Caroline Morris · Jonathan Boston
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Reconstituting the Constitution

this, he thought, reflected a process best described as the "conscious self-realisation of humanity".[43]

Within that philosophical context, Hammarskjöld spoke of the United Nations Charter pointing towards the ideal of a "true constitutional framework for world-wide international cooperation",[44] and even as the Charter containing the seeds of an international constitution.[45] The world was, however, at an embryonic stage in that process.[46] Contemporary legal philosophers have extended that concept to the notion of the "self-constituting of international society."[47]

The Charter, in fact, contains its own internal provisions for teleological transformation. There is general concern that these provisions have not been sufficiently implemented for the United Nations to remain effective as the central and primary organisation of the system. A tension exists between the most fundamental principle that underpins the United Nations Charter – the sovereign equality of states – and the vision of a future global order resting on the notion of "we the peoples of the United Nations" in whose name the document opens. There is no doubt that some constitutional character to the Charter was originally envisaged at the earliest stages

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[43] Frölich (2001), p. 17 ff.

[44] "...the United Nations is an experimental operation on one of the lines along which men at present push forward in the direction of higher forms of an international society. It is obvious that we cannot regard the line of approach represented by the United Nations as intrinsically more valuable than other lines, in spite of the fact that, through its universality, it lies closer to, or points more directly towards, the ideal of a true constitutional framework for world-wide international co-operation. . . . the United Nations is an effort just as necessary as other experiments, and nothing short of the pursuit of this specific experiment with all our ability, all our energy and all our dedication, can be defended. In fact, the effort seems already to have been carried so far that we have conquered essential new ground for our work for the future. This would remain true in all circumstances and even if political complications were one day to force us in a wholly new direction" (Hammarskjöld 1960b).

[45] "When a new social organism is created, we give it a constitution. Inside the framework of that constitution the first vital urges begin to stir, but as its life develops towards fullness the constitution is adjusted, so to say, from within, to new and changing needs which even the wisest legislator and statesman could only partly foresee" (Dag Hammarskjöld's address to the University of California, June 1955, quoted in Frölich 2008, p. 215).

[46] "In fact, international constitutional law is still in an embryonic stage; we are still in the transition between institutional systems of international coexistence and constitutional systems of international co-operation. It is natural that, at such a stage of transition, theory is still vague . . .." (Hammarskjöld 1960b).

[47] "The great intellectual challenge of the 21st century can be stated with relative clarity. The globalising of social phenomena is taking place in a philosophical vacuum, with social forms and processes crudely separated from their philosophical foundations, and left to develop, if at all, in a waste-land of rational and ethical nihilism.

Is the self-consciousness of the self-constituting of a true international society to be dominated by accident and force, because the human species is unable to reconstitute itself by reflection and choice? What is to be the philosophy of revolutionary social transformation at the global level?" (Allott 2005, pp. 131–132).

of planning within the United States Administration.[48] This concept prevailed through, in diluted form, at the founding conference at San Francisco.[49] And it has been authoritatively argued that the most appropriate method of legal interpretation applicable to the United Nation Charter is to be found in national constitutional law.[50]

The vision of humankind acting as one entity in international law has emerged with the introduction of the concept of the "common heritage of humankind", that characterises the opening provisions of most global treaties in the contemporary era.[51]

It has indeed become commonplace within some circles of scholarship today to regard the United Nations Charter as a prototype global constitution. Within the past few decades, a body of literature has emerged that speaks of "world constitutionalism".[52] This is defined as the constitutional and jurisprudential framework for the international behaviour of nations that reflects a philosophical recognition of

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[48] Indeed, the first document on the United Nations, drafted in the US State Department, in 1943, was entitled "Draft Constitution of an International Organization". In the subsequent draft version this was changed to "Charter" (Simma 1995, p. 5).

[49] "In the course of two months, the conference succeeded in distilling from the generally-worded principles and guidelines of Dumbarton Oaks a treaty text which was far from perfect in terms of legal technique but which has served the world organisation as its legal basis and constitutional framework for almost five decades." Grewe (1995), p. 10.

[50] "Among all international organizations, the UN holds a special position. The interpretation of the law of international organizations depends on various factions even under normal circumstances; the founding treaty, as a treaty under international law, is not of a structurally homogeneous nature. It contains contractual as well as normative elements. To those contractual elements, such as questions concerning the conclusion of the treaty, termination and to some extent amendment or modification, the ordinary rules for the interpretation of international treaties must be applied because of the equal standing of the partners. However, for the normative side of the founding treaty, the Charter and the organizational law derived from it (secondary law), the appropriate parallelism can only be found in domestic public law, e.g., the constitutional and administrative law of the member states. Different rules of interpretation must be applied, not only to the internal law in a narrow sense, such as the secondary organizational law, but also in the normative part of the founding treaty, the Charter in the strict sense of the word, because of its similarity to national constitutional law" (Grewe 1995, p. 27).

[51] This phrase, in varying form, appears in the Antarctic Treaty (1959), the Outer Space Treaty (1968), the Law of the Sea Convention (1982), and the Framework Convention on Climate Change (1992). See, for an exploration of the effect of such a phrase on national sovereignty, Mann Borgese (1998), especially Chap. 4.

[52] This school of thought owes most to former European Human Rights Court judge, RS MacDonald. MacDonald sought to determine "whether the Charter is a mere treaty, albeit with universal scope and near-universal membership, restating general principles of international law, or whether it is recognised as a world constitution increasingly influential in the creation and consolidation of a universal legal community." MacDonald (1999), p. 205. See also Tomuschat 1993: "States live, as from their birth, within a legal framework of a limited number of basic rules which determines their basic rights and obligations with or without their will. . . . One may call this framework . . . the constitution of the international community."

common interest, natural obligation, shared sovereignty, and legitimate enforcement operating within the rule of law. The contention here is that the United Nations Charter is more than a treaty and less than a world constitution, and that there is an evolutionary process underway whose ultimate manifestation cannot yet be foreseen.[53]

Connected to these considerations is the concept of the "law of humanity" – the notion that the legitimacy of sovereign will and power derives, not from legal positivism, but from the universal law of justice.[54] As the primacy of the nation-state in international relations cedes ground, trending "upwards" to the law of international organisation and "downwards" to the law imposed on corporations and individuals, legal positivism cedes primacy, by correlation if not cause, to a re-emergence of universal law, related to though not identical with, natural law.

These developments have direct implications for New Zealand constitutional thought and practice. One important part of that concerns the manner in which New Zealand relates international law to its own domestic law.

16.5 Implications of the Major Treaties for New Zealand Constitutional Thought and Practice

To what extent have the treaties influenced New Zealand constitutional thought? The major treaties of the twentieth century have heavily influenced the theory of sovereignty and of constitutional thought in United Nations member states, and

[53] "... The constitutionalist perspective is about the establishment of important, albeit limited, supra-national competencies at the international level. To consider the Charter of the UN and its extensions as the constitution of the international community *tout court* marks a significant step towards change and centralisation at the expense of classical sovereignty in international society. Constitutionalism is also about democratic governance and respect for individual rights. In this respect, I will suggest that the constitutionalisation of the principles of the Charter and its extensions is fully in line with the inclusionary ideals embodied in democratic constitutions and can thus be understood as a complementary feature of national constitutional traditions" (MacDonald 1999, p. 205).

[54] "The law, as conceived by legal positivism, is not a law for all humanity, since by definition it is prohibited from applying to all human beings. Its universality is restricted by its own nature, since there must be persons, or at least one person, exempt from it, and for whom it is not valid. ... The authority of the state, we assert, is limited by the law of humanity. This means, in accordance with our premises, that the right of any constraining power must be restricted to making and enforcing such laws as are necessary to secure the rights of all. But here arises a new difficulty – a difficulty which reveals, so to speak, the full misery of humanity, if we regard humanity not as an ideal community which should exist, but as it does actually exist in our experience. In this ideal order, no doubt, the competence of the sovereign to enforce his will upon his subjects *depends* upon the accordance of his will with the universal law of justice. But under the conditions of experience no-one can possess this competence, unless he first possesses the material power to enforce his will. On the other hand, the legality of the will is the condition of its power; on the other, the power of the will is the condition of its legality" (Ebbinghaus 1953).

New Zealand is no exception. Employing the five criteria developed in section 16.4, it is possible to gain a sense of the government's views of the impact which these treaties are making on New Zealand's national sovereignty.

16.5.1 Peremptory Norms

In the International Court of Justice case which it lodged against France over nuclear testing in 1995, New Zealand employed the concept of *jus cogens*. It argued that "such fundamental principles which have the character of *jus cogens*" do not fall within the scope of the primacy provision in Article 103 of the United Nations Charter. The obligations arising from those are not to be found simply in "any other international agreement" – they have a "much more basic character". New Zealand cited the International Court of Justice's *Military and Paramilitary Activities* case in support.[55]

A more recent reference was made by New Zealand in 2008, in the United Nations General Assembly's Sixth Committee – to the effect that exception to immunity of state officials from foreign criminal prosecution is "particularly appropriate when the prohibition of an international crime has reached the status of a *jus cogens* norm."[56]

Parliamentary discussion appears to contain only one reference to the concept – in the context of the third reading of the debate over the Cluster Munitions Bill in December 2009 – to the effect that, in twenty-first century international law, there should be no withdrawal provision in treaties banning weapons that could be regarded as violating a peremptory norm.[57]

In general, it is clear that New Zealand not only recognises the existence of peremptory norms but is disposed to cite them in a positive manner – in the knowledge of the derogation of national sovereignty this entails.

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[55] Statement by Hon Paul East, Attorney-General, International Court of Justice, The Hague, 1995. http://www.beehive.govt.nz/feature/nuclear+tests+case+new+zealand+v+france (last accessed 14 March 2011).

[56] Statement by New Zealand delegate, Tom Kennedy, United Nations General Assembly, New York, 3 November 2008. http://www.mfat.govt.nz/Media-and-publications/MFAT-speeches/2008/0-3-November-2008b.php (last accessed 14 March 2011).

[57] "[T]here is the whole question of the withdrawal clause that members will find in the convention itself, I think in article 20. I believe that in the current age it is an outmoded notion that States entering this kind of treaty banning weapons that violate such fundamental notions of human rights should be seen as *ius cogens*, a peremptory norm. There should be no withdrawal from those." Kennedy Graham, MP, Cluster Munitions (Prohibition) Bill, Third Reading, 10 December 2009, *New Zealand Parliamentary Debates (Hansard)*.

16.5.2 Contractual Permanency

The implication of these developments for New Zealand's constitutional status is that this country, along with all other non-nuclear weapon states, appears to be losing its customary right to withdraw from the Nuclear Non-Proliferation Treaty and, after a six-month period, commence a nuclear weapons programme. While this may be seen as a desirable political development by many, its constitutional significance is far-reaching.

16.5.3 Obligation Avoidance

On a few occasions New Zealand has violated its treaty obligations and yet managed to avoid outright censure. In 1956, New Zealand violated the United Nations Charter in actively supporting the British invasion of Egypt, against internal advice that this would be tantamount to an illegal action. The vote at the United Nations left New Zealand in a small minority being condemned for aggression, and demanding withdrawal.[58] The second occasion involved a possible dereliction of obligation by the New Zealand government under the International Crimes and International Criminal Court Act. An arrest warrant, issued in 2006 for Israeli military leader, Moshe Ya'alon, while he visited New Zealand, was quashed by the Attorney-General within 24 hours. In fact, under the Act and also under the Geneva Conventions Act, the government has a proactive obligation to actively investigate any case of suspected war crimes having been committed anywhere.[59]

16.5.4 Global Powers

In various statements, New Zealand has made it clear that it accepts the strengthening of the United Nations Security Council's powers through "legislation" under Chapter VII.

16.5.5 World Constitutionalism

New Zealand appears not to have expressed any official view on this more visionary aspect of constitutional thought. It is clear, however, that it does perceive the United Nations Charter as possessing superior status in international law, respecting Article 103.

[58] UNGA Emergency Session: Resolution 997, 2 November 1956. Voting was 64–5 (New Zealand) – 6.

[59] Dunworth (2008).

16.6 Conclusion

The major international treaties identified in this paper carry collectively the seeds of a movement towards a shared international sovereignty of some kind. The United Nations Charter stands separate and distinct from all other treaties as the fabric of a founding constitutional document. The treaties spawned within that system – on climate change, arms control, and individual human rights and criminal liability – are strengthening that movement. While some theorists speak of a prototype "world constitution", political leaders and diplomatic practitioners are preparing for an incremental sharing of sovereignty as the global problems intensify in the early twenty-first century.

New Zealand's constitutional thinking remains undeveloped, and consequently the country is ill-equipped to keep pace with the speed of global change.[60] The country aspires to be a responsible member of the international community, by which it means that it is in favour of international cooperation, the rule of law, and fairness in the use of the world's resources and enjoyment of its bounty. New Zealand believes it takes its international responsibilities seriously and is open and fair-minded. Yet this self-perception is redolent of an internationalism that is more characteristic of mid-twentieth century thinking.

Each of the global treaties considered here has impacted on the national sovereignty of New Zealand in a significant way. In each case it has resulted in less sovereign freedom possessed in the early 21st century than the mid-20th century. Along with each other nation-state, New Zealand is engaging in an ineluctable process of sharing sovereignty with the rest of the international community.

Appendix

A Case Study of National Sovereignty and International Law: The International Criminal Court and the Crime of Aggression

New Zealand's implementation of the 1998 Rome Statute, through the International Crimes and International Criminal Court Act 2000, offers insight into New Zealand's constitutional thinking on major treaties of the kind analysed in this chapter. And a member's Bill on the subject of aggression, introduced into Parliament in 2010, completes the picture of a small country wrestling with the tension between national sovereignty and international law.

[60] New Zealand's constitutional thought was recently described by Law Commission President, Sir Geoffrey Palmer, as in a "somewhat primitive state". (*The Dominion Post*, 13 November 2010, A21.)

Implementation Considerations

In 2000, the Parliament's Regulations Review Committee, considering the International Crimes and International Criminal Court Bill, recommended with the support of the Foreign Affairs, Defence and Trade Committee (FADT Committee) amendments to Clause 4 (1) of the Bill. The stated concern was that, as drafted, the clause could be interpreted to imply that subsequent amendments to the Rome Statute could automatically become incorporated into New Zealand law.

Consideration was also given to amending clause 179 (f) of the Bill to ensure that it would not apply to implementation of any amendments to the Statute that might impose substantive new obligations. It was recognised, however, that similar provisions in other New Zealand legislation implementing treaty obligations did not differentiate between substantive and other amendments, and that, in practice, any subsequent amendments to the Rome Statute would "require parliamentary scrutiny under the parliamentary treaty examination process" in any event.

Ten years later, such an issue arose as a result of decisions taken by the Parties at the International Criminal Court (ICC) Review Conference in Kampala in June 2010. Through an amendment adopted at the Conference potentially incorporating aggression as a justiciable crime in 2017, States Parties have effectively resolved the two outstanding issues in Article 5 (2) of the Rome Statute. The first is agreement on a legal definition of the crime of aggression. The second is the circumstances relating to the respective jurisdictional competences of the United Nations Security Council and the ICC Prosecutor. While States Parties effectively resolved both issues at Kampala in 2010, they also agreed that a subsequent decision would be taken at the next review conference in January 2017.

The Kampala resolution strikes an exquisite balance between global and national sovereignty.[61] Global powers have been strengthened in several respects:

- First, the Security Council may make a political determination of a case of state aggression, as it always could under the Charter,[62] then refer such a case to the ICC for possible individual criminal prosecution. And it can do this, irrespective of whether the aggressor country is a State Party to the ICC or not. This constitutes a major derogation of national sovereignty.
- Secondly, the ICC can initiate investigation, independent of the Security Council, upon referral by a State Party of complaint by a non-governmental organisation. But the Security Council may defer such an investigation for a 12-month period (renewable). A quadrilateral relationship is therefore developing between the United Nations (Security Council), the ICC, states and individuals over criminal jurisdiction, with national sovereignty as the underlying issue.

[61] Resolution RC/Res.6, 16 June 2010. ICC website.

[62] United Nations Charter, Article 39.

The principle of complementarity, whereby a suspected crime is handled in national jurisdictions in the first instance, and referred to the ICC only when the former are unwilling or incapable, is a clear protection of national sovereignty. Yet the Prosecutor's powers of *proprio motu*, allowing for investigations to be initiated in response to complaints from States Parties or non-governmental groups, constitutes a derogation of such sovereignty, and one of the principal reasons for the caution or opposition of some major powers.

The International Non-Aggression Bill 2009

New Zealand's perception of sovereignty and of its approach to implementing international law into domestic law was subjected to scrutiny in August 2009, with the introduction into Parliament of the International Non-Aggression and Lawful Use of Force Bill.

The Bill invited Parliament to act in advance of the ICC process in respect of aggression by making it a crime in domestic law for a New Zealand leader to commit aggression. Specifically, the purpose of the Bill was to achieve two related objectives: first, to ensure that the use of armed force by New Zealand is always in conformity with international law and in particular the United Nations Charter; and secondly, to protect New Zealand leaders from external pressure to commit the New Zealand Defence Force to any illegal action overseas.

To that end, the Bill would have:

(a) Required that New Zealand observe its binding obligation under the United Nations Charter not to commit an act of aggression;
(b) Made it a criminal offence in New Zealand law for any New Zealand leader to commit an act of aggression;
(c) Required a New Zealand leader to obtain the written advice of the Attorney-General, to be tabled for debate in the House 7 days in advance of any executive decision to commit New Zealand armed forces to action;
(d) Anticipated the inclusion at some future time of "aggression" within the jurisdiction of the ICC as one of the most serious crimes of concern to the international community and a punishable offence under international criminal law as envisioned in the Statute of Rome 1998, expecting the Act to be compatible with that Statute if it were amended to include aggression within the Court's jurisdiction; and
(e) Recognised that New Zealand might engage in the use of armed force, under the United Nations Charter, in exercise of the inherent right of individual or collective self-defence or in any other manner properly authorised by the Security Council of the United Nations.

Unlike some cases of domestic legislation, the Bill would not have extended universal jurisdiction to New Zealand in the prosecution of aggression. The Bill would thus have differed from the International Crimes and International Criminal Court Act 2000, which established universal jurisdiction for New Zealand over

genocide, war crimes and crimes against humanity. Thus, nothing in the Bill would have authorised New Zealand courts to prosecute non-New Zealand leaders outside New Zealand for any act of aggression. The Bill would have focused solely on New Zealand leaders, for acts committed by the New Zealand Defence Forces.

The debate in First Reading on the Bill, held in August–September 2009,[63] provided the opportunity for the government and opposition parties to advance views on the question of aggression as a criminal offence in domestic law. In short, the government was opposed to the Bill, primarily on the stated grounds that it would constrain New Zealand's freedom of action to employ armed force overseas under the "Responsibility to Protect" doctrine.

As explained by the Minister of Defence, New Zealand wished to "preserve" the freedom to use force even in situations when the United Nations Security Council did not authorise it. The government envisaged a case, such as the 1999 "Kosovo" kind, when the Council did not authorise force yet NATO States proceeded with armed force against Yugoslavia.[64]

The validity of such a concern that the doctrine of humanitarian intervention, as it was then called, justifies armed force without United Nations Security Council authorisation is contestable. In its updated version, the "responsibility to protect", it is clear that this is not the case.[65]

It is not the aim here to contest the policy dimension of the debate over this Bill. The relevant point is the reluctance of the New Zealand government to sacrifice what it sees as a sovereign national right to use armed force through a sub-global coalition without global authorisation – a twenty-first century version of the primacy of national sovereignty.

Subsequent events have also highlighted the potency of the dualist tradition in New Zealand law. Nine months after the Bill was voted down, the ICC Review Conference adopted, as noted above, an amendment to the Rome Statute, effectively incorporating aggression as a justiciable crime within the ICC sometime after 2017. In June 2010, in response to a question in Parliament in June 2010, the

[63] New Zealand Parliamentary website: http://ourhouse.parliament.nz/en-NZ/PB/Debates/Debates/d/8/8/49HansD_20090819_00001543-International-Non-Aggression-and-Lawful.htm; and http://ourhouse.parliament.nz/en-NZ/PB/Debates/Debates/b/3/d/49HansD_20090923_00001127-International-Non-Aggression-and-Lawful.htm (last accessed 3 April 2011).

[64] ". . . [I]t would effectively hand our foreign policy to the whims of a Security Council veto. . . . I refer members to an important recent situation when this was the case. Under the proposed legislation, New Zealand and other Western democracies could not have defended the people of Kosovo against genocidal aggression, because their Prime Ministers, Presidents and indeed chiefs of defence forces would have been prosecuted in the courts. There would have been no authorisation for their actions by the Security Council, because Russia and China vetoed the proposed resolution. . . . I also note that the intervention, which this whole House universally supported, did not initially have UN approval." (Minister of Defence, Hon Wayne Mapp, *New Zealand Parliamentary Debates (Hansard)*, 19 August 2009.)

[65] See International Commission on Intervention and State Sovereignty (2001). Also United Nations (2004), para. 203 and recommendations 55–57. Also United Nations (2005a), para. 133. Also United Nations (2005b), paras 138 and 139. Also Graham (2009).

government declined an invitation to move expeditiously to implement the amendment, preferring to wait until 2017 before acting.[66]

Under a monist tradition, such an amendment would be automatically translated into domestic law.

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[66] Hansard, Oral Questions, 20 June 2010, Question 12. http://www.parliament.nz/en-NZ/PB/Debates/Debates/Daily/9/0/a/49HansD_20100623-Volume-665-Week-46-Tuesday-22-June-2010-continued.htm. See also Parliamentary website: Oral Questions: Question 12, 17 November 2009.

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