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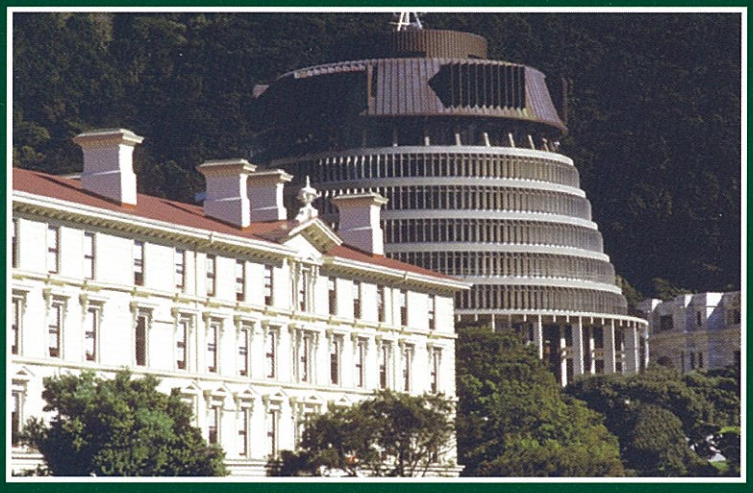

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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George Williams
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Treasa Dunworth
Ronald Sackville
Lord Cooke of Thorndon
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HIDDEN ANXIETIES: CUSTOMARY INTERNATIONAL LAW IN NEW ZEALAND

Treasa Dunworth*

The role of customary international law has to date received little attention in New Zealand courts and legal writing. Treasa Dunworth advocates closer attention to customary international law, and explores the possibility of adopting a "pedigree approach" to its reception into New Zealand common law.

I INTRODUCTION

When one is asked to speak on the topic of "international law and adjudication", the question of the role of international treaties in the domestic legal system is a mainstay. There is a range of issues to discuss: the appropriate role of Parliament in the process of treaty ratification and approval; the means by which treaties are incorporated in legislation; the role of the courts in handling treaties, whether in the guise of administrative law, statutory interpretation, or otherwise. But while the role of international treaties in our domestic legal system has received an increasing level of attention in recent years, the role of customary international law has been relatively neglected.

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The title of this paper echoes the title of a paper by Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423, in which the authors sketch out a map of the interaction between the Australian legal system and international law, noting that the increasing use of international law is a cause of considerable anxiety in Australia. In echoing that title, I am attempting to encapsulate my impression that those anxieties are also prevalent, but not articulated, in New Zealand.

This is quite astonishing given that when one opens any traditional textbook on international law, one finds, in the standard chapter on the relationship between international law and domestic law, that in common law jurisdictions such as New Zealand, while treaties are not part of domestic law unless incorporated by statute, customary international law is automatically part of the common law.[1] It is even more astonishing that we have paid so little attention to the status of customary international law when we realise that customary international law is that body of international law made of up state practice (or what states do) and opinio juris (what states think). It is therefore inevitably the product of political interests—even more so than international treaties.[2] One might have thought that in light of the heightened political content of customary international law, the domestic legal system would be less, rather than more, receptive to custom than to treaty.

It seems, however, that despite its basis in state power and its consequent vulnerability to manipulation, customary international law may well be gaining ground in some overseas jurisdictions.[3] My concern is that in the absence of a thorough discussion, the New Zealand courts may find themselves making decisions based on customary international law (or making decisions not to take account of customary international law) without having had the opportunity to think through the broader consequences of such decisions.[4]

The aim of this paper, then, is to start a discussion on the appropriate role for customary international law in New Zealand. The paper first examines the way in which the New Zealand courts treat customary international law. That examination demonstrates

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1 See for example Ian Brownlie *Principles of Public International Law* (6 ed, Oxford University Press, Oxford, 2003) 41–45. But see Antonio Cassese *International Law* (Oxford University Press, Oxford, 2001) 162–181 for an overview of approaches in non-common law jurisdictions.

2 For an overview of customary international law, see Treasa Dunworth "The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?" (2004) 15 PLR 36, 38–40, and citations therein.

3 Though the trend is far from clear-cut—see discussion in Dunworth "The Rising Tide of Customary International Law", above n 2, 40–46.

4 Almost without exception, the literature on the use of international law by domestic courts focuses on international treaty law. For example, the special issue of the Victoria University of Wellington Law Review in 1999 dealing with international law (vol 29(1)) did not consider, except in passing, customary international law. The New Zealand Law Commission barely acknowledges customary international law in its report *A New Zealand Guide to International Law and Its Sources* (NZLC R34, Wellington, 1996). More detailed consideration of the issue can be found in K J Keith "International Law and New Zealand Municipal Law" in J F Northey (ed) *The A G Davis Essays in Law* (Butterworths, London, 1965) 130, but almost forty years on, a revisiting of the issue is overdue.

that customary international law currently plays a role in two ways—by means of direct application and as an interpretative tool. The discussion also shows that the role of customary international law, as opposed to international treaty law, has been relatively minor, but that despite the lean pickings (or perhaps because of them?), there is uncertainty in the jurisprudence and in the literature surrounding the place of customary international law in New Zealand law. In fact, despite the self-confident starting point of Blackstone's quote, on which the earlier English cases rely, that "customary international law is part of our law", the relationship is anything but clear, and what scant judicial and academic comment there is shows that it is marked by confusion and uncertainty.

In my view, that uncertainty provides both an opportunity and a challenge. It provides an opportunity to respond to future cases on a principled, rather than an ad hoc, basis. It provides a challenge in that to take advantage of that opportunity it is necessary first to agree on those principles. In attempting to start that discussion, I explore the arguments surrounding the reception of customary international law—which in many ways simply mirror the larger debate on the role of international law in domestic law generally; although, as will be seen, customary international law raises particular additional concerns. I conclude by proposing that a pedigree approach be considered, whereby not all norms would be received in the same manner or to the same extent.

II THE CASE LAW

The most notable feature of the New Zealand case law on the question of customary international law is its scarcity. Only occasionally has the issue come before the courts. When it has done so, the courts "appear to have proceeded on the assumption, as William Blackstone put it over 200 years ago, that customary international law (or in his terms the law of nations) is part of the law of the land."[5] The majority of cases involve issues of sovereign immunity. Sovereign immunity is an ideal subject through which to examine the role of customary international law in the domestic sphere because it is still governed, for the most part, in the international sphere by customary rather than treaty law. Furthermore, in New Zealand at least, there is no legislation governing the matter.[6] Thus

5 Rt Hon Sir Kenneth Keith "The Impact of International Law on New Zealand Law" (1998) 6 Waikato LR 1, 22 (citing William Blackstone *Commentaries on the Laws of England* IV ch 5). See also Sir Kenneth Keith "Roles of the Courts in New Zealand in Giving Effect to International Human Rights—With Some History" (1999) 29 VUWLR 27, 34 where he simply states that "[b]y contrast [to treaties] customary international law is part of the law."

6 This is important because a domestic statute will always override customary international law: *Chung Chi Cheung v The King* [1939] AC 160 (PC). Not everyone is happy with the absence of legislation: see W K Hastings "Sovereign Immunity in New Zealand" [1990] NZLJ 214; W K Hastings "*Controller and Auditor-General v Davison*: Three Comments" (1996) 26 VUWLR 459; and the closing observations of Barker J in *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1, 9–10 (HC).

in New Zealand, when a question pertaining to sovereign immunity comes to be decided, the courts are actually applying customary international law directly, though they may not use that language.

That the New Zealand courts ought to apply the doctrine of sovereign immunity is unquestioned. In *Marine Steel Ltd v Government of the Marshall Islands*[7] the plaintiff sought leave to serve proceedings out of New Zealand to recover monies owing under a contract for ship repairs. One of the arguments raised was that the doctrine of sovereign immunity precluded the Court's jurisdiction. The Court rejected the argument on the basis that the Marshall Islands was not a sovereign state. However, in the course of its decision, the Court accepted that in the normal course of events it would be bound by the rule of immunity. In considering the argument that the customary international law rule of sovereign immunity could be relied on as a basis on which to strike out civil proceedings in the New Zealand courts, Barker J said "[o]bviously, the Court ought not to give leave to serve proceedings out of the jurisdiction against a foreign government, if to do so would breach the rule of sovereign immunity".[8] Implicit in that statement is the assumption that the (customary international law) rule of sovereign immunity binds the court.

The immunity argument was also raised (this time successfully) in *Buckingham v Hughes Helicopter*.[9] In that case, the Court set aside a warrant of arrest of a helicopter on board a United States military transport ship, having accepted the United States' application to have the warrant set aside on the basis that the ship and the helicopter were protected by sovereign immunity. Although the Court did not engage in any detailed discussion of the basis on which sovereign immunity was part of the law, Hardie Boys J quoted Lord Atkin's passage from *The Cristina*[10] that the doctrine of sovereign immunity arises from "international law engrafted into our domestic law".[11] Smellie J took the same approach in *Reef Shipping Co Ltd v The Ship "Fua Kavenga"*—again without further elaboration.[12]

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7 *Marine Steel Ltd v Government of the Marshall Islands*, above n 6. See commentary by Jerome B Elkind "Sovereign Immunity" [1981] NZLJ 505; [1982] NZLJ 263.

8 *Marine Steel Ltd v Government of the Marshall Islands,* above n 6 , 3.

9 *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738 (HC).

10 *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485, 490 (HL).

11 *Buckingham v Hughes Helicopter,* above n 9, 741.

12 *Reef Shipping Co Ltd v The Ship "Fua Kavenga"* [1987] 1 NZLR 550, 568–573 (HC). On the facts of the case, immunity did not lie because the transaction was deemed to be commercial in nature.

The most famous sovereign immunity case in New Zealand has been the so-called "Winebox Case": *Controller and Auditor-General v Davison*.[13] On the facts, the Court held that immunity did not lie, although the basis on which its decision was founded is far from clear. The commercial nature of the transactions in question was clearly a factor in applying the restrictive version of sovereign immunity and thus excluding immunity on the facts, as was the Court's extreme disapproval of the actions of the Cook Islands.[14] Nonetheless, the significant point in this context is that there was no suggestion that the Court could take the view that it was not bound at all by the doctrine of sovereign immunity.

It is noteworthy that in none of the cases is there any attempt to discuss the basis on which the doctrine of sovereign immunity is part of the law.[15] The closest we get to an explanation is Smellie J's support in *Reef Shipping* for the view that the doctrine of sovereign immunity arises from "international law engrafted into our domestic law".[16] The problem with this unreflective acceptance of precedent is that it becomes uncertain what the outcome would be if the mantra that "customary international law is part of our law" were applied in a context other than the relatively stable one of sovereign immunity. The lack of explicit discussion fosters undisclosed and unexamined anxieties about what the mantra really means.

The role of customary international law as an interpretative tool is likewise not examined from the point of view of principle.[17] As with the sovereign immunity cases, the

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13 *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 (CA).

14 This would seem to bear out Professor Dunbar's criticism of the application of customary international law in domestic courts in the context of *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529. See N C H Dunbar "The Myth of Customary International Law" (1983) 8 Aust Yr Bk IL 1.

15 A point noted by Merkel J in the Australian case of *Nulyarimma v Thompson* (1999) 165 ALR 621, 651 (FCA) when discussing *Marine Steel Ltd v Government of the Marshall Islands*, above n 6.

16 *Reef Shipping Co Ltd v The Ship "Fua Kavenga"*, above n 12, 569, citing *Compania Naviera Vascongado v Steamship "Cristina"*, above n 10, 490.

17 As will become evident, it is not always easy to differentiate between cases involving direct application and interpretative cases, particularly when the case involves interpretation of the scope, rather than the content, of a statute. Perhaps more than any other in New Zealand, the case of *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) exemplifies the difficulties in drawing clear distinctions between statutory interpretation, displacement of statutes, and direct application of customary international law. The slide between the categories opens up what has been termed as "phantom" use of customary international law. See Curtis A Bradley "The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law" (1998) 86 Geo LJ 479, 483, borrowing the term from Hiroshi Motomura "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation" (1990) 100 Yale LJ 545, 560–564.

focus is on the precedent supporting the rule, rather than on any examination of the reasons or justifications for the rule.[18] Thus, the law reports are replete with statements from the courts as to the "presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations".[19]

In *Governor of Pitcairn and Associated Islands v Sutton*, the Court made it clear that "[a] general statute, however apparently comprehensive, is not to be interpreted as contrary to international law on such matters as sovereign immunity".[20]

In *Sellers v Maritime Safety Inspector*, the Court said:[21]

> New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law …

This interpretative rule is generally unproblematic where customary international law is drawn on to interpret the content, rather than the scope, of a domestic rule. For example, *Adams v Bay of Islands County* turned on the definition of "ocean" in the first schedule to the Counties Act 1876 in determining a dispute as to the obligation to pay rates on an island.[22] The Court considered the (customary) international law of the sea to find that the island was indeed part of the county and thus that there was liability to pay rates. In *Worth v Worth* the Court of Appeal rejected an argument that the power of the New Zealand legislature to enact legislation could not be validly exercised in conflict with recognised principles of international law.[23] However, the Court did confirm the rule of construction that "if the enactment is ambiguous and is capable of two constructions, one of which

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18 See for example the discussion in *Sellers v Maritime Safety Inspector*, above n 17, 57, citing *R v Keyn* (1876) 2 Ex D 63.

19 *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA) Keith J. The courts frequently refer to "international obligations", which includes both treaty law and customary international law. For a thorough overview of the New Zealand jurisprudence regarding the use of treaties to interpret legislation, see Mark Gobbi "Making Sense of Ambiguity: Some Reflections on the Use of Treaties to Interpret Legislation in New Zealand" (2002) 23 Stat LR 47.

20 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426, 430 (CA) Cooke P.

21 *Sellers v Maritime Safety Inspector,* above n 17, 57 Keith J for the Court.

22 *Adams v Bay of Islands County* [1916] NZLR 65 (SC).

23 *Worth v Worth* [1931] NZLR 1109 (CA).

would, and the other would not, conflict with the rules of international law, the latter construction should prevail".[24]

A more interesting, and potentially problematic, use of customary international law as an interpretative tool occurs when the international rule is used to restrict the scope, rather than to clarify the content, of the statutory provision. Back in the 1870s, in *R v Dodd*,[25] the Court of Appeal had to consider an appeal against a conviction of manslaughter committed on board an American ship on the high seas. The Court arrested the judgment of the trial court on the basis that admiralty did not extend to foreign ships on the high seas. This limit on the apparent scope of the statute in question was consistent with the customary international law of the sea.[26] Another example of customary international law being used in this way is *In re the Award of the Wellington Cooks and Stewards' Union*,[27] in which the question for the Court was whether an award made by the Arbitration Court under the Industrial Conciliation and Arbitration Act 1905 could be enforced against the owners for breaches on the high seas and in foreign ports. The Court held that the award could be enforced as against a New Zealand-registered ship, but that, consistent with the customary international law of the sea, enforcement was not possible against a ship registered in Victoria.[28]

A more recent case in which customary international law was used to limit the scope of a domestic statute is *Governor of Pitcairn and Associated Islands v Sutton*.[29] In that case, an employee of the Governor, a New Zealand citizen, sought compensation under the Employment Contracts Act 1991 for wrongful dismissal. The Governor contested the Court's jurisdiction, claiming sovereign immunity. The Court of Appeal held that the employee's work necessarily involved her in public acts of the Crown in right of the United Kingdom. Accordingly, to look into the termination would intrude on its sovereign

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24 *Worth v Worth*, above n 23, 1121 Myers CJ. The particular question before the Court was one of private international law (test of domicil as founding jurisdiction in cases of dissolution of marriage).

25 *R v Dodd* (1874) 2 NZ Jur 52; 2 NZCA 598.

26 The statute was 12 & 13 Vict, c 96, set out in full in *In re the Award of the Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394, 409 (SC).

27 *In re the Award of the Wellington Cooks and Stewards' Union*, above n 26. See discussion by Keith "Roles of the Courts in New Zealand in Giving Effect to International Human Rights—With Some History" above n 5, 35.

28 Discussed by Keith "International Law and New Zealand Municipal Law", above n 4, 135.

29 *Governor of Pitcairn and Associated Islands v Sutton*, above n 20. This case might also be seen not as involving an issue of statutory interpretation, but as one of direct application of customary international law—thus illustrating the difficulties with this categorisation.

functions. However, the significant point for the present discussion is that the Court found that the rule of sovereign immunity applied unless clearly excluded by the Employment Contracts Act, despite the apparently unlimited scope of that Act.

In *Sellers v Maritime Safety Inspector*,[30] the Court of Appeal quashed a conviction under the Maritime Transport Act 1994, on the basis that guidelines issued under section 21 of the Act were invalid because they breached the international rule of the freedom of the high seas. The Court found that the effect of the guidelines was to impose a limitation on the customary international law right of navigation, and thus went on to interpret section 21 in a way that did not infringe this right. The Court held that the powers granted to the Director in section 21 had to be exercised in accordance with the relevant rules of international law.[31] As they had not been, the guidelines were invalid.

This conclusion was reached despite the fact that nowhere in the statute in question was there such a limitation.[32] Thus, facing a question as to the proper construction of a domestic statute, the Court appears to have moved away from the traditional two-step approach of finding an ambiguity in the domestic statute and then drawing on international law to resolve it, and instead seems to have approached the issue as though international law is simply one of the tools available to assist with the interpretative process.[33] The justification for this approach would be that the Court was simply acting consistently with the assumption that Parliament does not intend to legislate (or, in this case, confer a power) in a manner contrary to its international obligations. However, given the clear words of section 21, the case does seem to indicate that the courts may be willing to adopt an expansive approach to using customary international law in interpreting statutes.[34]

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30 *Sellers v Maritime Safety Inspector*, above n 17.

31 The Authority was constituted by the Maritime Safety Act 1994, and its Director was authorised by s 21 to make guidelines. However, the case is not one of judicial review of administrative action.

32 And note that it is established that customary international law ought to give way to an inconsistent domestic statute: *Chung Chi Cheung v The King*, above n 6. While Parliament is presumed not to intend to violate international law, that presumption is rebuttable, and is in fact rebutted if Parliament passes legislation clearly violating New Zealand's international obligations. See *BHP New Zealand Steel Limited v Electrix Limited and Patrick John O'Shea* (3 October 1997) HC AK CP24/97 24.

33 Treasa Dunworth "Public International Law" [2000] NZ Law Rev 217, 224–226.

34 For discussion, see Dunworth "Public International Law" above n 33; Jim Evans "Questioning the Dogmas of Realism" [2001] NZ Law Rev 145, 157–159; Paul Myburgh "Shipping Law" [1999] NZ Law Rev 387, 398.

Sellers offers some reflections on the basis on which customary international law is received or available for use as an interpretative tool. Conceding that its reading of the statute might "appear to be difficult to reconcile with the seemingly generally applicable wording of paras (b) and (c) of s 21(1)",[35] the Court places considerable emphasis on precedent to justify its approach. Then the Court goes on to say:[36]

> We consider that the gloss proposed in the preceding paragraph is consistent with the wording of s 21(1)(b) and (c) when that provision is read, as it must be, in its wider context. To repeat, for centuries national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.

From this, it would seem that the approach of the Court is simply to treat customary international law as part of the "wider context" in which domestic law is situated. This is, of course, in line with Blackstone's pronouncement that customary international law is part of the common law. Unfortunately, the Court does not go on to elaborate any principled discussion as to why this should be so and whether, and if so to what extent, the same approach is applicable some 200 years on.

It is probably fair to say that if the role of customary international law in the domestic sphere remained as marginal as it has to date, it would not be so pressing to articulate the basis on which it might or should be received. Any anxieties which might be experienced could be eased in the knowledge that the problem was marginal at best. However, there is good reason to suppose that its role has the potential to increase, not decrease. That is certainly the experience in other common law jurisdictions. For example, there is ever more frequent pleading on the basis of customary international law—although it is not always the case that those arguments are accepted by the courts.[37] Like all trends, this one is probably due to the convergence of a number of factors rather than one single dynamic. However, a clear influence is the general increase in awareness of and receptivity towards "the international" among both domestic lawyers and domestic judges. While this trend started life focused on international treaties—often in the context of human rights—it has expanded to incorporate customary international law norms as well. New Zealand followed the international trend in relation to international treaties, and there is no reason to suppose that it will not follow the same trend in the realm of customary international law.

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35 *Sellers v Maritime Safety Inspector*, above n 17, 61 Keith J for the Court.

36 *Sellers v Maritime Safety Inspector*, above n 17, 62 Keith J for the Court.

37 Dunworth "The Rising Tide of Customary International Law", above n 2, 43–46.

In an earlier paper,[38] I suggested two ways in which customary international law might find a bigger place in New Zealand law. The first is that it would arrive through the vehicle of administrative law.[39] Instead of pleading an international treaty as a relevant consideration, might a norm of customary international law not also assist a plaintiff? If we can accept that decision makers ought to at least take account of our international treaty obligations, is it really a further step to say they ought also to consider at least some norms of customary international law? The second way would be via a *Pinochet*-style challenge,[40] whereby the courts face an argument that an immunity claim which would normally be accepted, ought to fail in the face of a "heavier" norm of customary international law (the prohibition against genocide or torture, say);[41] in other words, that the court ought not apply the customary international law rule of sovereign immunity on the basis that to do so would offend a more important customary international prohibition. If an acting head of state were to be found in New Zealand, facing extradition to a third country on charges of torture or genocide, would our courts simply grant immunity and recommend that extradition not proceed? Or would they instead find that the customary international rules against torture or genocide "trumped" the immunity?[42] If the mantra that "customary international law is part of our law" is taken seriously, that is precisely what should happen. Since *Pinochet*, this may be appropriate in the context of allegations of torture or genocide, but it does raise questions as to what other norms might trump sovereign immunity. [43]

To summarise so far, while the underlying ambiguities already evident in the case law may be manageable in our present slumbering state, if we do see an increase in challenges based on customary international law the current consensus (if indeed there is one) may start to fracture. Unreflective reliance on precedent is no substitute for a reasoned analytical consideration of competing values and ideals. The remainder of this paper is an

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38 Dunworth "The Rising Tide of Customary International Law", above n 2.

39 Dunworth "The Rising Tide of Customary International Law", above n 2, 48–50.

40 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL).

41 Dunworth "The Rising Tide of Customary International Law", above n 2, 47–48. But see the critique of this "normative hierarchy theory" in Lee M Caplan "State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory" (2003) 97 Am J Int'l L 741, arguing that it rests on false assumptions about the doctrine of state immunity and proposing instead a theory of restrictive immunity to achieve the same result.

42 The opinion of Richardson J in *Controller and Auditor-General v Davison*, above n 13, 295–307 would seem to indicate that at the very least an exception would be carved out.

43 See for example the discussion of the Ontario Superior Court of Justice in *Bouzari v Iran (Islamic Republic)* [2002] OJ no 1624.

attempt to sketch out the contours of that discussion and to go some way towards bringing to the surface the anxieties that lurk beneath.

III SURVEYING THE DEPTHS: THE CONTOURS OF THE DEBATE

The appropriate role of customary international law domestically is part of the bigger question of how (or indeed, whether) international law generally should be received into domestic law. That question in turn is a manifestation of the more fundamental issue of how international law is perceived. As Lea Brilmayer explains in the United States context, "notions of what international law is all about are central to arguments over whether it belongs in American courts".[44] Discussing the issue at that fundamental level is outside the scope of the present work, but clearly one's understanding of what international law *is* will influence one's approach to the question of its appropriate role in domestic law.[45] The old "is international law really law?" question lies in wait for anyone attempting to embark on a reasoned discussion. In an effort to sidestep the question, much of the literature tends to focus on what the courts actually do, rather than examining what they ought to do.[46] When the "ought" question is discussed explicitly, positions tend to be polarised, either enthusiastically embracing the international to further policy choices,[47] or vehemently resisting the contamination of international law.[48]

An important point raised in support of the reception of international law into the domestic sphere is the need to avoid international responsibility for breaching

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44 L Brilmayer "International Law in American Courts: A Modest Proposal" (1991) 100 Yale LJ 2277, 2279.

45 For example, a classic Hartian approach, which dismisses international law as law, would hardly support its reception into domestic law. In comparison, a Kantian approach would find the reception of customary international law unproblematic, given that it considers the domestic and international as inherently connected (see Charles Covell *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (Macmillan, Houndsmills, 1998) and Fernando R Tesón "The Kantian Theory of International Law" (1992) 92 Colum LR 53).

46 Alex Conte "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 Cant LR 54. See also the special issue in (1999) 29 VUWLR, above n 4.

47 See generally Murray Hunt *Using Human Rights Law in English Courts* (Hart, Oxford, 1997).

48 In Australia: Murray Gleeson "Global Influences on the Australian Judiciary" (2002) 22 Aust Bar Rev 184, cited by Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423, 424. In New Zealand: James Allan "Statutory Interpretation and the Courts" (1999) 18 NZULR 439, 443 and response by Rt Hon Sir Kenneth Keith "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 77, 89–92.

international law.[49] Sovereign immunity affords a clear example: immunity is not recognised by our courts because that always ensures the most "just" outcome, but rather because not recognising immunity would place New Zealand in breach of its international obligations.[50] The political and legal costs of failing to respect our international obligations make it unrealistic and naïve for such a small country to take any other position than that of the "good international citizen".[51] The need to be seen as the "good international citizen" is clearly a powerful influence in New Zealand. For example, in the well-known case of *Tavita v Minister of Immigration*, having heard a submission that the Convention on the Rights of the Child[52] had no effect in the domestic legal system because it had not been incorporated, Cooke P (as he then was) famously responded that such an argument was "unattractive" because it implied that "New Zealand's adherence to the international instruments has been at least partly window-dressing".[53]

This "good international citizen" impulse is not only the result of a pragmatic assessment of New Zealand's relative place in international relations. It is also a manifestation of a broader internationalising impulse, an idea that New Zealand is, and wants to be, part of the international community. It is part of the vision we have of ourselves as part of the wider world.[54] If New Zealand society is not constrained by territorial limits but is instead part of a broader, global society, then our national identity aligns us as part of "international society".[55] Our law—New Zealand law—should, the argument goes, reflect the values of that international society.

Just as we do not expect Parliament to legislate, or the Executive to act, in a way that would breach international law, we do not expect the courts, as part of the organs of State,

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49 This point is raised in the Canadian context: see Gibran van Ert "Using Treaties in Canadian Courts" (2000) Can Yr Bk IL 3, 6.

50 See for example the criticism made by the International Court of Justice of the Belgian assertion of jurisdiction over the Minister of Foreign Affairs of the Democratic Republic of the Congo in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 121.

51 Interestingly, some commentators argue that it was this very motivation that led the United States courts to take such an approach to international law in the early years. At the time of the *Charming Betsy*, the United States was a weak power particularly in relation to the European powers. Thus, it was not in its interest to provoke any conflict. See Bradley, above n 17, 492.

52 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.

53 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (CA).

54 Described as the "internationalist conception" by Bradley, above n 17, 498.

55 See van Ert, above n 49, 7, making a similar point in the Canadian context. Compare the observations of Charlesworth and others, above n 48, 431–435.

to be out of step with international law in their decision-making. This is precisely the justification behind the principle that legislation should be interpreted in a manner consistent with international obligations if at all possible.[56] The argument is that courts ought to have the possibility of drawing on international law (including customary international law) where there is a need to ensure that New Zealand will be in line with its international obligations. This finds expression in the notion of legislative intent: that Parliament cannot be presumed to intend to legislate in contravention of New Zealand's international obligations.[57]

The "internationalist impulse", however, whether manifested though the vehicle of legislative intent or otherwise, presents a number of dangers. The first is that it needs to be moderated by what has been termed self-governance or self-determination.[58] That is, it is all very well to be open to the international, but not to the extent that we should abandon our own sense of law and justice. We may well be part of international society, but we are still self-defined as New Zealand. Ideally, the two impulses—internationalism and self-determination—will hold each other in check.[59]

A second concern with the internationalist impulse is the instability of (particularly) customary international law. Even a cursory glance at the literature on customary international law reveals that it is easy to assert but difficult to identify, and that its difficulties are compounded by the rise of the "new" customary international law.[60] This has led some commentators to argue that we should not be too eager to admit such a flawed concept into our domestic legal system.[61]

A third concern is based on the undemocratic methods by which customary international law comes about. The argument here is that customary international law

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56 The background to this principle is explained in Jonathan Turley "Dualistic Values in the Age of International Legisprudence" (1993) 44 Hastings LJ 185, 211–217.

57 The legislative intention conception does not claim that Parliament considered international law when passing the legislation, but rather that it would not have wanted to violate international law if it had been considered. See Bradley, above n 17, 495.

58 Van Ert, above n 49, 7.

59 Van Ert, above n 49, 8–9.

60 See Michael Byers *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, Cambridge, 1999), especially ch 8 "Fundamental Problems of Customary International Law".

61 J Patrick Kelly "The Twilight of Customary International Law" (2000) 40 Virg JIL 449, 455 and citations therein. Curtis Bradley also makes this point in the context of statutory interpretation in the United States: see above n 17.

arises through undemocratic and unrepresentative means and should therefore be treated with caution in a system that espouses democracy and the rule of law.[62]

A fourth concern relates to the domestic constitutional balance. One might concede that it is important not to breach our international obligations, while still holding the view that it is not for the courts to take such decisions—and therefore that customary international law ought not to be part of the common law, but ought to be received into the domestic sphere in the same way as international treaties: by legislative incorporation. In other words, this is a debate that rests squarely on the issue of parliamentary sovereignty. This debate is keenly conducted in the United States. For example, some commentators argue that application of customary international law by the federal courts is inconsistent with United States representative democracy and separation of powers.[63] We see the Supreme Court of Canada expressing a similar concern in *Baker*:[64]

> In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch.

This argument can be countered to some extent by pointing to Parliament's ability to legislate to override the court. In other words, Parliament remains supreme because it can override customary international law.[65] Customary international law is therefore no more threatening to Parliament than the common law itself.[66] An inconsistent domestic statute will always trump an international rule. It is also relevant to note that valid constitutional concerns are raised around the role of international treaties domestically as well, but those concerns do not automatically lead us to the conclusion that we ought to reject entirely the reception of international treaties into domestic law. The concerns go more to *how* we should receive treaties, not *whether* we should.

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62 Turley, above n 56, 202–211.

63 Curtis A Bradley and Jack L Goldsmith "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harv L Rev 815, 838–842 as cited by Kelly, above n 61, 455. Jonathan Turley also raises this point, above n 56, 204.

64 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, para 80 Iacobucci J.

65 Paul Craig and Nicholas Bamforth make this point in the context of judicial review: "Constitutional Analysis, Constitutional Principle and Judicial Review" (2001) PL 763, 767.

66 See generally Hunt, above n 47, 2–7 for a discussion of this point in the context of arguing for greater receptiveness of international human rights treaties. Hunt argues that the notion of absolute parliamentary sovereignty is outdated and out of touch with the realities of today's world. I do not think it is necessary to go this far to answer the constitutional argument against using customary international law.

Nonetheless, it cannot be denied that these concerns raise questions which go to the heart of legal and constitutional theory. In my view, these questions ought to be discussed and debated much more than they are at present. To the extent that they are acknowledged at all, they seem to be either dismissed as far-fetched, on the basis that customary international law "has always been part of the common law", or seized upon to completely reject any role for customary international law—or indeed any international law at all. But these questions are serious, and do deserve a response.

IV A PEDIGREE APPROACH?

One possible way of achieving a balance between the internationalist impulse and self-governance might be to agree that while customary international law ought to form part of the common law, it does not necessarily follow that all rules of customary international law ought to be accorded the same status. In other words, a pedigree approach could be adopted whereby not all norms of customary international law are received equally—allowing exclusion of those that are perceived to be less legitimate.

Given the paucity of case law on the issue in New Zealand, the door is still open to adopt this nuanced approach.[67] So far, the jurisprudence has concentrated on sovereign immunity and, to a lesser extent, on the law of the sea. For a number of reasons, the immunity cases should not lead to an automatic acceptance that all customary international law should form part of the common law. First, the doctrine of sovereign immunity is not the subject of legislation—presumably a deliberate decision on the part of the executive. Second, both immunity and the law of the sea are areas of strong pedigree in international law. While there are some areas of the law of the sea that are still open to debate, issues such as freedom of the high seas (in *Sellers*),[68] the definition of "ocean" (in *Adams*),[69] and flag ship jurisdiction (*Dodd*)[70] are, in the main, unwavering and undisputed.

Support for a pedigree approach can be found in other jurisdictions. In England, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai*,[71] the Court of Appeal

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67 Murray Hunt (above n 47, 17) argues that the *Trendtex* decision involving the issue of sovereign immunity (*Trendtex Trading Corporation v Central Bank of Nigeria*, above n 14) "represents a greater willingness on the part of courts to treat customary international law as part of the common law." My argument here, however, is that such a decision ought not automatically lead to the same result in different substantive cases.

68 *Sellers v Maritime Safety Inspector,* above n 17.

69 *Adams v Bay of Islands County*, above n 22.

70 *R v Dodd*, above n 25.

71 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai* (15 October 1985) 129 SJ 756 (CA).

had to consider an application by three British citizens for compensation for losses arising from the expropriation of their assets in Uganda. One of the issues before the Court was the exhaustion of local remedies rule. The applicants argued that this (customary) international law rule was part of English law, and in making the argument relied on *Trendtex Trading Corporation v Central Bank of Nigeria*.[72] In response, the Court said that it could not accept the argument because it overlooked:

> the fact that the rule of international law which was being considered in the *Trendtex* case was a rule which had undoubtedly been adopted and incorporated into English law. The principle of sovereign immunity is applied as part of the domestic law. All rules of international law are not so applied. There are rules or principles of international law, for example relating to human rights, which are no part of our domestic law and the domestic courts cannot apply or interpret them in the same way as they apply and interpret domestic law.

A notion of pedigree is also evident in the United States. In the *Sabbatino Case*, which was concerned with the Act of State doctrine, the Supreme Court said this:[73]

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

In Australia, Wilcox J stated in *Nulyarimma v Thompson*:[74]

> [I]t is difficult to make a general statement covering all the diverse rules of international customary law. It is one thing, it seems to me, for courts of a particular country to be prepared to treat a civil law rule like the doctrine of foreign sovereign immunity as part of its domestic law, whether because it is accepted by those courts as being "incorporated" in that law or because it is has been "transformed" by judicial act. It is another thing to say that a norm of international law criminalising conduct that is not made punishable by the domestic law entitles a domestic court to try and punish an offender against that law.

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72 *Trendtex Trading Corporation v Central Bank of Nigeria*, above n 14.

73 *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398, 428 Hartlan J for the Court.

74 *Nulyarimma v Thompson*, above n 15, 629.

In the New Zealand case of *Sutton*, Cooke P said that a "general statute, however apparently comprehensive, is not to be interpreted as contrary to international law on such matters as sovereign immunity",[75] which leaves open the possibility that there might be a different result if the international rule involved a different subject.

Thus, we see the courts in a number of jurisdictions take the view that not all rules of customary international law must be received in the same way and to the same extent in the domestic legal system. This is certainly the case in the context of international treaties; courts are much more prepared to take international human rights treaties into account in their decision-making.[76] On this basis then, rules of sovereign immunity and the law of the sea with a long pedigree (either in the sense of a long-standing place in the international legal system or a higher status, such as self-determination) would come within Blackstone's assertion that customary international law is part of the common law. Other rules may not.

The difficulty with a pedigree model is immediately apparent: it is handing to the courts the authority to determine what, and to what extent, rules of customary international law come into our common law. The domestic constitutional concerns would be increased under this proposal. However, given the elasticity of the interpretative role of customary international law, the ambiguous parameters in the "scope of the statute" cases, and the potential for development in the context of judicial review, it may not be unreasonable to suggest that courts are already making this determination. By at least self-consciously adopting a pedigree model, the courts may have more guidance in exercising their discretion in any given case.

A very real difficulty in adopting the pedigree approach would be ascertaining, and applying, the factors that would be taken into account. Suggestions include the longevity of the rule, the clarity (or otherwise) of its parameters, and the extent to which the process by which the rule came about might be considered "democratic".[77] However, even assuming that agreement could be reached on a list of such factors, it is not clear whether

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75 *Governor of Pitcairn and Associated Islands v Sutton*, above n 20, 430.

76 See for example Lord Steyn, writing extrajudicially, noting that human rights treaties may not fall within the rule that an unincorporated treaty cannot give rise to rights or obligations domestically: Lord Steyn "Democracy Through Law" (New Zealand Centre for Public Law occasional paper 12, 2002) 8.

77 Writing in the context of the application of international law generally in administrative law decisions, David Elliott has suggested four factors that the courts might consider in determining the appropriate level of domestic application for a given international norm: source, relevance, generality, and object. See David W Elliott "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002) 65 Sask L Rev 469, 508.

the present uncertainties would be aggravated or alleviated by such an approach. As with the constitutional concerns, it may be that a self-conscious pedigree approach would be beneficial not because of increased certainty but because it would be more transparent.

V CONCLUSION

Despite growing academic and judicial attention, the relationship between international law and domestic law in New Zealand is still far from clear.[78] However, the role of customary international law is almost completely unexamined, with the case law demonstrating that there is an unhealthy reliance on precedent at the expense of analytical reasoning as to why and whether customary international law ought to have a role in domestic law.

Blackstone's formula does provide a starting point—but that is all. It cannot, and ought not, suffice in today's more complicated world. The pedigree approach suggested here may not find favour, but it may help to start a discussion that is long overdue. Even acknowledging that its application is not without difficulty, a pedigree approach may allow us to move beyond the unwinnable tug of war between international lawyers on the one hand, with their cries of globalisation urging the domestic system to open its arms to customary international law, and domestic lawyers on the other, ducking behind a shield of outmoded notions of sovereignty.

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78 The recent discussions by McGrath and Glazebrook JJ in *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) demonstrate that the contours of the role of treaties in domestic law are only just starting to be defined. See their discussion on the role of the Executive Committee of the United Nations High Commissioner for Refugees Programme's Conclusion No 44 (XXXVII) "Detention of Refugees and Asylum-Seekers" (15 October 1986) UN Doc A/AC.96/688 and of the UNHCR's "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers" (February 1999): paras 97–121 McGrath J, paras 255–272 Glazebrook J. See also the conclusions of Mark Gobbi in "Making Sense of Ambiguity", above n 19 and Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR (forthcoming).