10 International Relations and Defence

International diplomacy and the activities of the defence forces are the prime methods by which the state of New Zealand conducts its foreign policy and projects itself to other countries. It is important that these commitments are authorised in accordance with democratic principles and are subject to democratic control.

Articles 70 and 71

Constitution Aotearoa would give Parliament a greater say in decisions around international relations and defence. The important new features we propose are:

- no international agreement shall be binding on the State unless a Cabinet decision on it has been approved by a majority of the House of Representatives:
- any declaration of war must be approved by a majority of the House of Representatives:
- there will be no significant contribution of forces to, or for any purpose of, the United Nations or otherwise without the prior approval of the House of Representatives; and
- the legal grounds for participation in all such activities shall be presented to the Parliament in an opinion of the Attorney-General.

Diplomacy and treaties

New Zealand is part of the community of nations.[1] We share this planet with the people of almost 200 other countries. We have control over our own territory as other nations do over theirs. Our Parliament makes the only laws applicable here

1 For introductory texts expanding upon the themes raised in this chapter see Rosalyn Higgins *Problems and Process in International Law and How We Use It* (Clarendon Press, Oxford, 1994); Philip James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012); Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2014); and Andrew Clapham *Brierly's Law of Nations* (7th ed, Oxford University Press, Oxford, 2012).

with only very limited exceptions.[2] The executive branch of our government enforces the laws here and sometimes beyond. New Zealand can determine its own policies and destiny free from the domination of other states. We are independent.

Restrictions on our country's ability to act will depend on the extent we have agreed to be bound by agreements made with other nations or the powers invested in international organisations to which we have decided to belong.

New Zealand's relationships with other nations, established and fostered through diplomacy, are important. In order to conduct international affairs we have the Ministry of Foreign Affairs and Trade, which has more than 50 posts in overseas countries.[3] In addition to carrying out diplomacy, the Ministry provides consular services to assist New Zealand citizens when they get into difficulties in foreign countries.

International trade constitutes an essential component of our economy and its gross domestic product (GDP), making trading relationships and participating in trade negotiations a significant part of our diplomatic efforts.

New Zealand belongs to a myriad of international organisations that help us achieve our goals, domestically and on a global level. The most important of these organisations is the United Nations, of which we were a founding member. There are now approximately 193 Member States of the United Nations. We also belong to the World Trade Organisation (WTO), an international organisation that has an important role in regulating international trade and adjudicating disputes that arise within that context. By way of another example, many people here travel overseas by air. Flying internationally is governed by complicated rules set by and run internationally by the International Civil Aviation Organisation and administered here by the Civil Aviation Authority.

Furthermore, New Zealand is party to an ever-increasing

2 There are some limited opportunities for the rules of customary international law to be applied in New Zealand as part of the common law: *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44(CA).

3 Ministry of Foreign Affairs and Trade "Embassies" New Zealand Foreign Affairs and Trade <www.mfat.govt.nz>.

number of treaties. Treaties are agreements in writing that are negotiated usually between states. They are governed by the rules of international law. In 2014 about 794 multilateral treaties and 808 bilateral or plurilateral treaties were in force. Multilateral treaties are those where there are many states participating. Bilateral treaties are those between two states. Plurilateral treaties are those with a limited number of parties who have a particular interest in the subject matter of the treaty. International rules cover the relations between states in all their many forms, as well as govern many facets of contemporary everyday life: security, anti-terrorism, postage, weather information, communications, customs, shipping, diplomatic and consular relations, human rights, finance, migration, mutual assistance and extradition, trade, visas, and many others. Frequently, it is necessary to change our law in order to ensure that we comply with the international obligations we undertake when we sign up to treaties and international organisations. In doing so we may also accept the jurisdiction of international courts and tribunals to decide how well we have complied with our legal obligations and to settle disputes.

New Zealand's interaction with other states has increased exponentially. This country had no ambassadors posted to overseas countries until 1942, at the height of the Second World War, when Walter Nash became Ambassador to the United States. More than 70 years later, the country is enmeshed in a web of complex relationships with other nations, which have an increasing impact on what occurs here. In many matters, New Zealand has an input into international decision-making processes. In 2014 New Zealand was elected to the Security Council of the United Nations for the second time for a term of two years, with enhanced influence and responsibility.

Sometimes, while New Zealand may not ultimately agree with all aspects of an outcome of international diplomacy or law-making, it may agree to accept it nonetheless. An example of this is the Trans-Pacific Partnership agreement (TPP), an ambitious trade agreement of which negotiations were finally completed in 2015, after many years of back-and-forth. It involves 11 Asian and Pacific-rim countries, including the

United States. The agreement has not yet been ratified at the time of writing. New Zealand's negotiators did not secure what they wanted in terms of access for dairy products under the agreement, but we will likely ratify the agreement anyway as in the eyes of the Government it holds other advantages, including a seat at the table for future negotiations. The difference between what happens now and what would happen under this proposed new Constitution is that there would have to be a vote in Parliament to ratify the treaty, not just legislation making the changes required.

The need for such a democratic change was expressed vividly by the Green MP Dr Kennedy Graham in a debate in the House of Representatives on 11 May 2016:[4]

> Yesterday the Green Party proposed that the select committee report on the treaty, tabled 2 days ago, be subject to a parliamentary debate. The proposal was rejected. That is extraordinary because the TPP is one of the most important treaties to affect New Zealand in many years, yet the Government, unwavering in the belief that it knows best, feels no obligation to have the treaty examination by the select committee debated in Parliament. It is required under the Standing Orders to have debates—three readings, and a plenary Committee, in fact—on the implementing legislation but not on the prior policy issue of the merits of the treaty itself.
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> There is something weird about the way we do things here in New Zealand. You would think that the policy considerations of negotiating and acceding to an international treaty would be the most important aspect of a nation's judgment on the issue. You might think that this matter needs to be settled through robust debate before we proceed to implementing legislation. And you might be forgiven for supposing that the technicalities of a legislation of 11 bills to make our law compatible with the new treaty requirements would be a matter for legal technicians, perhaps a parliamentary subcommittee of MPs with expert advisers. That would free up the time of the House to debate the real issue, which is the merits and demerits of the treaty itself. But no. We devote about 10 hours to debating 11 bills—and are required by the Speaker to stay on message, part by part and

4 (11 May 2016) 713 NZPD from 15.

> even clause by clause—that total 78 pages.
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> It defies logic, even constitutional logic, to suggest that 10 hours should be devoted to the technicalities of draft law, judged by worldly but inexpert members of Parliament, but nothing to the general policy of the national interest on whether or not to negotiate, sign, and ratify a major international agreement that imposes unprecedented new obligations on New Zealand
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> These reflections raise the underlying question of the role of Parliament in general when it comes to treaty making.

Article 70

Our proposal will involve parliamentary resolutions for all treaties, and these are numerous. But the requirement should be capable of being handled quite easily by the Parliament as most of the minor treaties and agreements are not controversial.

Usually the advantages of being part of international organisations and treaty regimes will outweigh the downsides. Sometimes people say we are giving away our "sovereignty" in such negotiations, but in all instances we have the option not to ratify treaties with which we do not agree, and in such instances New Zealand will not be legally bound by them—either at international law or domestic law.

Diplomacy and politics are both vital ingredients of our international relations. Law is another. International law is affected by, and affects, international diplomacy and politics. It plays a vital role in oiling the wheels of the international system. International law has a different character from domestic law and is easily misunderstood. It is not so much a set of rules as it is a normative system.[5] The international community largely lacks the equivalent of a legislature—a body that can make rules that bind even those who dissent from them. That does not mean, however, there is no law. There is a great deal of law and most of the nations obey most of it most of the time. Why? Because it is in their self-interest to do so.

There exists also the influence of customary international law that binds all states, regardless of their treaty obligations. While states can persistently object to rules during their development there can be no exclusion from such powerful rules as those that

5 Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 1–16.


THE INTERNATIONAL COURT OF JUSTICE REJECTS JAPANS ARGUMENT THAT IT IS FOR SCIENTIFIC PURPOSES AND ORDERS A HALT TO WHALING
WOULD IT HELP IF WE COOKED THE MEAT ON A BUNSEN BURNER BEFORE EATING IT?

prohibit acts such as slavery, torture or genocide.

Since the nature of international law is different from domestic law, its sources are different too. The most authoritative statement of the sources of international law is to be found in Article 38 of the Statute of the International Court of Justice 1945, which states that the Court is to apply international law to the disputes submitted to it, and goes on to define the sources of those rules. These are:

1. International treaties or conventions, whether general or particular, establishing rules expressly recognised by the contesting states:
2. International custom, as evidence of a general practice accepted as law:
3. General principles of law recognised by civilised nations:
4. Judicial decisions and the teachings of the most highly qualified experts of the various nations, as subsidiary means for the determination of rules of law.

The obligations of international law place particularly real restraints upon the freedom of the Government—this country has always treated international law seriously. New Zealand consistently states that it will not sign up to international obligations unless it can honour them in its domestic law. And we consistently call on other nations to uphold international law. As a small country without significant military power, this is in our self-interest, as the more countries abide by international norms and laws such as those relating to human rights and armed conflict, the less vulnerable we are. It is also consistent with international trade, order and respect for the rule of law. Therein lies the considerable constitutional importance of international law to our domestic governance. The reach of international law beyond these shores serves to protect the interests of a small state and to promote international peace and good order.

The main subjects of international law are nations. Some lawyers prefer to call international law by the alternative name, the law of nations. But these days it is not only nations that are accountable under international law. International human rights law, international humanitarian law, international criminal law

and international trade and investment law bring the treatment, and the conduct, of people and corporations within the range of international law; thus providing some protections against gross misbehaviours by both states and other individuals. The International Criminal Court has jurisdiction only over natural persons. It has the power to try New Zealanders for any international crimes they may commit. These are limited to genocide, crimes against humanity, war crimes and aggression.[6]

As the nature of international society has changed, so international law has progressed with it, although it is a slow evolution. Over time, we can expect international law to become increasingly similar to domestic law in treating governments and individuals more equally—but along with that goes the possibility of our government having less influence over the content of international obligations as they negotiate amongst all countries of the world. We have to choose whether to sign up to international obligations but, in the economic arena particularly, there is often no choice in practice if New Zealand wants to be at the table. And once signed up, the government will be bound by dispute resolution forums out of its control—consistent with the rule of law, at least in theory.

The Defence Force

So far we have concentrated upon law and diplomacy. But security and defence are also vitally important. The New Zealand Defence Force comprises a Navy, an Air Force and an Army. Including reserves and civilians more than 14,000 people are engaged with the Defence Force. They operate with expensive arms and equipment. Their prime role is a military one. They have to defend New Zealand and ensure its security. The Governor-General is their titular commander, but this role is purely constitutional and the Governor-General plays no role in directing the activities of the Defence Force. Like all other arms of the state the armed forces are controlled by the

6 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002). More than 120 states are party to it.

government of the day.[7] There have been growing pressures on New Zealand's resources, especially our oceans, and growing uncertainty about security in the region. But our military forces also help provide relief overseas in the case of emergencies and regularly assist United Nations peacekeeping operations. At the moment troops can be put in harm's way without the legal need for a parliamentary vote. That should change.

What we are proposing

Traditionally the Government has conducted and decided most things concerning New Zealand foreign relations and defence. But in recent years a parliamentary select committee has been given power to assess treaties before New Zealand ratifies them and becomes bound by them. It has been the case for many years that if our law needed to be changed because of a treaty New Zealand entered into, then an Act of Parliament would be passed. In practice, however, the Cabinet has the power to decide whether to enter into international agreements and treaties, and Parliament has limited choice as to whether or not to implement the agreement domestically by changing our laws. That needs to change. The House of Representatives needs to be able to vote on these issues and debate them.

Similarly, the Government largely controls decisions concerning defence. Currently, the Cabinet has the power under the royal prerogative to advise the Governor-General to declare war although such declarations now hardly ever occur and are considered by many to be obsolete. There is an occasional practice that Parliament should debate the matter and authorise decisions that involve putting our soldiers in harm's way, but there is no legal obligation that this occurs. The commitment to the Second South African (Boer) War was the only deployment in which Parliament voted. In the Second World War New Zealand did declare war but Parliament did not vote on it. In the cases of Afghanistan and East Timor the Government announced the deployments and then debated the issue in the House. In our view, transparency and accountability demand

7 *Bradley v Attorney-General (No 1)* [1986] 1 NZLR 176; *Curtis v Ministry of Defence* [2002] 2 NZLR 744.

that declarations of war and the use of service personnel in hostile situations overseas should require the clear consent of the Parliament.

We have given a nudge to these democratic issues and made them clear and explicit in the proposed Constitution. We think that Parliament should have a greater say in decisions around international relations—they are after all our elected representatives.

Article 70

Constitution Aotearoa proposes that no international agreement shall be binding on the State unless a Cabinet decision agreeing to be bound has been approved by the House of Representatives by an affirmative resolution of a majority of the House.

In this manner also, any declaration of war or commitment to any combat operation must be approved by a majority of the House of Representatives and there will be no significant contribution of forces to, or for any purpose of, the United Nations without the prior approval of the House of Representatives. It is sometimes argued that the power should remain with the Government alone because of the speed with which such decisions sometimes need to be made. In recent years there has been no real need for such urgency. A modern democracy simply cannot mobilise its forces fast. But consideration could be given to an emergency provision in the Constitution, although we have not included one.

Article 71

The legal grounds for participation in all such activities shall be presented to the Parliament in an opinion of the Attorney-General—this last point is included because there have been issues in recent years about the legality of some armed interventions which the United Nations Security Council had not authorised.

Article 71(8)