Ko Ngā Take Ture Māori

Māori Rights and Customary International Law

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A unique aspect of customary international law is that once crystallised at international law, it is binding at domestic law in common law states like New Zealand. This makes customary international law a particularly powerful source of law. Commentators have suggested that there is an international custom that recognises indigenous rights to use and occupy traditional lands. Were such a custom to crystallise at international law, it may be binding at common law in New Zealand. This article examines what impact an international custom recognising indigenous peoples' rights to traditional lands would have on New Zealand's legal system. It concludes that, irrespective of whether a custom has arisen, customary international law represents a significant source of law for indigenous peoples and would be particularly useful in the interpretation of statutes and in the review of executive decision-making.

I INTRODUCTION

Customary international law sits alongside international treaties as a primary source of international law. It requires "evidence of a general practice accepted as law"[1] and well-known examples include sovereign immunity[2] and freedom of the high seas.[3] Unlike international treaties, once crystallised at international law, customary international law is binding on common law states. This makes customary international law particularly powerful.

United Nations Special Rapporteur on the rights of indigenous peoples, Professor James Anaya, has suggested that there is an emerging customary international norm that recognises the rights of indigenous peoples to their traditional lands (the custom):[4]

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1 Statute of the International Court of Justice, art 38.

2 *Controller and Auditor-General v Davison* [1996] 2 NZLR 295 (CA) [*Winebox Inquiry*]; and *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL).

3 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); and *Re Piracy Jure Gentium* [1934] AC 586 (PC).

4 S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, Oxford, 2004) at 61 (emphasis added).

> It is now evident that states and other relevant actors have reached a certain new common ground about minimum standards that should govern behavior toward indigenous peoples, and it is also evident that the standards are already in fact guiding behavior. Under modern theory, such a controlling consensus, following as it does from widely shared values of human dignity, *constitutes customary international law.*

Other scholars have also noted this phenomenon. Claire Charters has stated there is an "emerging customary international law which protects a broad indigenous peoples' right to land".[5] Seth Korman also believes an indigenous norm to lands and territories is emerging, "albeit one that remains vague and ill-defined".[6]

This claim is promising, particularly for Māori in the current political climate.[7] Unlike the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) or the Treaty of Waitangi — which require legislative incorporation to be binding — a custom may automatically become part of, and binding at, New Zealand common law.[8]

This article examines the implications for New Zealand's legal system of a customary international norm recognising indigenous rights to land. For background, Part II details the custom proposed by jurists. It outlines the different tests applied to customary international law; the evidence supporting the emergence of the custom; the potential content of the custom; and the custom's status at international law. Part II observes, tentatively, that a custom may not yet have emerged at international law.

Part III then moves to consider whether New Zealand would be bound to such a custom were it to crystallise. First, New Zealand may have a defence to the custom as a "persistent objector" and may therefore be immune to the custom at international law. Secondly, contrary to Blackstone's doctrine, the custom may not be received automatically into New Zealand's domestic law. Part III concludes, however, that the custom would be binding on New Zealand at international and domestic law.

Finally, Part IV hypothesises the possible effects of such a custom on New Zealand's legal system. It concludes that while the custom cannot trump statutory provisions, it may become significant in three respects: it may become binding at common law; it may aid the interpretation of statutes;[9] and it may become a mandatory relevant consideration, useful in judicial review proceedings.

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5 Claire Charters "Developments in Indigenous Peoples' Rights under International Law and Their Domestic Implications" (2005) 21 NZULR 511 at 531.

6 Seth Korman "Indigenous Ancestral Lands and Customary International Law" (2010) 32 U Haw L Rev 391 at 395.

7 That is, in the context of the Crown grant of exploration rights to Brazilian oil and gas company Petrobras in the Raukumara basin, as well as the recent Marine and Coastal Area (Takutai Moana) Act 2011 [MCA]. See the recent High Court decision dismissing Greenpeace and Te Whanau-a-Apanui's judicial review application to overturn the Minister of Energy's decision to grant the exploration permit: *Greenpeace of New Zealand v The Minister of Energy and Resources* [2012] NZHC 1422.

8 *Sellers*, above n 3, at 62.

9 For example, Te Ture Whenua Maori Act 1993 [TWMA] or the MCA, above n 7.

The custom, once crystallised at international law, should represent a significant source of legal rights for indigenous peoples such as Māori.

II BACKGROUND: A CUSTOMARY INTERNATIONAL LAW NORM RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES TO TRADITIONAL LANDS

By way of background, it is necessary to outline the test for customary international law. This part of the article will also examine supporting evidence for the custom and its likely current status.

The Test for Customary International Law

In ascertaining whether a custom exists, two elements must be met: state practice and *opinio juris sive necessitates* (*opinio juris*). State practice is the objective limb. It requires the usage or practice of a custom and involves identifying state action as evidence of the existence of a custom.[10] *Opinio juris*, on the other hand, is the mental or subjective limb of the test.[11] State practice must be undertaken in the *belief* that the law requires such a practice.

Roberts describes two approaches to the test of customary international law.[12] The traditional approach to applying this test is exacting: it requires practice over time, is "evolutionary" and is identified through "an *inductive* process in which a general custom is derived from specific instances of state practice".[13] The decision of the International Court of Justice (ICJ) in *North Sea Continental Shelf Cases* (*North Sea*) is the leading case that follows the traditional approach.[14] In this case Germany, Denmark and the Netherlands disputed the location of their continental shelf boundary. The ICJ held that even where a rule or provision is of a norm-creating character, state practice is an "indispensable requirement".[15]

The second, modern approach to the test of customary international law is flexible and requires less practice over time. It is "a *deductive* process that begins with general statements of rules rather than particular instances of practice".[16] The ICJ followed the modern approach in *Military and Paramilitary Activities in and against Nicaragua*.[17] In this case, one issue was whether a prohibition against the use of force was a rule of customary

10 *Laws of New Zealand* International Law: Principles (Reissue 1) at [106].

11 At [107].

12 AE Roberts "Traditional and Modern Approaches to Customary International Law" (2001) 95 AJIL 757 at 757.

13 At 758 (emphasis in original).

14 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3.

15 At [74].

16 Roberts, above n 12, at 758 (emphasis in original).

17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [184]–[188]. For a critique of this decision see HCM Charlesworth "Customary International Law and the Nicaragua Case" (1987) 11 Aust YBIL 1.

international law. In determining whether there was a custom, the Court relaxed both the state action and *opinio juris* requirements. It held that *opinio juris* may be deduced from the attitude of states towards certain General Assembly resolutions. Consenting to General Assembly resolutions would be one way of expressing *opinio juris*.[18]

The Evidence Supporting a Custom

Jurists have mooted whether there exists a customary international law norm recognising the rights of indigenous peoples over traditional lands. Internationally, there are many treaties, declarations, cases and rulings that support an indigenous custom. These include:[19]

- The International Labour Organization's Convention 169;[20]
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR), including General Comments promulgated from their treaty-monitoring bodies, such as *General Recommendation 23* of the Committee on the Elimination of Racial Discrimination (CERD) and *General Comment 23* of the Human Rights Committee;[21]
- *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, Reparations, Costs)* (*Awas Tingni*);[22]
- The *UNDRIP*;[23] and
- Other sources such as the *Rio Declaration on Environment and Development* and *Agenda 21*.[24]

18 Charlesworth, above n 17, at 28.

19 Other sources include: *Hopu v France (Views)* UNHRC 549/1993, CCPR/C/60/D/549/1993/Rev1, 29 July 1997; *Lovelace v Canada (Views)* UNHRC R6/24, A/36/40, 30 July 1981; *Maya Indigenous Communities of the Toledo District v Belize (Merits)* IACHR 12.053, Report No 40/04, 12 October 2004; *Dann v United States (Merits)* IACHR 11.140, Report No 75/02, 27 December 2002; and *Aurelio Cal v Attorney-General of Belize* (2007) 71 WIR 110 (Belize SC).

20 Indigenous and Tribal Peoples Convention, 1989 (adopted 27 June 1989, entered into force 5 September 1991).

21 International Convention on the Elimination of Racial Discrimination 660 UNTS 195 (opened for signature 7 March 1966, entered into force 4 January 1969); International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976); Human Rights Committee *General Comment 23: The rights of minorities (Article 27)* CCPR/C/21/Rev1/Add5 (1994); and Committee on the Elimination of Racial Discrimination *General Recommendation 23: Indigenous Peoples* A/52/18 (1997) at annex V.

22 *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, Reparations, Costs)* IACourtHR Series C No 79, 31 August 2001.

23 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [*UNDRIP*].

24 *Rio Declaration on Environment and Development, Annex I to the Report of the United Nations Conference on Environment and Development* A/CONF151/26 (1992); and *Agenda 21: The United Nations Programme of Action from Rio, Annex II to the Report of the United Nations Conference on Environment and Development* A/CONF151/26 (1992).

There are also many examples of domestic laws and practices that support an indigenous custom. These include:

- The doctrine of native title, prominent in common law nations such as Australia, Canada, New Zealand and the United States of America;
- Treaty settlements with indigenous peoples, particularly prevalent in New Zealand and Canada; and
- Constitutions that recognise indigenous rights, such as those of Bolivia, Ecuador and Venezuela.

Indeed, Korman concludes that despite the great variety of state practice, domestic and international action ultimately recognise indigenous peoples and their rights to traditional lands.[25]

The Potential Ambit and Content of the Custom

It is clear from the evidence that the potential content of the custom is wide-ranging. At one end of the spectrum, the custom may oblige states to provide legal protection of indigenous peoples' rights to their lands. The nature of these rights is to be determined from an indigenous worldview. For example, art 26 of the *UNDRIP*, *Awas Tingni* and CERD expressly confirm that: indigenous peoples have a right to traditional lands; discriminatory treatment of indigenous lands is not to be tolerated; and the indigenous worldview determination of these rights should prevail. Article 26 provides:[26]

> **Article 26**
> 1. Indigenous peoples have the *right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. *States shall give legal recognition and protection to these lands, territories and resources.* Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

At the other end, however, the custom may merely impose a narrow, moral duty on states to recognise indigenous peoples' rights to their lands. These interests may be considered, for example, in the course of executive decision-making or by merely consulting indigenous peoples as "interested parties".

25 Korman, above n 6, at 462.
26 *UNDRIP*, above n 23 (emphasis added).

This is certainly the practice of many states. For instance, s 6 of the Resource Management Act 1991 provides:[27]

> **6 Matters of national importance**
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, *shall recognise and provide for the following matters* of national importance:
> ...
> (e) *The relationship of Maori and their culture* and traditions *with their ancestral lands*, water, sites, waahi tapu, and other taonga.

The Custom's Potential Status

While there is support for the custom, it is unlikely that a customary norm at international law recognising indigenous rights to traditional lands has emerged.

The traditional approach in determining customary international law is exacting and takes time to meet. The critical problem under the traditional approach is that this custom lacks certainty: it is uncertain as to what it entails and what it requires of states. One might ask what "rights" do indigenous peoples have under the custom; which lands are subject to the custom; and who decides?

Such uncertainty is a strong indication that the custom has yet to emerge. In *Sosa v Alvarez-Machain*, the Supreme Court of the United States found that uncertainty of content was evidence that a custom had not crystallised.[28] This dictum would likely apply to the custom in question.

The content of the custom is not the only concern. The test for customary international law also requires consistent practice of a custom. No state practises the stronger form of the custom discussed above; most states practise the weaker form. Although considered a world leader in indigenous rights, New Zealand extinguished the doctrine of native title to the foreshore and seabed in the Foreshore and Seabed Act 2004.[29] States generally:

- Recognise the importance of traditional lands to indigenous peoples;[30]

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27 Resource Management Act 1991, s 6 (emphasis added).

28 *Sosa v Alvarez-Machain* 542 US 692 (2004) at 738, n 29. For more on this case, see Brian D Lepard *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, Cambridge, 2010) at 333.

29 Foreshore and Seabed Act 2004. See also MCA, above n 8, which similarly extinguished Māori customary native title to the foreshore and seabed.

30 In New Zealand, this is exemplified by the Resource Management Act.

- Acknowledge that traditional lands include lands currently occupied by indigenous peoples and may also include previously occupied land;[31] and
- Recognise that indigenous peoples are "interested parties" in developments associated with traditional lands.[32]

For these reasons, Charters believes a custom, if it does exist, is confined to a weaker form. Charters explains that the custom would only contain:[33]

> ... a narrow States' duty to *respect* and *protect* indigenous peoples' relationship to their lands. Beyond that, the extent of the States' duty remains uncertain under customary international law. ... At best, a broad indigenous peoples' right to land is probably only on the cusp of achieving the status of customary international law.

This conclusion is not desirable for Māori. For Māori, these rights and obligations go no further than the existing mechanisms already in place in New Zealand. To illustrate, s 36 of the Resource Management Act 1991 already requires consultation with local iwi. *Control* is the missing element.

There is a strong argument for alternative approaches to the traditional tests of customary international law. Such alternative approaches include not just Roberts's aforementioned modern approach, but also a human rights approach. The human rights approach reads down the *opinio juris* limb to establish customary international law. The rationale for this approach is twofold. First, while not all human rights are *jus cogens*, human rights are nevertheless universal in nature. In theory, human rights exist regardless of state intention or practice. Secondly, even when states ignore human rights, any action that impacts human rights should, at the least, undergo high scrutiny to preserve the sanctity of the rights at stake. This is analogous to the presumption of consistency approach that New Zealand courts follow.[34]

Unlike the traditional and modern approaches, the ICJ has not yet endorsed a human rights approach. Nevertheless, jurists claim a human rights rationale is implicit in ICJ reasoning. Jeremy Pearce notes that there are instances where the ICJ has used customary international law as "another measure to bring about results it believes to be right, fair and just in the circumstances".[35] Brian Lepard outlines how such an approach is appropriate in the context of human rights. He states:[36]

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31 As is consistent with aspects of the doctrine of native title.

32 This being a moral, rather than a legal, duty.

33 Charters, above n 5, at 526 (emphasis added). Note that Charters openly adopts a positivist approach in her reasoning.

34 *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (SC) at 542–543; and Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 533. See Part IV below for more on the presumption of consistency.

35 Jeremy Pearce "Customary International Law: Not Merely Fiction or Myth" [2003] Aust ILJ 125 at 139.

36 Lepard, above n 28, at 332 (footnote omitted).

> [C]onsistent state practice in the form of observing human rights should be given less weight as evidence of *opinio juris* than in the case of norms having a less immediate effect on the realization of these principles. Meron has adopted a similar view that the International Court of Justice (ICJ) ... has accorded "limited significance to state practice, especially to inconsistent or contrary practice," in evaluating the customary law status of human rights or humanitarian norms.

Indigenous rights may enjoy the benefit of the human rights approach. In essence, indigenous rights are human rights applied in the indigenous context. This is how they are framed in the ICCPR, the ICERD and the *UNDRIP*.[37]

The concerns regarding the use of "alternative" approaches aside, the modern and human rights approaches to the test of customary international law would alleviate the rigidity of the traditional approach. Nevertheless, it remains unlikely that a custom would crystallise at international law even under these alternative approaches. While art 26 of the *UNDRIP* and the doctrine of native title provide certainty in respect of the custom's potential limbs, the custom itself is likely too uncertain to emerge at this stage.

III IS NEW ZEALAND BOUND BY THE CUSTOM? THE PERSISTENT OBJECTOR DEFENCE AND A "PEDIGREE" APPROACH

It is uncertain whether the custom will emerge at international law. However, even if the custom were to emerge, it is not a simple case that the custom would be automatically binding at New Zealand's domestic law. There are two instances in which a custom would not bind a common law state: first, where a state is a "persistent objector"; and secondly, where a country does not receive the custom into common law. The former operates as an international law defence, the latter as a vetting process to the reception of international law into domestic law. There is a strong possibility that both these exceptions apply to New Zealand. Logically, one should determine whether the custom is binding at international or domestic law before one considers its implications.

A Persistent Objector: Does New Zealand Have a Defence to the Custom?

A state that consistently objects to the custom during its formation and the course of its lifetime will be regarded as a persistent objector.[38] The persistent objector defence is the only instance where a custom will not automatically bind a state at international law and stems from the consent-based justification

37 Megan Davis notes that the *UNDRIP* is an elaboration of human rights in the indigenous context: Megan Davis "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples" (2008) 9 Melbourne Journal of International Law 439.

38 Lepard, above n 28, at 230.

of international law. The ICJ approved this defence in *North Sea*.[39] In this case, because of Norway's consistent protest, the ICJ granted Norway immunity from any new norm concerning the determination of territorial water boundaries.[40]

While there is disagreement as to its merits and application, the concept and elements of the persistent objector defence are relatively settled amongst jurists.[41] There are two limbs to the defence: first, a state must object to an international custom during its formation; secondly, a state must consistently maintain this objection throughout the custom's lifetime.[42] The burden to prove the defence lies with the state that intends to rely on it.[43] The defence would not apply where the international custom is a *jus cogens* norm, because of the superior nature of such norms.[44]

The test is strictly applied. A state's failure to protest *during* the formation of a custom "will normally be taken [to] signify acquiescence to the application of that rule to the state".[45] Protest *after* the custom has crystallised is considered noncompliance with the rule: the state would be in breach of its international obligations.[46] Inconsistent protest would not satisfy the threshold.[47]

New Zealand may be able to claim status as a persistent objector to any potential custom recognising indigenous rights to land, and therefore would not be bound by the custom. Reliance could be placed on New Zealand's initial failure to support the *UNDRIP*.[48] Throughout the *UNDRIP*'s development, New Zealand, along with its fellow CANZUS states — Canada, Australia and the United States of America — consistently opposed indigenous rights to "lands, territories and resources" under the *UNDRIP*.[49] In 2006, the CANZUS representative to the United Nations Permanent Forum on Indigenous Issues (UNPFII), Clive Pearson, stated that:[50]

39 *North Sea*, above n 14.

40 *Laws of New Zealand*, above n 10, at [108].

41 Jonathan Charney is critical of the persistent objector defence: Jonathan L Charney "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56 BYBIL 1. However, Lepard believes the defence should remain: Lepard, above n 28, at 229.

42 Mark E Villiger *Customary International Law and Treaties* (2nd ed, Kluwer Law International, The Hague, 1997) at 34.

43 At 34.

44 *Jus cogens* norms are a higher source of international law to customary international law in the sense that no derogation from a *jus cogens* is permitted. *Jus cogens* norms can be modified only by a subsequent norm of customary law having the same character. Examples include prohibitions on genocide and slavery. See *Laws of New Zealand*, above n 10, at [110].

45 *Laws of New Zealand*, above n 10, at [108].

46 See Villiger, above n 42, at 34.

47 Lepard, above n 28, at 229.

48 Reliance could also be placed on TWMA, above n 9, and cases such as *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC). These are instances of the state demarcating the limits of Māori customary rights. The limits may be wider than in other states. Nevertheless, the state has clearly indicated that it will determine the role of Māori indigenous rights, not international law.

49 *UNDRIP*, above n 23, art 28.

50 Clive Pearson "Statement by Clive Pearson, Representative of New Zealand, on behalf of Australia, New Zealand and the United States of America, on the Declaration on the Rights of Indigenous Peoples" (speech to the United Nations Permanent Forum on Indigenous Issues, 17 May 2006) <www.mfat.govt.nz> (emphasis added).

> ... the provisions on lands and resources [in the draft *UNDRIP*] are particularly *unworkable and unacceptable.* They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous (Article 26). Such provisions would be *impossible to implement.*

In 2007, the New Zealand Ambassador to the United Nations, Rosemary Banks, maintained a similar position to Clive Pearson at the *UNDRIP*'s final vote in the United Nations General Assembly. Banks stated:[51]

> [T]he provision on lands and resources cannot be implemented in New Zealand. Article 26 states that indigenous peoples have a right to own, use, develop or control lands and territories that they have traditionally owned, occupied or used. For New Zealand, the entire country is potentially caught within the scope of the Article. The Article appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous, and does not take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned. Furthermore, this Article implies that indigenous peoples have rights that others do not have.

In 2010, the Hon Pita Sharples announced New Zealand's support for the *UNDRIP* to the UNPFII, stating that:[52]

> In moving to support the Declaration, New Zealand ... *reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system.* Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, *define the bounds of New Zealand's engagement with the aspirational elements of the Declaration* ... In particular, where the Declaration sets out aspirations *for rights to and restitution of traditionally held land and resources,* New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach. That approach ... maintains, and *will continue to maintain, the existing legal regimes* for the ownership and management of land and natural resources.

These statements clearly indicate the New Zealand government's reservation with the *UNDRIP.* Consequently, New Zealand may be a persistent objector to an indigenous land rights custom.

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51 Rosemary Banks "Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations" (13 September 2007) <www.mfat.govt.nz>.

52 Pita Sharples, Minister of Māori Affairs "Mihi to United Nations Permanent Forum" (19 April 2010) <www.mfat.govt.nz> (emphasis added). The Minister of Justice soon announced it in the New Zealand Parliament: (20 April 2010) 662 NZPD 10229.

The statements alone, however, may not be enough to discharge the persistent objector test. This is for two reasons. First, on a closer analysis, official New Zealand statements may not object to indigenous land rights, but in fact *support* them. For example, Banks submitted to the General Assembly that:[53]

> In New Zealand, *indigenous rights are of profound importance*. They are *integral to our identity as a nation State and as a people*. New Zealand is unique: a treaty concluded at Waitangi between the Crown and New Zealand's indigenous people in 1840 is a founding document of our country. Today, we have one of the largest and most dynamic indigenous minorities in the world, and the Treaty of Waitangi has acquired great significance in New Zealand's constitutional arrangements, law and government activity.
>
> ... the place of Māori in society, their grievances and the disparities affecting them, are central and enduring features of domestic debate and of government action. Furthermore, New Zealand has an unparalleled system for redress accepted by both indigenous and non-indigenous citizens alike. Nearly 40% of the New Zealand fishing quota is owned by Māori as a result. Claims to over half of New Zealand's land area have been settled.
>
> For these reasons, *New Zealand fully supports the principles and aspirations of the Declaration on the Rights of Indigenous Peoples*. New Zealand has been implementing most of the standards in this declaration for many years. We share the belief that a Declaration on the rights of indigenous peoples is long overdue, and the concern that, in many parts of the world, indigenous peoples continue to be deprived of basic human rights.

Banks's statements do not represent an objection to Māori, or indigenous, land rights. Rather, they demonstrate that the New Zealand government at least *supports* general indigenous land rights. New Zealand's official statements, as a whole, may not be sufficient evidence to establish the persistent objector defence.

Secondly, New Zealand's statements may not evidence consistent objection. State objection must be consistent throughout the formation and lifetime of a custom. Any inconsistency will be read against the state.

New Zealand's statements on indigenous rights are ambiguous and inconsistent. The New Zealand government opposes the articulation of the *UNDRIP*'s provisions on indigenous land rights. Yet it supports indigenous rights generally, touting Māori land rights as world-leading. The New Zealand government should not benefit from such inconsistencies when claiming persistent objector status: from a plain application of the rule, New Zealand's

53 Banks, above n 51 (emphasis added).

objection may not be consistent enough.

A presumption of consistency or human rights approach reinforces this conclusion. This article will discuss the presumption of consistency in more detail in Part IV; however, the human rights approach is very similar in operation. As discussed briefly in Part II, the human rights approach reads down the *opinio juris* limb to establish customary international law, especially when human rights are at stake. In the persistent objector context, this approach means state objection must not only be consistent, but also very clear. Any ambiguity or inconsistency should be read against the state.

Jurists support this level of scrutiny to the persistent objector defence. Lepard suggests that states may only object to a custom on "principled grounds".[54] This limitation both respects the nature of the custom at stake and preserves state self-determination. Lepard also believes that some human rights norms may be immune from persistent objection altogether,[55] "even though it does not rise to the level of *jus cogens*".[56] The justification behind Lepard's theory is the universal nature of human rights: they cannot be defeated simply because one state does not subscribe to them.

The nature of the custom and the level of scrutiny to be applied suggest that official New Zealand government statements would have to target the custom specifically. They would need to articulate clearly and consistently an objection, leaving no room for ambiguity. From the evidence discussed, New Zealand's statements are not sufficiently clear, nor are they consistent in their objection to indigenous land rights. For these reasons, it is unlikely that New Zealand can rely on the persistent objector defence.

The Pedigree Approach: A Barrier to New Zealand Domestic Law Receiving the Custom?

The manner in which the state receives customary international law dictates whether a custom is part of its law.[57] There are two approaches to the reception of customary international law: the monist approach and the dualist approach. The monist approach is a steadfast application of Blackstone's doctrine that the law of nations will be binding at common law.[58] Under the monist approach, customary international law is automatically received into domestic law. There is no need for any positive state action: once crystallised, a custom will be binding. In contrast, under the dualist approach, customary

54 Lepard, above n 28, at 231.

55 At 331.

56 At 333.

57 A variety of typologies have been developed to describe how customary international law becomes part of domestic law: see Hilary Charlesworth and others "International Law and National Law: Fluid States" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (The Federation Press, Sydney, 2005) 1.

58 Joseph, above n 34, at 30. Joseph states that customary international law embodies the law of nations. He cites Blackstone: "the laws of nations ... is here adopted in its full extent by the common law". See also Ian Brownlie *Principles of Public International Law* (5th ed, Clarendon Press, Oxford, 1998) at 42.

international law will not be binding until it is positively incorporated into the domestic legal system.

The New Zealand courts follow the monist approach to the reception of customary international law.[59] While the Treaty of Waitangi would require legislative incorporation to be binding,[60] if the custom at issue were to crystallise, that custom would likely become binding at New Zealand common law.

Notwithstanding this, some jurists convincingly argue that Blackstone's mantra represents a starting point, rather than an authoritative statement of law. Treasa Dunworth suggests the New Zealand courts may follow a "pedigree approach" to the reception of customary international law.[61] This is the idea that not all customary norms will be received in the same way: only those customs with a certain "pedigree" may be accepted as binding at common law.[62]

This approach clearly qualifies Blackstone's doctrine. The judiciary would be empowered to accept or reject customs based on the markers they develop, rather than automatically accepting international customs. One marker of accepted customs is a requirement that the custom's content is sufficiently certain and is not the "subject of legislation".[63]

There are signs that suggest the pedigree approach could be adopted in New Zealand. First, there is a hint of a pedigree approach in current New Zealand judicial reasoning. In *Governor of Pitcairn and Associated Islands v Sutton*, Cooke P stated "[a] general statute, however apparently comprehensive, is not to be interpreted as contrary to international law on such matters as sovereign immunity".[64] Dunworth reads this as "leav[ing] open the possibility that there might be a different result if the international rule involved a different subject".[65]

Secondly, the reasons our courts follow Blackstone's mantra are unclear. Dunworth believes that a "fluid approach would allow better account to be taken of the international debates about customary international law's conceptual legitimacy".[66]

Finally, the pedigree approach is consistent with fellow common law countries. Dunworth explains that a "notion of pedigree is also evident" in

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59 *Sellers*, above n 3; and *Winebox Inquiry*, above n 2.

60 *Te Heuheu Tukino v Aotea Maori Land Board* [1941] NZLR 590 (PC). At 596–597, the Privy Council said: "It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law."

61 Treasa Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL 67 at 84.

62 At 81.

63 At 81. David Elliot 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: David Elliot "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002) 65 Sask L Rev 469 at 508.

64 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 430.

65 Dunworth, above n 61, at 83.

66 Treasa Dunworth "Lost in Translation: Customary International Law in Domestic Law" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (The Federation Press, Sydney, 2005) 136 at 150–151.

the United States,[67] the United Kingdom,[68] and Australia. In Australia, for example, Wilcox J in *Nulyarimma v Thompson* stated:[69]

> [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.

It is possible that New Zealand courts may follow a pedigree approach, now or in the future. Such an approach may be problematic for the custom at issue in this article as the judiciary would be more likely to reject the custom. The custom is less certain than other accepted norms, such as state sovereignty and maritime issues. Unlike those other norms, it is not a "traditional" area of international law and, further, extensive legislation has occurred in relation to indigenous issues in New Zealand.[70] However, the courts have not yet endorsed the pedigree approach. And irrespective of whether a pedigree approach is followed, the custom may still be received into domestic New Zealand law for two reasons.

First, the courts may limit the pedigree approach to apply only to *jus cogens* norms. Indeed, the features of "good" pedigree are consistent with the requirements of *jus cogens* norms. Walker and Mitchell support the pedigree approach:[71]

> ... in the sense that *jus cogens* norms of customary international law should be more readily accepted in a domestic setting and given a stronger role, than other norms of customary international law.

Insufficient pedigree simply means the custom is not *jus cogens* and therefore requires more attention before the courts decide whether to incorporate it into New Zealand law.

Secondly, the courts may not hold the custom to the same level of scrutiny as other customs (such as state sovereignty). Such an approach could

67 Dunworth, above n 61, at 82. See *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) at 428.

68 Courts of the United Kingdom follow a "judicial recognition" rule, which has been applied, for example, in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA).

69 *Nulyarimma v Thompson* [1999] FCA 1192, (1999) 96 FCR 153 at [25].

70 Examples include The Native Lands Act 1865; TWMA, above n 9; and MCA, above n 7.

71 Kristen Walker and Andrew D Mitchell "A Stronger Role for Customary International Law in Domestic Law?" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (The Federation Press, Sydney, 2005) 110 at 122.

be justified due to the nature of the custom at hand and the rights that are at stake: in essence, human rights in the indigenous context.

This would be consistent with the human rights approach. It is also congruent with recent judicial statements where ambiguity was read against the state.[72] Accordingly, it is likely that the custom would be received into our domestic legal system, regardless of whether a pedigree approach is endorsed by the courts.

IV THE IMPLICATIONS OF THE CUSTOM IN NEW ZEALAND LAW

It is likely that, should a custom crystallise at international law, New Zealand will be bound to the custom at international and domestic law. First, New Zealand is unlikely to be a persistent objector and will be bound at international law to the custom. Secondly, the judiciary will likely adopt the custom into New Zealand's domestic law, irrespective of a pedigree approach.

On the assumption the custom binds New Zealand, the issue as to what implications the custom will have for New Zealand's domestic law becomes relevant. A custom will become relevant in three respects: it may become enforceable at common law; it may become an aid to statutory interpretation; and it may also become a mandatory relevant consideration in administrative decision-making.

Binding at Common Law

A custom is only binding at common law where it does not conflict with domestic statutes or judicial determinations. As Brownlie explains, customary international law is:[73]

> ... part of the law of the land and [is] enforced as such, with the qualification that [it is] ... incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority.

In New Zealand, there is a range of domestic legislation dealing with Māori land rights, such as the Marine and Coastal Area (Takutai Moana) Act 2011 (MCA) and Te Ture Whenua Māori Act 1993 (TWMA). Such legislation may displace the custom's application, rendering it ineffective. While there is a prima facie "conflict" between these statutes and the custom, it is uncertain whether this conflict extinguishes the custom.

There are three schools of thought concerning the effect of a conflicting custom. The first school holds that where a custom conflicts with a statute, the custom is extinguished outright. According to the second school, a custom

72 See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

73 Brownlie, above n 58, at 42.

may be accepted as common law; however, where conflict arises the custom, as an accepted common law rule, would be extinguished by the conflicting statute. Under the final school, the custom may be accepted at common law and will only be extinguished by clear statutory language. Where a conflicting statute is repealed, or where gaps appear in the legislative framework, the custom may take effect at common law.

The New Zealand judiciary has not yet endorsed one particular school, but it is suggested that the third school would prevail. The New Zealand courts have applied a similar threshold in the context of indigenous rights. In determining whether statutory provisions extinguished the doctrine of native title to the foreshore and seabed in *Ngati Apa*, the Court of Appeal set a high threshold: only express statutory wording could extinguish the doctrine; mere conflict was not enough. The use of the high threshold was, in part, due to the nature of the doctrine: it dealt with indigenous rights in land. Elias CJ considered whether the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 extinguished the doctrine. Her Honour stated that:[74]

> No expropriatory purpose in the Act in relation to Maori property recognised as a matter of common law and statute can be properly read into the legislation. It is principally concerned with matters of sovereignty, not property. I agree with the reasons given in the judgment of Keith and Anderson JJ. The language of deeming, the preservation of existing property interests, the compatibility of radical title in the Crown and Maori customary property, and *the absence of any direct indication of intention to expropriate make it impossible to construe the legislation as extinguishing such property.*

As the custom in question also deals with indigenous property rights, the high threshold set in *Ngati Apa* should equally apply to the custom at hand. That is, unless a statute expressly extinguished the custom, the custom would lie dormant at common law. Where that statute is repealed — or more importantly, where legislation is unclear — the custom may wake and bind New Zealand courts.

It is unlikely that any domestic legislation would expressly extinguish the operation of the custom. There is no express provision in the TWMA or the MCA that precludes its operation. In fact, these enactments are arguably consistent with the operation of the custom. For example, s 8 of the MCA states:[75]

74 *Ngati Apa*, above n 72, at [63] (emphasis added).

75 (Emphasis added).

> **8 Rights and obligations under international law not affected**
> To avoid doubt, this Act does not affect—
> (a) the sovereignty of New Zealand under international law over the marine and coastal area, including the airspace above it; or
> (b) *the rights and obligations of New Zealand under international law* pursuant to that sovereignty; or
> (c) the provisions in any other enactment relating to any such rights and obligations under international law.

Similarly, s 2(2) of the TWMA states (in relation to the interpretation of the Act generally):[76]

> Without limiting the generality of subsection (1) of this section, it is the intention of Parliament *that powers, duties, and discretions* conferred by this Act *shall be exercised*, as far as possible, *in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho* by Māori owners, their whanau, their hapu, and their descendants [and that protects wahi tapu].

As the custom is an international and an indigenous land right obligation, it is possible for the custom to subsist at common law. The custom may therefore apply where there are gaps in legislation.

One area not determined by legislation is the doctrine of native title.[77] Native title is a common law doctrine that recognises the property rights of indigenous inhabitants. As Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* stated:[78]

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. ... [Native title rights] are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.

It is generally considered that to prove rights over land, one must show the practice is a traditional Māori activity carried out before 1840.[79] As such, native title is difficult to prove.

76 (Emphasis added).

77 This will not include the customary interests created by the MCA, above n 7, ss 51 and 58. For more on reading the gaps in statutes, see Susan Glazebrook "Filling the Gaps" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 153.

78 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23–24.

79 On native title, see generally Richard Boast and others *Maori Land Law* (Butterworths, Wellington, 1999).

The rights that follow from native title are varied. They generally grant usufruct rights, but can grant rights equivalent to fee simple title. In *Te Runanganui*, Cooke P noted further:[80]

> The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. Yet how they are decided or assessed tends to turn, not on the evidence only, but also on the approach of the Court considering the issue. At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law (see for instance *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ). At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy (see, throughout, the dissenting judgment of Dawson J in the same case). Viscount Haldane's phrase "a full native title of usufruct" in delivering the judgment of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 408, is one of the descriptions most frequently cited.

The custom may modify the test for native title to such an extent that the doctrine not only recognises traditional activities, but also protects *contemporary* activities. This is consistent with the view at international law that indigenous rights evolve and change. The custom may also reverse the evidential burden, requiring the Crown to prove that native title has been extinguished. Furthermore, the custom may read into native title the requirement that remedies for extinguishing native title rights should be available as of right.[81] This is consistent with the principles of the *UNDRIP* and ICERD that underpin the custom.

Without doubt, native title rights are significantly limited in operation. Parliament has extinguished native title over the foreshore and seabed,[82] Māori freehold land,[83] and traditional fishery rights.[84] Still, novel areas of law may arise. One emergent issue is that of freshwater ownership, where, as in *Ngati Apa*, the doctrine may be triggered once more.[85] In this way, the custom may have significant legal implications.

80 *Te Runanganui*, above n 78, at 24.

81 Consistent with arts 26 and 38 of the *UNDRIP*, above n 23.

82 Foreshore and Seabed Act. See generally MCA, above n 7.

83 The Native Lands Act 1862; The Native Lands Act 1865; and TWMA, above n 9.

84 Māori Fisheries Act 2004.

85 On 24 August 2012, the Waitangi Tribunal, in its Interim Report on the National Freshwater and Geothermal Resources Claim, found that there is a nexus between shares in the power companies and the Māori rights in the water resources used by those power companies: Waitangi Tribunal *Interim Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012). The Tribunal concluded that, in practical terms, the Crown would not be able to provide a meaningful form of rights recognition for Māori in respect of its water bodies after it sells shares in various State Owned Enterprises to private investors. The Tribunal therefore concluded that the sale should be delayed while an accommodation is reached with Māori.

An Aid to Statutory Interpretation: The Presumption of Consistency

The custom may also be an aid to statutory interpretation through the application of the presumption of consistency. The presumption of consistency is the judicial understanding that Parliament does not intend to legislate in breach of its obligations.[86] The courts have applied this presumption to international obligations, including customary international law. In *Worth v Worth*, the Court of Appeal stated:[87]

> [I]f the enactment is ambiguous and is capable of two constructions, one of which would, and the other would not, conflict with the rules of international law, the latter construction should prevail.

The courts have also applied the presumption to what can broadly be characterised as "indigenous obligations". In *Huakina Development Trust v Waikato Valley Authority*, the High Court invoked the Treaty of Waitangi to interpret the Water and Soil Conservation Act 1967.[88] The above case law suggests that in the present instance the custom could be applied flexibly as both an international law and an indigenous rights obligation.

The presumption of consistency should not be undervalued. *Sellers v Maritime Safety Inspector* and *Zaoui v Attorney-General (No 2)* illustrate the power of this approach.[89] In *Sellers*, Keith J for the Court of Appeal quashed the appellant's conviction for failing, among other things, to carry a safety beacon on his vessel as required under s 21 of the Maritime Transport Act 1994.[90] His Honour found that reading the international custom of freedom of the high seas consistently with s 21 rendered such requirements ineffective.[91]

The value of *Sellers* is in its departure from the suggestion in *Worth* that ambiguity is necessary to invoke the presumption of consistency.[92] Despite the very clear wording of s 21, the requirement to carry a safety beacon was deemed invalid: the Court preferred to uphold the custom instead of the domestic statute. The presumption of consistency approach may now be more readily available and would mark a departure from the approaches taken in England and Australia.[93]

The presumption of consistency was also integral in *Zaoui*. Although

86 Joseph and Dunworth describe the uncertainties in this area: Joseph, above n 34, at 533; and Treasa Dunworth "Public International Law" [2000] NZ Law Review 217 at 225. For more on the role of the presumption of consistency, see Jim Evans "Reading Down Statutes" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 123.

87 *Worth v Worth* [1931] NZLR 1109 (CA) at 1121.

88 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

89 *Sellers*, above n 3; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

90 *Sellers*, above n 3.

91 At 62.

92 See *Worth*, above n 87, at 1121. See also Treasa Dunworth "The rising tide of customary international law: Will New Zealand sink or swim?" (2004) 15 PLR 36 at 48.

93 In England, ambiguity is required before the presumption of consistency can be applied: *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) at 748. For more on the Australian approach, see David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law: Internationalism as Constitutionalism" (2001) 1 OUCLJ 5.

dealing with an international treaty, rather than customary international law, *Zaoui* illustrates the presumption's potential impact when discretionary executive power is being exercised. The Supreme Court found New Zealand's obligations under the ICCPR constrained the exercise of discretionary power under s 72 of the Immigration Act 1987.[94] While the value of *Zaoui* can be challenged on the basis that the presumption of consistency was invoked in tandem with the New Zealand Bill of Rights Act 1990, Geiringer considers this challenge weak.[95]

Following the approaches to the presumption of consistency in *Sellers* and *Zaoui*, the judiciary may utilise the custom at issue in statutory interpretation. Specifically, the judiciary may use the custom when interpreting both the new MCA tests for establishing customary rights and the discretionary powers of the Minister of Conservation under the MCA.

1 Interpreting the MCA Tests to Establish Customary Rights

The MCA, much like the Foreshore and Seabed Act 2004, creates two kinds of Māori customary interests: interests in activities or practices (protected customary rights) and interests in land (customary marine title).[96] This is legally significant because the MCA operates as a code, creating and regulating matters relating to the marine and coastal area, including any Māori customary interests. The Act provides that where the above two tests are met, Māori are entitled either to negotiate with the Crown or to seek a High Court determination of their rights.[97]

Section 51(1) provides the test for a protected customary right. The right will exist where it:[98]

> (a) has been exercised *since* 1840; *and*
> (b) *continues to be exercised* in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same way or similar way, or evolves over time; *and*
> (c) is not extinguished as a matter of law.

Section 58(1) provides that customary marine title exists in a particular part of the coastal marine area if the applicant group:[99]

> (a) holds the specified area in accordance with tikanga; and
> (b) has …
>   (i) exclusively used and occupied it from 1840 to the present day *without substantial interruption*[.]

94 *Zaoui*, above n 89.

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

96 Sections 51 and 58, respectively.

97 Section 94. Any claim must be lodged with the Crown or High Court within 6 years.

98 (Emphasis added).

99 (Emphasis added).

The custom could be used to mitigate the high threshold of these tests, to a point where the test is read down, or even ignored entirely as it was in *Sellers*. For example, where the custom is applied to the test for customary marine title, the requirement for "substantial" uninterrupted use could be read down to take into account the process of colonisation. This may mean that hapū and iwi will not automatically fail the "substantial" uninterrupted use test required under the MCA in cases where the Crown had confiscated lands from Māori. Rather, the law may recognise that but for the confiscation, Māori may have maintained occupation and use without substantial interruption. The burden would fall on the Crown to prove otherwise. This would moderate the difficult process of having customary rights recognised in law and unlock access to these rights for more iwi and hapū.

It is uncertain whether the Court's approach in *Sellers* — using international law to read down legislative provisions — will be followed. Keith J no longer sits on the Court of Appeal. His contribution to international law discourse in New Zealand was invaluable. Further, the custom in question differs. Freedom of the high seas has a high "pedigree", to use Dunworth's terminology. This "pedigree" was a significant factor in Keith J's judgment, where he stated:[100]

> 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.

For the custom in question, such pedigree is absent. It is not certain and does not have the same historical precedential value. Nonetheless, the presumption of consistency approach could still be useful. It is foreseeable that the judiciary may use the custom as an aid to statutory interpretation.

2 *Interpreting the Discretionary Powers of the Minister of Conservation in the MCA*

The custom may also have a significant impact on the discretionary powers of the Minister of Conservation. Section 56(1) of the MCA allows the Minister of Conservation to impose controls "including any terms, conditions, or restrictions that the Minister thinks fit" on protected customary rights where conservation issues are triggered. Part 2 of sch 1 regulates the Minister's discretionary power and s 6(a) imposes mandatory considerations on the Minister.

The custom may — as in *Zaoui* — constrain the exercise of this discretion so that it is consistent with the custom's obligations. If the Minister were to impose a control, the custom may require that it be imposed in a manner that respects the custom. This is despite the discretionary nature of

100 *Sellers*, above n 3, at 62.

the control. For example, if the protected customary right involves collecting hāngī stones from the marine and coastal area, the practice could be limited to a sustainable level, rather than banned outright.

This is merely one example of how the custom may constrain discretionary executive powers. The custom may also be useful, for example, in curbing the discretionary powers of the Minister of Energy in his or her discretion to grant oil exploration permits.[101]

A Mandatory Relevant Consideration in Judicial Review Proceedings?

While the judiciary has not yet applied customary international law as a mandatory relevant consideration in judicial review proceedings, it is suggested that the custom may be a mandatory relevant consideration for three reasons.

First, the Court of Appeal "brushed up against" the use of customary international law in judicial review in *Ashby v Minister of Immigration*.[102] In *Ashby*, the applicants sought judicial review of the Minister of Immigration's decision to grant visas to a visiting South African rugby team. One ground for review was that the Minister was "bound to take into account the *Convention for the Elimination of all Forms of Racial Discrimination*" when deciding whether to grant visas.[103] New Zealand had ratified the Convention, but it had not been incorporated into domestic law. The Court unanimously found that the Minister was not bound to consider the Convention and the claim was dismissed.[104]

Nevertheless, the Court made several "tantalising suggestions" for a possible role for customary international law in judicial review.[105] Cooke J stated:[106]

> I would not exclude the possibility that a certain factor might be of such overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow it to be ignored.

Dunworth believes that this would "allow for the possibility that a jus cogens norm at least, if not a norm of customary international law, would constitute a relevant consideration".[107] Indeed, customary international law may be a "factor ... of such overwhelming or manifest importance" that the courts will require decision-makers to consider it.[108] In this way, *Ashby* provides persuasive authority for courts to use customary international law as a ground

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101 See, for example, *Greenpeace*, above n 7. At the time of writing, the second applicant, Te Runanga O Te Whanau-a-Apanui, was considering lodging an appeal to the Court of Appeal.

102 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); and Dunworth, above n 92, at 48.

103 Dunworth, above n 92, at 48.

104 Ashby, above n 102, at 225.

105 Dunworth, above n 92, at 48.

106 *Ashby*, above n 102, at 226.

107 Dunworth, above n 92, at 49.

108 *Ashby*, above n 102, at 226.

for judicial review.

The second reason turns on principle. The Court of Appeal in *Tavita v Minister of Immigration* considered that an unincorporated treaty may be a mandatory relevant consideration in executive decision-making.[109] In principle, there is no reason for accepting ratified but unincorporated treaties as mandatory considerations, but not similarly accepting customary international law norms. As Dunworth states:[110]

> 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?

Finally, the justification for the role of unincorporated treaties in judicial review can be applied directly to customary international law. In *Tavita*, Cooke P rejected an argument that New Zealand was not bound to consider the Convention on the Rights of the Child. Cooke P famously stated that such an argument was "unattractive" because it implied "New Zealand's adherence to the international instruments has been at least partly window-dressing".[111] This rationale would support a bid for customary international law to be a mandatory relevant consideration also. As Dunworth states:[112]

> If good international citizenry is the basis of allowing unincorporated treaties to create relevant considerations in judicial review, it seems perverse to deny that at least some customary international norms might also constitute mandatory relevant considerations.

Thus, if treaties are to have a place in judicial review, "customary international law must also play a role".[113]

A challenge to this view is that the use of unincorporated treaties in judicial review "remains to be settled".[114] Deciding *Puli'uvea v Removal Review Authority* on similar facts to *Tavita*, the Court appeared to retreat on the issue.[115] More considered cases — such as *Ashby*, where the Court had the benefit of time and well-drafted counsel submissions — have found that unincorporated treaties do not bind the executive. In *Ashby*, the Court seemed to collapse the presumption of consistency approach with the mandatory relevant consideration approach in *Tavita*, creating much uncertainty in this

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109 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). For more on this case, see Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

110 Dunworth, above n 61, at 76.

111 *Tavita*, above n 109, at 266. Dunworth notes that "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'": Dunworth, above n 61, at 78.

112 Dunworth, above n 92, at 49.

113 At 49.

114 Geiringer, above n 109, at 67.

115 *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538 (CA).

area of the law.[116]

Despite these issues, Geiringer considers *Tavita* good law.[117] Cooke P's good citizenry justification for the use of ratified but unincorporated treaties can apply to customary international law. It is therefore possible that customary international law may also become a mandatory relevant consideration in executive decision-making.

Instances where this custom would be a mandatory relevant consideration will be heavily fact-specific. The custom may be a mandatory relevant consideration in the Minister of Conservation's aforementioned discretionary power to control protected customary rights. These controls may seriously curb customary rights conferred by the MCA. As in *Tavita*, the Minister of Conservation may be bound to consider the custom when determining whether a control should be imposed on a protected customary right. Failure to do so may result in the determination being set aside.

While this approach is not as forceful as the presumption of consistency, the two may be used in tandem. Applying these approaches, and upholding an international customary law of indigenous land rights, would have significant benefits for Māori.

V CONCLUSION

Customary international law, although not as well-known as its other international law counterparts, is a primary source of international law. Once a custom emerges at international law, it is binding at international law. For common law countries like New Zealand, it is also binding domestically at common law.

The appeal of a customary norm that recognises indigenous rights to their traditional lands is obvious: unlike the Treaty of Waitangi, or international treaties or declarations, the custom could be automatically binding in New Zealand.

The focus of this article was to examine what the implications of such a custom may be for New Zealand. On its way, the article also addressed whether the custom exists, and if it does, whether it would be binding at international and domestic law.

If a custom were to emerge, it is not the case that it would radically alter the legal landscape for Māori. Its implications are far more subtle. To this end, customary international law is not the Holy Grail some may believe it to be.

Yet, the custom is helpful in that it complements existing legal avenues available to Māori. For example, the custom would be useful in the interpretation of statutes and in the review of executive decision-making, especially where discretionary power is exercised. In this way, customary

116 Geiringer, above n 95, at 315.

117 At 319–320.

international law contributes to the existing jurisprudence where Māori rights are concerned. It is for this reason that customary international law represents a significant source of legal rights for indigenous peoples such as Māori.