Caroline Morris · Jonathan Boston
Petra Butler *Editors*

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international law.[36] Further, the opportunity for customary international law to apply is limited. In New Zealand, it mostly arises in the context of sovereign immunity litigation.[37] This is because that area of law is still governed, for the most part,[38] in the international sphere by customary rather than treaty law and there is no relevant domestic legislation.[39] In addition, arguments based on customary international law often do not succeed, not on the basis that customary international law does not form part of the common law, but rather, that the rule being posited, does not in fact exist as a matter of customary international law. For example, in *Bin Zhang v Police*, Clifford J found that the rule in article 36 of the Vienna Convention on Consular Relations (the right of a foreign national to be informed without delay of his right to consular notification in the case of detention or arrest) had not reached the status of customary international law.[40]

17.3.2 Second Entry Point: Direct Incorporation of Treaties by Statute

The second entry point of international law, the direct incorporation of treaties by legislation, is becoming more commonplace, reflecting perhaps the increasing technical nature of many treaties. For example, the International Crimes and International Criminal Court Act 2000, which implements the Rome Statute for the International Criminal Court, directly incorporates a number of key provisions in the Statute.[41] The Trade Marks Act 2002, the aim of which is "to ensure that New Zealand's trade mark regime takes account of international developments",[42] draws directly and extensively on both the Paris Convention and the TRIPS Agreement.[43] Section 51 Climate Change Response Act 2002, enacted to give effect to New Zealand's obligations arising from the Kyoto Protocol, not only incorporates into New Zealand law the obligations already agreed to in the Protocol, but gives any future agreements the status of law. Section 215 of the Child Support Act 1991,

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[36] *Chung Chi Cheung v The King* [1939] AC 160. Confirmed in *Bin Zhang v Police* [2009] NZAR 217.

[37] But see *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC) considering the customary international rules on the interpretation of treaties; *Zaoui v Attorney-General* (No 2) [2005] 1 NZLR 690 (CA) considering the customary international law prohibition against refoulement (per Glazebrook J) and *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) on the customary international law of freedom of the high seas.

[38] Note the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force).

[39] cf. State Immunity Act 1978 (UK). See *Jones v Saudi Arabia* [2006] 2 WLR 1424 (HL).

[40] *Bin Zhang v Police* [2009] NZAR 217.

[41] See International Crimes and International Criminal Court Act 2000, sections 6 and 12.

[42] Section 3(e) Trade Marks Act 2002.

[43] Sections 28, 29 and 30 Trade Marks Act 2002.

allows regulations to be made to give effect to any international agreements relating to child support, but goes on to provide that the implementing regulations override, not only the provisions of the Child Support Act 1991, but all other domestic legislation.[44] The full discussion by Keith J (as he was then) in *Airline Pilots' Association v Attorney General* remains a useful explication of precisely what statutory language is required to meet the threshold of direct incorporation.[45] The Legislative Advisory Committee has also set out different approaches that might be taken in drafting legislation as well as providing examples.[46]

17.3.3 Third Entry Point: Statutory Interpretation

By far the most commonly used entry point for international law is that of statutory interpretation.[47] As Lord Bridge articulated in *Regina v Home Secretary; Ex parte Brind* (dealing with the question of the impact of article 10 of the European Convention on Human Rights on the interpretation of the Broadcasting Act 1988):

> it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.[48]

This is precisely the position in New Zealand and has been confirmed repeatedly and consistently in the cases.[49] Originally, an ambiguity was required in the domestic law before international law could be invoked as an interpretative tool. However, that seems to have changed. The approach whereby an ambiguity is a prerequisite to drawing on international law as an interpretative tool has given way to a rule that even apparently clear legislation must be read consistently with international legal obligations. The case of *Sellers v Maritime Safety Inspector* exemplifies this interpretative approach.[50] Indeed, by 2002, the Court of Appeal went so far as to say that unless:

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[44] Perhaps not surprisingly, the provision gave rise to an inquiry by the Regulations Review Committee (see Regulations Review Committee 2002).

[45] *New Zealand Airline Pilots' Association v Attorney General* [1997] 3 NZLR 269 (CA).

[46] Legislative Advisory Committee (2001).

[47] Burrows 2003, pp. 495–496.

[48] Regina v Home Secretary; Ex parte Brind *[1991] 1 AC 696 at pp. 747–748.*

[49] See the list of cases cited by Gobbi (2007), p. 349, at footnote 6.

[50] *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA). For commentary, see Geiringer (2004), pp. 79–80. Other cases adopting the same interpretative approach include *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC); [1999] 2 NZLR 114 (CA), *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA). But see comment by Clifford J. in *Bin Zhang v Police* [2009] NZAR 217 at para 31: "there is a degree of ongoing confusion about the extent of ambiguity (if any) necessary in a statutory provision before the courts will look to international instruments."

> the words of a statute rule out such an interpretation (and here clearly they do not), then a Court should favour an interpretation that is in line with New Zealand's international obligations.[51]

The resort to international law is also evident in cases where the international obligation is co-opted as an interpretative tool even where the legislation has no direct link with the treaty in question. In the *Airline Pilots' Case*, Keith J stated that the traditional interpretative presumption applies "whether or not the legislation was enacted with the purpose of implementing the relevant text".[52] The same judge has justified this broader approach extra-judicially, noting that it provides "a more integrated view of the law and its various sources".[53]

This was acknowledged by Gault P in *Hosking v Runting*, which involved a claim based on an asserted common law tort of privacy.[54] One of the arguments before the Court in support of the existence of the tort was that a right to privacy was well recognized in international treaty law and formed part of New Zealand's international obligations. In principle, Gault P was open to the influence of international obligations in determining the common law. He said:

> [T]here is an increasing recognition of the need to develop the common law consistently with international treaties to which New Zealand is a party. That is an international trend. The historical approach to the state's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid. To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of Courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law.[55]

Although the argument failed in this particular case, the significance in this context is the judicial receptivity to the idea that the common law might be influenced by New Zealand's international obligations. The Supreme Court in *Ye v Minister of Immigration* followed this approach too of statutory interpretation consistent with New Zealand's obligations.[56] As will be discussed further below, the complications arise when different international obligations point to different results.

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[51] B v G [*2002] 3 NZLR 233 (CA) at 243 per Glazebrook J.*

[52] *New Zealand Airline Pilots' Association v Attorney General* [1997] 3 NZLR 269 (CA) at p. 289.

[53] Keith 1999, p. 40.

[54] *Hosking v Runting* [2005] 1 NZLR 1 per Gault J (CA). This approach is reflected in other jurisdictions, which also purport to have a dualist approach to international treaties.

[55] Hosking v Runting *[2005] 1 NZLR 1 [6] per Gault J (CA).*

[56] *Ye v Minister of Immigration* (formerly *Ding*) [2009] NZSC 76 at para 24. See also the reasoning of Glazebrook J in the Court of Appeal. See also the recent discussion about Art 31 Refugee Convention and its relevance to determining "reasonable excuse" in section 31(1)(f)(ii) Passports Act 1992; *X (CA746/2009) v R*, CA746/2009 (18 November 2010).

17.3.4 Fourth Entry Point: Constraints on the Exercise of Statutory Discretion

The way in which international law constrains statutory discretion is probably the most contentious and the most discussed aspect of the reception of international law into the domestic sphere. It manifests itself most frequently (but not exclusively) in immigration/refugee cases or related human rights.[57] The contours of the relationship continue to evolve. Questions raised before the courts include to what extent and on what basis international law obligations should be considered in determining whether a statutory discretion has been exercised properly.[58] What approach should be taken when different, perhaps competing, international obligations are at play?[59] Whose discretion is constrained by international law? For example, in *Zaoui v Attorney-General (No 2)*,[60] one of the questions for the Supreme Court was whether a statutory officer, rather than a Minister of the Crown, was obliged to take into account New Zealand's international obligations in making a decision to confirm a security certification. Another issue to come before the courts has been the precise meaning of particular international obligations. For example, in *Ding*, the Court of Appeal had to consider the argument that the United Nations Convention on the Rights of the Child required that the interests of the children in the immigration decision as the "paramount consideration" or simply a "primary consideration".[61]

17.4 Reflections

I turn now to some reflections on the foregoing in the light of the conference organisers' call for a constitutional conversation.

The first point must relate to the continued inexorable turn to international law. Even internationally, international law is a growth industry. Numbers are not the full story but they are part of the picture. We know that only 4,834 treaties were registered with the League of Nations in its 24-year life. In 1996 when the United Nations was 50, New Zealand's Law Commission reported that 30,000 treaties were registered with the United Nations.[62] Today, the UN website tells us that the

[57] *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA); *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA); *Mil Mohamud v Minister of Immigration* [1997] NZAR 223; *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC)*; Ding v Minister of Immigration* (2006) 25 FRNZ 568 (HC).

[58] Geiringer (2004).

[59] *Attorney-General v Tamil X* [2010] NZSC 107.

[60] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).

[61] *Ye v Minister of Immigration* [2008] NZCA 291 (CA). See discussion in Dunworth (2008), pp. 725–729.

[62] New Zealand Law Commission (1996), p. 30.

treaties and other treaty actions registered with the League take up 205 volumes in that Treaty Series; for the United Nations, it is 2,200 volumes, containing 158,000 treaty actions. While precise numbers cannot be compared, the trend is clear: international treaty-making is big business in today's world.

The nature of treaties is also changing. It is trite to observe that treaties, once solely concerned with questions of inter-state relations, have broadened into the realm of human rights, trade, the environment, labour law, shipping, fisheries and criminal law, to mention a few examples. A glance through the treaties presented to the Foreign Affairs Defence and Trade Select Committee reveals that, in the last 10 years, many of the treaties deal with trade and "cooperation"; and are less often the grand multilateral type than relatively narrow, bilateral or small plurilateral agreements. Importantly, their structure has changed. These treaties require states to harmonise their internal laws with that of an agreed international standard. Thus, since the middle of the twentieth century international law has changed in force and direction, particularly in the last two decades.

Within New Zealand too, international law's profile continues to rise. There is no doubt that, in part, this was influenced by the New Zealand Bill of Rights Act 1990, which referred to the International Covenant on Civil and Political Rights 1966 in its long title. Thus, the judicial consideration of the Act's provisions naturally involved a greater consideration of, and familiarity with, international legal obligations.[63] The rise of international law in New Zealand may also simply reflect the fact that there is more international law "out there". More pragmatically, international law is easier to access and judges and counsel are more educated about international law. It is not unusual to hear judges speak of what a marginal invisible subject international law was during their legal education, and comparing that to today's globalising trends.

Broadly speaking, the story of international law in New Zealand is one of receptivity.[64] Within the courts specifically, taken as a whole, and acknowledging that it might be possible to identify different judicial approaches and attitudes to international law, we have, for the most part, avoided the McHugh-Kirby type debates.[65] That consensus is encouraging because it allows us a space in which to explore the appropriate role for international law on a principled basis, rather than getting caught in a polemic, and ultimately unhelpful, debate. However, the consensus may have lulled us into complacency and, in my view, we are neglecting to engage in a more critical consideration of the appropriate role for, and justification of, international law in domestic judicial decision-making, and the related questions of to what extent and how Parliament should be involved in the making of international treaties. The inexorable turn to international law and its consequent growing influence in judicial decision-making mean that it is imperative to

[63] See, for example, *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

[64] Geiringer's "profound receptivity" in Geiringer (2006), p. 318.

[65] See *Al-Kateb v Godwin* (2004) 219 CLR 562.

articulate an appropriate methodology and robust justifications.[66] While there are promising indications from some judiciary and counsel in that regard, that task is far from complete.

I have argued elsewhere, in the context of customary international law specifically, that in admitting international law into New Zealand law, we ought to explicitly adopt a "filtering mechanism" whereby the weight and value of the international rule in question would be determinative of its reception, rather than simply its source in treaty or custom. Under this approach, depending on the value any particular rule is protecting, it may be more or less appropriate to admit its influence domestically.[67] Further, the ease with which a particular rule fits within the domestic system will affect its influence. Such an approach, if adopted explicitly, would require us to abandon the apparent (but illusory) certainty of the orthodox account of the relationship, but it would at least close the gap between rhetoric and reality.

It is also important to acknowledge that frequently "international law" will not simply provide one, uncontested, answer. Indeed, increasingly we are seeing the courts grappling with what, exactly, the international law is on a particular point. In *Attorney-General v Refugee Council of New Zealand*, the Court had to decide the meaning of article 31.2 of the Refugee Convention, which prohibits states from restricting the movements of refugees more than is "necessary".[68] This necessitated an examination, not only of the treaty text itself (which provided no elaboration as to what constitutes "necessary detention"), but also various subsidiary or second-tier documents. In *Zaoui* both the Court of Appeal and the Supreme Court had to consider the meaning of article 33.2 Refugee Convention and drew on secondary international law sources to assist in that regard.[69] In *Rwanda X*, the confidentiality requirements of the Refugee Convention fell to be examined in the light of domestic statutory language.[70] Most recently, in *Tamil X*, the exclusion clauses in the Refugee Convention had to be examined.[71] In all of these cases, while there was no dispute that international obligations were relevant to the decision, there was dispute about what the relevant international law position was. This should act as a caution to avoid approaching international law as though it will inevitably bring "order" to domestic law "chaos", or indeed, the other way around.

[66] Geiringer (2006), pp. 320–321.

[67] Dunworth (2005), pp. 136–155; Moran (2005), pp. 156–186.

[68] *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577 (CA).

[69] *Zaoui*, note 37; *Zaoui v Attorney-General (No 2)*, note 37.

[70] *Attorney-General v Rwanda X* [2008] NZSC 48.

[71] *Attorney-General v Tamil X* [2010] NZSC 107.

17.5 Conclusion

International law is in good heart in New Zealand. That being said, I have endeavoured to show that important questions are being neglected. The appropriate role for international law in any domestic legal system is not a question that can ever have an enduring answer. As international law changes, and our own legal landscape evolves, different considerations arise. A proper re-evaluation of the role of Parliament is well overdue. While the debates of the late 1990s were important and relevant, they need to be revisited. Similarly, while I would not advocate a polemic within the judiciary such as United States and to a lesser extent, Australia, the reception of international law in the courts is an important question deserving of diverse approaches and a rich conversation.

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Chapter 18
International Economic Law and the New Zealand Constitution: Towards an End to Executive Dominance?

Ben Thirkell-White

18.1 Introduction

At the 2000 *Building the Constitution* conference held in Wellington, the section on the effect of international treaties was largely devoted to concerns about globalisation. Those concerns had also been a driving force for reforms to the constitutional conventions surrounding treaty-making in New Zealand, which became operational in 1999. Following a Law Commission report in 1997, the Foreign Affairs, Defence and Trade Select Committee acquired new powers to scrutinise international treaties before they became legally binding in an attempt to give the legislature a larger role in economic law-making.[1]

Ten years on, issues of international human rights and criminal law are far higher on the agenda and interest in globalisation seems to have faded somewhat. The three sections of this chapter ask whether this declining interest in globalisation can be explained by a slowing in the pace of change in the international economic law that New Zealand is engaged with or by the success of the 1998 procedural reforms.

[1] For debate leading up to the reforms, see New Zealand Law Commission (1997); McKay (1997). For a discussion of their content and impact, see Dunworth (2000).

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In Sect. 18.2, I argue that the development of international economic law has stalled globally but that the New Zealand government continues to press ahead with some quite radical international economic agreements. Although many of these agreements do not appear dramatic because the changes they make to existing economic policy and regulation are minor, their effect is to lock-in existing liberal policy in ways that considerably restrict future policy-making flexibility. Growing doubts about New Zealand's economic performance across the political spectrum and the recent high profile-failures in international financial markets both raise the possibility that policy-makers may shortly wish to pursue alternative strategies to those that have served New Zealand at best moderately over the last 30 years.

The intellectual foundations underpinning international economic law are far less secure than those underpinning the international human rights regime, for example. International economic law creates rights but those rights are always highly contested. The economic consequences of establishing some rights rather than others are seldom clear cut and economic rights have much sharper distributional consequences, making it harder to produce universally acceptable international regulation. The creation of international economic law, then, is always an intensely political process. It is therefore particularly important to examine the institutions through which a particular set of international economic regulations is established.

In Sect. 18.3, I begin to explore the politics of international economic law-making through a review of the relevant International Relations literature. As the literature on globalisation became more sophisticated in the late 1990s, the idea that globalisation was an unstoppable "external" force began to be discredited. Instead, commentators talked about a "transformation" of the state and saw globalisation as a largely politically-produced phenomenon. Much of this literature emphasises the ways in which the internationalisation of economic law-making empowers the executive at the expense of the legislature. Equally importantly, it draws out the subtle social dynamics of international negotiations, which can socialise internationally-oriented staff within the executive into a particular technocratic and internationalist view of the issue areas they negotiate. Executive dominance is compounded by a fragmented outlook on international policy-making in which policy areas are isolated into technocratic "boxes" and there is little space to consider the interaction of, for example, trade policy with industrial policy or employment strategy. Internationally-oriented policy-makers can "go native" as promoters of international trade, seeing trade promotion as a goal in itself, without necessarily following through the complex impact of trade on a wide range of other domestic policy concerns. This kind of effect takes place to a certain extent in any area of technical, expert-dominated policy-making. However, in the domestic political arena parliamentary procedure and legislative scrutiny offset this tendency towards an overly narrow view of particular policy areas, since Ministers must negotiate with one another within the government and with the legislature which has incentives to take a more holistic outlook. The institutional arrangements for international policy-making are often more fragmented, short-circuiting this kind of criticism.

In Sect. 18.4, I turn to a discussion of the politics of international economic law-making in New Zealand in the light of the 1997 reforms. These reforms do provide some institutional avenues through which more holistic, domestic-oriented concerns might be pressed on trade policy experts. However, in practice the Foreign Affairs Trade and Defence Select Committee has been fairly quiescent in its reaction to the treaties put before it. After reviewing some potential explanations for this, I conclude that there is relatively little public political pressure for a less liberal and internationalist foreign policy in New Zealand. Reform to political institutions, then, is unlikely to remedy the lack of scrutiny over economic treaties unless it also succeeds in stimulating greater public engagement with the issues at stake. There are areas in which institutional reform might help, particularly greater openness about the agreements being negotiated, longer consultation periods and an opening up of the National Interest Analysis process. However, any real change in New Zealand trade policy will also require a more energised and activist civil society. Finally, in Sect. 18.5 I present the conclusions.

18.2 The Changing Significance of International Economic Law

This section reviews the changing shape of international economic law. It begins by drawing out some of the concerns about globalisation that stood behind pressure for constitutional change in New Zealand in the late 1990s. It goes on to look at the last 10 years, a period in which global economic regulation has stalled but New Zealand's signature of preferential trade agreements has kept up the liberalising momentum. There has historically been a strong pro-trade consensus amongst economists (though there have also always been dissenters even within the mainstream profession). New Zealand's recent agreements, though, spread into areas well beyond traditional trade concerns. Their main focus is on foreign investment and the competition law, intellectual property rights and other regulation that go with it. In these areas, economic opinion is far more divided. The strongly pro-market vision that might portray such agreements as uncontroversial was under increasing intellectual challenge (within the mainstream heart of the economics profession), even before the recent global financial crisis. In New Zealand, the disappointing results of the neo-liberal policies of the last 30 years are finally starting to provoke more intense debate about viable strategies for growth going forwards. Since the kinds of agreement MFAT is currently signing threaten to close off creative alternative growth strategies in the future, they are sufficiently controversial to warrant widespread public debate.