Report to the Secretary of Foreign Affairs and Trade on

Foreign policy tools available to respond to grave international situations of concern involving human rights and peace and security including the advantages and disadvantages of a future role for autonomous sanctions

Contents

1. Foreword

The Advisory Group has been asked for advice on what more Aotearoa New Zealand could be doing, in the current very difficult global security context, to help address grave challenges to international peace and security and grave abuses of human rights. The Group was requested to examine existing foreign policy tools, to give advice on their adequacy and advice on options for new or better tools.

The advice sought from the Group is much wider than the question of sanctions. The Terms of Reference recognise that sanctions are a tool of last resort. The Group must therefore first consider and advise on the best possible kete or toolkit of foreign policy options and skills that can be employed by Aotearoa New Zealand well upstream from the point at which sanctions might be considered. The Group found that this wider context also required it to consider some questions about aspects of foreign policy in Aotearoa New Zealand.

The Group understands that it was not set up as an inquiry. Nor is it to be a forensic review of current or past use of foreign policy tools. The Group decided that it was therefore not necessary to hold formal public hearings or consultations. This decision was influenced in part by the short deadline for the Group's report and the fact that much of its available time was over the summer holiday period. But also, the Group was influenced by the information from the Ministry that any formal consultation required, including with Iwi/Māori, would be a responsibility of the Ministry, in due course if appropriate.

This report is intended to be a forward-looking, practical set of recommendations about foreign policy tools and their effective implementation. It includes reflections drawn from Te Ao Māori and acknowledges the relevance of Te Tiriti o Waitangi in the foreign policy of Aotearoa, New Zealand.

The members of the Group are grateful to the many MFAT staff who shared their views on the issues under consideration. Their input was detailed and thoughtful and was provided in a free and frank spirit that greatly assisted the Group.

Briefings and written material shared with the Group enriched our understanding of the political and diplomatic complexities and sensitivities involved in many past and more recent cases. The Group's observations and recommendations do not go into these details. This is because the Group wants its report to be short and focused and able to be available to the public. But readers should understand that the absence of such detail and case studies, does not indicate that the Group was unaware of these complexities or failed to take them into account.

The members of the Group are grateful for having been entrusted with this important task. They are hopeful that, taken together, their recommendations can become a useful and practical framework for the future.

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May 2023

2. Conclusions

Introduction

1. The Secretary of the Ministry of Foreign Affairs and Trade (MFAT) established an Independent Advisory Group on Human Rights and the Foreign Policy Toolkit to "provide a written report to the Secretary of Foreign Affairs and Trade on the foreign policy tools available to respond to grave international situations of concern involving human rights and peace and security including the advantages and disadvantages of a future role for autonomous sanctions."

2. The Terms of Reference for the Group (attached as Annex 2) require consideration of the impact and limitations of bilateral, regional and global multilateral tools, and legal tools; as well as "the advantages and disadvantages of a potential future role for autonomous sanctions alongside New Zealand's existing foreign policy tools".

3. The following two sections, Conclusions and Recommendations, effectively form what elsewhere may be termed an Executive Summary. The body of the report elaborates on those conclusions and the basis for the recommendations.

4. The report begins by setting out why the review is important at this time. It goes on to provide background and context to the present diplomatic challenges and issues.

5. It identifies the value of a Te Ao Māori perspective; and canvasses the legal context.

6. The focus is then on how to strengthen Aotearoa New Zealand's response to grave human rights situations and to emerging or actual threats to peace and security. It concludes with a section on possible use of sanctions.

7. In summary, the report finds there is a strong case for further strengthening of Aotearoa New Zealand's diplomatic tools for responding to "grave situations of concern that threaten human rights" and to other threats to peace and security.

8. In brief, the report recommends:
   - a more proactive, preventive approach to situations of serious human rights abuses,
   - development of mediation and other dispute resolution skills for situations of conflict,
   - integration of a Te Ao Māori perspective, and,
   - for use only as a last resort, carefully constrained new legislation establishing generic provisions for the implementation of sanctions.

9. If new generic sanctions legislation is enacted, the opportunity should be taken to establish a comprehensive sanctions regime, including sanctions approved by the UN Security Council. But this legislation should be carefully constrained. There are significant international trade law obligations and trade policy issues of importance to Aotearoa New Zealand that need to be protected. Unilateral or autonomous sanctions should only be able to be triggered in a specific case where there is majority support in Parliament.

Conclusions

10. The Group agrees Aotearoa New Zealand faces a more challenging and dangerous international environment than it has for decades. Many of the foundations of the post-World War II multilateral order are being contested and systematically weakened. Russia's invasion of Ukraine has reminded us that ideas of 'might makes right' have not gone away and it has again underlined the limitations of multilateral institutions such as the United Nations Security Council when a Permanent member is involved in a conflict. Moreover, in the current environment authoritarian states are no longer simply seeking to ignore or marginalise ideas such as universal human rights, they are increasingly seeking to offer alternative frameworks that reflect their own political values.

11. The Group is conscious that Aotearoa New Zealand confronts this challenging external environment at a time when it is still significantly affected by the consequences of the Covid pandemic. These consequences include economic and social pressures and resulting inflation. Moreover, the recent devastation from storms and the cyclone have created significant additional problems. The Group appreciates this difficult context. It understands the problems faced by thousands of badly affected New Zealanders and that the consequential pressures on Government inevitably create a focus internally.

12. However, the growing challenges in the external world are not receding. To the contrary they are accelerating and it is in this context that the Government has asked for recommendations on how foreign policy tools can be made more effective.

13. Specific instruments recommended in this report will be of little value unless they are underpinned by the basic tools that are fundamental to effect achievement of a Government's foreign policy goals.

14. The Government of the day needs to have a clear and comprehensive foreign and trade policy framework. There should be a vision that can be communicated to the public, to the public servants who have to implement it and to other states who need to know where Aotearoa New Zealand stands and what its expectations are. Flexibility to adapt to evolving situations is a very important component. But developing basic policy on the hoof will undermine the effectiveness of the best foreign policy tools.

15. Aotearoa New Zealand is often identified internationally as having a highly effective professional foreign service. It is essential for continuing to serve Ministers well and for implementing the Government's vision, that this taonga is preserved and nurtured. And, in increasingly dangerous times, it is important that the service elements of the role – the expectations to serve in difficult places, to accept risks and hardships and to develop and maintain specialist skills -- are recognised and supported.

16. Relationships are critical to advancing interests and managing problems. The Chapter on lessons from Te Ao Māori underlines the importance of this. Relationships have to be constantly nourished. The Group strongly supports both bilateral and multilateral diplomacy as equally important basic tools in building and nourishing relationships.

17. No kete of foreign policy tools will be credible or respected if Aotearoa New Zealand is perceived as mean or backsliding when it comes to the quantity and quality of its Official Development Assistance. It is essential, even in difficult fiscal and economic times, that ODA keeps up proportionately to the current very modest .28 percent of GNI. And recognising that its performance among donors is currently only 17th, the goal should be to increase that proportion over time.

18. Given the challenging international context, there is a strong case for further strengthening of New Zealand's diplomatic tools for responding both "to grave situations of concern that threaten human rights" and to other threats to peace and security.

Grave Abuses of Human Rights

19. Human rights have been important to New Zealanders since the founding of the nation and today are expected to be at the heart of foreign policy.

20. Te Tiriti o Waitangi, Aotearoa New Zealand's founding document was unique for its time. It guaranteed to Māori not only "the unqualified exercise of their chieftainship over their lands, villages and all their treasures" but also granted them "the same rights and duties of citizenship as the people of England".[1] Te Tiriti's uniqueness is in recognising both collective Indigenous rights and the right to equality for Māori in all things relating to citizenship. No other treaty between colonising states and Indigenous Peoples included the right to equality.

21. Human rights, economic, social and cultural, as well as civil and political, are central to New Zealanders' expectations about our lives, education, health, work, personal security, equal opportunity and fair treatment, and our system of government. The Group agrees that they are vital to harmonious relations among the diverse groups that make up New Zealand.[2]

22. The Group is equally convinced that human rights are vital to peace, security and sustainable development worldwide. As then United Nations Secretary General Kofi Annan said in 1998, human rights are "at the core of every major challenge facing humanity". In the first two decades of the 21st century, war, terrorism, pervasive poverty, pandemic disease, the increase of authoritarianism and climate change have threatened, and continue to threaten, prospects for peace, security and sustainable development.

23. The Group notes that as a small, isolated, trading island State, Aotearoa, New Zealand benefits from, and is, to some extent, dependent on the international rule of law and multilateral mechanisms for enforcing it. But it is conscious that enforcing human rights standards internationally has been problematic since the outset. As a result, strengthening New Zealand's diplomatic responses to egregious human rights situations is challenging.

24. Aotearoa New Zealand has, in the past, provided strong diplomatic leadership in situations of grave human rights abuses. Examples include, at the UN Security Council, issues such as the genocide in Rwanda in 1994 and conflict in Syria and Palestine in 2016. New Zealand's chairing of negotiations on the Convention of the Rights of Persons with Disabilities resulted in a ground-breaking treaty with wide support and the swiftest adoption of any human rights treaty to date.

25. The Group agrees that the MFAT International Human Rights Action Plan 2019-2023 and New Zealand's Strategic Plan for International Development Cooperation 2021-2023, both clearly identify New Zealand's international human rights priorities and are consistent with each other. They recognise the importance of acknowledging New Zealand's domestic human rights issues when advocating international human rights initiatives. They provide a solid basis from which to respond to emerging and persisting situations of serious human rights abuses.

1 Te Ara. The Three Articles of the Treaty of Waitangi - recent translation of the Māori text. https://teara.govt.nz/en/document/4216/the-three-articles-of-the-treaty-of-waitangi

2 This summary draws on: Human Rights Commission. Human Rights in New Zealand Today. Wellington 2004, p

26. There appears, however, to be a gap in the diplomatic tools. Once a serious human rights situation exists the diplomatic tools are largely reactive. There is a lack of preventive or proactive tools for responding to emerging or persisting situations of serious human rights abuses that may also threaten international peace and security. In the sections below, we suggest a range of tools that are more preventive in focus.

27. The Group is convinced that any strategy to be active in promoting human rights, will struggle with credibility as long as Aotearoa New Zealand persists in not pursuing membership of the UN Human Rights Council. Aotearoa New Zealand has never served on the UN Human Rights Council, and is perceived by some partners as not pulling its weight.

Threats to peace and security

28. For much of the last forty years New Zealand has benefitted from an albeit imperfect system of agreed rules, norms and international institutions. We have enjoyed a long peace in our region, which has allowed states to focus on trade and development. However, many of the old certainties are now in flux. There has been a reassertion of power politics and the use of force and coercion, most vividly seen in the war in Ukraine, but also in the Indo-Pacific. Internal conflicts and civil wars continue to cause loss of life across much of the world. A new range of challenges to peace and security have emerged including in the cyber domain and various forms of foreign interference. These threats are also being seen much closer to home, including in a much more contested Pacific. At the same time it has become much harder to reach agreement in key international institutions about how to respond to these challenges.

29. The Group believes that in this environment the current kete of diplomatic tools can be strengthened. A number of recommendations in this regard are set out below.

30. In particular the Group considers that Aotearoa New Zealand should build on its track record and experience from leading peace negotiations in the Bougainville context. But in order to do that a deliberate policy commitment in that direction would be required along with a willingness to build some capacity in order to sustain such initiatives.

31. The Group also notes that while a mediation capacity can be used to manage an existing conflict it can also be deployed to help head off a looming conflict. The skills and experience are transferable. Although prevention upstream is not always possible, it is better and significantly cheaper for all concerned than trying to stop a conflict after it has started, as the current situation between Ukraine and Russia underlines.

Sanctions

32. The Group considers that the legitimate scope for utilising sanctions as a tool to influence states' behaviour has often been misunderstood in recent public discussions.

33. The Group points out that under international law, the choice is not just between UN Security Council approved sanctions and no sanctions at all. To the contrary, in global emergencies and in some cases involving national security, sanctions may be legitimately imposed without UN Security Council approval. This could include sanctions in response to decisions by other multilateral or regional bodies, or even unilaterally.

34. However, there are important limitations that need to be factored in. International law

generally, and international trade law in particular, strictly confine the potential scope for unilateral sanctions.

35. Political factors such as bilateral and regional relationships and reputational issues are also relevant. The large majority of states, including Pacific and Asian regional partners, oppose unilateral sanctions. Such sanctions are also regularly condemned by big majorities at the UN. Another political consideration is the fact that sanctions are rarely if ever successful in changing states behaviour. Moreover, in some cases they can precipitate further human rights abuses and humanitarian problems.

36. However, sanctions do allow people to show solidarity with victims, to underline the unacceptability of unlawful behaviour and encourage those defending against attack or abuse. The recent decision to impose sanctions on Russia shows that there will be cases where Aotearoa New Zealand needs to use a unilateral sanctions tool.

37. The example of the sanctions imposed on Russia also shows that broad sanctions can be imposed very quickly where there is majority support in Parliament. If a new emergency situation occurred in the future, the Russian sanctions model could be copied very quickly.

3. Recommendations

38. The report recommends, a more proactive, preventive approach to situations of serious human rights abuses, development of mediation and other dispute resolution skills for situations of conflict, integration of a Te Ao Māori perspective and, for use only as a last resort, new carefully constrained legislation establishing generic provisions for the implementation of sanctions. This new legislation should cover both sanctions approved by the UN Security Council as well as other categories of sanctions permissible under international law.

Human Rights Tools

39. Where a grave human rights situation is developing, New Zealand should routinely assess whether it could contribute, either bilaterally or multilaterally, to preventing further deterioration of the situation.

40. Where serious human rights abuses persist, an assessment should be made whether New Zealand could actively contribute to a process of conflict resolution, accountability and sustainable peace and development.

41. In those regions, sub-regions and states where New Zealand has important national interests and/or responsibilities, New Zealand should take the following systematic approach underpinned by international human rights standards:

- early identification and assessment, using international human rights standards, of developing grave human rights abuses
- development of preventive strategies, incorporating
- engaging at the leadership level
- drawing on advice from local human rights defenders (HRDs), civil society organisations (CSOs) and where they are established National Human Rights institutions (NHRIs)
- consulting with Iwi/Māori, NZ businesses, human rights and development CSOs, diaspora communities
- working with other states and international organisations
- where appropriate offering mediation or other services to contribute to resolution.

42. Where grave human rights abuses persist and offers of Aotearoa, New Zealand services are inappropriate, then existing reactive diplomatic tools should be used, including making public statements of concern including with other States, initiating and supporting appropriate UN General Assembly, UN Human Rights Council and International Labour Organization (ILO) action.

43. In addition, support for local human rights defenders, civil society organisations and National Human Rights Institutions should be incorporated as a named element within the kete of tools.

44. Intensified bilateral, multilateral and legal actions could include suspension of military cooperation, modification or suspension of international development cooperation, targeted travel bans, and legal action in international Courts and Tribunals. In cases involving the most egregious human rights abuses, where these measures have had little or no impact and when other states are taking action, the Group agrees the authority to impose further unilateral sanctions could be justified.

45. Aotearoa New Zealand should increase support for rigorous accountability measures that will ensure those responsible for human rights abuses can be held accountable and justice provided for victims.

46. More broadly, to prevent significant human rights abuses and the threats that they pose to peace and security, Aotearoa New Zealand should develop a comprehensive, long-term, integrated programme (foreign affairs, international development cooperation, labour, immigration, trade, defence and related security mechanisms) to strengthen human rights, as a priority, within Aotearoa New Zealand, throughout the Pacific and across Asia.

47. In the Pacific this could include advocacy for the development of a regional human rights declaration as a first step towards a Pacific human rights charter and related mechanisms.

48. In order for Aotearoa New Zealand to adopt a more proactive and preventive approach to situations of grave human rights abuses, human rights expertise, Indigenous rights expertise, status and leadership within MFAT will have to be strengthened. This should include a standalone Human Rights Division, an Ambassador for Human Rights, routinely including human rights elements in all Letters of Policy Guidance to incoming Heads of Mission, increased resources for human rights initiatives in the Pacific and Asia and a more active strategy of appointing Special Envoys for specific problem situations.

49. Aotearoa New Zealand should launch a bid for membership of the UN Human Rights Council at an early appropriate time.

Improving tools to maintain international peace and security

50. To contribute to a more preventive and proactive approach to threats to peace and security as well as grave human rights situations, Aotearoa New Zealand should be more active in offering mediation and dispute resolution services building on the example of the mediation work in the Bougainville conflict.

51. There should be a systematic programme to build and sustain MFAT capacity for mediation and other dispute resolution work. Such a capacity should be able to be deployed quickly and be resourced to be sustained over a long period.

52. A mediation capacity can be used to manage an existing conflict. But it can also be deployed to help head off a looming conflict. The skills and experience are transferable.

53. Aotearoa New Zealand has some advantages in building a small but effective mediation capacity. It enjoys high levels of trust and respect as a regional player. It has a track record of being able to act neutrally and successfully in this space.

54. The chapter in this report on experience from Te Ao Māori, shows that this approach – and the importance of the respected neutral "Rangatira" is well rooted in Indigenous knowledge and experience. Those concepts are readily translatable to many other cultures and situations.

55. Aotearoa New Zealand also has access to a valuable pool of talent. New Zealanders offshore are currently working in this space, including people working in and even leading major NGO resources, as well as several retired senior UN staff with considerable experience. There are MFAT staff who, from experience on UN Security Council delegations, have a good understanding of the necessary processes and techniques. Domestically, there is now, since the Treaty Settlement process began more than 25 years ago, a significant pool of former Crown and Iwi negotiators who have an intimate understanding of what it takes to reach settlement in a complex high stakes negotiation.

56. At the global level, given the current limitations of the UN system, Aotearoa New Zealand should be investing more effort, especially at senior Ministry and Ministerial levels, in processes for refreshing and updating post WWII institutions. We accept that this will inevitably be a long term project. But a UN renewal process has begun and Aotearoa New Zealand should be playing a leading role.

57. A parallel effort is required at the Pacific regional level. There is now scope for further expansion of the architecture in the peace and security context. A well-designed new regional "arrangement" could play an important role in strengthening regional solidarity. Such an arrangement could also help to strengthen Pacific Forum members' collective capacity to withstand enhanced security threats from the cyber world and from increasingly dangerous non-state actors, including drug cartels.

58. Public understanding of challenges to peace and security in the Indo-Pacific, including their connection to Aotearoa New Zealand is not strong. There is a real need to invest to grow New Zealand's expertise in this area, including with a focus on the South Pacific. There are a range of existing institutions that could be strengthened for this purpose.

59. Alongside official government to government interactions, non-official connections sometimes called "Track 2" diplomacy currently exist in the Aotearoa New Zealand toolkit. They have proved useful in building relationships – the whanaungatanga – that can be leveraged for future needs. But these tools can also be employed to focus on thematic issues such as the promotion of human rights and to lay the ground for conflict prevention and resolution. They can be applied as part of a systematic and sustained policy process to better manage a specific peace and security issue. This of course presupposes that there is the necessary political vision, leadership and resources.

Incorporation in tools of lessons from Te Ao Māori

60. The Group recommends that when situations arise in the future, in particular where one or more of the protagonists is a country with Indigenous Peoples or Peoples whose cultural values and norms reflect principles similar to those of Te Ao Māori, that a careful assessment should be made by MFAT in conjunction with an appropriate Tikanga expert supported by its Māori Policy Unit, of the opportunities for better utilising the language and concepts of Te Ao Māori as part of an initiative by Aotearoa New Zealand to help mediate the situation.

International Legal Tools

61. The Group believes that the system of international legal accountability should continue to be employed to positive effect as Aotearoa New Zealand has demonstrated on some occasions in the past.

62. Aotearoa New Zealand should include the international legal architecture as an element in its priorities for renewal of the UN system.

The sanctions tool

63. The Group believes that, provided the legislation is carefully limited to situations widely accepted as permissible under international law and there are carefully drafted thresholds, there is a case for new generic sanctions legislation. This legislation would include sanctions pursuant to UN Security Council decisions, sanctions in other cases permissible under international law as outlined in this report, and unilateral sanctions of the kind imposed on Russia in 2022. There would be different thresholds in respect of each category.

64. We recommend that implementation of such legislation in any case involving unilateral sanctions be triggered only by a Resolution of the House of Representatives. The Government should retain control of the tabling of any such Resolution and the legislation should provide that it be introduced only by the Prime Minister or Minister of Foreign Affairs.

65. Any such legislation should be framed so as to demonstrate on its face a clear intention by Aotearoa New Zealand to comply with relevant international trade rules, in particular the key elements of GATT article XXI so that New Zealand business interests are protected as far as possible.

66. We recommend the inclusion in such legislation of provisions requiring consideration of Tikanga based mediation processes in the context of consideration of possible wider mediation initiatives and also consultation by the Crown with Māori in circumstances where future unilateral sanctions would negatively impact Māori business ventures.

67. We recommend that the current complex mixture of sanctions related legislative provisions (including provisions in the United Nations Act and the Customs Act and the Immigration Act) be harmonised and fitted into a single Act that would cover all appropriate measures available to Aotearoa New Zealand to influence the behaviour of other states,

68. We recommend that any new legislation only be enacted in parallel with the establishment of a properly funded regulatory agency or arrangement.

69. Annex 1 contains a draft of the initial provisions of such a Bill to demonstrate how these recommendations could be effected in practice.

4. Why is this review important?

70. The Terms of Reference for this review make clear that Aotearoa New Zealand now confronts a world which is much more dangerous than that which has existed for decades. They identify a need to review what new or better tools could be part of the Aotearoa New Zealand kete or toolkit to respond to grave human rights abuses or threats to peace and security.

71. Some in Aotearoa New Zealand probably feel comfortable that our political values and freedoms are already sufficiently insulated from external dangers and that Government should not be in the business of exporting our values, especially if this may make trading partners uncomfortable. In this view, diplomacy should be focused on building trade opportunities, providing consular support for New Zealanders overseas and supporting Ministers overseas travel. This analysis is often based on the assumption that New Zealand cannot have any real influence on the big issues in international affairs. Such views also lead in the direction of minimising investment in diplomacy, security and defence.

72. The Group understands this perspective may be attractive to some people some of the time. But our history demonstrates that with a degree of regularity that big unexpected challenges arise. And when they occur historically the New Zealand public has repeatedly shown that they expect the nation to step up and to play its part - to do what in the crisis situation is seen as the right thing.

73. External events have also prompted strong public expectations and engagement in many non-military contexts and this has often led to proactive diplomatic leadership as well. These have included leadership in global decolonisation policy and its implementation in our former overseas territories, high public involvement in the anti-apartheid movement, global public and diplomatic leadership on disarmament, global diplomatic leadership in promoting and achieving extended maritime jurisdiction to 200 miles, global public and diplomatic leadership on Antarctic environmental protection and protection of whales, diplomatic leadership in mediating conflict in Bougainville, leadership in the UN Security Council on issues like the genocide in Rwanda in 1994 and Syria and Palestine in 2016.

74. Too often in these kinds of cases Aotearoa New Zealand has had to step up unprepared and under-resourced, both in terms of its civilian and military capacity. There are important lessons to learn about preparedness for global crises, just as we are now learning in terms of domestic disaster preparedness and infrastructure resilience.

75. Given the heightened risks in the current global situation, the Advisory Group believes that it would be irresponsible and dangerous to ignore the lessons of history. The risks in the current situation are clear for all to see. A widely-agreed set of laws, rules and norms that has served New Zealand well for decades, is under challenge. Corrosive impacts on values, rights and freedoms do not respect boundaries or oceans. They are highly contagious and accelerated by cyber and other forms of interference. This is already happening. Threats to international peace and security, including to the vital interests of Aotearoa New Zealand, are no longer remote.

76. In the face of these real threats, and confronting a more challenging international environment, the Group believes Aotearoa New Zealand needs to be certain it has all the necessary tools to safeguard its national interests and independence. What is at stake is the survival of an independent foreign policy. A passive approach that relies on others will not be sufficient to safeguard these interests.

77. There has never been a time in which New Zealanders have had a greater need of a strong and professionally credible response capacity and tools to protect their values and security. This must be underpinned by an integrated approach to foreign and national security policy that is implemented clearly bearing in mind all Aotearoa New Zealand interests including protection of values and human rights as well as economic interests.

5. Background

Historical context

78. The fundamental characteristic of the traditional or classical diplomatic toolkit was that it was designed for and operated mostly in the context of a bilateral relationship. Moreover, the importance of this classical toolkit was buttressed by the always present possibility that, at some point along the spectrum of responses, the other side might lose patience and declare war – which historically was often a legitimate toolkit option.

79. In 1945 a major development occurred. The United Nations Charter changed the rules. It eliminated the possibility of war and other forms of forceful coercion as legitimate parts of the toolkit. In its place the Charter introduced a set of rules, institutions and norms and gave institutions the capacity to broker solutions to threats to international peace and security.

80. This significantly changed the landscape. It levelled the diplomatic playing field - between the large and the small; at least to some extent. It set up a rules-based framework. It allowed peaceful transition from empires to a decolonised world where self-determination, economic development and better rules for trade, human rights and environmental protection began to benefit most of humanity. Most importantly it took out of play the most coercive and destructive of the traditional tools – war between states. Despite the Cold War, the emergence of extensive norms and rules and multiple options for leveraging collective machinery made managing important differences with other states easier. An example is the way the system was able to be used productively by Aotearoa New Zealand in 1986, by engaging the mana of UN Secretary General to help mediate the Rainbow Warrior dispute with France.

The modern system is not delivering

81. Unfortunately, the post 1945 system is still very far from delivering what was hoped at the end of World War II. And in the current climate it is being undermined by conscious political efforts by groups of states to roll back norms and rewrite institutional rules and entrench dysfunctionality.

82. The weakness of the 1945 model first became clear during the Cold War. And it became increasingly apparent in the 1990s with the emergence of increasingly violent and economically destructive civil wars. But international institutions have also been less and less effective in managing issues between states. Stalemates that have emerged over arms control, progress in climate change negotiations, and the failed collective response to the COVID pandemic are only a few obvious examples. Even worse are efforts underway to reassert old views of sovereignty and walk back binding commitments on freedoms and rights.

83. Most concerningly, the phenomenon of interstate conflict has again become a major feature of the international environment. The wars in Kuwait, Iraq, Afghanistan, Georgia, DRC, Libya, Syria, and now Ukraine represent a clear and ominous trend. This trend is all the more worrying because of the appearance of malign non-state actors such as ISIS and the Wagner Group and proxy forms of unlawful action involving interference in other states by organised cyber activities and the use of agents, disinformation and social media to cause social disturbance, to disrupt democratic processes and even conduct covert operations to murder individual enemies.

84. As explained below, in the section on International Legal Context, the machinery for developing and enforcing human rights, including Indigenous Peoples' rights, was also stunted in its growth. And that aspect of the system is also suffering significantly with some states' ambitions to roll back and undermine what has been achieved.

85. Many in the public and the media and in various NGOs and diasporas have much higher expectations than in the past. Diplomacy now takes place in a much more open, devolved and public environment. In many states, there are public, NGO and media expectations for action to be fast, effective and open.

86. It may be that because the option of war is no longer legitimately available, the significance of the graduated steps and red lines inherent in the old system has diminished, and they are not taken as seriously as in the past.

87. As a result of all these trends, important differences with other states are often difficult to manage and it is difficult to see evidence that the old traditional diplomatic toolkit is making a practical difference.

88. Also, the nature of many disputes has changed fundamentally. The traditional diplomatic toolkit was developed at a time when disputes were essentially bilateral, when one state felt a grievance against another over contested territory, the treatment of shared ethnic populations, trading rights or privileges or even a sense of its interests being disrespected.

89. But, contemporary problems are often likely to involve a situation where the complaining state is concerned not about an assault on its own rights or interests, but rather that another state has breached a collective norm e.g. a breach of international human rights law (in which the victim is not the complaining state but rather people who are citizens of the other state) or a breach of an environmental norm (e.g. Pacific countries concerns about climate change or past concerns about nuclear testing).

90. In a similar way, the invasion of Ukraine is not just a bilateral dispute between Ukraine and Russia. Ukraine is clearly a victim of Russian aggression. But because the invasion was a fundamental breach of the UN Charter – the rules-based system prohibiting the use of force against another state - the invasion is also an offence against the international community as a whole.

91. In modern disputes it seems, increasingly, that states are less likely to try to use the traditional bilateral toolkit in the expectation that their actions will have any material impact on the policies of the states to which they are addressed. Nor are they seriously intended, as was often their use in the past, to preserve space for continuation of productive private diplomacy with a view to brokering a compromise deal or allowing space for a genuine mediation.

92. Rather, tools are often employed in circumstances where Governments are under pressure to be seen to act and where it is politically important to be on the record. Sometimes this pressure will be domestic. Sometimes it will be from partners also concerned about the issue. But the hard fact remains. The traditional toolkit usually is exhausted quickly and usually the tools have little or no impact in terms of ameliorating the problem.

93. It seems clear therefore that while the foreign policy tools of the past remain important, they are no longer sufficient to address the challenges of the contemporary environment.

6. Te Ao Māori context

Introduction

94. Pre colonisation Māori had existing systems and processes in place to determine correct practice; a system that offered a set of precepts, principles or values which served to drive behaviour and practice; a system known as Tikanga Māori.[1] In 1840, with the guarantees of te Tiriti, the right of tino rangatiratanga afforded the right to protect Tikanga for Māori.[2] However, colonisation impacted negatively on the Māori world, marginalising Tikanga Māori.[3] Despite te Tiriti guarantees and the acknowledgment that Tikanga is the first law of Aotearoa,[4] the recovery and recognition of Tikanga continues.

95. Tikanga Māori, is centred on Te Ao Māori or the Māori World, the world in which Māori lived, a complex multi dimensional philosophy sourced from cosmology and the creation stories. Cosmology determines the relationships or whakapapa between the animate and the inanimate, people, the environment and the spiritual world. Concepts such as mana and tapu, assist in the regulation of the relationships or whakapapa between people, the environment and the spiritual world, providing the values, principles, for developing customary practices to resolve disputes. Considered as the obligation to do things in the right way[5] and essentially the Māori way of doing things – from the very mundane to the most sacred or important fields of human endeavour[6]; the aim of Tikanga is to achieve, restore and preserve, balance.

96. Given that Tikanga has a flexible dimension together with the nature of Tikanga it is suggested that any application of a Tikanga approach to foreign policy should be guided by Tikanga experts/tohunga.

Tikanga - Disputes

97. When conduct that is hee (a mistake or error) occurs, it destabilises the balance in the relational network, a network that is premised on whakapapa and whanaungatanga underscored with regulators such as mana and tapu to help to restore balance. The process to restore balance, to restore mana, occurs through a process known as utu where muru or recompense, is determined. In assessing what muru should be secured factors such as precedents, the status of the parties, what could be afforded, and what was appropriate for the type of offending would be considered. The penalty agreed upon reflected a 'collective' concern. Muru, like hara, was inter-generational and receiving the penalty/taking responsibility increased the group's mana.

98. Traditionally, muru was used to wipe or rub out the hara. In doing so it absolved someone of their wrong-doings. By extension muru included the act of ritual seizing to address and correct the imbalance. Unlike an act of war, a muru was accepted and well-planned. In assessing what muru was to be paid, factors such as precedents, the status of the parties, what could be afforded, and what was appropriate for the type of offending were often considered.

99. In some instances a unilateral application of a muru or a rahui could be appropriate. An early example[7] noted that the action of a chief's wife remarrying created a hee, thereby destabilising the balance constituting a hara manifest in a breach of mana. To address this imbalance, (similar to the notion of implicit consent) a muru, or raiding party stripped the wife of what property she possessed. A more recent example, in 1979, in opposition to the sporting contact between New Zealand and South Africa Hirini Mead, Joe Malcom

and Tamati Kruger called for a rahui on rugby in New Zealand.[8] Although this had limits it encouraged discussion and people voluntarily placed a rahui on themselves and did not play, watch or contribute to rugby in any way. In some instances where a rahui is breached the consequences could be death.[9] Similarly, the extreme unilateral application of muru could be death or banishment.[10]

100. When a dispute has adversely impacted on one's spirit and mauri, the question is how to bring it back into balance. Regardless of societal level or the status of the parties involved, the same fundamental principle applies, namely, the principle of whakahoki mauri or, restoring the balance.[11] This could be through muru or rahui.

101. Indigenous peoples ascribe to a world view that aligns with Tikanga Māori and concepts such as harmony, healing and balance. The United Nations Declaration on the Rights of Indigenous Peoples supports the recognition of these fundamental rights.

Tikanga 'Tools'

102. When considering how the concepts or tools of Tikanga can assist, if the hee fell on the lower end transgressions, the corresponding muru could be an apology. Moving up the scale of transgressions, appropriate acts of reparation could be considered in order to 'fix the damage' e.g. payment for the damage.

103. Further along the scale, such as with the rugby example, a unilateral application of a rahui (a form of tapu as a 'regulator' to achieve balance) could be considered. This would involve initially a meeting/wananga with parties to express that the situation is not agreeable and the discussion that as a response, the consideration to apply a rahui as a tool. This could manifest in economic and financial sanctions/restrictions – e.g. freezing of assets; arms embargo – restrictions on exchange of goods and services or restrictions on travel entry. At the end of the scale when a nguha (battle) occurs banishment is perceived as an equivalent to death.[12]

104. These tools should be implemented consistent with accompanying Tikanga concepts such as mana, tapu, mauri and importantly affected by rangatira. The rangatira, as a collective/ small group or an individual, is a key tool to guide this process. This provides the ability to 'fine tune' the muru/sanctions to be fit for purpose and agreed upon i.e. to be effective. Both parties would need to agree to the rangatira to facilitate the dispute resolution and also to the venue, for the process to be effective. The process would take as long as necessary to ensure balance is restored to both parties.

Tikanga Tools and where do these (new) tools fit?

105. First, as a preventive approach, with the application of whanaungatanga to achieve and maintain good relationships, globally and regionally and to be 'a good partner'. Concepts such as reciprocity and respect would assist to guide the process.

106. This application would seek to strengthen existing situations/relationships and underpin new situations/relationships e.g. Increasing involvement in the UN with a whanaungatanga approach e.g. an active role in collective meetings with 'friendly states' as facilitated, for example, by the Quakers who invite State members and Indigenous peoples to share a meal in an informal setting during the UN sessions in New York and Geneva. This encourages relationship building and such a proactive approach could preempt any possible conflicts that may arise.

107. Second, when an issue has escalated then the hara needs to be identified and a rangatira appointed to initiate dialogue either bilaterally and multilaterally or unilaterally. Appropriate redress considered to heal/achieve harmony could include an apology, a travel ban, arms embargo and/or financial sanctions. This approach is nimble and flexible enough to fine tune the appropriate redress collectively that would be agreed to collectively to overcome previous problems identified with the unilateral application of sanctions. This is a more surgical application of sanctions.

Why use Tikanga tools? A conceptual framework?

108. History reflects a troubled pathway for the recognition of Tikanga Māori. At face value the inclusion of 'Tikanga Māori' within legislation, policy and Treaty settlements, viewed as part of the common law[13] appears promising but often criticised as token. This raises a raft of questions as to the place of Tikanga.

109. Notwithstanding, Tikanga is a right guaranteed under the Treaty. The aim of Tikanga is balance which aligns with the settling of disputes. The nature of Tikanga enables a flexible and nimble approach that could be employed to fine tune the application of foreign policy that is considered collectively and agreed upon collectively to restore balance. It is suggested that Tikanga should be considered as a conceptual framework for foreign policy.

110. As Tikanga is underpinned by principles such as reciprocity and balance, these principles can translate and be understood within a global setting. This provides an alternative lens and approach not captured by the orthodox foreign policy tools. Given the escalating international issues the consideration of a Tikanga approach to foreign policy is timely.

"He moana pukepuke e ekengia e te waka"
(a choppy sea can be navigated)

[1] Carwyn Jones "A Māori constitutional tradition" (2014) 12 NZPIL 187.

[2] English text. Te Paparahi o te Raki Waitangi Tribunal (November 2014) Wai 1040, Stage 1, Northern Chiefs did not cede sovereignty to the Crown.

[3] See Iris Marion "Young Five Faces of Oppression" in Lisa Heldke and Peg O'Connor (ed) *Oppression, Privilege and Resistance* (McGraw Hill, Boston, 2004) for discussion on marginalisation.

[4] *Peter Hugh McGregor Ellis v the King* [2022] NZSC 115 at para [107], [19] and [22].

[5] New Zealand Law Commission 'Māori Customs and Values in New Zealand Law' SP 9 (March 2001, Wellington) at para [70] quoting Bishop Manuhuia Bishop.

[6] *J Williams He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 2. Cited New Zealand Law Commission 'Māori Customs and Values in New Zealand Law' SP 9 (March 2001, Wellington) para [71].

[7] Richard Benton, Alex Frame and Paul Meredith (eds) Te Mātāpunenga: *A Compendium of References to the Concepts and Institutions of Māori Customary Law, compiled for Te Matahauariki Institute* (Victoria University Press, Wellington, 2013) at 255. Samuel Marsden in a journal entry, 1815, recounting the loss of the fowls given to a head chief as told by Elder 1932.

[8] Richard Benton, Alex Frame and Paul Meredith (eds) Te Mātāpunenga: *A Compendium of References to the Concepts and Institutions of Māori Customary Law, compiled for Te Matahauariki Institute* (Victoria University Press, Wellington, 2013) at p 322.

[9] Richard Benton, Alex Frame and Paul Meredith (eds) Te Mātāpunenga: *A Compendium of References to the Concepts and Institutions of Māori Customary Law, compiled for Te Matahauariki Institute* (Victoria University Press, Wellington, 2013) at p 310..

[10] See Te Paparahi o te Raki Waitangi Tribunal (November 2014) Wai 1040, Stage 1, at 32 that stated 'The ultimate physical sanction for transgression was to be killed and eaten – an action that resulted in the complete removal of the victim's tapu and its consequent transfer to the victor'.

[11] This system is often employed in smaller rural communities, such as at my marae in Motairehe, Aotea, for lesser offences such as burglary. For instance, when a person had climbed through a neighbour's window and stole some food the reparation was an apology and community work; see also Stephanie Vieille "Māori Customary Law: A Relational Approach to Justice" (2012) 3 The International Indigenous Policy Journal, Article 4, Issue 1.

[12] See Te Paparahi o te Raki Waitangi Tribunal (November 2014) Wai 1040, Stage 1, at 32 that stated 'The ultimate physical sanction for transgression was to be killed and eaten – an action that resulted in the complete removal of the victim's tapu and its consequent transfer to the victor'.

[13] See *Takamore v Clarke* [2012] NZSC 116, [2012] 2 NZLR 733 at para [94]; "... Māori custom according to tikanga is therefore part of the values of the New Zealand common law"

7. International Legal Context

111. There are three areas relevant to this report where the international legal context may be helpful:
- Tools for responding to grave human rights violations
- Tools for responding to serious conflict situations
- International legal tools for accountability

Human rights, sovereignty and domestic jurisdiction

112. In 1945, despite the changes in legal context ushered in by the UN Charter, some states had expectations that rules for respect of sovereignty and refraining from intervening in matters within domestic jurisdiction would continue unchanged. They expected that other states would continue to be obliged not to get involved in "internal affairs".

113. On the surface, Article 2 of the Charter did seem to some to carry forward previous rules of international law in this respect. But there were important legal nuances in Article 2. And progressively the practice of the UN and its member states has been to open space for legitimate engagement by the wider international community on internal matters. This is reflected in treaties and norms developed in the UN system.

114. The United Nations Declaration on the Rights of Indigenous Peoples articulates fundamental rights. However, as a "Declaration" it is important to recognise that unlike a "Treaty" (which is a binding instrument under international law), it does not enjoy the same status.

115. While many human rights treaties and norms are now well established, grave abuses continue. The Group was asked to consider how better to respond to grave abuses. The group is conscious that this involves implementing foreign policy tools in a still very complex legal and political context.

116. This context remains politically dynamic and divisive. Some states continue to push back, trying to maximise the area of "sovereign domestic jurisdiction" and non-intervention. But it is now well established in international law that where there are grave breaches of internationally agreed human rights there is no obligation on other states to sit on the sideline. As former UN Secretary-General Kofi Annan famously said, "We will not enjoy security without development, [nor] enjoy development without security, and we will not enjoy either without respect for human rights."

117. It needs to be emphasised that the human rights space, which was carved out from the pre 1945 legal rules relating to sovereignty and domestic jurisdiction, is only an exception to long standing rules about sovereignty and non intervention.. It is therefore important, when seeking to respond to grave human rights abuses, to locate response actions and the related use of foreign policy tools clearly within the legal exception.

118. This means founding response actions on clear rules of international law set out in human rights treaties or UN system decisions which are applicable to the violator in question. It also means being ready and able to articulate this clearly and firmly. This doesn't mean that response measures need to be publicly communicated in technical legal language.

119. Sometimes violators will object strongly and publicly to response measures even when these are well founded legally. This is another reason for founding actions on good technical legal analysis and it being available to be publicly used for rebuttal.

120. Response measures taken through established international human rights machinery (including regional machinery) and right up to the UN General Assembly, have additional legal credibility because of the nexus between the obligations violated and the machinery itself – both having been generated under international law and within the legitimate multilateral system.

Responses in the face of grave international conflict

121. The United Nations Charter not only outlawed the use of force by individual states to resolve problems, but it also changed the previous legal dynamics applicable to third parties. Prior to 1945 third party states had had a legal obligation to stay out of the conflict. They could formalise this by declaring neutrality. Neutrals had strict legal obligations to mind their own business. If a third party took sides, providing military or even civilian and moral support for one of the parties, they could be designated as a belligerent and be attacked.

122. After 1945, under the UN Charter, the old concepts of belligerency and neutrality became irrelevant. Security was collectivised. Moreover, the Charter created expectations that states would not sit on the sidelines. Instead they would be free (and indeed are encouraged by the Charter) to be active in preventing conflict and supporting action to resist aggression.

123. As in the context of human rights, many states assumed in 1945 that the definition of what constituted an international conflict would continue as before i.e. limited to conflicts between states. The Charter did not specifically define conflict in that limited way. Nevertheless, most of its obligations and the institutional machinery it established were clearly focused on conflicts between states.

124. Progressively the legal context changed. Over time the practice of the UN and its member states has been to open space for legitimate engagement by the United Nations and members of the international community on internal conflicts of varying levels of complexity and intensity.

125. This issue also remains politically dynamic, just as it is in the human rights context. Some states continue to push back, trying to limit the scope of internal conflicts that might be covered and maximising the range of issues still covered by “sovereign domestic jurisdiction” and non-intervention.

126. It is now well established in international law that there is no obligation on the UN to sit on the sideline in the face of a grave internal conflict. And the corollary also is that response actions by individual member states in such cases have also become more common.

127. Both the General Assembly and the UN Security Council, were given legal powers to take collective decisions to take steps to deescalate situations, prevent conflict and to respond

where threats to the peace escalated into aggression or other breaches.

- The powers of the General Assembly are recommendatory i.e. non-binding. They are set out in Articles 10, 11 and 14.
- Chapter VI of the Charter provides the framework for the UN Security Council to lead a range of collective non-binding measures to prevent and manage conflict situations. These include all of the possible steps that could apply short of binding sanctions or forceful action.
- The Chapter VI umbrella envisages not only formal collective action but also other "peaceful means" either ad hoc processes designed by the parties or mediators or more formal legal settlement processes. (The latter are covered further below).
- The Chapter VI space is a much-underutilised tool for response action both by the Security Council and by individual or small groups of states. Preventing, managing down and eventually resolving conflict situations is hard and difficult work. The actors in this space include states like Norway, Switzerland and Finland and Sweden, the substantial "good offices" capacity in the Secretary-General's office and some non-governmental bodies like the Centre for Humanitarian Dialogue.

128. Response measures taken through established UN machinery (and also regional machinery), partnering with existing UN Secretariat capacity and with other states and organisations working independently in this space, have strong legal credibility because of the umbrella under which this activity sits by virtue of Chapters IV and VI and VIII of the Charter. The language of Chapter VI specifically signals that response measures that may be taken outside the collective mode. These are not only legitimate but are welcomed and indeed expected as part of the legitimate multilateral system.

Responses using judicial and other "accountability" tools

129. The traditional toolkit included a number of legal options along the spectrum of measures to manage a dispute with another state. These included conciliation, arbitration and judicial settlement. Arbitration generally tended to be ad hoc with a tribunal composed by the parties for the specific case. Judicial settlement usually utilises an existing established court.

130. As explained above, the 1945 arrival of the UN Charter was a watershed event in terms of other tools. However, this was not the case in terms of legal tools. The ICJ and the legal tools associated with it are the only feature of the pre-WWII architecture that was not significantly adapted and updated in 1945. The rules for jurisdiction by the International Court of Justice are essentially identical to the rules adopted for the Permanent Court of International Justice in December 1920. As a result, in essence, the judicial architecture underpinning the UN is still largely based on assumptions and policies regarding international law that are over 100 years old.

131. This is not to say that the ICJ is defunct. In fact, the Court is busy, and it resolves a significant number of disputes. But the vast majority of these disputes relate to manageable issues, ones that are not likely to result in grave situations of armed conflict or grave abuses of human rights.

132. In areas of grave concern involving risks of serious armed conflict, legal tools with binding results are mostly unavailable because of the archaic rules regarding jurisdiction.

133. Despite these constraints, Aotearoa New Zealand has demonstrated that it is possible to get legal tools employed in some situations. Examples include its ICJ case against France

over nuclear tests, its case on the legality of nuclear weapons, its arbitration against France over the Rainbow Warrior affair and, more recently, its involvement in ICJ cases against Japan over whaling and Russia over its actions in Ukraine.

134. Another major difficulty in employing legal tools is that the UN Charter contains only very limited measures to incentivise compliance by states with binding decisions adopted under the UN system including international law-making treaties. The continuation of the 1920 model, which focused on international legal adjudication of "disputes" between states, reflected much older assumptions about international law i.e., that international legal problems would be manifested between states in a bilateral kind of way. The 1945 model failed to adapt international legal jurisdiction to the change that took place in 1945 whereby decisions could be taken collectively establishing international legal obligations binding erga omnes - owed to the international community at large.

135. In practice articles 5, 6, 19 and 41 of the UN Charter have often proved insufficient to ensure accountability and to ensure that States will be held responsible for non-compliance with binding decisions of the UN or major breaches of international law. Ambiguity, both in the Charter and in treaties and in Security Council practice, about what constitutes binding language, only exacerbates the situation.

136. The result is that compliance and implementation in respect of binding international law adopted through the UN system has become unfair. States who don't want to act in good faith, or inadequately regulated corporates, or corrupt actors can effectively ignore the law and thereby undermine the system, as well as putting the majority of states at an economic, financial or political disadvantage.

137. Some steps forward have been made in recent times, including more use of the ICJ Advisory jurisdiction, the development of the dispute settlement mechanism for international trade law disputes operated by the WTO, dispute settlement procedures under the Law of the Sea, the ad hoc criminal tribunals and the International Criminal Court and the accountability mechanisms for compliance with international human rights treaties and operated under the Human Rights Council.

138. However, in the current troubled global political environment, all of these developments have been seriously challenged and, in some cases, undermined.
- ICJ Advisory Opinions can carry political weight, but they are not binding and often do not induce compliance
- The WTO mechanism is impaired due to a dispute about its structure and process.
- The ICC has failed to gain the universal adherence and respect that was hoped for.

139. Despite all these constraints the legal architecture can still on some occasions be employed to positive effect. It therefore continues to have an important place in the Aotearoa New Zealand foreign policy toolkit.

8. Responding to grave human rights abuses

140. The United Nations Charter, adopted in June 1945, states as one of the purposes of the United Nations:

> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; (emphasis added) [Article 1.3][1]

141. In December 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) committing member states to respect and fulfill the human rights of everyone within its borders. It was the beginning of decades-long efforts to prevent egregious human rights abuses by promoting "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world". (UDHR, 1948, p1). Research undertaken by the New Zealand Human Rights Commission in 2003 revealed that the UDHR "sums up the fundamental values and principles that most New Zealanders would endorse as essential to a decent life and a fair and just society".[2]

142. In the years since 1948, the rights in the UDHR have been codified in UN Covenants and Conventions. Together with the eight International Labour Organisation (ILO) fundamental conventions, they form the basis for a robust international human rights legal framework. Successive New Zealand Governments have played an active role in developing those treaties and, through ratification, have formally committed to respecting those rights. Ratification of a human rights treaty places obligations on the State to report regularly on progress in implementing those rights.

143. In recognition of the limitations of the human rights treaty body processes, the UN Human Rights Council introduced in 2006 the Universal Periodic Review (UPR). The UPR is a peer-to-peer process requiring every UN member, regardless of what human rights treaties they have ratified, to report every five years on the progress they have made in implementing the rights set out in the UDHR. This followed the adoption in 1998 of the ILO Declaration on Fundamental Principles and Rights at Work and its related Follow Up Procedure with an annual review on Members' progress in implementing those principles and rights.

144. Other initiatives to strengthen respect for and fulfilment of human rights internationally have included UN General Assembly support for the establishment of National Human Rights Institutions (NHRIs); the establishment of the UN Permanent Forum on Indigenous Issues and the UN Expert Mechanism on the Rights of Indigenous Peoples. Human rights standards are also reflected in the UN Sustainable Development Goals for 2030.

145. Unlike other regions, there are no Asia-wide or Pacific-wide intergovernmental human rights mechanisms. At the sub-regional level, ASEAN member states have adopted the ASEAN Human Rights Declaration and have established the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Commission on the Promotion and Protection of Women and Children. The Pacific Islands Forum's (PIF) Vision is "for a region of peace, harmony, security, social inclusion, and prosperity, so that all Pacific people can lead free, healthy, and productive lives"; and its Values include reference to "the defence and promotion of all human rights".[3] The Pacific Community (SPC) identifies human rights and social development as one of its nine critical streams of work.

3 The Pacific Islands Forum. https://www.forumsec.org/who-we-arepacific-islands-forum/

146. The years since 1948 and the adoption of the UDHR, and more especially since 1990, can be seen as years in search of ways to encourage implementation of international human rights standards at the national level; and to develop effective responses to potential and occuring serious human rights abuses.

147. The critical challenge has been reconciling guarantees in the UN Charter, and elsewhere, about respect for the sovereignty of the state and non-interference in domestic affairs with the emergence of egregious human rights abuses within national boundaries.

148. Since 1948, New Zealand has actively contributed diplomatically to the development and operationalising of international human rights law and the related mechanisms. The question is what more if anything could New Zealand do to respond when those laws and mechanisms fail to prevent situations of grave human rights abuses.

Current tools

149. The current kete contains bilateral, multilateral and legal tools. With some limited qualifications all those identified have contributions to make in Aotearoa New Zealand's responses to grave international situations of concern involving human rights and peace and security.

150. They are largely reactive.

151. While acknowledging the limits of current resources available, the Group advocates that Aotearoa New Zealand adds a preventive and proactive element to its toolkit for dealing with grave international situations of concern, in particular those involving serious human rights atrocities.

152. Dealing with "significant human rights abuses" requires a four-pronged approach:
- Prevention
- Response / Reaction / Punishment
- Resolution – implementation of any settlement and follow-up
- Justice & Accountability

Bilateral tools

153. Evaluating the effectiveness of current bilateral tools requires clarity of objectives.

154. All of them clearly express disapproval. Most importantly, they may also convey solidarity with those experiencing and challenging the abuse. They can indicate support for the positions of like-minded countries and contribute to building support for an active international response. Finally, they may hurt those responsible for the abuses.

155. Depending on the extent of New Zealand's engagement with the State concerned, two of the kete bilateral tools could have a direct practical impact, namely the suspension of military cooperation and the modification or suspension of international development cooperation.

156. On the basis of observation and experience, three of the kete bilateral tools are likely to be counter-productive except in the most egregious of situations. Those are the suspension of Ministerial and senior official engagements, the expulsion of diplomats from Aotearoa New Zealand and the withdrawal of our High Commissioner or Ambassador. They cut off the ability to communicate or to protect New Zealand citizens and other interests in those countries.

157. The extent of any significant impact is likely to be dependent on the extent of New Zealand's relations with the State concerned, including diplomatic, trade, economic, international development cooperation etc.

158. Given that leaders, ruling elites, those with power including the military, are responsible for serious human rights abuses, or, in the case of abuse by non-state actors, failure to stop them, then the relationships that New Zealand 'rangatira' have been able to establish with those leaders and others in the wider community will be of critical importance.

159. Missing from the bilateral tools list is any specific reference to supporting those challenging human rights abuses at the national level – human rights defenders, civil society organisations, National Human Rights Institutions.

Domestic legal tools

160. New Zealand currently lacks the ability to impose sanctions independently of the UN Security Council. Given the extent to which the use of the veto has limited the effectiveness of the Security Council, there is a case for adding that legal capacity to be available in the case of persistent, serious human rights abuses or other threats to peace and security, as discussed in detail below.

Multilateral tools

161. Of the multilateral tools, those that investigate and document serious human rights abuses can be vital to eventual accountability and sustainable peace. Most frequently those investigations occur as a result of special mandates at the Human Rights Council and through ILO monitoring processes. They merit Aotearoa New Zealand's active support.

Conclusions

162. In summary, MFAT should take a more comprehensive, proactive and preventive approach to significant human rights abuses. Such an approach would include current and additional elements, including:
    - Putting in place a process for monitoring / identifying situations likely to develop into significant human rights abuses, as a priority in those places where New Zealand has national interests and / or responsibilities.
    - Engaging both bilaterally and multilaterally to contribute preventively to developing human rights situationsIntegrating the Sustainable Development Goals (SDG) into preventive plans.
    - Actively supporting multilateral human rights mechanisms, including the Human Rights Council and the ILO
    - Incorporating ILO mechanisms with New Zealand's preventive and responsive diplomatic tools
    - Advocating for development of a Pacific regional human rights mechanisms
    - Where serious human rights abuses have occurred, asking what actions New Zealand can take, including providing mediation and dispute resolution services, to contribute to a process of conflict resolution, accountability and sustainable political, economic and social peace and development.

[1] https://www.un.org/en/about-us/un-charter/full-text

[2] Human Rights Commission / Te Kahui Tika Tangata. Human Rights in New Zealand Today Ngā Tika Tangata O Te Motu. Wellington 2004.

9. Responding to emerging or actual threats to peace and security

163. Aotearoa New Zealand relies for its security on its defence partnerships with key friends and allies and on an effective international system promoting widespread respect for international law and ensuring that states resolve their differences through peaceful means, rather than the use of force.

164. Where there are serious situations likely to affect (or already affecting) international peace and security, New Zealand has historically employed a range of non-military measures, frequently under the auspices of the United Nations Security Council. These have been levied against designated individuals, non-state actors (such as Al Qaeda, the Taliban, and ISIL/Daesh), and states (including North Korea, Iraq, Iran, Russia and Belarus).

165. As a member of the United Nations, New Zealand must implement sanctions measures imposed by the United Nations Security Council under article 41 of the Charter. Since 1966, the UNSC has imposed 30 sanctions regimes, 14 of which remain in force today.[1] New Zealand enacts UNSC sanctions through regulations permitted under the 1946 United Nations Act. However, as has been well traversed, unlike the UK, EU, US and Australia, it has no autonomous sanctions legislation.

166. In 2022, the passage of the Russia Sanctions Act allowed the government to enact a sweeping series of measures against the Russian Federation and Belarus, following the former's invasion of Ukraine. The legislation, which provides for travel bans, the freezing of assets, stopping aircraft and ships from using New Zealand ports, and export and import restrictions, was adopted unanimously. Several rounds of sanctions have been enacted against Russian political, military and economic leaders, as well as large commercial entities, banks, and individuals linked to disinformation efforts. In December 2022, the law was also used to impose sanctions on Iranian individuals and a company involved in supply of weapons technology (principally drones and loitering munitions) to Russia.

167. Outside of customised tools such as the Russia sanctions legislation, New Zealand has a modest range of other measures available in cases where there has been no UNSC authorisation. These measures include:

- Expressions of concern, raised either individually or in concert with partners. These statements usually come from the Foreign Minister or Prime Minister, but in March 2021 there was also a rare joint statement condemning 'military-sponsored violence' in Myanmar, signed by the Chief of the New Zealand Defence Force (NZDF) along with the heads of the armed forces of Australia, Canada, Germany, Greece, Italy, Japan, Denmark, Netherlands, ROK, the UK and US.[2] New Zealand ministers have also condemned cyber attacks by China, North Korea and Russia.[3]
- New Zealand can offer support for resolutions and statements in multilateral and regional institutions, including the Pacific Islands Forum, East Asia Summit, and various United Nations bodies.
- Diplomatic actions, including cutting off high-level connections and the possible expulsion of diplomats. New Zealand expelled the Argentinian ambassador in 1982 following that country's invasion of the Falkland Islands. However, breaking off diplomatic links can often be an "own goal". Most conflicts end by negotiation and diplomats become a key channel of communication when trying to resolve a problem. Cutting off diplomatic links also makes it harder to protect the interests of New Zealand citizens and

businesses. Once broken, diplomatic links cannot be unilaterally restored. Most countries are therefore extremely hesitant to break these connections. However there are other ways to shun aggressors. Following the invasion of Ukraine, New Zealand officials have walked out of multilateral meetings where Russian officials have spoken, and in June 2022 Aotearoa New Zealand decided not to participate in ASEAN Defence Ministers Meeting Plus (ADMM-Plus) Expert Working Group Meetings on counter-terrorism co-chaired by Myanmar and Russia.

- Suspension of military assistance and connections is another tool. Arms embargoes and export controls have also been used. Although New Zealand exports little military equipment, these measures have been used to prevent dual-use technologies, arms or equipment falling into the hands of human rights abusers or states that are threatening international peace and security. In 2018, a New Zealand aircraft producer was fined $74,000 for breaches of UN sanctions against North Korea.[4] There can also be limits on the use of international development cooperation. For example, current sanctions on Myanmar prevent any development assistance from being provided where it will help the military.
- Travel bans have been used in cases such as Fiji, Iran, Myanmar and Zimbabwe, as well as under the Russia Sanctions Act.
- New Zealand can pursue or support legal remedies for breaches of international law. For example, New Zealand has supported Ukraine's efforts to take Russia to the International Court of Justice.
- New Zealand can also potentially use 'good offices' or other forms of mediation. For example under the 2000 Biketawa Declaration, "in a time of crisis...the [Pacific Islands] Forum must constructively address underlying causes of tensions and conflict", listing potential actions such as the formation of a "fact finding mission", "third party mediation" the "creation of a Ministerial Action Group" (among other measures).

168. How effective are these actions? Much depends on a given regime's legitimacy and enforcement, but sanctions have, on their own, rarely been successful in achieving their aims. International sanctions on Russia since February 2022 have been sweeping and seem to have had a significant impact on the Russian economy, although quite how much is widely debated. While sanctions may impede Russia's ability to sustain its war effort over time, so far they have not stopped Moscow's aggression. Large parts of the international community, while not necessarily supportive of Russia's actions, have little interest in supporting sanctions.

169. Sanctions on Iran were credited by some for forcing Tehran to return to the negotiating table and ultimately to agree to the JCPOA. On the other hand, even tougher sanctions imposed by the US under President Trump seem to be having the reverse effect with recent reports that Iran now has stocks of highly enriched uranium - close to enough to build nuclear weapons. Similarly tough comprehensive sanctions against North Korea since the 1990s have not prevented Pyongyang from continuing to develop its arsenal of nuclear weapons.

170. Certainly, given the size of New Zealand's economy and the nature of our exports, whether or not this country joins international sanctions has little impact on the overall effectiveness of those measures (although it was argued in the wake of Russia's invasion of Ukraine that without new financial sanctions New Zealand's banking system could be used to circumvent others' restrictions). Even in cases where New Zealand's leverage might be assumed to be greater (for example the targeted travel ban and limits on education, defence and sporting links imposed on Fiji after the 2006 coup) it is difficult to assess their impact. In the opinion of some commentators, New Zealand's decision to cut off high level

contacts (and a resulting series of tit for tat diplomatic expulsions) likely hardened attitudes in Suva and arguably helped push Fiji closer to China. However, there is also some evidence that the sanctions strengthened the commitment of those Fijians who were advocating for the restoration of constitutional rule and democracy.

171. Regardless, even if New Zealand's support for sanctions has little material impact on a target state it can have important symbolic value, demonstrating important national interests and values. It is a way New Zealand can show solidarity with the victims of aggression, condemn unacceptable behaviour, and demonstrate support for like-minded countries and partners.

172. Finally, there are good reasons to believe that these decisions are only going to become more of an issue for New Zealand governments. As competition between the great powers intensifies, multilateral frameworks such as the UNSC look increasingly dysfunctional. It will be harder to get agreement to act against threats to international peace and security. For example, in June 2022 China and Russia vetoed a UNSC resolution against North Korean ballistic missile launches. Russia of course blocked any action following its invasion of Ukraine and the US has vetoed numerous resolutions on the Middle East. A resolution on Myanmar avoided a veto in December 2022, but was criticised by many observers as being weak.

173. In our wider region, it is clear that the UNSC would be unable to act in any potential conflict that might arise in the South China Sea or across the Taiwan Strait. While the most flagrant violation of international law might demand a New Zealand response, as it did in the Ukraine case, there is also the question of how to respond to "grey zone" coercive activities that seek to change the status quo but which are short of full-scale open violence.

Conclusion

174. New Zealand has a modest range of tools to employ in reacting to emerging or existing threats to international peace and security. Many of these tools - expressions of concern, travel bans, the use of international courts and tribunals - remain relevant and important, but the current international environment suggests that it will become harder to secure agreement in institutions like the UN Security Council on how to respond to serious threats to the peace. The nature and range of challenges is also changing, including cyber attacks and foreign interference. This suggests that in addition to investing in 'upstream' efforts to prevent conflicts from occurring in the first place, Aotearoa New Zealand will also want to explore other measures it may wish to use when threats to peace, stability and New Zealand's sovereignty emerge.

[1] https://www.un.org/securitycouncil/sanctions/information

[2] https://www.defense.gov/News/Releases/Release/Article/2552778/joint-statement-of-chiefs-of-defense-condemning-military-sponsored-violence-in/

[3] See for example, https://www.beehive.govt.nz/release/new-zealand-condemns-malicious-cyber-activity-chinese-state-sponsored-actors

[4] https://www.stuff.co.nz/business/102792816/aircraft-maker-pacific-aerospace-fined-74000-for-illegal-north-korea-exports

10. The sanctions tool

175. What do we mean by a " sanctions tool"? In the international context the word "sanctions" is a shorthand name for a set of often quite different measures designed to coerce another party into changing its behaviour. It can involve any coercive measure short of the threat or use of force and may be imposed by one state or many and may be authorised or recommended by international decisions or implemented in groups or individually. The history and legal context are discussed further below.

176. In recent public discussions in Aotearoa New Zealand the legitimate scope for utilising sanctions as a tool to influence states behaviour has often been misunderstood. As discussed below, under international law, the choice is not just between Security Council approved sanctions and no sanctions at all. To the contrary, in global emergencies and in some cases involving national security, sanctions may be legitimately imposed more widely. This could be in response to decisions by other multilateral or regional bodies, or even unilaterally.

177. There are important limitations, however. International trade law strictly confines the potential scope. Political factors such as bilateral and regional relationships and reputation are also significant. The large majority of states, including Pacific and Asian regional partners, oppose unilateral sanctions. Such sanctions are also regularly condemned by big majorities at the UN. By contrast, close Western partners all have such legislation. Another political consideration is the fact that sanctions are rarely if ever successful in changing states behaviour. Moreover they can precipitate even further human rights abuses and humanitarian problems.

178. The Group considers that sanctions are important to consider as a tool. They allow people to show solidarity with victims, to underline the unacceptability of unlawful behaviour including gross abuses of human rights and encourage those defending against attack or abuse. Also, as is currently the case with Russia, sanctions seem likely to be effective in degrading military capacity and imposing economic constraints that will possibly have impacts on behaviour over the longer term.

179. But the evidence from the Iraq, North Korea, and Iran cases is clear that, even over the long term, the deterrent effect of sanctions can be minimised or circumvented. In the short to medium term, therefore, sanctions do little or nothing in practice to change behaviour or resolve serious human rights violations or stop conflicts.

Historical and legal considerations

180. Prior to the UN Charter, unilateral sanctions were always seen as a legitimate part of the traditional toolkit used by states to manage disputes with other states. These often took the form of embargoes on the movement of trade and peoples and sometimes were intermingled with action like formal blockades of borders and shipping. These were all legitimate levers that could be used as part of the escalating spectrum of measures short of declarations of war. It was also accepted that unilateral economic measures could be a legitimate response action under the rules relating to situations of emerging or actual armed conflict.

181. In 1945 the UN Charter changed the legal context for the application of economic and related coercive measures. It introduced in Article 41, a collectivised mechanism for the imposition of economic and other measures against a state breaching or threatening a breach of the peace. The Security Council could decide to impose such measures in order to deter a violator or compel a restoration of international peace and security. Such a decision is binding and must be implemented by all UN members.

182. Some states and some academics argue that this fundamentally changed the legal context and that the Charter in effect extinguished the previous position under international law that allowed unilateral economic measures to be taken. This is a possible inference from the scheme of the Charter. (There are no provisions like those in Chapter VI of the Charter, described above, which clearly signal the legitimacy of states in their individual capacity continuing measures of "peaceful settlement" outside the collective framework.)

183. State practice therefore becomes an important element in interpreting whether the Charter intended Article 41 to be exhaustive or not. In this regard, it is important to look at other major relevant multilateral treaties which were negotiated about the same time as the Charter. The General Agreement on Tariffs and Trade, ("GATT") negotiated immediately after the Charter and signed in 1947 is a particularly important indicator. The GATT was intended to be an integral part of the UN system and was designed to regulate the economic aspects of relationships between UN members.

184. Tellingly, Article XXI of GATT clearly indicates that member states considered it legitimate for any state unilaterally to take:

"… any action which it considers necessary for the protection of its essential security interests

1. *(i) relating to fissionable materials or the materials from which they are derived;*
2. *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
3. *(iii) taken in time of war or other emergency in international relations; or to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".*

185. It seems, therefore, that state practice, as reflected in the GATT agreement and the subsequent operation of the WTO system, confirms that Article 41 of the Charter is not exhaustive and that unilateral economic measures may legitimately be taken in self-defence, in times of emergency and in various other situations relating to protection of a states' essential security interests.

186. However, it must be emphasised that these exceptions specified in Article XXI are quite narrow. They create a limited permissible legal context for unilateral sanctions. But they certainly do not give a carte blanche for unilateral sanctions at the complete discretion of the sanctioning state.
    - Conflict situations such as say the invasion of Ukraine seem to clearly fall within the Article XXI exception relating to "time of war". Various civil war situations are also likely to fit within this exception.
    - All sanctions imposed under the United Nations clearly fall within the exception.
    - A threat to the "essential security interests" of Aotearoa New Zealand would also be covered, depending on the facts of the case. It is possible to envisage various developments in the Asia/Pacific region that could meet this criterion.
    - In terms of really grave abuses of human rights, situations involving genocide, and crimes against humanity could be said to fit within the meaning of an "emergency in international relations".
    - Human rights issues of a lesser order are less easy to fit within the exception. Some will probably constitute an "emergency in international relations". Some will not. For instance, it seems much harder to view events such as the coups in Fiji (and their aftermaths) as constituting an "emergency in international relations".

187. All this suggests that this legal context is a difficult one. Decisions to apply unilateral economic measures can be legally challenged through the WTO disputes settlement system. The Group emphasises that there is a real risk to our reputation and trading interests if unilateral sanctions were applied and were subsequently found to not meet the criteria in the Article XXI exception.

188. The Group also notes that the relevant jurisprudence, i.e. what is permissible under GATT Article XXI, is constantly evolving as new cases are decided.This reinforces the concern about risk when contemplating possible unilateral sanctions in specific cases. It underlines the need for constraints in any legislation and also for careful legal assessment of any specific case at the relevant time.

189. The legal risks are not just in the WTO context. As explained above, there is also a legal argument that a unilateral sanctions measure that fails the test in GATT Article XXI test would also fail the wider test of legal consistency with the UN Charter.

190. It may seem unlikely that an aggrieved party would pursue a more general legal challenge of this kind at the International Court of Justice. But it is not impossible. Aotearoa New Zealand has a very wide acceptance of ICJ compulsory jurisdiction, unlike say the USA. It is possible therefore that an aggrieved party might see Aotearoa New Zealand as the weakest and legally most vulnerable party of a Western sanctions coalition and threaten or initiate ICJ proceedings. (This is not unthinkable. In 1993, in a different context, the rump state of Former Yugoslavia threatened ICJ action and deterred Aotearoa New Zealand from action that had been taken by most other Western powers).

191. All this suggests that there is merit in having some form of Parliamentary approval before unilateral sanctions are triggered.

Political considerations

192. Most experience over the past few decades suggests that sanctions are very rarely, if ever, effective in changing behaviour or resolving a grave human rights situation or halting a conflict. Also, sanctions can be counterproductive. They can make situations worse, allowing violators, especially in the case of unilateral sanctions, to develop public rationales domestically and build international support based on the claim that they are victims of unlawful western bullying. Sanctions often encourage violators to double down on repressive policies, intensifying their human rights violations.

193. Sanctions have sometimes caused significant humanitarian crises amongst the populations of states sanctioned, as happened in Iraq. In that sense sanctions can themselves constitute violations of human rights. Leaders of states sanctioned are generally immune from any meaningful impact of sanctions, whereas their innocent populations often bear very significant costs, becoming doubly victimised.

194. Experience shows that sanctions often generate problems in the states imposing sanctions. The case of the Australian Wheat Board and its non compliance with Australian sanctions against Iraq demonstrates that this risk is real. (Between 1999 and 2003 the AWB paid more than NZ$350 million to Saddam Hussein's regime as part of a sanctions avoidance scheme). This case also underlines the difficulties of a Foreign Ministry trying to operate a credible sanctions enforcement regime and the need for a serious professional regulatory machinery.

195. But the problem is not only corrupt corporates. History in other parts of the world has also shown that often states themselves, particularly those in the affected regions or those with trading interests at stake, will connive at sanctions busting or turn a blind eye to sanctions evasions by non-state actors.

196. In economic terms sanctions can end up being very costly for the state imposing the sanctions, both in terms of impacts on businesses and the economy more generally. Trade opportunities will be lost.

197. The cost of enforcement is high. For example, the cost of implementing the current one off sanctions regime against Russia is high (over $2 million in the current year) and has had to be absorbed within the existing MFAT budget – which in practice means other projects have had to be sacrificed. Moreover, because the major NZ exporters to Russia voluntarily suspended trade before the sanctions were introduced, the actual cost of implementation is much lower than it would otherwise have been.

198. Another consideration with imposing sanctions is the fact that in many cases retaliatory trade measures and other economic consequences are likely. These can include exacerbating inflation and supply chain problems. Potential trade implications are often a factor in the differential application of sanctions, with some states being sanctioned, but other more powerful violators not. This inevitably over time has a corrosive impact on the political legitimacy of sanctions policy, both internationally and domestically.

199. Most sanctions eventually face significant political challenges. The majority of the international community oppose the use of sanctions as a tool. There is resistance, even to UN sanctions under Chapter VII of the UN Charter, except as a last resort.

200. But it is unilateral sanctions which receive the most criticism. The UN General Assembly has condemned unilateral sanctions by a very wide margin. Almost all of Aotearoa New Zealand's Pacific Islands Forum partners, ASEAN friends and Asian regional trading partners are on the record as voting against unilateral sanctions. (Aotearoa New Zealand has been able to maintain a balanced position in such votes by abstaining).

201. The concern about unilateral sanctions is often driven by the fact that in some cases (e.g. the US sanctions against Cuba) the unilateral sanctions tool is employed (or continued) as much for domestic political reasons rather than as part of a rational foreign policy tool kit. There is also widespread concern that unilateral sanctions which are sometimes cloaked in terms of being a tool for human rights protection are actually being employed as a tool to advance a national foreign policy interest.

202. Finally the selective use of sanctions reinforces all these concerns. (Sanctioning Iran over nuclear proliferation but not Israel is only one such example.)

Application of Tikanga in decision making on sanctions

203. In the context of its discussions on Te Ao Māori, the Group discussed whether and how any new generic legislation on sanctions should appropriately reflect Tikanga and rights under Te Tiriti o Waitangi. The Group identified two possible examples relevant to this issue:
    - Unilateral sanctions that might potentially have significant impacts on Iwi by constraining Iwi economic ventures;
    - Unilateral sanctions in the context of a serious human rights situation in another state or a conflict situation between two other states where Tikanga based conflict resolution tools may be applicable and constructive.

204. The Group considered that the second issue was closely connected to the wider question of Aotearoa New Zealand being more active and better using its existing potential for helping resolve issues more proactively through dispute resolution processes such as mediation. The potential for underlining this with specific reference in any sanctions legislation was discussed.

205. The potential for including specific provision in any sanctions legislation to address the potential negative impacts on Iwi of a sanctions measure was also discussed.

206. It was appreciated by Group members that, because of the legal and political risks associated with ambiguity and uncertainty, the precise wording of any provision in legislation to address these issues would be very important.

207. The Group considered possible ways in which these issues might be included in any legislation on sanctions including:
    - A provision about the possible use of Tikanga related tools and concepts in conflict or human rights situations where this would be useful. This might impose a duty on the Minister, prior to recommending any unilateral sanctions regulations, to consider whether Tikanga related tools and concepts might be applicable in the specific situation.
    - A provision that, prior to recommending unilateral sanctions regulations, the Minister should consider whether the regulations imposing sanctions would impact negatively on Māori economic ventures. If so, the Crown must consult with a view to resolving the negative impact caused by the sanction.

208. The first suggestion would require some additional policy work by MFAT in a routinised way and for the Te Ao Māori dimension to be actively part of this. However the suggestion could not be interpreted as legally mandating the implementation of any such an initiative in any specific case.

209. Many of the same conditions that might make a Tikanga based mediation initiative appropriate would be equally applicable in other conflict situations as well. There is therefore a case for any such provision having wider application i.e. that the Minister should turn his or her mind to mediation possibilities in all cases, including specifically where Tikanga could be applicable.

210. Regarding situations where unilateral sanctions could impact negatively on Māori international trading ventures, the Group is aware that MFAT consultation with affected NZ stakeholders (including Māori business entities) is already normal in the sanctions context. The above suggestion in this regard is therefore largely consistent with existing policy. But including it in the legislation would have the result of locking in that process in a formal way.

Conclusions

211. The right to use unilateral sanctions measures as a tool does exist in international law. But it is a limited right. And there can be legal and reputational risks, depending on how the right is exercised.

212. The Group believes that these risks and the legally limited scope for legitimate use of unilateral measures, have an important bearing in considering the legal threshold that should be included in any legislation relating to generic provision for unilateral sanctions.

213. The Group also underlines that adding a generic unilateral sanctions making capacity to the Aotearoa New Zealand statute book would rarely, if ever, make the toolkit more effective in resolving a grave human rights situation or halting a major conflict.

214. However it does offer a tool for showing solidarity with victims, for underlining the unacceptability of unlawful conduct and for encouraging those defending against unlawful action.

215. The Group also notes that the case of the Russian invasion of Ukraine shows there is no problem in quickly enacting situation specific unilateral sanctions legislation when very serious cases arise. In future cases, new sanctions measures could be enacted even more quickly. The Russia sanctions now offer a clear legislative model that could be very easily and quickly adapted. Accordingly, it seems likely that in the vast majority of serious cases in the future, quick enactment is possible – as it was in response to the invasion of Ukraine.

216. It is also an important consideration that the Ukraine experience has shown there is a very strong benefit, in terms of the force of the signal sent, both to domestic constituencies and internationally, if sanctions are publicly and very visibly approved by Parliament. By contrast, the signal would be more muted if sanctions were made behind closed doors simply by Regulation.

217. Because of the political and legal risks involved in implementing unilateral sanctions there are also issues about allowing the Executive unfettered power to impose such sanctions behind closed doors by Order in Council and in the absence of a Parliamentary majority. In this regard it is necessary to bear in mind that, for the reasons explained above, a policy of unfettered unilateral sanctions could have some negative political impacts on Aotearoa New Zealand's reputation in the Pacific and in Asia. The damage would be felt in wider relationships over time.

218. Moreover Aoteroa New Zealand would be thrust into a tiny minority of states (currently only 6) in the UN voting in favour of unilateral sanctions.

219. There is the risk to our trading interests outlined above. There are distinct risks that some unilateral sanctions could be found by the WTO to be non compliant with GATT/WTO rules.

220. Moreover, the risk is much wider than that. Unlike others who employ unilateral sanctions, Aotearoa New Zealand depends very heavily on the "rules based" trading system and the fair adjudication of trade disputes. This is because of its export profile and the significance of exports for its overall economy. This situation creates a particular vulnerability and a need for us to come to the WTO with "clean hands''. We would be in a much more difficult position trying to hold others to account under WTO rules if we could be accused ourselves of a trade and economic sanctions policy that was not WTO consistent.

221. All these considerations weigh heavily when considering enacting generic unilateral sanctions legislation.

222. The policy of not having generic legislation allowing unilateral sanctions may have served New Zealand in the past – including by underpinning the sense of "independence" of Aotearoa New Zealand foreign policy. And the Russia sanctions legislation shows that quick ad hoc legislation is achievable. However, there are some alternative considerations that need to be balanced. There is a small risk that Parliament may not be able to act urgently at a particular point in time with a full legislative package. This could be because of a recess, an imminent election or because of a particular political situation in the Parliament.

223. The Group therefore accepts that a carefully constrained generic capacity for unilateral sanctions may offer Aotearoa New Zealand a vehicle for demonstrating enhanced concern or showing solidarity when confronted by a particularly grave international situation. It may also offer better capacity for aligning with some international partners in respect of such a situation, for responding to cases where cyber aggression has occurred, (particularly in cases of covert cyber interference in democratic processes where carefully nuanced responses may be important) and also for better responding to concerns of domestic constituencies.

224. In terms of bilateral relationships, political relationships in Asia and the Pacific are very important. Having a generic unilateral sanctions capacity may result in some reputational costs. This can be managed by ensuring the thresholds for use are clearly explained and in the careful use of those measures. Relationships with Europe, North America and Australia are also important. Some of these partners sometimes wish that Aotearoa New Zealand had a generic legislative capacity on sanctions.

225. All this suggests that, on balance, there is a case for a new approach.

226. The Group supports new legislation that would:
- Allow unilateral sanctions.
- Provide a generic model based on the current sanctions against Russia but allowing appropriate customisations for specific cases.
- Be drafted so as to visibly enhance its legitimacy. Legitimacy would be enhanced by having the legislation focus not just on unilateral sanctions, but for it to be a comprehensive new regime which also specifically covers demonstrably legitimate areas for sanctions eg: UN sanctions under Article 41 of the Charter and other situations reflected in international law e.g. GATT Article XXI.
- Establish a new and cautious threshold for implementation.
- Include in the threshold a pre-condition that in any particular case unilateral sanctions could only be triggered by the adoption of a Resolution in the House of Representatives.
- The Government would retain control by the legislation specifying that such a resolution could only be introduced by the Prime Minister or Minister of Foreign Affairs.
- The threshold should also include elements specifically designed to harmonise implementation as much as possible with WTO trade rules.
- Include provisions requiring consideration of Tikanga based mediation processes in the context of consideration of possible wider mediation initiatives and consultation by the Crown with Māori in circumstances where future unilateral sanctions would negatively impact Māori business ventures.

227. Annex 1 contains some suggested drafting of how these conclusions could be effected in a draft Bill.

228. The Group also notes that our legislation covering United Nations approved sanctions and is currently in separate legislation that is more than 75 years old. It has been partially updated but still uses archaic language and optically it looks increasingly like an orphan.

229. Finally the Group considers that, both in terms of legitimacy and effectiveness, it would make sense if Aotearoa New Zealand were to decide to employ unilateral sanctions as a foreign policy tool in a particular case, then that should be done in a collective or group context. It seems foolhardy to canvas the possibility that Aotearoa New Zealand would act purely alone – even if the country to be sanctioned was a very small one. This issue is also addressed in the recommended threshold.

230. The Group believes that this new limited and balanced approach would enable Aotearoa New Zealand to better defend its position in terms of trade law, to push back against bilateral criticism from those opposed to unilateral sanctions and to continue to abstain on international resolutions critical of more extreme unilateral sanctions.

231. The Group notes that the experience from the implementation of the Russia Sanctions Act demonstrates that any new sanctions legislation, as an enduring regulatory regime that needs ongoing administration, would have additional significant resourcing requirements and would very likely require new capacity for oversight and regulatory management.

Annex 1

(suggested drafting for Bill)

This annexe demonstrates how some of the recommendations above regarding possible future legislation for a comprehensive sanctions regime could be effected.

The Bill would be comprehensive. It would cover all aspects of sanctions, whether employed under UN mandates, under mandates from regional organisation or purely unilaterally. And it would provide the legislative authority for all sanctions measures including travel bans, trade restrictions and financial measures.

The Bill would be framed so as to demonstrate a clear intention by Aotearoa New Zealand to comply with relevant international trade rules, in particular the key elements of GATT article XXI.

The Bill would contain a schedule of detailed generic measures modelled on the Russia Sanctions Act 2022, but there should be a threshold provision which carefully limits the scope of sanctions.

The Bill would also provide that unilateral sanctions would only be implemented in a specific case, upon the adoption by the House of Representatives of a Resolution in terms prescribed in the Act.

The Minister of Foreign Affairs would be empowered to recommend Regulations be made with tailored sanctions for the specific case.

The Bill might be along the following lines:

1. Title

This Act is the International Sanctions Act 20...

2. Commencement

This Act comes into force on...

3. Purpose

The purpose of this Act is to enable New Zealand to impose and enforce sanctions, consistently with its obligations under Te Tiriti and international law, so as to assist in maintaining or restoring international peace and security, to protect its security and rights of self defence or to assist in responding to international emergency situations including those arising from grave abuses of human rights.

4. Threshold

Section 6 of this Act shall apply only when one of the following thresholds are satisfied –

(a) The United Nations Security Council has decided to impose a measures of the kind specified in Article 41 of the United Nations Charter,

(b) There is a direct and immediate threat to the security interests of New Zealand, Australia or any other member of the Pacific Forum,

(c) The House of Representatives, by Resolution adopted on the motion of the Prime Minister or the Minister of Foreign Affairs, has determined that an international emergency exists involving:

i. war or aggression or a breach of international peace and security

ii. a threat of war or aggression or a breach of international peace and security

iii. credible allegations of genocide, crimes against humanity, grave war crimes or a grave breach of human rights and a decision has been taken by an organ of the United Nations or a by a competent Regional Organisation to call for collective action to respond to the situation.

and has determined also that New Zealand measures taken under Section 6 would be implemented in parallel with measures being taken by other countries.

5. Requirement to consider other options including utilising Tikanga Māori

1. The Minister, before making a recommendation under section 6 of this Act for regulations imposing sanctions to respond to an international emergency situation covered by Section 4 (c) of this Act must ensure that consideration is given to options for initiatives by New Zealand, whether in partnership with other states and international organisations or not, involving mediation or conflict resolution techniques that may assist in resolving the international emergency situation.
2. Consideration pursuant to subsection (1) must include whether one or more of the states involved in the international emergency situation may be amenable to mediation or conflict resolution techniques drawn from Tikanga Māori.
3. The Minister, before making a recommendation under section 6 of this Act for regulations imposing sanctions to respond to an international emergency situation covered by Section 4(c) of this Act, must give consideration to whether the regulations imposing sanctions would impact on a māori authority, collective, hapu or iwi, by negatively affecting an international trade agreement or commercial partnership. If so, the Crown must consult with the māori authority, collective, hapu or iwi with a view to resolving the negative impact caused by the sanction.

6. Regulations

There would be a regulation making power, details of sanctions measures and other elements modelled on the Russia Sanctions Act 2022.

Annex 2

(Terms of Reference)

Independent Advisory Group on Human Rights and the Foreign Policy Toolkit

Terms of Reference

Background

1. Human rights, and international peace and security, are central to Aotearoa New Zealand's foreign policy interests, our values-based foreign policy, and our commitment to the international rule of law. Aotearoa New Zealand has a strong history of promoting and protecting international security globally. Our support for human rights at home and internationally is well recognised. And international advocacy has enhanced our reputation as a constructive state, committed to the international rules-based system.
2. There are a number of existing foreign policy tools to respond to grave situations of concern that threaten human rights or international peace and security. These are outlined further below in paragraph 6.1 and include bilateral diplomatic tools, multilateral tools and legal tools. These tools include sanctions imposed under the United Nations Act 1946 following a Security Council resolution. New Zealand does not have a general ability to impose comprehensive independent or "autonomous" sanctions. However, under existing law some tools are available such as travel bans and some export controls. Comprehensive independent sanctions currently require specific legislative authority, as occurred with the Russia Sanctions Act 2022.
3. International security is increasingly under threat. Human rights norms are increasingly ignored. A growing number of states are trending towards authoritarianism. New technologies, which may bring many benefits, are also being used to undermine established democratic and human rights standards. To respond to these growing challenges, New Zealand may need to review its foreign policy tools and their application with a view to refreshing its approach to responding to grave situations of concern.

Purpose and scope

4. The independent Advisory Group on Human Rights ("the Advisory Group") is appointed by the Secretary of Foreign Affairs and Trade and will report to the Secretary of Foreign Affairs and Trade. The Advisory Group will discharge its functions according to these Terms of Reference. The Advisory Group may determine its own procedures or processes, unless otherwise guided by these terms of reference.
5. The purpose of the Advisory Group is to provide a written report to the Secretary of Foreign Affairs and Trade on the foreign policy tools available to respond to grave international situations of concern involving human rights and peace and security including the advantages and disadvantages of a future role for autonomous sanctions.
6. In order to achieve this purpose, in the written report the Advisory Group will analyse and make recommendations on:

6.1 The full range of foreign policy tools available to respond to grave international situations of concern involving human rights and threats to peace and security, including:

6.1.1 Bilateral tools (such as diplomatic representations, summoning an ambassador, public statements of concern, recall/withdraw a New Zealand ambassador, suspend ministerial and senior official engagement, expel diplomats, suspend development assistance, suspend military cooperation);

6.1.2 Regional tools (such as promoting action in applicable regional organisations, statements of concern at regional meetings and initiating appropriate regional decisions);

6.1.3 Global multilateral tools (such as promoting action in appropriate UN bodies including initiating resolutions in the General Assembly or the Human Rights Council, speaking in the UN Security Council, pressing for UN Security Council sanctions, joint statements with other countries, pressing for UN Human Rights Council special sessions or urgent debates or Emergency Sessions of the General Assembly, promoting the appointment of Special Representatives or other investigations on crisis situations),

6.1.4 Legal tools (such as travel bans, export controls, legal action in international courts and tribunals).

Military aid, assistance and deployments are not included in the range of tools the Advisory Group may examine.

6.2 The impact and limitations of the foreign policy tools in addressing grave international situations of concern involving human rights and peace and security:

6.2.1 The Advisory Group's role is to review the impact and limitations of the tools in the abstract, in a forward-looking manner, and not to review or appraise how New Zealand or other States have responded to past or ongoing situations of concern. However, in order to achieve its purpose the Advisory Group may consider case studies where the tools have been used in the past to evaluate the impact and limitations of their use.

6.3 A possible framework to provide guidance and greater coherence in selecting the appropriate response tool(s) at the appropriate time, including the factors that should be weighed in determining the appropriate tool.

6.4 The advantages and disadvantages of a potential future role for autonomous sanctions alongside New Zealand's existing foreign policy tools, including:

6.4.1 Whether autonomous sanctions by New Zealand would be effective in deterring and addressing grave international situations of concern involving human rights, and threats to peace and security;

6.4.2 Whether comprehensive sanctions may give rise to unintended consequences, including threats to the economic and social rights and other human rights of populations in countries put under sanctions or have unintended impacts on neighbouring countries;

6.4.3 The impact that using autonomous sanctions would have on New Zealand's foreign policy generally and on its international relations.

6.4.4 The economic effect of autonomous sanctions on New Zealand businesses and people, including exporters, and the need for businesses to introduce sanctions compliance systems;

6.4.5 Any practical considerations including any administrative structures and resourcing required to implement and enforce an autonomous sanctions regime, drawing on international experience;

6.4.6 The advantages and disadvantages of a comprehensive autonomous sanctions regime as opposed to bespoke legislation introducing sanctions in response to a specific situation;

6.4.7 If New Zealand was to consider introducing autonomous sanctions, what types of situations should they address (i.e. threats to regional or international peace and security, human rights abuses, emerging security threats such as cyber attacks) and what kinds of legislative checks and balances might be appropriate ;

6.4.8 If New Zealand was to consider introducing autonomous sanctions, what is the appropriate threshold for imposing sanctions and what considerations should be relevant to the decision to impose sanctions.

Deliverables and timeframes

7 The Advisory Group will produce and deliver a final written report to the Secretary of Foreign Affairs and Trade by 31 March 2023, or such earlier date or later date as is determined by the Secretary of Foreign Affairs and Trade. The Advisory Group's work will cease after the provision of the final report.

8 The report should reflect the consensus view of the members of the Advisory Group, and the group is encouraged to reach consensus on its conclusions and recommendations. However, the members should feel free to adopt different positions on key issues and set those positions out in the report if consensus cannot be reached.

9 The Advisory Group will meet the Deputy Secretary of Foreign Affairs and Trade once in 2022, within one month of its establishment, on a date to be arranged by the Secretariat. This meeting will provide an opportunity for the Chair to share insight on the direction of the Advisory Group's work.

Sources of information

10 In fulfilling its purpose, as outlined above, the Advisory Group may have regard to:

10.1 Publicly available information;

10.2 Existing research and analysis undertaken by other entities and bodies;

10.3 Information held by the Ministry of Foreign Affairs and Trade or other Government agencies which is relevant to the issues outlined above, following a request to the Secretariat to access such information, and a security assessment on the release of such information.

Consultation

11 The advisory group may consult iwi/Māori, businesses, affected communities, and other entities or persons, including state sector and non-state sector, if it considers it helpful in achieving its purpose. Engagement with iwi/Māori should be in accordance with the Office for Māori Crown Relations: Te Arawhiti guidelines on engagement.

Secretariat

12 The Ministry of Foreign Affairs and Trade will establish a Secretariat to support the Group. The Secretariat will:

- liaise with the Chair and members of the Advisory Group.
- circulate a provisional agenda before each meeting of the Advisory Group and call for additional agenda items.
- circulate the final agenda and any material to be considered by the Advisory Group three days in advance of a meeting.
- if requested in accordance with paragraph 10.4 above, facilitate the Advisory Group's access to information held by the Ministry of Foreign Affairs and Trade or other Government agencies.
- attend meetings of the Advisory Group and record minutes.

Membership and participation

13 The Advisory Group members are appointed by the Secretary of Foreign Affairs and Trade.

14 The Group will consist of the following members, chaired by Colin Keating.

Name	Organisation	Sector / Perspective covered
Colin Keating		International law and foreign policy
Rosslyn Noonan		Human Rights
David Capie		Geopolitics and international relations
Valmaine Toki		Indigenous rights

15 A member may leave the Advisory Group by notifying the Secretary. If that occurs, the Secretary will consider whether to and, if appropriate, appoint a new member. Any failure to meet the requirements and expectations set out in these Terms of Reference may result in the Secretary removing a member from the Group by written notice to the member. This includes, but is not limited to, failure to meet the required standards of integrity, a breach of confidentiality, unauthorised communication with the media, or failure to declare a conflict of interest.

16 Nothing contained in these terms of reference creates or gives rise to a partnership, any fiduciary duty, agency, joint venture, or any relationship of employment.

Meetings and attendance

17 The first meeting of the Group will be in November 2022. The Secretariat will work with members to agree the frequency of meetings and mode of attendance (i.e. in person, virtual, or hybrid). Meetings may be flexible to correspond to peaks of work, for example the frequency of meetings may increase as the deadline for producing the report approaches.

18 Members are expected to attend every meeting, unless notified to the Secretariat in advance. If the Chair is unavailable to attend a meeting, they must nominate a panel member to act in their place. Members of the panel may not delegate attendance at meetings.

Standards of conduct and conflicts of interest

19 Members must conduct this work as individuals, separate from any concurrent employment or business activities. Members have a duty to act fairly and in good faith, and must conduct their duties independently, impartially, responsibly and in a trustworthy manner. They must not act in order to gain financial benefits for themselves, their families, friends or business interests.

20 A conflict of interest arises where a member (or a person in a close relationship with that member) has a personal or professional interest which compromises their integrity or otherwise conflicts (or might conflict, or might be perceived to conflict) with the interests of the Advisory Group.

21 Before a person is appointed as a member of the Advisory Group, the person will be required to disclose to the Secretariat the nature and extent of all interests that the person has, or is likely to have, in matters relevant to the operation and functions of the Advisory Group. Members are responsible for declaring any real or potential conflict of interest to the Secretariat as soon as it arises.

22 The Secretariat will maintain a register of interests, to ensure that any potential conflicts of interest are identified and managed effectively.

23 A conflict of interest will not necessarily bar an appointment, although a serious conflict may mean a candidate is not suitable for appointment, or should resign if a significant and unmanageable conflict arises during the term of appointment.

Confidentiality and information

24 The matters the Advisory Group is tasked with examining and reporting on may concern aspects of New Zealand's foreign policy, elements of which must remain confidential to avoid prejudice to the international relations of the Government of New Zealand, the security and defence of New Zealand, and the entrusting of information to the Government of New Zealand on a basis of confidence.

25 Accordingly, all meetings of the Advisory Group (except meetings for the purpose of consulting external stakeholders) must be held in private. All information provided to or generated by the Advisory Group, including any matters discussed at any meetings, and any information or documents provided to the Advisory Group, will be treated as confidential by the members of the Advisory Group, unless the Secretary of Foreign Affairs and Trade decides otherwise. The confidentiality obligations continue after a member leaves the Advisory Group, and after the Advisory Group produces its report.

26 Where information is already in the public domain, the confidentiality obligations outlined above do not apply.

27 The Secretary's strong preference is for the final report to contain no confidential information, such that it can be publicly released in full. However, if the Advisory Group considers it necessary to include confidential information in the report to fulfil its purpose, it will work with the Secretariat to ensure such information is withheld from public release if appropriate.

28 Members must at all times comply with the requirements of the Privacy Act 2020 and the Public Records Act 2005. All information provided to and by the Advisory Group and its Secretariat will be subject to the provisions of the Official Information Act 1982.

29 Any report or product created by the Advisory Group will be the property of the Crown. Government agencies may use reports and other work products created by the Advisory Group.

30 Members must not represent the Advisory Group, or comment on the business of the Advisory Group, to the media or in any public forum without the prior agreement of the Secretary of Foreign Affairs and Trade.

Finance and budget

31 Members will be paid a daily rate for their work on the Advisory Group, to be determined in accordance with the Cabinet Fees Framework set out in the Cabinet Office Circular CO(19)1 and agreed with each Member. Members will also be reimbursed for the actual and reasonable expenses associated with travel within New Zealand to attend meetings. Overnight accommodation will not be required or expected.