been recent obiter dicta from the New Zealand Court of Appeal in the case of *Drew v Attorney-General*, in which various of the above arguments were presented to the Court, and the Court stated that a restrictive interpretation should be adopted.[68]

D Where should United Nations regulations stand?

Having arrived at the conclusion that (in principle) the Bill of Rights Act overrides regulations, and notwithstanding section 2(2) of the UN Act, might one adopt a differing view in the case of regulations under the United Nations Act? Might one

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[64] Regulations under the United Nations Act 1946 are made by the Governor-General in Council: see section 2(1) of that Act. 'Regulations' within the jurisdiction of the Regulations (Disallowance) Act 1989 include regulations made by the Governor-General in Council: see section 2(a)(i) of that Act.

[65] See sections 5 and 9 of the Regulations (Disallowance) Act 1989.

[66] See Cabinet Office circular 'Procedures for regulations made by Order in Council' of 13 December 1994 CO(94)17; and Cabinet Office circular 'Revised Procedures for regulations made by Order in Council' of 6 April 1995 CO(95)5.

[67] See Cabinet Office circular 'Revised Procedures for regulations made by Order in Council' of 6 April 1995 CO(95)5, Appendix 2.

[68] Above n 53, 73. See also above, n 68.

be swayed, for instance, by an argument that because the empowering provision is a mechanism created to enable New Zealand to comply with its international obligations (under articles 25 and 41 of the UN Charter), this could justify the adoption of a broad interpretation of the term 'enactments' within that particular and limited context?

The answer is not clear. An interesting parallel exists in the interpretation of statutes that have been enacted to incorporate international obligations under treaties. The starting point here is the well accepted principle of statutory interpretation that if the words of a statute are clear and unambiguous, then the courts are bound to apply that meaning.[69] While that is a clear enough principle, the question one might raise in the context of this article is this: what if that interpretation would mean that the law is applied in breach of some international legal obligation assumed by New Zealand?

The courts have adopted the view that, notwithstanding the resultant breach of international obligations, there will be no derogation from the doctrine of interpretation as enunciated above. In *Ashby v Minister of Immigration*, Richardson J plainly stated that if the terms of the domestic legislation are clear and unambiguous, they must be given effect to by the Courts whether or not those terms carry out New Zealand's international obligations.[70] Adopting the same approach, this must also be the case even if the statute in question has been passed specifically to give effect to New Zealand's international obligations, particularly if Parliament has chosen to under-incorporate an international obligation. For example, the Court in *R v Barlow* noted that, while the International Covenant on Civil and Political Rights contains a general affirmation of the right to liberty and security of the person, this is not the case within the NZBORA.[71] Justice Richardson regarded this departure as a deliberate decision on the part of the legislature and declined to extend the meaning of the Bill of Rights.[72]

Applying that parallel scenario to the present inquiry, one might adopt a similar approach. That is, that 'enactments' should *not* be taken to include United Nations regulations even though this might result in a breach of New Zealand's international obligations.[73] Equally, however, one might be justified in taking the

[69] Evans J., *Statutory Interpretation. Problems of communication* (Auckland, Oxford University Press, 1989), p2.
[70] [1981] 1 NZLR 222 at 229.
[71] (1995) 2 HRNZ 635.
[72] Ibid, 655. Having said this, it is clear that (where possible) the Courts will attempt to reconcile the meaning of a statute so as to give effect to New Zealand's treaty obligations, stemming from the basic constitutional presumption that Parliament does not intend to legislate in a manner contrary to its international legal obligations: see, for example, Lord Scarman's comments in *Attorney-General v British Broadcasting Corp* [1981] AC 303 at 354; and *R v Chief Immigration Officer, Heathrow Airport, ex parte Salemat Bidi* [1967] 1 WLR 979 at 984 (per Denning LJ).
[73] Obligations, as mentioned, under articles 25 and 41 of the Charter of the United Nations.

opposite view on the basis that this is not a case of applying a clear and unambiguous statutory provision. As suggested earlier, the term within the context of sections 4 and 6 of the Bill of Rights is open to both broad and narrow interpretations.

Returning to the parallel of statutory incorporation of treaties, the New Zealand courts have in fact shown a willingness to interpret statutes in a manner consistent with international obligations, as far as this is possible. This stems from the basic constitutional presumption that Parliament does not intend to legislate in a manner contrary to its international legal obligations.[74] The point is illustrated through the various matters raised in the case of *Van Gorkom v Attorney-General and Anor*.[75]

It has to be said that this has been in the context of interpreting Acts of Parliament which incorporate international human rights obligations, the International Covenant on Civil and Political Rights in particular. In this regard, the New Zealand courts have followed the lead of Lord Wilberforce in *Minister of Home Affairs v Fisher*.[76] The case involved the human rights provisions of the Bermudan Constitution (influenced by the European Convention on Human Rights and the Universal Declaration on Human Rights) and, according to Lord Wilberforce, called for '. . . a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give individuals the full measure of the fundamental rights and freedoms referred to'.[77] One would expect, however, that the maintenance of international peace and security (the principle upon which UNSC resolutions are adopted under Chapter VII of the Charter) would be seen as an equally important objective.[78]

By arriving at such a relatively neutral position, or at least one that is arguable either way, it is difficult to draw a positive conclusion or recommendation from this particular analysis. What the analysis illustrates, however, is the potential dichotomy between the maintenance of peace and security and of human rights standards. Within the recommendations that follow, it will be proposed that this dichotomy is such that it places itself squarely within the realm of policy considerations for the sole purview of Parliament and not the Executive Government.

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[74] See, for example, Lord Scarman's comments in *Attorney-General v British Broadcasting Corp* [1981] AC 303 at 354; and *R v Chief Immigration Officer, Heathrow Airport, ex parte Salemat Bidi* [1967] 1 WLR 979 at 984 (per Denning LJ). In the 1974 case of *Police v Hicks* [1974] 1 NZLR 763, the Court readily accepted the relevance of the Single Convention on Narcotics (ratified by New Zealand in 1963) in interpreting the Narcotics Act 1965.

[75] [1977] 1 NZLR 535.

[76] [1980] AC 319.

[77] Ibid, at 328.

[78] See article 39 of the Charter of the United Nations, which permits the Security Council to make decisions under Chapter VII of the Charter (binding on members under article 25) as are necessary 'to maintain or restore international peace and security'.

VI Recommendations

In the absence of a specific and comprehensive review and report by the Regulations Review Committee itself, this article makes the following recommendations regarding the regulation-making power under the United Nations Act 1946.

First, it is proposed that the issues raised within this article are such that a review by the New Zealand Parliament of the empowering provision under section 2 of the Act is warranted. Such review should take place within the framework of the recommendations that follow.

Next, and following very closely in line with the Committee's Recommendation 3(3) pertaining to international treaties, Parliament should consider expressing the particular primary legislation provisions that may be overridden by United Nations regulations. Alternatively, and this links with the subsequent recommendations, the empowering provision might be amended at least to prohibit the overriding of any provision within the New Zealand Bill of Rights Act 1990.

Third, it is recommended that the regulation-making power and process should be limited to either of the following extents:

1. Empowering the making of regulations only *if* the Security Council resolution in question requires immediate action *and* Parliament is not sitting.

and/or

2. Empowering the making of regulations only *if* the Security Council resolution in question concerns a matter which threatens the life of New Zealand *and then* only by way of temporary measures.

and/or

3. Introducing a 'super affirmative' Parliamentary approval procedure for the making of United Nations regulations, through which a specialised Parliamentary committee would consider the regulations in their draft form and, in doing so, reflect upon the question of what limitations those regulations might place upon the rights and freedoms guaranteed under the NZBORA and, if any such limitations are exposed, whether these are justifiable in a free and democratic society.

By doing so, Parliament would retain control over the policy aspects involved in weighing any conflict between New Zealand's obligations under the United Nations Charter versus those under the International Covenant on Civil and Political Rights and thereby preserve its role as the protector of the public interest.