

**THE EFFECTS OF UNINCORPORATED
INTERNATIONAL INSTRUMENTS ON JUDICIAL
REASONING IN NEW ZEALAND**

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Introduction

The theory of dualism holds that international law and domestic law are separate systems. As a result, “the stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law”.¹ In order to have legal force within the domestic legal order, the provisions of treaties (and other international instruments, such as declarations) must be incorporated into legislation by Parliament.

However, there is a growing academic consensus that this orthodox paradigm is losing its explanatory value. The frequency with which New Zealand courts use unincorporated international instruments tells against such a rigid divide between the municipal and international legal systems. The root of dualism’s expository weakness is that it revolves around the concept of “bindingness” which sees law as applying in an “all or nothing” fashion. Dualism therefore struggles to explain why and how unincorporated instruments, which do not have the binding “force of law”, are having an increasingly significant effect on the resolution of domestic legal problems.

This paper aims to clarify the role played by unincorporated international instruments in New Zealand law. The object of Part One is to gain a better understanding of the effects that these instruments *actually* have on the reasoning of domestic courts. To do this, we must move beyond the black and white pallet of dualism and attune our eyes to the shades of grey on the spectrum between binding and non-binding authority. To this end, Chapter Two will focus our attention on the possibility that unincorporated international instruments may function as a type of authority that, while not binding, is not entirely permissive either.

Building on this, Chapter Three will attempt to set out a range of ways in which these instruments appear to be influencing the reasoning of New Zealand courts. While the courts’ use of unincorporated treaties in constraining administrative discretion tends to attract the most attention, this paper will also examine their use in the development of the common law and the interpretation of general statutes in order to gain a broader understanding of their impact on domestic law. The method of analysis will be bottom-up, involving a close examination of the judges’ reasoning. Obviously such analysis will be qualitative rather than quantitative. The number of cases in the data-set is necessarily limited and does not represent the cases where the court has simply declined to comment on submissions that invoked unincorporated international instruments. Nevertheless, such analysis gives insight into the different ways in which courts are willing to give effect to these instruments.

¹ *New Zealand Air Line Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 280-281.

² K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004)

Part Two will then ask *why* instruments have different effects in different cases. The goal is to identify factors and principles that influence the courts' decisions to allow instruments a specific kind of effect. As well as searching for instances of factors discussed in existing literature, the aim is to "look for new spaces and new linkages".² In any given case, these principles and factors will be woven through the court's judgment, sometimes breaking to the surface, other times remaining hidden and implicit in the reasoning.

Although in reality these factors will be intertwined, there is value in attempting to isolate and explicate them individually. This value lies in the increased certainty that would result if such factors and principles were explicitly recognised by the courts as being relevant to the domestic effect given to unincorporated instruments. Part Three will argue that, in New Zealand's constitutional climate, this transparent approach represents a viable and preferable alternative to the perpetuation of the dualist theory. It would strike a balance between the benefits derived from international law and the need to protect parliamentary supremacy and certainty in the law.

² K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63(3) CLJ 581 at 604.

PART I: THE SPECTRUM OF EFFECTS

Chapter One: The Value of Dualism

Before analysing why its descriptive value has diminished, it is useful to consider dualism's main benefits. First, dualism promotes certainty in the law by assuring litigants that courts will not rely on unincorporated international instruments to resolve legal problems. By decreasing the range of possible arguments available, dualism makes legal outcomes more predictable.³

Secondly, dualism protects the principle of parliamentary supremacy. The ratification of treaties is the prerogative of the Executive.⁴ Therefore, by denying legal force to unincorporated treaties, dualism prevents the Executive from making new law within the state, thereby securing the democratic legitimacy of the law-making process.

It could be argued that Parliament's more prominent role in treaty ratification under the procedure adopted in 2000 has made it more appropriate for courts to give effect to international obligations.⁵ Before ratification of multi-lateral treaties, the government must present the treaty to Parliament with a National Interest Analysis (NIA), which sets out matters such as the advantages and disadvantages of entering into the treaty and whether implementing legislation will be required.⁶ The treaty and NIA are referred to the Foreign Affairs, Defence and Trade Committee of the House or a more appropriate committee, which may make recommendations to the Government.⁷

In reality this procedure does very little to legitimise the courts' use of unincorporated treaties from a parliamentary sovereignty or democratic perspective. The amount of public input is limited. For example, committees tend only to allow three to four weeks for public submissions.⁸ In any case, the major human rights treaties on which

³ On the benefits of formal, rule based adjudication generally see John Smillie "Who wants juristocracy?" (2006) 11 Otago LR 183 at 190.

⁴ New Zealand Ministry of Foreign Affairs and Trade (2010) "The Treaty making process in New Zealand" <<http://www.mfat.govt.nz/Treaties-and-International-Law/index.php>>.

⁵ Mai Chen "A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making" (2001) 19 NZULR 448 at 452.

⁶ Standing Orders of the House of Representatives 2011, SO 395.

⁷ SO 396-397. If the select committee reports back with recommendations to the Government, a Government response must be tabled within 90 days of the report: Cabinet Office *Cabinet Manual 2008* at [7.121]. The Government cannot ratify a treaty that has been presented to the House until the relevant committee has reported, or 15 sitting days have elapsed from the date of the presentation, whichever is sooner: at [7.119].

⁸ Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at 620, fn 71.

courts rely most heavily were ratified before these procedures came into place. Parliament had no chance to scrutinise the International Covenant on Civil and Political Rights (ICCPR),⁹ its Optional Protocols,¹⁰ or the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹ because the Executive determined that domestic law already complied with the international obligations.¹²

Thus, courts are aware that reliance on unincorporated international instruments may elicit allegations of “judicial usurpation of the legislative function.”¹³ Perhaps for this reason, judges tend to endorse the doctrine of incorporation whether or not they plan to give effect to an unincorporated instrument. The judgments in the Australian case of *Teoh* demonstrate this ostensible consensus.¹⁴ The majority held that ratification of an unincorporated treaty could generate a legitimate expectation that decision-makers will not act inconsistently with the obligations. In his dissent, McHugh J argued that “how, when or where [Convention] undertakings will be given force in Australia is a matter for the federal Parliament”.¹⁵ Similarly, Mason CJ and Dean J in their majority judgment warned that courts should act with “due circumspection” when using unincorporated treaties.¹⁶ “Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law.”¹⁷

The main source of disagreement appeared to be whether allowing an unincorporated Convention to form the basis of a legitimate expectation in fact breached the incorporation doctrine (and thus undermined parliamentary supremacy).¹⁸ The majority considered that “legitimate expectations are not equated to rules or principles

⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

¹⁰ Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty 1642 UNTS 414 (opened for signature 15 December 1989, entered into force 11 July 1991).

¹¹ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

¹² Law Commission *The Treaty Making Process Reform and the Role of Parliament* (NZLC R45, 1997) at [29]-[30]. Parliament also did not have the opportunity to examine the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) because reservations were used to meet legislative deficiencies.

¹³ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) at 748 per Lord Harwich.

¹⁴ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

¹⁵ At 316.

¹⁶ At 318.

¹⁷ At 288.

¹⁸ A similar dynamic between the majority and minority judgments can be seen in the Canadian case of *Baker v Canada* [1999] 2 SCR 817.

of law”.¹⁹ By contrast, McHugh J argued that the majority’s ruling meant that the Executive had effectively amended the law of Australia.²⁰

In New Zealand case law, concerns about “backdoor incorporation” tend not to manifest themselves explicitly. Rather, they are implicit in restatements of the incorporation doctrine like that of Cooke J’s in *Ashby v Minister of Immigration* (*Ashby*) that “it is elementary that international treaty obligations are not binding in domestic law until they have become incorporated [by an Act of Parliament]”.²¹ Again, judges will generally invoke this mantra even when giving significant effect to the unincorporated instrument. Thus, in *C v Holland* (*Holland*), Whata J declared that “it is trite that international law does not form part of domestic law until incorporated by statute” before asserting a presumption that domestic law be developed consistently with the values of ratified international conventions.²²

The pattern presented by these cases raises the possibility that the effect given to an unincorporated international instrument is not dependent on the amount of weight that judges place on the principle of parliamentary supremacy. Rather, they appear to disagree about the circumstances in which use of an unincorporated instrument in judicial reasoning is a threat to Parliament’s supremacy over the content of the law. This disagreement directs our attention to a key question: in what manner can “non-binding” sources play a significant role in judicial reasoning?

¹⁹ *Minister for Immigration and Ethnic Affairs v Teoh*, above n 14, at 291 per Mason CJ and Deane J. See also Toohey J at 302 emphasising that his finding did not amount to incorporation of the Convention.

²⁰ At 316.

²¹ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 224.

²² *C v Holland* [2012] NZHC 2155 at [69].

Chapter Two: What Lies Between Binding and Non-binding Authority?

Some of the academic scepticism towards dualism is underpinned by the belief that a fundamental shift in the nature of legal reasoning is occurring. The traditionally dominant concept of binding authority based on the source of a rule is loosening its grip. Seeping into this space is a more fluid theory with a stronger emphasis on the role of substantive justification.²³

Dualism embodies the traditional positivist account of legal authority, which posits a sharp distinction between binding and non-binding sources of law. Critics of this view have argued that it obscures the extent to which judges can draw on wider legal principles that a positivist would not consider binding in the particular legal context, to reach judgments seen to be more consistent with the normative structure of the legal system as a whole. This renders such judgments more value-laden than the positivist picture suggests.²⁴

The two-dimensional nature of our legal vocabulary has meant that an important middle ground between binding and non-binding sources of law has been ignored. One attempt to shed light on this middle ground was Patrick Glenn's description of "persuasive authority".²⁵ In contrast to binding authority, persuasive authority is said to attract adherence as opposed to obliging it.²⁶ However, once we focus on the influence of these persuasive sources, it can be seen that this term actually captures a range of legal norms and sources whose nature, and whose relation to the relevant decision, vary in character.²⁷ Some sources of persuasive authority, such as law from foreign jurisdictions, are *only* persuasive. Other sources, however, seem to demand attention. Mayo Moran posits the term "influential authority" to capture their force.²⁸

Influential authority is reducible neither to binding authority nor to the permissive extreme of persuasive authority.²⁹ We cannot insist that persuasive authority be addressed. But where influential authority bears upon an issue, the decision must

²³ Mayo Moran "Baker, Charter Values and the Puzzle of Method" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford and Portland Oregon, 2004) at 390.

²⁴ See R Dworkin "Is the Law a System of Rules?" in R M Dworkin (ed) *The Philosophy of Law* (Oxford University Press, Oxford, 1977); and R Dworkin *A Matter of Principle* (Harvard University Press, Cambridge (Mass), 1985).

²⁵ Patrick Glenn "Persuasive Authority" (1987) 32(2) McGill LJ 261 at 263.

²⁶ At 263. Glenn used this term to explain the extensive citation of comparative law in European and North American jurisdictions.

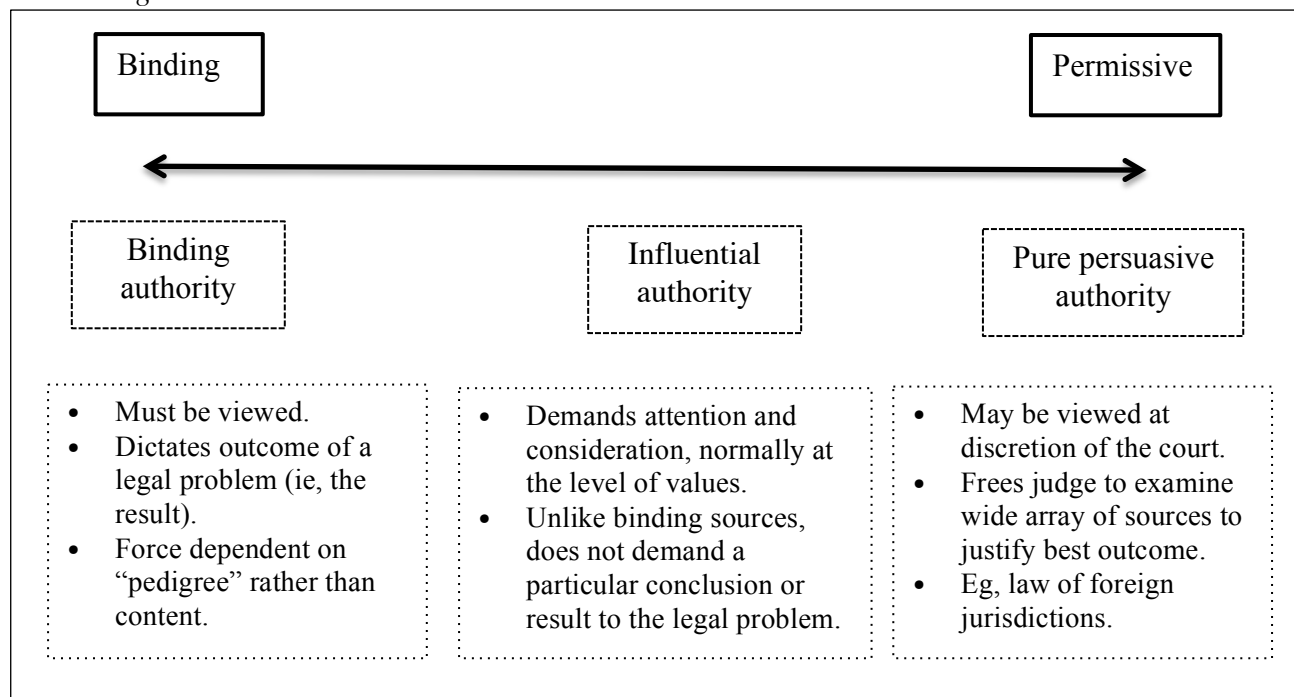
²⁷ Moran, above n 23, at 390.

²⁸ At 390.

²⁹ At 390.

address the role of that authority in its justification or be found legally wanting.³⁰ Similar to “binding” sources, its effect is mandatory in nature. However, what is mandatory is consideration of its values in moments of discretion, as opposed to the application of its terms.³¹ For this reason, its “mandatory effect” is not to be equated with “direct effect”. Influential authority does not generate distinct legal rights or demand that its actual terms are enforced. Instead influential norms must be addressed and weighed in the course of justifying a decision on which they bear.³²

Figure 1.



As an example of influential authority at play, Moran uses the Canadian Supreme Court case of *Baker v Canada*.³³ The majority held that the immigration officer had exercised his discretion to deport Ms Baker unreasonably because he was not attentive to the interests of her children.³⁴ The Court relied primarily on the Convention on the Rights of the Child (CROC) to derive this requirement, even though the CROC had not been legislatively implemented.³⁵ Moran argues that such cases should not be dismissed as confused mistakes. Sense can be made of them through the concept of influential authority.

³⁰ At 294.

³¹ Mayo Moran "Influential Authority and the Estoppel-Like Effect of International Law" in Hilary Charlesworth et al (eds) *The Fluid State: International Law and National Legal Systems* (The Federation Press, Sydney, 2005) at 166.

³² At 169.

³³ *Baker v Canada*, above n 18.

³⁴ At [65].

³⁵ At [69].

Furthermore, influential authority can help explain other “boundary problems”, such as the indirect effect of constitutional documents on private citizens’ positions under the common law.³⁶ Although the rights guaranteed in a bill of rights, for instance, do not apply directly to private litigation under the common law, courts are influenced by the values protected in the constitutional documents when developing common law principles.³⁷ In New Zealand, this has been labeled the “horizontal effects” of the New Zealand Bill of Rights Act 1990 (NZBORA).³⁸

New Zealand commentator Treasa Dunworth has drawn on the idea of influential authority for her analysis of dualism’s diminishing utility.³⁹ In the context of customary international law in particular (which, unlike treaties, is generally considered to automatically form part of New Zealand law),⁴⁰ Dunworth describes and argues for the explicit adoption of a “pedigree approach” to the incorporation of international law.⁴¹ Under this approach, international rules do not apply in an all-or-nothing way. Rather they exert a force, the strength of which depends on the rule’s “pedigree”.⁴² Furthermore, the ease with which the rule would “fit” with the domestic legal system affects its influence.⁴³ Dunworth’s decision to use the word “pedigree” to describe this approach is unfortunate. This term is usually associated with Hart’s positivist theory that the authority of legal rules depends on their source, or the manner in which they were adopted.⁴⁴ Dunworth in fact means the opposite: that the reception of a norm depends not on its source but its content or value-pedigree.

Dunworth and Moran’s analysis bears a strong resemblance to Dworkin’s theory of law as integrity. Dworkin posits that law consists not only of rules laid down in statute and judicial decisions, but also legal principles.⁴⁵ These principles explain and justify why the positive rules as a whole can be viewed as part of a coherent legal

³⁶ Moran "Baker, Charter Values and the Puzzle of Method", above n 23, at 393.

³⁷ See *Hosking v Runting* [2005] 1 NZLR 1 (CA).

³⁸ See Andrew Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*" (2004) NZ L Rev 681.

³⁹ Treasa Dunworth "Law Made Elsewhere: The Legacy of Sir Ken Keith" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington 2008) at 133.

⁴⁰ *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24].

⁴¹ Treasa Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL 67.

⁴² Dunworth "Law Made Elsewhere", above n 39, at 133.

⁴³ At 133.

⁴⁴ The term “pedigree” was coined by Ronald Dworkin in R Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, MA, 1977) at 17.

⁴⁵ At 14-45.

order.⁴⁶ Thus, when interpreting the law, judges attempt to show that their answers are justified by coherence with principle. The power of these principles depends not on their source, but on a sense of their appropriateness, developed in the profession and public over time.⁴⁷ Like influential authority, these principles do not apply in an “all-or-nothing” fashion.⁴⁸ Rather they have a dimension of force that must be balanced against competing principles.

The best legal answers or interpretations will have both “fit” and moral worth. An interpretation with “fit” will be consistent with precedent and coherent with surrounding statutes and principles.⁴⁹ It will have moral worth because the principles with which it coheres are also moral principles; it is their moral character which makes them fundamental principles of the legal order.

The idea of “law as integrity” could therefore explain why influential authority impacts across legal boundaries, affecting areas of law to which it does not formally apply. Judges, acting in fidelity to the notion of law as integrity, admit the influence of authority that engages with or supports fundamental legal principles. Admitting this effect thus enhances the overall coherence of the law, although it may disrupt certain boundaries or rules of recognition.

The dominant feature in this picture of legal judgment, then, is the giving of convincing reasons. The impact of legal values and principles shapes the contours of legal discretion and dictates, to some extent, the reasons that can legitimately be used to justify a decision. As a result, paying attention to how various legal resources impact on judicial reasoning seems to capture more of what is salient in legal judgment than fixation with the application of binding rules. The next chapter, therefore, will seek to determine how, exactly, unincorporated international instruments affect legal judgment through a close analysis of the reasoning in domestic cases.

⁴⁶ David Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 S Afr J on Hum Rts 11 at 15; R Dworkin *Law's Empire* (Balknap Press, Cambridge (Mass), 1986) at 15.

⁴⁷ Dworkin *Taking Rights Seriously*, above n 44, at 40.

⁴⁸ At 41.

⁴⁹ Dworkin *Law's Empire*, above n 46, at 228-232.

Chapter Three:

Exploring the Spectrum: What Range of Effects do Unincorporated International Instruments have on Judicial Reasoning in New Zealand Cases?

3.1 Common law development

The concept of bindingness may be inapt to describe common law reasoning generally. The essentially “shadowy character” of the common law does not resemble the crisp positivist picture of a set of rules identifiable by reference to sources.⁵⁰ Sometimes it seems sources are “binding only in so far as they are persuasive”.⁵¹ It is often hard to tell whether any particular factor has determined the court’s conclusion, and if so, which one. Normally an array of interwoven reasons and principles are given to justify the decision. Furthermore, the court may purport to have been heavily swayed by one reason, while a closer reading of the judgment suggests that other factors played a dominant role. The messy nature of common law reasoning makes it difficult to identify the role that an international instrument has played in a given case.

Moreover, there is no precise rule about how courts may use unincorporated international instruments in development of the common law. The 1996 Law Commission Report, “A New Zealand Guide to International Law and its Sources”, acknowledged that courts may consider treaties as “relevant to the determination of the common law”.⁵² However, in *Hosking v Runting* (*Hosking*), Gault and Blanchard JJ were more bold.⁵³ Setting the scene for their use of the ICCPR to develop a tort of wrongful publication of private information, they called international obligations a “vital source of relevant guidance”.⁵⁴ The “historical approach” whereby unincorporated obligations had no part in domestic law was “now recognised as too rigid”.⁵⁵ There was “increasing recognition of the need to develop the common law *consistently* with international treaties to which New Zealand is a party” (emphasis added).⁵⁶ This year, the High Court reiterated this proposition, again in the context of

⁵⁰ A W B Simpson “The Common Law and Legal Theory” in AWB Simpson (ed) *Oxford Essays in Jurisprudence* Second Series (Oxford University Press, Oxford, 1973) at 87.

⁵¹ Comment by Trevor Allan during ‘The Unity of Public Law’ 4 January 2003, Faculty of Law, University of Toronto, quoted in Moran “Baker, Charter Values and the Puzzle of Method”, above n 23, at 413.

⁵² Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at [68].

⁵³ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

⁵⁴ At [6].

⁵⁵ At [6].

⁵⁶ At [6].

privacy. In *Holland*, Whata J declared the existence of a common law action for intrusion upon seclusion, stating that:⁵⁷

...the ratification of international conventions confirming privacy based rights raises a presumption that domestic law should be applied and if necessary developed *consistently* with the values of privacy and autonomy protected by those rights. (emphasis added).

These privacy cases suggest that unincorporated instruments may be even stronger than influential authority. They may demand not only consideration but a decision that is consistent with the values those instruments support.

However, a recent Court of Appeal judgment fails to reflect this high point. In *Takamore v Clarke (Takamore)*, the Court said *Hosking* showed that courts are “willing to have regard to” international instruments in the development of the common law.⁵⁸ Such instruments have “the ability” to affect this development.⁵⁹ But the Court found that the Treaty of Waitangi (the Treaty) stood apart from other unincorporated instruments. The Court considered that, given the different ways courts have indirectly given effect to the Treaty, “no leap of faith” was required to suggest that, in general, the common law “should as far as is reasonably possible be applied and developed consistently with [it]”.⁶⁰ They noted that the Treaty is already used as an aid to interpretation, even where not mentioned in the text of the legislation.⁶¹ It may have “direct impact” on judicial review by generating mandatory considerations or potentially as a basis of a legitimate expectation.⁶²

However, these indirect methods have also been applied to other unincorporated treaties,⁶³ and so do not justify the majority’s special deference to the Treaty. Therefore, something else must have distinguished the Treaty in the Court’s eyes from other unincorporated treaties. It is likely that this was acceptance by the Crown of “obligations of good faith, reasonableness, trust, openness and consultation” arising

⁵⁷ *C v Holland*, above n 22, at [69].

⁵⁸ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [240] per Glazebrook and Wild JJ. Chambers J chose not to express any views on this due to a lack of submissions on point: at [269]. Therefore Glazebrook and Wild JJ’s judgment will be called that of “the Court”, as opposed to “the majority”, which suggests that there was a conflicting minority judgment.

⁵⁹ At [241].

⁶⁰ At [249].

⁶¹ At [248].

⁶² At [248]. The Court cited Thomas J’s dissent in *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) as an example of the Treaty’s potential in this regard.

⁶³ See *New Zealand Air Line Pilots’ Association Inc v Attorney-General*, above n 1 and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. The legitimate expectations model has not been used in New Zealand but has been used by the High Court of Australia: *Minister for Immigration and Ethnic Affairs v Teoh*, above n 14.

from the nature of the relationship between Maori and the Crown under the Treaty.⁶⁴ While the majority recognised that the judicial enforceability of these obligations remained doubtful,⁶⁵ the values embedded in the Treaty, when combined with existing methods of recognising the Treaty, were enough to place the Treaty further towards the “binding” end of the spectrum than other unincorporated treaties.

However, it is important to remain alert to potential discrepancies between explicit statements by a court about the legitimate role of international instruments and the role that the instruments have actually played in the judgment. In *Takamore*, for instance, the majority defined the relationship between the common law and international instruments in permissive terms, and so spoke as though the instruments were merely used to support their conclusions. For example, their finding that the development of the common law on burials should give greater consideration to indigenous culture was said to be “supported by” New Zealand’s international covenants.⁶⁶

The instruments were therefore presented as playing a buttressing role. The language suggested that the same conclusions may have been reached “but for” the instruments. However, the actual reasons given suggest the contrary. The only supporting authorities discussed were the Treaty of Waitangi, the ICCPR, the ICESCR,⁶⁷ the United Nations Declaration on the Rights of Indigenous Peoples,⁶⁸ the European Convention on Human Rights (ECHR)⁶⁹ and associated jurisprudence.⁷⁰ Far from merely “supporting” the majority’s conclusions, it can be argued that these unincorporated instruments determined them.

The same inverse relationship between rhetoric and reasons can be seen in *Hosking*, though here the relationship is the other way round. Despite the internationalist flourish in Gault and Blanchard JJ’s introduction, which emphasised the need for the common law to conform to New Zealand’s international treaties, it can be seen that the decision to develop the new privacy tort was reached independently of any demands imposed by the ICCPR. Their honours said they were “taking developments that have emerged from cases in New Zealand and in the larger British jurisdiction and recognising them as principled and an appropriate foundation on which the law

⁶⁴ *Takamore v Clarke*, above n 58, at [248].

⁶⁵ At [248].

⁶⁶ At [242].

⁶⁷ International Covenant on Economic, Social and Cultural Rights, above n 11.

⁶⁸ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, LXI A/RES/61/295 (2007).

⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

⁷⁰ *Takamore v Clarke*, above n 58, at [226]-[256].

may continue to develop to protect legitimate claims to privacy”.⁷¹ At the end, *nine* reasons were listed for their decision, one of which was that it was consistent with New Zealand’s obligations under the ICCPR and CROC.⁷² So, rather than demanding conformity, or even consideration, it appears the ICCPR and CROC were merely threads woven through the judgment in order to strengthen its reasoning. Specifically, the instruments provided evidence of privacy’s place as an “internationally recognised fundamental value” further to its protection in New Zealand, English, American and Canadian law.⁷³

Hosking has been said to exemplify how courts use unincorporated instruments to “fill gaps” in the common law.⁷⁴ But reliance on these instruments is more complex than a matter of plucking out international obligations to fill a perceived hole in domestic law. A more nuanced account sees the courts engaging in a “norm-reinforcing” methodology.⁷⁵ This describes the courts’ tendency to invoke international instruments as support for a legal principle or value that the court is backing. The instruments are not the source of a norm’s authority, but rather evidence of the norm itself.⁷⁶ This methodology allows the courts to simultaneously domesticate international humanitarian values and externally validate the content of domestic humanitarian norms.⁷⁷

Thus in *Mabo v Queensland [No 2]*, when rejecting the “unjust and discriminatory” doctrine of terra nullius, Brennan J held that “the expectations of the international community accord in this respect with the contemporary values of the Australian people”.⁷⁸ The notion of terra nullius was contrary “both to international standards and to the fundamental values of our common law”.⁷⁹ Similarly in *Dietrich v R*, art 14(3)(d) of the ICCPR was said to be a “a concrete indication of contemporary values” that favour steps to enhance the fairness of trials.⁸⁰

This norm-reinforcing methodology must be borne in mind when we speak in terms of “admitting the influence” of the international obligation. This phrase connotes the domestic acceptance of an external force. But unincorporated instruments are

⁷¹ *Hosking v Runtig*, above n 53, at [110]

⁷² At [148].

⁷³ At [92].

⁷⁴ Melissa Waters "Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties" (2007) 107 Colum L Rev 628 at 668.

⁷⁵ See Janet McLean "Divergent Legal Conceptions of the State: Implications for Global Administrative Law " (2005) 68 LCP 167 at 178 describing this methodology in the context of administrative law.

⁷⁶ At 177-178.

⁷⁷ At 177.

⁷⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

⁷⁹ At 42.

⁸⁰ *Dietrich v R* (1992) 177 CLR 292 at 321 per Brennan J.

normally referred to when there is a *coincidence* of internal and external norms. We often assume that it is the international obligation “doing the work” in a given judgment because we are accustomed to look to *sources* to find the reasons for a decision (such as precedent cases or statutes). However it may be that the driving force behind a decision is the court’s commitment to certain values, which are simply evinced by the international obligation, among other things.

3.2 Statutory interpretation

In cases where the interpretation of a statute is at issue, the role of unincorporated international obligations is more structured. This is because courts apply a rule of interpretation whereby “so far as its wording allows” statutes are read consistently with international obligations.⁸¹

This presumption is sometimes called an “exception” to dualism, which makes it sound less significant than its broad scope of application would suggest. The presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant obligation.⁸² Furthermore, in New Zealand it appears that there is no need for a domestic statute to be considered ambiguous on its face before the statutory presumption of consistency can be applied.⁸³ In *New Zealand Air Line Pilots’ Association Inc v Attorney-General (Air Line Pilots)*, *Wellington District Legal Services Committee v Tangiora (Tangiora)* and *Sellers v Maritime Safety Inspector (Sellers)* the Court of Appeal invoked the presumption without reference to the language of ambiguity.⁸⁴ The scope of the potentially relevant international obligations was also discussed prior to interpreting the statutory provision.⁸⁵

However, whilst application of the presumption gives the influence of treaties a defined form that common law development lacks, the overall impact of the treaty is

⁸¹ *New Zealand Air Line Pilots’ Association Inc v Attorney-General*, above n 1, at 289.

⁸² At 289.

⁸³ Claudia Geiringer “Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZULR 82 at 76.

⁸⁴ *New Zealand Air Line Pilots’ Association Inc v Attorney-General*, above n 1; *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA); and *Sellers v Maritime Safety Inspector*, above n 40.

⁸⁵ This development reflects the evolution of the Bangalore Principles. These principles arose out of a series of judicial colloquia from 1988-1998 that were attended by judges from New Zealand and other Commonwealth countries. The 1998 Principles dropped “uncertainty” as a prerequisite to using international human rights treaties in the interpretation of domestic legislation: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms *Developing Human Rights Jurisprudence Volume 8* (Bangalore, India, 27-30 December 1998); but see *Bin Zhang v Police* [2009] NZAR 217 (HC) at [31] per Clifford J: “there is a degree of ongoing confusion about the extent of ambiguity (if any) necessary in a statutory provision before the courts will look to international instruments.”

usually still difficult to discern. There are generally multiple reasons cited and interpretive techniques employed to justify the chosen interpretation. For example, in *Re an Unborn Child*, Heath J interpreted “child” as defined in the Guardianship Act 1968 to include an unborn child.⁸⁶ This interpretation was based on relevant international obligations, but also other provisions in New Zealand legislation that protected the interests of unborn children, a contextual and purposive interpretation of the Act, recent authority in the House of Lords and a desire to promote cohesion in this area of law.⁸⁷

Nevertheless, the presumption of consistency does firmly place relevant international treaties in the category of influential authority that must be considered.⁸⁸ In fact, theoretically, because the presumption is of “consistency”, international obligations are in this context stronger than influential authority. Through this presumption, the treaty demands not only consideration of its values, but that the statute is interpreted to *conform* to its *terms*. The acceptable reasons that may be given to justify an interpretation that does not so conform are whittled down to one - that the meaning of the words cannot possibly be construed in that way.

In reality, however, the application of the presumption is not so black-and-white. First, if the Treaty-consistent meaning is contrary to the purpose of the Act, the purposive interpretation will prevail; Courts are required by statute to interpret legislation “in light of its purpose”.⁸⁹ Secondly, it has been suggested that the strength of the presumption may vary. In *Air Line Pilots*, Keith J held that the application of the presumption “depends on” several factors, including the determinacy of the obligation and its relative importance.⁹⁰ Geiringer uses this dictum as evidence of the capacity of the presumption of consistency to facilitate a “pedigree approach” to the reception of international treaties whereby the strength of the presumption may vary.⁹¹ However a simpler way of rationalising Keith J’s statement is to say that the presumption will not necessarily be applied just because the statutory words do not rebut it.

This approach was evident in the recent Court of Appeal decision of *Hemmes v Young*.⁹² Mr Young had been adopted as a baby. He brought an application under s 10

⁸⁶ *Re an Unborn Child* [2003] 1 NZLR 115 (HC).

⁸⁷ At [63], [65] and [66]-[70].

⁸⁸ The word “treaties”, as opposed to “instruments” is used here because the rule is based on the presumption that Parliament does not intend to legislate contrary to its international “obligations”. This means that the presumption probably only applies with regard to binding international instruments. See “Chapter Seven: The Principle of Integrity” below.

⁸⁹ Interpretation Act 1999, s 5(1).

⁹⁰ *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 1, at 289.

⁹¹ Geiringer “Tavita and All That”, above n 83 at 103.

⁹² *Hemmes v Young* [2005] 2 NZLR 755 (CA).

of the Status of Children Act 1999 for a declaration that Mr Hemmes was his natural father. However, s 16(2) of the Adoption Act 1955 deemed Young not to be the child of his natural father "for all purposes". The issue was whether these words should be construed literally, or narrowly, so that they only referred to purposes of legal status, not biological status. The latter interpretation would allow Mr Young to seek a declaration that Mr Hemmes was his natural father. This interpretation was adopted by the majority on the basis that it would be discriminatory if adoptees were not able to seek declarations while non-adoptees could.⁹³ Although such discrimination was not covered by section 19 of NZBORA,⁹⁴ it did fall under discrimination on the basis of "birth or other status" per art 26 of the ICCPR.⁹⁵ Therefore, Hammond J stated that "the legislation should, as far as possible, be read so as to avoid such discrimination."⁹⁶ However, he did not end the matter by simply applying the presumption. Instead, he once again sketched out "two possible solutions" to the issue, a literal or a "rights-conscious reading".⁹⁷ His seven-paragraph justification for adopting the latter approach focussed on the need to avoid "the invidious distinction which troubled [him] from the outset".⁹⁸ In light of the advances in human rights law since enactment of the Adoption Act, Parliament could not have countenanced the distinction made against Mr Young.⁹⁹

This judgment demonstrates that the application of the presumption may not be automatic when the statutory words allow it. It also demonstrates that, although the "presumption of consistency" connotes the laying of an international gloss on domestic provisions, the norm-reinforcing methodology can play an important role in statutory interpretation cases. The application of the presumption is not "sterile" in the sense of being the inevitable product of the court's obligation. It is often dependent on the resonance of the values in the particular instrument. In *Hemmes v Young*, Hammond J saw the presumption of consistency as a means to read the statute in a "'human-rights conscious' way".¹⁰⁰ Seen in this light, although the court's finding of discrimination relied on the ICCPR, the court's concern to uphold the adoptee's rights was as determinative of the outcome as the international obligation itself.

⁹³ At [109].

⁹⁴ At [92]. This was because the status of being adopted did not fall under the limited prohibited grounds of discrimination under the Human Rights Act 1993.

⁹⁵ At [98] and [109].

⁹⁶ At [109].

⁹⁷ At [111]-[113].

⁹⁸ At [111], [113] and [116].

⁹⁹ At [118]. The Court of Appeal's ruling was overturned by the Supreme Court on another issue. In obiter, the Supreme Court indicated support for the Court of Appeal's finding on the interpretation of "for all purposes", stating that "we have no difficulty in reading that phrase as meaning for all legal purposes": *Hemmes v Young* [2005] NZSC 47, [2006] 2 NZLR 1 at [22].

¹⁰⁰ *Hemmes v Young*, above n 92, at [113]. Even the layout of the judgment suggests as much. "International obligations" is a sub-heading under a broader heading of "The human rights dimension".

3.3 Interpretation of statutory powers

It is now established that unincorporated treaties can be used to constrain statutory powers. The most dominant technique deployed is the presumption of consistency,¹⁰¹ although the mandatory considerations model has also been used.¹⁰² Whereas the latter model merely requires the decision-maker to consider the obligation, the former requires an outcome *substantively consistent* with the interests protected by the international obligation (provided that the presumption is not rebutted by the statutory words). Therefore this approach can result in stronger restraint on administrative power.¹⁰³

In *Zaoui v Attorney-General (No 2)* the Supreme Court applied the presumption of consistency to impose substantive constraints on administrative power.¹⁰⁴ Section 72 of the Immigration Act provided that where the Minister certifies that a person's continued presence in New Zealand constitutes a threat to national security, the Governor General (effectively the Cabinet)¹⁰⁵ may order deportation of that person.¹⁰⁶ Reading the power subject to relevant provisions in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR, the Court held that the power could not be lawfully exercised in such a way as to place Mr Zaoui in danger of being returned to a country where there was a substantial risk that he will face torture or be arbitrarily deprived of his life.¹⁰⁷

Zaoui can be seen as testimony to the strength of international obligations to constrain administrative powers. First, it confirmed that broadly termed powers will no longer be seen as necessarily rebutting the presumption of consistency.¹⁰⁸ Secondly, the Court imposed a substantive, not merely procedural, constraint. The Minister was not merely required to consider the values of the relevant treaties, but to exercise his power in conformity with their terms.

¹⁰¹ See for example *Zaoui v Attorney-General (No 2)*, above n 40; *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 1; and *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA).

¹⁰² See for example *Mil Mohamed Mohamud v Minister of Immigration* [1997] NZAR 223 (HC).

¹⁰³ Geiringer "Tavita and All That", above n 83, at 82.

¹⁰⁴ *Zaoui v Attorney-General (No 2)*, above n 40.

¹⁰⁵ At [89].

¹⁰⁶ Immigration Act 1987, s 72.

¹⁰⁷ *Zaoui v Attorney-General (No 2)*, above n 40, at [88]-[93]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

¹⁰⁸ At [91] the Court considered that there was nothing in the statement of the broad power conferred by s 72 to prevent the Court from constraining the exercise of the power in this way. Compare with *Ashby v Minister of Immigration*, above n 21, at 229 per Richardson J and *R v Secretary of State for the Home Department, ex parte Brind*, above n 13.

The robust approach of the Court may in part be explained by the fact that NZBORA rights were also engaged.¹⁰⁹ In tandem with the presumption of consistency, the Court applied the interpretative direction in s 6 NZBORA that statutes are, where possible, to be read in conformity with NZBORA rights. The Court's decision to invoke these two rules of construction in the same breath suggests that the Court regarded them as of essentially the same character.¹¹⁰ Indeed, both approaches recognise the susceptibility of statutory power to implied constraints and seem to demand clear and unambiguous statutory language to override fundamental rights and values. Thus, once again, we see international and domestic sources reinforcing the norms contained in each of them.

Much has been written about the norm-reinforcing methodology in the context of administrative law.¹¹¹ As Janet McLean puts it, "there is a coincidence of common law and international law values and the permeability of administrative law to both."¹¹² This permeability has been advanced by a shift in the theoretical underpinnings of the courts' judicial review jurisdiction. The orthodox conception sees judges as agents of Parliament, enforcing Parliament's intent and ensuring that powers are not exercised *ultra vires*. This approach has declined in dominance as two alternative approaches have gained ascendancy. One holds that Parliament is presumed to legislate against a "rule of law" floor of fundamental values. The other sees the courts as guardians of free-standing fundamental constitutional and administrative law values that derive from the common law itself. Both of these approaches have at times been embraced by the "principle of legality" which, similar to the presumption in s 6 NZBORA and the presumption of consistency, requires that law is applied consistently with fundamental common law rights unless Parliament has clearly indicated a contrary intention.¹¹³

Greater acceptance of these alternative approaches would see the courts draw on substantive value considerations – both domestic and international – as constraints on the exercise of discretion.

¹⁰⁹ New Zealand Bill of Rights Act 1990, ss 8 and 9, which provide the right not to be deprived of life and the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

¹¹⁰ Claudia Geiringer "International law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300 at 317.

¹¹¹ See for example D Dyzenhaus, M Hunt and M Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OJCLJ 5.

¹¹² McLean, above n 75, at 178.

¹¹³ See for example *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 295 at [35] per Baragwanath J; *Attorney-General v Mair* [2009] NZCA 625 at [175] per Baragwanath J; *R v Allison* [2002] 1 NZLR 679 (CA) at [23]; and *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC) at [36] per Chisholm and Harrison JJ.

3.4 *Taking stock*

This chapter has been intended to show that, in common law development, in statutory interpretation cases, and in judicial review, courts have established channels through which unincorporated international instruments may legitimately exert influence on domestic law. It can be seen that some sort of variegated approach to unincorporated international instruments is emerging.

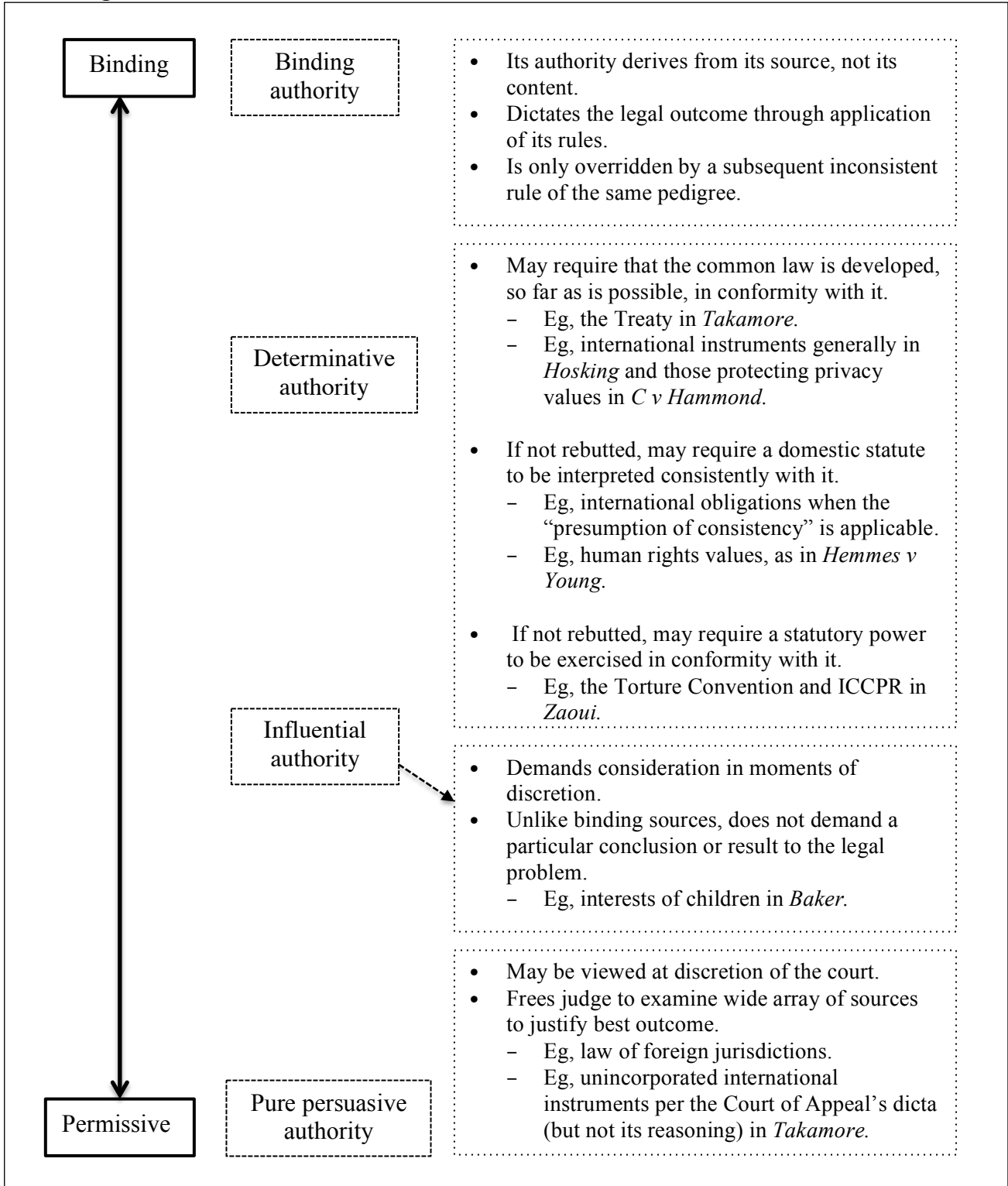
In some cases, courts consider these instruments to be merely permissive authority to which they are able, but not required, to have regard. This pole of the spectrum conforms to the doctrine of incorporation. International obligations are not given any special legal effect – they are merely “relevant”, like the law of foreign jurisdictions, or, in the context of administrative discretion, any other permissible relevant consideration.

In each of the three areas of law, there are also examples of the courts treating unincorporated instruments as influential authority. This development has been most controversial in the context of administrative law. Judges are not only constraining statutory discretions, but are requiring decision-makers to consider instruments that have not been subject to the democratic will of Parliament. In the context of courts interpreting general statutes, however, it is relatively uncontroversial. Because of the presumption of consistency, courts are already under an obligation to consider how relevant international obligations may bear on the statute’s construction.

Finally, in *Takamore*, *Holland* and *Zaoui*, unincorporated instruments are treated as something even stronger than influential authority. Rather than merely demanding consideration in decision-making, an instrument may demand substantive conformity in the decision-outcome. This represents the greatest departure from dualism and the most serious threat to parliamentary sovereignty. The term “determinative authority” is posited to capture this concept. Determinative authority differs from binding authority in three main respects. First, it does not have direct effect, but works indirectly by requiring domestic law to be developed or interpreted consistently with it. Secondly, its authority does not flow automatically from its source-pedigree, but is dependent to an extent on its content-values. Thirdly, determinative authority is rebuttable. It will be rebutted if the statutory words, interpreted in context, cannot bear the conforming meaning, or, in the context of common law, if the development demanded by the determinative authority would be inappropriate for the court to make.

The argument so far might be summed up roughly in the following diagram, which shows how far we have moved beyond a simple dualist, binding/non-binding approach to our sources of law:

Figure 2.



3.5 Moving on to Part Two

The next stage will be to analyse some of the factors and principles that will affect the point on this spectrum where the particular unincorporated instrument will lie in a given case. In this task, we must bear in mind the theme that has surfaced in this analysis - the court's tendency to employ a norm-reinforcing methodology. To an extent, this methodology supports the idea that some of the force of influential and determinative authority derives from its content. However, it also urges sensitivity to the fact that it may not be accurate to say that an international instrument "demands" attention or conformity to "its" values. The point is that the values may belong to both the domestic and international spheres. Therefore the fact that the case's outcome conforms to the international instrument's values does not necessarily mean that the instrument played a significant role. Depending on the court's reasoning, it might be more accurate to conclude that the values themselves (whose sources are multiple) acted as influential or determinative authority.

PART II: FACTORS AND PRINCIPLES

Chapter Four: Reading Silence in the Law

4.1 Silence in domestic law

The court's interpretation of silence in domestic law may determine whether an unincorporated rule or value is relied on at all. The silence discussed here is the absence of a specific statutory rule on the matter within domestic law. On one interpretation, this silence signifies a deliberate choice not to include that rule in the legal system. This interpretation is embodied in the principle of *expressio unius est exclusio alterius*, which holds that the expression of one rule excludes another. If enacted rules are the product of deliberate decisions, and the rules are enacted in a specific form, then the absence of another rule that might have been included may also be deliberate. Therefore to "read in" other rules may be to amend a statute, not interpret it.¹¹⁴

Under this view, courts should not rely on unincorporated instruments to read rules into the silence of domestic law. Thus, in *Bin Zhang v Police*, the Court refused to read the Land Transport Act 1998 consistently with the right of consular notification after arrest in art 36 of the Vienna Convention on Consular Relations.¹¹⁵ The Consular Privileges and Immunities Act 1971 had afforded the force of law to particular articles of the Convention, but not art 36.¹¹⁶ This exclusion was "quite deliberate" and evinced a "clear intention on the part of the legislature to exclude art 36 from domestic application".¹¹⁷

However, sometimes courts interpret domestic silence as permitting, or even inviting, judicial development of the law on that point. This approach allows courts to rely on unincorporated international instruments to read new rules into the silence. In some famous cases of silence-reading, courts have relied on rights or values in the ICCPR. The NZBORA affirms New Zealand's commitment to the ICCPR,¹¹⁸ but its provisions do not exactly replicate the ICCPR's articles and some articles have no NZBORA counterparts. Furthermore the rights may not be protected in a general sense by any other statutory rule.

¹¹⁴ J F Burrows *Statute Law in New Zealand* (LexisNexis, Wellington, 2003) at 211.

¹¹⁵ *Bin Zhang v Police*, above n 85; Vienna Convention on Consular Relations 596 UNTS 261 (opened for signature 18 April 1961, entered into force 19 March 1967), art 36.

¹¹⁶ Consular Privileges and Immunities Act 1971, s 4.

¹¹⁷ *Bin Zhang v Police*, above n 85, at [36].

¹¹⁸ New Zealand Bill of Rights Act 1990, long title.

In *Hosking* and *Simpson v Attorney-General (Baigent)* the majority judges interpreted statutory silence as an invitation to develop the law judicially.¹¹⁹ In *Hosking*, Gault and Blanchard JJ saw the omission of a right to privacy in the NZBORA as a reflection of privacy's "vague and uncertain" nature.¹²⁰ Given its "very wide scope", privacy law was "left for incremental development".¹²¹

In *Baigent*, the majority considered that the absence of a remedies clause was "probably not of much consequence", despite its inclusion in the White paper.¹²² The omission did not show an intention that there should be no remedy, but rather that "Parliament was content to leave it to the Courts to provide the remedy".¹²³ The inclusion of a statement to that effect in the Act was "unnecessary".¹²⁴ Thus the Court established public law damages for breaches of the NZBORA, relying in part on the obligation to provide effective remedies for violated rights in art 2(3) of the ICCPR.

The dissenting judgments demonstrate that these silences can also be interpreted as an indication that the status quo is satisfactory. In *Baigent*, Gault J argued that by "affirming" the rights in the NZBORA and omitting a remedies provision, the legislature must have contemplated that rights violations could be appropriately vindicated by existing remedies, or through the development of new private law remedies by analogy with those already existing.¹²⁵

In *Hosking*, Keith J disagreed that the tort of wrongful publication of private information existed. He considered the omission of privacy from the NZBORA to be "significant".¹²⁶ More importantly, various "silences in the law" indicated the reluctance of the law to recognise a broad obligation to respect privacy.¹²⁷ These silences were symptomatic of an area of law that was "particular".¹²⁸ A general privacy tort would cut across silences such as the "deliberate" exclusion of the news

¹¹⁹ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

¹²⁰ *Hosking v Runtig*, above n 53, at [93].

¹²¹ At [93] and [92]. Interestingly, eight years earlier in *R v Gardiner* CA 380-97, 14 July 1997 Blanchard J had taken the opposite approach to the exclusion of art 17. The appellant had relied on art 17 to argue that positive legal authority was needed for the state to undertake video surveillance. In noting that the privacy protections in art 17 were not incorporated into NZBORA, Blanchard J stated that "it is difficult to discern any intention to alter New Zealand law relating to privacy by this means.... If New Zealand's law does not represent an adequate response to the International Covenant, that is a matter for legislative attention": at 4.

¹²² *Simpson v Attorney-General*, above n 119, at 676 per Cooke P.

¹²³ At 718 per McKay J.

¹²⁴ At 718 per McKay J.

¹²⁵ At 706.

¹²⁶ *Hosking v Runtig*, above n 53, at [181].

¹²⁷ At [204].

¹²⁸ At [203].

media in its news-gathering capacity from the scope of general privacy legislation.¹²⁹ Furthermore, some of these silences were what could be called stubborn silences - the lack of legislative responses to persistent calls for a tort of the unreasonable publishing of private facts to be statutorily introduced.¹³⁰

4.2 Silence in the NZBORA specifically

The general rule is that the affirmation of the ICCPR in the Preamble cannot be relied on to fill perceived gaps in the NZBORA if these gaps were deliberately created by Parliament.¹³¹ However, courts do not always equate “deliberate exclusion from the NZBORA” with “deliberate exclusion of an international norm from the domestic system”. So, in *Baigent*, all majority judges used the Preamble as evidence that the omission of a remedies clause did not represent a deliberate rejection of public law remedies per se.¹³² Even the deletion of a remedies clause from the final version of the Act did not lead the majority to that conclusion.¹³³

Silence in the NZBORA is even more fragile when interpretative reliance on the ICCPR is combined with the application of the presumption of consistency to the NZBORA.¹³⁴ This approach is more controversial than it may initially sound. It effectively proposes that the NZBORA should be construed as giving effect to what was left out of it! Furthermore, this technique has been deployed to support common law developments. For example, in *Attorney-General v Chapman (Chapman)*, the majority decided not to extend *Baigent* public law damages to judicial breaches of the NZBORA.¹³⁵ However Elias CJ held that the availability of these damages was “consistent with the obligations of the State under the [ICCPR]”, specifically the art 2(3) obligation to provide an effective remedy “notwithstanding that the violation has been committed by persons acting in an official capacity”.¹³⁶ This use of the

¹²⁹ At [206].

¹³⁰ At [204].

¹³¹ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a Commentary* (LexisNexis Wellington, 2005) at 80. See *R v Barlow* (1995) 2 HRNZ 635 (CA) at 655 where Richardson J noted that the failure to replicate the right to liberty and security in art 9(1) of the ICCPR was a “deliberate decision on the part of the legislature.” Therefore this right could not be read in as an aspect of NZBORA’s search, arrest and detention provisions.

¹³² “Its purpose being the affirmation of New Zealand’s commitment to the Covenant (including art 3(b)), it would be wrong to conclude that Parliament did not intend there to be any remedy for those whose rights have been infringed”: *Simpson v Attorney-General*, above n 119, at 691 per Casey J. See also Cooke P at 767, McKay J at 718 and Hardie Boys J at 699.

¹³³ At 676 per Cooke J, 691 per Casey J, 698 per Hardie Boys J and 718 per McKay J.

¹³⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [36]; and *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [4].

¹³⁵ *Attorney-General v Chapman*, above n 134.

¹³⁶ At [4]. In fn 15, Elias CJ cited NZBORA’s long title and stated that “New Zealand law must be construed, where possible, to give effect to its international obligations”, citing *Sellers v Maritime Safety Inspector* as well as her own dissenting judgment in *Hamed v R*.

presumption transforms it from a tool that colours the meaning of amenable statutory words into a licence to incorporate NZBORA-excluded norms through the common law. It consolidates the majorities' technique in *Hosking* and *Baigent* of interpreting silence in NZBORA as an invitation to develop omitted international norms judicially.¹³⁷

However, it appears that courts will be more deferential to NZBORA silence in some contexts than others. For example, the NZBORA did not incorporate the right to protection against arbitrary or unlawful interference with privacy and family in art 17 of the ICCPR.¹³⁸ Several attempts to rely on this family right in the context of judicial review or appeals from specialised authorities have failed.¹³⁹ By contrast courts have invoked the protection of privacy in the creation of two new privacy torts,¹⁴⁰ as well as the promulgation of a constitutional principle.¹⁴¹

The silence in s 19 of the NZBORA has also received uneven treatment.¹⁴² Section 19 prohibits discrimination on the grounds identified by s 21 of the Human Rights Act 1993. In the context of judicial review, the court has applied the principle that the list of specifics is exhaustive. For example in *M v Minister of Immigration* the plaintiff argued that, due to art 2.1 of the ICCPR,¹⁴³ the ground of "nationality" in s 21 was related to immigration status.¹⁴⁴ The Court disagreed. Section 21 was clearly worded and there was no basis for this new ground of discrimination to be read into it.¹⁴⁵ However, in *Hemmes v Young*, when the Court was not interpreting a statutory power, the ICCPR was relied on to effectively fill gaps the "over-particularised" and "underinclusive" NZBORA.¹⁴⁶ Although the status of being adopted could not fall within "family status" in s 21(1),¹⁴⁷ a "human-rights conscious" reading of the

¹³⁷ In Smillie "Who wants juristocracy?" above n 3, at 190, Smillie notes that this approach creates substantial uncertainty "since legislative developments can always be construed either as encouraging... further judicial development of the common law."

¹³⁸ International Covenant on Civil and Political Rights, above n 9, art 17.

¹³⁹ See for example, *Chief Executive of the Department of Labour v Taito* [2006] NZAR 420 (CA). Mr Taito appealed from a decision of the Removal Review Authority on the basis that the Authority did not adequately consider the right of his disabled mother, whom he looked after, to be free from disproportionately severe treatment in s 9 NZBORA. By linking s 9 to art 17, the High Court allowed the appeal: *Taito v Chief Executive, Department of Labour* HC Auckland CIV 2004-485-1987, CIV 2004-404-6432, 23 September 2004. The Court of Appeal overturned this decision, emphasising that the NZBORA "does not expressly recognise a right to family life at all, still less a right to be cared for by one's children in old age": at [33]. This case was re-affirmed in *RL v CE* [2009] NZCA 596 (CA).

¹⁴⁰ *Hosking v Runting* above n 53; and *C v Holland*, above n 22.

¹⁴¹ See *Hamed v R*, above n 134 where, in her dissenting judgment, Elias CJ relied on art 17 of the ICCPR for the principle that positive legal authority was required for state action.

¹⁴² New Zealand Bill of Rights Act 1990, s 19.

¹⁴³ Art 2.1 prohibits discrimination on the grounds of "national or social origin ... or other status".

¹⁴⁴ *M v Minister of Immigration* [2011] NZFLR 977 (HC) at [31].

¹⁴⁵ At [31].

¹⁴⁶ *Hemmes v Young*, above n 92, at [92] per Hammond J.

¹⁴⁷ At [92].

Adoption Act 1955 allowed Hammond J to rely on the broader grounds of discrimination in art 26 ICCPR.

There are several possible explanations for these varying approaches to silence. First, in the context of judicial review the court may be inclined to exercise deference rather than disrupt the decision on the basis of an unincorporated ICCPR right. Furthermore, the unsuccessful applicants in *M v Minister of Immigration* and the right to family cases asked the court to interpret NZBORA provisions widely to include omitted ICCPR rights. Parliamentary supremacy is more conspicuously threatened when Courts fill NZBORA silences by stretching the meaning of its words. By contrast, an expansion of the common law to protect omitted rights can be portrayed as ordinary incremental development of the common law.¹⁴⁸

4.3 Summary

Whether any effect is given to an unincorporated international norm may depend on the courts' interpretation of the statutory silence; specifically, whether the silence is interpreted as a deliberate exclusion of the international norm from the domestic system, or merely a decision not to legislate on it. The latter interpretation allows the court to develop the norm. The context may affect the interpretation of silence and judges may disagree about which interpretation is appropriate in a given case.

¹⁴⁸ See "Chapter Six: The Concept of "Fit"" at 6.2 below.

Chapter Five: The Importance of the Unincorporated Rule

5.1 Importance may increase the instrument's effect

The “importance” of the unincorporated international rule is a factor that has been explicitly recognised as determining its effect. In *Rajan v Minister of Immigration* “the great importance of the right involved” was given as a factor in favour of applying the presumption to the Minister’s power of revocation.¹⁴⁹ In *Ashby*, Cooke P acknowledged that a treaty obligation “might be of such overwhelming or manifest importance” that Parliament could not have intended it to be ignored.¹⁵⁰

When will a rule be considered important? If the treaty concerns technical matters, importance may be dependent on factors such as the extent to which the rule underpins the legal scheme or promotes the treaty’s main purposes. For example, *Air Line Pilots*¹⁵¹ concerned para 5.12 of annex 13 of the Chicago Convention on International Civil Aviation, which places a prima facie prohibition on disclosure of various flight records for purposes other than accident investigation.¹⁵² Keith J considered that this rule was relatively unimportant compared with the “rules of the air” adopted in terms of art 12, which establishes the state’s fundamental obligation to ensure that aircraft in its territory or carrying its national mark comply with national regulations that are uniform with those established under the Convention.¹⁵³

Other factors that may indicate a rule’s importance are its antiquity and “the extent to which it is accepted in the international community”.¹⁵⁴ Rules that are declaratory of customary international law will be particularly powerful.¹⁵⁵ Long-established and broadly accepted treaty rules are more likely to be given domestic effect on the same basis that customary international law is generally considered to automatically form part of New Zealand law; they represent near universal rules or values; and are based in the accumulated experience and practice of a wide range of nations. In *Hosking*,

¹⁴⁹ *Rajan v Minister of Immigration*, above n 101, at 551. However the Court considered that a final ruling on the matter was unnecessary: at 552.

¹⁵⁰ *Ashby v Minister of Immigration*, above n 21, at 226. See also *Refugee Council of New Zealand Inc v Attorney-General* [2002] NZAR 769 (HC) at [192]-[193] where Baragwanath J called the recognition that some international obligations may be so important as to constitute mandatory considerations a “long-standing principle of constitutional and administrative law”.

¹⁵¹ *New Zealand Air Line Pilots' Association Inc v Attorney-General* above n 1.

¹⁵² Chicago Convention on International Civil Aviation 15 UNTS 295 (opened for signature 7 December 1944, entered into force 4 April 1947), annex 13 para 5.12

¹⁵³ *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 1, at 289.

¹⁵⁴ *Minister for Immigration and Ethnic Affairs v Teoh*, above n 14 at 288 per Mason CJ and Deane J. See also *Sellers v Maritime Safety Inspector*, above n 40, at 46 where the Court noted that the principle of the high seas was “one of the longest and best-established principles of international law”.

¹⁵⁵ See *Sellers v Maritime Safety Inspector*, above n 40.

Gault and Blanchard JJ were enthusiastic about the idea of drawing upon the “teachings of international law.”¹⁵⁶ International human rights standards, in particular, are seen as an important repository of enlightened principles that New Zealand should strive to embody. In *Ministry of Transport v Noort*, for instance, Cooke P held that to approach the NZBORA with a sense of its democratic values “is asking no more than we in New Zealand try to live up to international standards or targets and to keep pace with civilisation”.¹⁵⁷

It is axiomatic that courts consider human rights treaties to be important and thus deserving of influence on domestic law.¹⁵⁸ In *Mabo*, for example, international law was seen as a legitimate influence on the common law “especially when [it] declares the existence of universal human rights”.¹⁵⁹ International human rights will take on special importance if the court views municipal law as falling-short of giving full effect to them. Thus, in *Baigent*, Cooke P argued that there was “no reason for New Zealand jurisprudence to lag behind” international jurisprudence on public law remedies.¹⁶⁰ This may lead the court to modernise law it views as out of step with civilised standards. For example, Hammond J’s decision in *Hemmes* to rely on the ICCPR was driven by his view of the 1955 Adoption Act as an “elderly statute” that was “caught in something of a time-warp” having been enacted “prior to the enormous strides in human rights law over the last 20 years.”¹⁶¹

5.2 Instruments may evince importance

However, courts do not always speak as though the international rule’s importance strengthens the domestic influence of the instrument. A more tactful technique is for

¹⁵⁶ *Hosking v Runting* above n 53, at [6]. See also Jeremy Waldron "Foreign Law and the Modern *Ius Gentium*" (2005) 119 Harv L Rev 129 at 139 where Waldron argues for the reinvigoration of the ancient principle of *ius gentium*, by which courts would “seek guidance from the accumulated legal experience of mankind” as a guide to the development of domestic law.

¹⁵⁷ *Ministry of Transport v Noort Police v Curran* [1992] 3 NZLR 260 (CA) at 271.

¹⁵⁸ Indeed it has been argued that there should be an exemption of treaties protecting human rights from the dualism principle. In *Thomas v Baptiste* [1999] 3 WLR 249 (PC) at 23 per Millet, Browne-Wilkinson and Steyn LJ their Lordships mentioned these arguments but did not find it necessary to examine them.

¹⁵⁹ *Mabo v Queensland [No 2]*, above n 78, at 42 per Brennan J. See also *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 1, at 289 where Keith J compared the relative unimportance of para 5.12 with “a fundamental human rights treaty”; and *St Columbia's Environmental House Group v Hawkes Bay Regional Council* [1994] NZRMA 560 at 15 where Judge Kenderdine contrasted the nature of the appellant's submissions, which were based on the United Nations Rio Declaration, with the human rights issues in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). The Judge stated that “where the international covenant concerns more amorphous environmental issues it may not be quite so manifestly important.”

¹⁶⁰ *Simpson v Attorney-General*, above n 119, at 676.

¹⁶¹ *Hemmes v Young*, above n 92, at [63], [113] and [118]. See also Michael Kirby "The Common Law and International Law - A Dynamic Contemporary Dialogue" (2009) 30(1) LS 30 at 55-56 where Kirby discusses the value of international law as a guide to modern values.

the court to suggest that the instrument merely reinforces the fact that particular values are already important. For example, in *Takamore* “the importance of recognising the collective nature of the culture of indigenous peoples” was “recognised in particular” by the Declaration on the Rights of Indigenous Peoples.¹⁶² Similarly in *Baker*, the Canadian Supreme Court stated that “indications” of the importance of children’s rights could be found in international instruments, as well as in the purposes of the Act and in the Minister’s guidelines for making humanitarian and compassionate decisions.¹⁶³

It seems that the recognition of a rule or value in an international instrument indicates its importance in two respects. First, it is evidence that it is important to the international community. Therefore more signatories may indicate greater importance. Secondly, the fact of New Zealand’s commitment to the instrument shows that its values are considered important domestically.

The reason that courts seek to establish a value’s importance is to show that it is worth protecting, thereby justifying the development of the law or an interpretation that will protect it. Thus international instruments can play a central part in justifying judicial intervention. In particular, the privacy protection in art 17 of the ICCPR has been central in proving that privacy is still a value worth protecting, despite its omission from the NZBORA. In *Hosking*, for instance, Tipping J argued that courts should give “appropriate effect” to privacy values because they are “important in our society and hence are recognised in our international commitments”.¹⁶⁴

This suggests that the ICCPR was not utilised to fill a gap in the law.¹⁶⁵ Rather, by evincing privacy’s importance, the ICCPR was used to establish that there *was* a gap that needed to be filled by common law development – an important right was going un-vindicated.¹⁶⁶ The gap was then filled by the incremental development of the common law, in the traditional way.

This reasoning reappeared in the most recent privacy case, *Holland*.¹⁶⁷ Under the subtitle “Worth protecting”, Whata J stated that “privacy’s normative value cannot be seriously doubted, with various expressions of a right to personal autonomy affirmed in international conventions on human rights”.¹⁶⁸ Creation of a tort of intrusion into

¹⁶² *Takamore v Clarke*, above n 58, at [254].

¹⁶³ *Baker v Canada*, above n 18, at [67] per L’Heureux-Dubé J.

¹⁶⁴ *Hosking v Runtig*, above n 53, at [224].

¹⁶⁵ Compare *Waters*, above n 74, at 670-671.

¹⁶⁶ This also appeared to be the main role of the ICCPR in relation to the importance of the right to effective remedies in *Simpson v Attorney-General*, above n 119.

¹⁶⁷ *C v Holland*, above n 22.

¹⁶⁸ At [67].

seclusion was justified because “this is a case crying out for an answer, and given the value attached to privacy, providing an answer... is concordant with the historic function of this Court.”¹⁶⁹

5.3 “Importance” as a point of permeability

The onus on domestic courts to demonstrate that a right or value is “worth protecting” helps to explain the common law’s permeability to unincorporated international rights. A similar connection between “importance” and permeability to international law exists in administrative law. The “more obviously important” a consideration, the more willing courts are to deem it a mandatory consideration.¹⁷⁰ Furthermore, if an “important” right is affected by the decision, the court may review it to a more searching standard than the relatively deferential *Wednesbury* unreasonableness standard.¹⁷¹

In *Mihos v Attorney-General* the lack of a relevant international instrument contributed to the appellant’s failure to convince the court of the importance of his property rights.¹⁷² The Minister of Customs and Excise had exercised his power to seize the appellant’s car under the Customs and Excise Act 1996. The appellant argued that the Court should adopt a more intense standard than unreasonableness in its review of the Minister’s decision. However, the Court held that it could not recategorise property interests as falling within the class of “fundamental human rights”.¹⁷³ While Protocol 1 of the ECHR protects the right of peaceful enjoyment of possessions, the common law treated property rights “as of lower echelon compared with rights of integrity of the person which, together with other aspects of human dignity, are the primary focus of the New Zealand Bill of Rights Act and of major principles of the common law.”¹⁷⁴ Conceivably, had property interests been protected in a convention to which New Zealand was a party, the Court may have taken a different view.

5.4 Summary

There is a strong relationship between the importance of the international rule or value and the effect that it will have on domestic judgment. In some cases, the fact that the rule is important to the international legal community will legitimate the

¹⁶⁹ At [88].

¹⁷⁰ *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA) at 183.

¹⁷¹ See *Wolf v Minister of Immigration* HC Wellington CIV 2002-485-106, 7 January 2004.

¹⁷² *Mihos v Attorney-General* [2008] NZAR 177 (HC).

¹⁷³ At [93].

¹⁷⁴ At [93].

court's decision to give effect to the unincorporated instrument. In other cases, the instrument will merely evince that a value or right is important domestically and internationally, legitimising the court's decision to intervene in its name. The distinction appears fine. However, it determines whether the instrument behaves as influential or even determinative authority, or whether it is on the same level as the law of another country; merely persuasive authority to which the court may refer to support its arguments.

Chapter Six: The Concept of “Fit”

Although a particular unincorporated international rule is important, it may not be appropriate for the Court to accept its influence domestically. The propriety of doing so will largely be a question of “fit”. Two conceptions of fit will be explored here. The first relates to how well the *substance* of the rule or value fits with the domestic system.¹⁷⁵ The second concerns whether the *process* of giving domestic effect to that rule fits with the conventional role of the court. These ideas are closely related – if the substance of a value does not fit domestically, then it will not fit with the court’s proper role to give effect to it. Together, these ideas echo Dworkin’s argument that the best legal answer will fit with precedent and surrounding legal rules and principles.¹⁷⁶

6.1 Substantive fit

A rule will have substantive fit if it resonates in the domestic system.¹⁷⁷ As Whata J emphasised in *Holland*, “the development of New Zealand common law must employ locally recognisable and acceptable norms and concepts to be relevant and persuasive”.¹⁷⁸ In *Teoh*, it was noted that an international norm’s influence would depend on “its relationship to the existing principles of our domestic law.”¹⁷⁹

The Court of Appeal’s decision to treat the Treaty as determinative authority in *Takamore* was arguably a direct result of this substantive domestic fit.¹⁸⁰ The Treaty required the common law to be developed consistently with it, because of the obligations “arising from the nature of the relationship between Maori and the Crown”¹⁸¹. Treaty principles and obligations have a special fit with New Zealand’s constitutional history and legal order. It is a treaty involving only the Crown and Māori. Although similar treaties were entered into between the British Crown and other indigenous peoples, the Treaty does not involve other nations and so lacks the “foreign” element present in all other treaties. In fact, it is arguably constituent of the

¹⁷⁵ Dunworth referred to this conception of fit when she stated that “the ease with which a particular rule fits within domestic system will affect its influence”: Dunworth, above n 39, at 133.

¹⁷⁶ Dworkin *Law’s Empire*, above n 46.

¹⁷⁷ As we have seen, for a value or rule to be considered important, it must already “fit” to some extent. The value must resonate domestically or the rule should form an essential part of a particular area of law.

¹⁷⁸ *C v Holland*, above n 22, at [21].

¹⁷⁹ *Minister for Immigration and Ethnic Affairs v Teoh*, above n 14, at 288 per Mason CJ and Deane J.

¹⁸⁰ *Takamore v Clarke*, above n 58.

¹⁸¹ At [248].

nation of New Zealand.¹⁸² In any case, its local character makes its values and principles especially apt for absorption into New Zealand law.

Alternatively, a norm may resonate in a specific area of domestic law. For example, the Court's decision to apply a significant statutory gloss in *Sellers* was supported by the deep connection between New Zealand maritime law and international law.¹⁸³ The Court held that the Director of Maritime Safety's statutory power to issue guidelines relating to the safety of departing vessels must be exercised consistently with rules relating to the principle of the high seas in United Nations Convention on the Law of the Sea.¹⁸⁴ The Court emphasised that "for centuries national law in this area has been essentially governed by and derived from international law."¹⁸⁵

Although an instrument or rule may have substantive fit, nevertheless the court's receptivity to it in a particular domestic context may be disruptive for the legal system. Thus in *Mabo*, after explicitly admitting the influence of the ICCPR on the development of the common law regarding indigenous rights to land, Brennan J noted that this development "would be precluded if the recognition were to fracture a skeletal principle of our legal system".¹⁸⁶ Of course, this threat is present with any development of the law. As emphasised in *Hosking*, "Courts are at pains to ensure that any decision extending the law to address a particular case is consistent with general legal principle and with public policy."¹⁸⁷ However, the need to justify a development by reference to fit is more acute when an external, unincorporated norm is used as a reason for that development.

This issue of domestic disruption inevitably arises in human rights cases. It is the nature of rights and values to conflict with each other. Therefore, courts are alert to the possibility that protection of an international right will disrupt the domestic rights-balance by unduly limiting other rights. For example, in *Hosking* the dissenting judges considered that the new privacy tort would place an unreasonable limit on the "centrally important right to freedom of expression".¹⁸⁸ Such a limit would be contrary to s 5 NZBORA, which permits only "such reasonable limits prescribed by

¹⁸² Robin Cooke has called the Treaty "simply the most important document in New Zealand's history": Robin Cooke "Introduction to commemorative issue to mark the 150th anniversary of the Treaty of Waitangi" (1990) 14 NZULR 1.

¹⁸³ *Sellers v Maritime Safety Inspector*, above n 40.

¹⁸⁴ At 62. This was a significant statutory gloss because it meant that "day-to-day (or at least year-to-year) meaning of national law may vary without formal change" in order to remain consistent with international law; United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

¹⁸⁵ At 62.

¹⁸⁶ *Mabo v Queensland [No 2]*, above n 78, at 29 per Brennan and McHugh JJ and Mason CJ.

¹⁸⁷ *Hosking v Runting*, above n 53, at [5] per Gault and Blanchard JJ.

¹⁸⁸ At [222] per Keith J. See also Anderson P's separate judgment at [262]-[271].

law as can be demonstrably justified in a free and democratic society”. Controversially, however, Gault and Blanchard JJ suggested that limits imposed to give effect to rights in international conventions would always be justified.¹⁸⁹

Recognition of an international right or value will also be precluded if it would be inconsistent with public policy. In *Chapman* the Supreme Court denied the availability of NZBORA compensation for breaches by the judiciary.¹⁹⁰ Although the right to effective remedies (recognised in art 2(3) of the ICCPR) was important, to acknowledge it in this context would be inconsistent with central policy considerations, “the most important of which is judicial independence”.¹⁹¹

Potential disruption of government policy will also preclude the effect of an international right. As discussed above, New Zealand courts have denied the existence of family-based rights. This is partly because these rights have been claimed in contexts such as immigration and child protection, where the government has carefully struck a balance between family values and other considerations. Thus in *Chief Executive for Department of Labour v Taito*, the Court of Appeal chose not to recognise a right to family life on the basis that it would “potentially drive a coach and four through government immigration policy” as well as affecting other aspects of government policy, such as social welfare.¹⁹²

Overall, “substantive fit” is a crucial factor. If recognition of a rule would be tantamount to importing a foreign value into the domestic legal system, or would greatly disturb existing legal or policy arrangements, then the instrument is likely to function only as permissive authority that the Court is free to regard, but may deny any effect to. By contrast, international rules that resonate in and mesh well with New Zealand law are more likely to be given effect. “More fit” does not necessarily equal “more effect” – a court may merely use the instrument as evidence of the norm or value’s importance. But as *Takamore* demonstrates, there may be a point at which the fit is strong enough to dissipates the stigma associated with instruments that have not been “transformed” into the domestic system, allowing the Court to be more explicit about the instrument’s influential or determinative effect.

¹⁸⁹ At [114]: “...it could not be contended that limits imposed to give effect to rights declared in international conventions to which New Zealand is a party cannot be demonstrably justified in a free and democratic society.”

¹⁹⁰ *Attorney-General v Chapman*, above n 134.

¹⁹¹ At [97] per McGrath and William Young JJ.

¹⁹² *Chief Executive of the Department of Labour v Taito*, above n 139, at [35] per William Young. See also *RL v CE*, above n 139, at [43] where the court made it clear that the “right to family life” could not be invoked in the context of reviewing a decision to declare children “in need of care and protection” under s 67 of the Children, Young Persons and Their Families Act 1989 and to give Child Youth and Family interim custody. While the “importance of family life” was not questioned, the Family Court was the place for such values to be considered.

6.2 Methodological Fit

The idea of “fit” can also be viewed from a procedural perspective. An international rule is more likely to be recognised if the *method* of doing so fits with the court’s conventional function.

(a) Common law development

We have seen that part of the courts’ “historic function” is to vindicate important rights.¹⁹³ However, while that aspect of the courts’ role tends to increase the common law’s permeability to international instruments, there is a competing consideration – the need to develop the common law *incrementally*. The common law has traditionally been seen as an inappropriate mechanism to design and implement wholesale legal change.¹⁹⁴ Furthermore, judicial restraint in law-making recognises that it is the constitutional function of Parliament to act as legislator. The courts may, however, develop the law in small steps on a case-by-case basis, by extending existing principles to new situations.¹⁹⁵

Therefore, the effect given to an unincorporated international instrument in common law development will depend on whether the law is close to, or has already arrived at, the destination towards which the instrument is pointing. If the potential development is only a small step further than the law’s existing position, then reliance on the instrument is legitimated by the orthodoxy of this method. For example, in *Baigent*, Cooke P and Hardie Boys J made efforts to show that development of NZBORA compensation was no bold extension of the law.¹⁹⁶ Cooke P pointed out that the possibility of such compensation had been alluded to in previous cases.¹⁹⁷ Hardie Boys J stated that the development “simply takes one step further this Court’s response to the Act”.¹⁹⁸

Of course, the members of the court may disagree about the size of the step that is about to be taken. In *Hosking*, Gault and Blanchard JJ considered that the substance

¹⁹³ *C v Holland*, above n 22, at [88].

¹⁹⁴ Roger Masterman *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, Cambridge, 2010).

¹⁹⁵ See for example *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 462 per Richardson P, Henry, Keith and Blanchard JJ. The Court justified judicial, as opposed to Parliamentary, development of qualified privilege by pointing out that the Court was “not engaged in any extensive development of the law”. It was rather a “matter of refinement”.

¹⁹⁶ *Simpson v Attorney-General*, above n 119.

¹⁹⁷ At 676.

¹⁹⁸ At 702. See also *Takamore v Clarke*, above n 58, at [257] per Glazebrook and Wild JJ: “we note that this requires little extension of the common law relating to burial”.

of the law developed by the New Zealand High Court was already very close to the recognition of a tort of wrongful publication of private information.¹⁹⁹ Thus, they were simply recognising prior developments as “principled and an appropriate foundation” on which to make, as Whata J later recalled it, “an incremental addition consistent with common law method”.²⁰⁰ Indeed, at times, Gault and Blanchard JJ even framed the case as a question of whether past developments “should be rejected”.²⁰¹ Keith J, on the other hand, considered that the creation of a general tort “would depart...from long-established [particularised] approaches to the protection of personal information”.²⁰²

The small steps principle has now been relied on to justify the most recent judicial development to the law of privacy. In *Holland*, Whata J argued that it was “functionally appropriate” for the common law to establish a tort of intrusion upon seclusion: “the similarity to the *Hosking* tort is sufficiently proximate to enable an intrusion tort to be seen as a logical extension or adjunct to it.”²⁰³

As indicated by the dissenting judgments in *Baigent* and *Hosking* and the defence’s submissions in *Holland*,²⁰⁴ the steps taken by the courts in those cases could feasibly be characterised as large and thus inappropriate. Therefore, the requirement of methodological fit may not be as tight a control on the common law’s permeability to international rules and values as it initially appears to be, because there can be significant disagreement about whether the step is small or large.

(b) Interpretation of statutes and statutory powers

Because “methodological fit” depends on the Court’s conventional role, the requirements for methodological fit will differ depending on the particular role the court is performing. The conventional function of the court in the context of statutory interpretation is to discern and give effect to Parliament’s intended meaning. The presumption that Parliament intends to legislate consistently with international obligations has become part of the court’s legitimate methodology. Thus, giving effect to an international treaty will have methodological fit so long as the words of the statute do not rebut the international-consistent meaning. Whether the words

¹⁹⁹ *Hosking v Runtig*, above n 53, at [7] and [90].

²⁰⁰ *C v Holland*, above n 22, at [80].

²⁰¹ *Hosking v Runtig*, above n 53, at [90].

²⁰² At [222].

²⁰³ *C v Holland*, above n 22, at [86].

²⁰⁴ See [4] (b) where the defence submitted that the proposed tort is “cut well adrift” from the *Hosking* tort, which was an addition to principles dealing with breach of confidence where revelation of private facts is critical.

permit the gloss will be the “hard question”.²⁰⁵ It is not, however, the courts’ role to more broadly interpret legislation in light of the “appropriate response” of the New Zealand government to international obligations if there are no obligations that pertain to the domestic legal problem.²⁰⁶

When interpreting statutory powers, the idea of methodological fit will also be informed by the judiciary’s unwillingness to intrude on delegated discretions. This factor may affect whether the instrument is considered relevant to the exercise of the statutory power, as well as the extent to which it shapes the decision-maker’s discretion.

In common law cases, courts appear comfortable relying on the “values” of international instruments, independent of the “applicability” of their terms to the particular domestic problem. But in the context of judicial review, the danger of limiting a lawful Executive function may lead a court to be more conservative in its estimation of the obligation’s relevance.

For example, in *Ashby*, an obligation that appeared broad on its face was not considered applicable to the specific situation.²⁰⁷ The Court was asked to hold that the Minister of Immigration must consider the International Convention on the Elimination of All Forms of Racial Discrimination 1965 when exercising his discretion to grant temporary entry permits to the South African rugby team. At the time, South Africa practised apartheid. Under art 2(1)(b) of the Convention, New Zealand undertook “not to sponsor, defend or support racial discrimination by any persons or organisation”.²⁰⁸

The Court refused to imply this mandatory consideration. It was “far from clear” that the Convention extended to sporting contacts.²⁰⁹ It made “no reference to sporting contacts at all”.²¹⁰ Ultimately the Court refused to hold that Convention was a mandatory consideration because it had “real doubt as to whether there [was] any

²⁰⁵ K J Keith "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 77.

²⁰⁶ See *Wellington District Legal Services Committee v Tangiora*, above n 84.

²⁰⁷ *Ashby v Minister of Immigration*, above n 21.

²⁰⁸ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969), art 2(1)(b).

²⁰⁹ *Ashby v Minister of Immigration*, above n 21, at 266 per Cooke J. By contrast the non-binding Commonwealth Statement on Apartheid in Sport (Gleneagles Agreement), London, 15 June 1977, which specifically discouraged sports contact with teams from South Africa, may have been a mandatory consideration. The Court did not need to decide on this point because there was evidence that the Minister had considered the Agreement.

²¹⁰ At 226 per Cooke J. Somers J was less certain about the scope of the Convention and acknowledged the possibility that it was intended to preclude sporting contacts: at 233.

breach of the Convention in allowing a South African team to play in New Zealand".²¹¹ This implies that the Convention was only relevant to the discretion if the Minister's proposed action constituted a breach of it. That idea is out of kilter with the claim that influential authority might have a "broader systemic effect" beyond its terms, namely attentiveness to its core values.²¹²

In *Van Gorkom*, the Court *was* willing to rely on the values of an international instrument.²¹³ Cooke J found that a regulation empowering the Minister of Education to lay down conditions as to payment for removal expenses of teachers did not allow conditions that discriminated on the basis of sex. Cooke J justified his finding partly by reference to articles in United Nations Declarations that guarantee rights to freedom from sexual discrimination and to equal pay for equal work.²¹⁴ While these very general statements were "not directed specifically to such narrow questions as removal expenses", they nonetheless represented goals towards which member states were expected to work.²¹⁵ The discriminatory regulations would not accord with "the spirit" of the Declarations.²¹⁶

Thus, the Court of Appeal was more open to non-binding instruments' values in *Van Gorkom*, than to those of a ratified Convention in *Ashby*. A likely explanation is that *Van Gorkom* concerned a sub-delegated power governing a relatively prosaic matter (payment for removal expenses). By contrast, the power in *Ashby* was vested in a Minister and related to immigration policy, "a sensitive and often controversial political issue".²¹⁷ Giving effect to the Convention did not have methodological fit in this context. It is quite possible, however, that a court today would come to a different conclusion than that reached by the Court in *Ashby* in 1981. Given the domestic advances in human rights law that has taken place since, including the enactment of the NZBORA, the anti-discrimination values in the Convention would have greater substantive fit, making judicial intervention more legitimate.

The principle of methodological fit may also influence the *extent* of the instrument's impact on the statutory discretion. There is sometimes a tension between the court's duty to apply the presumption of consistency, and its traditional methodology in judicial review cases. This tension has been exposed in the court's dealings with art 3

²¹¹ At 226 per Cooke J.

²¹² Moran "Influential Authority", above n 31, at 167.

²¹³ *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (SC).

²¹⁴ Universal Declaration of Human Rights GA Res 217A, III A/810 (1948), arts 2 and 23(2); Declaration on the Elimination of Discrimination against Women GA Res 2263, XXII A/Res/2263 (1967), art 10.1.

²¹⁵ At 543.

²¹⁶ At 543.

²¹⁷ *Ashby v Minister of Immigration*, above n 21, at 231 per Richardson J.

of the CROC. It stipulates that in any proceedings concerning children, the best interests of the child shall be “a primary consideration”.²¹⁸ It seems that this notion of primacy must go to the relative weight that must be attached to the consideration vis-à-vis other factors.²¹⁹ Thus the presumption of consistency, properly applied, would require the decision-maker to show that she had placed particular weight on the child’s best interests.²²⁰ However, under the traditional mandatory considerations model, a mere consideration of the child’s best interests would suffice.

Generally courts purport to apply the presumption of consistency, but require only that the child’s best interests are considered. For example, in the recent case of *Ye v Minister of Immigration* the Supreme Court claimed to interpret the Immigration Act in a way that was “consistent” with New Zealand’s international obligation under the CROC.²²¹ This involved interpreting the relevant provisions so that the children’s interests “are *always* regarded as an *important* consideration in the decision-making process” (emphasis added).²²² However, in a seeming contradiction, the Court then emphasised that the words of art 3 “do not denote how this consideration ranks against any other relevant consideration”.²²³

Geiringer, writing before *Ye*, concluded that the most likely explanation for the courts’ blurring of the two frameworks was that they did not appreciate that “primacy” goes to the weight attached to the child’s best interests.²²⁴ This explanation does not seem feasible here. The Supreme Court had the benefit of Glazebrook J’s analysis in the Court of Appeal, which clearly explained that because “weight is built in” under the UNCROC obligation, a standard administrative law inquiry may not be sufficient.²²⁵

A more likely explanation can be found in the idea of methodological fit. The court is torn between two of its functions. On the one hand, it should give effect to the international obligation through the established presumption of consistency. On the other hand, to demand that certain weight is placed on the child’s best interests does not fit with the orthodox approach to judicial review, which leaves the decision-maker to decide the weight to attach to a consideration. When this conflict is set in the context of immigration, “where the Courts are very slow to intervene”,²²⁶ the court

²¹⁸ Convention on the Rights of the Child, above n 12, art 3.

²¹⁹ Dyzenhaus, Hunt and Taggart, above n 111, at 7.

²²⁰ See Geiringer "Tavita and All That", above n 83, for an excellent comparison of these two models in relation to the art 3 of the Convention on the Rights of the Child.

²²¹ *Ye v Minister of Immigration*, above n 63, at [24].

²²² At [25].

²²³ At [25].

²²⁴ Geiringer "Tavita and All That", above n 83, at 98.

²²⁵ *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [88] per Glazebrook J.

²²⁶ *Ashby v Minister of Immigration*, above n 21, at 226 per Cooke J.

views methodological fit with its orthodox function as more important than fit with its obligation to apply the presumption of consistency.

6.3 Summary

In summary, the idea of “fit” regulates the effect of unincorporated instruments in two ways. First, if the substance of an unincorporated rule “fits” or meshes well with the domestic system, the court is more likely to give legal effect to the instrument, or use it to buttress its arguments. Secondly, a court is more likely to give effect to an instrument, or to recognise its values in common law development, if the *method* by which this is done fits with the court’s conventional function.

Chapter Seven: The Principle of Integrity in Government

This principle is a driving force behind judicial use of unincorporated international instruments. The factors discussed so far have focussed on the content of the international norm and the function of the court in relation to the other branches of government. The principle of integrity in government also concerns the court's institutional role. However, it does not go to the international norm's content but the fact of the state's commitment to it.

This principle is a manifestation of the courts' sensitivity to the potential hypocrisy that springs from a gap between standards endorsed internationally and the domestic legal reality.²²⁷ As the Executive is responsible for entering international agreements, it is most vulnerable to allegations of hypocrisy. In *Tavita v Minister of Immigration (Tavita)*, Cooke P labelled "unattractive" the argument that the Minister, when deciding whether to cancel a removal warrant on humanitarian grounds, was entitled to ignore the relevant provisions concerning family and child protection in the ICCPR and the CROC.²²⁸ Although he did not rule on whether such provisions were mandatory considerations,²²⁹ he criticised the Crown's argument for "implying that New Zealand's adherence to the international instruments has been at least partly window-dressing".²³⁰

This sentiment was echoed by the majority in *Minister for Immigration and Ethnic Affairs v Teoh*.²³¹ They insisted that ratification by Australia of an international convention was "not to be dismissed as a merely platitudinous or ineffectual act".²³² It was rather a "solemn undertaking"²³³ and a "positive statement" by the Executive to the world and the Australian people that the Government and its agencies will act in accordance with the Convention.²³⁴

The principle of integrity in government is related to the concept of "the honour of the

²²⁷ See Margaret Allars "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law" (1995) 17 Syd LR 204 at 235-236.

²²⁸ *Tavita v Minister of Immigration*, above n 159, at 266 per Cooke P.

²²⁹ The case was adjourned sine die to enable the Associate Minister, who had not known about the child's existence at the time he made his decision, to reconsider.

²³⁰ At 266.

²³¹ *Minister for Immigration and Ethnic Affairs v Teoh*, above n 14.

²³² At 291 per Mason CJ and Deane J.

²³³ At 301 per Toohey J.

²³⁴ At 291 per Mason CJ and Deane J. McHugh J dissented. He considered that ratification of a treaty was "by its very nature" a statement only to the international community, not the national community. This was a necessary implication of the incorporation doctrine: at 316.

Crown”. In the context of interpreting the Treaty of Waitangi, the High Court has stated that emphasis on this concept was important “where the focus is on the role of the Crown and the conduct of the Government.”²³⁵ The Court noted that the concept of the Crown’s honour was an expression of the international law doctrine of good faith, which requires states to perform and interpret treaties in good faith.²³⁶

Underlying the principle of integrity is the notion that it is unjust to claim the benefit of a certain position without accepting its burdens.²³⁷ This concept permeates various areas of law. In tort, for example, a person who publicly holds themselves out as possessing certain skills will generally be held to that standard. Administrative law, of course, directly addresses the desirability of the *government* acting with integrity. Through the doctrine of legitimate expectations, undertakings in published policies or representations to individuals may give rise to procedural legal obligations. In Australia, this doctrine has been used to imply treaty obligations into an administrative discretion.²³⁸ However employment of the legitimate expectations doctrine in this context is problematic and perhaps for this reason has not been embraced in New Zealand.²³⁹

The Executive is not the only branch of government vulnerable to allegations of hypocrisy. In *Tavita*, Cooke P observed that “legitimate criticism” could extend to the courts if they allowed the Executive to ignore international human rights norms not mentioned in broad discretionary provisions.²⁴⁰ In *Baigent*, he spoke of the need to guard against the tendency of both the Courts and Parliament to give “lip service to human rights in high-sounding language, but little or no real service in terms of actual decisions”.²⁴¹ His criticism of Parliament was presumably directed at the fact that it affirmed New Zealand’s commitment to the ICCPR in the NZBORA, and yet did not incorporate the article requiring an effective remedy for violations of rights.²⁴²

Thus, the principle of integrity in government encompasses two ideas. The first is

²³⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC) at 682.

²³⁶ See Charter of the United Nations, art 2; and Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), arts 26 and 31(1).

²³⁷ Moran "Influential Authority", above n 31, at 404.

²³⁸ *Minister for Immigration and Ethnic Affairs v Teoh*, above n 14.

²³⁹ See Moran "Influential Authority", above n 31, at 408. Because most individuals will actually not have such expectations, the device seems fictional and creates additional justificatory burdens. Furthermore, the Executive could by word or deed negate the expectation of application and so nullify the consequences of ratification: Dyzenhaus, Hunt and Taggart, above n 111 at 12. See also Michael Taggart "Legitimate Expectations and Treaties in the High Court of Australia" (1996) 112 LQR 50 and P Sales and J Clement "International Law in Domestic Courts: The Developing Framework" (2008) 124 LQR 388 at 407-413.

²⁴⁰ *Tavita v Minister of Immigration*, above n 159, at 266.

²⁴¹ *Simpson v Attorney-General*, above n 119, at 676.

²⁴² International Covenant on Civil and Political Rights, above n 9, art 2(3).

that in the course of their respective functions, each branch of government should act in accordance with the values they purport to uphold. If the Courts trumpet the importance of human rights, they should be willing to place weight on international human rights instruments in their decisions. Moreover, the Executive must not ratify international conventions with one hand and sweep them aside as irrelevant considerations with the other.

The second idea is that the government must show integrity as a whole. Because the hypocrisy of one branch taints the whole, one branch may be required to give substance to the “lip-service” of another. It is impliedly for this reason that Cooke P saw the executive’s argument in *Tavita* as opening the courts to “legitimate criticism”. Ultimately, this concept underlies the statutory presumption of consistency. The Courts interpret law under the assumption that Parliament intends to legislate consistently with the obligations to which the Executive has committed the state. The principle of integrity also explains the broader approach to the presumption that New Zealand courts have adopted, which is to apply it “whether or not the legislation was enacted with the purpose of implementing the relevant text”.²⁴³ As Keith J has noted extra-judicially, this approach is supported by “a more integrated view of the law and its sources”.²⁴⁴

New Zealand’s accession to the First Optional Protocol of the ICCPR has further fuelled the courts’ motivation to make good on Executive commitments.²⁴⁵ The fact that individuals can seek remedies against state at international law under this Protocol “cannot be disregarded” in considering whether a domestic remedy should be available.²⁴⁶ It would be a “strange thing” if Parliament was taken to contemplate that New Zealanders could go to the United Nations Committee in New York for appropriate redress, “but could not obtain if from our own Courts.”²⁴⁷

The upshot of the principle of integrity in government is that the extent to which the state has committed itself will affect the domestic influence of the instrument. Depending on the commitment, an instrument will have a particular status or “pedigree” in the Hartian sense of the word. At international law, ratification of a treaty establishes consent to be bound.²⁴⁸ A ratified treaty thus implicates the

²⁴³ *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 1, at 289.

²⁴⁴ K J Keith "Roles of the Courts in New Zealand in giving effect to International Human Rights - with some History" (1999) 29 VUWLR 27.

²⁴⁵ Optional Protocol to the International Covenant on Civil and Political Rights, above n 10.

²⁴⁶ *Hosking v Runtig*, above n 53, at [6] per Gault and Blanchard JJ.

²⁴⁷ *Simpson v Attorney-General*, above n 119, at 691 per Casey J.

²⁴⁸ Vienna Convention on the Law of Treaties, above n 236, art 2(1)(b).

government's integrity most seriously and is most likely to be given effect.²⁴⁹ Correspondingly, if New Zealand has entered reservations regarding particular treaty provisions, these provisions are unlikely to be given effect.²⁵⁰

Treaties that have been signed but not ratified and other non-binding instruments will also be relevant. For example in *Takamore*, the Court's decision to adopt a "more modern" approach to Māori customary law was influenced by the Declaration on the Rights of Indigenous Peoples.²⁵¹ The Court noted that "whilst the Declaration is non-binding, New Zealand announced its support of the Declaration in 2010".²⁵² In *Birds Galore v Attorney General* the High Court said treaties that were signed but not ratified would be considered by courts "on the basis that in the absence of express words, Parliament would not have wanted a decision maker to act contrary to such a treaty".²⁵³ While this suggests that the presumption of consistency may apply to such instruments, the Court of Appeal in *Tangiora* made it clear that "non-obligatory material" is only persuasive authority. It is relevant "as one part of the context" and "not as a matter of international obligation".²⁵⁴

The principle of integrity obviously has limits. Parliament can override treaty obligations and rebut the presumption of consistency with clear statutory wording, even though the position in international law is flatly to the contrary.²⁵⁵ Nevertheless, the principle of integrity in government can be seen as the glue attaching the state to its international obligations. Without it, dualism would deny any legal salience to treaties that the states are, at international law, bound to perform. Politically speaking, modern dualist systems rely on a limited application of the principle of integrity in order to smooth over this asymmetry of obligation and avoid allegations of hypocrisy from the international community. The state's integrity is important because "as New Zealand's role in world affairs has shown we see ourselves as members of a global

²⁴⁹ In *Birds Galore Ltd v Attorney-General* HC Auckland CP1161/86, 23 June 1988 at 26 the Court was explicit that "any loose arrangement [between states] cannot attract the same deference from the Courts as an international treaty".

²⁵⁰ See *Ye v Minister of Immigration*, above n 63, at [24] and fn 17 per Blanchard, Tipping, McGrath and Anderson JJ where, after applying the presumption of consistency, the Court noted that New Zealand's reservation to the Convention on the Rights of the Child concerning children unlawfully in New Zealand will have relevance to cases where the children are unlawfully in New Zealand (although it was not relevant in that case).

²⁵¹ This involved integrating it into common law where possible rather than relying on the strict rules of colonial times: *Takamore v Clarke*, above n 58 at [254].

²⁵² *Takamore, v Clarke*, above n 58, at [253]. See also Cooke J's use of non-binding Declarations in *Van Gorkom v Attorney-General*, above n 212.

²⁵³ *Birds Galore v Attorney-General*, above n 248, at 24.

²⁵⁴ *Wellington District Legal Services Committee v Tangiora*, above n 84, at 139 per Richardson P, Gault, Keith and Blanchard JJ.

²⁵⁵ Under art 27 of the Vienna Convention on the Law of Treaties, above n 236, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

community”.²⁵⁶ New Zealand tries to be a “good international citizen”.²⁵⁷ However, by increasing the legal salience of a state’s commitment to international instruments the principle of integrity ultimately threatens to subvert both dualism and parliamentary supremacy.

²⁵⁶ *X v Refugee Status Appeals Authority* [2006] NZAR 533 (HC), at [65] per Baragwanath J.

²⁵⁷ Treasa Dunworth "Lost in Translation: Customary International Law in Domestic Law" in Hilary Charlesworth et al (eds) *The Fluid State: International Law and National Legal Systems* (The Federation Press, Sydney, 2005) at 141

PART III: CONCLUSIONS

Chapter Eight: Striking a Balance between Dualist Values and the Beneficial Effects of Unincorporated International Instruments

8.1 The effects of unincorporated international instruments on judicial reasoning in New Zealand

By departing from the idea of “all or nothing” binding rules embodied by the theory of dualism, we become more aware of the subtle ways in which unincorporated international instruments shape legal judgment. The fibrous texture of common law reasoning makes it difficult to identify the role they play in a given case. Nevertheless, it appears these instruments have the potential to act as three distinct types of authority.

In some cases, they are treated as purely persuasive authority. The court may refer to them to add support to its arguments and help justify its conclusions. This is relatively uncontroversial in a dualist system. In other contexts, however, they may behave as “influential authority”, demanding consideration in spaces of discretion (be it the judge’s discretion, or a statutory decision-maker’s, or both). Finally, these instruments may require the legal problem to be resolved consistently with their values or terms. In interpretation of statutes and statutory powers, for instance, the presumption of consistency may mean that the terms of an instrument dictate the resolution of the legal problem, and in common law cases, courts have held that the law must be developed consistently with principles or values of unincorporated international treaties, specifically the Treaty of Waitangi²⁵⁸ and the ICCPR.²⁵⁹ In these cases, therefore, unincorporated obligations bear a greater resemblance to binding than permissive authority and may usefully be described as “determinative”. However, determinative authority is not the same as binding, because the influence of the international obligation will still be rebutted by legislative intent to the contrary, or where the common law development required by the obligation does not fit the court’s proper methodology.

²⁵⁸ *Takamore v Clarke*, above n 58.

²⁵⁹ *C v Holland*, above n 22; and suggested by the Court in *Hosking v Runting* above n 53.

8.2 Resulting problems

This spectrum of effect potentially poses a major threat to two fundamental legal principles. First, the ability of unincorporated international treaties, under certain circumstances, to command attention or conformity of decision-outcome undermines parliamentary supremacy. Granted, this threat should not be overstated. The presumption of consistency is rebutted by clear contrary wording, and unwanted common law developments can be changed by legislation. Although some commentators argue that there are now “constitutional overrides on the power to legislate”,²⁶⁰ there is little evidence that courts will give effect to an international obligation where this involves striking down a clearly worded statute. However, while parliamentary supremacy is not completely undermined, it is necessarily eroded by the significant effects that Executive-made commitments are having on adjudication in New Zealand. A particular threat is the courts’ willingness to attribute to Parliament an intention to comply with international norms despite statutory indications to the contrary,²⁶¹ and in cases where the statute was enacted prior to the relevant treaty commitment.²⁶²

Secondly, the courts’ use of these instruments undermines certainty in the law. An unincorporated instrument may have one of a range of different effects on the court’s reasoning and the outcome of the case. This variability is due to the multiplicity of principles involved, differences in judicial approaches and the interaction of these factors in a particular context. The resulting uncertainty is compounded by the inherently uncertain nature of international instruments which, as products of “the lowest common denominator of agreement” among participating states, are often vaguely worded.²⁶³

²⁶⁰ Philip A Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) at 70.

²⁶¹ For example in *Zaoui v Attorney-General (No 2)* above n 40, there were indications in the wider statutory scheme that, once the Minister had decided to rely on a security risk certificate, the person was to be removed expeditiously and without further intervention. See Geiringer "International Law through the lens of Zaoui", above n 110, at 316-317.

²⁶² In *Hemmes v Young*, above n 92, the Court interpreted the Adoption Act 1955 consistently with the right to freedom from discrimination in the ICCPR, which was ratified twenty-three years after the enactment of the Adoption Act: Ministry of Justice “International Covenant on Civil and Political Rights” <www.justice.govt.nz/policy>.

²⁶³ D MacKay, "The Status of Treaties in New Zealand Municipal Law" (paper presented at *Conference of Teacher and Practitioners of Public Law*, New Zealand Institute of Public Law, Wellington, August 1996), quoted in Philip A Joseph "Constitutional Review Now" (1998) NZ L Rev 85 at 113. There is at least evidence of sensitivity to this source of uncertainty. The Court in *New Zealand Air Line Pilots' Association Inc v Attorney-General* above n 1, at 289, cited the “indeterminate character” of the relevant treaty obligation as relevant to its decision not to apply the presumption of consistency.

8.3 Possible solutions

a) *Strict Dualism*

One way to curtail this damage to parliamentary supremacy and legal certainty would be reversion to a strictly dualist system. However, this is not realistic.²⁶⁴ The courts' increasing resort to unincorporated international instruments is not an isolated, containable phenomenon. It is bound up with wider trends in legal reasoning and in the nature of New Zealand's constitution.

For example, the courts' use of unincorporated instruments indicates an increasing concern for the content of rules. While the source-pedigree of international instruments retains relevance, courts will also be significantly influenced by their content-value – whether the rules are important or fit with the substance of the domestic legal system. This is particularly evident when courts employ a norm-reinforcing methodology; here the courts' focus is not on applying or giving effect to any particular source. Rather, what shapes the judges' discretion and drives the outcome are the legal values themselves, such as privacy (*Hosking*) or equality under the law (*Hemmes*). This represents some departure from the positivist picture of legal judgment, in which problems are resolved through the application of formal binding rules, regardless of content. It resembles more a Dworkinian style of reasoning, in which answers are justified by demonstrating their coherence to principle and values embedded in the legal system.

This style of reasoning is a trend that extends beyond the courts' use of international instruments. A desire to promote coherence of the system as a whole has also led to an enhanced relevance of substance over form and the blurring of boundaries between traditionally compartmentalised areas of law.²⁶⁵ Thus courts rely on both domestic and international human rights instruments in the development of private law, such as civil privacy torts,²⁶⁶ defamation,²⁶⁷ and the law relating to burial,²⁶⁸ as well as in the more conventional context of public and criminal law.²⁶⁹

²⁶⁴ See also Law Commission *The Treaty Making Process Reform and the Role of Parliament*, above n 12 at [91]: "...the alternative is to exclude New Zealand's international law obligations from judicial consideration on the basis that Parliament can and will provide a general codification of public policy. We see no likelihood of such development."

²⁶⁵ See John Smillie "The Allure of "Rights Talk": *Baigent's Case* in the Court of Appeal" (1994) 8 Otago LR 188 at 192 where he explains that, in *Simpson v Attorney-General*, "the "fundamental" nature and international dimension of the affirmed rights [were] more important than the legal form in which they are declared."

²⁶⁶ *Hosking v Runtig*, above n 53; *C v Holland*, above n 22.

²⁶⁷ *Lange v Atkinson*, above n 195.

²⁶⁸ *Takamore v Clarke*, above n 58.

²⁶⁹ This goal of overall integrity was made explicit in in *C v Holland* at [91] where the High Court held that a recent case concerning police surveillance had "persuasive force" in the context of a private

Secondly, the trend towards courts allowing greater effect to unincorporated international instruments is connected to a shift in New Zealand's underlying constitutional balance. In the last decade, New Zealand courts have been increasingly willing to use judicially enforced normative values to restrain the political branches of government (the Executive and Parliament).²⁷⁰ This "rise of constitutionalism"²⁷¹ was set in motion by the enactment of human rights legislation, but has also been spurred by parallel developments at common law. Lord Steyn's substantive conception of the rule of law has gained traction, reinvigorating the principle of legality.²⁷² Legislation is thus no longer interpreted solely according to its terms but against a backdrop of rights sourced in the common law, bills of rights and international law.²⁷³ This has led some to argue that the relationship between branches of government is now characterised by interdependence, not sovereignty and subordination.²⁷⁴ Judicial use of unincorporated instruments is inherently connected to this constitutional development by reinforcing the rights and values that claim recognition by the courts.²⁷⁵

The view of government as a "collaborative exercise" is also connected to the use of unincorporated instruments in a more direct sense. This is through the more unified conception of the state implicated by invocation of these instruments. The desire of the judiciary to promote integrity between the three branches of government in respect of commitments undertaken by the state arguably marks a shift from the traditional domestic conception of the state to a more internationalised one. As Janet McLean notes, administrative law in the common law tradition "views the government apparatus as a series of disaggregated entities, often competing with each other for power... and enjoying a temporally contingent mandate".²⁷⁶ By contrast, modern public international law has tended to conceive of the state as a unified legal person.²⁷⁷ The principle of integrity binds the branches of government together in a common enterprise and does not excuse governments from obligations based on their lack of temporal (or other) connection to the act of commitment. Thus, from both

privacy action because "the concern is to ensure that civil and criminal law apply and develop rules of law in a consistent and coherent way."

²⁷⁰ See Joseph "Constitutional Review Now", above n 263.

²⁷¹ Philip A Joseph *Constitutional & Administrative Law in New Zealand* (Thomson Brookers, Wellington, 2007) at 5 quoting Lord Cooke of Thorndon.

²⁷² Joseph "The Rule of Law: Foundational Norm", above n 260.

²⁷³ P A Joseph and A T B Joseph "Human Rights in the New Zealand Courts" (2011) 18 AJ Adm L 80 at 100.

²⁷⁴ M Taggart "Reinventing Administrative Law" in N Bamforth and P Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart, Oxford, 2003) at 334.

²⁷⁵ Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 334.

²⁷⁶ McLean, above n 75, at 167.

²⁷⁷ At 167.

domestic and international law, currents are flowing towards a more symbiotic relationship between branches of government. Any attempt to reinvigorate dualism, and thus reinstate sharp divides between the Executive, Parliament and Judiciary, would be to swim against the tide.

In sum, it may not be desirable or practical to preclude the influence of unincorporated international instruments in domestic law. By enhancing the protection of human rights and other important interests, such as the environment, these instruments may have a positive influence on New Zealand law and government.²⁷⁸

b) Formalise the variable effects

A more realistic approach to managing the influence of unincorporated international instruments would be to strike a balance between the benefits of giving them some effect, and the need for certainty and democratic law-making. This balance could be achieved through greater formalisation of the factors and principles that determine how much effect they are given.

From a positivist perspective, part of the problem of uncertainty is that the secondary rules that supposedly govern the relationship between domestic law and these instruments (“unincorporated instruments are not part of New Zealand law”, “domestic statutes will be interpreted consistently with them”) do not accurately or comprehensively reflect the reality of the relationship. So they do not deliver the certainty we seek. According to Hart, secondary rules are sociological facts whose existence is “*shown* by the way in which particular rules are identified”, or by the way particular rules are given effect.²⁷⁹ So we have to study how courts actually treat these instruments. Can stable patterns of use be identified? The results of the bottom-up examination of judgments in this paper indicate that certain patterns *can* be identified in the courts’ reasoning that could form the basis of more rule-like guidance governing the use of these instruments in domestic legal reasoning.

What, then, are these patterns? First, if it appears that an international norm has been deliberately excluded from the domestic legal system, a court is unlikely to give it any effect. Secondly, an instrument is more likely to be given effect either directly, or indirectly (as norm-reinforcement), if the rules or values contained in the instrument

²⁷⁸ These positive influences may extend beyond the law to wider governance. For example, as a result of Cooke J’s comments regarding New Zealand’s international obligations in *Tavita*, the Immigration Service introduced guidelines to ensure that a humanitarian assessment is conducted before removal orders are executed.

²⁷⁹ H L A Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 101.

are considered “important”, or are widely recognised domestically. Nevertheless, it will only be given effect where this would not unduly disturb the domestic legal or policy system. In other words, there must be substantive fit. In addition, the concept of methodological fit is crucial. A rule is unlikely to be given effect if the process of doing so is out of step with the court’s proper function in the particular context, taking it beyond, for instance, incremental development of the common law. Finally, due to the principle of integrity, the extent to which New Zealand has committed itself to the instrument will affect its force.

If these factors are emphasised by courts, or formalised by appellate courts, more clarity and certainty will be injected into the law. Further explication of these principles by the courts would also be beneficial. For example, under what circumstances will silence in the law be interpreted as deliberate exclusion of an international norm? What makes an international rule “important”? Human rights and the values protected by them are obviously important, but are some rights more fundamental than others? The clarification of such factors, however, will depend on the resolution of on-going contentions within the domestic system, such as the extent to which it is appropriate for courts to intervene in administrative discretions.

The courts should also strive to be transparent about the actual role the instrument plays in their decision, avoiding the gap between rhetoric and reasoning present in cases such as *Hosking* and *Takamore*. It should be clear, for example, whether the instrument simply provides extra support for their conclusions or determines an outcome that would not have been reached otherwise.

The certainty that this approach will generate is limited because the factors and principles involved are inherently controversial.²⁸⁰ However, this approach would require the Courts and the legal community to engage explicitly with the question of whether an unincorporated international norm should be given domestic effect on a particular occasion,²⁸¹ in light of the norm’s substance and its relationship to the domestic legal system, and in light of any questions of institutional competence and propriety.

Furthermore, this approach would pay more respect to the principle of parliamentary supremacy. With the true effects of the instrument laid bare, and questions of substantive and methodological fit brought to the fore, the court would be under a

²⁸⁰ See Hart above n 279, at 251.

²⁸¹ See Dunworth "Lost in Translation: Customary International Law in Domestic Law", above n 257, at 154.

stronger obligation to justify the infringement of parliamentary supremacy that may arise from the use of unincorporated international instruments in the domestic courts.

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