JENNIFER BLAKE

COMPLEMENTARY PROTECTION: DOES THE IMMIGRATION BILL 2007 MEET NEW ZEALAND'S OBLIGATIONS UNDER INTERNATIONAL LAW?

SUBMITTED FOR THE LLB (HONOURS) DEGREE

FACULTY OF LAW

VICTORIA UNIVERSITY OF WELLINGTON

2008

CONTENTS

The text of this paper (excluding table of contents, footnotes and bibliography) comprises approximately 8982 words.

I INTRODUCTION

After undertaking a comprehensive review of New Zealand's immigration legislation, on 8 August 2007 the Hon David Cunliffe MP, Ministry of Labour introduced the Immigration Bill 2007 (the Bill) to Parliament.[1] One of the stated objectives of the Bill is to support New Zealand's immigration-related international obligations.[2] One area of these obligations which has been highly controversial is complementary protection. This refers to the protection of people seeking asylum who are not eligible for protection under the United Nations Convention Relating to the Status of Refugees (Refugee Convention), due to either not meeting the convention's definition of refugee, or being classified under an exclusion clause.[3] The key aspect of complementary protection is the duty of non-refoulement: the duty of a state not to return a person to a country where they will face serious ill treatment.

This paper will undertake an analysis of what New Zealand's international law obligations are regarding complementary protection. It will determine that treaty provisions provide the core obligations. The three treaties from which New Zealand's complementary protection obligations arise are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[4] the International Covenant on Civil and Political Rights (ICCPR),[5] and the United Nations Convention on the Rights of the Child (CRC).[6] This paper will ascertain how these obligations should be interpreted and applied, with reference to state practice and international and domestic court decisions.

This paper will consider the current law in New Zealand surrounding non-refoulement through an analysis of the present immigration legislation, the New Zealand Bill of Rights Act 1990 (BORA),[7] and the interpretation of this legislation by the courts. It will look to how both the statute and case law has incorporated

---

[1] Department of Labour, Immigration Act Review www.dol.govt.nz (accessed 4 April 2008).
[2] Immigration Bill 2007, no 132-1 (explanatory note), 2.
[3] United Nations Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, as amended by the Protocol Relating to the Status of Refuges (31 January 1967) 606 UNTS 267.
[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
[5] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
[6] Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.
[7] New Zealand Bill of Rights Act 1990.

international obligations and will determine that they do not meet the standard required by international law. The Bill will then be analysed to see how the proposed reform alters this position.

This paper will show that the Bill, as it stands, represents a failure on the part of the New Zealand Government to meet its complementary protection requirements under international law in four key areas; the inclusion of clause 122, the retention of the article 33(2) exception, the exclusion of Convention on the Rights of the Child rights and the implications of clause 121(2)(b) for the possibility of refoulement to the death penalty. Whilst the Bill can be seen as an improvement on the current legislation, it by no means goes far enough to ensure compliance with responsibilities at international law. If New Zealand wishes to be seen to take its international responsibilities seriously the Bill will need further development.

II COMPLEMENTARY PROTECTION

Complementary protection is defined in reference to the Refugee Convention; it refers to any protection offered, by states, to asylum seekers, that goes beyond the obligations of the Refugee Convention. The Refugee Convention is considered to be the orthodox protection instrument for those seeking asylum,[8] and it is for this reason that protection given to those outside the Refugee Convention is seen to be complementary.[9] It is thus important to know the limits of the Refugee Convention in order to understand the scope of complementary protection.

A REFUGEE CONVENTION

The Refugee Convention entered into force for New Zealand on 27 September 1960, and the Immigration Act 1987 sets out the Convention in schedule six.[10] The Bill also includes the full text of the Convention as a schedule and the Bill proposes to

---

[8] Erika Feller, Volker Turk and Frances Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press, Cambridge, 2003) 6.
[9] Ibid, 5.
[10] Immigration Act 1987, 6th sch.

provide a statutory basis for the system by which New Zealand meets its obligations under the Convention.[11]

The Refugee Convention gives the internationally accepted definition of a refugee though the obligation upon State parties to provide protection to those who fall within this category is subject to several limitations.[12] Article 1 of the Convention, as amended by the 1967 Protocol Relating to the Status of Refugees, defines a refugee in detail, with the basic requirements set out in article 1(A)(1) being as follows:[13]

> Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.

This definition is restrictive as it requires a threat of persecution to fit within one of the specific grounds. Article 1 goes on to further restrict the definition by providing a number of exceptions and importantly at F it provides that:[14]

> The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments to make provision in respect of such crimes;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admittance to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

After satisfying the requirements of article 1, refugees under the Convention are prima facie entitled to the significant benefit of non-refoulement: at Article 33(1) the Convention provides that when a refugee's life or freedom would be threatened on

---

[11] Immigration Bill 2007, no 132-1, c113(a).
[12] United Nations Convention Relating to the Status of Refugees, above n 3.
[13] Ibid, art 1(a)(1).
[14] Ibid, art 1(f).

account of one of the Article 1 reasons, they shall not be returned to their home/resident state.[15] There is, however, an exception to this. Article 33(2) excludes the benefit from any person for whom:[16]

> there are reasonable grounds for regarding as a danger to the security of the country of which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The Refugee Convention thus permits derogation from the principle of non-refoulement even in relation to those who fit its definition of refugee. It by no means provides protection to all people who may be at risk of ill treatment if they are returned to their country of origin. The Convention also provides no protection to individuals who are at risk, after being returned, of being subsequently expelled by the country to which they have been returned. As long as the territory to which the asylum seeker is being returned does not present a risk to his or her safety the Convention does not consider whether that state may in turn extradite or expel the refugee to a territory which may present such a risk.[17]

The boundaries of the Convention are fairly well defined and where these leave off is the point where complementary protection begins. There have been suggestions that the Convention has been amended by recent developments in human rights law, and should be interpreted in light of this.[18] However it seems, as the Supreme Court of New Zealand found, unnecessary and incorrect to attempt to stretch the language of the Convention when there are other tools which could be used to provide this additional protection.[19]

III INTERNATIONAL COMPLEMENTARY PROTECTION OBLIGATIONS

The international law on protection of asylum seekers has widened significantly in recent decades as the international community recognises the need for

---

[15] United Nations Convention Relating to the Status of Refugees, above n3, arts 1, 33(1).
[16] Ibid, art 33(2).
[17] The Scope and Content of the Principle of Non-Refoulement: Opinion, Sir Elihu Lauterpacht and Daniel Bethlehem www.unhcr.org (accessed 10 April 2008).
[18] Zaoui v Attorney General (No 2) [2006] 1 NZLR 289, 311 (SC) Keith J for the Court.
[19] Ibid.

protection outside the bounds of the Refugee Convention and an obligation for states to provide this protection.[20] The General Assembly has extended the competence of the United Nations High Commissioner for Refugees in acknowledgment that there is a need to protect a broader range of people than those that fall within the Refugee Convention definition,[21] and there has been a proliferation of human rights instruments creating specific obligations in this arena.[22] The obligations upon New Zealand come in two distinct forms, treaties and customary international law, and it has been accepted by the Attorney General on behalf of the New Zealand government that it is obliged by international law, when legislating domestically, to comply with these relevant international norms.[23]

Customary international law is that body of rules that is accepted to be binding upon all states.[24] It is not necessarily to be found in treaty or other international instruments, it is the "principles of law recognised by civilised nations", and it is universally applicable.[25] In order for a norm to be found to be customary international law it must satisfy two requirements; firstly it must be supported by state practice, and secondly these states must have carried out the practice in question because they felt they were under an obligation to do so (opinion juris).[26] The issue of the extent of state practice necessary to support the development of an international law norm was addressed by the International Court of Justice (ICJ) in *North Sea Continental Shelf Cases (Federal Republic of German/Demark; Federal Republic of Germany/Netherlands)* where the Court found that the practice, including that of states specially affected, must be extensive and virtually uniform.[27]

---

[20] ILC "Expulsion of Aliens" (10 July 2006) A/CN.4/565, para 535.
[21] The Scope and Content of the Principle of Non-Refoulement, above n 17.
[22] See Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, above n 4; International Covenant on Civil and Political Rights, above n 5; American Convention on Human Rights (22 November 1969) 1144 UNTS 123; OAU Convention Governing the Specific Refugee Problems in Africa (10 September 1969) 1001 UNTS 45; Cartagena Declaration on Human Rights (22 November 1984) OEA/Ser.L/V/II.66/doc.10; 1967 Declaration on Territorial Asylum and Principles Concerning Treatment of Refugees: Resolution Adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966 (Asian-African Refugee Principles) (12 August 1966).
[23] *Zaoui v Attorney General*, 318 Keith J for the Court.
[24] Vienna Convention on the Law of Treaties 1155 UNTS 331 (23 May 1969), art 53.
[25] Statute of the Court of International Justice, 1945, art 38(1)(b), 38(1)(c).
[26] Malcolm N. Shaw *International Law* (5ed, Cambridge Univerity Press, Cambridge, 2003), 70.
[27] *North Sea Continental Shelf Cases (Federal Republic of German/Demark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 4, 29 para 74 Judgment of the majority.

Since the conclusion of the Refugee Convention there has been a trend in international law disallowing the return of individuals to growing categories of ill treatment.[28] While the United Nations High Commissioner for Refugees (UNHCR) suggested as early as 1980 that international law was evolving to deny any exceptions to the right of non-refoulement, this idea is often limited to those who are refugees within the context of the Refugee Convention.[29] As humanitarian law develops it is increasingly suggested that this prohibition should exist in a general human rights context, in regards to all significant human rights abuses, and further that this widened concept has become a norm of customary international law.

As was found by Ruma Mandal in his study of complementary protection across eleven states world-wide, the scope of protection and the criteria for eligibility varies greatly.[30] While it is apparent that clear standards as to best practice internationally have arisen, and it is quite possible that customary norms are emerging, there is not at present sufficient state practice to support a customary norm of non-refoulement to torture or other circumstances that does not permit derogation for any reason.[31] Justifications, particularly of "national security", are still being used frequently enough to mean that practice is not "extensive and virtually uniform", [32] and thus not at a level high enough to create custom.[33] The concepts of complementary protection in the international arena are not yet developed enough to offer a level of protection as strong as a rule of customary international law.

For these reasons I will look to New Zealand's treaty commitments to ascertain our international obligations, using wider international law only as a backdrop to these.

A Treaty Law

---

[28] ILC "Expulsion of Aliens", above n 20, para 353.
[29] UNHCR *Guidelines for National Refugee Legislation* (9 December 1980).
[30] Ruma Mandal, external consultant to United Nations High Commissioner for Refugees, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, Department of Internal Protection PPLA/2005/02.
[31] Ibid, xi.
[32] See *North Sea Continental Shelf Cases*, above n 27, 29 para 74.
[33] Mandal, above n 30, xi.

The Bill is represented as being, in part, an instrument to support New Zealand's international immigration obligations and seeks in particular to address three international treaties to which New Zealand is a party. One of these is the Refugee Convention,[34] which is referred to in the current legislation, the Immigration Act 1987, however importantly for complementary protection the Bill also seeks to address the CAT,[35] and the ICCPR.[36] This paper will look to the obligations encased in both of these treaties. These are not, however, the only treaty obligations New Zealand is bound by and in particular the CRC gives standards that are applicable to the question of complementary protection in cases where family unity will be impacted.[37] Therefore New Zealand's obligations under the CRC will also be analysed.

As New Zealand is party to numerous treaties applicable to the immigration context there be can difficulties with conflicting treaty terms. While later developments in international law cannot be said to amend the terms of a previous treaty, the ICJ has provided that interpretation must take into account "the framework of the entire legal system at the time."[38] In line with this, more recent treaty obligations should affect states application of the RC by imposing an additional level of consideration.[39]

The principle of *pact sunt servanda* is a fundamental of international law and provides that treaties are binding; the treaty obligations New Zealand has signed up for must be observed.[40]

1. CAT

---

[34] United Nations Convention Relating to the Status of Refugees, above n 3.
[35] Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, above n 4.
[36] International Covenant on Civil and Political Rights, above n 5.
[37] United Nations Convention on the Right of the Child, above n 6.
[38] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Namibia Opinion)* [1970] ICJ Rep 12, Judgment of the Majority.
[39] Jane McAdam *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007) 174.
[40] Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, South Melbourne, 2004) 353.

The CAT came into force for New Zealand on 26 June 1987, when the Convention itself began operation. The Bill is intended to codify certain obligations under CAT.[41]

The prohibition on torture has come to be seen as a peremptory norm in the international arena:[42] a norm accepted and recognised by the international community from which no derogation is permissible.[43] CAT is the primary instrument dealing with the prevention and punishment of torture and in the aid of such prevention imports an absolute prohibition on refoulement to torture. Article 3(1) draws on the language of the Refugee Convention and provides:[44]

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This express obligation has been used by a growing number of asylum seekers over the past decade and as the number of states party to the Convention grows, with 136 States now party and 74 others signatories,[45] the significance of this prohibition for complementary protection is undeniable. It gives protection against return to any person who would face torture. There is no room for exceptions and thus many who would not qualify for protection under the Refugee Convention are protected under CAT. The Committee Against Torture considers further that this prohibition extends to return to a state where it is likely the individual will subsequently be expelled by that state to a nation where they will be at risk of torture.[46]

The extent to which Article 3 has been complied with, and the restrictiveness of its interpretation has varied greatly across State parties. However the Committee against Torture, the body established to monitor its implementation, has in numerous

---

[41] New Zealand Immigration Bill 2007.
[42] Shaw, above n 26, 116.
[43] Vienna Convention on the Law of Treaties, above n 24, art 53.
[44] Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, above n 4, Art 3(1).
[45] Office of the High Commissioner for Human Rights: Convention Against Torture and Other Cruel, Inhuman or Treatment or Punishment http://untreaty.un.org (accessed 24 April 2008).
[46] Communication No 13/1993 (Mutombo v Switzerland) (27 April 1994) CAT/C/12/D/13/1993.

cases upheld the absolute nature of the prohibition.[47] In *Paez v Sweden* Sweden had given the actions of the applicant in handing out home made bombs, which were used against police, as one of the reasons that they had not provided protection against reoulement to Peru where Paez would be at risk of torture.[48] Sweden classified these violent actions as falling under article 1(F) of the Refugee Convention which they maintained gave rise to an exception to their obligation not to return regardless of the applicant's risk of torture. This logic was refuted by the Committee which reiterated that there are no exceptions to article 3 CAT.[49]

The duty in regards to non-refoulement to torture, or to a state where there is a risk of subsequent refoulement to a territory where there is a risk of torture, is explicit and allows for no exception. The Vienna Convention on the Law of Treaties provides that "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the term of the treaty in their context and in the light of its object and purpose" and if New Zealand is to take its obligations at all seriously, there is no room to narrow this responsibility.

2. *ICCPR*

The International Covenant on Civil and Political Rights came into force for New Zealand on 28 March 1987.[50] The ICCPR is referenced in BORA, where it is said one of the purposes of the Act is to "affirm New Zealand's commitment" to this instrument,[51] and the Bill intends to codify New Zealand's immigration-related obligations under the ICCPR.[52]

While the ICCPR does not contain any specific non-refoulement provisions, nor make explicit reference to the area of complementary protection, the ICCPR is important in that the States parties have signed up to guarantee to individuals the

---

[47] Mutombo v Switzerland, above n 16; Communication No 43/1996 (Tala v Sweden) (7 March 1996) CAT/C/17/D/1996.
[48] Communication No 39/1996 (Paez v Sweden) (28 April 1997) CAT/C/18/D/39/1996.
[49] Ibid.
[50] Office of the High Commissioner for Human Rights: International Covenant on Civil and Political Rights www2.ohchr.org (accessed 28 Jun. 08).
[51] New Zealand Bill of Rights Act 1990.
[52] Immigration Bill 2007, no 132-1 (explanatory note), 5.

rights within the instrument and it is increasingly seen as a breach of this duty to return an asylum seeker to a territory where these rights will not be observed. Importantly for complementary protection are two articles in particular:[53]

> Article 6
>
> (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> ...
>
> Article 7
>
> No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

These two articles give obligations which are seen to be peremptory norms in the international community.[54] In regards to Article 6, the interpretation of the obligation has changed in recent times as the international human rights position on the death penalty increasingly weighs in favour of abolition. The term arbitrarily was included in the drafting of the Covenant as an allowance to those states who continue to practice the penalty. However in *Judge v Canada* the United Nations Human Rights Committee (HRC), the panel that monitors how countries are implementing the Covenant, found that Canada had breached its obligations under article 6 of the ICCPR by returning Judge to the United States where he was to face the death penalty.[55] The HRC found that the ICCPR should be treated as a living instrument and revised their earlier decision in *Kindler v Canada* by holding that States who have abolished the death penalty may not return asylum seekers to states when there is a real risk of its application.[56]

Article 7 is important in its inclusion and widening of Article 3 CAT. The idea of 'inhuman or degrading treatment' has also been subject to debate on its scope. The same wording, however, appears in the European Convention on Human Rights and thus the extended use of this terminology has led to more clarity on what is comprised

---

[53] International Covenant on Civil and Political Rights, above n5, arts 6, 7.
[54] *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, para 43 Lord Bingham; Malcolm N. Shaw *International Law* (5ed, Cambridge Univerity Press, Cambridge, 2003), 257.
[55] Communication No 829/1998 (Judge v. Canada) (7 August 1998) CCPR/C/78/D/829/1998.
[56] Communication No 470/1991 (Kindler v. Canada) (25 September 1991) CCPR/C/48/D/470/1991.

within it.[57] It is generally regarded as part of a hierarchy of ill treatment with torture as the pinnacle.[58] In 1996 the HRC held that a State could be found to be in violation of section 7 of the ICCPR if it returned an individual to cruel, inhuman or degrading treatment.[59] However the risk of such treatment must be real, i.e. the necessary and foreseeable consequence of deportation.[60] This situation was found in *Chitat Ng v Canada* where, in another death row case, Canada was found to be in violation of article 7 as the method of execution, by gas asphyxiation was determined by the HRC to be inhuman or degrading treatment.[61]

Another ICCPR right that is important for complementary protection is article 23(1) which provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State".[62] While the implication of this article under the ICCPR have not been greatly explored the equivalent provision of article 8 of the ECHR has been subject to much litigation in the immigration context, [63] and has been held to place restrictions on States' right to remove individuals from their territory.[64] The Court of Appeal in *Tavita v Minister of* Immigration found article 8 jurisprudence relevant in its interpretation of both the ICCPR and the CRC which could indicate that similar interpretations of article 23(1) will follow.[65] At present however there is no obligation of non-refoulement in regards to ICCPR article 23(1).

The decision of the HRC in *Judge v Canada* and other similar decisions makes it clear that the ICCPR obligations are not only applicable within a State borders. It shows that a State's obligations go further and gives clear guidance that the duty of non-refoulement does not have to be explicitly enunciated. Whilst decisions of the HRC have only been made in regards to non-refoulement under

---

[57] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, art 3.
[58] McAdam, above n 39, 141.
[59] Communication No 692/1996 (ARJ v Australia) (11 August 1997) CCPR/C/60/D/692/1996.
[60] Ibid.
[61] Communication No 469/1991 (Chitag Ng v Canada) (25 September 1991) CCPR/C/49/D/469/1991.
[62] International Covenant on Civil and Political Rights, above n5, art 23(1).
[63] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, above n 57, art 8.
[64] *Berrehab v The Netherlands* (1988) 11 EHRR 322 (ECHR); Beldjouri v France (1992) 14 EHRR 801 (ECHR).
[65] *Tavita v Minister of Immigration* [1994] NZFLR 97.

article 6 and 7, they recognise that in principle the obligation not to return an asylum seeker could arise in relation to 'non-discrimination, prohibition of inhuman treatment and respect for family life'.[66]

As a party to the ICCPR, New Zealand has a duty not to return any individual to a territory where they have reason to believe that their rights under article 6 or 7 will be violated. While it may develop in the future there is currently insufficient authority to suggest an obligation of non-refoulement in regard to other ICCPR rights.

3. CRC

The CRC came into force for New Zealand on 5 June 1993 and has widely been given effect in New Zealand's law by the Care of Children Act 2004.[67] It is however not referred to in the Immigration Act 1987 or the Bill.

The CRC has been ratified by all states excepting Somalia and the USA, both of whom are signatories, and this overwhelming agreement by the international community gives the Convention great weight and means that it is seen to be indicative of international norms.[68] The instrument contains both general and specific provisions which can be of importance for complementary protection. This protection is not limited to children, as immigration decisions relating to family members of children can also be subject to the Convention. What is seen as the key provision, article 3(1), provides for the primary importance of the consideration of the child's interest:[69]

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

---

[66] UNHRC "General Comment No 15: The Position of Aliens under the Covenant" (11 April 1986); UNHRC "General Comment No 18: Non Discrimination" (10 November 1989).
[67] Care of Children Act 2004.
[68] *Ding and Anor v Minister of Immigration* [2006] 25 FRNZ 568, 577 (CA) Baragwanath J.
[69] United Nations Convention on the Rights of the Child, above n6, art 3(1).

The CRC also places an emphasis on the importance of family unity and the rights of the child to remain with their parents.[70] Article 9 provides:[71]

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except where competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.
>
> ...

In furtherance of article 9's focus on the importance of the family, article 10 provides:[72]

> 1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purposes of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner.
>
> ...

Article 3 is seen as reflecting an absolute principle at international law; it is an umbrella provision and relates to all actions concerning children.[73] The meaning of 'concerning' is to be read widely and relates to actions that have both direct and indirect effects.[74] In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* the Australian High Court advocated such an approach and found that concerning included 'regarding, touching, in reference or relation to; touching children'.[75] The scope of 'consideration' has also been widely questioned. It is generally accepted that this implies some type of active investigation as opposed to merely a noting of the interests.[76] Alston interprets the article as requiring the interests to be given substantial weight and for the decision maker to be alert, alive and sensitive to them.[77]

---

[70] United Nations Convention on the Rights of the Child, above n6, art 9.
[71] Ibid, art 9.
[72] Ibid, art 10.
[73] McAdam, above n 39, 173.
[74] General Comment No. 5 "General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6.)" (27 November 2003) CRC/GC/2003/5 (2003), 5.
[75] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353 (HCA).
[76] McAdam, above n 39, 178.
[77] P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (OUP, Oxford, 1994) 13.

Much has been said regarding the wording of article 3 in that the interests of the child are 'a' not 'the' primary consideration; the Convention does not dictate the child's rights to be the paramount consideration.[78] The significance of this has however been heavily debated and given diverse interpretation.[79] Alston maintains that this is merely to allow flexibility in extreme cases, giving the example of where a pregnant mother's interests must be balanced against that of her child.[80] This has not, however, been the way that the provision has been applied. In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* the High Court of Autralia found that the Convention ranked the best interests of the child of 'first importance along with other considerations which require equal but not paramount weight'.[81] It found that the decision maker must ask whether the force of any other consideration outweighed the welfare, and if so, the appellant must be notified and given a chance to argue against this.[82] The Committee on the Rights of the Child has made it clear however that competing considerations must be of a rights-based nature stating that '[n]on rights based arguments such as those relating to general migration control, cannot override best interest considerations'.[83]

It is internationally accepted that the family is the primary unit of society and therefore entitled to protection and respect.[84] Family unification is paramount throughout the CRC and in the asylum seeker context the Committee on the Rights of the Child dictates that when unification in the country of origin is not possible, or would cause adaptation issues and infringe upon the best interests of the child,[85] articles 9 and 10 must be taken into account.[86] It is clear that these articles, in

---

[78] United Nations Convention on the Rights of the Child, above n 6, art 3.
[79] McAdam, above n 39, 179.
[80] P Alston and B Gilmour Walsh *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF ICDC, Florence, 1993) 39.
[81] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*, above n 75.
[82] Ibid.
[83] General Comment No. 6 "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin" (3 June 2005) CRC/GC/2005/6 (2005), 23.
[84] Kate Jastram "Family Unity" in Thomas Aleinikoff *Migration and International Legal Norms* (TMC Asser, The Hague, 2003), 185.
[85] Jacquiline Bhabba 'Children, Migration and International Norms' in Thomas Aleinikoff *Migration and International Legal Norms* (TMC Asser, The Hague, 2003), 213.
[86] 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', above n 83, 23.

conjunction with article 3, necessitate that decision makers take into account the best interests of the child when considering the immigration status of family members.[87]

These principles are so well recognised that they were taken in a United States District Court decision to represent customary international law.[88] It was found that, despite the fact that the United States has not ratified the CRC, American officials must consider the impact on affected child before deporting a felon.[89]

The Committee on the Rights of the Child has also made comment on the idea of subsequent refoulement. In General Comment No. 6 the Committee dictated that States Parties must not only consider the potential consequences of returning a child to a particular state, but also the possibility that the State in question may in turn refoule to a third territory where rights may not be upheld.[90] While this is not explicit in the Convention it is clear from this statement that, as with other treaties, there is an implied duty on states to investigate these risks and not close their eyes to the possibility.

The CRC requires that all immigration decisions which will carry consequences for minors need to be assessed in light of the Convention provisions.[91] It is clear that, at a minimum, the best interests of the child must be given more than a precursory assessment in any situation where the child will be impacted, either directly or indirectly, and must be carefully weighed against competing interests.[92]

B Conclusions

The international law on complementary protection as applicable to New Zealand can be derived from treaty obligations. From these treaties comes the duty on a State not to return any person to a territory where they believe that person will be at

---

[87] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (SCC); Communication No 930/2000 (Winata v Australia) (16 Aug 2001) CCPR/C/72/D/930/2000.
[88] *Beharry v Reno* (2002) 183 F.Supp.2d 584 (USDC) Weinstein J.
[89] Ibid.
[90] "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin" above n 83, 10.
[91] United Nations Convention on the Rights of the Child, above n 6, art 3.
[92] "General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6.)", above n 74, 4.

risk of torture, arbitrary loss of life, including the death penalty, or cruel or inhuman treatment or punishment.[93] From the CRC comes the additional obligation to have regard to the best interests of the child and their rights to family when undertaking an immigration decision which will, directly or indirectly, affect them.[94]

In regard to the risk of torture, this obligation of non-refoulement includes the duty not to return to a territory where it is believed they will subsequently be expelled to this risk. This is equally so when an obligation of non-refoulement is said to arise under the CRC; if the state would be unable to return an individual to a particular territory after consideration of the CRC, they are equally prohibited from returning to a State where there is a real risk of subsequent removal to this particular territory.

IV CURRENT NEW ZEALAND LAW

Complementary protection is currently provided for in New Zealand law in a number of ways. Treaty obligations and customary international law are part of the law of New Zealand however they are directly enforceable only at the international, not the domestic, level.[95] The way and extent to which these obligations are brought into, and given effect, in our domestic arena can be assessed primarily by their inclusion in domestic legislation. It is then imperative in turn to look to the way that this legislation has been interpreted and applied by the judiciary, particularly as New Zealand courts have been seen to draw heavily upon international instruments in interpretation of complementary protection areas. The case law is an important consideration, not only for what the current law is in New Zealand, but also as to how well the legislation is working. Judicial decisions can show whether legislation is clear, whether judges have to make implications, and whether judges feel that the legislation goes far enough.

---

[93] United Nations Convention Relating to the Status of Refugees, above n 3; International Covenant on Civil and Political Rights, above n 5; Convention Against Torture and other Cruel or Inhumane Treatment, above n 4.
[94] United Nations Convention on the Rights of the Child, above n 4.
[95] Shaw, above n 26, 122.

New Zealand has a traditional dualist approach to international law, meaning that a level of separation is maintained between international and domestic law.[96] Thus, even if a treaty has been ratified, it must be converted into a domestic legal obligation, usually by an act of Parliament, in order to officially be New Zealand law.[97] While the courts have increasingly made reference to unincorporated treaty obligations, the start point is still the constitutional maxim that by entering into a treaty the Executive has not changed the domestic law.[98] The level of consideration that should be given to unincorporated treaty obligations has been a topical issue recently in the courts after the decision in *Tavita v Minister of Immigration* opened the way for judicial contemplation of these obligations.[99]

The presumption of consistency model has recently been described as requiring "that so far as its wording allows legislation should be read in a way consistent with New Zealand's international obligations."[100] In 2008 the Court of Appeal in *Ye and Ors v Minister of Immigration* accepted this as the correct approach to incorporation,[101] as did the Supreme Court *Zaoui v Attorney General (No 2).*[102] Whilst this method gives more voice to international obligations, it is still limited.

A Immigration Act 1987

The primary legislation at present is the Immigration Act 1987, the instrument the Bill is to repeal. The stated object of Part 6A, Refugee Determination, is to "provide a statutory basis by which New Zealand ensures it meets its obligations under the Refugee Convention". Much of the focus in regards to asylum seekers is therefore referential to the Convention.[103] Section 129X, the non-refoulement provision in the Act, goes no further than the Refugee Convention; it is applicable

---

[96] Palmer, above n 40, 351.
[97] Ibid.
[98] Claudia Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 68.
[99] *Tavita v Minister of Immigration*, above n 65.
[100] *Schier v Removal Review Authority* [1999] 1 NZLR 703, 708.
[101] *Ye and Ors v Minister of Immigration And Anor* (7 August 2008) CA184/06, para 84 Glazebrook J, para 521 Chambers and Robertson JJ.
[102] *Zaoui v Attorney General* (No 2), above n 18, para 90 Keith J for the Court.
[103] Immigration Act 1987, s 129A.

only to those who meet the definition of refugee under the Convention and is subject to the exceptions of the Convention.[104] Section 129X states:[105]

> (1) No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand, unless the provisions of article 32.1 or article 33.2 of the Refugee Convention allow the removal or deportation.
>
> ...

Section 72, 73, 91 and 92 of the Immigration Act 1987 are the sections which empower deportation or removal under section 129X.[106] Section 72 provides:[107]

> Where the Minister certifies that the continued presence in New Zealand of any person named in the (security risk) certificate constitutes a threat to national security, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person.

Section 73 applies when the Minister has reason to believe an individual is a terrorist,[108] whilst sections 91 and 92 are applied following criminal convictions of individuals.[109]

The only aspects of complementary protection in the Act is the ability to appeal against a removal order on humanitarian grounds or to appeal against a deportation order on the grounds it would be unjust or unduly harsh.[110] If a person is not classified as a refugee and has not been issued with a deportation order they may make an appeal under section 47(3):[111]

> An appeal may be bought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

---

[104] Immigration Act 1987, s 129X(1).
[105] Ibid, s 129X(1).
[106] Ibid, s 72, 73, 91, 92.
[107] Ibid, s 72.
[108] Ibid.
[109] Ibid, s 91,92.
[110] Ibid, s 47(3), 104, 105(1).
[111] Ibid, s 47(3).

If a person has been issued with a deportation order they can similarly appeal under section 104.[112] Section 105 provides that a deportation order may be quashed if it is found that:[113]

> ...[I]t would be unjust or unduly harsh to deport the appellant from New Zealand, and that it would not be contrary to the public interest to allow the appellant to remain in New Zealand.

The provisions do not detail what would constitute exceptional circumstances, or what would qualify as unjust or unduly harsh, thus it has been open to interpretation by the courts, and it is not absolute. Even in the event that such circumstances are found, there is still the option to expel if it would be contrary to the public interest to allow the person to remain in New Zealand.[114]

B Bill of Rights Act 1990 (BORA)

All legislation in New Zealand is to, if possible, be read consistently with the BORA which provides a guarantee of fundamental rights. Most applicable to complementary protection are those BORA provisions that mirror the rights in the international instruments. By their inclusion in BORA it can be seen that we not only sign up to these ideas, but that we advocate the rights as fundamental for the Government of New Zealand to act in accordance with. Sections 8 and 9 provide for the right to life and the prohibition on torture:[115]

> 8. No-one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.
>
> 9. Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

---

[112] Immigration Act 1987, s 104.
[113] Ibid, s 105(1).
[114] Ibid, s 47(3), 105(1).
[115] New Zealand Bill of Rights Act 1990, arts 8, 9.

While these provisions do not expressly include any requirement of non-refoulement it is possible that such an obligation could be found to be implicit as was found by the South African Constitutional Court in regards to their domestic Bill of Rights Act.[116] The Supreme Court in *Zaoui v Attorney General (No 2)* do not expressly say this is the case for BORA but the suggestion is strong as they compare section 8 and 9 with the equivalent articles 6.1 and 7 of the ICCPR.[117] The Court stated that neither instrument expressly includes non-refoulement obligations but non-refoulement has been long understood as part of the ICCPR obligations.[118]

C Case Law

Complementary protection has been a topical issue in the New Zealand courts recently and there have been several landmark cases, particularly *Zaoui v Attorney General (No 2)*.[119] The advancements in this area have been aided by cases such as *Tavita v Minister of Immigration* that, as discussed above, have advocated the use of unincorporated treaty obligations in the assessment of decision-making.[120]

In 1998, in *S v Refugee Status Appeals Authority*, the Court of Appeal observed as obiter that: "[I]t is important to note that exclusion from the provisions of the refugee convention does not mean automatic expulsion from New Zealand or refoulement. This country's obligations under the torture convention remain".[121] This was an important indication that whilst only the Refugee Convention is provided for in the Immigration Act 1987 that this does not mean that New Zealand's other international obligations are irrelevant.

In 2001, in the case of *A, B & C (a family of Peru) v Chief Executive Department of Labour*, the High Court in an appeal against a decision of the Removal Review Authority, found that international instruments are indicative of what contitutes exceptional circumstances under s63B of the Immigration Act 1987 (the

---

[116] *Mohammad and Another v President of the Republic of South Africa and Others* [2001] 3 SA 893 (CC).
[117] *Zaoui v Attorney General (No 2)*, above n 18, para 79 Keith J for the Court.
[118] Ibid.
[119] Ibid.
[120] *Tavita v Minister of Immigration*, above n 65.
[121] *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291.

previous section for humanitarian appeal).[122] The Court found that the test under s63B was necessarily much broader than that under the Refugee Convention and due to the impact that any decision would have on the family the ICCPR and the CRC could provide guidance.[123] While the Court did not find that a breach of the standards of these instruments could negate the ability to remove an individual, it was an acknowledgment that the instruments must be considered.

In 2007 in *Bel and Kao v The Chief Executive of the Department of Labour* the High Court read the CRC obligations into the Immigration Act 1987. The Court accepted that when individuals have a child born in New Zealand, particular care must be taken to carefully consider the position of the child if a removal decision is contemplated.[124] The Court asked whether their were "exceptional circumstances of a humanitarian nature that would make it unduly harsh to that child for her parents, who are unlawfully in New Zealand, to be removed from New Zealand."[125] Even when applying the CRC the Court recognised that merely because it was in the best interests of the child to remain was not determinative and that this broader interpretation of the s47(3) test must be met for protection from refoulement to arise.[126]

In 2008, in *Ye and Ors v Minister of Immigration*, the Court of Appeal considered the decision by an immigration officer not to cancel the deportation order of the parents of two separate sets of siblings after the officer had undertaken reviews of both cases.[127] The Court expresses the importance of international obligations,[128] and Glazebrook J stated:[129]

> The power to exclude or expel aliens is subject to limitations imposed both by international law itself and by New Zealand domestic law. These limitations either

---

[122] *A, B & C (a family from Peru) v Chief Executive Department of Labour* [2001] NZAR 981, para 31 (HC) Durie J.
[123] Ibid.
[124] *Bel and Kao v The Chief Executive of the Department of Labour* (29 May 2007) HC WN CIV 2006 485 865, para 17 Young J.
[125] Ibid, para 19 Young J.
[126] Ibid, para 22 Young J.
[127] *Ye and Ors v Minister of Immigration And Anor*, above n 101.
[128] Ibid, para 385 Hammond & Wilson JJ, para 550 Chambers & Robertson JJ.
[129] Ibid, para 118 Glazebrook J.

> prohibit the exclusion or expulsion of certain categories of aliens, or circumscribe the circumstances in which the power of exclusion or expulsion can be exercised...

Glazebrook J states that because of New Zealand's agreement to the CRC, in cases such as these the potential detriment to the child must be weighed against the state's right to control its borders.[130] In this case the Court of Appeal takes New Zealand's international obligations and the rights of the child very seriously. Hammond J and Wilson J see the process undertaken by the immigration officer as an endeavour by New Zealand to meet these international obligations,[131] and believe that the critical question in relation to the Ye children should have been "was there something about the circumstances of the children which meant Mrs Ding really should be allowed to stay...?"[132] This reasoning gives direct effect to New Zealand's CRC obligations.

The Supreme Court in 2006 also took New Zealand's complementary protection obligations very seriously in the landmark case of *Zaoui v Attorney General*.[133] Zaoui, an asylum seeker from Algeria, who feared that if he was removed to Algeria he would be subject to the threat of torture or arbitrary deprivation of life, was on appeal to the Refugee Status Appeals Authority and was found to be a refugee in August 2003.[134] Whilst the appeal was awaiting consideration the Director of Security had, under the Immigration Act 1987, in March 2003 issued a certificate in respect of Zaoui stating that his 'continued presence in New Zealand constitutes a threat to national security in terms of section 72 of the Act'.[135] This meant that while Zaoui was found to fit within the terms of the Refugee Convention his article 33(1) right to non-refoulement was negated by the exception clause in article 33(2).[136] He could therefore by deported under section 72 of the Immigration Act 1987 despite the risk to his safety.[137] After an application by Zaoui for review of the making of the certificate the Inspector-General of Intelligence and Security issued an interlocutory decision on the procedure he would follow and the scope of that review.[138] It is from

---

[130] *Ye and Ors v Minister of Immigration And Anor* (7 August 2008) CA184/06, para 128 Glazebrook J.
[131] Ibid, para 397 Hammond & Wilson JJ.
[132] Ibid, para 407 Hammond & Wilson JJ.
[133] *Zaoui v Attorney General (No 2)*, above n 18.
[134] Ibid, 297 Keith J for the Court.
[135] Ibid, 297 Keith J for the Court.
[136] United Nations Convention Relating to the Status of Refugees, above n 3, art 33.
[137] Immigration Act 1987, s 72.
[138] *Zaoui v Attorney General (No 2)*,above n 18, 297 Keith J for the Court.

an application by Zaoui for judicial review of that interlocutory decision that this appeal arose.

The Court ruled that under section 6 of the BORA, section 72 of the Immigration Act 1987 is to be given a meaning, so far as possible, consistent with the rights and freedoms of the BORA.[139] They found further that the BORA rights and the powers under section 72 should be interpreted, if possible, in line with the obligations of international law, both customary and treaty based.[140] CAT and ICCPR obligations were found by the Court to be particularly relevant.[141] The Supreme Court found that there was nothing in s72 preventing this interpretation, these provisions prevent removal.[142] Therefore despite the alleged security risk Zaoui could not be refouled while there was a danger this would result in arbitrary deprivation of life or torture.[143]

The Court used a presumption of consistency approach to bring the absolute prohibition on refoulement into the Immigration Act 1987.[144] This approach has been used in other cases to read treaty obligations into domestic law. Whilst judgment by the Supreme Court gives a strong precedent, it can only be applied in similar situations and does not give the level of protection to these rights that would be offered by statute if Parliament were to legislate them in.

D Consistency with International Obligations?

Neither the BORA or the Immigration Act 1987 give significant complementary protection. The BORA provides for the protection of the rights to life and the right not to be subjected to torture or cruel treatment, however there is no specific indication in the legislation these include a non-refoulement obligation.[145] As can be seen from the ICCPR this does not prevent the BORA from having non-refoulement read into its provisions, however this has not yet been done by the New

---

[139] *Zaoui v Attorney General (No 2),* above n 18, 321 (SC) Keith J for the Court.
[140] Ibid.
[141] Ibid, 318 (SC) Keith J for the Court.
[142] Ibid, 321 (SC) Keith J for the Court.
[143] Ibid.
[144] Ibid.
[145] Bill of Rights Act 1990, s 8, 9.

Zealand courts. The Immigration Act 1987 while containing complementary protection provisions at sections 47 and 104, it does not detail the circumstances to which these sections will apply, and permits exceptions in the case of the public interest.[146] There is no endorsement of the CAT, ICCPR or CRC within the legislation. While the New Zealand courts have read legislation to imply all three of these treaties as being relevant, and in *Zaoui v Attorney General* they went as far as to find that CAT and ICCPR imposed a bar to removal, they have been forced to do so by the means of implied consistency.[147] Whilst this may provide protection in individual cases it does not offer certainty in the law.

The New Zealand government, through the Attorney General, acknowledged in *Zaoui v Attorney General* that they had an obligation to comply with these international obligations.[148] The obligations of complementary protection are important protections in the immigration context; it is the rights of children, the right to life and the right to be free from torture and cruel treatment that are at stake. The right to non-refoulement to ill treatment and where the CRC is not met should be guaranteed by statute in New Zealand. That the Courts are using tools such as implied consistency shows that New Zealand's complementary obligations are wider than the legislation provides for. That these rights are then being given effect by the courts is an indication to the legislature that the statute is outdated and needs to be brought into line with New Zealand's international obligations.

Even after *Zaoui v Attorney General* the presumption of consistency approach is limited and provides less certainty than statutory protection. The reality is that it is only a presumption and therefore international obligations can be rebutted by the clear words of a statute. The Immigation Act, as the primary legislation for protection of asylum seekers in New Zealand, does not meet New Zealand's international obligations.

V THE BILL

[146] Immigration Act 1987, s 47(3), 105.
[147] *Zaoui v Attorney-General (no 2)*, above n 18.
[148] Ibid, 318 Keith J for the Court.

The explanatory note to the Bill states that significant global changes have taken place since the Immigration Act 1987 was passed and in order to keep abreast with these changes a review of New Zealand's immigration legislation was necessary.[149] One of the areas where this change can be seen is in the complementary protection arena and as has been shown these changes have not only been in international thought and practice but also in the approach by the New Zealand judiciary. One of the Bill's primary six purposes is to support New Zealand's immigration-related international obligations, thus it is plainly accepted by the New Zealand government that this should be a priority.[150]

A What does the Bill propose?

The Bill states that its purpose is to provide a statutory basis for three international agreements, the Refugee Convention, the ICCPR and the CAT.[151] As such, it provides for two classes of protection to asylum seekers, refugee status or protected person status:[152]

> 119 Recognition as Refugee
> A person may be recognised as a refugee if the person is a refugee within the meaning of the Refugee Convention.
>
> 120 Recognition as a protected person under Convention Against Torture (1): A person may be recognised as a protected person under the Convention Against Torture if there are substantial grounds for believing that person, if deported from New Zealand would be subjected to torture and section 122 applies.
>
> 121 Recognition as a protected person under Covenant on Civil and Political Rights (1): A person may be recognised as a protected person under the Covenant on Civil and Political Rights if there are substantial grounds for believing that person, if deported from New Zealand, would personally be subjected to arbitrary deprivation of life or to cruel treatment and section 122 applies.

---

[149] Immigration Bill 2007, no 132-1 (explanatory note).
[150] Ibid, cl 3(2)(d).
[151] Ibid, cl 113.
[152] Ibid, cls 119, 120(1), 121(1).

> (2): For the purposes of this section and section 122-
> (a) cruel treatment means cruel, inhuman, or degrading treatment or punishment.
> (b) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards;
> (c) the impact on the person on the inability of a country to provide health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

The limitation provided in clause 122(2) is that the treatment needs to be faced "in every part of his or her country or countries... and is not faced generally by other persons in or from that country or those countries".[153]

Under clause 127(2), following a determination that a claimant should be recognised as a protected person, the determination office must also determine whether there are serious reasons for considering the claimant meets one of the article 1F exceptions in the Refugee Convention.[154] The Bill provides that recognition as a protected person must be granted if clause 120 or 121 is met, regardless of any finding under clause 127(2).[155] However clause 129 provides:[156]

> The Minister must make any decision about a protected person's immigration status where a determination officer has determined under s127(2) that there are serious reasons for considering that the person has committed a crime or been guilty of an act described in section 127(2).

This decision on immigration status does not give the option to expel as the deportation of a protected person is prohibited under section 153.[157] Refugees are also protected in this way however this is subject to article 32(1) or 32(2) of the Refugee Convention which permit deportation.[158] Non-refoulement protection is thus provided to any person who is covered by the Refugee Convention or for whom there are substantial reasons for believing he or she would be subject to arbitrary deprivation of

---

[153] Immigration Bill 2007, no 132-1, cl 122(2).
[154] Ibid, cl 127(2).
[155] Ibid, cl 120, 121, 127(2).
[156] Ibid, cl 129.
[157] Ibid, cl 153.
[158] Ibid, cl 153(2).

life, torture or cruel treatment as long as that risk is not faced generally within that country.

The right to appeal removal on humanitarian grounds is retained under the Bill at clause 185 with the conditions set at section 186 remaining the same as at clause 47(3) of the current Act. So while the consideration of international obligations may potentially be brought in here the Bill has no specific reference to the CRC or to the importance of the considerations of the child and family when considering protection status.

B Does the Bill meet our international obligations?

While the Bill definitely represents an improvement in this area on the current legislation there has still been much criticism of the proposal.[159] These criticisms are well founded as there are four main areas in which the Bill does not meet New Zealand's express international obligations in the area of complementary protection. These deficiencies in the protection offered by the Bill are: the limitations of clause 122, the retention of the article 33(2) exception to refoulement protection for those given refugee status without any adjustment for complementary protection, the non inclusion of rights guaranteed in the CRC and the retention of the ability to refoule to the death penalty.

i Clause 122

One of the major critiques has been in relation to clause 122 and the limitation that negates protection if the threat of torture, arbitrary deprivation of life or cruel treatment is faced generally by other persons in the country or countries of return.[160] The Bill states that it intends to codify New Zealand's obligations under the CAT and the ICCPR. The inclusion of clause 122, however, unduly constricts the protections given under clause 120 and 121. Clause 122 effectively limits the applicability of the

[159] Human Rights Commission "Aspects of the Immigration Bill that raise Human Rights Concerns" September 2007; Human Rights Foundation "Immigration Bill: Summary of Issues" (2 November 2007); UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees to the Transport and Industrial Relations Committee on the New Zealand Immigration Bill" (20 November 2007).
[160] Ibid.

protections to a much narrower class of people than intended in the international instruments, and therefore significantly undercuts these obligations.

In its submission on the Bill, the UNHCR recommended a full revision of this section noting that if a person is able to show that they are at a real risk, in violation of any of the three conventions "then the fact that others might equally be at risk is an irrelevant consideration and New Zealand's convention responsibilities would be engaged."[161] The New Zealand government, as a party to the ICCPR and the CAT has an obligation to provide the protections encapsulated within them. As stated by the New Zealand Human Rights Foundation this section "is inconsistent with New Zealand's core obligations."[162]

The Select Committee report released 21 July 2008 acknowledged these problems with clause 122 and recommended its deletion.[163] The Committee felt that the intent behind the clause was that claimants who could find protection within their country of nationality or former habitual residence should not be granted the status of protected persons in New Zealand. However they recommended amendments of clause 120 and 121 to achieve this objective without the risks that come with the present clause 122.[164]

ii Retention of Article 33(2) Exception

Under clause 127, when a determination officer is making a finding about an asylum seeker's status, the officer must consider whether to recognise the person as (a) a refugee, (b) a protected person under clause 120 or (c) a protected person under clause 121.[165] This means that should a person be recognised as a refugee no further assessment is made as to whether they would qualify as being at risk of torture, arbitrary death or cruel treatment if returned to their home/resident territory. There is then a gap in the complementary protection whereby under clause 153(2) a refugee can still be expelled or extradited if it is found that there are reasonable grounds for

[161] UNHCR, above n 159, para 28.
[162] Human Rights Foundation, above n 159.
[163] Immigration Bill 2007, no 132-1 (explanatory note), 16.
[164] Ibid, 15, 16.
[165] Immigration Bill 2007, no 132-1, cl 127(1).

regarding him or her as a danger to the security, or as a danger to the community of New Zealand without an assessment being made as to the risk they would face.[166]

Although a refugee would then have the opportunity to appeal on humanitarian grounds, when presumably the CAT and ICCPR obligations could be used to prevent removal, this seems an unduly difficult and circular process. One option is that a general non-refoulement clause be included within the Bill which prevents non-refoulement to torture, arbitrary death or cruel treatment in any situation. The other option would be to explicitly limit clause 153(2) if the obligations under the ICCPR or the CAT as well as the CRC obligations are engaged. At the moment clause 153(2) represents a gap in the Bill where our international obligations could be missed.

iii Non Inclusion of CRC Rights

As a party to the CRC New Zealand must ensure it acts consistently with the rights guaranteed by the convention. Article 3(1), the key provision, provides that the best interests of the child are a primary consideration and, in the immigration context, this has been supplemented by the Committee on the Rights of the Child comments that state's general immigration concerns should not override best interest considerations.[167] The lack of inclusion of the CRC is also protested by the Human Rights Foundation and represents a failure of the Bill.[168] Given the explicit linking of CRC provisions to immigration decisions it is inconsistent with our obligations for these CRC provisions not to have inclusion in the Bill.

The Bill needs to ensure that decision makers are aware of, and take account of, the interests of any affected child in accordance with the CRC. While the alteration of clause 185 on humanitarian appeal would be beneficial it seems also necessary to include a general provision calling for these interests to be considered.

iv Clause 121(2)(b) and the Death Penalty

---

[166] Immigration Bill 2007, no 132-1, cl 153(2).
[167] Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, above n 83, 17.
[168] Human Rights Foundation, above n 159.

The HRC has found that States Parties to the ICCPR who have themselves abolished the death penalty, may not return asylum seekers to a territory where they have reason to believe that this punishment will be administered.[169] Clause 121(2)(b), as it stands, would allow for such refoulement. The last exercise of the death penalty in New Zealand was in 1957,[170] and the death penalty was officially abolished with the Abolition of the Death Penalty Act 1989.[171] New Zealand policy has not endorsed the idea of capital punishment for half a century and has an obligation under the ICCPR not to return any person to a death sentence. Clause 121(2) is in need of amendment to omit the phrase 'arbitrary depravation of life' and with it the sanctioning of refoulement to death.[172]

VI CONCLUSION

While the Government's review of the Immigration Act 1987 was purportedly intended to contain a focus on reaching consistency with New Zealand's international obligations, the Immigration Bill released in August 2007 does not achieve this in the area of complementary protection. As a party to the ICCPR, the CAT and the CRC the New Zealand government is bound under international law to ensure New Zealand complies with these conventions.[173] The legislation of New Zealand does not currently encapsulate the ideas of these treaties and while the judiciary has increasingly been reading their terms into the Immigration Act 1987, this does not give the level of certainty required that these rights will be protected. Reform is required. The Immigration Bill was presented as an instrument to codify the obligations of these international treaties, however the text is far out of step with the accepted standards of the international community and New Zealand's duties under international law. Serious reforms of the proposed Immigration Bill are therefore necessary if New Zealand is not to breach international law by its introduction as a statute.

---

[169] Kindler v. Canada, above n 56.
[170] Capital Punishment in New Zealand www.nzhistory.net.nz (last accessed 01/08/08).
[171] Abolition of the Death Penalty Act 1989.
[172] Immigration Bill 2007, no 132-1, cl 121(2)(b).
[173] Palmer, above n 40, 353.

VII BIBLIOGRAPHY

A Table of Cases

A, B & C (a family from Peru) v Chief Executive Department of Labour [2001] NZAR 981 (HC).

Communication No 692/1996 (ARJ v Australia) (11 August 1997) CCPR/C/60/D/692/1996.

Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817 (SCC).

Beharry v Reno (2002) 183 F.Supp.2d 584 (USDC).

Bel and Kao v The Chief Executive of the Department of Labour (29 May 2007) HC WN CIV 2006 485 865.

Beldjouri v France (1992) 14 EHRR 801 (ECHR).

Berrehab v The Netherlands (1988) 11 EHRR 322 (ECHR);

Communication No 469/1991 (Chitag Ng v Canada) (25 September 1991) CCPR/C/49/D/469/1991.

Ding and Anor v Minister of Immigration [2006] 25 FRNZ 568 (CA).

Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) [2006] UKHL 26.

Communication No 829/1998 (Judge v. Canada) (7 August 1998) CCPR/C/78/D/829/1998.

Communication No 470/1991 (Kindler v. Canada) (25 September 1991) CCPR/C/48/D/470/1991.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Namibia Opinion) [1970] ICJ Rep 12.

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 128 ALR 353 (HCA).

Mohammad and Another v President of the Republic of South Africa and Others [2001] 3 SA 893 (CC).

Communication No 13/1993 (Mutombo v Switzerland) (27 April 1994) CAT/C/12/D/13/1993.

North Sea Continental Shelf Cases (Federal Republic of German/Demark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 4.

Communication No 39/1996 (Paez v Sweden) (28 April 1997) CAT/C/18/D/39/1996.

S v Refugee Status Appeals Authority [1998] 2 NZLR 291.

Schier v Removal Review Authority [1999] 1 NZLR 703.

Communication No 43/1996 (Tala v Sweden) (7 March 1996) CAT/C/17/D/1996.

Tavita v Minister of Immigration [1994] NZFLR 97.

Communication No 930/2000 (Winata v Australia) (16 Aug 2001) CCPR/C/72/D/930/2000.

Ye and Ors v Minister of Immigration And Anor (7 August 2008) CA184/06.

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

B Legislation

Abolition of the Death Penalty Act 1989.

Care of Children Act 2004.

Immigration Bill 2007, no 132-1.

Immigration Act 1987.

New Zealand Bill of Rights Act 1990.

C International Treaties

American Convention on Human Rights (22 November 1969) 1144 UNTS 123.

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

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.

International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

OAU Convention Governing the Specific Refugee Problems in Africa (10 September 1969) 1001 UNTS 45.

United Nations Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, as amended by the Protocol Relating to the Status of Refuges (31 January 1967) 606 UNTS 267.

Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

D Other Primary Sources

Cartagena Declaration on Human Rights (22 November 1984) OEA/Ser.L/V/II.66/doc.10.

Human Rights Commission "Aspects of the Immigration Bill that raise Human Rights Concerns" September 2007.

Human Rights Foundation "Immigration Bill: Summary of Issues" (2 November 2007).

General Comment No. 5 "General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6.)" (27 November 2003) CRC/GC/2003/5 (2003), 5.

General Comment No. 6 "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin" (3 June 2005) CRC/GC/2005/6 (2005), 23.

Statute of the Court of International Justice, 1945.

Office of the High Commissioner for Human Rights: Convention Against Torture and Other Cruel, Inhuman or Treatment or Punishment http://untreaty.un.org (accessed 28 June 08).

Office of the High Commissioner for Human Rights: International Covenant on Civil and Political Rights www2.ohchr.org (accessed 28 June 08).

Principles Concerning Treatment of Refugees: Resolution Adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966 (Asian-African Refugee Principles) (12 August 1966).

UN General Assembly Resolution 2312 (XXII) (Declaration on Territorial Asylum) (14 December 1967).

UNHRC "General Comment No 15: The Position of Aliens under the Covenant" (11 April 1986).

UNHRC "General Comment No 18: Non Discrimination" (10 November 1989).

UNHCR "Guidelines for National Refugee Legislation" (9 December 1980).

UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees to the Transport and Industrial Relations Committee on the New Zealand Immigration Bill" (20 November 2007).

E Texts

Alston, P (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (OUP, Oxford, 1994).

Alston, P and B Gilmour Walsh *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF ICDC, Florence, 1993).

Bhabba, Jacquiline 'Children, Migration and International Norms' in Thomas Aleinikoff *Migration and International Legal Norms* (TMC Asser, The Hague, 2003).

Feller, E, Volker Turk and Frances Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press, Cambridge, 2003).

Jastram, Kate "Family Unity" in Thomas Aleinikoff *Migration and International Legal Norms* (TMC Asser, The Hague, 2003).

McAdam, Jane *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007).

Palmer, Geoffrey and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, South Melbourne, 2004).

Shaw, Malcolm N. *International Law* (5ed, Cambridge Univerity Press, Cambridge, 2003).

F Journal Articles

Geiringer, Claudia "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

G Other Secondary Sources

Capital Punishment in New Zealand www.nzhistory.net.nz (accessed 01 August 2008).

Department of Labour, Immigration Act Review www.dol.govt.nz (accessed 4 April 2008).

ILC "Expulsion of Aliens" (10 July 2006) A/CN.4/565.

Mandal, Ruma, external consultant to United Nations High Commissioner for Refugees, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, Department of Internal Protection PPLA/2005/02.

The Scope and Content of the Principle of Non-Refoulement: Opinion, Sir Elihu Lauterpacht and Daniel Bethlehem www.unhcr.org (accessed 10 April 2008).