

R197 Raniga, D. P.  
2007 (LawSS23)

International obligations and sections 9 & 23(5) of the Bill of Rights

DAKSHA PRIYA RANIGA

*INTERNATIONAL OBLIGATIONS*  
*AND*  
*SECTIONS 9 & 23(5) OF THE BILL OF RIGHTS*

LLB (HONS) RESEARCH PAPER

LAWS 523 – ADVANCED BILL OF RIGHTS

FACULTY OF LAW

VICTORIA UNIVERSITY OF WELLINGTON

2007

**Victoria**  
UNIVERSITY OF WELLINGTON  
*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



**LIBRARY**

## TABLE OF CONTENTS

<b>ABSTRACT</b> .....	<i>i</i>
<b>I INTRODUCTION</b> .....	<i>1</i>
<b>II BACKGROUND ON TORTURE</b> .....	<i>3</i>
<b>A Purpose of the Prohibition on Torture</b> .....	<i>3</i>
1 Historical Focus on Physical Integrity .....	<i>3</i>
2 Modern Focus on Inherent Dignity.....	<i>3</i>
<b>B The Legal Prohibition on Torture</b> .....	<i>4</i>
1 International Law .....	<i>4</i>
2 Domestic Law .....	<i>5</i>
3 The Need for Stronger Measures .....	<i>5</i>
<b>III THE UNITED NATIONS CONVENTION AGAINST TORTURE</b> .....	<i>6</i>
<b>A Development</b> .....	<i>6</i>
<b>B Content</b> .....	<i>8</i>
1 The definition of torture .....	<i>8</i>
2 General obligation of states .....	<i>9</i>
3 Expulsion, return or extradition.....	<i>9</i>
4 Prosecution of alleged torturers .....	<i>10</i>
5 Preventive measures.....	<i>11</i>
6 Remedial measures.....	<i>12</i>
7 Cruel, inhuman or degrading treatment or punishment .....	<i>13</i>
<b>C The Committee Against Torture</b> .....	<i>13</i>
<b>IV THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS</b> .....	<i>14</i>
<b>A The Relevance of ICCPR Jurisprudence to NZ</b> .....	<i>14</i>
<b>B The Human Rights Committee</b> .....	<i>15</i>
<b>C Obligations Read Into Article 7</b> .....	<i>15</i>
1 Prosecution of alleged perpetrators.....	<i>15</i>
2 Preventive measures.....	<i>16</i>
3 Expulsion, return or extradition.....	<i>17</i>
<b>D Differences between Obligations under UNCAT and Article 7</b> .....	<i>17</i>

TABLE OF CONTENTS

INTRODUCTION ..... 1

1. THE PROBLEM ..... 2

2. THE SCOPE OF THE STUDY ..... 3

3. THE RESEARCH DESIGN ..... 4

4. THE RESEARCH INSTRUMENTS ..... 5

5. THE DATA COLLECTION PROCEDURE ..... 6

6. THE DATA ANALYSIS PROCEDURE ..... 7

7. THE RESULTS ..... 8

8. THE CONCLUSIONS ..... 9

9. THE LIMITATIONS OF THE STUDY ..... 10

10. THE RECOMMENDATIONS ..... 11

APPENDIX I ..... 12

APPENDIX II ..... 13

APPENDIX III ..... 14

APPENDIX IV ..... 15

APPENDIX V ..... 16

APPENDIX VI ..... 17

APPENDIX VII ..... 18

APPENDIX VIII ..... 19

APPENDIX IX ..... 20

APPENDIX X ..... 21

APPENDIX XI ..... 22

APPENDIX XII ..... 23

APPENDIX XIII ..... 24

APPENDIX XIV ..... 25

APPENDIX XV ..... 26

APPENDIX XVI ..... 27

APPENDIX XVII ..... 28

APPENDIX XVIII ..... 29

APPENDIX XIX ..... 30

APPENDIX XX ..... 31

APPENDIX XXI ..... 32

APPENDIX XXII ..... 33

APPENDIX XXIII ..... 34

APPENDIX XXIV ..... 35

APPENDIX XXV ..... 36

APPENDIX XXVI ..... 37

APPENDIX XXVII ..... 38

APPENDIX XXVIII ..... 39

APPENDIX XXIX ..... 40

APPENDIX XXX ..... 41

APPENDIX XXXI ..... 42

APPENDIX XXXII ..... 43

APPENDIX XXXIII ..... 44

APPENDIX XXXIV ..... 45

APPENDIX XXXV ..... 46

APPENDIX XXXVI ..... 47

APPENDIX XXXVII ..... 48

APPENDIX XXXVIII ..... 49

APPENDIX XXXIX ..... 50

APPENDIX XL ..... 51

APPENDIX XLI ..... 52

APPENDIX XLII ..... 53

APPENDIX XLIII ..... 54

APPENDIX XLIV ..... 55

APPENDIX XLV ..... 56

APPENDIX XLVI ..... 57

APPENDIX XLVII ..... 58

APPENDIX XLVIII ..... 59

APPENDIX XLIX ..... 60

APPENDIX L ..... 61

APPENDIX LI ..... 62

APPENDIX LII ..... 63

APPENDIX LIII ..... 64

APPENDIX LIV ..... 65

APPENDIX LV ..... 66

APPENDIX LVI ..... 67

APPENDIX LVII ..... 68

APPENDIX LVIII ..... 69

APPENDIX LIX ..... 70

APPENDIX LX ..... 71

APPENDIX LXI ..... 72

APPENDIX LXII ..... 73

APPENDIX LXIII ..... 74

APPENDIX LXIV ..... 75

APPENDIX LXV ..... 76

APPENDIX LXVI ..... 77

APPENDIX LXVII ..... 78

APPENDIX LXVIII ..... 79

APPENDIX LXIX ..... 80

APPENDIX LXX ..... 81

APPENDIX LXXI ..... 82

APPENDIX LXXII ..... 83

APPENDIX LXXIII ..... 84

APPENDIX LXXIV ..... 85

APPENDIX LXXV ..... 86

APPENDIX LXXVI ..... 87

APPENDIX LXXVII ..... 88

APPENDIX LXXVIII ..... 89

APPENDIX LXXIX ..... 90

APPENDIX LXXX ..... 91

APPENDIX LXXXI ..... 92

APPENDIX LXXXII ..... 93

APPENDIX LXXXIII ..... 94

APPENDIX LXXXIV ..... 95

APPENDIX LXXXV ..... 96

APPENDIX LXXXVI ..... 97

APPENDIX LXXXVII ..... 98

APPENDIX LXXXVIII ..... 99

APPENDIX LXXXIX ..... 100

APPENDIX XLXXX ..... 101

APPENDIX XLXXXI ..... 102

APPENDIX XLXXXII ..... 103

APPENDIX XLXXXIII ..... 104

APPENDIX XLXXXIV ..... 105

APPENDIX XLXXXV ..... 106

APPENDIX XLXXXVI ..... 107

APPENDIX XLXXXVII ..... 108

APPENDIX XLXXXVIII ..... 109

APPENDIX XLXXXIX ..... 110

APPENDIX XLXXXX ..... 111

APPENDIX XLXXXXI ..... 112

APPENDIX XLXXXXII ..... 113

APPENDIX XLXXXXIII ..... 114

APPENDIX XLXXXXIV ..... 115

APPENDIX XLXXXXV ..... 116

APPENDIX XLXXXXVI ..... 117

APPENDIX XLXXXXVII ..... 118

APPENDIX XLXXXXVIII ..... 119

APPENDIX XLXXXXIX ..... 120

APPENDIX XLXXXXX ..... 121

APPENDIX XLXXXXXI ..... 122

APPENDIX XLXXXXXII ..... 123

APPENDIX XLXXXXXIII ..... 124

APPENDIX XLXXXXXIV ..... 125

APPENDIX XLXXXXXV ..... 126

APPENDIX XLXXXXXVI ..... 127

APPENDIX XLXXXXXVII ..... 128

APPENDIX XLXXXXXVIII ..... 129

APPENDIX XLXXXXXIX ..... 130

APPENDIX XLXXXXXX ..... 131

APPENDIX XLXXXXXXI ..... 132

APPENDIX XLXXXXXXII ..... 133

APPENDIX XLXXXXXXIII ..... 134

APPENDIX XLXXXXXXIV ..... 135

APPENDIX XLXXXXXXV ..... 136

APPENDIX XLXXXXXXVI ..... 137

APPENDIX XLXXXXXXVII ..... 138

APPENDIX XLXXXXXXVIII ..... 139

APPENDIX XLXXXXXXIX ..... 140

APPENDIX XLXXXXXXX ..... 141

APPENDIX XLXXXXXXXI ..... 142

APPENDIX XLXXXXXXXII ..... 143

APPENDIX XLXXXXXXXIII ..... 144

APPENDIX XLXXXXXXXIV ..... 145

APPENDIX XLXXXXXXXV ..... 146

APPENDIX XLXXXXXXXVI ..... 147

APPENDIX XLXXXXXXXVII ..... 148

APPENDIX XLXXXXXXXVIII ..... 149

APPENDIX XLXXXXXXXIX ..... 150

APPENDIX XLXXXXXXXI ..... 151

APPENDIX XLXXXXXXXII ..... 152

APPENDIX XLXXXXXXXIII ..... 153

APPENDIX XLXXXXXXXIV ..... 154

APPENDIX XLXXXXXXXV ..... 155

APPENDIX XLXXXXXXXVI ..... 156

APPENDIX XLXXXXXXXVII ..... 157

APPENDIX XLXXXXXXXVIII ..... 158

APPENDIX XLXXXXXXXIX ..... 159

APPENDIX XLXXXXXXXI ..... 160

APPENDIX XLXXXXXXXII ..... 161

APPENDIX XLXXXXXXXIII ..... 162

APPENDIX XLXXXXXXXIV ..... 163

APPENDIX XLXXXXXXXV ..... 164

APPENDIX XLXXXXXXXVI ..... 165

APPENDIX XLXXXXXXXVII ..... 166

APPENDIX XLXXXXXXXVIII ..... 167

APPENDIX XLXXXXXXXIX ..... 168

APPENDIX XLXXXXXXXI ..... 169

APPENDIX XLXXXXXXXII ..... 170

APPENDIX XLXXXXXXXIII ..... 171

APPENDIX XLXXXXXXXIV ..... 172

APPENDIX XLXXXXXXXV ..... 173

APPENDIX XLXXXXXXXVI ..... 174

APPENDIX XLXXXXXXXVII ..... 175

APPENDIX XLXXXXXXXVIII ..... 176

APPENDIX XLXXXXXXXIX ..... 177

APPENDIX XLXXXXXXXI ..... 178

APPENDIX XLXXXXXXXII ..... 179

APPENDIX XLXXXXXXXIII ..... 180

APPENDIX XLXXXXXXXIV ..... 181

APPENDIX XLXXXXXXXV ..... 182

APPENDIX XLXXXXXXXVI ..... 183

APPENDIX XLXXXXXXXVII ..... 184

APPENDIX XLXXXXXXXVIII ..... 185

APPENDIX XLXXXXXXXIX ..... 186

APPENDIX XLXXXXXXXI ..... 187

APPENDIX XLXXXXXXXII ..... 188

APPENDIX XLXXXXXXXIII ..... 189

APPENDIX XLXXXXXXXIV ..... 190

APPENDIX XLXXXXXXXV ..... 191

APPENDIX XLXXXXXXXVI ..... 192

APPENDIX XLXXXXXXXVII ..... 193

APPENDIX XLXXXXXXXVIII ..... 194

APPENDIX XLXXXXXXXIX ..... 195

APPENDIX XLXXXXXXXI ..... 196

APPENDIX XLXXXXXXXII ..... 197

APPENDIX XLXXXXXXXIII ..... 198

APPENDIX XLXXXXXXXIV ..... 199

APPENDIX XLXXXXXXXV ..... 200

<b>V</b>	<b>THE PROTECTION AGAINST TORTURE AND OTHER ILL TREATMENT IN NEW ZEALAND</b> .....	<b>18</b>
<b>A</b>	<b>The Statutory Framework</b> .....	<b>18</b>
1	<i>The Crimes of Torture Act 1989</i> .....	18
2	<i>The New Zealand Bill of Rights Act 1990</i> .....	21
<b>B</b>	<b>The Case Law</b> .....	<b>22</b>
1	<i>Zaoui</i> .....	22
2	<i>Taunoa</i> .....	24
3	<i>Clark</i> .....	27
(a)	The facts.....	27
(b)	The claim.....	27
(c)	The submissions.....	28
(d)	The decision.....	29
<b>C</b>	<b>Summary</b> .....	<b>30</b>
<b>VI</b>	<b>COMPARISON WITH OVERSEAS JURISDICTIONS</b> .....	<b>31</b>
<b>A</b>	<b>The European Convention for the Protection of Human Rights and Fundamental Freedoms</b> .....	<b>31</b>
1	<i>Duty to investigate</i> .....	32
2	<i>Extradition</i> .....	34
3	<i>Duty to establish protective measures to safeguard certain individuals from serious ill treatment by private parties</i> .....	37
4	<i>Obligations not read into Article 3</i> .....	39
<b>B</b>	<i>United Kingdom</i> .....	40
<b>C</b>	<i>Canada</i> .....	44
<b>D</b>	<b>Summary</b> .....	<b>46</b>
<b>VIII</b>	<b>CAN THESE OBLIGATIONS BE READ INTO THE BILL OF RIGHTS?</b> .....	<b>46</b>
<b>A</b>	<b>Legislative Under-Incorporation of Treaty Obligations</b> .....	<b>47</b>
<b>B</b>	<b>The Nature of the Obligations</b> .....	<b>49</b>
1	<i>Non-Justiciability</i> .....	49
2	<i>Positive Obligations and the 'Process Theory' of Rights</i> .....	50
<b>IX</b>	<b>CONCLUSION</b> .....	<b>52</b>
	<b>BIBLIOGRAPHY</b> .....	<b>54</b>

## ABSTRACT

This paper examines the incorporation of international obligations into domestic law through the New Zealand Bill of Rights Act 1990, specifically with regard to the right to be free from torture and other ill treatment. New Zealand is bound by a range of obligations at international law, to take steps to prevent acts of torture and other ill treatment. This paper looks at New Zealand's obligations under the United Nations Convention Against Torture 1984 and the International Covenant on Civil and Political Rights 1966, and examines the extent to which these obligations have been utilised by New Zealand courts when interpreting the scope the Bill of Rights. It then outlines the approach taken on this issue by the European Court of Human Rights, the United Kingdom courts and the Canadian courts. The paper then considers some difficulties the courts face in reading these obligations and concludes that, despite these difficulties, an effective and robust protection of the right to be free from torture and other ill treatment requires these obligations to be read into the Bill of Rights.

*Word Length:* The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises 15,109 words.

### Key Words:

New Zealand Bill of Rights Act 1990  
International obligations-Incorporation-Domestic law

<sup>1</sup> Because of popular, "other cruel, inhuman or degrading treatment or punishment" will hereafter be referred to as "other ill treatment."

<sup>2</sup> Office of the United Nations High Commissioner for Human Rights "Status of ratification of the Convention against Torture as of 2 November 2004" [www.ohchr.org/pengdoc/contra-torture.pdf](http://www.ohchr.org/pengdoc/contra-torture.pdf) (last accessed 1 October 2007).

<sup>3</sup> *Zand v Attorney-General* (No 2) [2005] 1 NZLR 389, 411 (SC) (South J for the Court).

## I INTRODUCTION

The right to be free from torture and other cruel, inhuman, or degrading treatment or punishment<sup>1</sup> is extensively protected worldwide, through both international and domestic law. This right is enshrined in the New Zealand Bill of Rights Act 1990 (“the Bill of Rights”) in both sections 9, which protects the right to be free from torture or cruel, degrading or disproportionately severe treatment or punishment, and 23(5), which protects the right of individuals deprived of liberty to be treated with humanity and respect for the inherent dignity of the person. New Zealand is also bound at international law to protect this right, namely by its ratification of the United Nations Convention Against Torture 1984 (“UNCAT”) and the International Covenant on Civil and Political Rights 1966 (“the ICCPR”). UNCAT specifically focuses on this right, and after 178 ratifications,<sup>2</sup> it is widely held to reflect the international consensus on the prohibition on torture. Both UNCAT and the ICCPR impose a number of duties upon States parties, such as prosecuting alleged offenders and investigating allegations of torture or other ill treatment, to ensure the effective protection of this right.

These obligations have not been explicitly incorporated into the domestic law of New Zealand. As such, the traditional “dualist” position dictates that there is an obligation *on* New Zealand to fulfil these duties, but no obligation *in* New Zealand. International law is only applicable in domestic law to the extent that it has been incorporated into domestic law, thus these obligations cannot be enforced domestically. However, the Supreme Court, with reliance on UNCAT and the ICCPR, has recently read an implied obligation to not return or extradite a person to a country where they face a substantial risk of torture into section 9 of the Bill of Rights.<sup>3</sup> This raises the question to what extent the other obligations required by UNCAT and the ICCPR can be implied into the Bill of Rights, and thus enforceable in domestic law.

---

<sup>1</sup> For ease of purpose, “other cruel, inhuman or degrading treatment or punishment” will hereinafter be referred to as “other ill treatment.”

<sup>2</sup> Office of the United Nations High Commissioner for Human Rights “Status of ratification of the Convention against Torture as of 2 November 2004 [www.ohchr.org/english/law/cat-ratify.htm](http://www.ohchr.org/english/law/cat-ratify.htm) (last accessed 1 October 2007).

<sup>3</sup> *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289, 321 (SC) Keith J for the Court.

This paper will attempt to answer that question. It begins with a brief survey of the purposes and the legal prohibition of torture and other ill treatment. Part III describes the origins of UNCAT and the duties it imposes on States parties. Part IV describes the protection against torture and other ill treatment provided for in Articles 7 and 10(1) of the ICCPR, and outlines the obligations imposed on States parties in order to ensure these rights are effectively protected.

Part V summarises the New Zealand position on the incorporation of these obligations through the Bill of Rights, and Part VI provides a comparison with the approaches taken by the European Court of Human Rights, the United Kingdom and Canada.

Part VII discusses the difficulties with imposing these obligations on the State through the Bill of Rights. The legislative under-incorporation of these obligations and the process theory of rights upon which the Bill of Rights was based present potential hurdles for reading these obligations into the Bill of Rights. Also, the non-justiciability of many of the obligations may impede the courts from entering judgement on the fulfilment of these obligations

Ultimately, however, this paper concludes that those hurdles can and should be overcome. The obligations New Zealand is under to provide effective protection against torture and other ill treatment requires these obligations to be incorporated through the Bill of Rights.



## II BACKGROUND ON TORTURE

### A Purpose of the Prohibition on Torture

#### 1 Historical Focus on Physical Integrity

The prohibition on torture originated from the protection of physical integrity against extreme forms of punishment. Those origins can be seen in the prohibition of 'cruel and unusual punishment' in Article 10 of the Bill of Rights 1688 and other early bills of rights.<sup>4</sup> The common law also recognised that 'every person's body is inviolate' as a fundamental principle, thus protecting physical integrity. The common law was specifically motivated to disallow the use of torture by:<sup>5</sup>

the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.

#### 2 Modern Focus on Inherent Dignity

Many contemporary human rights instruments aim to protect the 'inherent dignity of the person.'<sup>6</sup> The concept of 'inherent dignity' goes wider than just physical security. Acts that degrade or humiliate a person also infringe upon dignity. In recognition of this, most modern human rights instruments protect against other ill treatment that violates a person's dignity, while not being sufficiently severe to constitute torture. This category of 'other ill treatment' was originally described in the Universal Declaration of Human Rights 1948 ("the

---

<sup>4</sup> For example, the Eighth Amendment of the US Constitution.

<sup>5</sup> *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, 246 (HL) Lord Bingham of Cornhill.

<sup>6</sup> For example, International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, preamble.

UDHR”) as “cruel, inhuman or degrading treatment.”<sup>7</sup> Subsequent human rights instruments have mostly adhered to this formulation.<sup>8</sup>

Individuals who are deprived of liberty are particularly vulnerable to degrading or humiliating treatment. In recognition of this, many human rights instruments outline the specific right of detainees to humane treatment.<sup>9</sup> This right encompasses the right to be free from torture, and imposes a specific obligation on States to ensure the humane treatment of detainees.

Contemporary human rights instruments also extend the protection against torture and other ill treatment to encompass both punishment and treatment. This broadens the scope of the protection beyond the criminal law, and has seen the right to be free from torture and other cruel, inhuman or degrading treatment utilised in a wide variety of contexts.<sup>10</sup>

## ***B The Legal Prohibition on Torture***

### *1 International Law*

There is an extensive web of prohibition of torture and other ill treatment at international law. Article 5 of the UDHR, the source of many subsequent human rights instruments, reads “No one shall be subjected to torture or to cruel, inhuman or degrading treatment.” Similar language is found in Article 7 of the ICCPR, Article 3 of the European Convention on Human Rights (“the ECHR”), Article 5(2) of the Inter-American Convention on Human Rights and Article 5 of the African Charter on Human and Peoples Rights. Common Article 3 of the 1949 Geneva Conventions prohibits the ill treatment of certain classes of people.

<sup>7</sup> Universal Declaration of Human Rights (10 December 1948) A/RES/III/217, art 5. I will use the term ‘other ill treatment’ in reference to this formulation.

<sup>8</sup> For example, see International Covenant on Civil and Political Rights, above n 6, art 7. European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, art 3.

<sup>9</sup> For example, New Zealand Bill of Rights Act 1990, s 23(5) International Covenant on Civil and Political Rights, above n 6, Article 10(1).

<sup>10</sup> Such as immigration law and assessing the adequacy of prison detention conditions.

Specific conventions which provide for mechanisms for the prevention against torture have also been enacted.<sup>11</sup>

The prohibition on torture is considered to be a fundamental and non-derogable right. It is also generally accepted that the prohibition on torture is a 'jus cogens' or peremptory norm, and applies to all States regardless of whether they have become a party to a particular international instrument.<sup>12</sup>

## 2 Domestic Law

While the content of domestic bills of rights around the world tends to differ, virtually all of them contain a core set of civil and political rights, including the right to be free from torture.<sup>13</sup> Many constitutional bills of rights protect the security of the person. For example, section 12 of the Canadian Charter of Rights and Freedoms 1982 ("the Canadian Charter") guarantees the right "not to be subjected to any cruel and unusual treatment or punishment", while section 7 protects the broader right to "life, liberty and security of the person." The Eight Amendment of the United States Constitution 1791 borrows the phrase from the Bill of Rights 1688 and protects against "cruel and unusual punishments." Section 9 of the Bill of Rights provides everyone with the "right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment." The term "disproportionately severe" is unique to New Zealand.<sup>14</sup>

## 3 The Need for Stronger Measures

Despite the extensive web of prohibition at domestic and international law post-World War Two, widespread use of torture and other ill treatment has continued to be carried out by States against individuals. During the 1970s, this

<sup>11</sup> For example, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 112; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (11 November 1987) 1561 UNTS 363; and the Inter-American Convention to Prevent and Punish Torture 1985.

<sup>12</sup> A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* ((LexisNexis NZ Ltd, Wellington, 2005) 224. See also, *R v Bow Street Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 WLR 827.

<sup>13</sup> Philip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP, Oxford, 1997) 2, Butler 223-224

<sup>14</sup> A Butler and P Butler, above n 12, 223.

was exposed, in part, by the worldwide Campaign for the Abolition of Torture, carried out by Amnesty International.<sup>15</sup> Also, the increasing use of torture by autocratic regimes in Latin America to repress domestic opposition received mass media attention, serving to raise and solidify public opinion against the use of torture.<sup>16</sup> The United Nations General Assembly (“the General Assembly”) recognised that in light of the alarming reports of torture, “further and sustained efforts” were necessary to strengthen the protection against torture and other ill treatment at international law.<sup>17</sup> The need for international action was especially crucial in light of the State involvement in torture: a domestic legal system could not be expected to bring such practices to an end while the State supported them.<sup>18</sup>

### III THE UNITED NATIONS CONVENTION AGAINST TORTURE

#### A Development

In 1974, the General Assembly adopted a draft resolution requesting the upcoming Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (“the Congress”) to “give urgent attention” to strengthening the protection of torture and other ill treatment.<sup>19</sup>

The deliberations of the Congress resulted in the creation of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the General Assembly in 1975 (“the Declaration”).<sup>20</sup> The Declaration consists

<sup>15</sup> J H Burgers, and H Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, Dordrecht, 1988) 13.

<sup>16</sup> *Ibid.*, 13.

<sup>17</sup> *Ibid.*, 14.

<sup>18</sup> *Ibid.*, 14.

<sup>19</sup> UNGA “Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment in Relation to Detention and Imprisonment” (6 November 1974) A/RES/29/3218(XXX).

<sup>20</sup> United Nations General Assembly “Declaration on the Protection of All Persons From Being Subjected To Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (9 December 1975) A/RES/30/3452(XXX). The draft declaration was adopted with only one minor amendment – in article 2, where torture and other ill treatment were to be condemned as a denial of the principles of the United Nations Charter, the term ‘principles’ was replaced with ‘purposes’. See N Rodley *The Treatment of Prisoners Under International Law* (2 ed, Oxford University Press, Oxford, 1999) 36.

of twelve articles. It provides a definition of torture and imposes a general obligation on States to 'take effective measures' to prevent torture and other ill treatment. It also includes some specific measures. For example, article 5 requires States to ensure that the training of, and general rules for, persons charged with custody of prisoners must reflect the prohibition on torture and other ill treatment. Also, article 6 requires States to keep interrogation methods and detention practices under review. The Declaration was intended to impose a 'moral obligation' upon States to ensure their national processes conformed to these standards, and to provide the basis for a legally binding convention.<sup>21</sup>

Two years later, the General Assembly requested the Commission on Human Rights ("the Commission") to "draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in light of the principles embodied in the Declaration."<sup>22</sup> The Swedish government submitted a draft text to the Commission, which subsequently formed the basis of the Commission's deliberations. The Swedish draft, while corresponding closely with the obligations in the Declaration, included some significant additions.<sup>23</sup>

An open-ended working group of the Commission drafted the UNCAT over a period of seven years.<sup>24</sup> In 1984, the Commission forwarded the text, including articles upon which no consensus had been achieved, to the General Assembly. The General Assembly made minor changes and on 10 December 1984, the General Assembly adopted that form of the text, and opened UNCAT for signature, ratification and accession.<sup>25</sup>

<sup>21</sup> Burgers and Danelius, above n 15, 16; N Rodley, above n 20, 36.

<sup>22</sup> UNGA "Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (8 December 1977) A/RES/32/62, para 1.

<sup>23</sup> Burgers and Danelius, above n 15, 35; N Rodley, above n 20, 48. For example, the Swedish proposal included a clause preventing States from extraditing or expelling a person to a country where reasonable grounds exist to believe that person may be in danger of being tortured or subjected to other ill treatment (Article 4); a clause establishing universal jurisdiction over suspected torturers (Article 8); and implementation procedures establishing a system of international supervision similar to the Optional Protocol of the ICCPR.

<sup>24</sup> A detailed analysis of the working group's deliberations is outside the scope of this paper. For reference, see generally Burgers and Danelius above n 15. See also A Boulesbaa "An Analysis of the 1984 Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1985-6) *Dick J Int'l L* 185.

<sup>25</sup> United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, above n 11.

## **B Content**

### *1 The definition of torture*

The definition of torture found in UNCAT follows the definition found in the 1975 Declaration. That definition, in turn, was influenced by the elucidation of Article 3 of the ECHR by the European Commission of Human Rights (“European Commission”), in the *Greek case* in 1969.<sup>26</sup>

Article 1 provides a description of some of the constituent elements of torture. To constitute torture, the act must cause *severe* pain or suffering. The acts must be of sufficient gravity to be considered torture under UNCAT. Also, there is no indication that the pain must be inflicted systematically. Thus a single, isolated act can be considered to constitute torture.<sup>27</sup> The act must be *intentional* – accidents or negligent acts which results in pain or suffering do not constitute torture. The act must be committed for a particular *purpose*. Article 1 lists three particular purposes, but prefaces them with the term “such ... as”, indicating that the list is not exhaustive.<sup>28</sup>

Article 1 also requires the act of torture to be carried out by, or with the consent or acquiescence of a public official, or other person in an official capacity. During the travaux préparatoires there was debate over whether an act should be defined as torture regardless of who committed it. However, the Commission eventually decided to limit the application of UNCAT to torture for which State authorities could be held responsible. This consensus was reached because the UNCAT was aimed at solving the problem of State-sanctioned torture.<sup>29</sup>

Article 1 excludes from the definition of torture “pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>30</sup> This extends the ambit of the definition from that found in the 1975 Declaration, which limited the

<sup>26</sup> Report on the Greek case Chapter IV para 1-2, cited in Burgers and Daneilius, above n 15, 49.

<sup>27</sup> Burgers and Daneilius, above n 15, 118.

<sup>28</sup> Ibid, 118.

<sup>29</sup> Ibid, 120.

<sup>30</sup> United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, above n 11, art 1(1).

exception for lawful sanctions to those that were “consistent with the Standard Minimum Rules for the Treatment of Prisoners.”<sup>31</sup> The removal of that qualifier means any sanctions which a State prescribes by law, even those which might otherwise qualify as torture, will not be classified as torture under UNCAT. Conversely, a qualified exception would have meant that various forms of corporal punishment would be contrary to the UNCAT. This would have given UNCAT a role in the reform of the penal sanctions in different States, an outcome which undoubtedly would have been unacceptable to a number of countries.<sup>32</sup>

## 2 *General obligation of states*

Article 2 contains “the general but basic obligations of each State Party to promote the objectives of the [UNCAT].”<sup>33</sup> It requires States to take “effective legislative, administrative, judicial or other measures”<sup>34</sup> to not only prohibit, but also prevent torture. Paragraph 2 outlines the absolute prohibition on torture, making it clear that no exceptional situation can justify torture. This is further reaffirmed in paragraph 3, which prevents superior orders from being used as a justification for torture.

## 3 *Expulsion, return or extradition*

Article 3 prevents a State from sending an individual to another State where that person would be at serious risk of being subjected to torture. This article was inspired by the case law of the European Commission, which had concluded that the prohibition on torture in Article 3 of the ECHR not only obliges States to prevent torture within its own territory, but also to refrain from handing a person over to another State where he might be subjected to such treatment.<sup>35</sup> Paragraph 1 prohibits the expulsion, extradition or return (“refoulement”) of such a person, showing a clear link between this provision and

<sup>31</sup> UNGA “Declaration on the Protection of All Persons From Being Subjected To Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, above n 20, art 1(1).

<sup>32</sup> Burgers and Danelius, above n 15, 121-122.

<sup>33</sup> Burgers and Danelius, above n 15, 123.

<sup>34</sup> United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, above n 11, art 2(1).

<sup>35</sup> Burgers and Danelius, above n 15, 125.

Article 33 of the Convention Relating to the Status of Refugees DATE (“the Refugee Convention”).<sup>36</sup>

There needs to be substantial grounds for believing the person would be in danger of being subjected to torture before Article 3 applies. The existence of such grounds must be assessed in light of the circumstances of the case – questions of evidence may often be difficult, and it would be unreasonable and contrary to the spirit of UNCAT to require full proof of the alleged facts.<sup>37</sup> The general human rights record of the State concerned will also be relevant to the inquiry, as recognised in paragraph 2.

#### 4 *Prosecution of alleged torturers*

Article 4 requires each State party to make acts of torture a criminal offence in their domestic law, and to ensure it is punishable by appropriately severe penalties.

Article 5 obliges States to establish jurisdiction over offences of torture on the basis of territoriality, the nationality of the offender or, if the State considers it appropriate, the nationality of the victim. This sets up a system of universal jurisdiction, the aim of which is to ensure an alleged torturer cannot escape the consequences of their actions by going to another country.<sup>38</sup> This aim is furthered by the provisions of Articles 6, 7, 8 and 9.

Article 6 requires States to take alleged torturers into custody and immediately make preliminary inquiries into the facts, in order to decide whether to prosecute or extradite the alleged offender. States parties can choose the manner in which to carry out this obligation – existing domestic procedures for the detention of suspected offenders and time-limits on custody may be sufficient to fulfil this obligation. Article 6 makes clear, however, that a State must instigate

<sup>36</sup> No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

<sup>37</sup> Burgers and Danelius, above n 15, 127.

<sup>38</sup> Ibid 131.



the investigation in a timely manner, so as not to effectively allow the alleged offender a safe-haven.

Article 7 obliges States to either prosecute or extradite an alleged offender. Again, this supports the aim of ensuring no safe-havens are available to such alleged offenders. While Article 5 lays down the basis for the exercise of such jurisdiction, Article 7 requires States to exercise that jurisdiction where the alleged offender is present in a country under its jurisdiction.<sup>39</sup>

Article 8 aims to remove any legal obstacles that may prevent extradition of an alleged torturer to face prosecution. It ensures that any existing extradition treaties will be read compatibly with the aims of the UNCAT. Paragraph 1 deems offences of torture to be extraditable offences in any extradition treaty already existing between States parties, and makes it compulsory to include torture as an extraditable offence in any future extradition treaties. Where there is no extradition treaty, paragraph 2 allows States to rely on the UNCAT as the legal basis for extradition.

Article 9 obliges States to "afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4." This clause recognises that the prosecuting State will often be different to the State in which the acts of torture allegedly occurred. The provision of evidence and information to the prosecuting State will thus be essential for a successful prosecution.<sup>40</sup>

##### 5 *Preventive measures*

Article 10 requires States parties to include information and education regarding the prohibition on torture and other ill treatment in the training of all persons who may be involved in the custody, interrogation or treatment of any arrested, detained or imprisoned person. This includes law enforcement personnel, civil or military, medical personnel, and public officials. The provision of such information is expected to minimise the risk of any person who is involved in the

---

<sup>39</sup> Ibid, 136.

<sup>40</sup> Ibid, 140.

custody of detained persons will carry out acts of torture or other ill treatment of their own initiative. It is also expected to make it more difficult for higher authorities to order, encourage or tolerate such practices.<sup>41</sup>

Article 11 provides that each State party shall systematically review interrogation rules, instructions, methods, practices and arrangements for the custody and treatment of detained, arrested or imprisoned persons, with a view to preventing torture. It is not enough to simply lay down rules prohibiting torture and other ill treatment. States must have procedures in place to reassess those rules. If cases of torture or other ill treatment are detected, the rules may need to be revised and improved.<sup>42</sup>

Article 12 requires each State party to ensure there is a prompt and impartial investigation by its competent authorities of any suspicion that an act of torture or other ill treatment has been committed. Both the elements of promptness and impartiality are significant:<sup>43</sup>

Promptness is essential not only in the interest of the victim but also in many cases to prevent the acts from occurring again, whether against the same person or against someone else. Impartiality is important, since any investigation which proceeds from the assumption that no such acts have occurred, or in which there is a desire to protect the suspected officials, cannot be considered effective.

Article 15 prohibits the use of any statements made under torture as evidence in any proceedings. This provision recognises that a statement made under torture will often be unreliable and thus contrary to the principle of a fair trial.<sup>44</sup> Preventing information gained through torture from being used in proceedings also removes a key impetus for employing torture in the first place. This is an indirect preventive measure.

## 6 Remedial measures

---

<sup>41</sup> Ibid, 143.

<sup>42</sup> Ibid, 144.

<sup>43</sup> Ibid, 144-145.

<sup>44</sup> Ibid, 148.

Article 13 provides any person who claims to be the victim of torture or other ill treatment with a formal right of complaint and a right to have that complaint properly examined. It also requires States to take measures to ensure the complainant and any witnesses are protected from any ill treatment or intimidation as a consequence of the complaint. This provision recognises that often the alleged victim will be under some form of detention, and afraid of lodging a complaint since the complaint will likely be directed against someone involved in their custody, and could make the complainant vulnerable to further ill treatment. To ensure the alleged victim is able to exercise their right to complain, the State may have to take measures such as removing the complainant to another place of detention, changing the personnel responsible for the complainant's detention, or ensuring a witness is present during further interrogations.<sup>45</sup>

Article 14 provides that a victim of torture shall be able to obtain redress and have an enforceable right to compensation, including the "means for as full rehabilitation as possible."<sup>46</sup>

#### 7 *Cruel, inhuman or degrading treatment or punishment*

In Article 16 States parties give a general undertaking to prevent acts of cruel, inhuman or degrading treatment or punishment. This corresponds to the basic obligation in Article 2 for States to take effective measures to prevent torture. However, only those obligations listed in Articles 10, 11, 12 and 13 apply to other forms of cruel, inhuman or degrading treatment or punishment. The Commission found it impossible to draft a precise definition of other cruel, inhuman or degrading treatment or punishment when drafting the UNCAT. The vagueness of the concept thus made it unsuitable for those obligations of the UNCAT which would be reflected in the penal and procedural laws of the States parties.<sup>47</sup>

### C *The Committee Against Torture*

<sup>45</sup> Ibid, 146.

<sup>46</sup> United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, above n 11, art 14(1).

<sup>47</sup> Burgers and Danelius, above n 15, 149.

Article 17 of UNCAT sets up the Committee Against Torture ("CAT"), a panel of human rights experts who review periodic reports from States parties and scrutinise the measures taken to give effect to the undertakings in UNCAT. CAT can also consider interstate and individual complaints against States parties.<sup>48</sup>

#### **IV THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

##### **A The Relevance of ICCPR Jurisprudence to NZ**

New Zealand has ratified the ICCPR, and incorporated it into New Zealand law, primarily through the Bill of Rights.<sup>49</sup> The Long Title of the Bill of Rights expressly provides that it is an "Act ... (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." New Zealand has also ratified the First Optional Protocol to the ICCPR, allowing individuals the right to petition the Human Rights Committee ("the HRC").

The jurisprudence and commentary generated by the ICCPR is highly relevant for the interpretation of the Bill of Rights. The ICCPR was extensively drawn on by the drafters of the Bill of Rights.<sup>50</sup> In one of the first cases to interpret the Bill of Rights, the Court of Appeal noted that "[i]n approaching the Bill of Rights Act it must be of cardinal importance to bear in mind the antecedents."<sup>51</sup> Subsequent cases have followed this approach.<sup>52</sup>

The language in section 9 of the Bill of Rights is almost identical to Article 7, and s23(5) resembles Article 10(1), which also indicates that the Bill of Rights was intended to follow ICCPR jurisprudence on this right. Thus, the

<sup>48</sup> See generally, N Rodley above n 20, 152-161.

<sup>49</sup> This is not the only statute that implements the ICCPR into New Zealand law. For example, the Long Title of the Human Rights Act 1993 states that it is an Act to "provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights."

<sup>50</sup> Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" [1984-85] I AJHR A 6, para 4.21-4.23.

<sup>51</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 (CA) Cooke P.

<sup>52</sup> For example, *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289, 318 (SC) Keith J for the Court.

incorporation of these obligations into the ICCPR rights provides strong support for such incorporation to occur within the Bill of Rights.

While the jurisprudence from the ICCPR will be 'highly persuasive' in interpreting the Bill of Rights, it must be kept in mind that the New Zealand courts are not bound to follow the views of the HRC.<sup>53</sup>

### ***B The Human Rights Committee***

The HRC is the United Nations treaty body responsible for monitoring the ICCPR. It is made up of a panel of eighteen human rights experts who determine the meaning and effect of ICCPR provisions through making 'Observations' on periodic reports submitted by States parties; by issuing 'General Comments' on the scope and effect of the ICCPR rights; and by giving 'Views' on individual communications brought by persons claiming an infringement of their rights.<sup>54</sup>

### ***C Obligations Read Into Article 7***

The HRC has identified numerous obligations within many of the articles in the ICCPR. These obligations have been justified by the mandate of article 2, which "requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."<sup>55</sup> Specifically, in relation to the prohibition of torture and other ill treatment, the HRC has recognised a number of different obligations upon States parties, including the duty to prosecute alleged torturers, to establish certain preventive measures, and to refrain from extraditing, expelling or returning a person to face conduct in breach of Article 7.

#### ***1 Prosecution of alleged perpetrators***

<sup>53</sup> *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA); *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA).

<sup>54</sup> See generally, Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2 ed, Oxford University Press, Oxford 2004) 16-21.

<sup>55</sup> Human Rights Committee "General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant", (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13. See also, Joseph, Schultz and Castan, above n 54, 35.

The HRC has recognised an obligation under Article 7 to prosecute perpetrators of torture, or cruel, inhuman or degrading treatment.<sup>56</sup> It has also condemned the grant of amnesties, specifically for acts of torture, as being incompatible with the duty of States to investigate such acts.<sup>57</sup>

## 2 Preventive measures

In the early communications where the HRC found breaches of Article 7, and Article 10(1), ill treatment was regularly found to have occurred while the individual was being kept in detention.<sup>58</sup> This correlation between the deprivation of liberty and the violation of human dignity, as well as concurrent drafting of UNCAT in the international community, prompted the HRC to give special attention to measures essential for preventing breaches of Article 7.<sup>59</sup> It has since identified the following preventive obligations on States Parties: to promptly and impartially investigate complaints of a breach;<sup>60</sup> to provide mechanisms and procedures to prevent occurrences of torture, including systematic review of interrogation rules, instructions, methods and practices;<sup>61</sup> and to provide appropriate training and instruction to enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>62</sup> States are also under an obligation to prohibit the use or admissibility of statements obtained through torture or other ill treatment in judicial proceedings.<sup>63</sup>

<sup>56</sup> Joseph, Schultz and Castan, above n 54, 266.

<sup>57</sup> Human Rights Committee "General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)" (10 March 1992), para 15; *Rodriguez v Uruguay* Communication No. 322/1988 (19 July 1994) para 12.4.

<sup>58</sup> For example, *Marais v. Madagascar* Communication No. 49/1979, (1983); *Muteba v. Zaire*, Communication No. 124/1982 (1984); *Penarrieta et al. v. Bolivia*, Communication No. 176/1984 (1988).

<sup>59</sup> M Nowak, *UN Covenant on Civil and Political Rights: a commentary* (N P Engel Publisher, Strasbourg, 1993) 135-136.

<sup>60</sup> Nowak, above n 59, para 133-134; *Concluding Observations on Peru*, UN Doc. CCPR/C/79/Add. 67, (1996) para 10.5.

<sup>61</sup> Nowak, above n 59, para 11. For example, *Herrera Rubio v Colombia*, Communication No. 161/1983 (1987) para 10.5.

<sup>62</sup> *Ibid*, para 10.

<sup>63</sup> *Ibid*, para 12.

Unsurprisingly, these obligations closely resemble those in Articles 10, 11, 12 and 13 of UNCAT.<sup>64</sup> The prohibition on the use of statements obtained through any Article 7 treatment in judicial proceedings is wider than the corresponding prohibition in Article 15, which only prohibits those statements obtained through torture. The HRC has also gone further than UNCAT, and read the following duties on States parties: to prohibit 'incommunicado' detention; to ensure routine visits by physicians, attorneys and family members; and to have a centralised registration system for all imprisoned persons. These duties help to prevent substantive breaches of the ICCPR, while also indicating the type of evidence which a State should adduce in order to refute allegations of torture or other ill treatment.<sup>65</sup>

However, the HRC has not yet found a breach of the ICCPR based solely on a breach of one of these preventive measures. Considering that only cases of extreme ill treatment have been found to breach Article 7, it seems highly unlikely that an omission of a preventive measure alone will suffice.<sup>66</sup>

### 3 *Expulsion, return or extradition*

The HRC has read an obligation on States parties to not expel, return or extradite a person to a country where a violation of that person's Article 7 rights is a necessary and foreseeable consequence.<sup>67</sup> This provides a broader protection than Article 3 of UNCAT, which only applies to return to face acts of torture.<sup>68</sup>

## **D Differences between Obligations under UNCAT and Article 7**

<sup>64</sup> M Nowak, above n 59, 136.

<sup>65</sup> Joseph, Schultz and Castan, above n 54, 255; M Nowak, above 59, 136; *Hill and Hill v Spain*, Communication No. 526/1993, UN Doc CCPR/C/59/D/526/1993 (1997).

<sup>66</sup> For example, see the cases cited in *Taunoa v Attorney-General* (31 August 2007) SC 70, per Blanchard J para 166-168.

<sup>67</sup> For example, *C v Australia* Communication No 900/99, UN Doc CCPR/C/76/D/900/1999 (2001); *Judge v Canada* Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003); General Comment 20, para 9; *Ng v Canada* Communication No 469/91, UN Doc CCPR/C/49/D/469/1991 (1993).

<sup>68</sup> *BS v Canada*, Communication No 166/00, UN Doc CAT/C/27/D/166/2000 (2001).

The HRC has declined to distinguish between the different categories of treatment in Article 7.<sup>69</sup> As such, many of the obligations read into this provision apply to *all* acts of ill treatment of any level of severity. As noted above, for example, States parties must refrain from exposing individuals to the danger of torture, as well as other cruel, inhuman or degrading treatment or punishment upon return to another country through extradition, expulsion or refoulement.<sup>70</sup> This is broader than UNCAT, which provides fewer protections against cruel, inhuman or degrading treatment or punishment.

The HRC has also extended the obligation on States parties under Article 7 to protect individuals against infringement of their rights by private parties.<sup>71</sup>

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

This also goes beyond UNCAT, which limits its protections to acts which have some degree of State involvement.

## **V THE PROTECTION AGAINST TORTURE AND OTHER ILL TREATMENT IN NEW ZEALAND**

### **A The Statutory Framework**

#### **I The Crimes of Torture Act 1989**

The Crimes of Torture Act 1989 (“the Torture Act”) serves two purposes: to enable New Zealand to meet its international obligations under both UNCAT and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (the Optional Protocol).

<sup>69</sup> Human Rights Committee, above n 57, para 2.

<sup>70</sup> Human Rights Committee, above n 57, para 9; Joseph, Schultz and Castan, above n 54, 231.

<sup>71</sup> Joseph, Schultz and Castan, above n 54, para 2.



Part one of the Torture Act addresses New Zealand's obligations under UNCAT. It criminalises acts of torture. The definition of 'torture' in the Torture Act follows the UNCAT definition, with some discernable differences. For example, the Torture Act definition omits any reference to 'public officials.'<sup>72</sup> The section which criminalises torture, however, only applies to public officials or those acting in a public capacity.<sup>73</sup> Also, the definition adds a qualifying reference to the ICCPR: torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions but only to the extent that those sanctions are not inconsistent with the Articles of the ICCPR.<sup>74</sup>

Section 4 of the Act recognises jurisdiction on the basis of territoriality and the nationality of the offender but does not go so far as to recognise jurisdiction based on the nationality of the victim of torture.<sup>75</sup> Section 8 fulfils the obligation on States parties to include the offence of torture in any present and future extradition treaties.

The obligations regarding extradition, expulsion or refoulement to face torture, and to establish preventive and remedial measures are omitted. The exclusion of these obligations appears to be due to a number of factors. Firstly, New Zealand entered a reservation at the time of signing UNCAT, reserving the right to award compensation to torture victims as referred to in Article 14 only at the discretion of the Attorney-General of New Zealand. Secondly, the bill to implement New Zealand's commitment to UNCAT was introduced as part of an omnibus Law Reform (Miscellaneous Provisions) Bill in 1987. This Bill contained over a hundred clauses, concerning at least fifty different statutes. As is apparent from Hansard, the implementation of UNCAT did not receive any meaningful attention from Parliament. The omission of certain obligations could thus easily be an oversight. However, the more likely explanation is that the government did not consider these extra obligations to be necessary in New Zealand. The attitude of the government towards UNCAT is summed up by the then Minister of Justice in his justification for enacting this statute:<sup>76</sup>

---

<sup>72</sup> Crimes of Torture Act 1989, s2.

<sup>73</sup> Ibid, s3(3).

<sup>74</sup> Ibid, s3(3).

<sup>75</sup> Ibid, s 4.

<sup>76</sup> (13 December 1988) NZPD 8932.

In introducing [the provisions of the Torture Act] the Government by no means is suggesting that torture is a problem in New Zealand. However, it is a problem in other parts of the world. The convention was designed to bring pressure to bear on those countries that use torture as an instrument of State policy.

It is apparent that the Government believed that criminalising torture, and enabling universal jurisdiction over that offence was sufficient to meet its obligations under UNCAT. Perhaps, impliedly, the government considered it had fulfilled the omitted obligations through other mechanisms and thus did not need to spell them out in the Torture Act.

Part two of the Torture Act enables New Zealand to meet its international obligations under the Optional Protocol. The Optional Protocol was adopted by the General Assembly on 18 December 2002 and entered into force on 22 June 2006.<sup>77</sup> It is a system of preventive measures designed to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.<sup>78</sup> The Optional Protocol provides for a system of regular visits and recommendations by independent international and national bodies to places where people are deprived of their liberty.

The Torture Act enables the mandate of the international Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (“the Subcommittee”) to be fulfilled, by granting it access to and information about New Zealand’s detention centres, and all persons detained.<sup>79</sup> It also sets up National Preventive Mechanisms, domestic counterparts to the Subcommittee, as required by Article 3 of the Optional Protocol.<sup>80</sup> The Minister of Justice has designated the Ombudsmen, the Police Complaints Authority, the Children’s Commissioner and

---

<sup>77</sup> UNGA “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (18 December 2002) A/RES/57/199.

<sup>78</sup> *Ibid*, preamble.

<sup>79</sup> Crimes of Torture Act 1989, ss 18-20.

<sup>80</sup> *Ibid*, ss 26-30.

Visiting Officers appointed in accordance with the relevant Defence Force Orders, as National Preventive Mechanisms.<sup>81</sup>

The National Preventive Mechanisms are required to visit 'places of detention' at regular intervals to examine the conditions of detention, and make recommendations for improving the conditions as well as for preventing torture or other ill treatment.<sup>82</sup> They are required to report to the Government on their findings.<sup>83</sup> The Subcommittee, which also has unrestricted access to inspect places of detention, is required to provide advice and assistance to the National Preventive Mechanisms.<sup>84</sup>

New Zealand's ratification of the Optional Protocol goes some way in rectifying the omission of the preventive measures of UNCAT in the Torture Act. However, the National Preventive Mechanisms and the Subcommittee have recommendatory powers only, and it is too soon to tell how effective these measures will be in practice.

## 2 *The New Zealand Bill of Rights Act 1990*

Sections 9 and 23(5) provide everyone the right to be free from torture and other ill treatment. The White Paper defines section 9 as being "aimed at any form of treatment or punishment which is incompatible with the dignity and worth of the human person."<sup>85</sup> It points to the Bill of Rights 1689 as the origin of this protection.

Understanding the scope of section 9 can be aided by considering the other rights protected under the heading 'security of the person' in the Bill of Rights: the right not to be deprived of life,<sup>86</sup> the right not to be subjected to medical or

<sup>81</sup> Mark Burton "Designation of National Preventive Mechanisms" (21 June 2007) *New Zealand Gazette* Wellington 1816.

<sup>82</sup> Crimes of Torture Act, 1989, s 27. Section 16 provides a non-exclusive list of places of detention.

<sup>83</sup> *Ibid*, s 27 (c).

<sup>84</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above n 77, art 11.

<sup>85</sup> Ministry of Justice, above n 50, para 10.162.

<sup>86</sup> New Zealand Bill of Rights Act 1990, s 8.

scientific experimentation<sup>87</sup> and the right to refuse to undergo medical treatment.<sup>88</sup> These rights all seem to be aimed at securing physical bodily integrity, which includes mental and psychological integrity.

Section 23(5) protects the particular right of persons deprived of liberty to be treated with humanity and respect for their inherent dignity, which suggests that section 9 is aimed at more serious conduct which results in physical or psychological harm.<sup>89</sup>

## **B The Case Law**

### *1 Zaoui*

The Supreme Court in *Zaoui v Attorney General (No 2)* (“*Zaoui*”) relied on international jurisprudence to inform the scope of section 9.<sup>90</sup> Mr Zaoui, who had been classified as a refugee, was the first person to be the subject of a security risk certificate under Part 4A of the Immigration Act 1987. This statutory scheme enabled the Government to rely on certain classified security information and deport a person who was considered a threat or danger to the security of New Zealand.<sup>91</sup> The broad issue before the Supreme Court was to what extent the Executive had to take into account the risk that Mr Zaoui’s human rights would be violated if he were deported from New Zealand.

Counsel for Mr Zaoui argued that the State’s powers to deport him had to be consistent with the non-refoulement provision in Article 3 of UNCAT, or any comparable international law or Bill of Rights standard.<sup>92</sup> The basis for this argument was the reference to Article 33.2 of the Refugee Convention in the

<sup>87</sup> New Zealand Bill of Rights Act 1990, s 10.

<sup>88</sup> *Ibid*, s 11.

<sup>89</sup> Andrew Butler and Petra Butler, above n 12, 225. See also, comments in *Taunua v Attorney-General* (31 August 2007) SC 70, per Blanchard 176-177; Tipping J para 285; McGrath J para 339.

<sup>90</sup> *Zaoui v Attorney-General (No 2)*, above n 3, 318-321 Keith J for the Court.

<sup>91</sup> For a thorough description of the statutory framework, see C Geiringer “International law through the lens of *Zaoui*: Where is New Zealand at?” (2006) 17 PLR 300, 302-309.

<sup>92</sup> *Zaoui v Attorney General (No 2)* above n 3, 299 Keith J for the Court.

Immigration Act 1987 as a 'relevant security criteria' upon which a security risk certificate could be issued.<sup>93</sup>

The Supreme Court ultimately found that these human rights concerns did not have to be considered at the stage of issuing a security risk certificate.<sup>94</sup> However the Government was still under an obligation to act in conformity with New Zealand's obligations under the ICCPR and UNCAT to protect Mr Zaoui from return to threats of torture or the arbitrary taking of life, as accepted by the Solicitor-General.<sup>95</sup> This acceptance distinguishes the position of the New Zealand government from that espoused by the Canadian Supreme Court that obligations in respect of torture are not absolute, especially in the face of a national security threat.<sup>96</sup>

The issue before the Court was in which way these obligations were to be met under New Zealand law. The Supreme Court turned to sections 8 and 9 of the Bill of Rights as providing a possible answer, and held that:<sup>97</sup>

These provisions do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. This is also the case with articles 6(1) and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions of a state party – here New Zealand – if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life.

Thus, relying on numerous international cases, the Supreme Court read an implied non-refoulement obligation into the Bill of Rights.<sup>98</sup> The Court went on to

<sup>93</sup> Article 33.2 allows the refoulement of a refugee who is found, on reasonable grounds, to constitute a danger to the community.

<sup>94</sup> *Zaoui v Attorney General (No 2)* above n 3, 317-318 Keith J for the Court.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

<sup>97</sup> *Zaoui v Attorney General (No 2)* above n 3, 318-319 Keith J for the Court.

<sup>98</sup> *Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR) paras 90 and 91; *Kindler v Canada* (1993) CCPR/C/48/D/470/1991, paras 13.1-13.2; *R(Ulla) v Special Adjudicator* [2003] 1 WLR (CA); *Chahal v United Kingdom* (1996) 23 EHRR 413 paras 73-82.

invoke the presumption of consistency to hold that the power to deport Mr Zaoui had to be exercised consistently with this obligation:<sup>99</sup>

As directed by s 6 of the Bill of Rights, s 72 is to be given a meaning, if it can, consistent with the rights and freedoms contained in it, including the right not to be arbitrarily deprived of life and not to be subjected to torture. Those rights in turn are to be interpreted and the powers conferred by s 72 are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty based.

## 2 *Taunoa*

*Attorney-General v Taunoa* ('*Taunoa*') is also known as the 'prisoner compensation case,' where several inmates were compensated for breaches of section 9 and section 23(5) of the Bill of Rights.<sup>100</sup> The claim was based on the use of the Behavioural Management Regime ("the BMR") and administrative segregation by the Department of Corrections to help control the behaviour of maximum security prisoners at Auckland Prison.<sup>101</sup> The High Court found aspects of BMR were contrary to the Penal Institutions Act 1954 (PIA) and the Penal Institutions 2000 (Regulations), and breached section 23(5).<sup>102</sup>

The breaches of section 23(5) were attributable to several factors, including: lengthy unlawful segregation from other inmates; loss of ordinary inmate 'entitlements' while on segregation; cell hygiene, bedding, clothing falling below standards established by prison regulations; inadequate monitoring of inmate mental health; inadequate exercise conditions; and unlawful strip searches. On appeal, the Court of Appeal confirmed the finding of section 23(5) breach in respect of all the claimants, and further held there was a breach of section 9 in relation to a Mr Tofts, who had pre-existing psychiatric difficulties and should not have been placed on BMR.<sup>103</sup>

<sup>99</sup> *Zaoui v Attorney General (No 2)* above n 3, 321 Keith J for the Court.

<sup>100</sup> *Attorney General v Taunoa* (2004) 7 HRNZ 379 (HC) Ronald Young J.

<sup>101</sup> See the High Court judgement for a detailed description of the regime.

<sup>102</sup> *Taunoa v Attorney-General*, above n 100, para 276 Ronald Young J (the liability judgement).

The Penal Institutions Act 1954 has since been repealed and replaced by the Corrections Act 2004.

<sup>103</sup> *Attorney-General v Taunoa* [2006] 2 NZLR 457, 487-489 (CA) O'Regan JJ for the Court

The case was further appealed and cross-appealed to the Supreme Court.<sup>104</sup> The inmates appealed against the rejection of their claim that placement on BMR amounted to a breach of section 9. The Attorney-General cross-appealed on the issue of appropriate remedies.<sup>105</sup> By a majority, the Supreme Court upheld the Court of Appeal's decision and declined to find a breach of section 9 for any of the inmates.

The trilogy of *Taunoa* cases thus raised a number of issues concerning the scope and application of sections 9 and 23(5). The most significant, for the purposes of this paper, is the treatment of New Zealand's international obligations relevant to the interpretation of sections 9 and 23(5).

In the High Court, Ronald Young J looked to the statutory definition of torture in the Torture Act, and the definition in Article 1 of UNCAT, in order to identify the elements of torture under section 9.<sup>106</sup> He followed the definition as stated in UNCAT, but added an extra element: that "the acts are unjustifiable in the particular circumstances."<sup>107</sup> This final element seems contrary to the standing of torture as an 'absolute' right in the international jurisprudence.<sup>108</sup> Justifiability was not in issue, however, and the point was not appealed.

Ronald Young J also held that the complaints made under the Standard Minimum Rules of Prisoners, the Bill of Rights 1688, the ICCPR and UNCAT were 'mirrored' in the complaints of breaches of the PIA, the regulations and the Bill of Rights, and thus did not need to be considered separately.<sup>109</sup> Specifically in relation to the ICCPR and UNCAT, the Judge considered that:<sup>110</sup>

<sup>104</sup> *Taunoa v Attorney-General* (31 August 2007) NZSC SC 6/2006.

<sup>105</sup> An exploration of the issues of appropriate remedies for a breach of section 9 or section 23(5) of the Bill of Rights is outside the scope of this paper.

<sup>106</sup> *Taunoa v Attorney-General*, above n 100, para 256-259 Ronald Young J (the liability judgement).

<sup>107</sup> *Ibid*, para [259]

<sup>108</sup> See for example, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above n 11, art 2; Clayton and Tomlinson, *The Law of Human Rights: Volume 1* (Oxford University Press, Oxford, 2000) 388 citing *Chahal v UK* (1996) 23 EHRR 413.

<sup>109</sup> *Taunoa v Attorney-General*, above n 100, para 280 Ronald Young J (the liability judgement).

<sup>110</sup> *Ibid*, para 282.

the relevant provisions of the ICCPR and the Torture Convention have been incorporated into New Zealand legislation. Sections 9 and s23(5) of the New Zealand Bill of Rights Act cover in very similar ways these covenants and conventions as well as other international laws of conduct in relation to the treatment of prisoners.

On appeal, the claimants argued Ronald Young J had erred in concluding that the ICCPR and UNCAT were part of New Zealand law, and then failing to consider the international jurisprudence. The Court of Appeal, however, held that the respondent's had misinterpreted Ronald Young J because:<sup>111</sup>

that is not what the Judge said. What he said was that the provisions of the ICCPR and the Convention against Torture had been incorporated into New Zealand legislation, particularly ss 9 and 23(5) of the Bill of Rights. We agree with the Judge's conclusion in that regard.

Certain provisions of the ICCPR and UNCAT are thus incorporated into New Zealand law through the Bill of Rights. The courts did not further elaborate on which provisions exactly; however considering the claim was about the humane treatment of prisoners, the provisions of the ICCPR and UNCAT relating to the treatment of prisoners are likely to be the most relevant.

The inmates also attempted to claim that the Court should order an investigation into BMR and the circumstances of its imposition. Specifically, they claimed that they had a right to a prompt and impartial investigation under Article 12 of UNCAT. However, Ronald Young J refused to allow the claimants to file a late amended statement of claim on the opening day of the High Court trial, as it was too late. That decision was upheld on both appeals and, as a result, the Court did not consider whether the State was under an obligation to investigate allegations of torture or ill treatment under the Bill of Rights.<sup>112</sup> Counsel for the inmates subsequently filed a new claim for these obligations in *Clark*, discussed below.

---

<sup>111</sup> *Attorney-General v Taunoa* [2006] 2 NZLR 457, 509 (CA) O'Regan for the Court.

<sup>112</sup> But see *Taunoa v Attorney-General* (31 August 2007) NZSC SC 6/2006, para [228] Blanchard J indicating that, if the Government were considering to act on a recommendation to investigate further from the Committee Against Torture, a Court order to investigate may not be necessary.



3 *Clark*

The claimant in *Clark v Governor – General & Ors*<sup>113</sup> sought to bring a claim against the State for breaching its obligations under Articles 10, 11, 12 and 13 of UNCAT. The Attorney-General successfully applied to have this part of the claim struck out. As it is directly on point, it bears setting out the details of the decision in full.

## (a) The facts

The plaintiff, Wayne Clark, was an inmate in D Block at Auckland Prison where he claimed he was assaulted by prison officers. He sought an enquiry into the incident under section 10 of the PIA.<sup>114</sup> Justice Doogue interviewed the plaintiff pursuant to section 10 of the PIA, and advised the Chief District Court Judge that the complaints could not be adequately dealt with under the PIA, as they alleged serious criminal offending. The Chief District Court Judge advised the plaintiff's counsel that the Office of the Ombudsman would be prepared to investigate matter. Counsel rejected the offer because, in his view, the Ombudsman did not have sufficient investigatory powers to properly investigate the matter.

The Chief District Court Judge subsequently advised the plaintiff that he was not prepared to accede to the request for a formal investigation, for three reasons: firstly, alternative mechanisms involving other parties, such as the Police, the Prison Inspectorate and the Ombudsman, were available; secondly, there were no clear legislative guidelines governing how such an investigation was to be undertaken; and thirdly, any agreement to the request could open door for large numbers of similar requests.<sup>115</sup>

## (b) The claim

---

<sup>113</sup> (27 May 2005) HC WN CIV-2004-485-001902.

<sup>114</sup> The Penal Institutions Act 1954 was repealed and replaced by the Corrections Act 2004. Section 19 of the Corrections Act is largely similar to section 10 of the PIA.

<sup>115</sup> *Clark v Governor – General & Ors* (27 May 2005) HC WN CIV-2004-485-001902, para 12, Associate Judge Gendall.

The plaintiff was dissatisfied with the outcome of this process, and instituted proceedings against the Crown seeking, first, judicial review of the decision to decline to further investigate the incident, and secondly, a declaration that the failings of the Government to provide for and/or fund education, review, investigation and protection of complainants in respect of torture and ill treatment constituted breaches of the Bill of Rights, specifically sections 9 and 23(5).<sup>116</sup>

(c) The submissions

The defendants applied for the second part of the plaintiff's claim to be struck out. They submitted that obligations of education, review, investigation and protection of complainants are not part of the rights incorporated into New Zealand law by the Bill of Rights. While acknowledging that these measures can help systematically with the prevention and punishment of acts breaching the Bill of Rights, they argued that neither sections 9 and 23(5), expressly or impliedly, impose those obligations on the Government. It was also pointed out that the plaintiff cannot rely directly on international law obligations to found domestic causes of action.<sup>117</sup>

The plaintiff relied on the jurisprudence of European Court of Human Rights (ECtHR), where obligations to investigate and protect complainants have been implied into Article 3 despite the ECHR not containing provisions expressly outlining such obligations.<sup>118</sup> In reply to the argument against international obligations founding domestic causes of action, the plaintiff submitted that a number of cases supported the contention that unincorporated human rights instruments can provide the basis of claims in domestic courts, and pointed to *Baigent's Case* as an example.<sup>119</sup>

The plaintiff also submitted that the Government must have intended the Bill of Rights to provide a domestic remedy to those whose rights were

<sup>116</sup>Ibid, para 13 Associate Judge Gendall.

<sup>117</sup>Ibid, para 15 – 17 Associate Judge Gendall.

<sup>118</sup>*Krastanov v Bulgaria* [2004] ECHR 50222/99.

<sup>119</sup>*Simpson & Anor v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 676 (CA) Cooke P. In this case, a majority of the Court relied on Article 2(3) of the ICCPR to grant a remedy.

violated.<sup>120</sup> If the Court refused to read these international obligations into NZ law, the plaintiff would have no domestic remedy and be forced to complain directly to the Human Rights Committee.

(d) The decision

Associate Judge Gendall found “considerable force” in the arguments against the Bill of Rights incorporating these obligations. He found it significant that section 9, which was enacted after UNCAT, contains no reference to Articles 10, 11, 12 or 13. Similarly, the Torture Act was enacted specifically to implement UNCAT, and also lacks any reference to these particular obligations. The Judge considered both of these to be indicative of Parliamentary intention “to retain the discretion as to the further implementation of the Convention and ICCPR.”<sup>121</sup> He also found that the existing mechanisms for investigating prisoner’s claims of abuse established under the PIA suggest that the courts should not read these obligations into the Bill of Rights, since reading in these wider obligations would “require considerable interference in an area that is currently governed by statute.”<sup>122</sup>

Associate Judge Gendall then turned to the arguments in support of these obligations being incorporated into domestic law. First, he recognised “the fundamental nature of the right against torture and ill treatment, and the corresponding need to place obligations on the Government to investigate and prevent such abuses.”<sup>123</sup> Second, he recognised that “legislative incorporation of rights must imply an incorporation of effective remedies.”<sup>124</sup> The ICCPR also expressly requires States to ensure remedies are available for violations of rights.<sup>125</sup> Third, he noted that incorporation of these obligations into the Bill of Rights would not be “unprecedented” – the ECtHR has read them into article 3 of

---

<sup>120</sup> Ibid.

<sup>121</sup> *Clark v Governor – General & Ors* (27 May 2005) HC WN CIV-2004-485-001902, para 50, Associate Judge Gendall.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid, para 51.

<sup>124</sup> Ibid, para 52 relying on *Baigent’s Case*.

<sup>125</sup> International Covenant on Civil and Political Rights, above n 6, art 2(3).

the ECHR.<sup>126</sup> However, he noted that this precedent is of limited value, considering the “different constitutional basis” of the ECtHR from New Zealand’s domestic courts. Interestingly, he does not consider the position under the ICCPR. As stated above, the HRC has read similar obligations into Article 7.

Associate Judge Gendall ultimately decides that for the plaintiff to succeed, it must be shown that these obligations are of the “right nature to be incorporated into law.”<sup>127</sup> He distinguishes between those obligations that are applicable to specific disputes and thus justiciable, and those that are political and require executive action, and are consequently non-justiciable. He considers two of the claimed obligations to be non-justiciable: issues of funding and training officials and of systematically reviewing procedures relating to interrogation of prisoners would be too political for the courts to decide: the “court process is not well-suited to the type of analysis necessary.”<sup>128</sup>

Associate Judge Gendall found the other two obligations, that of prompt and impartial investigation, and protection of complainants and witnesses, to be justiciable, because without them “rights against torture and ill treatment will be empty.”<sup>129</sup> However, he held that it was unnecessary to decide whether these obligations are incorporated into the Bill of Rights because the Government had not breached them: the statutory mechanisms available “illustrate that a statutory regime is in place for the investigation of complaints of torture or ill treatment.”<sup>130</sup>

The end result, then, is a tentative finding that the obligations found in Article 12 and Article 13 of UNCAT could be incorporated into the Bill of Rights.

### C Summary

*Zaoui*, *Taunoa* and *Clark* each address the incorporation of international obligations into New Zealand law through the Bill of Rights. All three cases rely

<sup>126</sup> *Clark v Governor – General & Ors* (27 May 2005) HC WN CIV-2004-485-001902, para 53, Associate Judge Gendall.

<sup>127</sup> *Ibid*, para 57.

<sup>128</sup> *Ibid*, para 61.

<sup>129</sup> *Ibid*, para 63.

<sup>130</sup> *Ibid*, para 76.

extensively on international jurisprudence when interpreting the scope of sections 9 and 23(5), particularly from UNCAT and the ICCPR. The Bill of Rights has thus been read to imply an obligation of non-refoulement; to incorporate certain obligations relating to the treatment of prisoners into New Zealand law; and, albeit tentatively, to incorporate an obligation to provide a right of complaint and a duty to investigate allegations of torture or ill treatment.

Under UNCAT and the ICCPR, there are a number of other obligations relating to the effective protection of torture and ill treatment. To what extent can these other obligations be read into section 9? *Clark* identifies at least two difficulties with reading these obligations into section 9. First, there is limited legislative incorporation of these obligations, indicating that Parliament did not intend to implement these obligations in domestic law. Secondly, the nature of many of the other obligations under UNCAT require policy decisions. As such, they are beyond the competence of the courts. Another hurdle preventing the incorporation of these obligations through the Bill of Rights is that they require the State to undertake a number of positive obligations, which may be incompatible with the 'process theory' of rights protected by the Bill of Rights.

Each of these issues is considered below, after a brief investigation of how other courts in other jurisdictions have addressed this issue.

## **VI COMPARISON WITH OVERSEAS JURISDICTIONS**

### **A *The European Convention for the Protection of Human Rights and Fundamental Freedoms***

Article 3 of the ECHR provides a broad, general protection against torture and inhuman or degrading treatment or punishment: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Unlike most of the substantive rights clauses in the ECHR, Article 3 has no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. The European Court of Human Rights (the ECtHR) has stated on many occasions that this reflects the

place of Article 3 as enshrining one of the fundamental values of democratic society.<sup>131</sup> New Zealand courts have noted that the jurisprudence of the ECtHR as relevant when interpreting analogous provisions in the Bill of Rights.<sup>132</sup> The jurisprudence from the ECtHR, while compelling, is less persuasive when interpreting the Bill of Rights.

The ECtHR has read an extensive number of duties on States, under the ECHR. It has justified doing so by reference to the obligation in Article 1 on States parties to “secure” the rights provided for in the ECHR to their citizens, along with the obligation in Article 13 to provide effective remedies: “the emphasis is on the “effective” protection of human rights, not the entrenchment of “theoretical” or “illusory” rights”<sup>133</sup> The ECtHR has read a number of duties into Article 3, including the duty to investigate allegations of a breach of Article 3,<sup>134</sup> the duty to not return an individual to a place which will breach their Article 3 rights<sup>135</sup> and a duty to ensure *private* persons do not breach Article 3 in their treatment of others.<sup>136</sup>

### 1 *Duty to investigate*

*Aksoy v Turkey*<sup>137</sup> was the first case in which the Court identified an investigative element in Article 3. In this case, the applicant was arrested and detained for two weeks on suspicion of belonging to the Workers Party of Kurdistan. He claimed the police had tortured him during his detention, and ten days after his release he was admitted to hospital, where he was diagnosed as suffering from nerve damage in both arms causing paralysis. The applicant had

<sup>131</sup> *Aksoy v Turkey* (1997) 23 EHRR 553 para 62 (ECHR); *Ireland v United Kingdom* (1978) 2 EHRR 25 para. 163 (ECHR); *Soering v United Kingdom* (1989) 11 EHRR 439 para. 88 (ECHR); *Chahal v United Kingdom* (1996) 23 EHRR 413 para. 79 (ECHR).

<sup>132</sup> For example, *Tavita* [1994] 2 NZLR 257, 262 (CA) Cooke P.

<sup>133</sup> Keir Starmer, “Positive Obligations under the Convention” in Jowell, J and Cooper, J (eds) *Understanding Human Rights Principles* (Hart Publishing, Portland, 2001) 145; For example, see *Ilhan v Turkey* (2002) 9 EHRR 203, para 91.

<sup>134</sup> *Balogh v Hungary* [2004] ECHR 47940/99 Para 47; *Selmouni v France* (2000) 29 EHRR 403, para 87.

<sup>135</sup> *Soering v United Kingdom*, above n 131; *Chahal v United Kingdom*, above n 131.

<sup>136</sup> *A v United Kingdom* (1998) 27 EHRR 611 (ECHR); *Z and others v United Kingdom* (2001) 10 BHRC 384 (ECHR).

<sup>137</sup> *Aksoy v Turkey*, above n 131.

been healthy before the detention, and there was no other explanation for his injuries.

The Court found that the applicant's injuries had been caused by torture, thus there had been a violation of Article 3. The Court further held that:<sup>138</sup>

[w]here an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention.

The Court held that the lack of an investigation into the applicant's claim of torture breached Article 13 – the right to an effective remedy before a national authority:<sup>139</sup>

The nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture ... and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13.

Thus in *Aksoy*, while the Court recognised the importance of investigating allegations of torture, the duty fell under Article 13, rather than Article 3. In

---

<sup>138</sup> *Aksoy v Turkey*, above n 131, para 61.

<sup>139</sup> *Ibid*, para 98.

*Assenov and Others v Bulgaria*<sup>140</sup> the Court went further and recognised an obligation for the State to investigate allegations of torture not only under Article 13 but also under Article 3. In *Assenov*, it was unclear whether the applicant had been subjected to treatment prohibited by Article 3. The Court concluded that a violation of Article 3 had occurred, not from ill treatment per se but from a failure to carry out an effective official investigation on the allegation of ill treatment.<sup>141</sup>

The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible . . . If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (see para 93 above), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

The Court also reiterated its position in the *Aksoy* case and concluded there had also been a violation of Article 13.<sup>142</sup>

The obligation to investigate allegations of torture has also been found to have been breached where the investigation carried out by the State was not a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the acts of ill treatment.<sup>143</sup>

## 2 Extradition

<sup>140</sup> (1999) 28 EHRR 652 (ECHR).

<sup>141</sup> *Assenov and others v Bulgaria* (1999) 28 EHRR 652, para 102 (ECHR).

<sup>142</sup> *Ibid*, para 117. See also *Ilhan v Turkey* [2000] App 22277/93 para 89-92 (ECHR); *Khashiyev and another v Russia* [2005] App 57942/00 para 177-180 (ECHR).

<sup>143</sup> *Selmouni v France* above n 134, para 79.



State decisions to extradite which expose individuals to the risk of conduct prohibited under Article 3 have been held to give rise to a breach of Article 3.<sup>144</sup> This rule was laid down in the landmark decision of *Soering v United Kingdom*.<sup>145</sup> The applicant in this case was a German national, who was detained in England pending extradition to the United States of America to face charges of murder in Virginia. If convicted there, he faced the risk of being sentenced to death.

The issue confronting the ECtHR was whether the United Kingdom could be held responsible under the ECHR when the proscribed ill treatment would be administered in the United States of America. In answering this in the affirmative, the Court made a global assessment of the need to provide effective protection of the rights under the ECHR.

It noted that while the ECHR does not protect a right not to be extradited, if the enjoyment of a protected right is adversely affected as a result of that extradition, the responsibility of the extraditing States is engaged. Other instruments, such as extradition treaties, which expressly allow for extradition "cannot absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction."<sup>146</sup>

The Court then considered the absolute and fundamental nature of the prohibition in Article 3. It identified that the abhorrence of torture and other ill treatment is recognised in Article 3 of UNCAT as sufficient to engage State responsibility for actions committed by another State. The ECtHR pointed out that the explicit recognition of this obligation in UNCAT does not preclude such an obligation being read into Article 3 of the ECHR:<sup>147</sup>

The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of article 3 of the ECHR.

---

<sup>144</sup> Keir Starmer *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group London 1999) 506. *Ahmed v Austria* (1997) 24 EHRR 278, para 39, (ECHR).

<sup>145</sup> (1989) 11 EHRR 439.

<sup>146</sup> *Soering v United Kingdom*, above n 131, para 86.

<sup>147</sup> *Ibid*, para 88.

It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article

Thus the ECtHR held that the decision of a State party to extradite a fugitive may engage its responsibility under Article 3 where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.<sup>148</sup>

On the facts, the ECtHR held that the risk of Mr Soering being sentenced to death and thus being exposed to the "death row phenomenon" were substantial. These circumstances, when taken together with the average six to eight years a prisoners spend on death row prior to execution, the stringency of the conditions while on death row, the applicant's young age and mental health condition, and the fact that extradition to face trial in Germany was an available alternative, led the ECtHR to find that extradition to the United States of America would expose the applicant to treatment beyond the threshold set by Article 3.

The *Soering* approach was subsequently upheld by the Court, even in the face of a national security threat. In *Chahal v United Kingdom*,<sup>149</sup> the applicant faced deportation to India by the United Kingdom government on grounds of national security and the international fight against terrorism. Chahal alleged, inter alia, that his deportation was contrary to his Article 3 right.

---

<sup>148</sup> Ibid, para 91.

<sup>149</sup> (1996) 23 EHRR 413.

The United Kingdom government argued that the risk Mr Chahal posed to national security was an implied limitation in Article 3, which provided grounds entitling the State to expel him. Alternatively, the United Kingdom argued that the risk to national security was a factor to be weighed in the balance when considering issues under Article 3. Where, as here, the risk of ill treatment was doubtful, the threat to national security weighed heavily in the balance struck between protecting the rights of the individual and the general interests of the community. Thus, the United Kingdom government argued, it was justified in deporting Mr Chahal.<sup>150</sup>

The Court disagreed and reaffirmed the fundamental and absolute nature of the prohibition in Article 3:<sup>151</sup>

The Court is well aware of the immense difficulty faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the [ECHR] prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct ... The prohibition provided by art 3 against ill-treatment is equally absolute in expulsion cases.

3 *Duty to establish protective measures to safeguard certain individuals from serious ill treatment by private parties*

In *A v United Kingdom* the Court found Article 3 required States to take measures designed that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment.

The applicant in this case was a nine year old boy who had been beaten several times with a garden cane by his stepfather. Under English law, it was a defence to a charge of assault on a child that the treatment in question amounted to 'reasonable chastisement'. As such, the stepfather was found not guilty of assault.

<sup>150</sup> *Chahal v United Kingdom*, above n 131, para 76.

<sup>151</sup> *Ibid*, para 79-80.

The ECtHR held that the beating meted out on the applicant was of sufficient severity to meet the threshold of prohibited treatment under article 3.<sup>152</sup> It also held that the State ought to be held responsible for the conduct of the stepfather:<sup>153</sup>

[T]he obligation on the high contracting parties under art 1 of the convention to secure to everyone within their jurisdiction the rights and freedoms defined in the convention, taken together with art 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals ... Children and other vulnerable individuals, in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity.

Here, the failure of the English law to provide adequate protection to the applicant against treatment or punishment contrary to Article 3 constituted a breach of Article 3.

This decision was reaffirmed in the later case of *Z and Others v United Kingdom*.<sup>154</sup> In this case, the applicants were four siblings who had been subjected to horrific neglect and emotional abuse in their mother's home over a number of years. Social services visited the family several times from 1987 to 1993 and, despite concerns over their ill treatment voiced by their grandmother, neighbours, general practitioner, head teacher, and by the National Society for the Prevention of Cruelty to Children, the local authority failed to remove the children from the harmful environment. The applicants attempted to sue the local authority for damages for breach of statutory duty concerning the discharge of their duties relating to the welfare of children under the Children Act 1989, and for negligence. Their application, however, was struck out on the grounds that no action lay against the local authority in those grounds. That strike out decision was subsequently upheld by the Court of Appeal and the House of Lords.

<sup>152</sup> *A v United Kingdom*, above n 136, para 21.

<sup>153</sup> *Ibid*, para 22.

<sup>154</sup> *Z and Others v United Kingdom*, above n 136.

The applicants took their complaint to the European Court arguing, *inter alia*, that their article 3 right had been breached by the local authority's failure to protect them from inhuman and degrading treatment. The Court reiterated the obligation it had found under article 3 in *A v United Kingdom*:<sup>155</sup>

The court re-iterates that art 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on high contracting parties under art 1 of the convention to secure to everyone within their jurisdiction the rights and freedoms defined in the convention, taken together with art 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *A v UK* (1998) 5 BHRC 137 at para 22). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge

While the Court recognised that social services faced difficult and sensitive decisions, and had to observe the principle to respect and preserve family life, there had nonetheless been a failure of the system to protect these applicants from "serious, long-term neglect and abuse."<sup>156</sup> As such, a violation of Article 3 was found.

#### 4 *Obligations not read into Article 3*

The EctHR has not read the obligations to train and educate all personnel involved in the custody, interrogation or treatment of detained individuals and to systematically review interrogation rule into Article 3. The omission of these obligations can be explained by reference to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>157</sup> ("the CPT"). Established by the Council of Europe in 1987, the CPT pays periodic and ad hoc visits to places of detention within the States parties "to examine the

<sup>155</sup> *Ibid*, para 73.

<sup>156</sup> *Ibid*, para 74.

<sup>157</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (11 November 1987) 1561 UNTS 363.

treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.”<sup>158</sup>

The CPT has thus read a number of procedural safeguards in Article 3, including detailed rules on the conduct of interrogations and the obligations of authorities in charge of detained individuals.<sup>159</sup> Unlike the EctHR, the CPT has only recommendatory powers. As such, these obligations cannot be enforced against States parties.<sup>160</sup>

### **B United Kingdom**

The Human Rights Act 1998 (UK) (“the HRA”) incorporates the rights contained in the ECHR into the domestic law of the United Kingdom. However, apart from the jurisprudence generated by applications from the United Kingdom, the State is not bound by the jurisprudence of the EctHR. Section 2(1) of the HRA only requires the courts to ‘take account’ of ECHR jurisprudence.<sup>161</sup> The above cited decisions on the prohibition of extradition that exposes individuals to the risk of conduct prohibited under Article 3, and the horizontal application of the Article 3 right, are thus directly binding on the United Kingdom.

In *A and others v Secretary of State for the Home Department (No 2)*<sup>162</sup> the House of Lords had to decide whether evidence allegedly obtained by the use of torture overseas was admissible in English judicial proceedings. The Court unanimously answered this question in the negative.

The appellants in this case were non-UK nationals who had been certified as suspected international terrorists pursuant to the Anti-terrorism Crime and Security Act 2001 (UK) (ACSA). ACSA was introduced as a response to the 9/11

<sup>158</sup> Ibid, art 1.

<sup>159</sup> See generally, M Evans and R Morgan *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford University Press, Oxford, 1998) 251-253 and 257-295.

<sup>160</sup> N Rodley, above n 20, 165.

<sup>161</sup> R Clayton and H Tomlinson, *The Law of Human Rights: Volume 1* (Oxford University Press, Oxford, 2000) 133-135.

<sup>162</sup> [2006] 2 AC 221.

terrorist attacks in United States of America. Section 21 allowed the Secretary of State to issue a certificate against any non-British citizen whose presence in the UK he or she believed to be a risk to national security, and also reasonably suspected of being a terrorist, as defined in the Act. Section 23 authorised the detention of such a person, whether temporarily or indefinitely. Section 25 allowed that person to appeal to the Special Immigration Appeals Commission (SIAC) against their certification. On appeal, the SIAC must cancel the certificate if "there are no reasonable grounds for a belief or suspicion of the kind referred to in s21 (a) or (b)" or if the SIAC "considers that for some other reason the certificate should not have been issued."

The appellants raised the issue of evidence obtained through off-shore torture during their appeal to the SIAC. The SIAC found that the question whether evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. A majority of the Court of Appeal upheld this decision.<sup>163</sup> The appellants based their appeal to the House of Lords on three main points: the common law of England, the ECHR and principles of public international law.

The third head of appeal is the most relevant for this paper. Here, the appellants conceded that generally, a treaty has no binding force unless it is given effect by statute or it expresses principles of customary international law. However, they relied upon the principle that a statute which is passed after the date of a treaty and which deals with the same subject matter, must be construed, if it is reasonably capable of such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it.<sup>164</sup> ACSA must thus be interpreted consistently with UNCAT. They also relied upon the obligations under the HRA to take account of Strasbourg jurisprudence in connection with a convention right,<sup>165</sup> to interpret and give effect to primary and subordinate legislation in a

---

<sup>163</sup> See *A and others v Secretary of State* [2004] All ER 62.

<sup>164</sup> *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, 254 (HL) Lord Bingham of Cornhill.

<sup>165</sup> Human Rights Act 1998, s 2.

way which is compatible with convention rights so far as possible,<sup>166</sup> and to not act incompatibly with a convention right.<sup>167</sup>

Lord Bingham of Cornhill summarised the appellants' argument in the following steps:<sup>168</sup>

- 1) The convention is not to be interpreted in a vacuum, but taking account of other international obligations to which member states are subject, as the European Court has in practice done.
- 2) The prohibition of torture enjoys the highest normative force recognised by international law.
- 3) The international prohibition of torture requires states not merely to refrain from authorising or conniving at torture but also to suppress and discourage the practice of torture and not to condone it.
- 4) Article 15 of the Torture Convention requires the exclusion of statements made as a result of torture as evidence in any proceedings.
- 5) Court decisions in many countries have given effect directly or indirectly to art 15 of the Torture Convention.
- 6) The rationale of the exclusionary rule in art 15 is found not only in the general unreliability of evidence procured by torture but also in its offensiveness to civilised values and its degrading effect on the administration of justice.
- 7) Measures directed to counter the grave dangers of international terrorism may not be permitted to undermine the international prohibition of torture.

Their Lordships unanimously concluded that evidence procured by a foreign State through torture cannot be used in a judicial proceeding against a suspected terrorist. Lord Bingham held that article 15 of UNCAT should be given force *through* Articles 3 and 5(4) of the ECHR – which is analogous to our courts using section 9 of the Bill of Rights to give effect to UNCAT.<sup>169</sup> He also held that “the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention.” Lord Carswell, however, held that reading UNCAT into the domestic law was “not without ... difficulties”, and also unnecessary, considering the common law is able to accommodate the

<sup>166</sup> *Ibid*, s 3.

<sup>167</sup> *Ibid*, s 6.

<sup>168</sup> *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, 255 (HL) Lord Bingham of Cornhill.

<sup>169</sup> *Ibid*, para 270-272 per Lord Bingham of Cornhill.



principles involved.<sup>170</sup> Regardless of the differences in reasoning, the decision in *A and others v Secretary of State for the Home Department (No 2)* is significant in the extensive references made by their Lordships to international obligations for the prevention of torture.<sup>171</sup> The obligation under UNCAT to reject evidence obtained through torture undoubtedly influenced the House of Lords in rejecting the Government's case.<sup>172</sup>

The Joint Committee on Human Rights<sup>173</sup> (the Committee) recently reported on the United Kingdom's compliance with UNCAT.<sup>174</sup> The Committee noted that the United Kingdom Government is under both negative and positive obligations under UNCAT to protect against acts of torture. It noted with concern that the Government did not appear to sufficiently appreciate these obligations, as evidenced by its argument in *A v Secretary of State (No 2)* that the non-incorporation of UNCAT into domestic law allowed the admittance of evidence obtained by torture abroad; proposals to rely on diplomatic assurances to deport people to countries which practise torture; and the lack of official inquiry into allegations of the use of United Kingdom airports in "extraordinary renditions."<sup>175</sup>

The Committee recommended that the Department of Constitutional Affairs, the Government Department with central responsibility for ensuring the Government complied with UNCAT, should provide guidance and advice on UNCAT obligations to other Government Departments – particularly in relation to the positive obligations to take steps to prevent and to investigate acts of torture or inhuman or degrading treatment. Also, the Committee recommended that the proposed new Commission for Equality and Human Rights should have a role in ensuring UNCAT compliance, by scrutinising Government policy and practice for

<sup>170</sup> Ibid, para 151 per Lord Carswell. See also Lord Hope at para 112.

<sup>171</sup> Ibid, para 27-45 Lord Bingham; see also 111-112 Lord Hope of Craighead.

<sup>172</sup> Joint Committee on Human Rights *The UN Convention Against Torture (UNCAT)* (18 May 2006) Nineteenth Report of Session 2005-06, Vol 1 Report and formal minutes, para 28.

<sup>173</sup> Appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (excluding individual cases); proposals for remedial orders, draft remedial orders and remedial orders. The Joint Committee is made up of 6 members of the House of Lords and 6 members of the House of Commons.

<sup>174</sup> Joint Committee on Human Rights, above n 174.

<sup>175</sup> Ibid, para 39. All of these issues are considered further in the Report, but an analysis of each is beyond the scope of this paper.

compliance with both negative and positive obligations under UNCAT, and to recommend measures to improve those practices where appropriate.<sup>176</sup>

The omission of any reference to Article 3 in these recommendations implicitly recognises that the obligation to fulfil these duties lies *on* the Government, but cannot be enforced through the HRA.

### C *Canada*

The Canadian Charter of Rights and Freedoms 1982 (the Charter) provides for the protection of fundamental rights and freedoms at domestic law in Canada. Section 12 provides everyone the “right not to be subjected to any cruel and unusual treatment or punishment.” Despite the difference in wording, this provision is the equivalent to section 9 of the Bill of Rights.<sup>177</sup> The broader right to security of the person is also provided for in the protection of fundamental justice in section 7 of the Charter. Canada has also ratified both the ICCPR and UNCAT.

The prohibition of “cruel and unusual punishment” in section 12 does not apply to acts carried out by foreign states. As such, the Supreme Court of Canada has unanimously held that extraditing a person to face trial in a country where the death penalty is available does not violate section 12.<sup>178</sup> Instead, the Court relied on the principles of fundamental justice to hold that such extradition would “shock the conscience” and breach section 7 of the Charter. Such extradition can only proceed if the State seeks assurances from the receiving country that the death penalty will not be sought for extradited individuals.<sup>179</sup>

In *Singh v Minister of Employment & Immigration*<sup>180</sup> the Supreme Court of Canada ruled that sending a refugee back to their country of origin would jeopardize their section 7 right. More recently however, in *Suresh v Canada*

<sup>176</sup> Ibid, para 41 and 42.

<sup>177</sup> See *Taunoa v Attorney-General* (31 August 2007) NZSC SC 6/2006, para 72-75, and 166-168 Elias CJ.

<sup>178</sup> *United States v Burns* [2001] 1 SCR 283, para 50-57.

<sup>179</sup> Ibid. See also Hogg 50-12 – 50-13.

<sup>180</sup> [1985] 1 SCR 177.

(*Minister of Citizenship and Immigration*)<sup>181</sup> ("*Suresh*") the Court controversially left open the possibility of returning a person to face torture in unspecified exceptional circumstances.<sup>182</sup> The Canadian approach thus provides less protection against refoulement than international standards.<sup>183</sup> In the course of the judgement, the Court implies that Canada is not bound treaty obligations regarding non-refoulement to torture because those obligations had not been formally incorporated:<sup>184</sup>

Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis.

The Supreme Court of Canada thus treats international law as informing the guarantees in the Charter. It shows a high degree of deference to the Government, while at the same time playing down the role of international law. The Court's approach to the non-binding nature unincorporated international human rights obligations is further exemplified in the case of Mr Ahani.

In *Ahani v Canada (Attorney General)*<sup>185</sup>, a judgement that was delivered by the Supreme Court at the same time as *Suresh*, Mr Ahani was found to have provided insufficient evidence of a risk of being subjected to torture if he was deported to Iran, and his appeal against deportation failed. He took his case to the HRC, who asked Canada to stay his deportation until the petition was heard. The Government refused. Mr Ahani sought an injunction in the Ontario Court of Appeal to stay the deportation. By a majority, the Court held that the Committee's views were non-binding and unenforceable, and that to accept Mr Ahani's claim would turn a non-binding unincorporated treaty obligation into a constitutional

---

<sup>181</sup> [2002] 1 SCR 3.

<sup>182</sup> *Ibid*, para 77-78.

<sup>183</sup> Compare the absolute prohibition on such return as outlined in *Chahal v United Kingdom*.

<sup>184</sup> *Ibid*, para 60

<sup>185</sup> [2002] SCC 2.

principle of fundamental justice.<sup>186</sup> Mr Ahani was denied leave to appeal to the Supreme Court, and subsequently deported.<sup>187</sup>

#### **D Summary**

Various obligations have been read into the respective 'torture' protections in the ECHR, the HRA (UK) and the Canadian Charter. A comparison of the jurisprudence from these sources indicates that is not an international consensus on the extent to which extra preventive and remedial measures must be read into 'torture' protections. The ECtHR leads the field, reading a vast number of such obligations into Article 3 of the ECHR and pushing the boundary of the application of such protections to private parties. The United Kingdom is bound by many of these obligations. Further, the judiciary in the United Kingdom have shown an increased receptivity to international human rights obligations, perhaps reflecting the intent behind the HRA – to 'bring rights home'. By contrast, the Canadian courts do not consider themselves bound to comply with the international human rights obligations.

Despite the differences in the treatment of the weight of international law obligations, all three jurisdictions recognise a form of the non-refoulement obligation. The obligation to ensure certain preventive measures are in place has also been recognised, although the lack such measures has not, of itself, been sufficient to find a breach.

#### **VIII CAN THESE OBLIGATIONS BE READ INTO THE BILL OF RIGHTS?**

In *Clark*, the court considers that existing statutory mechanisms which protect the preventive rights of UNCAT negate the need to read these obligations into section 9. However, the existence of these mechanisms does not necessarily negate the need to read them into the Bill of Rights. Policy, after all, can change and statutes can be easily repealed.

<sup>186</sup> *Ahani v Canada* (2002) 58 OR (3d) (CA) 107, para 33.

<sup>187</sup> See generally Audrey Macklin "Mr Suresh and The Evil Twin" (2002) 20 *Refuge* 15.

Reading all the obligations into the Bill of Rights would also make them easier to enforce. With the current array of statutory mechanisms fulfilling various obligations, the Government could unintentionally decrease New Zealand's protection of these rights. Reading these protections into section 9 will provide a more robust protection against torture and other ill treatment. It will serve to raise public awareness of these rights, and lessen the likelihood of these rights being abrogated through legislation.

However, there are at least three difficulties with reading these obligations into the Bill of Rights. The first is concerned with the constitutionality of enforcing obligations that Parliament left out of the implementing legislation. The second and third focus on the nature of the obligations, and whether it is appropriate to impose these obligations on the State through the Bill of Rights and through the courts.

#### **A Legislative Under-Incorporation of Treaty Obligations**

The Torture Act, which implements UNCAT into New Zealand law, omits many UNCAT obligations. Reading those obligations through the Bill of Rights thus raises the risk of acting contrary to Parliamentary intention, as identified by Associate Judge Gendall in *Clark*. As outlined above, the omission of these obligations from the Torture Act does not appear to have been a deliberate decision of Parliament to retain discretion as to the further implementation of these obligations. However, regardless of the reason for the omission, it is submitted that the under-incorporation of UNCAT does present a complete bar against reading these obligations into the Bill of Rights for at least three reasons.

First, the Supreme Court relied explicitly on UNCAT for support in reading an implied non-refoulement protection into the Bill of Rights.<sup>188</sup> The Court clearly did not consider the limited legislative incorporation of UNCAT an impediment to invoking the presumption of consistency. The reliance on UNCAT obligations in *Zaoui*, however, does not necessarily mean all the UNCAT obligations can be treated the same. Those obligations that require the State to do

---

<sup>188</sup> *Zaoui v Attorney-General (No 2)*, above n 3, 318-319 Keith J for the Court.

more than refrain from taking an action might be construed differently. This is considered below.

Secondly, many obligations similar to those found in UNCAT have been read into Articles 7 and 10(1) of the ICCPR. In enacting the Bill of Rights with direct reference to the ICCPR, Parliament was clearly intending to ensure New Zealand complied with its international obligations.<sup>189</sup> The HRC jurisprudence on these obligations thus provides strong support for reading them into sections 9 and/or 23(5).

Associate Judge Gendall's concern in *Clark* that, due to the lack of any explicit obligations in the language of section 9, reading such obligations into the Bill of Rights would usurp parliamentary intention is unfounded. The nature of the rights guaranteed in the Bill of Rights requires them to be phrased in broad language, rather than minute detail. Interpreting section 9 with a literal and narrow approach like this unduly narrows the scope of the provision, and goes against the grain of the 'broad and purposive' interpretation necessary in order to give individuals the 'full measure of their rights'.<sup>190</sup> Such an approach is ill suited to Bill of Rights interpretation. Also, the New Zealand courts have frequently had recourse to ICCPR jurisprudence in order to interpret the Bill of Rights. The similar used in both instruments indicates Parliament intended section 9 and 23(5) to be interpreted consistently with ICCPR jurisprudence.

Thirdly, the recent implementation of the Optional Protocol through the Torture Act indicates Parliament's greater willingness to be held to account over its international obligations to ensure the humane treatment of prisoners. The National Preventive Mechanisms and the Subcommittee will be able to assess the State's compliance with certain obligations that have not been explicitly incorporated into domestic law – such as the provision of appropriate education and training to prison staff. It is submitted that this development lessens the "repugnancy" of allowing the courts to consider similar issues under the Bill of Rights.

<sup>189</sup> Ministry of Justice, above n 50, para 4.21-4.23; see also K Keith "The Role of International Human Rights Law in NZ" (1997) 32 *Tex Int'l L J* 410.

<sup>190</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260, 268 (CA) Cooke P.

## *B The Nature of the Obligations*

### *1 Non-Justiciability*

The second difficulty encountered in attempting to read these obligations into the Bill of Rights is the *nature* of some of these obligations. The obligations which are within the “traditional” purview of the courts – such as ensuring evidence obtained through torture is inadmissible – are clearly within the competence courts to decide. However, the courts are understandably more reluctant to address “political” resource questions.<sup>191</sup> The obligations to prosecute an alleged torturer, to train officials, to systematically review interrogation procedures, and to investigate allegations of torture all require a Court to venture into resource allocation issues.

Decisions as to the allocation of State resources are the domain of democratically-elected bodies. It is considered inappropriate for the unelected and unaccountable judiciary to enter this domain.<sup>192</sup> Opposite, and in tension with, this view is the need for courts to fulfil their constitutional responsibility for protecting the citizen against infringements of their rights by the State – a role that has been explicitly recognised by the Bill of Rights. A South African judge has pointed out that the unelected role of the judiciary can work to its advantage when protecting human rights:<sup>193</sup>

When it comes to matters of deep principle, [the judiciary's] lack of accountability actually becomes a virtue. We are not running for office, and electoral popularity is of no concern to us. We defend deep core values which are part of world jurisprudence and part of the evolving constitutional traditions of our country. Our lack of accountability in these circumstances becomes a “plus”.

<sup>191</sup> For example, *Lawson v Housing New Zealand* (1996) 3 HRNZ 285 (HC); *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

<sup>192</sup> A Sachs “Social and Economic Rights: Can They Be Made Justiciable?” (2000) 53 SMU L Rev 1381, 1388.

<sup>193</sup> *Ibid.*

New Zealand is not short of examples of the risk that the legislature's susceptibility to "electoral popularity" can pose to fundamental human rights.<sup>194</sup> That risk is especially great in relation to individuals who are under arrest, or imprisoned for a crime. Human rights breaches of such individuals tend to garner little public sympathy and consequently those individuals are most in need of the courts to regulate the conduct of the legislature in relation to their fundamental rights.<sup>195</sup>

Another limitation on the courts is the unsuitability of the adversarial litigation process for deciding issues of resource allocation. Policy judgements require extensive social inquiries and an evaluation of a mix of different factors, as opposed to simply resolving a dispute between parties.<sup>196</sup> For example, a claim against the State for failing to properly train officials would require the court to investigate the adequacy of that training to determine whether the obligation was breached. Litigation in an adversary process is not the ideal way to conduct that inquiry.<sup>197</sup> The court would need all the relevant information from the government before it could investigate further, and techniques of having *amicus curiae* briefs from the government have not developed in New Zealand.<sup>198</sup>

## 2 *Positive Obligations and the 'Process Theory' of Rights*

Related to this issue of allowing courts to enter judgement on political, resource allocation questions is the issue of the appropriateness of imposing these positive obligations on the State through the Bill of Rights.

<sup>194</sup> For example, the enactment of a retrospective penalty in order to punish 'home invasion' offenders, in breach of their rights against double jeopardy and retroactive penalties: see *R v Poumako* [2000] 2 NZLR 695 (CA); *R v Pora* [2001] 2 NZLR 37 (CA).

<sup>195</sup> For example, consider the public uproar over the compensation paid to prisoners for breaches of their s 9 and s 23(5) rights in *Taunoa v Attorney-General*. The Government responded to that uproar by enacting the Prisoners and Victims Compensation Act. See generally, K Dawkins and M Briggs "Review: Criminal Law" (2005) 3 NZLR 393, 413-420.

<sup>196</sup> I L M Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 49.

<sup>197</sup> Geiringer, C and Palmer, M "Human Rights and Social Policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12, 38; Richardson, above n 195, 49.

<sup>198</sup> Richardson, above n 195, 49-50; But note, the Supreme Court in *R v Hansen* recently signalled it was open to receiving such information from the Crown, albeit it was rejected in this case due to late submission.



The Bill of Rights protects civil and political rights. These can be classed in three groups: those that regulate procedures followed by the State in its dealings with individuals; those that protect rights to participate in political and social processes; and certain basic, fundamental rights.<sup>199</sup> The first two groups are concerned solely with process, and do not affect the substance of the law. The rights in the third group, however, do affect the substance of the law. For example, the right to be free from torture and other ill treatment, which is located within this third group, cannot be abrogated by Parliament allowing torture. The substantive impediment that this group of rights imposes upon Parliament is justified by the fundamental nature of these rights, broadly agreed to in the international community, and the need to protect minority rights.<sup>200</sup>

While the nature of the rights in the Bill of Rights generally restrains the State from acting in a particular way, in certain situations the State is required to take action in order to avoid breaching the right.<sup>201</sup> For example, the right to legal aid imposes a duty on "the government to maintain and fund a system for the evaluation of applications and the assigning of lawyers."<sup>202</sup>

However, as Jeremy Waldron points out, rights do not have a simple one-to-one relation with duties.<sup>203</sup> A particular duty that is associated with a right itself generates waves of duties that back it up.<sup>204</sup>

The right not to be tortured, for example, clearly generates a duty not to torture. But, in various circumstances, that simple duty will be backed up by others: a duty to instruct people about the wrongfulness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on.

<sup>199</sup> Keith, K Otago Law review 1986 Vol 6 No 2 209-211

<sup>200</sup> Ibid.

<sup>201</sup> Compare the strict 'negative obligations only' approach under the US Constitution in *DeShaney v Winnebago Social Services Department* (1989) 489 US 189, 203 Rehnquist CJ.

<sup>202</sup> P Rishworth "Interpreting and Applying the Bill of Rights" in Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 60.

<sup>203</sup> J Waldron "Rights in Conflict" in J Waldron (ed) *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press, Cambridge, 1993) 212.

<sup>204</sup> Ibid.

These waves of duties can be likened to the range of obligations that UNCAT and the ICCPR impose upon States parties. The obligation not to engage in torture and other ill treatment is clearly established at both international and domestic law. The obligation not to expose individuals to risk of that treatment by sending them to a place where they may be subjected to torture or other ill treatment is a "second wave" on that initial prohibition. It is one step removed from engaging in acts of torture or other ill treatment directly, but is clearly necessary in order to effectively protect an individual's right not to be subjected to such treatment.

The duties to investigate allegations of a breach, and to train and educate personnel who involved in the custody of detained persons are designed to further reduce the risk of torture or other ill treatment, and impose additional waves of duties upon the State

The orthodox position under the Bill of Rights is that positive action is only required by the State where it is necessary in order to avoid a breach of a right.<sup>205</sup> That is, those bound under section 3 of the Bill of Rights are not required to take acts that will maximise the enjoyment of a right.<sup>206</sup> However, as Waldron's 'waves of duties' model exemplifies, the right to be free from torture and other ill treatment generates duties which are required, not to 'maximise' enjoyment of the right, but to ensure the right is effectively protected.

## IX CONCLUSION

The prohibition on torture is recognised as a fundamental right. It protects physical security, an interest which is vital for safeguarding the inherent dignity of the person. History attests to the insufficiency of ex-post facto measures to protect the right to be free from torture and other ill treatment. The problem is not an offshore one: New Zealand does not have an impeccable track record for ensuring prisoners are treated with humanity and respect for inherent dignity.

<sup>205</sup> P Rishworth, above n 201, 210 quoting *Plattform 'Artze Fur Das Leben' v Austria* (1988) 13 EHRR 204 (ECHR).

<sup>206</sup> *Mendelssohn v Attorney-General* [1999] 2 NZLR 268, 273 (CA) Keith J for the Court; P Rishworth, above n 201, 222.

Individuals who are deprived of liberty are particularly vulnerable to infringements on their right to bodily integrity, and on their right to be treated with humanity. A number of the obligations formulated at international law to protect the right to be free from torture and other ill treatment address this particular vulnerability.

Protection against torture requires states to take some action to prevent its occurrence – anything less would be mere ‘window-dressing’ of the right. The Solicitor-General’s acceptance that the State is under an obligation to act according to its international obligations in *Zaoui*, as well as the recent legislative implementation of the Optional Protocol evidence a greater willingness on the part of both the executive and the legislature recently to act consistently with these obligations.

However, as submitted earlier, reading these obligations into the Bill of Rights will provide a more robust protection of these rights, and will also ensure the judiciary can fulfil their “constitutional role” in safeguarding the rights enshrined in the Bill of Rights.<sup>207</sup>

---

<sup>207</sup> Richardson, above n 195, 49-50.

## BIBLIOGRAPHY

### A Primary Materials

#### 1 Table of cases

*A and others v Secretary of State for the Home Department* (No 2) [2006] 2 AC 221, 246 (HL).

*A v United Kingdom* (1998) 27 EHRR 611 (ECHR).

*Ahani v Canada* (2002) 58 OR (3d) (CA) 107.

*Ahani v Canada* (Attorney General) [2002] SCC 2.

*Ahmed v Austria* (1997) 24 EHRR 278, para 39, (ECHR).

*Aksoy v Turkey* (1997) 23 EHRR 553.

*Assenov and others v Bulgaria* (1999) 28 EHRR 652 (ECHR).

*Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

*Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA).

*Balogh v Hungary* [2004] ECHR 47940/99.

*BS v Canada*, Communication No 166/00, UN Doc CAT/C/27/D/166/2000 (2001).

*C v Australia* Communication No 900/99, UN Doc CCPR/C/76/D/900/1999 (2001).

*Chahal v United Kingdom* (1996) 23 EHRR 413.

*Clark v Governor – General & Ors* (27 May 2005) HC WN CIV-2004-485-001902.

*DeShaney v Winnebago Social Services Department* (1989) 489 US 189.

*Herrera Rubio v Colombia* Communication No. 161/1983 (1987).

*Hill and Hill v Spain* (2 April 1997) CCPR/C/59/D/526/1993.

*Ilhan v Turkey* [2000] App 22277/93 para 89-92 (ECHR).

*Ireland v United Kingdom* (1978) 2 EHRR 25.

*Judge v Canada* Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003).

- Khashiyev and another v Russia* [2005] App 57942/00 para 177-180 (ECHR).
- Kindler v Canada* (1993) CCPR/C/48/D/470/1991.
- Krastanov v Bulgaria* [2004] ECHR 50222/99.
- Lawson v Housing New Zealand* (1996) 3 HRNZ 285 (HC).
- Marais v. Madagascar* Communication No. 49/1979, (1983).
- Mendelssohn v Attorney-General* [1999] 2 NZLR 268.
- Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 (CA).
- Muteba v. Zaire*, Communication No. 124/1982 (1984).
- Ng v Canada* Communication No 469/91, UN Doc CCPR/C/49/D/469/1991 (1993).
- Penarrieta et al. v. Bolivia*, Communication No. 176/1984 (1988).
- R v Bow Street Magistrate, ex p Pinochet Ugarte* (No 3) [1999] 2 WLR 827.
- R v Goodwin* (No 2) [1993] 2 NZLR 390 (CA).
- R v Pora* [2001] 2 NZLR 37 (CA).
- R v Poumako* [2000] 2 NZLR 695 (CA).
- R(Ullah) v Special Adjudicator* [2003] 1 WLR (CA).
- Rodriguez v Uruguay* Communication No. 322/1988 (19 July 1994).
- Selmouni v France* (2000) 29 EHRR 403.
- Simpson & Anor v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).
- Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR).
- Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.
- Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC).
- Taunoa v Attorney-General* (31 August 2007) NZSC SC 6/2006.
- Tavita* [1994] 2 NZLR 257, 262 (CA).
- United States v Burns* [2001] 1 SCR 283.

*Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA).

*Z and others v United Kingdom* (2001) 10 BHRC 384 (ECHR).

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

## 2 *International Materials*

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

UNGA "Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment in Relation to Detention and Imprisonment" (6 November 1974) A/RES/29/3218(XXX).

General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7).

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

Universal Declaration of Human Rights (10 December 1948) A/RES/III/217.

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

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 112.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (11 November 1987) 1561 UNTS 363.

Inter-American Convention to Prevent and Punish Torture 1985.

UNGA "Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment in Relation to Detention and Imprisonment" (6 November 1974) A/RES/29/3218(XXX).

United Nations General Assembly "Declaration on the Protection of All Persons From Being Subjected To Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (9 December 1975) A/RES/30/3452(XXX).

UNGA "Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (8 December 1977) A/RES/32/62.

UNGA "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (18 December 2002) A/RES/57/199.

### 3 *Parliamentary Materials*

Joint Committee on Human Rights The UN Convention Against Torture (UNCAT) (18 May 2006) Nineteenth Report of Session 2005-06, Vol 1 Report and formal minutes.

Mark Burton "Designation of National Preventive Mechanisms" (21 June 2007) New Zealand Gazette Wellington 1816.

Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" [1984-85] I AJHR A 6, para 4.21-4.23.

New Zealand Parliamentary Debates (13 December 1988).

### 4 *Legislation*

Crimes of Torture Act 1989.

New Zealand Bill of Rights Act 1990.

## **B** *Secondary Materials*

### 1 *Texts*

Alston, Philip (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP, Oxford, 1997).

Bossuyt, Marc J *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, Dordrecht, 1987).

Boulesbaa, Ahcene *The U.N. Convention on Torture and the Prospects for Enforcement* (Kluwer Law International, The Hague, 1999).

Burgers, J Herman and Hans Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, Dordrecht, 1988).

Burrows, J F *Statute Law in New Zealand* (3 ed, LexisNexis NZ Ltd, Wellington, 2003).

Butler, Andrew and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005).

Clayton, Richard and Hugh Tomlinson *The Law of Human Rights: Volume 1* (Oxford University Press, Oxford, 2000).

Evans, Malcom D and Rod Morgan *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford University Press, Oxford, 1998).

Joseph, Sarah, Jenny Schultz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2 ed, Oxford University Press, Oxford, 2004).

Nowak, Manfred *UN Covenant on Civil and Political Rights: a commentary* (N P Engel Publisher, Strasbourg, 1993).

Rishworth, Paul, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

Rodley, Nigel S *The Treatment of Prisoners under International Law* (2 ed, Oxford University Press, Oxford, 1999).

Smith, Rhona K M *Textbook on International Human Rights* (2 ed, Oxford University Press Inc, New York, 2005).

Starmer, K "Positive Obligations under the Convention" in Jowell, J and Cooper, J (eds) *Understanding Human Rights Principles* (Hart Publishing, Portland, 2001).

Starmer, Keir *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, London, 1999).

Wade, Sir William and Christopher Forsyth *Administrative Law* (9 ed, OUP, Oxford, 2004) see chapter 6.

## 2 Journals

A Sachs "Social and Economic Rights: Can They Be Made Justiciable?" (2000) 53 SMU L Rev 1381.

Boulesbaa, A "An Analysis of the 1984 Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1985-6) Dick J Int'l L 185.

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

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

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



Geiringer, C and Palmer, M "Human Rights and Social Policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12.

I L M Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46.

K Dawkins and M Briggs "Review: Criminal Law" (2005) 3 NZLR 393.

K Keith "The Role of International Human Rights Law in NZ" (1997) 32 Tex Int'l L J 410.

Keith K "The Henry Harkness Lecture: The Impact of International Law on New Zealand Law" (1998) 7 Waikato L Rev. 1.

Keith, K "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZULR 307.

Keith, K Otago Law review 1986 Vol 6 No 2.

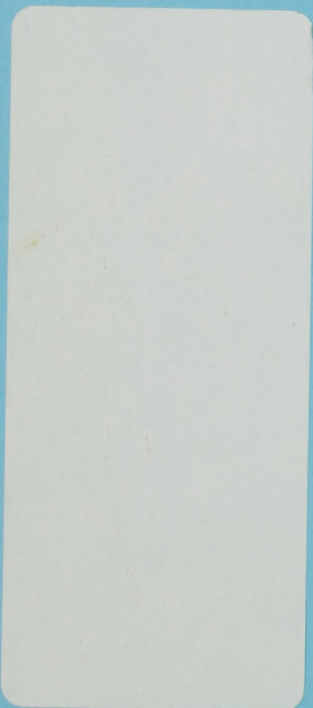
Knop, K "Here and There: International Law in Domestic Courts" (2000) 32 NYU J Int'l L & Pol 501.

La Forest, Anne Warner "Domestic Application of International Law in Charter Cases: Are We There Yet?" (2004) 37 UBC Law Rev 157.

Mowbray, A "Duties of Investigation Under the European Convention on Human Rights" (2002) 51 ICLQ 437.

Weiser, Irit "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 UBC Law Rev 113.





VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 01706846 9

