

Chapter 11

The United Nations Act 1946 and Executive Law-Making

The New Zealand's counter-terrorist obligations under UN Security Council resolution 1373 (2001) were, as discussed in chapters 4 and 5, implemented under regulations made pursuant to the United Nations Act 1946.¹ Resolution 1373 placed particular emphasis on the issue of the financing of terrorism, calling upon States to become party to the International Convention for the Suppression of the Financing of Terrorism and requiring certain steps to be taken in the prevention and suppression of terrorism.² New Zealand's immediate response, by interim measure, was to make the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 (the Terrorism Regulations), pursuant to an empowering provision in the United Nations Act.³

The object of this text is to examine the interface between counter-terrorist legislation and human rights, as applicable to New Zealand. Within that context, this chapter first examines the potential impact of the Terrorism Regulations upon human rights. In doing so, it will be concluded that there are no issues of concern, but an interesting aspect of the traditional tension between the executive and legislature is exposed. 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. Although the issues to be discussed are not limited to the regulations made by New Zealand in

¹ SC Res 1373, UN SCOR, 4385th Mtg, UN Doc S/Res/1373 (2001).

² *International Convention for the Suppression of the Financing of Terrorism* (the Financing Convention), opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

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 2001* would have passed through Parliament). Due to the early dissolution of Parliament, however, (prompted by early elections in July 2002), the life of the Regulations were extended to 31 December 2002 by the *United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Amendment Regulations 2002*.

response to Resolution 1373, those regulations illustrate an exercise of the regulation-making powers of the New Zealand Government in respect of obligations imposed upon it by the United Nations Security Council. Particular attention is therefore 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 (NZBORA), this heightening the tension because of Parliament's role as "guardian of the public interest".⁴

The United Nations Act 1946

Resolutions adopted by the UN Security Council under Chapter VII of the Charter of the United Nations, and the obligations they impose upon member States, are given effect to in New Zealand 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". 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-section (2) thus 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.

⁴ It is, naturally, contestable whether Parliament or the Judiciary is the ultimate "guardian" of the public interest, although most would agree that both are responsible for this, a matter outside the scope of discussion within this chapter. Notably, however, that phrase was used by the Regulations Review Committee when discussing the issue of abrogation of human rights: see 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, 16.

New Zealand has made various regulations under the United Nations Act in response to sanctions imposed by the Security Council.⁵ Although the Act is principally intended to respond to the making of sanctions by the Security Council, which tend to be of an interim nature, the Act does not contain any provision linking the life of United Nations regulations to the life of the corresponding sanctions.

Regulation-Making Powers in New Zealand

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.⁶ The report was not directly on point to the issue being considered here, but there are principles enunciated within it that are relevant to the question of the executive's

⁵ The extant regulations made under the *United Nations Act 1946* are:

- The *United Nations Sanctions (Afghanistan) Regulations 2001*, made for the purpose of giving effect to SC Res 1267, UN SCOR, 4051st Mtg, UN Doc S/Res/1267 (2001), and SC Res 1333, UN SCOR, 4251st Mtg, UN Doc S/Res/1333 (2000).
- The *United Nations Sanctions (Democratic Republic of the Congo) Regulations 2004*, made for the purpose of giving effect to SC Res 1493, UN SCOR, 4797th Mtg, UN Doc S/Res/1493 (2003); and SC Res 1552, UN SCOR, 5011th Mtg, UN Doc S/Res/1552 (2004).
- The *United Nations Sanctions (Iraq) Regulations 1991*, made for the purpose of giving effect to SC Res 661, UN SCOR, 2933rd Mtg, UN Doc S/Res/661 (1990; SC Res 670, UN SCOR, 4943rd Mtg, UN Doc S/Res 670 (1990); SC Res 686, UN SCOR, 2978th Mtg, UN Doc S/Res/686 (1991); and SC Res 687, UN SCOR, 2981st Mtg, UN Doc S/Res/687 (1991).
- The *United Nations (Iraq) Reconstruction Regulations 2003*, made for the purpose of giving effect to SC Res 1483, UN SCOR, 4761st Mtg, UN Doc S/Res/1483 (2003).
- The *United Nations Sanctions (Kimberley Process) Regulations 2004*, made for the purpose of giving effect to SC Res 1306, UN SCOR, 4168th Mtg, UN Doc S/Res/1306 (2000); and SC Res 1343, UN SCOR, 4287th Mtg, UN Doc S/Res/1343 (2001).
- The *United Nations Sanctions (Liberia) Regulations 2001*, made for the purpose of giving effect to SC Res 1343, UN SCOR, 4287th Mtg, UN Doc S/Res/1343 (2001).
- The *United Nations Sanctions (Rwanda) Regulations 1994*, made for the purpose of giving effect to SC Res 918, UN SCOR, 3377th Mtg, UN Doc S/Res/918 (1994).
- The *United Nations Sanctions (Sierra Leone) Regulations 1997*, made for the purpose of giving effect to SC Res 1132, UN SCOR, 3822nd Mtg, UN Doc S/Res/1132 (1997).
- The *United Nations Sanctions (Somalia) Regulations 1992*, made for the purpose of giving effect to SC Res 733, UN SCOR, 3039th Mtg, UN Doc S/Res/733 (1992).
- The *United Nations Sanctions (Sudan) Regulations 2004*, made for the purpose of giving effect to SC Res 1556, UN SCOR, 5053rd Mtg, UN Doc S/Res/1556 (2004).

⁶ 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.

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 be able to amend other Acts. While this focus on international treaties is due to the particular terms of reference of the Committee inquiry,⁷ 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.⁸ The Committee took a peculiar approach to the issue of section 2 of the United Nations Act. On the one hand, it noted concern with the breadth of these regulation-making powers. It nevertheless dismissed the need to review those powers, stating:⁹

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 did not, however, explain the basis for this conclusion. While the issue might appear to be narrow in its focus, it is unfortunate that it has not been fully considered since it is one that goes to the heart of the Committee's inquiry – the balance between the executive's law-making authority and Parliamentary sovereignty. That, in turn, is an issue that is of central importance to this text. It should by this stage of the work be apparent that consideration of the interface between counter-terrorism and human rights is, at a domestic level, one that concerns all three branches of

⁷ 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.

⁸ It is unclear why the report does not consider the *Charter of the United Nations*, since this is an instrument that would appear to fall within the terms of reference (*ibid*).

⁹ Committee Report (n 6) 29.

the State and involves the separation of powers of each branch and the ability of one to check the other.

Notwithstanding the lack of direct consideration of the United Nations Act, there are various matters discussed within the report, and recommendations made, that are of relevance to the regulation-making power under this legislation. 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.¹⁰ 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:¹¹

- Limiting enabling provisions to override the principal Act only;¹²
- Expressing the particular primary legislation provisions that may be overridden by such regulations;¹³
- Limiting such operation to matters of a technical nature or emergency measures;¹⁴
- Providing for additional Parliamentary scrutiny of any such regulations;¹⁵ and
- Prohibiting the derogation of the common law and the New Zealand Bill of Rights Act 1990.¹⁶

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.¹⁷ That is, however, the extent of

¹⁰ Ibid, recommendation 1, 17. See also the Regulation Review Committee's discussion of Henry VIII Clauses at page 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.

¹¹ A number of the recommendations reflect those made by an earlier Committee in its 1995 report, above n 6, 22.

¹² See Recommendation 3(2), *ibid*, 4: discussed within pp.21–22 of the report.

¹³ See Recommendations 3(3) and 4, *ibid*, 4: discussed within pp.21–23 of the report.

¹⁴ See Recommendation 2, *ibid*, 4: discussed within pp.19–20 of the report.

¹⁵ See Recommendation 5, *ibid*, 4: discussed within pp.23–26 of the report.

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

¹⁷ See sections 3 and 4 of the *United Nations Act 1946*. The application of the Act to the Cook Islands is a carryover of New Zealand's former governance over the Cook Islands as a 'non-self-governing territory'. The Cook Islands became self-governing in free association

the Act. 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.

Limiting Enabling Provisions to 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.¹⁸ 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.¹⁹

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

with New Zealand on 4 August 1965 and has the right at any time to move to full independence by unilateral action: see Countryreports.org, 'Cook Islands' URL <<http://www.countryreports.org/country.asp?countryid=58&countryName=Cook%20Islands>> at 20 March 2005. Against that background, section 4 of the *United Nations Act 1946* provides: "(1) This Act shall be in force in the Cook Islands and, to the extent to which Her Majesty has jurisdiction therein, in every other territory for the time being administered by Her Majesty's Government in New Zealand. (2) Except so far as otherwise expressly provided, regulations made under this Act shall not be in force in the Cook Islands or in any such territory as aforesaid".

¹⁸ The practical observation, however, is that this does not occur very frequently: discussion between the author and Professor John Burrows, University of Canterbury, 10 March 2005.

¹⁹ Committee Report (n 6) 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, para 10.

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 2001 session of Parliament.

Tying this point to the potential abrogation of human rights, it is notable that a similarly restrictive view is adopted within the International Covenant on Civil and Political Rights (ICCPR).²⁰ As discussed in chapter 7, Article 4 of the Covenant permits certain limitations upon rights and freedoms when a public emergency which threatens the life of a nation arises. A State party cannot, however, derogate from certain specific rights and may not take discriminatory measures on a number of specified grounds.²¹ 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.²² The Human Rights Committee signalled in its general comment on the application of article 4 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.²³ 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.

Providing Additional Parliamentary Scrutiny

Greater scrutiny by Parliament of Henry VIII regulations was something recommended by the Committee. Under current procedures, the Regulations (Disallowance) Act 1989 provides for what is known as a

²⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²¹ 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 1 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).

²² Article 4(3) of the *International Covenant on Civil and Political Rights*.

“negative” procedure of Parliamentary approval.²⁴ That is, regulations remain in force unless specifically disallowed by Parliament. The alternative “positive” procedure for scrutiny would provide that regulations do not come into force until first allowed by Parliament.²⁵ As recently noted by the Regulations Review Committee, this is a reasonably common (and growing feature) of the making of regulations in New Zealand.²⁶ 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.²⁷ 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 in a timely manner, without the risk of subsequent disallowance.²⁸

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.²⁹ It pointed to this allowing the executive to ensure compliance

²³ See Human Rights Committee, *States of Emergency (Article 4)*, CCPR General Comment 29 of 2001, reprinted UN Doc HRI/GEN/1/Rev.6 at 186 (2003), para 2.

²⁴ See section 6 of the *Regulations (Disallowance) Act 1989* and Standing Order 387 of *New Zealand Standing Orders of the House of Representatives*.

²⁵ For further discussion on positive approval procedures, see Thornton GC, *Legislative Drafting*, (4th ed, Butterworths, 1996), 337. The only positive procedures in New Zealand are contained within: (1) 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; and section 78B of the *Dog Control Act 1996* (inserted by section 46 of the *Dog Control Amendment Act 2003*).

²⁶ Regulations Review Committee, *Interim Report on the Inquiry into the Affirmative Resolution Procedure*, NZAJHR (2004), I.16F, 3.

²⁷ For further discussion on the process, see Tudor P, “Secondary Legislation: Second Class or Crucial?”, *Statute Law Review*, Volume 21, 149.

²⁸ 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 6, 26.

²⁹ 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.

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 difference needs to be noted. The submissions of the Ministry made a broad distinction between matters of policy and technical matters and equated bilateral treaties as being technical, versus multilateral treaties as often involving policy issues.³⁰ The former, according to the Ministry's formulation, may properly override primary legislation. Where, within that scale, do obligations imposed by the UN Security Council fall? There is no absolute answer. From one perspective, resolutions of the Security Council are adopted as an exercise by the Council of its mandate under the United Nations Charter (a multilateral treaty) and are likewise binding upon States through the Charter.³¹ Adopting the Ministry's broad categorisation, such resolutions might therefore be considered as involving matters of policy. The reality, however, is that obligations imposed upon States under resolution of the Security Council are quite often very specific and technical (particularly when calling for the imposition of trade sanctions and the like). The question must therefore be addressed having regard to the substance of each particular resolution and its effect.

If the effect of UN regulations is to abrogate human rights, by impacting upon the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, or the Human Rights Act 1993, that is clearly a matter of policy rather than mere technicalities. Adopting the philosophy behind the Ministry's own submissions, 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" (as expressed by the Review Committee) must be protected.³² Central to this Parliamentary role, as recognised by the Committee, is the protection of rights and freedoms.³³

This is not to suggest that non-compliance with Security Council resolutions is acceptable. Indeed, non-compliance with mandatory provisions of a resolution of the Council would be contrary to New Zealand's obligations as a member of the United Nations.³⁴ If that occurred, the Security Council would be entitled to issue sanctions against New

³⁰ *Ibid.*

³¹ *Charter of the United Nation 1945*, Articles 24 and 25. There are 191 States parties to the Charter.

³² Committee Report (n 6) 16.

³³ *Ibid.*, 17.

³⁴ *Charter of the United Nations*, Article 25.

Zealand for its failure to comply.³⁵ The issue being addressed here concerns the manner in which such obligations are implemented by New Zealand, by whom they are implemented (the executive alone, Parliament alone, or the executive with Parliamentary scrutiny), having regard to the consequences of the implementing regulations (potentially abrogating human rights).

The Issue in Context: Counter-Terrorism versus Human Rights

The issue being considered here (the relationship between regulations made under the United Nations Act and human rights) is one that, unless subsequently taken up by the Regulations Review Committee, is relatively academic in nature. Discussion of the issue, to this point, has predominantly been in the abstract. It is therefore useful to place the issue in context by considering the Terrorism Regulations made in response to Security Council resolution 1373 (2001).

Suppressing the Financing of Terrorism

As discussed within chapter 3, one of the primary objectives of resolution 1373 (2001) was to suppress the financing of terrorist activities and entities by imposition of specific obligations to achieve those ends. In that regard, 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 off 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.³⁶

As also intimated within chapter 3, of the various terrorism-related conventions, the Financing Convention is possibly the most controversial. It requires States parties 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

³⁵ See Chapter VII of the *Charter of the United Nations*, Articles 41 and 42 in particular.

³⁶ See the preamble to the *International Convention for the Suppression of the Financing of Terrorism* (n 2).

funds with other States on a case-by-case basis. Bank secrecy is no justification for refusing to cooperate under the treaty.

Security Council resolution 1373 was adopted soon after 11 September 2001, through which the Council determined that all States are to prevent and suppress the financing of terrorist acts, including the criminalisation of such financing and the freezing of funds and financial assets.³⁷ Described as one of the most strongly worded resolutions in the history of the Security Council,³⁸ it also requires countries to cooperate on extradition matters and the sharing of information about terrorist networks.³⁹ As a decision made under Chapter VII of the United Nations Charter, compliance with the latter Resolution is mandatory under international law.⁴⁰

The Terrorism Regulations

In its first report to the Security Council Counter Terrorism Committee under paragraph 6 of the Resolution, 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.⁴¹ 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 legislative amendments introduced under the Counter-Terrorism Bill 2003.

The question in context is this: were the regulations made within the terms of the empowering provision under the United Nations Act 1946? If

³⁷ SC Res 1373 (n 1).

³⁸ 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 worked, at that time, 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.

³⁹ SC Res 1373 (n 1) para 3.

⁴⁰ *Charter of the United Nations*, Article 25.

⁴¹ *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, New Zealand*, 2 January 2002, S/2001/1269. 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.

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 would have been *ultra vires*.⁴²

If, on the other hand, the regulations did no more than what is permitted by the United Nations Act, it is suggested 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.⁴³ Aspects of the Committee's 2002 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 concerning the making of regulations that impact upon Acts of Parliament.

Examining the Terrorism Regulations

Having regard to the controversial nature of the Financing of Terrorism Convention, and the fact that New Zealand reported to the Security Council Committee that (by way of interim measure) it implemented the financial regulation obligations through the Terrorism Regulations,⁴⁴ 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

⁴² See, for example, *Official Assignee v Chief Executive Officer of the Ministry of Fisheries* (CA) [2002] 2 NZLR 722.

⁴³ Standing Order 387 of *New Zealand Standing Orders of the House of Representatives*.

⁴⁴ It should be noted, however, that the 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. It only said that the Regulations were there to give effect to the financial regulation obligations imposed under Security Council resolution 1373 (n 1).

defined within the Schedule to the Regulations).⁴⁵ This, according to the Regulations' preamble, has been done for the purpose of giving effect to Resolution 1373.⁴⁶ If, upon examination, 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.⁴⁷ Added to this would be the fact that the regulations would bypass the legislative process mandated within the House of Representatives Standing Orders.⁴⁸

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 were clearly within the scope of obligations imposed upon New Zealand through paragraph 1 of resolution 1373 (2001):

1. *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;
 - (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

⁴⁵ Limited to Al-Qaida, the Taliban and Usama bin Laden: see the Schedule to the *United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001* and the Regulation's definitions of those entities within regulation 4(1).

⁴⁶ The Regulations are also stated to be made to give effect to SC Res 1267, UN SCOR, 4051st Mtg, UN Doc S/Res/1267 (2001), and SC Res 1333, UN SCOR, 4251st Mtg, UN Doc S/Res/1333 (2000). These resolution of the Security Council relate to the regulation of financial and other assistance to the Taliban regime in Afghanistan.

⁴⁷ See Robertson *Adams on Criminal Law* (Brookers Loose-Leaf), 10-30.

⁴⁸ See Standing Orders 389 to 392 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.

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;

The Regulations did not go as far as the Financing of Terrorism Convention goes, nor the Terrorism Suppression Act 2002 (NZ) — through which the Convention was eventually incorporated into domestic law.⁴⁹ Neither was the New Zealand Bill of Rights Act, nor the Privacy or Human Rights Acts, impinged upon. The offences within the Regulations were framed within the context of conduct in support of terrorist organisations where the person *knows* that s/he is doing so. This is in fact much narrower in focus than the equivalent provisions of the Terrorism Suppression Act 2002, which drew criticism on account of the broad definition of terrorist groups and liability for *reckless* conduct within sections 8 and 9 of the Act.⁵⁰ The executive acted responsibly, in the author's view, to avoid any potential natural justice⁵¹ or rule of law⁵² conflicts between the Regulations and human rights.

This is all positive news and displays a responsible approach on the part of the Executive in using regulations for counter-terrorist measures. Notwithstanding this, two potential problems remain. First is the fact that the power to make 'Henry VIII' regulations inconsistent with the NZBORA

⁴⁹ 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 40 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.

⁵⁰ 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 Banker's Association to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/133, Parliamentary Library, Wellington.

⁵¹ A criticism that might be directed towards the Terrorism Suppression Acts 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: see Chapter Seven.

⁵² A criticism that might be made of the Terrorism Suppression Act'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. The Solicitor-General's advice to the Attorney-General, however, was that the definitional provisions of the Terrorism (Bombings and Financing) Bill did not pose such a problem and guaranteed certainty: Letter from the Solicitor-General to the Attorney-General, "re Terrorism Suppression Bill: Slip Amendments – PCO 3814B/11 Our Ref: ATT114/1048 (15)", 9 November 2001, paras 6-15.

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)?

The Issue in Principle: How should the *United Nations Act* and *Bill of Rights Act* interact?

The foregoing discussion 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 writer’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?

Operative Provisions of the Bill of Rights Act

As discussed in chapter 8, the operative provisions of the Bill of Rights, sections 4, 5 and 6, 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.

Given that regulations made under the United Nations Act are ‘Henry VIII’ regulations, how do these operative sections apply? Two issues arise. First, does section 6 of the NZBORA require the regulations to be made consistently with the Bill of Rights Act? Secondly, does section 4 of the Bill of Rights, combined with section 2(2) of the United Nations Act, provide United Nations regulations with special protection?

Applying Section 6 of the NZBORA

The position here is simple. By application of the general principles of statutory interpretation, one is able to argue that section 6 of the Bill of Rights requires any item of subordinate legislation to be made in a manner that is consistent with the NZBORA, lest that subordinate legislation (including UN regulations) be *ultra vires* its empowering Act. 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”. This was the approach taken by the New Zealand Court of Appeal in *Drew v Attorney-General*, 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 by reason of inconsistency with the New Zealand Bill of Rights Act 1990.⁵³

Adopting that approach, 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.

Applying section 4 of the NZBORA to section 2(2) of the UN Act

The next question to consider is whether section 4 of the NZBORA, combined with section 2(2) of the United Nations Act, provides United Nations regulations with special protection. The effect of section 4 of the NZBORA is that no provision of an enactment can be treated as invalid or ineffective if that provision is irreconcilably in conflict with the Bill of Rights. Does section 4 thus protect the Henry VIII status of regulations made under the United Nations Act? To answer this, a further question needs to be considered: is section 2(2) of the United Nations Act irreconcilably in conflict with the Bill of Rights?

As just discussed, section 6 of the Bill of Rights requires enactments to be interpreted in a manner that is consistent with it. How, then, is section 2(2) of the United Nations Act to be interpreted? Section 2(2) provides:

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.

⁵³ *Drew v Attorney-General* [2002] 1 NZLR 58: discussed further in chapter 8, *infra*, concerning the meaning of the term “enactments”.

However, nowhere in the United Nations Act is there an authority to regulate in a manner inconsistent with the Bill of Rights. One possible interpretation, then, is that since such authority is not contained within the Act itself, then regulations made under the Act cannot be repugnant to the provisions of the NZBORA. This would certainly be an interpretation that is more consistent with the Bill of Rights and is therefore to be preferred by application of section 6 of the NZBORA to section 2(2) of the UN Act. On the other hand, it might be argued that the words of section 2(2) do not avail themselves of the potential interpretation proffered, since they clearly provide validity to regulations despite “any repugnancy to any Act” [emphasis added].

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. What the analysis illustrates, however, is the potential dichotomy between the maintenance of peace and security and that of human rights standards: the central conflict being considered within this thesis. 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 that should remain within the purview of Parliament and not the Executive Government alone.

Recommendations

In the absence of a specific and comprehensive review and report by the Regulations Review Committee itself, the author 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 chapter 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, and

possibly any provision of the Privacy Act 1993 and Human Rights Act 1993.

- Third, it is recommended that the regulation-making power and process should be limited to either of the following extents:
 - Empowering the making of regulations only *if* the Security Council resolution in question requires immediate action *and* Parliament is not sitting.
and/or
 - 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
 - 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 adopting the latter restriction(s), 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 and the protector of the public interest.

Conclusion

Although examination of the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 has not disclosed any potentially *ultra vires* provisions, consideration of the Regulations has triggered contemplation of an important issue. Namely, how the balance of power is to be attained in the situation of subordinate legislation made under the United Nations Act 1946 (in pursuit of international security measures mandated by the UN Security Council).

Regrettably, there has been little direct consideration of the issue within New Zealand. This chapter has therefore examined the issue and outlined

the potential dangers that exist with the regulation-making power under the Act. First, the Executive may make regulations that are not subject to scrutiny; second, those regulations have superior status over Acts of Parliament; and third, they may be used to limit human rights with no power of recourse to the Courts. The recommendations made seek to achieve a balance between national and international security, with the desire to maintain and protect human rights and preserve the “checking” function under the separation of powers doctrine.

