Domestic Procedures for International Treaty Actions: The courts and unincorporated treaties in New Zealand

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I. Introduction

This article is a companion paper to a recently published article that provides a detailed description of the international treaty examination procedures that New Zealand has put in place to increase the role of Parliament with respect to international treaty actions.[1] That article noted that a separate article would be addressing a further important (but largely unrecognised) background issue to the new procedures. That issue concerns the relevant case law particularly with respect to unincorporated treaties.[2]

It is suggested that the question of unincorporated treaties is of special importance to the relationship between international law and domestic law in countries like New Zealand, and to the relationship between all three branches of government.

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1 See Bracegirdle A, 'Domestic Procedures for International Treaty Actions: Description of New Zealand Procedures' (2003) 14 PLR 28.

2 An unincorporated treaty is one that has not been incorporated into domestic law through legislation passed by or under the authority of Parliament. A treaty is only incorporated into domestic law if, and to the extent that, the statutory provisions give it the force of law or other direct application or effect. Otherwise, it is, properly, only the statutory provisions that apply. A treaty that has undergone transformation into statutory provisions is not thereby 'incorporated' into domestic law. Mere references in a statute to a treaty are also not incorporation.

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The treaty examination procedures point to possible developments in those relationships. On a broader front, the procedures may be pointing towards an emerging convergence in different international approaches to the domestic legal status and application of treaties and to international law generally. But if so, it is important that any recourse by the courts (and the Executive) to unincorporated treaties is managed with sensitivity to concerns over certain aspects of globalisation and over democratic accountability.[3]

The purposes of this article, then, are several. First, it examines the primary case law of the Court of Appeal, New Zealand's highest domestic court until the advent of the Supreme Court in 2004, on the use made of treaties that have not been incorporated into domestic law by Parliament. Relevant recent decisions from other jurisdictions of the Privy Council, New Zealand's highest court until its replacement by the Supreme Court last year, are also noted. The purpose of that examination is to show that the Court of Appeal has been pressing against, if not pushing out, the constitutional boundaries in this area, to the detriment of Parliament's role as lawmaker. Second, the article responds to some of the enthusiasm that has been expressed in New Zealand at constitutional developments of that kind, suggesting that it is misplaced and that such developments serve to enhance rather than limit the power of the Executive vis-à-vis Parliament. Third, in relation to the incorporation and application of treaties, the article offers some suggestions that are more sensitive to democratic concerns and the interests of Parliament.

II. Court of Appeal Decisions Concerning Unincorporated Treaties

(a) General position at international law

As is well known, in countries (such as many in the Commonwealth) that follow a 'dualist' approach to the relationship between international treaties and domestic law, treaties form part of domestic law only if they are incorporated into it through legislation passed by or under the authority of Parliament, and the act of becoming party to a treaty has consequences only at international law and not also at domestic law. In the case of countries that follow the 'monist' approach, the argument for treaties applying directly in domestic law on a self-executing basis can be made on the ground that Parliament (or one House of Parliament) will have given its consent to them; in the case of the dualists, the only point at which it may be possible to talk of parliamentary 'approval' of a treaty is when legislation is put before Parliament

[3] 'Globalisation' has generated a vast literature and is beyond the scope of this article. There is not even consensus on a definition of the word, but borderlessness, interdependence and interconnectedness are among the simplest suggestions. 'Democratic accountability', in the present case, means: (a) maintaining the accountability and responsiveness of the Executive to the national representative institution (Parliament), and (b) applying foreign law to the citizen only as enacted by Parliament.

and passed to implement the treaty in domestic law in circumstances where it is clear that that is the purpose of the legislation.[4]

For the dualists, it therefore follows that, unless the treaty has been incorporated into domestic law, it ought not be applied (or otherwise recognised, other than to a limited extent) by the domestic courts. If that principle is not respected, international treaties would be brought into domestic law, and be binding on ordinary citizens, without any parliamentary involvement. Concern about a 'democratic deficit' and suspicion about international treaties (and perhaps international law more generally) could be expected to follow.

(b) Tavita and Baigent cases

There are signs of such concern in several countries.[5] In New Zealand's case, standard dualist principles were reasonably well settled[6] (and international treaties received little attention in the New Zealand courts) until the mid 1990s, when unincorporated treaties were relied on against the Crown in two Court of Appeal decisions in the human rights area. One of those cases, known as *Baigent's Case*,[7] can be explained, at least in part, on the ground of an anomalous fact situation, and did not in any event involve direct application of the treaty, the International Covenant on Civil and Political Rights, that was drawn on in the judgment. It is also perhaps worth noting that the international obligation that was drawn on in that case was Article 2(3) of the Covenant which requires an effective remedy for the violation of rights or freedoms 'as herein recognised'. The substantive right at issue in the case, section 21 (concerning unreasonable search) of the New Zealand Bill of Rights Act 1990 (a statute which affirms New Zealand's commitment to the Covenant but was not necessary for New Zealand's implementation of or

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[4] This summary of the legal position is not intended to understate the complexities of monist/dualist approaches: see further below (nn 87–90 and the text related thereto).

[5] Particularly in Australia. Ironically, in the most controversial case there in recent times, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, where the Australian High Court decided that ratification of a treaty created a legitimate expectation that a decision maker will act in accordance with the treaty, it was the Australian Government that was on the receiving end of the 'democratic deficit'. A Joint Statement was made by Australian Ministers in response to the decision at the time, and successive Australian governments responded to it by introducing legislation, the Administrative Decisions (Effect of International Instruments) Bill. Such legislation was enacted in South Australia, and the case has generated a substantial literature. However, the decision probably no longer represents the law in view of the very recent criticisms of it by 4 of 5 Judges of the High Court in a decision that went unanimously against the applicant: see *Re Minister forImmigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502.

[6] The leading case was probably *Ashby v Minister of Immigration* [1981] 1 NZLR 222. For an excellent summary of the principles more generally on the relationship between international law and municipal law, see Jennings R and Watts A (eds), *Oppenheim's International Law*, 1992 (9th edn), Vol 1, paras 18–21. See also Aust A, *Modern Treaty Law and Practice* (2000), especially Ch 10, 'Treaties and Domestic Law'.

[7] *Simpson v Attorney-General* [1994] 3 NZLR 667.

compliance with that international instrument which New Zealand had ratified over a decade earlier), is in quite different terms to the 'corresponding' right in the Covenant, Article 17 concerning arbitrary or unlawful interference with privacy, home, etc.

Too much has been made of the other case, *Tavita v Minister of Immigration*,[8] in which the Court considered as 'unattractive' and as pointing to 'window dressing', comments by the Crown to the effect that Ministers and Departments are entitled to ignore international instruments in the exercise of their discretion under legislation. In that case, the treaties at issue included the Convention on the Rights of the Child, which New Zealand had ratified earlier in the same year but which had not required separate implementation in New Zealand law. The Court commented that legitimate criticism could extend to the Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

But several aspects of the case should not be overlooked, notwithstanding the reference that has been made to it in other New Zealand cases and the influence that it seems to have had on the subsequent controversial decision of the Australian High Court in *Teoh's Case*.[9] It was only an interim judgment of the Court of Appeal, and the appeal was adjourned sine die (although a stay on the plaintiff's removal from New Zealand under immigration legislation remained in force). The point about the domestic legal status of international instruments was not fully argued, and the Court considered that a final decision on the argument was neither necessary nor desirable. If the Court was intending to enhance the status of international law, and human rights treaties in particular, it is not clear how it could achieve that in the absence of recognition that governments are contracting at international law with the other states parties in becoming party to treaties and that it is under that law that governments are accountable for alleged non-compliance with treaties. The precise purport of the case is also obscure. It did not decide that international treaty obligations founded mandatory relevant considerations (such that failure by decision makers to take the obligations into account would render the decisions reviewable in the courts) on the facts before it. Rather, it appears simply to have been leaving that open as a possibility for further development by the courts in future.

(c) Other cases

In New Zealand's case, what is perhaps most significant is that no further conclusive development, in respect either of treaty obligations as mandatory relevant considerations or of the application of unincorporated treaties more

[8] [1994] 2 NZLR 257. The relevant Ministerial decision at issue in this case was taken before the child was born and before New Zealand became party to the main treaty at issue.

[9] See above, n 5.

generally, has yet taken place. This is despite the fact that treaties have come before the Court of Appeal frequently since *Tavita case*. The Court of Appeal set out relevant considerations in *Puli'uvea case*[10] and *Rajan case*[11] (and also examined the relevant statutory provisions), but again did not need to take final decisions. In *New Zealand Air Line Pilots' Association case*,[12] it reiterated the long-standing orthodox point that the stipulations of a treaty duly ratified by the executive do not, by virtue of the treaty alone, have the force of law, and it went on to note that the giving of full effect to treaty provisions in New Zealand law is required in some cases and not in others and that, if national legal effect is needed, the effect might be given indirectly as well as directly. In *Tangiora case*,[13] upheld on appeal to the Privy Council, it decided that international treaty provisions, when used to assist in the interpretation of domestic statutes, must be relevant and applicable to the construction of the statute concerned. In *Butler's case*,[14] another case of judicial review in the immigration (refugee) area, it noted that if the courts could consider applications for review in such cases, the basic principle that the executive cannot change the law by entering into treaties in the absence of securing any necessary legislative change would appear to be avoided. In *Nicholls and Tikitiki case*,[15] it stated that international considerations are relevant only in the process of bona fide interpretation of domestic legislation, not to create ambiguity or uncertainty that is not there, and it specifically agreed with the Solicitor-General's submission that international law is available to clarify Parliament's intention, but not to reshape it.

Extensive reference was made to relevant treaties by the Court of Appeal in a case that was concerned with whether 'same sex' marriages must be permitted under anti-discrimination law.[16] In that case, the Court decided against further development of the law. The law was further developed by the Court in a defamation case involving qualified privilege and political comment, but in that case the international material provided only limited support and, on appeal, the Privy Council referred the decision back for reconsideration to the Court of Appeal where a different balance was struck.[17] The common law on privacy has been developed by the Court in another recent case, and some of the comments on and

[10] *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 and [1996] 3 NZLR 538 (application for leave to appeal to the Privy Council only).

[11] *Rajan v Minister of Immigration* [1996] 3 NZLR 543.

[12] *New Zealand Air Line Pilots' Association Inc. v Attorney-General and Others* [1997] 3 NZLR 269.

[13] *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129.

[14] *Butler v Attorney-General and Refugee Status Appeal Authority* [1999] NZAR 205. At the suggestion of the Court, the Refugee Convention (and Protocol) was subsequently enacted into NZ law, but unhappily the Immigration Amendment Act 1999 achieved a lack of clarity on the issue of incorporation.

[15] *Nicholls and Tikitiki v The Registrar of the Court of Appeal and Attorney-General* [1998] 2 NZLR 385.

[16] *Quilter v Attorney-General* [1998] 1 NZLR 523.

[17] *Lange v Atkinson and Australian Consolidated Press Ltd* [1998] 3 NZLR 424; see also at [2000] 1 NZLR 257 (Privy Council), and [2000] 3 NZLR 385 (Court of Appeal — second decision).

use of unincorporated treaties in that case are admittedly borderline.[18] Unincorporated treaties, including the United Nations Convention on the Law of the Sea, were extensively relied upon by the Court in a maritime case.[19] But that was done on the back of a determination by the Court that a principle set out in that Convention to the effect that the state of nationality of a ship has exclusive jurisdiction over the ship on the high seas is declaratory of customary international law (and thus part of domestic law in any event), even though the only recent application of customary international law in the New Zealand courts had been in cases involving sovereign immunity.[20] In other words, customary international law operated as a hook (or Trojan horse) to make a number of unincorporated treaties accessible to the Court, in a circumstance where the use of such law was not obvious, or even available, on the face of the statutory provision concerned.

Unincorporated international human rights instruments have informed, but have not actually been applied in, decisions of the Court in other recent cases where the Court has rejected the appeals of the plaintiffs or appeals have been allowed on other grounds.[21] One recent case, involving the application of a provision in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), concluded under the auspices of GATT/WTO as part of the Uruguay Round agreements in 1994, is less easy to square away with principle, but the context of

[18] *Hosking v Runting* [2005] 1 NZLR 1.

[19] *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44. For a recent criticism of this case, on statutory interpretation grounds, for using international law to create an exception to a statute in a manner that undermines a stable legal system, see Evans J, 'Questioning the Dogmas of Realism', in Bigwood R (ed.), *Legal Method in New Zealand: Essays and Commentaries* (2001), at 293–5. Also, it can be drawn from the article by Geiringer C, '*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law' (2004) 21 NZULR 66, that the broad model of presumption of consistency with international obligations that was applied in this case and *New Zealand Airline Pilots' Association case* may be more radical in its potential implications for domestic law than the *Tavita* model of treaties as mandatory relevant considerations.

[20] See *Marine Steel Ltd v Government of Marshall Islands* [1981] 2 NZLR 1; *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738; *Reef Shipping Co Ltd v The ship 'Fua Kavenga'* [1987] 1 NZLR 550; *Governor of Picairn and Associated Islands v Sutton* [1995] 1 NZLR 426; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278; and *Air New Zealand Ltd v Director of Civil Aviation & Attorney-General* [2002] 3 NZLR 796 (also act of state).

[21] *Tranz Rail Ltd v Rail & Maritime Transport Union* [1999] 1 ERNZ 460; *Mendelssohn v Attorney-General* [1999] 2 NZLR 268; *R v N* [1999] 1 NZLR 713; *R v Harlen* (1999-2001) 18 CRNZ 582; *B v G* [2002] 3 NZLR 233; *D v S* [2002] NZFLR 116; *R v Oran* (2003) 20 CRNZ 87; and *R v Jackson* CA401/01, 27 August 2002 (unreported). But see *R v Poumako* [2000] 2 NZLR 695 and *R v Pora* [2001] 2 NZLR 37, as to the International Covenant on Civil and Political Rights supporting the New Zealand Bill of Rights Act 1990 with reference to criticisms by the Court of criminal sentencing legislation having retrospective effect; cf *R v D* [2003] 1 NZLR 41, as to the Sentencing Act 2002 (in relation to the sentence of preventive detention) only being subject to interpretation consistently with the Covenant if the words of the statute allow it, and *ER v FR* [2004] NZFLR 633, as to the Covenant not being incorporated and not providing a basis for a declaration of inconsistency.

that case is complex and difficult and it is not easily construed.[22] Other recent cases have also extensively referred to, but without appearing to be decisively determined by, GATT/WTO customs valuation codes that have been implemented in, but not incorporated into, New Zealand law.[23]

(d) Influence on High Court

In the lower courts in New Zealand, it is probable that the Court of Appeal decision in *Tavita case* has had a significant influence on the balance of the case law.[24] But both pre- and post-*Tavita*, statements of orthodox principle by the High Court can be found.[25] In the pre-*Tavita* case, the judge put it forcefully:

> I can accept that, as a matter of proper conduct, Ministers of the Crown should, in principle, seek to uphold New Zealand's international obligations. They are the executive of the country, and we do not wish to become an international pariah. However, it is a further and long step to hold that there is some consequential generalised duty, enforceable at law, to that effect. Is it for the Courts to direct Ministers to obey the UN Charter? International conventions of various descriptions? . . . What is certain is that an order by way of mandamus to a Minister to (indirectly) procure compliance with New Zealand's international obligations in a way which will benefit the applicant, is in substance the enforcement of an international treaty — not itself part of domestic law — for the benefit of that private citizen applicant. I will not do indirectly something which the Court is forbidden — and for good public policy reasons — to do directly.[26]

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[22] *Pharmaceutical Management Agency Ltd v Commissioner of Patents* [2000] 2 NZLR 529, a decision now arguably corrected on this point of principle by *Pfizer Inc v Commissioner of Patents* [2005] 1 NZLR 362. See also *Anheuser Busch v Budweiser Budvar National Corporation* [2003] 1 NZLR 472, where the reference to unincorporated treaty provisions (the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property) played a much more peripheral part in the decision.

[23] *Elitunnel Merchanting Ltd v Regional Collector of Customs* (2000) 1 NZCC 61, 151; *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand Customs Service* (2001) 1 NZCC 61, 198; *Chief Executive of New Zealand Customs Service v Nike New Zealand Ltd* [2004] 1 NZLR 238. See, similarly, *Chief Executive of the New Zealand Customs Service v Rakaia Engineering & Contracting Ltd* (2002) 1 NZCC 61, 217, concerning the 1983 International Convention on the Harmonized Commodity Description and Coding System adopted under the auspices of the then Customs Cooperation Council (now the World Customs Organisation). On the implementation/ incorporation distinction, see above n 2.

[24] One recent commentator has referred to the confusion and lack of consistency characterising the High Court's jurisprudence as it has grappled with the mandatory relevant considerations approach to treaties and virtually ignored the presumption of consistency approach: see Geiringer C, above n 19, at 98–101.

[25] See, for example, *Federated Farmers of New Zealand Inc v New Zealand Post* [1990–92] 3 NZBORR 339; *Lawson v Housing New Zealand* [1997] 2 NZLR 474.

[26] *Ibid*, at 390. However, in a more recent case, the same judge seems virtually to have accepted that the Deportation Review Tribunal was bound to consider an unincorporated treaty obligation, Article 11 of the International Covenant on Economic, Social and Cultural Rights: *Rahman v Deportation Review Tribunal & Ministerof Immigration*, HC CP49/99, 26 September 2000 (unreported).

One author, after citing that case, went on to note the increasing influence of international law in judicial interpretation of domestic law, but concluded:

> the Courts will need to avoid overemphasis of international law which has not been enacted in the domestic law. Otherwise, the legislature may decide to intervene in order to maintain basic principles of parliamentary democracy.[27]

The foregoing examples of cases from New Zealand's experience make it difficult to avoid the conclusion that the floodgates have now opened, or perhaps that the goalposts have now shifted, in terms of the influence of unincorporated international treaties in domestic law.[28] That is a development which probably made a response by Parliament in terms of the international treaty examination procedures inevitable.

III. Respecting Parliament's Role

(a) Calls for further developments by the courts

In New Zealand, there has probably been more concern with the Crown's implementation of and accountability for compliance with treaties to which it is party, than with the courts giving effect to unincorporated treaty obligations. There have been articles of a descriptive kind by one author commenting on the question of a more broadly receptive approach to international human rights instruments, and treaties in general, in New Zealand law.[29] But the judicial developments have also inspired calls in New Zealand for the courts to go further in this area. There have been calls for international treaties to be used in judicial review, specifically for international obligations to found mandatory relevant considerations on the part of

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[27] Williams D, *Environmental and Resource Management Law*, 2nd edn (1997), para 2.24.

[28] One recent study which analysed all reported Court of Appeal decisions in the 3 years 1976, 1986 and 1996 reported that international treaties were relied on in 13 per cent of cases involving statutory interpretation by the Court in 1996, compared to none in 1976 and 1986: Allan J, 'Statutory Interpretation and the Courts' (1999) 18 NZULR 439. However, for a criticism of the limitations of that list, see Keith K, 'Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness', in Bigwood, above n. 19, at 89–90; and for a different list, which nevertheless shows substantial growth in citations of international legal texts, periodicals and law reform materials, see Richardson I, 'Trends in Judgment Writing in the New Zealand Court of Appeal', *ibid*, charts at 269–78.

[29] Keith K, 'The Application of International Human Rights Law in New Zealand' (1997) 32 Texas Intl LJ 401; Keith K, 'The Impact of International Law on New Zealand Law' (1998) 6 Waikato Law Rev. 1; Keith K, 'Roles of the Courts in New Zealand in Giving Effect to International Human Rights — With Some History' (1999) 29 VUWLR 27; Keith K, above n 28, at 89–92; Keith K, 'Law made Elsewhere: Do We Need a New Way of Thinking?', paper to NZ Law Conference, 2001 (see Internet site; http://www.nz-lawsoc.org.nz/conference/papers2.html); Keith K, 'Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?' (2004) 63 Camb LJ 581; Keith K, 'The Unity of the Common Law and the Ending of Appeals to the Privy Council' (2005) 54 ICLQ 197.

decision makers and to give rise to contents-based substantive review.[30] There has been a dense, and to some extent challenging, call for unincorporated treaties (particularly, it seems, international human rights instruments) to be of broad interpretative application in relation to the exercise of statutory discretionary powers.[31] There has been a call for expanding the use of the presumption of consistency with international obligations in statutory interpretation by the courts.[32] There has been a claim that Parliament's concern that court recognition of unincorporated obligations somehow usurps parliamentary sovereignty is misguided.[33] There has also been a suggestion that the parliamentary examination procedures ought to legitimise the application of international treaties by the courts.[34]

This last suggestion has, in effect, already been commented upon in the earlier article.[35] The other calls raise many issues, the proper consideration of which is beyond the scope of this article. Some comments can however be made. So far as the calls for expanded use of unincorporated treaties in administrative law are concerned, those calls are made with particular reference to cases before the courts involving international human rights treaties. It may be that in common law dualist jurisdictions, unincorporated human rights treaties are taking on a sui generis character and becoming an exception to the general rule that international treaties cannot be applied in the absence of incorporation by the legislature into domestic law. At least one book, written prior to the passage of the Human Rights Act 1998 in the United Kingdom, is devoted to sometimes ingenious arguments in support of a broad development of that kind.[36]

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[30] See Joseph P, 'Constitutional Review Now' [1998] NZ Law Rev. 85, at 109–19; Joseph P, *Constitutional and Administrative Law in New Zealand* (2001), at 782–4; Taggart M, 'Introduction to JR in New Zealand' [1997] JR 236, at 239; Taggart M, 'Administrative Law' [2003] NZ Law Rev 99, at 107–9.

[31] Dyzenhaus D, Hunt M & Taggart M, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 Oxford University Commonwealth LJ 5 (presented by Taggart to NZ Law Conference 2001, see Internet site, above n 29).

[32] Geiringer C, above n 19.

[33] Chen M, 'A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making' (2001) 19 NZULR 448, at 452 (n. 4).

[34] Poole M, 'International Instruments in Administrative Decisions: Mainstreaming International Law' (1999) 30 VUWLR 91, at 107–10; Palmer G, 'Human Rights and the New Zealand Government's Treaty Obligations' (1999) 29 VUWLR 57, at 62; Taylor P, 'The New Zealand Treaty Making Process' (June 1999) 133 Planning Quarterly 3, at 4.

[35] See above, n 1, at 34–35.

[36] Hunt M, *Using Human Rights Law in the United Kingdom Courts* (1997). The dilemma that the author faces, however, in reconciling such a development with parliamentary sovereignty is emphasised when he resorts to taking a shot at the worth of Parliament as an institution (*ibid*., at 24). This has echoes of the debate over the ultra vires basis for judicial review: see, in particular, the strident criticisms of Parliament and representative democracy in Joseph P, 'The Demise of Ultra Vires — A Reply to Christopher Forsyth and Linda Whittle' (2002) 8 Canterbury Law Rev. 463, at 470–73.

Yet, from the point of view of international law on treaties, human rights treaties are not in a special position (some do not provide for withdrawal, but that is not a unique feature, and nor is the fact that they may embody rules of customary international law and that obligations with respect to human rights are specifically mentioned in the United Nations Charter). It is not possible to generalise about treaties or international law from a human rights sample (any more than from an environmental or trade and economic sample). Many treaties require states parties to impose prohibitions or other burdens of one sort or the other on individuals, and some of the cases noted earlier have already sought to go beyond human rights treaties. As this concern has recently been put:

> Would the argument apply to duties imposed on individuals as well as rights? And, as a result, could an individual complain if a duty were imposed on him or her by treaty without legislative sanction (remembering the rule of law doctrine that one should not be punished except where in breach of the law)? From a wider perspective, should the Crown enjoy a de facto legislative power?[37]

(b) Enormous scope of treaty obligations

New Zealand's treaty links are voluminous and concern virtually every area of government activity, with a huge range of on-going negotiations.[38] Looking across them, it could be concluded that the international community has had an excessive preoccupation in the past with promoting the positive side of 'globalisation'. If so, it might be observed that redressing the balance in the future through greater attention to the 'negative' aspects of 'globalisation' could be expected to entail comparative growth in treaties establishing international crimes and other controls and providing for co-operation between enforcement and regulatory authorities. (The experience of the 1990s might also suggest that the subject of compliance with treaties generally, and enforcement of compliance, is bound to become an even more crucial matter in future. The international rule of law, and the international legal order, will not prosper from an uneven approach of picking and choosing which treaties to support, and when.) International criminal and related treaties are unlikely to be

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[37] Conte A, 'From Treaty to Translation: The Use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand' (2001) 8 Canterbury Law Rev. 54, at 57. See also the very forthright statement of such concern by the House of Lords in *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 2 All ER 523, at 526 and 544, which also in effect makes the point that non-application of unincorporated treaties is not a legislated principle but something that the courts have elaborated as a principle of the common law, and by Laws LJ in *European Roma Rights Centre v Immigration Officer* [2004] 4 All ER 247 in which he drew attention to the differences between international treaties negotiated between sovereign states (characterising treaties as 'free radicals') and Acts of Parliament made by national assemblies answerable to citizens at elections.

[38] The list of New Zealand treaties alone runs to 2 volumes: see *New Zealand Consolidated Treaty List* (Part 1, Multilateral Treaties, and Part 2, Bilateral Treaties), Ministry of Foreign Affairs and Trade (1997), published as New Zealand Treaty Series 1997, No. 1 and No. 2 (although that very comprehensive list also includes inherited treaties and terminated treaties).

received enthusiastically as candidates for direct application in domestic law. Looked at from this point of view, dualism (properly understood[39]) can and does serve to protect people from the impact of treaties that have not been through the democratic process of incorporation into domestic law.

In the case of treaties in the 'good' category (although some treaties such as extradition treaties may be both good and bad for individuals), and particularly in the case of treaties in the human rights area, part of the problem seems to be an assumption that if the treaty is not contained in domestic law in terms, then the government is not giving proper effect to it, and the courts ought to make up for that omission by having recourse to it directly. It may not be generally understood that international law, while very much concerned that states do comply with their treaty obligations, does not address or regulate how countries give effect to treaties, that being a matter for national constitutional systems. This is not the place to go into the intricacies of domestic implementation of international treaties,[40] even though this issue, on analysis, often lies at the heart of debates over treaties. Suffice to say that it is a difficult and complex art, for the monists as well as for the dualists, with many choices.

In New Zealand, it is rare for treaty texts to be included in legislation, and rarer still for them to be given the force of law in any respect. Although this practice may have increased in recent years, it is to be resorted to with caution, since it can create confusion about the status of treaties as instruments, and accountability for them, on the international legal plane, and blur the distinction between interpretation of treaties directly and interpretation of statutory provisions giving effect to them.[41] Because the law will only be changed when it is necessary to do so to give effect to the terms of a treaty, legislation can be expected when the treaty entails the imposition of new prohibitions or other obligations on people, and not necessarily when it is providing for rights. Most dualist states will have a mass of statute law (and common law) that is already consistent with, and can be relied upon for the

[39] See above, under the section on 'General position at international law', responding to the academic tendency to cast dualism in a negative light nowadays.

[40] See, for example, Thornton G, *Legislative Drafting* (1996), at 308–14; Burrows J, *Statute Law in New Zealand* 3rd edn (2003), at 335–43; Law Commission (of New Zealand) Report 34, *A New Zealand Guide to International Law and its Sources* (May 1996), at 14-22; Law Commission (of New Zealand) Report 45, *The Treaty Making Process: Reform and the Role of Parliament* (December 1997), at 51–57; Legislation Advisory Committee (LAC), *Guidelines on Process and Content of Legislation* (2001), Ch 6, 'International Obligations and Standards', and Appendix 3, 'Treaties' (see Internet site; http://www.justice.govt.nz/lac/index.html), a publication which contains a general injunction against legislating unnecessarily; Gobbi M, 'Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand's Constitutional Response' (1998) 6 Tulane J. of Int'l & Comp. Law 57; Gobbi M, 'Drafting Techniques for Implementing Treaties in New Zealand' (2000) 21 Statute Law Rev. 71; Gobbi M, 'Making Sense of Ambiguity: Some Reflections on the Use of Treaties to Interpret Legislation in New Zealand' (2002) 23 Statute Law Rev. 47.

[41] See Jennings & Watts, above n 6, para. 631 (n 2), at 1270.

implementation of, major human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. The tradition in such jurisdictions of detailed and precise legislation also makes these treaties, which include broad, even vague, provisions (overlapping with existing statutes at many points but at a level of generality), difficult to incorporate in terms while maintaining reasonable certainty. There may, as well, be an argument as to whether direct application of general, sometimes minimum, international standards might operate to reduce the protection of a detailed, comprehensive approach under existing law. As a starting point, domestic litigants ought generally be required to base their arguments on legislation or the common law, and not to seek refuge in treaties that are in principle to be left to the international legal system.

(c) Limits on use of unincorporated treaties

None of this is to suggest that unincorporated treaties can be of no assistance in domestic law. There are recognised situations where assistance can be obtained. But those cases are limited,[42] and any expansion ought to be a matter of caution. Assistance that extends to application, whether directly or (beyond a certain point) indirectly, of unincorporated treaties, as if they are little different from domestic statutes, and especially involving their enforceability at private suit as some litigants have sought to do, is particularly problematic. As has been noted:

> There are few, if any, exceptions to the principle that legislation is required to make a treaty part of domestic law. This principle is the necessary counterweight to the executive's treaty-making power, for without it the executive would be able to circumvent the legislature and change the law of the land by adoption.[43]

It would be inadequate to reply that the courts could be relied upon to enforce treaties only against the Crown and not individuals, because cases readily suggest themselves where enforcement at the behest of one individual would be to the detriment of other individuals.

Of course, the boundaries are unlikely ever to be sharply determined. As one perceptive comment puts it:

> No-one doubts the proposition that, under current principles which apply in both New Zealand and Australia, treaties do not have full effect in domestic law unless

[42] It can be argued that they are more limited than is suggested, for example, in Law Commission Report 34, above n. 40, at 23–6.

[43] Hastings W, 'New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi' (1989) 38 ICLQ 668. He has also written: 'Individuals cannot enforce a treaty against the government. Courts have considered that the entering into, performance, and breach of treaties by the executive is not contestable by private individuals. Individuals may, however, enforce legislation implementing a treaty, against the government if the legislation specifically states that it binds the Crown.': see Chap. 16, 'International Environmental Treaties', in Milne C (ed.), *Handbook of Environmental Law* (1992), at 277.

> implemented by a relevant Parliament. I choose this formulation deliberately, not to excite controversy by pushing the acceptable boundaries of the influence of international law, but to make the point that the precise rule is not entirely clear. It has been formulated in various ways: treaties 'do not form part' of domestic law, do not 'alter' domestic law, have 'no direct legal effect', do not alter rights, modify law orimpose financial obligations. Whether or not there is a difference between any of these formulations, or others, may not have been a significant question in the past. It is becoming more significant now, as the influence of treaties is more keenly felt.[44]

The same commentator went on to draw attention to the need to reconsider treaty implementation, as the other side of that coin: 'unless there is a sea-change in the detail and regularity of incorporation, uncertainty about the effect of treaties before courts will continue as well.'[45] She concluded:

> Ultimately it may be necessary formally to accept that at least some international instruments have direct effect subject to appropriate democratic safeguards. But we are still a long way from that.[46]

There is also the alternative route for the 'application' of unincorporated treaty obligations that reflect rules of customary international law and, for that reason, apply automatically as part of the common law. The lack of rigour by the courts in their preoccupation with non-incorporation at the expense of that option has been criticised,[47] although evidence of state practice, on which such rules are based, has been described as 'scattered and unsystematic'[48] and may mean that the relevant rules are not easy to identify with reasonable certainty in particular cases. It may be, for example, that the landmark House of Lords decision in *Pinochet case*[49] is to be properly understood in terms of the application of customary international law, and not as a case of the application of unincorporated treaty obligations.

The limits on the assistance that unincorporated treaties can provide to litigants has nothing to do with the fact that treaties (at least the multilateral kind) look

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[44] Saunders C, 'A Prerogative Under Pressure', (unpublished) paper to Third Annual Administrative Law Conference (in New Zealand), 1998, at 13.

[45] *Ibid*, at 20.

[46] *Ibid*

[47] Higgins R, 'The Relationship Between International and Regional Human Rights Norms and Domestic Law' (1992) 18 Commonwealth Law Bulletin 1268; Cunningham A, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 ICLQ 537. See also Higgins, *Problems and Process: International Law and How We Use it* (1994), especially Ch 12, 'The Role of National Courts in the International Legal Process'; and for renewed interest in this area in New Zealand, see Dunworth T, 'The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?' (2004) 15 PLR 36, and Dunworth T, 'Hidden Anxieties: Customary International Law in New Zealand' (2004) 2 NZJPIL 67.

[48] Law Commission Report 34, above n 40, at 31.

[49] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening) (No. 3)* [1999] 2 All ER 97.

something like domestic legislation. The point has been made that treaties are, properly speaking, not a source of law but a source of obligation between the parties.[50] Looked at from this point of view, they are more analogous to contracts (or bargains) than to legislation on the domestic plane. This point has been partly recognised from very early times, but perhaps less so recently, in calls for parliamentary approval of treaties.[51] The point also occasionally arises in court decisions bearing on the interpretation of treaties.[52] Treaties in their origins are not 'legislated', and it is not by chance that they commonly refer to the parties as the Contracting States. While the domestic courts can, within bounds, obtain some assistance from unincorporated treaties, which may be relevant (like other material sources of evidence[53]) to issues before them, it is to be expected that the application and enforcement of treaties is a matter between the parties to the contracts at international law. As the Court of Appeal put it in one recent (habeas corpus) case: 'The claim for a direct Covenant remedy in a New Zealand court also appears to be flatly contrary to principle.'[54]

(d) Other reasons to involve Parliament

The need for parliamentary involvement arises rather for a different reason (apart of course from the constitutional considerations). That is the huge, sometimes called driving, influence that treaties are perceived to be having on government policy and on the statute book. They are not like regulations or other delegated legislation or (domestic) Crown contracts, but can be more general and intrusive in their purpose and substance. It has been estimated that as much as one-quarter of all New Zealand public Acts, in whole or in part, may be implementing international treaties,[55] but

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[50] See Jennings R, 'Recent Developments in the International Law Commission: Its Relation to Sources of International Law' (1964) 13 ICLQ 385, at 388–90; also see Jennings & Watts, above n 6, para. 11.

[51] For example, see *The Federalist* (1787), particularly No. 75 (Hamilton A, 'The Treaty-Making Power of the Executive'); Bagehot W, *The English Constitution* (1872, in Introduction to 2nd edn); cf Blackburn R, 'Parliament and Human Rights', Chap. XI in Oliver D & Drewry G, *The Law and Parliament* (1998), at 183 and 189–90.

[52] A recent New Zealand Court of Appeal decision in point is *Edwards v United States of America* [2002] 3 NZLR 222, at 229 (concerning an extradition treaty), a case which does, however, also reinforce the point that the courts may have been making increasing reference to unincorporated treaties because they may have been regarding them more like legislation than contracts. See also *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22 concerning the interpretation of a contract for carriage of goods that incorporated treaty rules (the Hague Rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading) in a situation where the carriage was not governed by either international treaty or the national law of either party.

[53] The Evidence Act 1908 (N.Z.) provides, in sections 37 and 38, for international treaties to be proved and received in evidence.

[54] *McVeagh v Attorney-General* [2002] 1 NZLR 808, at 819.

[55] LAC *Guidelines* (1991 edn), para 44 (p 15) & Appendix E (pp 71–82), now revised with somewhat different comments and lists (2001 edn, above n 40), Ch 6 & Appendix 3; see also Law Commission Report 34, above n 40, Appendix C (at 116–9).

often without any indication of that fact in the statutes concerned. It has been pointed out, with reference to the presumption that statutes are not intended to contravene international law serving as a general qualifying doctrine: 'Since New Zealand is a party to around 1,000 multilateral treaties and 1,400 bilateral treaties, that would effect a massive change to the legal system.'[56] The problem that past treaties pose in the event of any change to arrangements relating to the present status of treaties in domestic law is plainly a substantial one. With reference to the binding nature of treaty actions at international law, it needs also to be mentioned that, particularly in the case of multilateral treaties, it can be more difficult and take longer to amend or withdraw from treaties than is the case with either domestic legislation or contracts.[57]

Furthermore, there is the practical point that has been put in the following terms:

> In a unitary state, there is rarely any difficulty in performing a treaty obligation which necessitates a change in the internal law of the state. In the United Kingdom and New Zealand, for example, once the government has entered into a treaty, it can easily secure the passage of any legislation which is necessary to perform the treaty obligations. There is only one Parliament for the whole country and that Parliament has power to make laws upon all subject matters. Moreover, in a system of responsible government, the government is usually able to control the Parliament. The result is that the government which has the power to form treaty obligations also has the power to see that the obligations are performed through legislative action.[58]

(The implications of this comment, including in terms of separation of powers, and whether it is more or less true for New Zealand under its Mixed Member Proportional (MMP) voting system and makes a parliamentary treaty examination process more or less necessary, may be a matter for debate.) The same commentator has also pointed to the proliferation of international treaties being accompanied by their increasing domestic intrusiveness.[59]

There is no indication that the influence of treaties on statute law is slowing down,[60] or likely to do so in future with the addition of significant new legislative requirements arising particularly out of the Kyoto Protocol to the United Nations

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[56] Evans, above n 19, at 294.

[57] Perhaps with that in mind, one recent commentary, with reference to treaties in the economic area, has drawn attention to the possible (mis)use of treaty-making by the Executive with the intention of constraining Parliament (and others) by closing off options: Waelde T & Kolo A, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 ICLQ 811, at 822 and 847. See also Taylor P, above n 34.

[58] Hogg P, *Constitutional Law of Canada*, 1997 (4th edn), at 295.

[59] *Ibid*, at 303.

[60] See statistics in Gobbi M, 'Drafting Techniques for Implementing Treaties in New Zealand' (2000) 21 Statute Law Rev, 71, at 72–5; Gobbi M, 'Treaty Action and Implementation' [2004] NZYIL 223; Keith K, paper to NZ Law Conference 2001, above n 29, at 13–15.

Framework Convention on Climate Change.[61] The content of treaty implementing legislation may be largely determined by the terms of the treaty, leaving little opportunity or flexibility for Parliament to influence the content of the statutory provisions. Parliament may be presented with a fait accompli, an all or nothing choice between passing the legislation in its entirety to enable the Executive to become party to the treaty or rejecting the legislation. Similarly, treaties come before Parliament under the treaty examination procedures on the basis of texts that have been adopted by the parties. Unless it is possible to lodge reservations, Parliament may, again, be reduced to an all or nothing, yes or no, response. In a sense, once a treaty has been adopted, it is too late.

There is no easy answer to these conundrums, short of involving Parliament in some manner at the formative stage when the text of the treaty is under negotiation. Suggestions to that effect have been made in New Zealand.[62] Two of the authors of those suggestions have also drawn particular attention to treaties that might affect future policy choices but do not require legislative change and would therefore not have involved Parliament at all prior to the treaty examination procedures.[63] This highlights a further issue, which is the importance, at an officials level, of not claiming more for treaties than is appropriate, especially with respect to suggestions of people being obliged to comply with treaties because the Executive has become party to them. In short, if that is the intention, the agreement of Parliament must first be obtained to incorporate the obligations into domestic law. Even where a treaty is intended to affect the actions only of the Crown, it may be appropriate to seek prior legislation where the treaty may be imposing constraints of any significance on future policy choices such as in the trade area. (It may also be the case that the processes of corporatisation and privatisation in the state sector in recent times make it less easy to rely on non-legislative options such as administrative practice and directions to give effect to many treaties.) The treaty examination procedures are no substitute for proper processes in that regard.

Mutual forbearance, and give and take, will nevertheless continue to be important. It has been noted that treaties 'are not the only way in which activities at the national level are in effect governed internationally.'[64] Treaties are sometimes regarded as but one option on the menu for the conduct of foreign policy. They may be becoming of ever broader purport and, perhaps partly for that reason, certain significant drawbacks in treaties are being highlighted and may be bringing treaty making under increasing pressure. Outcomes that might drive foreign policy or the

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[61] See, for example, Chen M, 'Ratifying Kyoto' [2001] NZLJ 443.

[62] Law Commission Report 34, above n. 40, at 14 (n 7), and Report 45, above n 40, at 44, 46 & 58–60; Mansfield W, 'The Constraints of Treaties and International Law', in James C (ed.), *Building the Constitution* (2000), at 105–11; Taylor P, 'The Global Perspective: Convergence of International and Municipal Law', Ch 7 in Bosselmann K & Grinlinton D (eds), *Environmental Law for a Sustainable Society* (2002), at 125–6.

[63] Mansfield, at 108; Taylor, at 125.

[64] Mansfield, above n 62, at 106.

international legal system in less transparent, 'non-legal' directions are in principle to be avoided.[65] It may sometimes be the broader foreign policy that is of interest or concern, rather than the treaty manifestation of it.

(e) Two special factors

In the case of New Zealand, two additional factors may have helped to give rise to the new interest in treaties. One is the New Zealand Bill of Rights Act 1990, on the back of which the courts have introduced or made reference to international material in a number of cases. While the Act affirms and draws on the International Covenant on Civil and Political Rights, it does not incorporate that instrument into New Zealand law. But it may have generated some confusion about the relationship between domestic law and that treaty. Moreover, while of constitutional significance, the Act was enacted as an ordinary statute and is of neither entrenched nor overriding status.

The second factor is the Treaty of Waitangi concluded in 1840 between the Crown and Maori Tribes of New Zealand. The Treaty has given rise to substantial jurisprudence and writings in recent times,[66] and its resurgence has likely played a part in increasing the courts' familiarity with treaties generally. The Treaty is to be regarded as a founding document of New Zealand, but its status may be a matter more of constitutional law than international law. One writer who has commented on its status under international law[67] cited McNair[68] in support of the orthodox view that such treaties are not to be regarded as treaties in the international law sense of the term, but purported to trump McNair by citing another noted international lawyer, Brownlie, in support of a contrary view. However, Brownlie, in the course of a set of lectures on the Treaty, also made the following comment:

> It is not an international agreement presently in force, since it could not survive the disappearance of one Party [that is, at international law] as a result of its execution. Even if it were a valid international agreement, it would be subject to certain modifications, on the basis that particular obligations had been terminated as a result either of a fundamental change of circumstances or as a consequence of the emergence of new peremptory norms of general international law.[69]

Nothing said in this article would limit, or apply to, the Treaty in any way.

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[65] See the interesting comments on Memoranda of Understanding in Australia, above n 6, at 17–18 and Ch 3.

[66] See, for example, Joseph P, *Constitutional and Administrative Law in New Zealand* (2001), Ch 3.

[67] *Ibid*, at 49–52.

[68] McNair A, *The Law of Treaties* (1961).

[69] Brookfield F (ed.), *Treaties and Indigenous Peoples — the Robb Lectures 1991* (given by Brownlie I in Auckland, New Zealand) (1992), at 82.

(f) Summary of the legal position

It is worth recording the careful conclusions of one noted writer of long-standing here, by way of summary of the legal position on unincorporated treaties and judicial review (there have of course been developments in this area since he was writing, for example with respect to the ambiguity limitation, but his comments overall are significant):

> (1) Where the treaty has been implemented by domestic legislation, it can, for the purpose of judicial review, never be considered to a greater extent than to overcome a doubt or an ambiguity of the statute.
>
> (2) Where the treaty has not been implemented by domestic legislation, it must never be used so as to introduce into domestic law or practice a rule which Parliament has failed to adopt, for if this were not so the treaty would, through a back door, acquire legal force in the absence of parliamentary sanction. This paramount principle, therefore, requires the utmost care on the part of the Executive as well as the courts.
>
> (3) It follows that if in exercising its discretion the Executive fails to take account of the unincorporated treaty it cannot be criticised by the court in proceedings for judicial review.
>
> (4) On the other hand if in exercising its discretion the Executive takes account of the unincorporated treaty this is unobjectionable, provided the Executive does not in fact allow itself to be bound by the treaty, but sees in it only one of several elements leading to the decision.
>
> In short, while the unincorporated treaty cannot be the sole or decisive basis for the Executive's decision, it should be allowed to reinforce a decision founded on other grounds. To put it negatively, arguments derived from the treaty should not be excluded on the ground of absence of incorporation, for the treaty imposes an international obligation which, within the limits of prevailing English law, should be fulfilled. This may be a difficult path to follow, but the difficulty is created, not by the law, but by the Executive's failure to adopt the route prescribed by a basic principle of constitutional law.[70]

As noted earlier, in New Zealand's case the judicial flirtation with unincorporated treaties has not yet (quite) become a consummation. At the very time that New Zealand has introduced a new electoral system directed, in part, at reducing Executive domination of Parliament, it would be odd for the courts to be transferring powers in the other direction, from Parliament to the Executive. Constitutionally, the New Zealand system is marked by its comparative lack of checks and balances. The spreading influence of unincorporated treaties is not a check on the Executive; rather, it will have the opposite effect.

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[70] Mann F, *Foreign Affairs in English Courts* (1986), at 96. See also de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (1995), Ch 28, 'Treaties and Foreign Affairs' (especially at 998); and Taylor G, *Judicial Review: A New Zealand Perspective*, Supplement (1997), at 109–13.

(g) Recent Privy Council decisions

In case that comment may be considered to overstate the position, it is appropriate, finally, to note several recent Privy Council decisions, including Lord Hoffmann's memorable reference in one dissenting judgment to the majority having found

> in the ancient concept of due process of law a philosopher's stone, undetected by generations of judges, which can convert the base metal of executive action into legislative gold. It does not however explain how the trick is done.[71]

These decisions concern some of the so-called 'death penalty' cases in which the Privy Council has considered appeals from Caribbean jurisdictions. The cases have mainly turned on particular constitutional provisions in force in the relevant jurisdictions. But in several of the cases, the Privy Council has had to confront directly issues arising out of reliance by the appellants on unincorporated human rights treaties. Despite the serious nature of the appeals before it, the Privy Council has reiterated

> the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. . . . When so enacted, the Courts give effect to the domestic legislation, not to the terms of the treaty.[72]

It considered this trite law, going on to say that the 'many authoritative statements to this effect are too well known to need citation'.[73]

But the Privy Council has not stopped there. The minority judgment in that same case went on to say that this general conclusion

> will disappoint those who contend for the application of unincorporated international human rights conventions in municipal legal proceedings so that such rights will be *directly* enforced in national courts as if they were rights existing in municipal law. The widest possible adoption of humane standards is undoubtedly to be aspired to. But it is not properly to be achieved by subverting the constitutions of states nor by a clear misuse of legal concepts and terminology; indeed, the

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[71] *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50, at 88. See also Collins L, 'Foreign Relations and the Judiciary' (2002) 51 ICLQ 485, especially at 495–6. Lord Hoffmann may have read too much into the majority decision in that case, because the majority was, in the end, careful to base its decision not on the direct application of the treaty provision at issue but rather on common law principles and a provision of the Jamaican Constitution (with the treaty provision in effect called in aid). Thus, so far as unincorporated treaties are concerned, the decision is not inconsistent with the earlier Privy Council decisions noted below in the text. It may be worth adding that, despite the apparent incorporation of rights in the European Convention on Human Rights and Fundamental Freedoms into United Kingdom law under the Human Rights Act 1998, the House of Lords continues occasionally to express strong objections to the direct applicability of provisions in that Convention: see, for example, *R v Lyons* [2002] 4 All ER 1028 (especially the judgment of Lord Hoffmann) and *In re McKerr* [2004] 2 All ER 409.

[72] *Thomas v Baptiste* [2000] 2 AC 1, at 23.

[73] *Ibid*

> furthering of human rights depends upon confirming and upholding the rule of law. Suppose that an international treaty declares certain conduct to be criminal wherever committed (and such examples exist), unless and until the Legislature of a state party to the treaty has passed a law making such conduct criminal under its municipal law, it would be contrary to due process. . . . for the Executive of the state to deprive any individual of his life, liberty or property on the basis of the international treaty. It would be a clear breach of that individual's constitutional rights. An unincorporated treaty cannot make something due process: nor can such a treaty make something not due process unless some separate principle of municipal law makes it so.[74]

Shortly after that judgment, the majority of the Privy Council put it even more strongly:

> The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the seventeenth century.[75]

The relevant judgments of the Privy Council may not be a model of clarity and consistency as it has grappled to find other reasons based on constitutional provisions and the common law for some of its decisions.[76] It has also made some (obiter) expressions of support for the legitimate expectations approach to unincorporated treaties set out in *Teoh's Case*.[77] But it is perhaps surprising that none of the judgments of the Court of Appeal have resulted in the question of unincorporated treaties in domestic law ending up before the Privy Council for an authoritative finding. On the point that such treaties are not applicable in domestic law, the Privy Council comments probably represent the law in New Zealand.

III. Future Developments

It may be that the time is coming when human rights treaties ought to be separated off from consideration of international treaties generally, and dealt with in a different way from the past in dualist jurisdictions. Importation of such standards may become inevitable if there is to be acceptance of the increased submission to international supervisory jurisdiction in the human rights area (which includes 3 further Optional Protocols in New Zealand's case in the past few years). Perhaps

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[74] *Ibid*, at 33.

[75] *Higgs v Minister of National Security* [2000] 2 AC 228, at 241.

[76] This has continued to be the case in subsequent 'death penalty' decisions, where international instruments have been used to aid in constitutional interpretation: see *Roodal v The State* [2003] UKPC 78 and *Khan v The State* [2003] UKPC 79. Also see, to similar effect, *Boyce v R* [2004] UKPC 32, *Matthew v The State* [2004] UKPC 33, and *Watson v R* [2004] UKPC 34 (split judgments each of 9 Law Lords and all delivered on 7 July 2004).

[77] Ironically, the Australian High Court has now moved away from its decision in that case: see above, n 5.

international human rights treaties will come to exercise a similar underlying influence on statutes and their interpretation as fundamental common law principles may increasingly be doing.[78] Regardless of other principles, international standards in this area may also be required to have a more direct role to play in countries where there are deficits in respect for human rights and good governance.[79]

In New Zealand, a great deal of attention has nevertheless been given to the virtues of international human rights obligations in the domestic legal system.[80] This attention is of course understandable, but it does threaten to skew understanding of the huge range of other international treaties to which states are party, and distort consideration of the role (and limits on that role) that treaties ought to play in domestic law. In the absence of a separation between human rights treaties and other treaties, discussion in this area may also degenerate into a contest between a Diceyan parliamentary supremacy/Hart positivism paradigm on the one hand and some sort of limited sovereignty/Dworkian rights-based paradigm on the other hand. These can be 'straw man' arguments. In the treaties area, and more generally for that matter,[81] comparative analysis may well reveal that, at the detailed operational level, there is a much closer similarity between national jurisdictions than appears at first sight. It may be more helpful to focus on the similarities rather than on notions of sovereignty given that, across most jurisdictions, responsibilities

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[78] See the 18 principles listed in the LAC Guidelines, above n 40, at 45–8.

[79] But note the perceptive view expressed in Bull H, *The Anarchical Society: A Study of Order in World Politics*, 2002 (3rd edn), Ch 6, 'International Law and International Order', at 154, to the effect that the growing influence of international human rights and duties reflects a contraction rather than an expansion of international consensus.

[80] See Keith articles, above n 29. See also, for example, Hunt P & Bedggood M, 'The International Law Dimension of Human Rights in New Zealand', Ch 2 in Huscroft G & Rishworth P (eds), *Rights and Freedoms* (1995); Richardson I, 'Rights Jurisprudence — Justice for All', in Joseph P (ed.), *Essays on the Constitution* (1995), at 65–9 (although 2 other chapters of that book are concerned with trans-Tasman trade and economic treaties); Palmer article, above n 34; Butler A & P, 'The Judicial Use of International Human Rights Law in New Zealand' (1999) 29 VUWLR 173; Rishworth P, 'The Rule of International Law?', and Evatt E, The Impact of International Human Rights on Domestic Law', Chs 14 & 15 in Huscroft G & Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002). This attention is also notable for largely ignoring the constitutional protection of property rights (see, for example, the criticisms by Palmer G, '*Westco Lagan v A-G*' [2001] NZLJ 163), and for largely ignoring economic, social and cultural rights more generally for that matter.

[81] See, for example, the interesting articles by Waldron J, 'A Question of Judgment', TLS, 28 September 2001, and McLean J, 'Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act' (2001) NZ Law Rev. 421, to the effect that the power to strike down legislation in the U.S. may be more apparent than real and may be substituted for in countries like N.Z. with an 'ingenious and aggressive' approach by the courts to statutory interpretation. The House of Lords has also commented about the protection of fundamental rights through statutory interpretation:

> In this way the courts of the United Kingdom, although acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

(*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131).

and powers are in practical terms shared. The question, rather, is to ensure how the interests of all branches of government are properly kept in view.[82] In the case of treaties, this means for the dualist that the more that the courts take account of unincorporated treaties and the more that they treat such treaties like statutes, the more consideration will need to be given to upgrading the involvement of Parliament, *vis-à-vis* the Executive, in treaty actions before they take place. In short, the constitutional relationships are bound not to remain unaffected. Further developments ought, however, to be a matter for conscious decision by Parliament.

One Australian commentator, in a perceptive comment, has recently mentioned the possibility that treaty examination procedures may increase (not decrease) the openness of countries to international law and treaties.[83] (How controlled that process is may depend on the extent to which the House and select committees can do justice to the new system.) Senior Australian legal figures have also pressed for domestic law to be more receptive to international law,[84] with one commenting that the 'reconciliation of municipal and international law represents a great challenge to the legal system' and that growing economic integration, coupled with international problems and world concern about fundamental human rights, 'makes the gradual process of establishing an effective relationship between municipal and international law both inevitable and desirable.'[85] It is likely that the treaty examination procedures will bring about greater select committee familiarity with treaties over time, and a constructive engagement by the Government with committees in this area including in terms of on-going reporting on, and involvement in, important negotiations.

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[82] For a recent insightful article on the importance of respecting those interests (and on the role and responsibilities of the different branches of government, including limits on the judicial role), see Ekins R, 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127. He also notes (at 139–41) that adjudication about rights boils down to political and moral choices in a political context that is pervaded by moral disagreement (that is, in the final analysis, these are choices for Parliament to make and for the courts to respect).

[83] Opeskin B, 'Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries — Part II' (2001) P.L. 97, at 100 (although the article incorrectly characterises the N.Z. procedures in certain respects).

[84] Mason A, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 PLR 20; Brennan G, 'The Role and Rule of Domestic Law in International Relations' (1999) 10 PLR 185. For recent comment on this whole area, see Charlesworth H, Chiam M, Hovell D & Williams G, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 Sydney LR 424.

[85] Kirby M, 'Lord Cooke and Fundamental Rights', in Rishworth P (ed.), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997), at 348. It has also been suggested that the role of the courts may need to increase in response to the decline in the standing of other institutions: see, for example, Mulgan R, 'The Westminster System and the Erosion of Democratic Legitimacy', Ch 8 in Gray B & McClintock R (eds), *Courts and Policy: Checking the Balance* (1995). Of course, it is not unknown for decisions of the courts to make matters more difficult for Parliament: for recent examples, see Bracegirdle A, 'Members of Parliament and Defamation: the courts in New Zealand raise the bar' (Spring 2002) 17(2) Australasian Parliamentary Review 140.

An international common law may be most likely to emerge under pressure of growing global problems. It may be that we are now moving into such an era,[86] and that Parliament might need accordingly to give consideration to incorporation (in a suitably managed way such as through some measure of self-execution) of treaties that are developed in response. The coalescing of monist and dualist systems has probably been regarded as something of a Holy Grail on the part of some international lawyers.[87] While the authorities point to a complexity and diversity in national systems applying to treaties,[88] it is, as noted, also possible to see important similarities. This is particularly so if the detail of what actually happens in different systems in practice is examined. It has been noted that 'even the written constitutions of other countries do not necessarily tell the full story; they may be varied by constitutional conventions and practices which are not apparent from the black-letter law'[89] (such as the development of executive agreements, which comprise the very great majority of all United States treaties but are also to be found in other countries such as Switzerland, and other agreements in simple form that may reduce the 'rigour' of domestic constitutional requirements).[90] The recent

[86] There is no shortage of pessimistic material about the effects of globalisation, or aspects of it, coming from sources that might, on the face of it, be regarded as respectable. See, for example, the books by the Professor of European Thought at LSE, Gray J, *False Dawn* (1998); a Professor of Law at Yale University, Chua A, *World on Fire* (2002); and a former UK MP, Harvey R, *Global Disorder*, 2003 (2nd edn). For a recent article expressing concern over secessionist developments (including the international community's failings, and the accommodations reached, in the former Yugoslavia) that is critical of the ability of international law to play a constructive role due both to its dependence on states many of which are authoritarian and to its limited historical commitment to democratic governance, see Horowitz D, 'The Cracked Foundations of the Right to Secede' (2003) 14(2) *Journal of Democracy* 5, especially at 13–14.

[87] See, for example, Alston P (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999), at 13 and 476–7; Brownlie I, *Principles of Public International Law*, 1998 (5th edn), at 31–4; Higgins, *Problems and Process*, above n 47, at 216, where she hopes for a changing legal culture more receptive to international law; Taylor, above n 62, at 124–5.

[88] Jacobs F & Roberts S (eds), *The Effect of Treaties in Domestic Law* (1987), which argues however (at xxiv) that the antithesis between monism and dualism is an oversimplification to be viewed with caution; Reisenfeld S & Abbott F (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (1994); Leigh M & Blakeslee M (eds), *National Treaty Law and Practice*, ASIL(1995).

[89] MacKay D, 'Treaties — A Greater Role for Parliament?' (1997) 20(1) Public Sector 6, at 7. See also Aust, above n 6, especially at 145.

[90] Of course, from the legislature's point of view, such developments may be resisted as subverting the constitution. See Wheare K, *Legislatures* (1963), Ch 7, 'Making Peace and War', to the effect that executive agreements in the United States have allowed law-making to slip out of the Senate's grasp, giving the President a freer hand than the Executive in the United Kingdom because such agreements have the force of law within the United States (as a result of a Supreme Court decision in 1937 that gave the same domestic legal status to these agreements as to treaties duly made and ratified) and presenting the legislature with *faits accomplis*. He notes that a constitutional amendment proposed by one Senator in the 1950s to remedy this transfer of power from Congress to the Executive failed to go forward by only one vote. Wheare was writing prior to the Case-Zablocki Act of 1972, which requires all executive agreements to be transmitted to Congress. For the complexity of the position in the US with respect to treaties, see Jackson J, 'Status of Treaties in

development of treaty examination procedures has probably increased the similarities.

But it is probably also going too far to say, as one commentator has done, that the monism argument is likely to become considerably stronger in New Zealand now that the processes for Parliament's consideration of international treaties that the Government is intending to enter have altered.[91] It is always open to Parliament to take further, deliberate steps in that direction. For example, both the Australian and United Kingdom Parliaments have in the past considered (private) Members' Bills providing for Parliamentary approval of treaties. In both cases, it was decided not to proceed with the bills. A Member's Bill to similar effect, the International Treaties Bill, has been before the New Zealand Parliament but has also been subject to a recent decision by the House that it not proceed.[92] Such legislation raises in stark manner the relationship between the branches of government and whether treaties should take on a self-executing character that would entail a significant move in the direction of monism, possibly reducing the legislative burden, and away from the present 'stand-off' attitude by domestic law to international treaties. In any such event however, Parliament would have to put a similar effort into treaties as it now puts into legislation.[93] ▲

Domestic Legal Systems: A Policy Analysis' (1992) 86 AJIL 310, commenting on its DAHS (direct application, higher status) treaty system; and for an indication of Congress' continued preoccupation with these issues, see the voluminous *Treaties and Other International Agreements: The Role of the United States Senate*, Report of Congressional Research Service, Library of Congress (as a study for the Senate Committee on Foreign Relations) (2001).

[91] Palmer, above n 34, at 61; see also Palmer G & M, *Bridled Power: New Zealand Government Under MMP* (2004), Ch 18, 'International Law', where the authors refer to an old quotation from Jenks that international law 'represents the common law of mankind in an early stage of development'. See, further, Lord Cooke, 'The Dream of an International Common Law' (but approaching the matter more from the perspective of a general common law, than a common international law or a common approach to international law), and Walker K, 'Treaties and the Internationalisation of Australian Law' (calling for a 'philosophy of harmonisation' in terms of domestic compliance with international law), both in Saunders C (ed.), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996).

[92] See above, n 1, at 35 (and n 22 thereof).

[93] But it would also have to devise procedures to process through insignificant treaties and treaty amendments. On the one hand, as instruments akin to contracts rather than legislation (see above n 50), treaties are always likely to remain primarily a matter for the Executive rather than Parliament. On the other hand, that depends on whether treaties are confined to matters of administration, implementation and detail (which can properly be left to the Government) or, as some undoubtedly do, deal with matters of policy and principle (and might therefore involve Parliament in some manner). In the case of regulations, that is a distinction which the Regulations Review Committee of Parliament looks for in its scrutiny of regulations and empowering provisions in bills, and it is interesting to note that the Standing Orders of the House of Representatives on international treaties appear immediately after those on delegated legislation (which set out the role of that committee). That committee examines all regulations and takes up issues with respect to particular regulations where it identifies such issues itself on specified grounds or complaints are made to it. Whether any such procedures could be adapted to treaties and treaty amendments would be a matter for further consideration.