HUMAN RIGHTS AND THE NEW ZEALAND GOVERNMENT'S TREATY OBLIGATIONS

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The International Law Association established a New Zealand branch in Wellington in 1996. The following paper is an edited version of the speech made by Sir Geoffrey Palmer, on the occasion of the inaugural meeting of the Association in Auckland on 30 April 1998.

I THE PLACE OF INTERNATIONAL LAW IN CONTEMPORARY NEW ZEALAND SOCIETY

It is now trite to observe that international law, and obligations entered into internationally, drive a great amount of New Zealand's domestic law. New Zealand law on a wide range of issues must take into account and is often bound by the relevant international norm or obligation. To a degree unimagined 50 years ago New Zealand cannot please itself as to what policies it pursues. It is constrained by international developments and international law.

In New Zealand's relations with other nations the practical, everyday rules of cooperation cover a wide range of matters - postage, civil aviation, weather information, communications, customs, diplomatic and consular relations, visas, trade rules, banking obligations, money exchange, the ever-expanding umbrella of human rights, and a multitude of others. Many of these matters are regulated through international treaties and conventions. Some have international organisations and tribunals tasked with looking after or supervising the functions. The obligations place a substantial restraint upon the New Zealand Government's freedom of action, but in many cases New Zealand also derives great benefit from them.

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Sir Geoffrey was the chairperson of the NZ Institute of International Affairs UDHR Seminar held on 15 April 1998, at which the five first papers in this book were delivered.

In his book *The End of the Nation State* (1995) Kenichi Ohmae talks of "a cross-border civilization".[1] The French observer Jean-Marie Guehenno says: [2]

> Having lost the authority conferred on them by their role as depositories of a public interest, overtaken by the globalization of the new circuits of wealth, in competition with the wealth of new actors, manipulated by interests more often more powerful than themselves, the nation-states, exhausted and sickly, will increasingly be suspected of condemning corruption only to protect what power is left to them.

This is a sombre thought and one which in some ways makes the range of international law and its content of even greater importance.

There is an increasing amount of writing on the effects of globalisation and opinions on the subject vary widely. Some say it is inevitable and to be welcomed. Others say that it will remove the sovereign state as we know it and democracy with it, allowing international multi-national capitalism to rule. It is not necessary to take a position on these issues here, except to note that they are of central importance.

What we do know about international law is that the methods of making and enforcing it are fundamentally different from municipal law. The number of new treaties which appear on the scene with increasing regularity is extraordinarily high. It has been calculated that two new treaties are made every day worldwide. New Zealand has an invaluable publication in two volumes published by the Ministry of Foreign Affairs and Trade entitled the *New Zealand Consolidated Treaty List*.[3] The Ministry of Foreign Affairs and Trade tells me that New Zealand is bound by the provisions of 970 multilateral treaties and 717 bilateral ones. In other words, New Zealand is bound by more treaties than there are statutes in force passed by the New Zealand Parliament.

The Law Commission in its *Report A New Zealand Guide to International Law and its Sources*[4] commented at para 7: [5]

> About a quarter of New Zealand public Acts appear to raise issues connected with international law .... Any proposal to amend such legislation should prompt the question whether there is a treaty which must be taken into consideration. Even when there is no direct

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1 Kenichi Ohmae *The End of the Nation State: The Rise of Regional Economies* (Harper Collins, London, 1995).

2 Jean-Marie Guehenno *The End of the Nation-State* (University of Minnesota Press, 1995) 108.

3 Compiled by Tony Small, and published in 1997.

4 NZLC R34.

5 See Sir Kenneth Keith "Sovereignty ? A Legal Perspective", Address to Foreign Policy School, 29 June 1996, 8-9.

> obligation, there may well be an international standard - especially in the human rights area - which is relevant to the preparation of new legislation and the replacement and amendment of the old. It may also be relevant to the interpretation of legislation.

This estimate does not include the many regulations which also give effect to treaty provisions or empower the Government to give effect to them.

Apart from the increase in sheer quantity of international instruments that bear upon the conduct of states, three features of international law since the Second World War stand out. The first is the enormous range of treaties concerning the environment, an area which prior to the Second World War would hardly have entered the international lawyer's consciousness. While that is a great and important subject it is not on tonight's agenda. My views of it have been set out elsewhere.[6] The second feature and one even more remarkable is the development of international human rights law. The third is the burgeoning quantity of international trade law and the formation of the World Trade Organisation.

II INTERNATIONAL LAW AND MUNICIPAL LAW

For many years international law and municipal law have been seen as two separate circles that never intersect. Increasingly, however, the way to look at them, I suggest, is that they are two circles with a substantial degree of overlap and indeed it can be argued that there is only one circle.

Sir William Blackstone's *Commentaries on the Laws of England* contains a famous passage about the importance of international law, more honoured in the former American colonies than it was in Blackstone's homeland in the years that followed. The statement is worthy of full quotation:[7]

> In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises, which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule,

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6 G W R Palmer *Environment: The International Challenge* (VUP, Wellington, 1995); L D Guruswamy, G W R Palmer, Burns H *Weston International Environmental Law and World Order: A Problem Oriented Course Book* (1994).

7 Vol IV, 67.

> but merely as declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilised world.

There have been a few cases which have discussed the issue, although not many. The effect of the authorities is authoritatively summarised in the latest edition of *Oppenheim*:[8]

> The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from rules of customary international law will be recognised and given effect by English courts without the need for any specific act adopting those rules into English law. It also means that international law is part of the *lex fori* and does not have to be proved as a fact in English courts in the same way as foreign law; although evidence of state practice or received international opinion is permitted in order to establish the existence or content of a rule of international law. Judicial notice is taken of the conclusion of treaties by the United Kingdom.

There is a wonderful academic argument at international law about the difference between monism and dualism as a proper explanation for the jurisprudential nature of international law. According to the dualist theory international law and domestic law are seen as and are to be analysed as totally separate legal systems. It is submitted that this position can no longer be supported, if it ever could, and it certainly cannot be supported in New Zealand.[9] It is not correct to say that in New Zealand international law may apply within the State only when its principles have been incorporated into the internal domestic law of the State. Such a position is incompatible with the obligations that New Zealand has undertaken and the principle of good faith which accompanies them.[10]

In 1991 the House of Lords in the United Kingdom decided that the rights and freedoms guaranteed by the European Convention on Human Rights could not be directly invoked in English courts to determine whether administrative discretion exercised under broad statutory powers had unnecessarily interfered with those rights or freedoms or had been disproportionate to the decision-makers' aim.[11]

The reasoning has been severely criticised and it is doubtful whether it could ever be the position in New Zealand. It may well be that New Zealand courts would prefer the legitimate expectation theory advanced in *Minister for Immigration and Ethnic Affairs v*

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8 *International Law* (1992) Volume 1, Introduction and Part I, 57.

9 See J B Elkind and A Shaw, "The Municipal Enforcement of the Prohibition Against Racial Discrimination: A Case Study on New Zealand and the 1981 Springbok Tour" (1984) 55 BYIL 189, 233-241.

10 See art 26 Vienna Convention on the Law of Treaties.

11 *Brind v Secretary of State for the Home Department* [1991] AC 696.

Teoh.[12] The English position will inevitably be transformed by the introduction in October 1997 of the Human Rights Bill, the purpose of which is to incorporate and give express domestic effect to the European Convention on Human Rights.

The monism argument is likely to become considerably stronger in New Zealand now that the processes for Parliament's consideration of international conventions and treaties that the Government is intending to enter has altered.

III PARLIAMENTARY INVOLVEMENT WITH TREATIES

In a little-noticed report tabled late in 1997, the Foreign Affairs and Trade and Defence Select Committee of Parliament made a report which contained six significant recommendations. These were:

1 That, for a trial period of 12 months, all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) should be tabled in the House prior to ratification, accession, acceptance or approval and be subject to the following procedure.

2 A document along the lines of a "National Interest Analysis" would be prepared for each treaty and tabled in the House at the same time.

3 Both the treaty and accompanying "National Interest Analysis" would be referred to the Foreign Affairs, Defence and Trade Committee upon tabling. This committee could retain the treaty documents for itself, or refer them to a more appropriate select committee, for inquiry and report back to the House, if the relevant committee considers an inquiry necessary, within 15 sitting days of tabling in the House.

4 If requested by members, the House should provide an opportunity for members to debate any select committee reports on treaties in the House (in addition to the existing opportunities and the proposal in recommendation 1).

5 The Government will not ratify, accede to, accept or approve any treaty until after a select committee reports on its inquiry into a treaty or 15 sitting days elapses from the date the treaty is tabled, whichever occurs first.

6 In the event that the Government needs to take urgent action in the national interest in ratifying, accepting or approving a treaty, and it is not possible to

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12 (1995) 69 ALJR 423.

> table it beforehand, it will be tabled as soon as possible after such action has been taken together with an explanation to the House.[13]

As the report observed, the recommendations represented a significant advancement in Parliament's role in the international treaty process. It is significant also that the Executive Government tabled a response to the recommendations in the House of Representatives saying "it was broadly willing to accept them with some modifications". The trial will run for the rest of the Parliamentary term. Major bilateral treaties of particular significance may also be subject to the procedure on a case by case basis. The Government response also adjusts the time frames put forward by the Select Committee.

It is suggested that Parliamentary scrutiny of treaties in this new manner bolsters the argument in favour of courts giving enhanced weight to treaties to which New Zealand has acceded or ratified, even in the event that there is no complementary local legislation.

IV INTERNATIONAL HUMAN RIGHTS LAW

The Second World War produced such universal feelings of revulsion about inhuman acts towards individuals and peoples that it led to a remarkable international development with the overt support of states. Human rights became legally recognised at international law. And international law, which had previously been the concern of states alone, has gradually provided a framework for the delivery of human rights to individuals and in some cases to peoples.

The evolving framework of international human rights law has its modern origins in the Charter of the United Nations, particularly the preamble (which sets out the purposes and principles of the organisation) and in articles 1, 13, 55, 56, 73-74. Although not often acknowledged, members of the United Nations are under a legal obligation to act in accordance with the purposes and principles of the Charter. Under the Charter, they have a legal duty to promote and encourage respect for human rights and fundamental freedoms.[14]

The paramount position that fundamental human rights enjoy in contemporary international law is illustrated by a statement of Sir Hersch Lauterpacht: [15]

> Insofar as the denial of fundamental rights has been associated with the nation-state asserting the claim to ultimate reality and utterly subordinating the individual to a mystic and absolute

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13 "Inquiry into Parliament's Role in the International Treaty Process" Appendix to the Journals of the House, 1997, I.4A.

14 Article 1(3).

15 *International Law and Human Rights* (Stevens, London, 1950), 70.

> personality of its own, the recognition of these rights is a brake upon the exclusive and aggressive nationalism, which is the obstacle, both conscious and involuntary, to the idea of a world community under the rule of law.

Following the United Nations Charter, three documents were negotiated that are often referred to collectively as "The International Bill of Rights". These documents are the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966); and the International Covenant on Civil and Political Rights (1966). To that list the First Optional Protocol to the International Covenant on Civil and Political Rights (1966) is often rightly added.

The Universal Declaration was a declaration, not a treaty, and did not give rise to binding international obligations except to the extent that its provisions entered the realm of customary international law, as arguably, some articles of the Declaration have. Consider for example the *Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute, 1987, which has a provision about customary international law and human rights:

> 702. Customary International Law of Human Rights
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> A state violates international law if, as a matter of state policy, it practices, encourages, or condones:
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> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognised human rights.

This statement of customary international law is identical in content to article 3 (right to life), article 4 (no-one shall be held in slavery), article 5 (torture or other cruel punishment), article 9 (arbitrary amnesty, detention) and article 2 (no racial discrimination) of the Universal Declaration.

The other instruments in the Bill of Rights are "hard" law treaties and they have been ratified or acceded to by New Zealand as long ago as 1978 in the case of the first two, and 1989 with respect to the First Optional Protocol. New Zealand has also ratified the Second Optional Protocol which commits New Zealand irrevocably against the death penalty. New Zealand's decision to accede to the First Optional Protocol enables individuals subject to New Zealand jurisdiction to make complaints (called

communications) to the Human Rights Committee against the Government where they claim to be victims of a violation of any of the Covenant rights.

There is little doubt that that body of international law known as human rights law is, as Her Excellency Judge Rosalyn Higgins has pointed out in an essay: [16]

> strikingly different from the rest of international law, in that it stipulates that obligations are owed directly to individuals (and not to the national government of an individual); and it provides, increasingly, for individuals to have access to tribunals and fora for the effective guarantees of those obligations.

Human rights are often stated to be universal. The universality of international human rights has profound implications. Some argue that it must be understood as a relativistic concept, that the human rights enjoyed by the inhabitant of an advanced industrialised country cannot be the same as those of a person in a developing country. Some countries, notably China, argue that human rights arguments are a way to force western standards and concepts on a non-western society. No doubt the character of legal systems one from another is very different but the content of the international norm cannot vary and it is that that gives rise to the obligations. This is easier to understand when it is remembered that the international Bill of Rights reflects *minimum* standards; the most basic pre-requisites that recognise the humanity of all individuals. However cultural and religious diversity are to be respected, it cannot be by different standards arising out of the same principles of universal application. As Judge Higgins has explained: [17]

> The international covenants, in particular, benefited in their formulation, which took place over a long period of years, in the participation of states from all parts of the world, representing all the political and religious systems. The texts were adopted with general approval; and states of all the varying political and religious systems have a free choice as to whether to become a party to the Covenants. If particular elements in the Covenants were really to be regarded as incompatible with a profound religious tenet or political point of departure, then the correct course of action was to enter a reservation as to those elements. It is striking that this has in fact not been done - reservations rarely go to these rather important points of religious and political philosophy. If it is not done, then in my view sensitivity to political and cultural diversity does not require that a state be regarded as exempted from what has been undertaken.

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16 Rosalyn Higgins "Problems and Process - International Law and How We Use It" (1995) 95.

17 Higgins, above n 16, 98.

Sir Kenneth Keith has commented: [18]

> [A] number of important international treaties appear not to be subject to withdrawal at all. Notable instances occur in the human rights area. Both of the human rights covenants and the second protocol to the Civil and Political Rights Covenant, on the abolition of the death penalty, contain no provisions for their termination. By contrast other human rights instruments do.
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> [T]he Australian Attorney-General recently expressed the view that there is no power to withdraw from the International Covenant on Civil and Political Rights, (1995) 16 Aust YBIL 470-471. The reasoning applies equally to the other Covenant and the second optional protocol relating to capital punishment. That particular point gives heightened significance to the matters of a constitutional kind ...

The UN Human Rights Committee, in its most recent General Comment adopted under article 40(4), has expressed the position most succinctly:[19]

> The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal.
>
> [I]t is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation.
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> ...
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> The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

I sometimes wonder if that legal position is well known to the New Zealand Parliament and Ministers.

V NEW ZEALAND'S RESPONSE

At the international level New Zealand has been a supporter of international human rights. As a long-time member of the international community and one of the founding members of the United Nations, New Zealand has always been an enthusiastic supporter of human rights and the development of careful treaties defining them.

New Zealand has always prided itself on its international human rights record. The United States State Department does a study of human rights violations around the world and frequently when this comes out the New Zealand media publicises the fact that New Zealand has a more or less clean bill of health.

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18 Keith, above n 5, 12-13.

19 General Comment No 26(61) adopted on 29 October 1997, paras 1, 3 and 5.

Since New Zealand assumed the obligations under the Covenant, it has been obliged to give periodic reports on compliance with it. The reception given to these reports has not always been quite as complimentary as New Zealand authorities may have wished. On the last occasion, for example, it was observed that we did not seem to have a good reason for our Bill of Rights Act not being supreme law. The Human Rights Committee noted that it is expressly possible under the terms of the Bill of Rights Act to enact legislation contrary to its provisions and regretted that this appeared to have been done in a few cases.[20] New Zealand has also passed some highly dubious law relating to censorship, using the term "objectionable publication", which almost certainly is in breach of our international obligations.[21] In a written question, the Committee requested more information of the NZ delegation on the effect of the Employment Contracts Act 1991 on the earnings level of women (including Maori and Pacific Island women) and their participation in the workforce.[22] Later in the Report the Committee noted with regret that despite improvements Maori were still disadvantaged in relation to access to health, education and employment.[23]

Looking back with the advantage of hindsight, New Zealand was enthusiastic to embrace internationally promulgated norms on human rights but not so anxious to monitor its own domestic laws and practices to see that they were fully in compliance with those international obligations. We always assumed, or so it seems to me, that the good sense of Parliament could be relied upon to ensure that domestic legislation would not breach the norms that we had undertaken.

It appears, however, to be increasingly clear that the mechanisms within Parliament are not adequate to achieve that goal.[24]

As the 1985 White Paper, *A Bill of Rights for New Zealand,* observed no Government or Parliament were likely in New Zealand to attempt to sweep away basic rights. The real point of a Bill of Rights was different: [25]

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20 Ministry of Foreign Affairs and Trade, *Human Rights in New Zealand : New Zealand's Third Report to the United Nations Human Rights Committee on Implementation of the International Covenant on Civil and Political Rights*, Information Bulletin No 54, June 1995 p 69, para 11.

21 Above n 20, pp 69-70, paras 15 and 22; Re New Truth and TV Extra, 4 November 1994 (1996) 3 HRNZ 162, 176-177.

22 Above n 20, No 54, p 40.

23 Above n 20, p 70, para 17.

24 See also Cabinet Office Manual references to international obligations.

25 White Paper, *A Bill of Rights for New Zealand* (Government Printer, Wellington, 1985) para 4.10.

> What is in point is the continual danger - the constant temptation for a zealous Executive - of making small erosions of these rights. In some instances there may be a plausible argument based on expediency. But each small step makes the next small step easier and more seductive. For many years the needs, or alleged needs, of implementing a host of policies - or still worse of administrative convenience - have pressed against personal rights and freedoms.

Although the proposal to entrench the Bill of Rights and give it supreme law status was not proceeded with, the Bill of Rights has nevertheless had a significant effect on New Zealand jurisprudence. And while it is dangerous to generalise about it, the body of case law would suggest that when we come to matters of detail the New Zealand legislature has not been as meticulous as the received wisdom suggested it was about protecting basic rights. Neither have the administrative and judicial authorities been altogether zealous in ensuring that the exercise of state power remains within the norms.

This is surprising, especially in light of the long title to the Bill of Rights and section 3(a) which expressly provides that the Bill of Rights, subject to section 4, applies to acts of the legislative, executive and judicial branches of the Government.

In my view, the experience we have had with the New Zealand Bill of Rights Act 1990 suggests that it was necessary in New Zealand to enact a statute in furtherance of its obligations under the International Covenant of Civil and Political Rights if those obligations were to be properly observed.

Remember that the long title of the New Zealand Bill of Rights Act is:

> An Act -
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> . . .
>
> (h) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (i) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

In *Ministry of Transport v Noort; Police v Curran*[26] Cooke P (as he then was) stressed that "[i]n approaching the Bill of Rights Act it must be of cardinal importance to bear in mind [its international] antecedents".

It is as well to remember also the words of Cooke P in *Tavita v The Minister of Immigration*[27] when His Honour was considering the First Optional Protocol and the fact

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26 [1992] 3 NZLR 260, 270.

27 [1994] 2 NZLR 257.

that it gave an individual subject to New Zealand jurisdiction, who had exhausted all available domestic remedies, a right to submit a communication to the Human Rights Committee of the United Nations, which the President described as "in substance a judicial body of high standing". As Cooke P observed: [28]

> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

These remarks did not enjoy enthusiastic endorsement from either Ministers or their advisers. Indeed, it is fair to say that there is apprehension about what the Human Rights Committee might say about New Zealand.

The observation that the Human Rights Committee is "in a sense part of this country's judicial structure" was echoed by Justice Tipping in *Quilter v Attorney-General.*[29]

VI HUMAN RIGHTS IN NEW ZEALAND

The Human Rights Act 1993 added considerably to the grounds of discrimination articulated in the earlier legislation passed in 1977. The long title of the Act says that it is an Act "to give better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights". I pause to note that that is a rather generalised description of those treaty obligations. The 1993 legislation is certainly important legislation and a considerable advance on what went before. It applies to private as well as public law situations. It contains within it, however, measures which the Government recently has found it necessary to revisit.

Among other things, the 1993 legislation contains three provisions that were designed to ensure that New Zealand law and practice conformed with the new Human Rights Act. The provisions are as follows:[30]

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28 [1994] 2 NZLR 266, 266.

29 Unreported CA 200/96, Judgment of 17 December 1997, 10.

30 Human Rights Act 1993, s 5.

(i) To examine, before the 31st day of December 1998, the Acts and regulations that are in force in New Zealand, and any policy or administrative practice:

(j) To determine, before the 31st day of December 1998, whether any of the Acts, regulations, policies, and practices examined under paragraph (i) of this subsection conflict with the provisions of Part II of this Act or infringe the spirit or intention of this Act:

(k) To report to the Minister, before the close of the 31st day of December 1998, the results of the examination carried out under paragraph (i) of this subsection and the details of any determination made under paragraph (j) of this subsection:

While the policy behind these provisions appears to be relatively straightforward, in reality the task of examining the New Zealand statute book and administrative practices to see that they do not offend against the new prohibited grounds of discrimination is a formidable task that requires a lot of effort and co-ordination.

The Human Rights Act contains within it a substantial incentive to carry out the task. Section 151 of the Act provides as follows:

151. Other enactments and actions not affected– (1) Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of any other Act or regulation which is in force in New Zealand.

(2) Except as expressly provided in this Act, nothing in this Act relating to grounds of prohibited discrimination other than those described in paragraphs (a) to (g) of section 21(1) of this Act shall affect anything done by or on behalf of the Government of New Zealand.

Section 151 expires with the close of the 31st day of December 1999 and, on the close of that day, "shall be deemed to be repealed".

While the matter is not beyond legal doubt, the likely effect of this provision is that the human rights prohibitions contained in the Act could be given primacy over other statutes. From a practical point of view, the implications of this are dramatic but from a human rights point of view entirely beneficial.

The Coalition Government has not found this an easy issue to grapple with. The review conducted by the Human Rights Commission has been known as Consistency 2000. Cabinet Papers that have been in free circulation in Wellington and which were considered in 1997 suggest that the Government considered providing itself with permanent legislative exemptions from the Act. The Papers contained quite detailed conceptual material about the consequences of such exemptions.

The international law advice on the matter was quite clear and robust. It was summarised in one of the draft Cabinet Papers that was leaked:

> In summary, the Ministry of Foreign Affairs and Trade advises that a permanent exemption for the Crown which covered the "old grounds" (race, colour, sex, etc.), as well as the "new grounds" would put New Zealand in clear breach of a number of major human rights treaties which are very widely accepted. It would do serious damage to our international reputation. It would bring forward criticism from UN committees and would give many countries (e.g. Nigeria, Cambodia, Myanmar, etc.) whom we are trying to influence cheap ripostes to any representations we might make on their human rights records. It would cement in many minds in Asia the suspicion that the "Pauline Hanson syndrome" is not unique to Australia.

The Government appears to have flirted with some radical exemptions for itself but, in the end, drew back. It is currently considering specific exemptions for specific purposes.

The Government has decided to terminate the Consistency 2000 project. This will require repeal of provisions in the Human Rights Act referred to earlier. The Government has also decided that it will repeal section 151(1), that might have given primacy to human rights prohibitions after 1 January 2000. That will ensure that the Human Rights Act will not limit nor affect the specific provisions of any other Act or regulation.

The Government has rejected the Consistency 2000 approach on the basis that it is a "very detailed and centralised approach". Henceforth Chief Executives of each Government Department will be responsible for making sure the Department is complying with the Act. Existing legislation will be checked for compliance as it comes up for amendment.

The policy that has been adopted, while not as extreme as some of the proposals contained in the earlier Cabinet Papers, is susceptible of serious criticism. It significantly reduces New Zealand's commitment to the honouring of its human rights obligations. It is likely once again to attract the attention of the Human Rights Committee which will quite possibly report adversely on the decision to backtrack from obligations solemnly entered into, and obligations which have been converted into New Zealand domestic law. It is possible that the proposed amendment of section 151(1) will itself be challenged under the First Optional Protocol.

In that respect it is worthwhile examining how New Zealand has presented itself to the Human Rights Committee on this issue.

VII NEW ZEALAND GOVERNMENT'S COMPLIANCE WITH COVENANT OBLIGATIONS?

In introducing New Zealand's Initial Report under article 40 to the Human Rights Committee in 1983, the New Zealand Representative (Mr Beeby) stated that:[31]

> ... before his country had ratified the Covenant, it had found it necessary to undertake an extensive review of domestic law and practice. The review had been lengthy owing to his country's wish to *ensure scrupulous compliance* with the obligations which it had been about to accept and to the fact that New Zealand was one of a minority of countries which had neither a written constitution nor a bill of rights in the sense in which that term was normally understood.

Later during discussion with Committee members, New Zealand's Representative explained the Government's understanding as to the time frame for implementing its treaty obligations - including those under the ICCPR - in its law. The Representative confirmed that:[32]

> New Zealand regarded itself as required by the recognised rules of the law of treaties to give effect in its law and its practice to obligations imposed on it by a treaty immediately it became bound by the treaty.

During this discussion, a number of Committee members were critical of New Zealand's lack of implementation of the Covenant's non-discrimination guarantees under articles 2(1) and 26.[33]

Twelve years later, New Zealand's non-compliance with the non-discrimination guarantees of the Covenant surfaced again, more acutely. In a written question, the Human Rights Committee invited the Government to[34]

> ... clarify the effect of section 151(2) of the Human Rights Act 1993, which appears to postpone the operation of the new prohibited grounds of discrimination until 2000, *and its compatibility with the Covenant*.

New Zealand's response to this question clearly showed an intention to implement Consistency 2000 in order to fulfil its obligations under the Covenant: [35]

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31 CCPR/C/SR.481, para 2 (emphasis added).

32 CCPR/C/SR 487, para 3.

33 See, for example, CCPR/C/SR 481, paras 24 and 39 and SR 482, paras 2 and 39. For the New Zealand Representative's response, see CCPR/C/SR 487, para 17.

34 MFAT Information Bulletin No 54, above n 20, p 41 (emphasis added).

> Section 151(2) of the Human Rights Act 1993 provides that nothing in the Act affects anything done for or on behalf of the government of New Zealand which would otherwise amount to unlawful discrimination on the grounds of age, political opinion, employment status, family status or sexual orientation. Section 151(2) expires on 31 December 1999. The exemption in section 151(1) is intended to afford to the Government sufficient time to review its policies and practices and to implement all changes which may be required to ensure compliance with the Act. A transitional period was considered necessary in view of the wider scope of the new legislation.
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> Identification of the necessary administrative changes will be assisted by the Human Rights Commissioner under section 5(1) of the Act. Section 5(1) of the Act requires the Human Rights Commission to examine all legislation and Government policies and practices to determine whether any legislation, policies and practices constitute unlawful discrimination, or conflict with the spirit of intention of the Act, and report to the Minister of Justice the results of its examination and determination by 31 December 1998. The review began on 22 September 1994.

The Human Rights Committee was far from satisfied with this position. Indeed, it was overtly critical. Under the heading "Principal Subjects of Concern", the Committee wrote: [36]

> The Committee regrets that the operation of the new prohibited grounds of discrimination, contained in Section 21 of the Human Rights Act 1993, is postponed until the year 2000. It also takes note with concern that the prohibited grounds of discrimination do not include all the grounds in the Covenant and, in particular, that language is not mentioned as a prohibited ground of discrimination.

Now that New Zealand has retreated from the criticised policy to an ever milder one, how can it present itself?

Can New Zealand now truly say it endeavours to ensure "scrupulous compliance" with the Covenant's obligations? In the three years since the Human Rights Committee's criticisms, New Zealand's position has become increasingly indefensible. Once the Parliament legislates the approved policy of the Government by abandoning Consistency 2000 and the sunset clause it will be open to severe criticism from the Committee.

A full systematic and comprehensive study of the problems of New Zealand law and practice would have been greatly to our advantage so that New Zealand had a full

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35 MFAT Information Bulletin No 54, above n 20, p 47.

36 Comments of the Human Rights Committee adopted at its 1411th meeting held on 5 April 1995, reproduced in MFAT Information Bulletin No 54, above n 20, p 68, para 13.

inventory of exactly what its problems were in respect of the grounds of prohibited discrimination. A systematic analysis of the whole of New Zealand statute law in terms of New Zealand's international human rights obligations would have been an invaluable resource in reshaping statutes over time. Its loss is likely to be a real one in the years to come.

VIII CONCLUSION

The issues will remain for New Zealand if domestic law does not comply with international obligations. What steps are we going to take to ensure that our law does comply? The answers to these issues are not readily apparent and the whole episode, while not catastrophic for human rights in New Zealand, will make it harder to argue that we are, as a country, as steadfast in pursuit of human rights principles as we represent ourselves to be at an international level.

Why does the New Zealand Government require exemptions from the human rights obligations that it has solemnly legislated about? What sort of example is that to the private sector which is bound while the public sector is not? In the absence of a centralised effort that oversees the whole government it is likely that issue will drop off the end of the agenda. New Zealand will be accused of a "go slow" policy on human rights and it will have no persuasive defence. Funding has stopped. The Human Rights Commission is doing no further work on Consistency 2000.

One is left with the impression that the Government and the Parliament did not understand what they were doing when they set up the provisions of the Human Rights Act 1993 that they now wish to alter. The Government machine found the Consistency 2000 project too hard to carry out and Ministers did not like it. Like all Ministers they like to think they are in charge. But in the pragmatism that inevitably dominates New Zealand Governments of all political persuasions, it is easy to lose sight of principle. New Zealand may well have lost something of importance to its future in these decisions.

It is hard to resist the conclusion that the whole episode shows that the impact of international law, and the importance of the human rights obligations that New Zealand has solemnly assumed by treaty, are not well understood within the Executive branch of the Government outside the Ministry of Foreign Affairs and Trade and the Ministry of Justice. Neither, it appears, do these human rights issues enjoy much political support. The matters reviewed here passed with little public commentary, analysis or debate. It is doubtful that many ordinary New Zealanders know anything about them. The Government must have calculated that any adverse comment that may be directed at New Zealand by the Human Rights Committee can be shrugged off.

One ought not to be too critical of what has occurred. The relationship of international law and municipal law are not well understood even at a time when their

relationship is evolving. The notion that what the New Zealand Parliament passes as legislation may be in breach of New Zealand's international treaty obligations is not something capable of being debated easily in Parliament or anywhere else. But what we do know from examining the experience in other countries, and in this respect we need go no further afield than Australia, is that profound consequences can flow from international treaty obligations. We need as a nation to improve our work rate on these issues and try to get to grips with them.

As has been observed by Paul Hunt and Professor Margaret Bedggood "the distinction between international and domestic human rights protection is increasingly blurred".[37] In New Zealand the blurring has now become messy. It needs to be properly sorted out. We have a legal policy problem that has been swept under the carpet rather than solved. As a result New Zealand's traditional commitment to human rights will be seen to be somewhat tarnished.

New Zealand's problems with international treaties are not likely to be restricted to international human rights. International environmental law and trade law are likely to present similar problems. More will be heard of these issues in the years to come.

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37 "The International Law Dimension of Human Rights in New Zealand" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: the NZ Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995).