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DEMANDING ATTENTION: THE ROLES OF UNINCORPORATED INTERNATIONAL INSTRUMENTS IN JUDICIAL REASONING

Alice Osman*

This article analyses New Zealand courts' use of unincorporated international instruments, such as treaties and non-binding declarations, in cases of common law development, statutory interpretation and judicial review. The theory of dualism holds that these instruments are not part of New Zealand law until incorporated by Parliament. However, this theory does not accurately describe the relationship between domestic and international law. The binding/non-binding distinction assumed by the theory of dualism fails to account for the significant effect that unincorporated international instruments are having on the outcome of domestic legal problems. A close analysis of case law reveals that these instruments play a variety of roles in judicial reasoning. Furthermore, it is possible to identify factors and principles that tend to determine what role an instrument will play in a given case. In the interests of certainty, the courts should move away from the simplistic language of dualism to articulate a nuanced and principled approach.

I INTRODUCTION

> Beware of slogans. Look past the familiar words and formulas. Look for new spaces and new linkages.
>
> – Sir Kenneth Keith[1]

The orthodox account of the relationship between New Zealand domestic law and international law describes it as a "dualist" system. The theory of dualism holds that international law and domestic law operate on separate planes. In order to have "the force of law", the provisions of

* Judges' Clerk, High Court of Auckland. This article was written in my personal capacity. I am grateful to the reviewer for the constructive feedback. Thanks also to Professor John Dawson for his invaluable insights and suggestions, and to Josh Pemberton for his helpful comments.

1 KJ Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581 at 604.

treaties (and non-binding international instruments, such as declarations) must be incorporated into legislation by Parliament.[2] However, a closer look at the manner in which courts use unincorporated international instruments exposes the language of dualism as "lazy shorthand".[3] This article will argue that, in reality, these instruments frequently play a significant role in judges' reasoning. In the interests of certainty, courts should articulate a nuanced approach that more accurately reflects the way courts use unincorporated international instruments.

The article will begin by investigating the theory behind the dualist "slogans". It will be shown that dualism revolves around the concept of "bindingness", which sees law as applying in an "all-or-nothing" fashion. For this reason dualism 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. To find these answers, we must move beyond the black and white palette of dualism and attune our eyes to the shades of grey on the spectrum between binding and non-binding authority. To this end, the first half of this article will explore the possibility that unincorporated international instruments can function as a type of legal authority that, while not binding, cannot simply be ignored. For these instruments may, in fact, determine the outcome of the domestic legal problem.

In order to gain a holistic understanding of the impact of unincorporated international instruments on domestic law, this article will examine their use in the development of the common law as well as statutory interpretation cases (which tend to attract the most attention). The method of analysis will be bottom-up, involving a close examination of the judges' reasoning. Such analysis will necessarily be qualitative rather than quantitative. Nevertheless, it gives valuable insight into the different ways in which courts are willing to use these instruments.

The courts' increasing reliance on unincorporated instruments is not an isolated or containable phenomenon. It is linked to trends in legal reasoning and New Zealand's constitutional climate. However, this move away from dualism need not entail a move away from certainty and predictability in the law. Rather we must "look for new linkages".[4] As the second part of the article will demonstrate, it is possible to identify factors and principles that appear to determine how a court will treat an unincorporated international instrument in a given case. Building on Treasa Dunworth's idea of a "pedigree approach" to international law,[5] it will be argued that courts should

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

3 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) 126 at 134.

4 Keith "Sovereignty at the Beginning of the 21st Century", above n 1, at 604.

5 Treasa Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL 67 at 81–84. For further discussion of this approach in the context of unincorporated international instruments,

aim to explicitly articulate these relevant factors, so that they may form the basis of a refined and principled approach to the use of unincorporated international instruments.

II ORTHODOX PRINCIPLES: DUALISM AND INCORPORATION

Dualism sees international law and domestic law as operating on separate planes. New Zealand's "dualist" approach was described in a Law Commission guide to international law as the "basic constitutional principle" that "the executive cannot, by entering into a treaty, change the law."[6] It is often expressed in judgments through citation of Keith J's statement in *New Zealand Air Line Pilots' Association Inc v Attorney-General* that "the stipulations of a treaty duty ratified by the executive do not, by virtue of the treaty alone, have the force of law".[7] Dualism can be contrasted with the "monist" approach in countries such as the United States, where in general treaties ratified by the Government are automatically enforceable domestically.[8] Dualism also stands in contrast to New Zealand's monist approach to customary international law, which (in theory, at least) [9] is automatically part of New Zealand law.[10]

At international law, ratification of a treaty establishes a state's consent to be bound.[11] The ratification of treaties is the prerogative of the Executive. [12] By denying legal force to unincorporated treaties, dualism is therefore seen as securing the democratic legitimacy of the law-making process and protecting parliamentary sovereignty. Courts are aware that undue reliance on unincorporated international instruments may elicit allegations of "judicial usurpation of the legislative function."[13] Democratic concerns, and the increasing importance of international law to

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see Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 82 at 102–103.

6 Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at [43].

7 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 2, at 280–281. See *Clark v Governor-General* HC Wellington CIV-2004-485-1902, 27 May 2005 for a thorough judicial analysis of dualism and the incorporation doctrine.

8 Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 161.

9 Treasa Dunworth has called the monist paradigm "entirely inadequate" in describing the relationship between customary international law and domestic law: Dunworth "Law Made Elsewhere", above n 3, at 133. See also Treasa Dunworth "Lost in Translation: Customary International Law in Domestic Law" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (The Federation Press, Sydney, 2005) 136.

10 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24].

11 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 2(1)(b).

12 New Zealand Ministry of Foreign Affairs and Trade (2010) "The Treaty making process in New Zealand" <www.mfat.govt.nz>.

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

everyday life in New Zealand, have also led to an expansion in the role of Parliament in treaty examination before ratification.[14]

Before ratifying a treaty, the Government introduces legislation to implement it, unless it considers that New Zealand law already conforms to its terms. Major human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (the ICCPR), were so ratified without Parliamentary scrutiny or implementing legislation.[15] As will be seen, however, a determination by the Executive that domestic law already complies with a treaty does not necessarily prevent courts from using the treaty to effect significant changes to domestic law.[16]

If implementing legislation is considered necessary, the treaty can be incorporated in a number of ways, and to greater or lesser extents. Parliament may incorporate the full text of a treaty into statute, making the terms of the treaty enforceable domestically.[17] More commonly, Parliament enacts legislation with the express purpose of ensuring that New Zealand's international obligations are implemented. Such legislation may alter or only partially incorporate the international terms.[18] A very limited form of incorporation occurs when statutes direct decision makers to take into account international obligations.[19] Instruments that are not binding at international law, such as declarations, may also be incorporated to varying extents into domestic law.[20]

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14 See Mai Chen "A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making" (2001) 19 NZULR 448 at 452. Under procedures adopted in 2000, before the Government ratifies a multilateral treaty, it 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. The treaty and NIA are referred to the Foreign Affairs, Defence and Trade Committee of the House or a more appropriate committee, which take submissions from the public and may make recommendations to the Government: Standing Orders of the House of Representatives 2011, SO 395–397.

15 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976); and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). See Law Commission *The Treaty Making Process Reform and the Role of Parliament* (NZLC R45, 1997) at [29]–[30].

16 See Section VII: The Principle of Integrity in Government.

17 For example, s 84A of the Maritime Transport Act 1994 provides that "[t]he provisions of the LLMC Convention as amended by the LLMC Protocol have the force of law in New Zealand."

18 For example, s 4 of the Adoption (Intercountry) Act 1997 provides that the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption has the force of law in New Zealand "subject to the provisions of this Act."

19 See, for example, s 177(3) of the Immigration Act 2009, which provides that in considering whether to cancel a deportation order, an immigration officer "must have regard to any relevant international obligations"; and s 8 of the Resource Management Act 1991, requiring that all persons exercising powers

The focus of this article, then, is international treaties and non-binding instruments (or particular provisions thereof) that have not been fully implemented through domestic legislation, and therefore cannot be directly enforced to resolve a domestic legal issue. So, as an example, New Zealand's international obligation under art 3(1) of the United Nations Convention on the Rights of the Child (UNCROC)[21] is reflected in s 4 of the Care of Children Act 2004, which requires that the welfare and best interests of a child be the first and paramount consideration in any decision made under that Act.[22] But art 3(1) remains an "unincorporated" international rule for purposes of decisions made outside of the scope of that Act – in immigration decisions, for instance.

These unincorporated international instruments are frequently cited by the courts, despite, according to dualist theory, not being a part of New Zealand law. In fact, it has been argued that dualism is not an absolute rule with a series of exceptions, but is entirely inadequate to explain the relationship between New Zealand law and international law.[23] In supporting and developing this claim, the next section will suggest that an outdated theory of legal reasoning lies at the heart of dualism's dwindling explanatory value.

III WHAT LIES BETWEEN BINDING AND NON-BINDING AUTHORITY?

By imaging national and international law as separate systems, 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 positivist 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

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and functions under the Act in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

20 For example, the New Zealand Coastal Policy Statement 2010 is a piece of delegated legislation which embraces the precautionary principle to environmental management enunciated in various non-binding sources of international law, such as the Rio Declaration on Environment and Development A/Conf/151/26 (Vol I) (13 June 1992), 31 ILM 874; and the International Union for Conservation of Nature Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management (as approved by the 67th meeting of the IUCN Council, 14–16 May 2007).

21 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

22 As well as "in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child": Care of Children Act 2004, s 4(1); and Care of Children Bill 2003 (54-1) (explanatory note).

23 Dunworth "Law Made Elsewhere", above n 3, at 132–133.

of the legal system as a whole.[24] Such judgments are more value-laden than the positivist picture suggests.

Drawing on these wider jurisprudential arguments, some of the scepticism towards dualism is underpinned by a 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.[25]

The binary nature of our legal vocabulary has meant that 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".[26] In contrast to binding authority, persuasive authority is said to attract adherence as opposed to obliging it.[27] However, once we focus on the impact these persuasive sources have on spaces of discretion, it can be seen that this term actually captures a range of legal norms and sources whose nature and influence vary in character.[28] Some sources of persuasive authority, such as law from foreign jurisdictions, are *only* persuasive. They may be useful for the judge to refer to, but can legitimately be ignored. Other sources, however, seem to demand attention. Canadian commentator Mayo Moran posits the term "influential authority" to capture their force.[29]

Influential authority is reducible neither to binding authority nor to the perfmissive extreme of purely persuasive authority.[30] We cannot insist that persuasive authority be addressed. But where influential authority bears upon an issue, the decision must address the role of that authority in its justification or be found legally wanting.[31] Similar to "binding" sources, its effect is mandatory in nature. However, what is mandatory is consideration of its values in moments of discretion, as

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24 See RM Dworkin "Is the Law a System of Rules?" in *The Philosophy of Law* (Oxford University Press, Oxford, 1977) 38; and Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge (Mass), 1985).

25 Mayo Moran "Authority, Influence and Persuasion: Baker, Charter Values and the Puzzle of Method" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004) 389 at 390.

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

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

28 Moran "Authority, Influence and Persuasion", above n 25, at 390.

29 At 390.

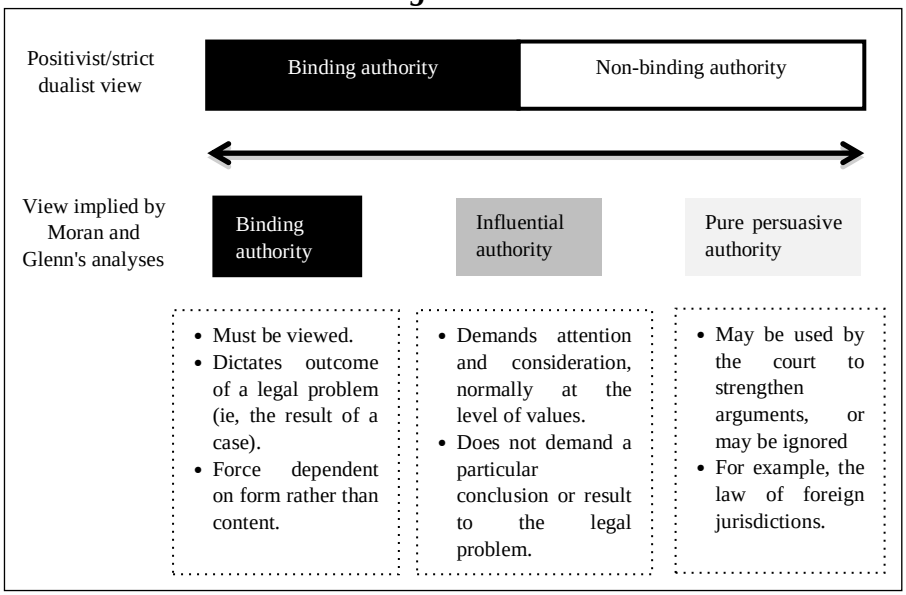
30 At 390.

31 At 294.

opposed to the application of its terms.[32] 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.[33]

As an example of influential authority at play, Moran uses the Canadian Supreme Court case of *Baker v Canada*.[34] 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.[35] The Court relied primarily on the UNCROC to derive this requirement, even though the UNCROC had not been legislatively implemented.[36] Moran argues that such cases should not be dismissed as confused mistakes. Sense can be made of them through the concept of influential authority.

Figure 1



32 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) 156 at 166.

33 At 169.

34 *Baker v Canada* [1999] 2 SCR 817.

35 At [65].

36 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.[37] 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.[38] In New Zealand, this has been labeled the "horizontal effect" of the New Zealand Bill of Rights Act 1990 (NZBORA).[39]

New Zealand commentator Treasa Dunworth draws on the idea of influential authority in her analysis of dualism's diminishing utility.[40] In the context of customary international law in particular, 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", by which she means its content or value-pedigree.[42] Furthermore, the ease with which the rule would fit with the domestic legal system affects its influence.[43]

Dunworth and Moran's analyses bear a strong resemblance to Dworkin's theory of law as integrity. In his early work, Dworkin posits that law consists not only of rules laid down in statute and judicial decisions, but also legal principles.[44] These principles explain why the positive rules as a whole can be viewed as part of a coherent legal order.[45] 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.[46] Like influential authority, these principles do not apply in an "all-

37 Moran "Authority, Influence and Persuasion ", above n 25, at 393.

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

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

40 Dunworth "Law Made Elsewhere", above n 3, at 133.

41 Dunworth "Hidden Anxieties", above n 5.

42 Dunworth "Law Made Elsewhere", above n 3, at 133. Dunworth's use of the word "pedigree" to describe this approach is perhaps unusual. This term is normally associated with Hart's positivist theory that the authority of legal rules depends on their source, or the manner in which they were adopted: see Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Mass), 1977) at 17. Dunworth in fact means the opposite: that the reception of a norm depends not on its source but its content or value-pedigree.

43 Dunworth "Law Made Elsewhere", above n 3, at 133.

44 Dworkin *Taking Rights Seriously*, above n 42, at 14–45.

45 David Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11 at 15; and R Dworkin *Law's Empire* (Belknap Press, Cambridge (Mass), 1986) at 15.

46 Dworkin *Taking Rights Seriously*, above n 42, at 40.

or-nothing" fashion.[47] Rather they have a dimension of force that must be balanced against competing principles.

In his later statement of his theory, Dworkin argued that 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.[48] It will have moral worth because the principles with which it coheres are also moral principles; it is their ability to provide the best moral justification for the deployment of coercive force that makes them the 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. This 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 is the giving of convincing reasons. The legal values and principles shape the contours of legal discretion and dictate, to some extent, the reasons that can legitimately be used to justify a decision. Therefore, paying attention to how various legal resources impact on judicial reasoning captures more of what is salient in legal judgment than fixation with the application of binding rules. With this in mind, the next section will analyse the reasoning in domestic cases to gain insight into the roles that unincorporated international instruments are playing in legal judgment.

IV EXPLORING THE SPECTRUM: WHAT ROLES DO UNINCORPORATED INTERNATIONAL INSTRUMENTS PLAY IN DOMESTIC CASES?

A Common Law Development

The concept of "bindingness" may be inapt to describe common law reasoning generally. The "shadowy character" of the common law does not resemble the crisp positivist picture of a set of rules identifiable by reference to sources.[49] Sometimes it seems sources are "binding only in so far as they are persuasive".[50] Normally an array of interwoven reasons and principles are given as

47 At 41.

48 Dworkin *Law's Empire*, above n 45, at 228–232.

49 AWB Simpson "The Common Law and Legal Theory" in *Oxford Essays in Jurisprudence, Second Series* (Clarendon Press, Oxford, 1973) 77 at 87.

50 Comment by Trevor Allan during The Unity of Public Law Conference, University of Toronto, 4 January 2003 as cited in Moran "Authority, Influence and Persuasion ", above n 25, at 413.

justification for an outcome. It is therefore 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. In 1996, a Law Commission report acknowledged that courts may consider treaties as "relevant to the determination of the common law".[51] However, in *Hosking v Runting*, Gault and Blanchard JJ stated the position more boldly.[52] 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".[53] There was "increasing recognition of the need to develop the common law *consistently* with international treaties to which New Zealand is a party".[54] This proposition was reiterated, again in the context of privacy, in *C v Holland*.[55] Justice Whata declared the existence of a common law action for intrusion upon seclusion, stating that:[56]

> … 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.

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 that those instruments support.

A substantial part of the Court of Appeal's judgment in *Takamore v Clarke* was dedicated to a discussion of relevant international instruments.[57] This case concerned the interaction of New Zealand's common law with tikanga in relation to body disposal decisions. When analysing this judgment, it must be borne in mind that on appeal the Supreme Court did not adopt the Court's reasoning (although it did affirm the outcome).[58] Regardless, it is noteworthy that when given the

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51 Law Commission *A New Zealand Guide to International Law and its Sources*, above n 6, at [68].

52 *Hosking v Runting*, above n 38.

53 At [6].

54 At [6] (emphasis added).

55 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

56 At [69] (emphasis added).

57 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore* CA]. Justice Chambers chose not to express any views on executors' duties 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.

58 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore* SC]. See the discussion in Section X: The Concept of "Fit" below.

opportunity to develop the common law, the Court of Appeal decided to place unincorporated international instruments at the forefront of its reasoning. The Court dedicated around 18 paragraphs to a discussion of the ICCPR, the ICESCR,[59] the United Nations Declaration on the Rights of Indigenous Peoples,[60] the European Convention on Human Rights (ECHR)[61] and associated jurisprudence. The Court, using slightly weaker language than Whata J in *Holland* and the majority in *Hosking*, said that courts are "willing to have regard to" international instruments, which have "the ability" to affect the development of the common law.[62]

The Court found that the Treaty of Waitangi (the Treaty) stood apart from other instruments. In light of 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.[63] They noted that the Treaty is already used as an aid to interpretation, even where not mentioned in the text of the legislation, and that it may have "direct impact" on judicial review by generating mandatory considerations.[64]

However, other unincorporated treaties are also used in these ways, and so something else must have distinguished the Treaty in the Court's eyes. It is likely that the difference was acceptance by the Crown of "obligations of good faith, reasonableness, trust, openness and consultation" arising from the nature of the relationship between Māori and the Crown under the Treaty.[65] While the Court recognised that the judicial enforceability of these obligations remained doubtful,[66] 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.

It is important to remain alert to discrepancies between explicit statements made by a court about the role of unincorporated instruments in its reasoning, and the role that those instruments actually play. For example, in *Hosking*, the decision to develop the new privacy tort would likely have been reached even without consideration of the ICCPR and UNCROC. At the judgment's

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59 International Covenant on Economic, Social and Cultural Rights, above n 15.

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

61 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).

62 *Takamore* CA, above n 57, at [240] and [241].

63 At [249].

64 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.

65 *Takamore* CA, above n 57, at [248].

66 At [248].

conclusion, *nine* reasons were listed for the decision, one of which was that it was consistent with New Zealand's international obligations.[67] So, rather than the international instruments demanding conformity (as Gault and Blanchard JJ's introductory dicta may have suggested) it appears that they were merely threads woven through the judgment in order to strengthen its reasoning.

B Statutory Interpretation

1 Interpretation of statutes generally

When interpreting statutes, courts apply a principle of interpretation whereby legislation is read consistently with international obligations where possible.[68] As this presumption applies only in respect to New Zealand's international *obligations*, the distinction between ratified treaties on the one hand, and non-ratified treaties and other non-binding instruments on the other, becomes important. In *Van Gorkom v Attorney-General*, Cooke P held that reference to United Nations declarations was "not out of place" but "not essential".[69] The Court of Appeal more recently confirmed that such "non-obligatory material" is relevant "as one part of the context" but "not as a matter of international obligation".[70]

In relation to binding treaties, the presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant obligation.[71] However, the presumption will be rebutted if Parliament has in clear words "deliberately eschewed the international obligation".[72] If the treaty-consistent meaning does not support the purpose of the Act, the purposive interpretation will prevail.[73] And of course, the international obligation relied on must be seen as properly pertaining to the domestic legal problem.[74]

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67 *Hosking v Runting*, above n 38, at [148].

68 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 3, at 289.

69 *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (SC) at 542; affirmed by *Van Gorkom v Attorney-General* [1978] 2 NZLR 387 (CA).

70 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA) at 139.

71 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 3, at 289.

72 *Taylor v Attorney-General* [2014] NZHC 2225 at [39].

73 Courts are required by statute to interpret legislation "in light of its purpose": Interpretation Act 1999, s 5(1). See Section VII: The Principle of Integrity below.

74 In *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* [2014] NZCA 37, [2014] 2 NZLR 662, the Court of Appeal stated "an international obligation is relevant if, assessed objectively, it could reasonably apply to the facts of the case under consideration." Leave to appeal this decision was refused by the Supreme Court in *Liu v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZSC 76.

Again, the overall impact of an instrument in statutory interpretation cases can be difficult to discern if multiple interpretive techniques are employed to justify the chosen meaning.[75] However, the presumption of consistency does firmly place relevant international treaties in the category of influential authority: they must be considered. Indeed, when the wording allows, they are arguably stronger than influential authority; the presumption demands the statute is interpreted to *conform* to its terms. Thus in *Teddy v Police*, Woolford J felt himself bound to give effect to New Zealand's obligations under the United Nations Convention on the Law of the Sea:[76]

> The Maritime Transport Act *must* be read consistently with international law.
>
> …
>
> Accordingly, in order for New Zealand to meet its international obligations, s 65(1)(a) *must* apply to all New Zealand ships whether within or beyond [the] territorial sea.

Even though Woolford J considered it "difficult" to read one of the Act's provisions as conferring jurisdiction extraterritorially, "nonetheless" because of New Zealand's international obligations, it did so "by necessary implication".[77]

Claudia Geiringer has posited that the strength of the presumption of consistency may vary.[78] This observation was based on Keith J's comment in *Air Line Pilots* that the application of the presumption "depends on" several factors, including the determinacy of the obligation and its relative importance.[79] Subsequent cases support Geiringer's hypothesis. In the 2014 case *LM v R*, Glazebrook and Arnold JJ referred to the need to interpret s 144A of the Crimes Act 1961 consistently with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[80] Their Honours then stated:[81]

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75 See for example *R v Hallett* [2013] NZHC 1757 at [34] where Duffy J cited art 15.1 of the International Covenant on Civil and Political Rights as one of several reasons for her conclusion that the principle against retrospective increases in penalties in s 6 of the Sentencing Act 2002 trumped the requirement to impose a minimum term of imprisonment in s 103 of the Act. Another example is *Teddy v Police* [2014] NZCA 422 [*Teddy* CA] at [59] and [60] where the Court of Appeal cited New Zealand's obligations under the United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) as one of four factors that "reinforced" its conclusion on the extraterritorial effect of s 413 of the Maritime Transport Act 1994.

76 *Teddy v Police* [2013] NZHC 756 [*Teddy* HC] at [23]–[24] (emphasis added); affirmed on appeal in *Teddy* CA above, n 75.

77 At [26].

78 Geiringer "*Tavita* and All That", above n 5, at 103.

79 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 2, at 289.

80 *LM v R* [2014] NZSC 110; and Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 18 January 2002).

> This interpretive principle is *even stronger* in a case, such as the present, where the legislation was specifically directed (at least in part) towards compliance with those international obligations.

The Court of Appeal also evinced the presumption's varying strength when, in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, it asked itself:[82]

> … what weight should a court endeavouring to interpret s 3(1)(b) of the Equal Pay Act place on [the Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value]?

Ultimately, the Court decided that the Convention's "use as an interpretative aid is limited", and placed less weight on it than the Employment Court had done.[83] Clearly, then, courts do not feel equally compelled to read domestic statutes consistently with international obligations in all circumstances.

2 *Interpretation of discretionary powers*

It is now established that unincorporated treaties can constrain statutory discretions of judges and,[84] importantly, administrative decision-makers. The two techniques employed by the courts are the presumption of consistency, and the imposition of mandatory considerations. The latter model, sparked by the oft-cited case of *Tavita v Minister of Immigration*, merely requires the decision-maker to consider the obligation.[85] The presumption of consistency, however, requires that the decision-outcome is *substantively consistent* with the international obligation. In the context of judicial review, this approach can therefore result in stronger restraint on administrative power.[86]

The Supreme Court imposed a substantive constraint in *Zaoui v Attorney-General (No 2)*.[87] Reading the Immigration Act 1987 consistently with relevant articles in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR, the Court held that the Minister and Governor-General's powers to issue security risk certificates and make

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81 At [52] (emphasis added).

82 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 at [226].

83 At [231]. See below at 368 for comment on why the Court placed limited weight on the Convention.

84 See for example Whata J in *R v Wilson* [2014] NZHC 32 at [41]: "in exercising any discretion that affects a young person, I am obliged to have regard to UNCROC and the values it espouses, unless directed not to do so by Parliament."

85 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). For a recent example see *Battison v Meloy* [2014] NZHC 1462, [2014] NZAR 927 at [48]: "[t]he rights of a child in the Convention need to be taken into account when assessing the exercise of the statutory disciplinary provisions that affect a student under the age of 18."

86 Geiringer "Tavita and All That", above n 5, at 82.

87 *Zaoui v Attorney-General (No 2)*, above n 10.

deportation orders 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 would face torture or be arbitrarily deprived of his life.[88] The decision-makers were not directed to simply consider the values of the relevant treaties, but to exercise their power in conformity with their terms.[89]

Far more frequently, however, courts conflate the presumption of consistency with the weaker mandatory considerations model, holding that a power will be exercised consistently with an international obligation if the obligation and its values are taken into account. The Supreme Court adopted this approach in the case of *Ye v Minister of Immigration*, which set a precedent for later cases.[90] For example, in *Harlen v Ministry of Social Development* Courtney J held that the Social Security Appeal Authority's discretion not to recover overpayment of benefits could be exercised consistently with rights to adequate standards of living in the ICESCR and UNCROC by the Authority "having regard to the adequacy of the beneficiary's standard of living and the impact of debt collection on it".[91]

C Norm-reinforcement

To speak, as we are, of the "role played by an international instrument" or the "influence" it has in a given case, connotes the domestic acceptance of an external force. So, for example, *Hosking*, has been said to exemplify how courts use unincorporated instruments to "fill gaps" in the common law.[92] But reliance on these instruments can be more complex than a matter of pulling rules down from the plane of international law to be used on the domestic plane below. In the human rights context in particular, it will often be more accurate to describe the courts as engaging in a "norm-reinforcing" methodology.[93] This describes the courts' tendency to invoke international instruments

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88 At [88]–[93]; and 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).

89 See Claudia Geiringer "International law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300. *Zaoui v Attorney-General (No 2)*, above n 10, also demonstrated that broadly termed powers would no longer be seen as rebutting the presumption of consistency: at [91]. Compare *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229 per Richardson J and *R v Secretary of State for the Home Department, ex parte Brind*, above n 13.

90 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. See below for a suggested explanation for the Court's approach.

91 *Harlen v Ministry of Social Development* [2012] NZHC 669, [2012] NZAR 491 at [68] citing *Ye v Minister of Immigration*, above n 90.

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

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

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.[94] This methodology allows the courts to simultaneously domesticate international values and externally validate the content of domestic humanitarian norms.[95] Thus in *Hosking*, Gault and Blanchard JJ said that international instruments evinced privacy's place as an "internationally recognised fundamental value", further to its protection in New Zealand, English, American and Canadian law.[96] The robust approach of the Court in *Zaoui* can also be explained through this methodology.[97] Along with the presumption of consistency, the Court applied the interpretative direction in s 6 of NZBORA that statutes are, where possible, to be read in conformity with NZBORA rights.[98] So again, international and domestic sources reinforced the norms contained in each of them. Much has been written about the norm-reinforcing methodology in the context of administrative law.[99] As Janet McLean puts it, "there is a coincidence of common law and international law values and the permeability of administrative law to both."[100]

We may assume that it is the international instrument "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). But this norm-reinforcement methodology alerts us to the fact that the driving force behind a decision may be the court's commitment to certain values, which are simply evinced by the international obligation, among other things. The case of *Hemmes v Young* is a striking example.[101] Justice Hammond was required to decide whether to read the Adoption Act 1955 in a way that was consistent with art 26 of the ICCPR, which prohibits discrimination on the basis of "birth or other status".[102] Rather than simply applying the presumption of consistency, Hammond J framed the issue as a choice between a literal interpretation or a "right-conscious reading". He saw the presumption of consistency as a means to read the statute in a '"human-rights conscious'

94 At 177–178.

95 At 177.

96 *Hosking v Runting*, above n 38, at [92].

97 *Zaoui v Attorney-General (No 2)*, above n 10.

98 Geiringer "International law through the lens of Zaoui", above n 89, at 317. Sections 8 and 9 of the New Zealand Bill of Rights Act affirm 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.

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

100 McLean, above n 93, at 178.

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

102 International Covenant on Civil and Political Rights, above n 15, art 26.

way".[103] Although the relevant ground of discrimination was not covered by s 19 of NZBORA, he considered that in light of the advances in human rights law since the Adoption Act was enacted, Parliament could not have countenanced such discrimination.[104] The Court's concern to uphold the adoptee's rights therefore appeared to be just as determinative of the outcome as the international obligation itself.

D The Spectrum of Authority

This section has suggested that in the development of the common law and the interpretation of statutes and statutory discretions, courts have created channels through which unincorporated international instruments may exert influence on domestic law. Some sort of variegated approach to unincorporated international instruments is emerging.

In some cases, courts consider these instruments to be purely persuasive authority to which they are able, but not required, to have regard. This end of the spectrum is where all unincorporated instruments would sit in a more strictly dualist system. International instruments do not have 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. So, in *Takamore*, the Court of Appeal described international instruments (apart from the Treaty of Waitangi) as purely persuasive, and in *Van Gorkom* and *Tangiora* the Courts explicitly stated that non-binding international material such as declarations was relevant but nothing more.[105]

There are also examples of the courts treating unincorporated instruments as *influential* authority. Because of the presumption of consistency, courts are obliged to consider how relevant international obligations may bear on the statute's construction. The instruments cannot be ignored. Likewise, when interpreting administrative discretions, courts imply relevant international obligations or the values contained in them as mandatory considerations so that the relevant decision-maker is required to consider them. The UNCROC and children's interests thus operate as influential authority in cases such as *Baker*, *Ye* and *Harlen*.[106]

Finally, rather than merely demanding consideration in decision-making, it seems an instrument, or the value it protects, may demand substantive conformity in the decision-outcome. This represents the greatest departure from strict dualism. The term "determinative authority" is posited

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103 *Hemmes v Young*, above n 101, at [113].

104 At [118]. The Court of Appeal's ruling was overturned by the Supreme Court on another issue in *Hemmes v Young* [2005] NZSC 47, [2006] 2 NZLR 1. However, in obiter, the Supreme Court stated that they had "no difficulty" with Hammond J's interpretation: at [22].

105 *Van Gorkom v Attorney-General*, above n 69; and *Wellington District Legal Services Committee v Tangiora*, above n 70.

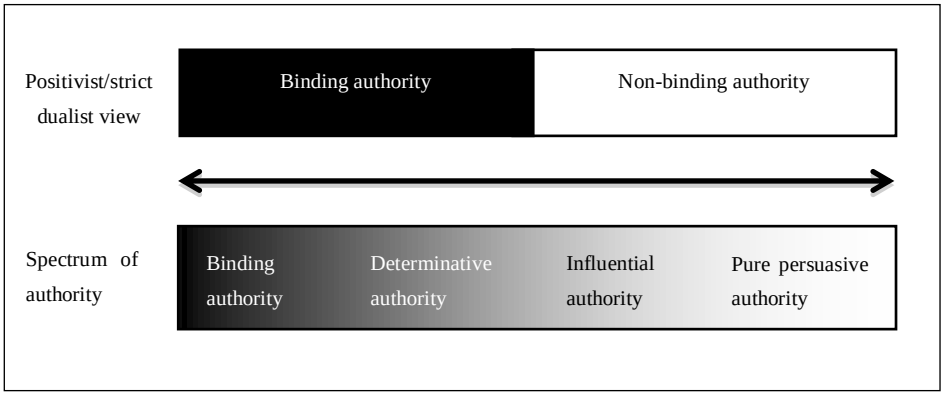
106 *Baker v Canada*, above n 34; *Ye v Minister for Immigration*, above n 90; and *Harlen v Ministry of Social Development*, above n 91.

to capture this concept. The Treaty of Waitangi could be said to have behaved as determinative authority in *Takamore*, as it required that the common law be developed, so far as is possible, in conformity with it.[107] Likewise international obligations and privacy values generally in *Holland*.[108] In statutory interpretation cases, the instrument (or the rights it protects) may require that legislation be interpreted consistently with it, as in *Teddy* and *Hemmes*.[109] And in the context of judicial review, unincorporated instruments may act as determinative authority by requiring that a statutory power be exercised in conformity with them, as the Torture Convention and ICCPR did in *Zaoui*.[110]

Determinative authority can be said to differ 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 often dependent to an extent on its content-values. Thirdly, an instrument will only operate as determinative authority if the statutory words, or any other relevant contextual factors, do not make it inappropriate to give the instrument effect.

The argument so far might be illustrated by building on the diagram in Figure 1, to illustrate how far we have moved beyond a simple dualist, binding/non-binding approach to law:

Figure 2



107 *Takamore v Clarke* CA, above n 57.

108 *C v Holland*, above n 55.

109 *Teddy* HC, above n 76; and *Hemmes v Young*, above n 101.

110 *Zaoui v Attorney-General (No 2)*, above n 10.

V THE DEPARTURE FROM DUALISM IN CONTEXT

It can be seen from the discussion in the previous sections that the courts' increasing resort to unincorporated international instruments is not an isolated, containable phenomenon. Not only is it related to the increasing volume of international law connected to the domestic legal and political system,[111] but it is arguably also bound up with wider trends in legal reasoning. The courts' use of unincorporated instruments indicates an increasing concern for the content of rules. 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 increased relevance of substance over form and the blurring of boundaries between traditionally compartmentalised areas of law.[112] Thus courts rely on both domestic and international human rights instruments in the development of private law, such as privacy torts,[113] defamation,[114] and the law relating to burial,[115] as well as in the more conventional context of public and criminal law.

Moreover, it can be argued that the increasingly significant role played by unincorporated international instruments is connected to a shift in New Zealand's underlying constitutional balance. The theoretical underpinning of the courts' judicial review jurisdiction is arguably evolving. The orthodox conception, which sees judges as agents of Parliament, enforcing Parliament's intent and ensuring that powers are not exercised ultra vires, has declined in dominance. New Zealand courts are increasingly willing to use judicially enforced normative values to restrain the political branches of government (the Executive and Parliament).[116] This "rise of constitutionalism"[117] was set in motion by the enactment of human rights legislation, and has also been spurred in common law by the reinvigoration of Lord Steyn's substantive conception of the rule of law and the principle of legality.[118] Similar to the presumption in s 6 of NZBORA and the presumption of consistency, the

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111 In the year ending 30 June 2011, Parliament enacted 25 Bills with implications for New Zealand's international obligations, the Executive was involved in 60 treaty actions and the judiciary released 88 judgments that referenced New Zealand's international obligations: Mark Gobbi "Treaty Action and Implementation" (2011) 9 New Zealand Yearbook of International Law 351 at 351.

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

113 *Hosking v Runting*, above n 38, and *C v Holland*, above n 55.

114 *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

115 *Takamore v Clarke* CA, above n 57; and *Takamore* SC, above n 58, at [12] per Elias CJ.

116 See PA Joseph "Constitutional Review Now" (1998) NZ Law Review 85.

117 Lord Cooke of Thorndon "The constitutional renaissance" (paper presented at the first plenary session of the New Zealand Law Conference, Rotorua, April 1999) at 2 as cited in Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Brookers, Wellington, 2014) at 5

118 Philip Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 47.

"principle of legality" requires that law is applied consistently with fundamental common law rights unless Parliament has clearly indicated a contrary intention.[119]

It may be said, then, that legislation is 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.[120] This has led some to argue that the relationship between branches of government is now characterised by interdependence, not sovereignty and subordination.[121] Judicial use of unincorporated instruments is inherently connected to this constitutional development by reinforcing the rights and values that claim recognition by the courts.[122]

VI ARTICULATING A MORE NUANCED APPROACH

Given that the courts' use of unincorporated international instruments is linked to shifts in both legal reasoning and the constitutional landscape, it would be safe to assume that it will not wane any time soon. And by enhancing the protection of human rights and other important interests – such as the environment – unincorporated instruments clearly have the potential to exert a positive influence on New Zealand law and government.[123] However, in celebrating the advantages of a move away from a dualist approach, we should also bear in mind what is arguably being put at risk. Despite the changing constitutional climate, the threat to parliamentary supremacy over the law is a concern that will undoubtedly continue to drive debate over both the courts' use of unincorporated international instruments, and Parliament's involvement in their signing and/or ratification. This article, however, will focus on another legal principle that is vulnerable to erosion: legal certainty.

In a hypothetical, strictly dualist system, litigants would be assured that courts would not rely on unincorporated international instruments to resolve legal problems. By decreasing the range of possible arguments available, legal outcomes would be more predictable and disputes would be resolved more efficiently.[124] As the first part of this article has shown, the New Zealand courts' use of these instruments is far more variable and complex, and accordingly, far less certain. The courts

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119 See for example *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 295 at [35]; and *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC) at [36].

120 PA Joseph and ATB Joseph "Human Rights in the New Zealand Courts" (2011) 18 AJ Admin L 80 at 100.

121 Michael Taggart "Reinventing Administrative Law" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 311 at 334.

122 PA Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 334.

123 These positive influences undoubtedly 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.

124 On the benefits of formal, rule-based adjudication generally see John Smillie "Who Wants Juristocracy?" (2006) 11 Otago Law Review 183 at 190.

must also deal with the inherent uncertainty of international instruments, which as the product of compromise and negotiation, are often phrased in general and vague terms.

The remainder of the article will argue that it is possible to nurture certainty whilst simultaneously embracing international law. Part of the problem is that the "secondary rules" used to describe the relationship between domestic law and these instruments ("unincorporated instruments do not have the force of law", "domestic statutes will be interpreted consistently with them") no longer accurately or comprehensively reflect the reality of the relationship. So they do not deliver the certainty we seek. According to Hart, the secondary rules concerning the ultimate rules for the recognition or identification of the law are sociological facts whose existence is "*shown* in the way in which particular rules are identified" or given effect to by legal officials.[125] Therefore to modernise our vocabulary, it may help to study how courts actually treat unincorporated international instruments, and ask: can any patterns be identified?

This Part will suggest an answer in the affirmative. It will seek to demonstrate that particular factors and principles do appear relevant to the role that an unincorporated international instrument or rule will play in the court's reasoning. In other words, these factors are indicative of where on the spectrum of authority (Figure 2) an unincorporated instrument will sit in a given case. They will be woven through a court's judgment, sometimes breaking to the surface, other times remaining hidden and implicit in the reasoning. And of course, this account is by no means comprehensive; rather, it discusses those factors and principles most readily apparent from a survey of the case law.

VII THE PRINCIPLE OF INTEGRITY IN GOVERNMENT

Much of this article has focussed on how the content-value of unincorporated instruments can affect the role they play in judgments. The principle of integrity in government, however, concerns the fact of the state's commitment to the international norm rather than the norm's content. It serves as a reminder that the form of an unincorporated international rule remains important.

The principle of integrity in government encapsulates the courts' sensitivity to the potential hypocrisy that springs from a gap between standards endorsed internationally and the domestic legal reality.[126] As the Executive is responsible for entering into international agreements, it is most vulnerable to allegations of hypocrisy.[127] In *Tavita*, the Crown argued that the Minister was entitled to ignore provisions concerning family and child protection in the ICCPR when deciding whether to

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125 HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994) at 101 (emphasis in the original).

126 Margaret Allars discusses the idea of integrity in government in her article "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.

127 Australian judges have stated that ratification is a "solemn undertaking" by the Executive and is "not to be dismissed as a merely platitudinous or ineffectual act": see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 301 per Toohey J and at 291 per Mason CJ and Deane J.

cancel a removal warrant on humanitarian grounds. President Cooke famously criticised the Crown's argument for "implying that New Zealand's adherence to the international instruments has been at least partly window-dressing".[128]

The other branches of government are also vulnerable to allegations of hypocrisy. In *Simpson v Attorney-General* (*Baigent's case*), Cooke P 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".[129]

Thus, the principle of integrity in government encompasses two ideas. The first is 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 representations of another. It is impliedly for this reason that in *Tavita*, Cooke P considered that "legitimate criticism" could extend to the courts if they allowed the Executive to ignore international human rights norms not mentioned in broad discretionary statutory provisions.[130] 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".[131] As Sir Kenneth Keith has noted extra-judicially, this approach is supported by "a more integrated view of the law and its sources".[132]

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128 *Tavita v Minister of Immigration*, above n 85.

129 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) at 676 [*Baigent's case*]. His Honour's criticism of Parliament was presumably in reference to the fact that it affirmed New Zealand's commitment to the International Covenant on Civil and Political Rights in the NZBORA, and yet did not incorporate the article requiring an effective remedy for violations of rights.

130 *Tavita v Minister of Immigration*, above n 85, at 266.

131 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 2, at 289.

132 KJ Keith "Roles of the Courts in New Zealand in giving effect to International Human Rights – with some History" (1999) 29 VUWLR 27 at 40.

From a constitutional perspective, the idea of integrity in government as a whole supports the view that the branches of government are involved in a "collaborative exercise".[133] It can also be said to signal 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".[134] By contrast, modern public international law has tended to conceive of the state as a unified legal person.[135] The principle of integrity supports this unified conception and does not excuse governments from obligations based on their lack of temporal (or other) connection to the act of commitment.

The upshot of the principle of integrity in government is that the extent to which the state has committed itself will affect the "source pedigree" of the instrument and in turn its domestic influence. A ratified treaty implicates the government's integrity most seriously and thus, as discussed above, is more likely to act as influential or determinative authority than un-ratified treaties or "soft" international law.[136] If New Zealand has ratified a treaty after entering reservations regarding particular provisions, the courts are unlikely to place weight on those provisions.[137] Treaties to which New Zealand is not a party, such as the ECHR, may be considered but will not oblige the Court's consideration. The extent to which New Zealand advocated for a particular instrument on the international stage may also be taken into account. With regards to the Universal Declaration on Human Rights, Chief Judge Colgan considered that:[138]

> … manifestations of those rights in New Zealand … should be interpreted to give effect to those fundamental aspirations to which New Zealand not only committed itself, but indeed was instrumental in formulating.

Arguably, the convention that the Executive will not ratify a treaty unless satisfied that domestic law complies with it implicates the principle of integrity. In *Baigent's Case,* Gault J opined that the presumption that domestic law sufficiently provides for ratified treaties was of "doubtful

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133 See Joseph "Parliament, the Courts, and the Collaborative Enterprise", above n 122.

134 McLean, above n 93, at 167.

135 At 167.

136 Refer to the discussion at 356 of this article. See also *Paki v Attorney-General* [2014] NZSC 118 at [317], where Glazebrook J considered the United Nations Declaration on the Rights of Indigenous Peoples to be "relevant" to findings on Māori custom. Chief Justice Elias thought it may be "of some importance" to the question of remedies for breaches of equitable duties owed to Māori: at [164].

137 See *Ye v Minister of Immigration*, above n 90, at [24] and [24], n 17 where the majority noted that New Zealand's reservation to the UNCROC concerning children unlawfully in New Zealand will have relevance in some cases.

138 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, (2014) 11 NZELR 335 at [38].

validity".[139] If a court considers that domestic law is not in fact compliant, it may feel compelled to make good on the Executive's ratification of the treaty. So in *Baigent's case*, none of the five Court of Appeal judges considered that New Zealand law fulfilled the obligation in art 3 of the ICCPR to provide an effective remedy for breaches of rights. The majority held that the creation of public law damages for breaches of NZBORA was necessary to provide for that right. Interestingly, only Gault J, who dissented, mentioned the presumption that domestic law is compliant.[140] By contrast, in *Terranova* the Court of Appeal did canvass the conflicting arguments as to whether domestic law complied with Convention 100. That "confusing background" appeared to make the Court cautious to place weight on the Convention.[141]

Obviously, the principle of integrity has limits. Parliament can rebut the presumption of consistency with clear statutory wording, even though the position in international law is flatly to the contrary.[142] Nevertheless, the state's integrity is important because "we see ourselves as members of a global community".[143] New Zealand tries to be a "good international citizen".[144] Its recent successful bid to sit on the United Nations Security Council is cogent evidence of this. Politically speaking, then, modern dualist systems rely on the principle of integrity to smooth over the asymmetry of obligation between the national and international planes, thereby avoiding allegations of hypocrisy from the international community.

VIII THE IMPORTANCE OF THE UNINCORPORATED PROVISION AND THE VALUE IT PROTECTS

The "importance" of the unincorporated international provision in question is a factor that has been explicitly recognised as determining its effect. For example, in *Ashby* the Court acknowledged that a treaty obligation "might be of such overwhelming or manifest importance" that Parliament could not have intended it to be ignored.[145]

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139 *Baigent's case*, above n 129, at 707.

140 At 704, 707 and 711.

141 *Terranova*, above n 82, at [226] and [230].

142 Under art 27 of the Vienna Convention on the Law of Treaties, above n 11, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

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

144 Dunworth "Lost in Translation: Customary International Law in Domestic Law", above n 9, at 141.

145 *Ashby v Minister of Immigration*, above n 89, at 226. See also *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA) at 551, where "the great importance of the right involved" was noted as a factor in favour of reading the Minister's power to revoke a residence permit as subject to international obligations; a final ruling was unnecessary.

When will a provision be considered important? If the treaty concerns technical matters, importance may be dependent on the extent to which the provision underpins the legal scheme. For example, in *Air Line Pilots*[146] Keith J noted the "relevant unimportance" of a rule prohibiting disclosure of flight records in the Chicago Convention on International Aviation compared with the "rules of the air" which establish the state's fundamental obligation to ensure that its aircraft and those in its territory comply with Convention regulations.[147]

Other factors that may indicate a rule's importance are its antiquity and "the extent to which it is accepted in the international community".[148] 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 on the accumulated experience and practice of a wide range of nations.[149]

It is obvious that courts consider human rights treaties to be important and thus deserving of influence on domestic law.[150] As discussed above, in this context courts frequently speak as though the instrument merely reinforces the fact that particular rights or values are important. By establishing a rule's or value's importance, courts are able to justify the interpretation or development of the law that will protect it. This reasoning appeared in 2012 in *Holland*.[151] 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".[152] Creation of a tort of intrusion into 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."[153] Thus 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.

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146 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 2.

147 At 289; and Chicago Convention on International Civil Aviation 15 UNTS 295 (opened for signature 7 December 1944, entered into force 4 April 1947), annex 13 at [5.12].

148 *Minister for Immigration and Ethnic Affairs v Teoh*, above n 127 at 288.

149 See also *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 46 where the Court noted that freedom of the high seas was "one of the longest and best-established principles of international law".

150 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 Lord Millet, Lord Browne-Wilkinson and Lord Steyn mentioned these arguments but did not find it necessary to examine them.

151 *C v Holland*, above n 55.

152 At [67].

153 At [88].

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.[154] Furthermore, if an "important" right is affected by the decision, the court may review it more intensely than under the *Wednesbury* unreasonableness standard.[155] International instruments may therefore serve as useful tools for courts and litigants to employ when contending that a more demanding review is justified (provided that such an argument is feasible in the statutory setting).[156]

IX THE CERTAINTY OF THE UNINCORPORATED PROVISION OR VALUE

This factor is relatively simple and well-established. Unincorporated international instruments represent "the lowest common denominator of agreement" among participating states, and as a result are often vaguely worded.[157] The courts are sensitive to this fact. In *Air Line Pilots*, the Court of Appeal indicated that the "indeterminate character" of the international obligation at issue pointed against the application of the presumption of consistency.[158] On numerous occasions since, courts have indicated their reluctance to place weight on unincorporated international rules or principles that are of vague or uncertain scope.[159] An unincorporated provision will be more likely to have domestic influence if international judicial bodies or organisations have developed and refined its contents. Thus, the Court of Appeal decided not to apply the presumption of consistency to the Biosecurity Act 1993 in part due to "difficulties involved in endeavouring to reconcile the various different international agreements".[160] These agreements were "lacking coherence and clarity

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

155 See *Wolf v Minister of Immigration* HC Wellington CIV 2002-485-106, 7 January 2004; and *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (HL).

156 In *Babulal v Chief Executive, Department of Labour* HC Auckland CIV-2011-404-1773, 29 September 2011, the appellant relied on international obligations relating to children to argue for a "hard look" intensity of review. At [33] Lang J found that s 177 of the Immigration Act did not allow for an intense review, particularly given that the decision maker was not obliged to give decisions.

157 D MacKay "The Status of Treaties in New Zealand Municipal Law" (paper presented at Conference of Teachers and Practitioners of Public Law, New Zealand Institute of Public Law, Wellington, August 1996) as cited in Joseph "Constitutional Review Now", above n 116, at 289.

158 *New Zealand Air Line Pilots' Association Inc v Attorney-General*, above n 2, at 289.

159 See for example *Bleakley v Environmental Risk Management Authority* HC Wellington AP177/00, 2 May 2001 at [154] where McGechan J noted that he did not gain assistance from the "somewhat uncertain" international concept of the precautionary principle expressed in the Rio Declaration.

160 *The New Zealand Pork Industry Board v The Director-General of the Ministry of Agriculture and Forestry* [2013] NZCA 65 at [114].

because of the potential conflicts in the applicable principles and rules and in the different approaches adopted by the [World Trade Organisation]."[161]

X THE CONCEPT OF "FIT"

This next principle is broader in scope: the role played by an unincorporated international instrument 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.[162] 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 likely 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.[163]

A Substantive Fit

An international rule will have substantive fit if it resonates in the domestic system. 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".[164] The Court of Appeal's decision to treat the Treaty of Waitangi as determinative authority in *Takamore* (as noted above in Section IV) was arguably a direct result of this substantive domestic fit.[165] Treaty principles and obligations have a special fit with New Zealand's constitutional history and legal order. 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 nation of New Zealand.[166]

International instruments will have particular resonance in areas of domestic law that are necessarily international in flavour. Maritime law is one such example. In *Sellers* (and *Teddy*), the Courts' application of significant glosses to the Maritime Transport Act was driven by the fact that "for centuries national law in this area has been essentially governed by and derived from

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161 At [114].

162 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 "Law Made Elsewhere", above n 3, at 133.

163 Dworkin *Law's Empire*, above n 45.

164 *C v Holland*, above n 55, at [21].

165 *Takamore* CA, above n 57.

166 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.

international law."[167] Furthermore, one of that Act's stated objectives is to implement international agreements;[168] as Glazebrook and Arnold JJ explicitly recognised in *LM v R*, the presumption of consistency will be "stronger" when domestic legislation is directed, at least in part, towards ensuring compliance with international obligations.[169] Conversely, as the Court of Appeal indicated in *Terranova*, where there is evidence that Parliament saw the domestic legislation as bringing New Zealand "into line" with the unincorporated instrument so that ratification could be achieved, courts may be more willing to place weight on the instrument when interpreting the legislation.[170]

Obviously, human rights tend to "fit" New Zealand's legal system. However, the influence of an unincorporated instrument may be curtailed if giving effect to it would unduly limit domestically protected rights.[171] Recognition of an international right or value will also be precluded if it would be inconsistent with public policy. In *Attorney-General v Chapman* the Supreme Court denied the availability of NZBORA compensation for breaches by the judiciary.[172] 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, in particular judicial independence.[173]

Sensitivity to government policy is also part of the reason New Zealand courts have repeatedly declined invitations to rely on the family-protective right in art 17 of the ICCPR as a basis on which to recognise a right to family life.[174] Claimants commonly seek to rely on this article in the context of 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

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167 *Sellers v Maritime Safety Inspector*, above n 149, at 62 as cited in *Teddy* HC, above n 76, at [23]; and *Teddy* CA, above n 75, at [33]. A more extreme example is extradition. Parliament has recognised the importance of New Zealand's bilateral treaties in this context by requiring the courts to treat them as determinative authority. Section 11(1) of the Extradition Act 1999 explicitly directs that the Act must be construed to give effect to the relevant extradition treaty: see *Kim Dotcom v The United States of America* [2014] NZSC 24 at [165].

168 Maritime Transport Act 1994, long title.

169 *LM v R*, above n 80, at [52].

170 *Terranova*, above n 82, at [230].

171 *Hosking v Runting*, above n 38, at [222] and [262]–[271].

172 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

173 At [97].

174 International Covenant on Civil and Political Rights, above n 15. Article 17(1) provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his … family".

"potentially drive a coach and four through government immigration policy" as well as affecting other aspects of government policy, such as social welfare.[175]

A tricky feature of "substantive fit" as a predictor of how a court will use an instrument, is that a rule or value may fit the New Zealand context so well that there is no need to resort to unincorporated international instruments to justify the decision. Arguably, this explains the lack of discussion of international instruments in the Supreme Court *Takamore* decision. To recap, the majority Court of Appeal relied heavily on international instruments to justify their conclusion that executors were required to take into account tikanga when making decisions about the resting places of dead bodies. The Supreme Court majority came to essentially the same conclusion, but reached no further than domestic law for authority. It considered that the common law had "always been seen as amenable to development to take account of custom"[176] and, specifically, it was "well established" that the law of burial required the personal representative to take cultural views into account.[177]

Overall, however, substantive fit is worth bearing in mind. If recognition of a rule 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 ignore. By contrast, international rules that mesh well with New Zealand law and values are more likely to have an influential or determinative effect.

B Methodological Fit

The idea of "fit" can also be viewed from a procedural perspective. An unincorporated instrument is more likely to be recognised if the method of doing so fits with the court's conventional function.

C Common Law Development

As discussed above, part of the courts' "historic function" is to vindicate important rights.[178] While this function increases the common law's permeability to international law, courts are nonetheless restrained by their obligation to develop the common law incrementally. Such restraint 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.[179]

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175 *Chief Executive of the Department of Labour v Taito* [2006] NZAR 420 (CA) at [35] per William Young J.

176 *Takamore* SC, above n 58, at [150].

177 At [152].

178 *C v Holland*, above n 55, at [88].

179 See for example *Lange v Atkinson*, above n 114, 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

Therefore, the effect of an unincorporated international instrument in common law development may depend on whether the law is already close to arriving at the destination towards which the instrument is pointing. If so, 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 simply took "one step further this Court's response to the Act".[180] And 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."[181]

D Interpretation of Statutes and Discretionary Powers

The presumption that Parliament intends to legislate consistently with international obligations has become part of the court's legitimate methodology. Therefore in general terms, giving effect to an unincorporated instrument will have methodological fit so long as the words allow the presumption to be applied.[182] As discussed in the next section, the absence of a rule from a statute may also cause the court to question whether applying the presumption of consistency would be proper.

It can be argued that an unincorporated international instrument is less likely to act as determinative authority when the court is reviewing an administrative power. In this context, the court's convention of presuming consistency must compete with the judiciary's traditional reluctance to interfere with delegated discretions. In the immigration arena in particular, "the Courts are very slow to intervene".[183] This tension between the courts' two functions can be seen in the courts' dealings with art 3 of UNCROC. It stipulates that in any proceedings concerning children, the best interests of the child shall be "a primary consideration".[184] It seems that this notion of primacy must go to the relative weight that the decision maker must attach to the consideration vis-à-vis other factors.[185] Indeed, in *Ye*, the Supreme Court acknowledged that a CROC-consistent reading of the Immigration Act meant that the children's interests "are *always* regarded as an *important*

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that the Court was "not engaged in any extensive development of the law". It was rather a "matter of refinement".

180 *Baigent's case*, above n 129, at 702. See also *Takamore v Clarke* CA, above n 57, at [257] per Glazebrook and Wild JJ: "we note that this requires little extension of the common law relating to burial".

181 *C v Holland*, above n 55, at [86].

182 Whether the words permit the gloss will often be the "hard question": Kenneth Keith "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 77.

183 *Ashby v Minister of Immigration*, above n 89, at 226 per Cooke J.

184 United Nations Convention on the Rights of the Child, above n 21, art 3.

185 Dyzenhaus, Hunt and Taggart, above n 99, at 7; and Geiringer "*Tavita* and All That", above n 5, at 89.

consideration in the decision-making process".[186] However, when reviewing the Minister's decision, the Court seemed to retreat from this position, emphasising that the words of art 3 "do not denote how this consideration ranks against any other relevant consideration".[187] Viewed through the lens of methodological fit, it could be said that the court's conventionally un-intrusive approach won out, with the result that CROC was treated as a mandatory consideration, as opposed to demanding conformity with its terms.

XI INTERPRETATION OF SILENCE IN DOMESTIC LAW

This factor is closely related to the concept of fit. It posits that a court's reliance on an unincorporated instrument will, in some cases, depend on the court's interpretation of silence in domestic law. The silence discussed here is the absence of a specific statutory rule on the matter. On one interpretation, this silence might signify 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*. Under this view, to "read in" other rules in reliance on unincorporated international instruments may be to step outside the courts' proper function, and to amend a statute rather than interpret it.[188]

Justice Clifford applied this reasoning in *Zhang v Police*, and 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.[189] The Consular Privileges and Immunities Act 1971 had afforded the force of law to particular articles of the Convention, but not art 36.[190] This exclusion was "quite deliberate" and evinced a "clear intention on the part of the legislature to exclude art 36 from domestic application".[191] The absence of statutory rules may also hinder an international instrument's influence less directly. For example, in *Hosking v Runting*, Keith J's dissenting view was heavily influenced by what he saw as "silences in the law", such as the "deliberate" exclusion of the news media in its news gathering capacity from the scope of general privacy legislation.[192] This,

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186 *Ye v Minister of Immigration*, above n 90, at [25] (emphasis added).

187 At [25].

188 On the issue of "reading in" rules generally see JF Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at 211.

189 *Zhang v Police* [2009] NZAR 217 (HC); and Vienna Convention on Consular Relations 596 UNTS 261 (opened for signature 18 April 1961, entered into force 19 March 1967), art 36.

190 Consular Privileges and Immunities Act 1971, s 4.

191 *Zhang v Police*, above n 189, at [36]. Justice Keith's dissenting judgment in *Hosking v Runting,* above n 38, displays similar reasoning. He considered the omission of privacy from NZBORA to be "significant": at [181].

192 *Hosking v Runting*, above n 38, at [204] and [206].

he opined, indicated "the reluctance of the law" to recognise a broad obligation with respect to privacy, as contained in the ICCPR.[193]

In some notable cases, however, courts have interpreted domestic silence as permitting, or even inviting, judicial development of the law on that point. And unincorporated international instruments have played an important role in the creation of new rules to fill the silence. The majority's reliance on the ICCPR in *Baigent's Case*, for example, was enabled by their conclusion that the absence of a remedies clause in NZBORA was "probably not of much consequence".[194] The fact that it had been included in the draft Bill of the White Paper and subsequently excluded from the Act showed that "Parliament was content to leave it to the Courts to provide the remedy".[195]

An interesting trend to monitor is the courts' reliance on general purposive statements in statutes ("an Act to affirm New Zealand's commitment to …", or "the purpose of this Act is to implement New Zealand's obligations under …") when applying the presumption of consistency (or developing the common law) in a way that gives effect to provisions in the instrument that were not specifically incorporated. Chief Justice Elias took this approach in *Hamed v R* when she explained why s 21 of NZBORA should be interpreted to require authority of law for state intrusion on personal freedom:[196]

> Such interpretation is necessary to give effect to New Zealand's international obligations under art 17, and is therefore to be preferred, especially when the legislation in question is enacted to implement those obligations.

This reasoning supports the proposition that the presumption of consistency is "stronger" when legislation is directed towards ensuring compliance with international obligations. It also leads to the question: in what circumstances will it and will not it be appropriate to interpret a statute consistently with provisions that Parliament did not directly incorporate?

XII CONCLUSION

By departing from the idea of "all-or-nothing" binding rules embodied by the theory of dualism, we become more aware of the subtle, yet significant ways in which unincorporated international instruments shape legal judgment. Courts can be seen to carry out a Dworkinian style of reasoning, in which answers are justified by demonstrating their coherence with principle and values embedded in the legal system. It appears unincorporated international instruments are able to play different

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193 At [204].

194 *Baigent's case*, above n 129, at 676 per Cooke P.

195 At 718 per McKay J.

196 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [36].

roles in judicial reasoning, depending on the presence and combination of a range of factors and principles in any given case.

In some cases, they are treated as purely persuasive authority to which the court may refer as additional support for its arguments, or disregard entirely. This may occur when, for example, the instrument is non-binding or its terms are vague and uncertain. In other contexts, however, unincorporated instruments and the values contained in them behave as influential authority, demanding consideration in spaces of discretion. Thus courts may imply them as mandatory considerations in the exercise of discretionary powers in an effort to promote those values and maintain the integrity of government.

Finally, courts may treat unincorporated instruments as demanding a decision-outcome that is consistent with their terms or values. In these cases the instruments can be said to operate as determinative authority. This may occur through the presumption of consistency if, for example, the domestic legislation has close links with the relevant international obligations, provided that the exclusion of the international rule from the statute is not seen as deliberate. Or it may occur if the court is satisfied that development of the common law in conformity with an important international value would involve only an incremental step forward from precedent. In these types of cases, unincorporated obligations bear a greater resemblance to binding authority than permissive authority, although their influence can still be rebutted by contrary statutory wording.

It would be helpful for judges to articulate, where possible, the role they see these instruments as playing in their judgments, and the factors or principles that have influenced the instruments' effect. Over time, this approach would increase certainty and predictability in the law. Importantly, it would also require both the courts and wider legal community to engage with questions of when and why, in New Zealand's changing constitutional context, it is appropriate to give significant legal effect to international rules that have not been formally adopted by Parliament.[197]

197 See Dunworth "Lost in Translation: Customary International Law in Domestic Law", above n 9, at 154.